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SCSL-03-01-PT
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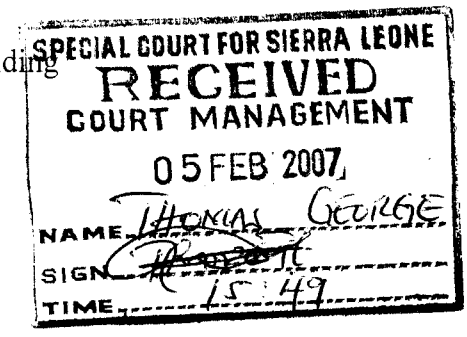
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

TRIAL CHAMBER II

Before: Hon. Justice Julia Sebutinde, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Richard Lussick



Registrar: Mr. Lovemore G. Munlo SC

Date filed: 5 February 2007

THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION RESPONSE TO "DEFENCE APPLICATION FOR SERVICE OF A DISCLOSURE STATEMENT PURSUANT TO RULE 68"

Office of the Prosecutor
Ms. Brenda J. Hollis
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4250

I INTRODUCTION

1. The Prosecution files this Response to the "Defence Application for Service of a Disclosure Statement Pursuant to Rule 68" of 25 January 2007 ("the Motion").[1]
2. The Defence seeks an order that the Prosecution make a disclosure statement identifying the provision of the Rules pursuant to which each statement, transcript or other item of material known to the Prosecution is disclosed.
3. The Prosecution submits that the Motion should be dismissed.

II. SUBMISSIONS

A. The letter and spirit of Rule 68

4. Provision 68 of the Rules of Procedure and Evidence ("the Rules") provides that:

> "(A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
>
> (B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material."

i. No particular form of statement disclosing the existence of exculpatory evidence

5. As a preliminary matter, the Prosecution wishes to reiterate that it has never disputed the pivotal nature of the obligation contained in Rule 68, and has always recognized that the obligation to disclose is a continuing one.[2] The Prosecution has at all times acted

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[1] *Prosecutor v. Charles Ghankay Taylor,* SCSL-03-01-PT-166, "Defence Application for Service of a Disclosure Statement Pursuant to Rule 68", 25 January 2007 ("**Motion**").

[2] Ibid., Annex 1, Prosecution Letter dated 30 August 2006: "Pursuant to its obligation under Rule 68, the

accordingly. The Prosecution notes further that the Defence acknowledges that the Prosecution has exercised its disclosure obligations at all times in good faith.[3]

6. The Prosecution submits that, contrary to what the Defence seems to imply, the "statement" referred to in Rule 68 need not be in any particular form. Notably, it does not require that the Prosecution issues a certificate, as the Defence seems to assert.[4]
7. The Prosecution submits that, by disclosing successive batches of documents according to Rule 68, it has in fact disclosed to the Defence the existence of all exculpatory material known to the Prosecution at the date of each of the disclosures.
8. Judge Sebutinde clearly stated her view in this regard during the 22 September 2006 Status Conference:

> "But, like you said, Mr. Staker, it is a statement disclosing the existence of evidence." [5]

9. On this basis, the Prosecution submits that it has complied with its obligations under the disclosure Rules.

ii. Rule 68 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory

10. The Prosecution submits that disclosure obligations must be guided by established Rules and not by the demands of the Defence. The Prosecution submits that it has, at all times, respected the obligations contained in Rules 66 and 68 by disclosing material relating to witnesses that the Prosecution intends to call to testify, as well as purely exculpatory material.
11. The Prosecution submits that the Defence interpretation of Rule 68 goes beyond the obligations contained in the Rule.
12. The Special Court has developed a practice according to which there is no obligation on the Prosecution to identify specifically the disclosed material as either inculpatory or

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Prosecution is continuing to disclose evidence that in any way tends to suggest the innocence or mitigate the guilty of the Accused or that may affect the credibility of Prosecution evidence. As this is a continuing obligation, we will disclose further such material as it is identified and prepared for disclosure."

[3] Ibid., para. 15.

[4] Ibid., para. 14.

