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SPECIAL COURT FOR SIERRA LEONE

IN TRIAL CHAMBER II

Case No: SCSL-03-01-PT

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

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 25 January 2007

THE PROSECUTOR

-v-

CHARLES TAYLOR

PUBLIC

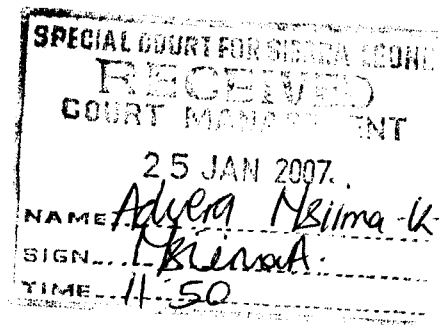
**DEFENCE APPLICATION FOR SERVICE OF A DISCLOSURE STATEMENT
PURSUANT TO RULE 68**

Office of the Prosecutor

Mr. Stephen Rapp
Mr. Christopher Staker
Mr. James C. Johnson
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Shyamala Alagendra
Mr. Alain Werner

Counsel for Charles Taylor

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



I INTRODUCTION

1. This is the Defence Application for Service of a Disclosure Statement pursuant to Rule 68.
2. As further advanced below in Sections III and IV the Defence submits that the Prosecution have failed to properly discharge their obligation pursuant to Rule 68 of the Rules of Procedure and Evidence (the “Rules”) to make a statement disclosing to the Defence the existence of exculpatory evidence.

II LEGAL FRAMEWORK

3. According to Article 17(2) of the Special Court for Sierra Leone (“SCSL”) Statute, “[t]he accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses” [emphasis added].
4. This statutory right of the Accused is key to all the rules and principles of evidence and procedure, including the disclosure procedure. With regard to the disclosure of exculpatory evidence the leading principle of disclosure, as set out in Rule 68 of the Rules, the Prosecutor shall:

“within 30 days of the initial appearance of the accused make a statement under the Rule disclosing to the Defence the existence of evidence known to the Prosecution 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 evidence.”
5. The importance of disclosure as a fair trial issue has been acknowledged by many Trial Chambers. In *Prosecutor v. Kordic and Cerkez*,¹ it was held that, “Rule 68 performs an important function [...] it forms part of the Prosecution’s duty as ministers of justice assisting in the administration of justice [...] The Prosecution’s obligation under Rule 68 is not a secondary one [...] it is as important as the obligation to prosecute.” In *Prosecutor v. Krstic*² it was held that disclosure of exculpatory material was fundamental to the fairness of proceedings before the Tribunals.

¹ *Prosecutor v. Kordic and Cerkez*, Decision on Motions to Extend for Filing Appellant’s Briefs, May 11, 2001, para. 14; *Prosecutor v. Blaskic*, Decision on Production of Discovery Materials, January 27, 1997, para. 50.1; as referred to by *Prosecutor v. Blaskic*, Appeals Chamber Judgment, July 29, 2004, para. 264.

² *Prosecutor v. Krstic*, Appeals Chamber Judgment, April 19, 2004, para. 180.

6. The Appeals Chamber in *Prosecutor v. Blaskic*³ affirmed that the OTP “has the duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Rule 68 to determine whether any material has to be disclosed.”
7. The SCSL Trial Chamber in *Prosecutor v. Norman et al.*⁴, has defined the legal obligation to disclose “as soon as practicable” exculpatory evidence as: “(a) exculpatory evidence that in any way tends to suggest the innocence of the Accused, (b) exculpatory evidence that in any way tends to mitigate the guilt of the Accused, and (c) exculpatory evidence that may effect the credibility of prosecution evidence.”

III DISCLOSURE CHRONOLOGY

8. To date the Prosecution have served the Defence with disclosure packages dated 17 May 2006, 11 August 2006, 30 August 2006, 22 September 2006, 3 October 2006, 13 October 2006, 27 October 2006, 24 November 2006, 13 December 2006 and 8 January 2007⁵. Yet the procedure adopted by the Prosecution in order to ensure compliance with Rule 68 has varied.
9. With regard to the 17 May 2006 and 11 August 2006 disclosure packages, the Prosecution has purported to meet their Rule 68 obligations by serving a covering letter including a blanket assertion that the witness related material enclosed therein was served “in accordance with Rules 66 and 68 of the Rules of Procedure and Evidence.” No further particulars were given in the accompanying index to the statements and other witness related material enclosed as to which provision each item was served pursuant to.

