728 SCSL-03-01-T (24118 – 24124) 24118

SPECIAL COURT FOR 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: 10 February 2009

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

Case No. SCSL-03-01-T

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO PUBLIC DEFENCE MOTION FOR THE DISCLOSURE OF THE IDENITY OF A CONFIDENTIAL 'SOURCE' RAISED DURING CROSS-EXAMINATION OF TF1-355

Office of the Prosecutor:
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I. INTRODUCTION

1. The Defence files this Reply to the "Prosecution Response to the Defence Motion for the Disclosure of the identity of a Confidential 'Source' raised during Cross-Examination of TF1-355", served on the Defence on 5 February 2009 ("Response").[1]
2. The Response is without merit as discussed below.

II. SUBMISSIONS

3. The Prosecution's submissions at paragraph 4 of the Response that the Defence has failed to demonstrate how the information sought – the individual names of the persons within ECOMOG who assisted the witness – is relevant, is flawed. The argument is founded on an ill-conceived proposition that ECOMOG as an entity could operate independent of its functionaries. The Defence submits that it has clearly demonstrated at paragraph 22 of the Motions how the information required is relevant.[2] In order to properly cross-examine the witness on his relationship with the unnamed persons within ECOMOG and whether they were facilitating him as a spy or whether they had a link with arms smuggling to the CDF, it is clearly of paramount importance to have their identities disclosed. Without that opportunity, undue limitations would have been placed on the Defence's ability to test the Prosecution's evidence or indeed pursue its own line of defence.

4. With respect to the Prosecution's argument in paragraphs 5 to 7 of the Response, that the Defence was not inhibited at all in cross-examination as the witness fully accounted for his movements and his relationship with ECOMOG; the Defence

[1] *Prosecutor v. Taylor,* SCSL-2003-01-T-719, "Public Prosecution Response to the Defence Motion for the Disclosure of the identity of a Confidential 'Source' raised during Cross-Examination of TF1-355", 5 February 2009.
[2] *Prosecutor v Taylor,* SCSL-2003-01-T-714 'Defence Motion for the Disclosure of the identity of a Confidential 'Source' raised during Cross-Examination of TF1-355', 23 January 2009 **(the Motion)**.

submits that, again, the Prosecution misses the point. As argued above, only by identifying specific individuals whom the witness interacted with can the Defence, *inter alia*, properly interrogate the witness's status and his motive for venturing into Sierra Leone. This is particularly important against the Defence's allegation that the witness was a spy who had illicit dealings with ECOMOG.

5. With respect to the arguments in paragraphs 8 and 9 of the Response that the witness went into Sierra Leone as a journalist and therefore journalistic privilege should apply, the Defence submits that: i) The Prosecution is misstating the evidence. Although the witness did state that he was a journalist[3] working with The National newspaper at the time of his journey to Sierra Leone, he never stated explicitly in his evidence that he was travelling into Sierra Leone on that occasion for the purposes of researching for journalistic material or articles;[4] ii) It is disputed that the witness went to Sierra Leone as a journalist but rather as a spy working with the ECOMOG; iii) The Defence would only be in a position to interrogate and expose the witness's motive for going into Sierra Leone if identities of those who facilitated the trip are disclosed; iv) Thus, ultimately, whether journalistic privilege applies to the witness with respect to his Sierra Leonean trip is a factual issue which requires a disclosure of the particulars sought.

6. With respect to the arguments at paragraph 11 *et seq* of the Response, where the Prosecution argues for a broad definition of a journalist *source*, the Defence submits that: i) It is disputed as a matter of fact that the witness went into Sierra Leone as a journalist and consequently that the persons who assisted him qualify as sources; ii) As a point of law, the main authorities that the Prosecution relies on for a broad definition of *source* do not assist the present case where the terms has to be considered in the context of the Accused's rights to a fair trial. The

[3] *Prosecutor v Sesay* et al , SCSL-0-2004-15-T Trial Transcript 28 October 2004 p. 68 line 12 ("**RUF Transcript**")
[4] *Prosecutor v Taylor*, Trial Transcript, 14 January 2009, T22503:2 – T22506:18

Goodwin, for instance, was a civil case relating to the rights of a private company to order disclosure and involved weighing up public interest in safeguarding a journalistic source so that the company did not mislead the public as to its accounts. The broader definition in the *Goodwin* case was in any event 'watered down' in the *Camelot v Centaur Communications*[5] case where the court ruled for a case by case analysis of privilege rather than broad brush stroke.

