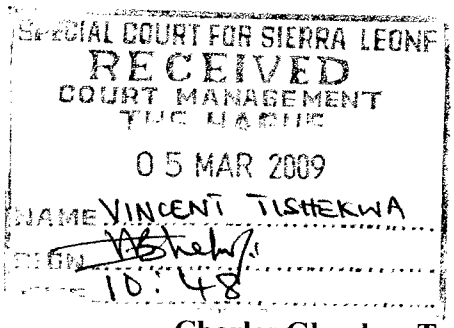
7561 SCSL-03-01-T (24587-24595) 24587

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

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 March 2009



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

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION RESPONSE TO DEFENCE MOTION PURSUANT TO RULES 66 AND 68 FOR THE DISCLOSURE OF EXCULPATORY MATERIAL IN REDACTED WITNESS STATEMENTS OF WITNESSES THE PROSECUTION DOES NOT INTEND TO CALL

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I. INTRODUCTION

1. The Prosecution files this Response to the "Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call" filed on 25 February 2009 and served on the Prosecution on 26 February 2009 ("Motion").[1]
2. The Defence has improperly combined three requests for relief in one pleading:[2] an order pursuant to Rules 66 and 68 for the disclosure of the unredacted copies of statements of three sources[3] and of 82 Prosecution witnesses that the Prosecution has not called in the Taylor Trial:[4] an order for the modification of the protective measures in respect of those 82 potential Prosecution witnesses; and permission from the Trial Chamber to contact any potentially useful witness through the Witness and Victim Section (WVS) of the court.
3. In addition to the procedural defect, the multiple requests for relief are without legal merit. First, the Defence has failed to demonstrate any violation by the Prosecution of its disclosure obligations that would necessitate an order for the disclosure of Rule 66 and/or 68 material. Secondly, the Defence has failed to satisfy the requirements of the test for variation of protective measures. Thirdly, existing protective measures provide procedures that allow the Defence to request contact with a protected witness. To the extent the Defence request to use WVS to initiate contact is at variance with any existing order, the Prosecution has no objection to variance of that particular order to allow access through WVS.

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[1] *Prosecutor v. Taylor*, SCSL-2003-01-T-714, "Public with Confidential Annex A Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call ", 25 February 2009 ("**Motion**").

[2] See *Prosecutor v. Taylor*, SCSL-2003-01-T-139, "Decision on Defence Motion for Leave to File an Oversized Filing of 'Defence Motion on Adequate Time and Facilities for the Preparation of Mr. Taylor's Defence'", 11 December 2006, where the Trial Chamber dismissed the Defence Motion and stated that it was "NOT SATISFIED that it is necessary to combine "several motions in one"" and also *Prosecutor v. Taylor*, SCSL-2003-01-T-145, "Decision on Defence Motion for Urgent Reconsideration of "Decision on Defence Motion for Leave to File and Oversized Motion: 'Defence Motion on Adequate Time and Facilities for the Preparation of Mr. Taylor's Defence'", 14 December 2006.

[3] In the Motion the Defence refers to 85 prosecution witnesses; however, as explained below, TF1-605, 606 and 607 are Rule 70 sources, rather than witnesses.

[4] This disclosure request is in reality two requests, one for disclosure pursuant to the requirements of Rule 66; one for disclosure pursuant to the requirements of Rule 68.

II. ARGUMENTS

Disclosure obligations under Rules 66 and 68:

4. The Prosecution has fulfilled it obligations under Rules 66 and 68 of the Rules of Procedure and Evidence ("the Rules") through its disclosure of the redacted versions of the statements of the 82 potential Prosecution witnesses whom the Prosecution has not called in the Taylor case. The Prosecution has fulfilled its obligation to provide Rule 68 material received from the three sources.

Rule 66:

5. Pursuant to Rule 66 the Prosecution has disclosed the redacted versions of statements of potential witnesses the Prosecution did not call at the Taylor trial.
6. The obligation to provide un-redacted witness statements, disclosing the identifying data of witnesses, relates only to those witnesses which the Prosecution calls to testify at trial. This is governed by the established practice at the SCSL that the parties must disclose unredacted witness statements of upcoming trial witnesses within a certain time prior to the witness being called to testify, for the Prosecution, typically 42 days. This procedure has been established pursuant to Rules 75 and 69(C) and Articles 16 and 17 of the Statute of the SCSL; striking a balance between the rights of victims and witnesses and the right of the Accused to a fair trial.[5] As acknowledged by the Defence, the Prosecution has consistently complied with its disclosure obligations pursuant to the 42 day disclosure rule.[6]
7. As the witnesses subject to this motion were never called to testify, the Prosecution had no obligation to provide the unredacted versions of their witness statements and has complied with its obligations under Rule 66.