³ *Prosecutor v Blaskic*, Appeals Chamber Judgment, July 29, 2004, para. 302.

⁴ *Prosecutor v. Norman et al.*, SCSL-04-14-T-146, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004.

⁵ Annex 1: Letters from the Prosecution with supporting material addressed to the Defence Counsel for Mr. Taylor, dated 17 May 2006, 11 August 2006, 30 August 2006, 22 September 2006, 3 October 2006, 13 October 2006, 27 October 2006, 24 November 2006, 13 December 2006 and 8 January 2007. The Prosecution has been notified that the Defence has not received a disclosure package dated 10 November 2006 although we have been sent an electronic copy of the covering letter of this date.

10. A similar approach was adopted with the 22 September 2006 and 3 October 2006 disclosure packages, with two distinguishing features. Firstly the covering letters included the following declaration:

“Pursuant to its obligations under Rule 68, the Prosecution is continuing to disclose evidence that in any way tends to suggest the innocence or mitigate the guilt 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.”

Secondly, an extra column was inserted into the index accompanying the witness related material entitled “Rule” and every statement referred to underneath was then identified as falling within the ambit of both Rule 66 and 68.

11. On 2 October 2006⁶ the Defence wrote to the Prosecution setting out their interpretation of Rule 68. A further letter elaborating the position of the Defence was dispatched on 5 October 2006.⁷
12. In the covering letter accompanying the 13 October 2006⁸ disclosure package the Prosecution replied stating;

“Pursuant to its obligations under Rule 68, the Prosecution is continuing to disclose evidence that in any way tends to suggest the innocence or mitigate the guilt of the Accused or that may affect the credibility of Prosecution evidence. The Prosecution is also mindful of your interpretation of Rule 68 as articulated in your letters dated 2 October 2006 and 5 October 2006. Members of our team have instructed themselves on those parameters as you set them out, and will be conducting themselves accordingly in potential Rule 68 disclosure reviews. We reiterate that we acknowledge that this is a continuing obligation and we will disclose further such material as it is identified. In addition, in furtherance of our efforts to be forthright in fulfilling our disclosure obligations, when we disclose Rule 68 material, we will indicate in the disclosure receipts that it is Rule 68 material. In order to be precise about our analysis of the material, we shall mark disclosure material related to witnesses testifying as Rule 66 and not both 66/68 material. We interpret this practice to be fulfilling our obligations and communicating our analysis fairly and frankly.”

13. The Prosecution adopted the approach outlined in their letter dated 13 October 2006 above in all subsequent disclosure packages; i.e. those of 27 October 2006, 24 November 2006,

⁶ Annex 2: Letter from the Defence Counsel for Mr. Taylor to the Prosecution dated 2 October 2006.

⁷ Annex 3: Letter from the Defence Counsel for Mr. Taylor to the Prosecution dated 5 October 2006.

⁸ Annex 1.

13 December 2006 and 8 January 2007, as well as an earlier disclosure package served on 30 August 2006.⁹

IV ARGUMENT

14. The approach adopted by the Prosecution is erroneous as each purported Rule 68 statement served refers only to the contents of the disclosure package it accompanies. The Defence submit the Rule requires the Prosecution to disclose to the Defence the existence of all exculpatory evidence known to the Prosecution as of the date of the statement. The statement should therefore apply at large as of the date it is made and not be confined to a specific disclosure package.
15. The Defence accept that the Prosecution are not required to scrutinise each document served paragraph by paragraph indicating whether each passage is served pursuant to Rule 66 or 68. The Defence also accept that the Prosecution have exercised their Rule 68 obligations at all times in good faith. Notwithstanding this, the Defence submit that, at the very least, Prosecution should identify which provision each statement, transcript or other material is served pursuant to. The Prosecution have failed to do this with regards the contents of the 17 May 2006 and 11 August 2006 disclosure packages.
16. The Defence are also concerned that the identification of each statement identified within the 22 September 2006 and 11 August 2006 disclosure packages as falling within both Rule 66 and Rule 68 suggests that the issue of exculpatory material has not been properly considered with regard to material served therein.
17. It should be noted that the 17 May 2006 disclosure package included statements from 226 witnesses and 15 other documents totalling over 30,000 pages. Many of the witnesses featured had given evidence in other trials before the SCSL, further highlighting, in the submission of the Defence, the need for this material to be examined in light of Rule 68.¹⁰
18. The Prosecution's failure to properly consider this (and other material served) in accordance with their Rule 68 obligations has left the Defence with the task of sifting through thousands

⁹ Annex 1.

