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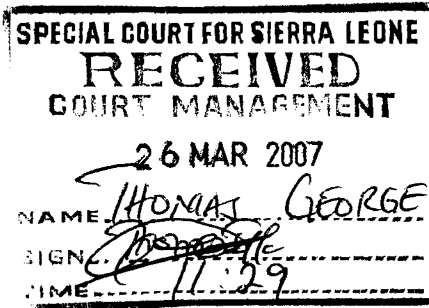
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone



Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty
Acting Registrar:	Mr. Herman von Hebel
Date filed:	26 March 2007

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

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION'S REPLY TO DEFENCE "RESPONSE TO 'PUBLIC URGENT PROSECUTION MOTION FOR LEAVE TO SUBSTITUTE A SUPPLEMENTED WITNESS LIST AS ANNEX A(4) OF THE CONFIDENTIAL PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND FOR NON-PUBLIC DISCLOSURE FILED ON 8 MARCH 2007'"

Office of the Prosecutor:

Ms. Brenda J. Hollis

Defence Counsel for Charles Taylor

Mr. Karim A. A. Khan
Mr. Roger Sahota

I. INTRODUCTION

1. Pursuant to Rule 7 of the Rules of Procedure and Evidence ("Rules"), and the Trial Chamber's "Order for Expedited Filing" issued on 22 March 2007,[1] the Prosecution files its reply to the Defence "Response to 'Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List as Annex A(4) of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure filed on 8 March 2007'" (Response).

II. SUBMISSIONS

2. The Prosecution understands the Response to state that the Defence does not oppose the orders sought.[2]

3. Referring to Rule 66 (A) (ii), the Defence state that "the 'no later than 60 days' is a cut off point after which, absence a showing of good cause, no disclosure will be admitted."[3] To the extent that the Defence is attempting to establish a blanket exclusion of statements disclosed after the 60 day cut off point, absent a showing of good cause, the Prosecution submits that such a blanket exclusion is contrary to the jurisprudence of the Special Court and to international jurisprudence, which allows subsequent disclosure of statements of witnesses previously identified without a showing of good cause in cases where the statements contain no "new" evidence.

4. Trial Chamber I, in the "RUF" case[4], set out the criteria to be applied to determine if good cause need be shown for disclosure made after the "60 day rule" is in effect. In its Ruling dated 1 June 2005[5], the Trial Chamber initially sought

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[1] *Prosecutor v. Taylor*, SCSL-03-01-PT-211, "Order for Expedited Filing", 22 March 2007.
[2] *Prosecutor v. Taylor*, SCSL-03-01-PT-212, "Response to 'Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List as Annex A(4) of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure filed on 8 March 2007'" Response, 23 March 2007, para. 2.
[3] Response, para. 3.
[4] *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, No. SCSL-04-15-T ("*Sesay et al.*")
[5] *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T-396, "Ruling on Application For Exclusion of Certain Supplemental Statements Of Witness TF1-361 And Witness TF1-122", 1 June 2005 ("*Sesay et al.* Ruling").

guidance from Rule 89 (B) and (C).[6] The Trial Chamber then referred to the test used by the Trial Chamber in the *Bagosora* case:[7]

> "First, is the evidence relevant to the charges in the Indictments, or do they constitute entirely new charges? Second, do the will-say statements merely provide additional details of matters already disclosed in [the] original indictment, on [sic] in other materials disclosed to the Defence? Third, if this is indeed new evidence, should it be admitted and under what conditions?"[8]

The *Bagosora* Decision refers to "will-say" statements; however, the Prosecution submits that this is the test to be applied to determine whether good cause need be shown for disclosure of any witness statements after the sixtieth day before the commencement of trial.

5. In the *Sesay et al.* Ruling, Trial Chamber I "reiterated" the test to be applied to determine whether "additional, supplemental or will-say statements" contain new evidence.[9] The Trial Chamber stated the test as follows:

> "(i) whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event the witness will testify to in the indictment or Pre-Trial Brief of the Prosecution, and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice."

The Trial Chamber stated that the test derived from the jurisprudence as established in the *Bagosora* Decision.[10]

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[6] Rule 89(B) and (C) of the Rules provide that:

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

[7] *Prosecutor v. Bagasora*, Case No. ICTR-98-41-T, "Decision on Admissibility of Evidence of Witness DBQ", 18 November 2003 ("*Bagasora* Decision").

[8] *Sesay et al.* Ruling, para. 21.

[9] *Ibid.*, para. 22.

[10] *Ibid.*, para 22, fn. 26.