7. The Defence submits further that the Prosecution's submissions in paragraphs 19 and 20 of the Response that the *Van Mechelen*[6] case can be distinguished are mistaken and maintains its assertions at paragraph 15 of The Motion. *Van Mechelen* provides useful guidance on the approach that should be taken in the unique situation where anonymous information comes from security agents, as is the case here with military personnel from ECOMOG. The parallel that is being drawn and the guidance that this court could get from this case is that it should be slow to attach privilege to security agents as informants.[7]

8. With respect to the 'balance of interests' argument in paragraphs 25 to 27 and the 'exercise of discretion' argument at paragraph 28 of the Response; the Defence submits that on the totality of the evidence and especially having regard to: i) the dispute as to whether the witness went to Sierra Leone as a journalist; ii) that fact that the persons who assisted the witness were military personnel; iii) the fact that the witness established no real and present danger to the alleged sources if their identities were revealed; and the accused' fair trial rights, it is in the interest of justice that the names of the persons who assisted the witness into Sierra Leone be disclosed. Alternatively, the Trial Chamber should exercise its discretion in favour of disclosure.

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[5] *Camelot v Centaur Communications* (1998) 1 All ER 251 (*CA*)
[6] *Van Mechelen and Others v The Netherlands*, (55/1996/674/861-864) 23 April 1997.
[7] The Motion para 15

9. More specifically, the Defence submits that it has satisfied the *Bridjanin*[8] two-pronged test. In relation to the first limb of the test, the evidence is clearly very relevant to the Defence case for the reasons laid out in paragraph 22 of the Motion. The Prosecution's assertion in relation to the second limb that the Defence was able to challenge the evidence through other questions during cross-examination and will be able to challenge the evidence by calling its own evidence during the Defence case is without merit. The pertinent issue is the role of the unnamed military personnel from ECOMOG. In order to properly cross-examine the witness on his relationship with these people within ECOMOG in relation to whether they were facilitating him as a spy and to establish whether they had a link with CDF arms smuggling, it is clearly paramount to know their names so that their roles within the organisation at that time can be identified and tested. Further, given the apparent unique nature of the personal relationship that this witness had with these unnamed ECOMOG persons, it is impossible to obtain the information sought from any other sources.

10. With respect to paragraph 29 of the Response, the Defence submits that it is disingenuous for the Prosecution to plead ignorance when it was clear from the witness's testimony in the RUF proceedings[9] that there was certain information that he did not intend to divulge. The Prosecution's argument that they do not know what the witness did not divulge in court is far-fetched. Once the Prosecution knew that its witness had information that he did not wish to divulge – which the Prosecution knew, at least, from the RUF trial – it had Rules 66 obligations in the present proceedings. The result would otherwise be the untenable situation where a witness chooses what information to give and what not to give, as did TF1-355.

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[8] *Prosecutor v Bridjanin*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para 46.
[9] RUF Transcript, Supra note 4, 28 October 2004, p.68 Witness said that he will not disclose source of certain information.

11. The Defence therefore persists with its claim in the Motion.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 10th Day of February 2009
The Hague, The Netherlands

LIST OF AUTHORITIES

SCSL References

Prosecutor v Taylor, SCSL-2003-01-T-714, Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised during Cross-Examination of TF1-355, 23 January 2009

Prosecutor v. Taylor, SCSL-2003-01-T-719, and Public Prosecution Response to the Defence Motion for the Disclosure of the identity of a Confidential 'Source' Raised during Cross-Examination of TF1-355, 5 February 2009

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Prosecutor v Brdjanin, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002
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Van Mechelen and Others v The Netherlands, (55/1996/674/861-864) 23 April 1997 http://www.hrcr.org/safrica/arrested_rights/mechelen_netherlands.html

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Camelot v Centaur Communications (1998) 1 All ER 251 (*CA*) Internet: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1997/2554.html&query=camelot&method=boolean