719) SCSL-03-01. (24040 – 24051) 24040

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

TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Mr. Herman von Hebel

Date filed: 5 February 2009

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

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION RESPONSE TO DEFENCE MOTION FOR DISCLOSURE OF THE IDENTITY OF A CONFIDENTIAL SOURCE RAISED DURING CROSS-EXAMINATION OF TF1-355

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Nina Jørgensen
Ms. Kathryn Howarth
Ms. Ula Nathai-Lutchman

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Response to the Defence "Motion for the Disclosure of the identity of a Confidential 'Source' raised during Cross-Examination of TF1-355" filed on 23 January 2009 and served on the Prosecution on 26 January 2009 ("Motion").[1] In the Motion, the Defence seeks an order compelling Witness TF1-355 ("Witness") to disclose the identities of the person/s who facilitated his trip to Sierra Leone in 1997.
2. The written Motion was filed at the direction of the Trial Chamber following oral arguments on the issue.[2] The Witness agreed during cross-examination that serving ECOMOG officers facilitated his trip to Sierra Leone, and gave details relating to that assistance.[3] He requested not to reveal the individual name/s of his facilitator/s. He justified this request based on his ethical obligations as a journalist, the promise he had made to his facilitator/s not to disclose their identity/ies and the risk of an adverse effect on his facilitator/s who were still serving members of the Nigerian army.
3. The Motion should be dismissed as the evidence sought by the Defence is not relevant, and on the basis that the Witness may invoke journalistic privilege in relation to the names of his facilitator/s and the privilege is not outweighed so as to require disclosure.

II. ARGUMENT

The evidence sought lacks relevance

4. The Defence has failed to demonstrate the relevance of the individual names of the Witness's facilitator/s. When the issue arose during cross examination, the Defence gave the following justifications for its demand that the Witness give the names of individuals within ECOMOG who assisted him: first, that the protections normally given to a journalistic source would not apply to military personnel; second, the Witness' contacts with ECOMOG showed an ongoing relationship with that

[1] *Prosecutor v. Taylor*, SCSL-2003-01-T-714, "Public Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355", 23 January 2009.
[2] *Prosecutor v. Taylor*, Trial Transcript, 14 January 2009, ("T"), 22520:29-22522:21.
[3] T22505 - 22506, T22523 – 22527, T22533 – 22534, T22536-22537

organisation; third, that ECOMOG were channelling arms to the CDF,[4] and further that the Witness was a spy. [5] The substance of the Defence argument relates to ECOMOG as an **entity** and the Witness' alleged relationship with ECOMOG. The Defence has not established how the names of the individual/s within that organisation are relevant to the issues it raised.

5. Moreover, despite the privilege claimed by the Witness in relation to the names of his facilitator/s within ECOMOG, no other limitations were placed on the Defence's ability to explore these issues with the Witness. Notably, during the course of cross-examination, the Witness provided many details relating to his relationship with ECOMOG and his trip to Sierra Leone. These details included: the circumstances in which he contacted ECOMOG, the motivation for his trip to Sierra Leone, that the decision had been made at "The National" newspaper to send the Witness as a journalist to obtain first hand information from Sierra Leone, that a particular ECOMOG soldier facilitated his travel,[6] the route taken, modes of transport and other circumstances of the journey.[7]
6. Also, during the course of cross-examination, the Witness agreed that he had been aware of accusations that ECOMOG was supplying arms to the CDF in Sierra Leone and that he had asked his sources within ECOMOG about that issue but that they had stated that this was not something that they were aware of and therefore these enquiries had proved fruitless.[8]
7. Therefore the Defence had the opportunity to explore these issues during cross-examination. The Defence does not demonstrate how knowledge of the name/s of the individual/s within ECOMOG is of any, or any further relevance.

<u>The Witness may invoke journalistic privilege in relation to the evidence sought</u>

8. Should the Trial Chamber nevertheless consider that the names of the individuals who assisted the Witness to make the trip to Sierra Leone are relevant, the Witness should not be required to reveal the information on the basis of journalistic privilege.

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[4] T22506:9 - 22507:13.
[5] T22519:16 – 28.
[6] T22524:25 – 22525:9.
[7] T22505 - 6, T22523 – 22527, T22533 – 22534, T22536-22537.
[8] T22536:3 – 22537:6.