Rule 68:

8. The Prosecution has met its disclosure obligations under Rule 68. All potentially exculpatory material contained in the witness statements of the 82 potential witnesses and three sources has in fact been disclosed by the Prosecution, as indicated in the cover letters and/ or in the receipts accompanying the disclosure of

[5] See for example, the reasoning of the Trial Chamber in *Prosecutor v. Morris Kallon*, SCSL-03-05-PT-33, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23rd May 2003, especially at paras. 9 and 10.
[6] Motion, para. 5.

those statements.

9. The only information that has been redacted from these statements is information which directly identifies the individuals or such other information which would lead to the identification of the individuals. The redacted portions of the statements therefore "relate to the particulars and personal details of the [individuals and] place names".[7] However, contrary to the Defence assertion, the redacted identifying data does not relate to "material pieces of evidence without which the Defence cannot evaluate the significance of the [individual] statement".[8]
10. The Defence's unfounded assertion that Rule 68 material has been redacted is incorrect.[9] All Rule 68 material has been disclosed. The Defence pleading is additional proof of this. In its Confidential Annex to the Motion, the Defence summarises the unredacted evidence of each individual, including the potentially exculpatory evidence given by several of the individuals,[10] and the Defence also points to the potential exculpatory significance of the individual's evidence.[11] The fact that the Defence has been able to highlight the potentially exculpatory evidence given by many of these individuals is indicative of the fact that the Prosecution has indeed fulfilled its obligation pursuant to Rule 68, and that the Defence has no need for identifying data in order to evaluate the significance of the information. The identifying data which has been redacted does not fall within the ambit of Rule 68.
11. This Trial Chamber has previously articulated that "in order to establish that the Prosecution has breached its Rule 68 disclosure obligations, the Defence must (1) specify the targeted evidentiary material; (2) make a prima facie showing that the targeted evidentiary material is exculpatory in nature; (3) make a prima facie showing that the material is within the Prosecution's custody and control, and (4) show that the Prosecution has in fact, failed to disclose the targeted exculpatory material."[12]

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[7] Motion, para. 4. "individuals" is substituted for "witnesses".
[8] Ibid., again "individual" is substituted for "witness".
[9] Motion, para. 25.
[10] Confidential Annex, Summary of Unredacted Evidence.
[11] Confidential Annex, Exculpatory Significance.
[12] *Prosecutor v. Taylor*, SCSL-03-01-T-735, "Decision on Confidential Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68", 18 February 2009, para 5, referring to *Prosecutor v. Sesay et al*, SCSL-04-15-T-363, "Decision on Sesay Motion Seeking Disclosure of the relationship Between

12. The Defence has failed to satisfy the requirements of this test. First, the Defence incorrectly identifies the "targeted evidentiary material". In this instance, the "targeted evidentiary material" is the redacted portions of the statements, rather than the "complete and unredacted witness statements".
13. Secondly, the Defence fails to demonstrate how any of the *redacted* material in the statements – the names and identifying information - is prima facie exculpatory in nature. Rather the Defence simply asserts in relation to all 85 statements that "the Prosecution has indicated the exculpatory nature of this witness' evidence." The Defence has failed to satisfy the second limb of the test as they do not make a prima facie showing that the targeted material is exculpatory in nature.

Protective Measures:

14. The Defence application for variation of the protective measures of 82 potential Prosecution witnesses is also without merit and should be dismissed.
15. The Appeals Chamber of the SCSL has articulated the applicable test where a party seeks to rescind, vary or augment protective measures pursuant to Rule 75:

> "where…a party wishes to rescind protective measures previously granted to a witness, it should present supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection [footnote omitted]. The Trial Chamber must thus be satisfied that there is a change in the security situation facing the witness such as a diminution in the threat level faced by the witness that justifies a variation of protective measures orders".[13]

16. The Defence has failed to satisfy the requirements of the test for variation of these witnesses' protective measures. First and foremost, the Defence has failed to

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Governmental Agencies of the United States of America and the Office of the Prosecutor", 2 May 2005, para 36, and *Prosecutor v Sesay et al*, SCSL-04-15-T-436, "Decision on Gbao and Sessay Joint Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005, para 24.

[13] *Prosecutor v Sesay et al*, SCSL-04-15-T-1146, "Decision on Prosecution Appeal of decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", in the Appeals Chamber, 23 May 2008, paras. 35 – 37.

present any supporting evidence which is capable of establishing the witnesses no longer need the protections afforded.