6. In its 1 June 2005 Ruling, the *Sesay et al.* Trial Chamber determined that the statements in question did not contain new evidence, but rather were germane to the general and factual allegations set out in the indictment and Pre-Trial Brief; that the statements contained evidence which was "separate and constituent different episodic events or, [...] building-blocks constituting an integral part of, and connected with, the same *res gestae* forming the factual submissions of the charges in the Indictment."[11]

7. The Prosecution submits that the Case Summary would be considered when determining if the evidence was a building block constituting an integral part of, and connected with, the same *res gestae* forming the factual submissions of the charges in the indictment, and in determining if there is notice to the Defence as required under part (ii) of the test set out in paragraph 6 above.[12]

8. Trial Chamber I also held that, where the Defence is alleging a breach of disclosure rules, the allegation should be substantiated by *prima facie* proof of such breach.[13] Thus, the Prosecution is not required to make a showing that each subsequent disclosure of statements of previously identified witnesses is permissible without a showing of good cause. It is for the Defence to raise the matter where they believe the Prosecution has breached a disclosure obligation and to substantiate the allegation with *prima facie* proof of the breach.[14] Trial Chamber I held that, as a general rule, even where a breach of disclosure obligations exists, the judicially preferred remedy is an extension of time to enable the Defence to prepare, rather than exclusion of the evidence.[15] The Trial Chamber, of course, may exclude the evidence where warranted.[16]

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[11] *Ibid.*, paras. 23, 28, 29.
[12] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73-397, ("*Norman et al.*"), "Decision on Amendment of the Consolidated Indictment", dated 16 May 2005, ("*Norman et al.* Decision"), para. 52: "...The Prosecutor's case summary [...] accompanies the Indictment in order to give the Accused better details of the charges against him [...]."
[13] *Sesay et. al.* Ruling, para. 20 and 26.
[14] *Ibid.*
[15] *Ibid.*, para. 24.
[16] *Ibid.*

9. The Prosecution is aware that other Special Court Trial Chamber decisions/rulings and international ad hoc tribunal jurisprudence are not binding precedent, but the Prosecution submits they are persuasive authority and of assistance to this Trial Chamber if it is called upon by the Defence in this case to determine the issue raised above.[17]

10. The Prosecution has exercised its disclosure obligations at all times in good faith and in a timely manner and will continue to do so in the future.

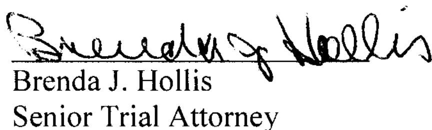
III. CONCLUSION

11. The apparent Defence assertion that Rule 66 (A) (ii) imposes a blanket exclusion of statements disclosed after the effective date of the "60 day rule", absent a showing of good cause, is erroneous. The test to be applied to determine if statements disclosed after that date require a showing of good cause is the test set out by Trial Chamber I as discussed above. The Prosecution requests the Trial Chamber to grant the orders sought in its pending motions dated 8 and 19 March 2007.

Filed in Freetown,

26 March 2007

For the Prosecution,



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[17] Article 20(3) of the Statute provides that "[t]he Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. [...]." Given that the SCSL Trial Chambers are bound by SCSL Appeals Chamber decisions, it logically follows that the Trial Chamber should also be guided by such jurisprudence.

INDEX OF AUTHORITIES

<u>SCSL - *Prosecutor v. Taylor*</u>

1. *Prosecutor v. Taylor*, SCSL-03-01-PT-200, Confidential "Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure", filed on 8 March 2007.

2. *Prosecutor v. Taylor*, SCSL-03-01-PT-205, Public "Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List as Annex A(4) of the Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure filed on 8 March 2007", filed on 19 March 2007.

3. *Prosecutor v. Taylor*, SCSL-03-01-PT-207, Confidential "Response to 'Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure,'" filed 19 March 2007.

4. *Prosecutor v. Taylor*, SCSL-03-01-PT-208, Public "Prosecution's Reply to 'Defence Response to 'Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure,'" filed 21 March 2007.

5. *Prosecutor v. Taylor*, SCSL-03-01-PT-211, Order for Expedited Filing, 22 March 2007.

6. *Prosecutor v. Taylor*, SCSL-03-01-PT-212, Defence "Response to 'Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List as Annex A(4) of the Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure filed on 8 March 2007'", filed on 19 March 2007.

<u>SCSL – Other cases</u>

7. *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T-396, Ruling on Application For Exclusion of Certain Supplemental Statements Of Witness TF1-361 And Witness TF1-122, 1 June 2005.

<u>ICTR</u>

8. *Prosecutor v. Bagasora*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003 quoted in *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T-396, Ruling on Application For Exclusion of Certain Supplemental Statements Of Witness TF1-361 And Witness TF1-122, 1 June 2005.