¹⁰ See *Prosecutor v Blaksic*, Appeals Chamber Judgment, July 29, 2004, para. 302.

of pages of exhibits, statements and transcripts to determine whether any of the material served is exculpatory or not. It has been very difficult for the Defence to identify the material that has been served pursuant to Rule 68 or that is which is solely served under Rule 66 or that which falls within both provisions. The dangers of this approach were described by Counsel for the Defence at the Status Conference of the 22 September 2006:¹¹

“...Your Honour, what we have requested, and it has applied before other international courts which may have some persuasive effect on Your Honour in considering this matter, is that rather than just dumping boxes of documents on a party, in a bid to focus the issues, in a bid to show that they have turned their mind to disclosure obligations rather than just emptied out cupboards into boxes, they have to, in my submission, detail why a document is being served. Is it because it is, in its totality or in part, Rule 68? Is it because it's Rule 66? Or why? Is it because they are intending to use it for trial under 73(F), I believe it is, or not? Your Honour, that has not been done.”

19. Her Honour Judge Sebutinde subsequently outlined her interpretation of Rule 68 at the same hearing:¹²

“In my opinion, Rule 68(B) is clear. There are no two ways about it. It is not similar to 66. It is not. It deals specifically with exculpatory material in favour of the accused person, and it lays two obligations on the Prosecution. One, within a time frame, 30 days of the initial appearance, to make a statement disclosing the existence of this evidence known, and on a continuing basis, to continue to make a statement whenever this evidence comes up to the Prosecution's knowledge.

Now, I think what Mr. Khan was saying is that so far -- well, at least until recently, there has not been this identification of exculpatory evidence as such. Everything has just been thrown into the same melting pot and passed over, disclosed under Rule 66. And I can appreciate that this would cause a difficulty for the Defence to sort out what is exculpatory and what is not, out of the entire basket of disclosures.”

V CONCLUSION

20. Accordingly, for the reasons adumbrated above the Defence respectfully urges the Chamber to order the Prosecution to make a disclosure statement in compliance with Rule 68 identifying which provision each statement, transcript or other material known to the Prosecution is served pursuant to.

¹¹ *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Status Conference Transcript, 22 September 2006, p. 22, lns. 6-16.

¹² *Ibid*, p. 29, ln. 23 – p. 30, ln 9.

Respectfully Submitted,



Karim A. A. Khan
Counsel for Mr. Charles Taylor

Dated this 25th Day of January 2007

Table of Authorities

Special Court for Sierra Leone

1. *Prosecutor v. Norman et al.*, SCSL-04-14-T-146, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004.
2. *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-PT, Status Conference Transcript, 22 September 2006.

ICTY Jurisprudence

3. *Prosecutor v. Kordic and Cerkez*, Decision on Motions to Extend for Filing Appellant's Briefs, May 11, 2001.
Online: <http://www.un.org/icty/kordic/appeal/decision-e/10511EX315605.htm>
4. *Prosecutor v. Krstic*, Appeals Chamber Judgment, April 19, 2004.
Online: <http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>
5. *Prosecutor v. Blaskic*, Appeals Chamber Judgment, July 29, 2004.
Online: <http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf>



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Charles Ghankay Taylor
Case Number: SCSL-2003-01-PT
Document Index Number: 166
Document Date 25 January 2007
Filing Date: 25 January 2007

Number of Pages 133

Page Numbers from: 3957-4081

- Application**
 Order
 Indictment
 Other
 Correspondence

Document Title:

**Defence Application for Service of a Disclosure Statement
Pursuant to Rule 68 (CONFIDENTIAL-Annexes).**

Name of Officer:

Advera Nsiima K.
Signed: *Nsiima A.*