The Witness was acting in his capacity as a journalist

9. The Witness was a journalist performing a newsgathering function at the time of his trip to Sierra Leone, a conflict zone. At that time he was a Managing Editor at the "The National" newspaper.[9] He testified about several articles that were published by "The National" during this period, which reported the involvement of the government of Liberia in the conflict in Sierra Leone.[10] During the course of cross-examination the Witness further explained that he wrote several articles on the basis of his findings, including an article titled "Liberian soldiers in Sierra Leone".[11]

Scope of the privilege

10. International human rights law has recognized a privilege for journalists to protect their confidential sources.[12] This privilege is also recognized in national jurisdictions[13] to varying degrees, as well as being referred to by international tribunals.[14] The issue raised by the Defence does not relate to the existence of a privilege as such but rather to its scope. The Defence erroneously argues that a distinction should be drawn between a facilitator, who provides assistance irrespective of the beneficiary's profession, and a journalistic source.

11. The term "source" should be interpreted broadly to cover those who contribute directly to the journalist's newsgathering function by providing the facilities and conditions to allow that function to be carried out as well as those who provide information. Support for a broad definition of a source can be found in European

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[9] *Prosecutor v Taylor*, Trial Transcript, 13 January 2009, T22278:24 – 28 and 22344:1: the witness became a Managing Editor at "The National" in early August 1997 and remained in this position until the newspaper was shut down in 1998.

[10] *Ibid.*, T22295:4 – 22295:23, referring to the editorial, "Who is the Judas in ECOWAS"; T22304:26 - 22307:15, referring to the article, "In Sierra Leone, who is the government supporting?"; T22333:23 – 22337:18, referring to the "Stop" article.

[11] T22534:16 – 22535:5.

[12] *Goodwin v UK*, European Court of Human Rights ("ECtHR") Judgment of 27 March 1996 ("***Goodwin* case**").

[13] *Goodwin* case, para. 39. See also State Shield Laws available at http://www.rcfp.org/privilege/ and "Briefing Paper on Protection of Journalists' Sources", Freedom of Expression Litigation Project, Interights and Article 19, May 1998.

[14] See *Prosecutor v Brima et al*, "Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality", 26 May 2009 ("**Brima Appeal Decision**"), at para. 41 and appended to that Decision the "Separate and Concurring Opinion of Hon. Justice Robertson QC", 26 May 2006 ("**Robertson Separate Opinion**"), at para. 28 where, although the Brima Appeal Decision was based on Rule 70(B) and (D), Justice Robertson put the assumption of a "Goodwin-style privilege" in definitive form. See also *Prosecutor v Brdjanin and Talic*, IT-99-36, "Decision on Interlocutory Appeal", 11 December 2002, ("***Brdjanin* Appeal Decision**"), para. 41.

human rights law,[15] as well as some domestic law, such as certain Shield Laws in the United States. An example is, the Colorado Press Shield Law defines "source" as "any person from whom *or any means by or through which* news information is received or procured by a newsperson, while engaged as such, regardless of whether such newsperson was requested to hold confidential the identity of such person or means."[16]

12. Guidance as to the meaning of the term "source" may also be derived from the rationale for upholding journalistic privilege. In the landmark case of *Goodwin v The United Kingdom*, the European Court of Human Rights ("ECtHR") described this privilege as a basic condition for press freedom:

> Without such protection, sources may be deterred from *assisting* the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.[17]

13. The protection is considered to be two-fold, relating both to the journalist and to the source who volunteers to *assist* the press in informing the public about matters of public interest.[18]

14. Additional support for a broad definition of the scope of the privilege is contained in the language used by international tribunals in noting the critical function performed by those reporting from war zones in particular, including journalists and human rights workers. The ICTY Appeals Chamber, recognizing the public interest in the work of war correspondents, has found that "[b]oth international and national authorities support the related propositions that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances, hinder their

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[15] See Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies), and Explanatory Memorandum ("**Explanatory Memorandum**") stating that a wide interpretation of the term "source" is necessary. These principles have been cited by the ECtHR under the heading "relevant international law", "Decision as to the Admissibility of Application No. 40485/02 by NORDISK FILM & TV A/S against Denmark", 8 December 2005 ("**Nordisk Film Decision**").

[16] C.R.S. § 13-90-119(1) (f). See further, the New Jersey Shield Law provides for a privilege to refuse to disclose "The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered." N.J.S.A. 2A:84A-21.

[17] *Goodwin* case, para. 39, emphasis added.

[18] Nordisk Film Decision, emphasis added.

ability to gather and report the news."[19] The ICTY Appeals Chamber has likewise referred to society's interest in protecting the integrity of the "newsgathering process".[20]

15. This Trial Chamber has recognised the public interest that attaches to human rights officers gathering confidential information in the field and the (qualified) privileged relationship between a human rights officer and his informants.[21] The Appeals Chamber impliedly affirmed this recognition by stating that "[s]ince the Trial Chamber has acknowledged the privileged relationship and the public interest arising out of the work of human rights officers, the Appeals Chamber will not delve into these issues in any further detail".[22] In his Separate Opinion, appended to the Decision of the Appeals Chamber, Justice Robertson stated that in terms of the public interest protected, there is little difference between an investigative journalist, a war correspondent and a human rights reporter operating in a conflict zone, particularly having regard to the possible risks to those who inform them.[23]
16. The need for a broad definition of a source is particularly clear in situations such as the current one, involving a journalist who received assistance to travel to a conflict zone to gather information. In conflict zones, where journalists are often operating in dangerous, unfamiliar areas, and often do not speak the local language, it is critical that those who facilitate their work, whether they be interpreters, drivers, those who provide transportation, arrange meetings, or advise on dangers presented, be able to rely on promises of confidentiality from the journalist. These "facilitators", may put themselves at great personal risk. Equally, without these "facilitators", journalists cannot safely and effectively inform the public of developments in situations of conflict.
17. The Witness provided a current and powerful example as to why the notion of a "source" demands a wide definition: the movement of journalists from South

[19] *Brdjanin* Appeal Decision, para. 35.
[20] *Brdjanin* Appeal Decision, paras. 36 and 46.
[21] *Prosecutor v Brima, et al*, SCSL-04-16-T-389, "Decision on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify without being Compelled to Answer any Questions in Cross-Examination that the Witness Declines to Answer on the Grounds of Confidentiality Pursuant to Rule 70 (B) and (D) of the Rules", 16 September 2005, para. 20.
[22] *Brima* Appeal Decision, para. 33
[23] Robertson Separate Opinion, para. 28.

Africa into Zimbabwe to report on events there.[24] But for the role of such "facilitators" the world would be ignorant of human rights abuses. To exclude this type of source from the scope of journalistic privilege would be contrary to the very purpose of the privilege.

18. On the facts of the current case, the individuals within ECOMOG who assisted the Witness's trip to Sierra Leone clearly functioned as "sources", providing him with the means to acquire information in his capacity as a journalist.

Military "facilitors"

19. The Defence also erroneously argues that civilian and military facilitators should be distinguished. The case cited in support of the Defence argument – *Van Mechelen* – is not on point and must be distinguished. That case concerned anonymous witnesses who were members of the police authorities and the use of their statements to found a conviction. The ECtHR stated that although the interests of police witnesses deserved protection, they were in a unique position due to their general duty of obedience to the State's executive authorities, links with the prosecution, and frequent duty to give evidence in open court.[25]

20. There is no analogy to be drawn between police witnesses, and journalistic sources from within a military structure, who have no links to the prosecution and no frequent duty to give evidence in open court.[26] Indeed, military sources may be exposed to an even greater risk than civilian sources due to their potential access to highly confidential operational material and severe, perhaps life-threatening consequences for breaches of confidentiality.

Journalistic privilege is not outweighed by other interests

21. Journalistic privilege is recognized to be a qualified rather than an absolute privilege, and a balancing exercise must be undertaken in which competing interests are weighed. The balancing exercise was described in an appropriate manner by the ICTY Appeals Chamber in the *Brdjanin* case. The Appeals Chamber considered

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[24] T22527:18 – 22528:1.

[25] *Van Mechelen and Others v The Netherlands*, (55/1996/674/861-864), 23 April 1997, para. 56.

[26] Notably, in the case of *Prosecutor v Bizimungu et al.*, ICTR-99-50-T, "Decision on Defence Motion for Exclusion of Portions of Testimony of Expert witness Dr. Alison des Forges", 2 September 2005, ("**Bizimungu Decision**"), para. 23, the confidential sources of an expert witness's testimony were military officers and the Court drew no distinctions when addressing the issue of non-disclosure.

that in order to decide whether to compel a war correspondent to testify before the Tribunal, a Trial Chamber must balance the public interest in accommodating the work of war correspondents with the interest of justice in having all *relevant* evidence available to the court.[27]

22. The Appeals Chamber formulated a test for striking the correct balance as follows: the petitioning party must demonstrate (1) that the evidence sought is of direct and important value in determining a core issue in the case, and (2) that the evidence sought cannot reasonably be obtained elsewhere.