[5] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-166, Status Conference, Transcript, 22 September 2006, ("**Status Conference**") p. 29 (lines 12-13).

exculpatory.[6] Further, the Special Court jurisprudence does not require the Prosecution to provide the type of Rule 68 statement the Defence requests. Contrary to what the Defence contends,[7] this issue was not settled during the Status Conference of 22 September 2006.[8] As Judge Sebutinde rightly pointed out, there was no jurisdiction to resolve this matter during the said Conference and advised that the matter should, if considered necessary by the parties, be resolved by way of a motion.[9] However, Judge Sebutinde incidentally noted

> "I am aware that there is no legal obligation [for the Prosecution] to do this [i.e. to sort the disclosure]".[10]

13. This matter, although it has never been the subject of litigation per se in the other cases currently before the Special Court, has however been unambiguously settled by the Appeals Chamber at the ICTY and endorsed by Trial Chamber I. The Appeals Chamber of the ICTY found:

> "The Appeals Chamber agrees with the Prosecution that Rule 68 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory." The jurisprudence of the Tribunal shows that while some Trial Chambers have recognised that it would be fairer for the Prosecution to do so[11], there is no *prima facie* requirement, absent an order of the Trial Chamber to that effect, that it must do so."[12]

14. Trial Chamber I of the Special Court endorsed this jurisprudence, in the RUF case, by "*[r]elying persuasively on [it]*".[13]

15. The Prosecution submits that a purposive interpretation of Rule 68 leads to the same conclusion as the jurisprudence of Trial Chamber I of the Special Court, and of the ICTY

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[6] The Prosecution, in the three other on-going trials at the Special Court (the CDF, the RUF and the AFRC), has adopted the same practice as the one now disputed by the Defence for Charles Taylor.
[7] Motion, para. 19.
[8] Status Conference, pp. 13-35.
[9] Ibid., p. 29, (line 16), and p. 30, (lines 10-21).
[10] Ibid., p. 14, (lines 6-7).
[11] *Prosecutor v. Krajišnik*, IT-00-39 & 40-T, "Decision on Motion From Momcilo Krajisnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68", Trial Chamber, 19 July 2001 (***Krajišnik* Decision**"); in this case the Trial Chamber stated that "Rule 68 does not specifically require the Prosecution to identify the relevant material, but merely disclose it.", p. 2, "Considering" (a).
[12] *Prosecutor v. Krstić*, IT-98-33-A, "Judgement.", Appeals Chamber, 19 April 2004, para. 190 (emphasis added).
[13] *Prosecutor v. Sesay et al.*, SCSL-2004-15-T,"Sesay-Decision on Defence Motion for Disclosure Pursuant to Rule 66 and 68 of the Rules", 9 July 2004, paras 41 and 43, where Trial Chamber I, after having quoted the *Krstić* jurisprudence of the Appeals Chamber of the ICTY, stated: "*Relying persuasively on the aforementioned*, the Trial Chambers considers that the key question to be answered here is whether the Defence has made a *prima facie* showing of exculpatory material sought from the Prosecution." (emphasis added).

Appeals'Chamber. Indeed, the purpose of this Rule is to ensure that the defence is aware of the existence of any material in the possession of the Prosecution that the latter deems exculpatory. Conversely, the purpose of Rule 68 is not to *prepare* the work of the defence, by analysing this material for the defence. The jurisprudence confirms that the obligation to disclose exculpatory evidence is not intended to serve as means through which the Prosecution is forced to replace the Defence in conducting the preparation of its case.[14]

16. The first disclosure made in May 2006 did not distinguish between the statements disclosed under Rule 68 as opposed to those disclosed under Rule 66 and Rule 68. However, in this May 2006 disclosure, the Prosecution had already identified *documents* that were identified as Rule 68 specifically. As is argued in this Response, a disclosure made without such labeling complied with the applicable legal requirements. The Prosecutor may adopt a more liberal policy from time to time, but when this is not required by the rule, it cannot be compelled to apply the policy retroactively.

17. However, as stated during the 22 September 2006 Status Conference,[15] the Prosecution has followed a liberal approach to Rule 68 since the end of August 2006, in order to facilitate the smooth progression of the pre-trial stage of this case. Since that time, the Prosecution, in its disclosures made on 30 August 2006, 22 September 2006, 3 October 2006, 13 October 2006, 27 October 2006, 10 November 2006, 24 November 2006, 13 December 2006, 8 January 2007 and 25 January 2007, has gone beyond the disclosure obligations set out in Rules 66 and 68, by *identifying*, within each disclosure package, the statements that lie exclusively within the purview of Rule 68 on the one hand, and the statements and other material that are disclosed under Rule 66 but may contain Rule 68 material on the other hand. The Prosecution wishes to note than, since the disclosure of 30 August 2006, its practice has not varied, contrary to what the Defence asserts.[16] The reason why the disclosure package of 22 September 2006 contained only material that was identified as falling within the ambit of both Rule 66 and potentially Rule 68, is because no statement, transcript etc. contained in this package was identified as being

[14] See, for example, this line of reasoning in *Prosecutor v. Blagojević,* IT-02-60-PT, "Joint Decision on Motions Related to Production of Evidence", Trial Chamber, 12 December 2002, para. 26.
[15] Status Conference, p. 14, (lines 12-16).
[16] Motion, para. 10.

purely exculpatory.