17. Secondly, the Defence misapplies the test in arguing that "the eighty-two witnesses are no longer in need of protection based on the limited degree to which the Defence is seeking disclosure". In the above mentioned Decision, the Appeal Chamber held that Trial Chamber I erred by misdirecting itself as to the applicable legal principle in determining when to order a variation of existing protective measures. In that case, the Trial Chamber "concluded that "the variations to the protective measures requested by the Defence are minimal" and that they "will not significantly diminish the protection available to the witnesses". However, the Appeals Chamber held that "by focusing solely on the minimal nature of the variations requested by the Defence, the Trial Chamber failed to apply the appropriate legal test for determining whether to vary protective measures, namely, whether changed circumstances have diminished the need for protective measures" and concluded that "the party seeking a variation must show that changed circumstances warrant such a variation, not that its consequences will be minimal".[14]

18. Thirdly, the Defence argument that there has been a change in circumstances in the security situation facing the witnesses because the witnesses will no longer testify is unpersuasive. In the above mentioned Decision, the Appeals Chamber specifically noted the conclusion of Trial Chamber I, that despite the fact that various witnesses subject to protective measures would not be called to testify, "such witnesses may still be targets of threats and intimidation if it becomes known that they were intending to testify for the Prosecution".[15] Further, the Defence argument is inconsistent with the application, which is premised on the possibility of the Defence calling any/ all as witnesses.

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[14] Ibid., para. 40.

[15] Ibid., para 6 and para 39. At para 6, the Appeals Chamber refer to para 18 of *Prosecutor v Sesay et al*, "Prosecution Notice of Appeal and Submissions Regarding 'Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", 3 March 2008.

19. The Defence has therefore failed to discharge its burden and its application for variation of the protective measures relating to the 82 potential witnesses should be dismissed.

Procedure for contacting Witnesses through the WVS:

20. Existing protective measures provide procedures whereby the Defence can request to be allowed to contact a particular witness. The Defence need only therefore review the applicable protective measures order and comply with the requirements of that order to request to be allowed to contact any of the 82 witnesses.

21. As stated at the outset of this Response, to the extent that the Defence request to use WVS to initiate such contact is at variance with any existing order the Prosecution has no objection to variance of that order to allow access through WVS. Such a procedure allows the witness to indicate whether he or she consents to being contacted by the Defence and to set out any conditions under which contact must take place. However, there is no basis for the disclosure of the identity or identifying information of prosecution witnesses prior to their consent to be interviewed by the Defence and clear indication that they wish to waive existing protective measures to the extent of allowing the Defence to know their identity. A witness' address, current whereabouts, or phone number or other contact information should only be provided to the Defence with the express consent of the witness.

22. In the event the witness refuses to meet with the Defence, the Defence may always file a motion requesting the issuance of a subpoena to enable the contact to occur. Both parties would be able to set out their positions on the adequacy and appropriateness of such a motion.

TF1-605, 606 and 607:

23. TF1-605, 606 and 607 were not originally listed as witnesses; no request has been made that they be added to the list of Prosecution witnesses. They are sources from whom the Prosecution received confidential information intended to generate new evidence pursuant to Rule 70. Nevertheless, the evidence provided by these sources which was determined by the Prosecution to fall within the ambit of Rule 68 has

been disclosed as Rule 68 material. There is no requirement to provide any additional information.

III CONCLUSION:

24. As noted above, the Motion is procedurally defective as the Defence requests multiple forms of relief in one pleading. The Trial Chamber ought therefore dismiss the Motion on the basis of procedural irregularity or require the Defence to file separate motions addressing each request for relief separately.

25. Should the Trial Chamber nevertheless entertain the Defence requests for relief, for the reasons considered above, the relief requested in the Motion should be denied. However, to the extent that the Defence request to use WVS to initiate contact with any of the 82 potential Prosecution witnesses is contrary to any existing protective measures order, the Prosecution has no objection to variance of that order to allow contact to be initiated through WVS.

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

Brenda J. Hollis
Principal Trial Attorney

INDEX OF AUTHORITIES

SCSL cases

Prosecutor v. Taylor, SCSL-2003-01-T

1. *Prosecutor v. Taylor*, SCSL-2003-01-T-139, "Decision on Defence Motion for Leave to File an Oversized Filing of 'Defence Motion on Adequate Time and Facilities for the Preparation of Mr. Taylor's Defence'", 11 December 2006

2. *Prosecutor v. Taylor*, SCSL-2003-01-T-145, "Decision on Defence Motion for Urgent Reconsideration of "Decision on Defence Motion for Leave to File and Oversized Motion: 'Defence Motion on Adequate Time and Facilities for the Preparation of Mr. Taylor's Defence'", 14 December 2006

3. *Prosecutor v. Taylor*, SCSL-03-01-T-735, "Decision on Confidential Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68", 18 February 2009

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4. *Prosecutor v. Morris Kallon*, SCSL-03-05-PT-33, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23rd May 2003

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6. *Prosecutor v Sesay et al*, SCSL-04-15-T-436, "Decision on Gbao and Sessay Joint Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005

7. *Prosecutor v Sesay et al*, SCSL-04-15-T-1146, "Decision on Prosecution Appeal of decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", in the Appeals Chamber, 23 May 2008