23. In the case of *Goodwin,* the ECtHR proposed a higher standard for overriding journalistic privilege. The Court held that the importance of the protection of journalists' sources for press freedom was such that any measure for disclosure could only be justified by an overriding requirement in the public interest,[28] or in other words where vital public or individual interests are at stake and can be convincingly established.[29]

24. Judge Hunt, in his Separate Opinion in the *Simic* case, which concerned the question whether ICRC representatives had capacity to testify, also put forward a stricter test than that in the *Brdjanin* case:

> The correct test is whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party...as to outweigh the risk of serious consequences of the breach of confidence in the particular case. Both the gravity of the charges and the availability of means to avoid disclosure of the fact that the evidence has been given would be relevant to that determination.[30]

25. Applying the appropriate balancing exercise as described in the *Brdjanin* case, the Defence has failed to show that the balance should be struck in its favor. It has failed to demonstrate that the significant public interest in protecting the public watchdog role of the press, in particular in situations of armed conflict, is outweighed by the importance of the evidence. Indeed, the requested evidence falls

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[27] *Brdjanin* Appeal Decision, para. 46. Emphasis added.
[28] *Goodwin* case, para. 39.
[29] Explanatory Memorandum, para. 28.
[30] *Prosecutor v Simic et al.*, IT-95-9, "Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness", 27 July 1999, ("Hunt Separate Opinion"), para. 35.

far short of the caliber of evidence envisaged by the ECtHR, or by Judge Hunt and Justice Robertson (dealing specifically with the issue of a journalist's or human rights reporter's privilege in his Separate Opinion) who both pointed to a clear case in which the balance falls in favor of disclosure as being where the evidence is necessary either to establish the innocence of the accused or would raise a reasonable doubt about guilt (or conversely, would establish guilt).[31] Such clear instances may be unlikely to arise, however, in complex cases involving international crimes.

26. In the current situation, neither branch of the *Brdjanin* test has been demonstrated. In relation to the first limb, the names of the members of ECOMOG who facilitated the trip lack relevance and therefore certainly are not of "direct and important value in determining a core issue in the case". In relation to the second limb, the test is not satisfied due to the fact that the Defence was able to challenge the evidence through other questions in cross-examination,[32] and is able to challenge the evidence through other means,[33] for example, calling its own evidence during the Defence case.

27. For these reasons, in this instance, the journalistic privilege is not overridden by other interests and must be upheld.

Exercise of discretion

28. Even in the absence of journalistic privilege, the Trial Chamber has discretion under Rule 54 to refuse the request to order the Witness to disclose the information. As the Defence concedes in the Motion, Rule 54 is "entirely discretionary in nature".[34] Therefore, even in the absence of a privilege, the Trial Chamber may refrain from exercising its discretion, in the current circumstances, where the information is of no/or limited relevance and/or probative value, where the Defence have been

[31] Hunt Separate Opinion, paras. 29 and 32; Robertson Separate Opinion, paras. 31 and 33.
[32] See Robertson Separate Opinion, para. 21, "The Defence may not elicit the name of the source, or obtain answers to any questions the witness reasonably believes will tend to identify the source. But his reliance on the source may be shaken in other ways...Obviously the court must respect the witness's refusal to answer any question which might lead to the discovery of the source's identity, but that still leave some scope for a challenge to the reliability of the source and of the witness's understanding of what the source actually told him" and as to the facts of our case see paras 5-6 above.
[33] See *Bizimungu* Decision, para. 26, noting that: "It is up to the Defence to challenge pieces of information which it contends are unreliable using investigative sources of its own"
[34] Motion, para. 10.

afforded the opportunity to cross-examine the Witness in relation to the relevant issues, and where the Trial Chamber is able to deal with matters of reliability, credibility and the weight to be attached to evidence in their decision making process at the end of the trial. [35]

The Prosecution is not in breach of disclosure obligations

29. The Defence argument that the Prosecution is in breach of its disclosure obligations is frivolous. The Prosecution does not have and has never had the information sought.

Conclusion

30. The Defence has not shown the relevance of the requested information, the information is privileged, and no sufficient basis has been provided to justify the disclosure of privileged information. The Motion should be dismissed.

Filed in The Hague,
5 February 2009,
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[35] See also the resolution of the matter in the Bizimungu Decision and Robertson Separate Opinion, para. 29 at which Justice Robertson, referring to the Bizimungu Decision, observes that "[no] court wishes to punish for contempt a witness of probity who refuses to answer a question on grounds of honest conscience."

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