18. The Prosecution wishes to stress that this additional information (i.e. the identification of purely Rule 68 material) was given only to further facilitate the pre-trial process; the Prosecution has never conceded that the Defence's interpretation of Rule 68 is correct and that this *modus operandi* corresponds to an obligation on the prosecution.[17] The Prosecution considers that its practice leads to the most expansive disclosure of potential Rule 68 material and therefore benefits to the Defence, by allowing for the review of the entire document.

19. The Prosecution continues to access documents to seek knowledge of any exculpatory material within these documents. As is recognized by Rule 68 (B), the Prosecution is under a continuing obligation to disclose such material, but it will complete the process as to presently available documents before the due date of the pre-trial brief.

20. In view of the above, the Prosecution submits that it has respected its obligations under both Rules 66 and 68 of the Rules, and has indeed gone beyond these obligations. An order to run a retrospective review of the material disclosed this far would amount to an unnecessary, new obligation being placed on the Prosecution.

B. Absence of Prejudice for the Defence and Principle of Judicial Economy

21. The Prosecution submits that, in the present instance, "the material has been disclosed and the Defence has had the opportunity of reviewing it and, therefore, no injustice is done to the Defence."[18]

22. Furthermore, the order sought by the Defence would not be in conformity with the principle of judicial economy. The disclosed material has indeed been in the possession of the Defence for months, so that the latter has had the opportunity to go through and assess its exculpatory potential as well as its content in general. Asking the Prosecution to go through this material again would result in duplication, if not triplication of the work for both the Prosecution and Defence. It would not serve the purported goal of the Motion, which supposedly aims at allowing for a more efficient preparation of the

[17] See Motion, Annex 1, Prosecution Letter to the Defence dated 13 October 2006, in which the Prosecution declares that it is "mindful of [the Defence's] interpretation of Rule 68" and that "[m]embers of our team have instructed themselves...accordingly", but in which the Prosecution does not concede that this interpretation is correct.
[18] *Krajišnik* Decision, p. 2, "Considering" (c).

Accused's defence.

23. Therefore, as found in *Prosecutor v. Krajišnik and Plavšić*, the Prosecution submits that "given the resources expended already and the stage of pre-trial development, it would not be efficient or reasonable to order the Prosecution to identify material that has already been disclosed in this way."[19]

C. The material disclosed is relevant for the preparation of the Defence

24. The Defence complains that it has to sift through "thousands of pages of exhibits, statements and transcripts" and that the Prosecutor is allegedly "dumping boxes of documents on a party".[20] However, the Prosecution wishes to stress that it is under the obligation to transmit each and every piece of this abundant material, either under Rule 66 or 68, or both to the Defence. In other words, each and every statement, transcript or other item of material disclosed by the Prosecution is relevant to the preparation of the Accused's defence, either because it consists of statements of witnesses that the Prosecution intends to call to testify, or because it may be, in the Prosecution's view, exculpatory. The Defence is under the ethical and professional obligations to be cognizant of this material, be it abundant or not.

III. CONCLUSION

25. Accordingly, the Prosecution submits that its disclosures statements are in compliance with Rule 68. Therefore, the Prosecution should not be obliged to undertake a retrospective review of the material which it has disclosed to date.

26. Therefore, the Prosecution respectfully submits that the Motion be dismissed.

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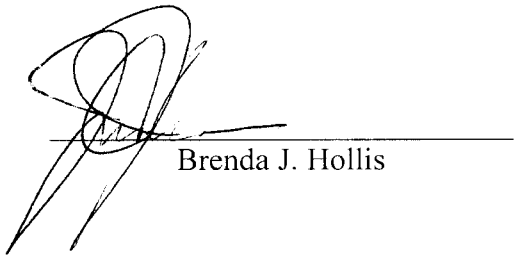
[19] Ibid., p. 2, "Considering" (d).
[20] Motion, para. 18.

Filed in Freetown,

5 February 2007

For the Prosecution,



Brenda J. Hollis

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