# 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:** 5 November 2007



PROSECUTOR

**Against**

CHARLES GHANKAY TAYLOR

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DECISION ON EX PARTE AND CONFIDENTIAL PROSECUTION MOTION FOR AN ORDER TO PROVIDE TO THE PROSECUTION NON-PRIVILEGED DOCUMENTS RECENTLY OBTAINED FROM THE ACCUSED'S PERSONAL ARCHIVE

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**TRIAL CHAMBER II** ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

**SEISED** of the Ex-*Parte* and Confidential Prosecution "Motion for an Order to Provide to the Prosecution Non-Privileged Recently Obtained Documents from the Accused's Personal Archive", filed on 31 August 2007 ("Motion")[1];

**COGNISANT** of the provisions of Article 17 of the Statute of the Special Court, ("Statute") and of Rules 39, 54 and 73 of the Rules of Procedure and Evidence ("Rules");

**HEREBY** decides the Prosecution Motion solely on the written submissions of the Prosecution.

## I. PRELIMINARY REMARKS

1. At the status conference on 20 August 2007 Counsel for the Accused informed the Trial Chamber that a Defence Investigator had provided the Defence team with a large number of documents ("Documents") which appeared "to come from the personal archive of the Accused."[2] Consequently, the Prosecution filed this Motion *ex parte* seeking an order that it be provided with non-privileged documentation from the said archive. According to the Prosecution, the Motion was filed *ex parte* "to ensure that the Documentation is immediately secured," since "to inform the Defence, which necessarily includes informing the Accused, of this request before the Documentation is secured could frustrate the purpose of the motion".[3]

2. In the Trial Chamber's view, this Motion is capable of being disposed of on an ex parte basis. However, Article 17 of the Statute entitles the Accused to "a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses". Accordingly, any limits placed on the rights of the Accused either to participate in these proceedings or to hold the proceedings in public, must be narrowly interpreted and properly justified. In the present case, the Trial Chamber finds no justification for delivering this Decision *ex parte* or on a confidential basis.

## II. SUBMISSIONS

3. In its Motion the Prosecution seeks:

(a) that the Trial Chamber, pursuant to Rules 39 and 54:

(i) order the Registry, with the assistance of the appropriate United Nations organisations, if necessary, to immediately secure the Documents in a container which shall be sealed and shipped to the nearest Registry office;

(ii) order the Defence to fully cooperate with the Registry and make the Documents immediately available to the Registrar and/or his designated representative(s).

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[1] SCSL-03-01-T-332.
[2] Transcript 20 August 2007, p. 14.
[3] Motion, para. 2.

(b) that the Trial Chamber appoint a Judge or request that the Registrar appoint a qualified legal professional as a "Special Master" ("Appointee") to conduct a review of the Documents in accordance with sub-paragraphs (c) and (d) below.

(c) that the Trial Chamber, pursuant to Rule 39 and 54 of the Rules, direct that the container be opened only in the presence of the Appointee and Defence Counsel.

(d) that the Trial Chamber direct that the Appointee and Defence Counsel observe the following procedure:

(i) the Appointee shall review the Documents to determine if any material is subject to legal professional privilege and shall exclude any such privileged material ("Excluded Materials");

(ii) at any time, the Defence may object to a document or part thereof being included in the materials which are to be forwarded to the Prosecution. If necessary, portions of the documents may be served or redacted. The onus is on the Defence to clearly establish the basis of any claimed privilege;

(iii) the Appointee shall rule on all Defence claims of privilege and separate the excluded Materials from the remaining documentation; and

(iv) after the Documents have been reviewed, the Excluded Materials shall be returned to the container, which shall then be sealed and immediately shipped to the offices specified by the Defence;

(v) the defence shall have seven (7) calendar days following the completion of the Appointee's review to file any motion challenging the provision of the Documents to the Prosecution; and

(vi) if no motion is filed by the Defence within seven (7) calendar days, or when so ordered by the Trial Chamber, the Registry shall provide all the Documents not excluded to the Prosecution for its review. On receipt, the Prosecution shall immediately scan the Documents and provide the Defence with copies forthwith.[4]

4. The Prosecution submits that its request is based Rule 54 and that pursuant to that Rule a party must show that the order sought is "necessary" (not simply useful or helpful) for the purposes of the investigation, or for the preparation or conduct of the trial. It agrees that the Rule does not permit a party to conduct a "fishing expedition" in search of evidence which will assist its case. Instead a party must identify expressly and precisely the legitimate forensic purpose for which access is sought and must demonstrate that such access is likely to materially assist the case, or that there is at least a good chance that it will give that assistance.[5]

5. The Prosecution argues that "it appears highly probable that the Accused's 'personal archives' contain relevant material which will materially assist the Prosecution case" and that it is "certainly 'likely' and there is a 'good chance' that relevant material is included in the archives containing

[4] Motion, para. 22.
[5] Motion, para. 9.

evidence of (a) the existence of a common plan, design or purpose and the nature of the Accused's participation; (b) the Accused's role in the conflict and the widespread or systematic attack against the civilian population of Sierra Leone; (c) the Accused's relationships, interactions and communications with those involved in the actual conduct of the armed conflict, the attack against the civilian population and the crimes charged; and (d) the Accused's intent, knowledge and/or awareness of the crimes with which he is charged.[6]

6. The Prosecution submits that by seeking such an order no lawyer-client privilege would be affected. They argue that from the statements made during the Status Conference a reasonable inference can be made that Documents "were not recently created and certainly [were] not created as work product by the Defence legal team" and that the Documents from the personal archive existed "before" the Accused was detained by the Special Court for Sierra Leone.[7]

7. The Prosecution recognizes that in seeking this remedy a proper balance must be struck between the rights of the Accused and the Prosecution's right to have access to all potentially relevant information. The Prosecution further understands that any order which it seeks must be proportionate.[8]

## III. DELIBERATIONS

8. It is not possible for the Trial Chamber to decide from the available information whether or not any of the documents in the archive are privileged. In any event, no general right rests with the Prosecution to have access to all potentially relevant information, nor is there any general disclosure obligation upon the Defence. The disclosure obligations placed on the Defence under the Rules refer to very limited circumstances such as, for example, the Defence obligations in relation to the defence of alibi and any special defence.[9]

9. Rule 54 of the Rules provides:

> "At the request of either party or of its own motion, Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

10. The Rule is a general rule in unambiguous language. Clearly, the test for whether the Trial Chamber ought to issue an order under the Rule is whether to do so is necessary (not simply useful or convenient) for the purposes of an investigation or for the preparation or conduct of the trial.[10]

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[6] