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SCSL-03-01-T
(12589-12594)

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SPECIAL COURT FOR SIERRA LEONE

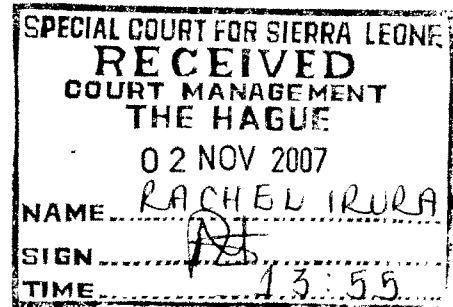
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 2 November 2007



PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

**PUBLIC VERSION OF THE CONFIDENTIAL
DECISION ON PROSECUTION MOTION REQUESTING
SPECIAL MEASURES FOR DISCLOSURE OF RULE 70 MATERIAL**

Office of the Prosecutor:

Brenda Hollis
Leigh Lawrie

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

SEISED of the Confidential Prosecution Motion Requesting Special Measures for Disclosure of Rule 70 Material, filed on 20 June 2007 (“Motion”);¹

NOTING the Confidential Defence Response to Prosecution Motion Requesting Special Measures of Disclosure of Rule 70 Material, filed on 27 August 2007 (“Response”);²

NOTING ALSO the Confidential Prosecution Reply to Defence Response to Prosecution Motion Requesting Special Measures for Disclosure of Rule 70 Material, filed on 30 August 2007 (“Reply”);³

COGNISANT of the provisions of Article 17 of the Statute of the Special Court (“Statute”), Rules 68, 70 and 79 of the Rules of Procedure and Evidence of the Special Court (“Rules”);

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules.

I. SUBMISSIONS

Motion

1. On 3 April 2007, the Prosecution held a telephone interview with [REDACTED: Witness]. The [REDACTED: Government] agreed to the interview on the condition that any information provided by [REDACTED: Witness] would remain confidential and would not be disclosed without its consent, thus invoking the protection of Rule 70(B).⁴ During a subsequent review of the interview notes, the Prosecution identified exculpatory Material which could fall within the ambit of Rule 68(B) (“Rule 68 Material”).⁵ In accordance with Rule 70(B) the Prosecution on 30 April 2007 sought the permission of the [REDACTED: Government] to disclose the Rule 68 Material to the Defence.
2. On 7 May 2007 the [REDACTED: Government] granted the Prosecution permission to disclose the Rule 68 Material in the current proceedings on the conditions that-
 - (a) the Rule 68 Material continue to be considered as information falling within Rule 70(B) and be subject to the relevant protection contained in Rule 70;
 - (b) the Rule 86 Material may not be disclosed to any person or entity other than the Accused and the Defence in the current proceedings, without prior written approval of the [REDACTED: Government];

¹ SCSL03-01-T-302.

² SCSL03-01-T-330. The Defence was granted an extension of time to file its Response, see Decision on Defence Office Application to Suspend all Time Limits Pending the Resolution of Issues Surrounding the Termination of Mr. Karim Khan by Mr. Charles Ghankay Taylor Before the Prosecution Opening Statement of 4 June 2007, 3 July 2007.

³ SCSL03-01-T-331.

⁴ Motion, paras 5, 6.

⁵ *Ibid.*, para. 6.

- (c) prior to any disclosure of the Rule 68 Material, the Prosecution seeks such orders from the Special Court as may be necessary to implement the conditions specified above; and
- (d) any subsequent use of, or reference to, the Rule 68 Material in the current proceedings must be on a confidential basis and, when made during trial, in closed session.
3. The Prosecution therefore requests that the Trial Chamber order that:
- (i) save for the limited disclosure to the Defence and the Accused as set out below, the Rule 68 material remain subject to the relevant protections of Rule 70;
- (ii) the Rule 68 Material may not be disclosed to any person or entity other than the Accused and the Defence in the current proceedings without the prior written approval of the [REDACTED: Government]; and
- (iii) any use of, or reference to, the Rule 68 Material in the current proceedings be on a confidential basis and, when made during trial, in closed session.⁶

Response

4. The Defence opposes the Motion and submits that the Prosecution breached the time limits for disclosure as stipulated by Rule 68(B) of the Rules. The Defence submit that the disclosure of the Rule 68 Material after the filing of the Defence Pre-Trial Brief probably has “caused prejudice to the defence investigations and, for that matter, the Accused’s preparation of his defence.”⁷

5. The Defence submits that it is “in the dark” as it did not have an opportunity to review the Rule 68 Material. The Defence argues that it must be permitted to see the Rule 68 Material prior to agreeing to any limitations on its use and that it is entitled to use any exculpatory material “as it deems fit”, including the possibility of reasonably using the material during its investigations, including disclosing the information to potential witnesses, without first securing the permission of the [REDACTED: Government].⁸

6. The Defence therefore requests that the Trial Chamber order the Prosecution to disclose the Rule 68 Material in their possession forthwith without limiting its subsequent use and in the alternative, prays that it is given an opportunity to review the Rule 68 Material before a final ruling is made.⁹

Reply

7. The Prosecution submits that the Defence objections are without merit and that the relief sought by the Defence would violate the confidentiality guaranteed to the provider by Rule 70. The Prosecution acknowledges that the Rule 68 Material was obtained on 3 April 2007, one year after the initial appearance of the Accused. It argues, however, that it has a continuous disclosure obligation under Rule 68(B).¹⁰ The Prosecution further argues, that as soon as the Rule 68 Material came to the

⁶ Motion, para. 13.

⁷ Response, paras 8, 9, 10.

⁸ Response, paras 11-12.

⁹ Response, para 13.

¹⁰ Reply, paras 6, 7.

knowledge, it contacted the provider on 30 April 2007, for permission to disclose the material for the Defence and upon obtaining the provider's conditional approval on 7 May 2007, filed the Motion in order to comply with its obligation both under Rule 68 and Rule 70.¹¹ The Prosecution submits that, assuming *arguendo* there was a violation of the disclosure Rules, the Defence has not shown any prejudice to the Accused. The Prosecution argues that the new Defence team was assigned on 1 August 2007, and therefore did not have the opportunity to review any of the disclosed material. Further, the Prosecution argues that evidence will not be led until 7 January 2008 and that for those reasons there was no prejudice to the Accused.¹²

8. The Prosecution asserts that the conditions set forth in the Motion are in the interest of justice and properly balance the rights of the Accused under Rule 68 and those of the provider of confidential information under Rule 70. They argue that the Defence may request permission from the [REDACTED: Government] to disclose the information or source if it deems it necessary.¹³

II. DELIBERATIONS

9. In the present case the Prosecution is required by Rule 68 to disclose to the Defence exculpatory information that falls under the protective ambit of Rule 70(B). The Prosecution is thus faced with two apparently conflicting obligations, on the one hand, pursuant to Rule 68, to ensure that all exculpatory material in its possession is disclosed to the Defence, whilst on the other, pursuant to Rule 70, ensuring that where such exculpatory material has been provided to the Prosecution on a confidential basis, confidentiality is not breached.

10. Rule 68(B) provides that

The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of the evidence known to the Prosecutor 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 material. [emphasis added]

Rule 68(B) thus imposes on the Prosecution a continuous obligation to disclose exculpatory material.

11. Under Rule 70(B), the Prosecution can assure third parties that confidential information provided by them will not be disclosed without their consent. The rule states that:

If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

¹¹ Reply para. 7.

¹² Reply, paras 12-13.

¹³ Reply, paras 12-13.

12. The Appeals Chamber pointed out that Rule 70(B) does not require the Trial Chamber to enquire into whether the information itself is confidential.¹⁴ The Trial Chamber need only be satisfied that the information was provided to the Prosecution by a third party on a confidential basis. The Trial Chamber is satisfied, and it was not contested by the Defence, that the information in the present case was so provided.

13. The relationship between Rules 68 and 70 has been described by the Appeals Chamber in the following terms:

Rule 70 is principally an exception to the disclosure scheme contained in Rules 66 to 69. Rule 70(B) exempts from disclosure "information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence" unless the Prosecutor first gains the provider's consent.¹⁵

14. The Appeals Chamber thus suggests that the Prosecution's obligation under Rule 70(B) to the provider of confidential information governs its disclosure obligation under Rule 68. It would thus be contrary to the terms of Rule 70(B) for the Trial Chamber to order disclosure of the Rule 68 Material without due regard to the conditions imposed by the [REDACTED: Government], as requested by the Defence.

15. This conclusion is consistent with the policy behind Rule 70(B), which was designed to encourage States and other entities to share sensitive information with international tribunals. As was stated by the ICTY Appeals Chamber, considering a similar provision in the *Milošević* case, the rule

"creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and the information's sources will be protected".¹⁶

16. In the Trial Chamber's view, the orders proposed by the Prosecution strike a delicate but appropriate balance between the entitlement of the Defence to the use of the exculpatory material and the continued protection of the confidentiality of the information required by Rule 70(B).

FOR THE ABOVE REASONS the Trial Chamber

GRANTS THE MOTION and

ORDERS THAT


¹⁴ *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-AR73, 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 2006, para. 23, citing *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 29.


¹⁵ *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-AR73, 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 2006, para. 17.

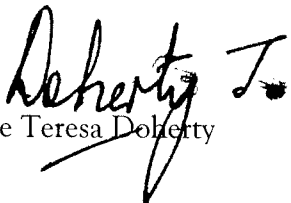
¹⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 18.

1. save for the limited disclosure to the Defence and the Accused as set out below, the Rule 68 material remain subject to the relevant protections of Rule 70;
2. the Rule 68 Material may not be disclosed to any person or entity other than the Accused and the Defence in the current proceedings without prior written approval of the [REDACTED: Government]; and
3. any use of, or reference to, the Rule 68 Material in the current proceedings be on a confidential basis and, when made during trial, in closed session.

Done at The Hague, The Netherlands, this 2nd day of November 2007.


Justice Richard Lussick


Justice Julia Sebutinde
Presiding Judge


Justice Teresa Doherty

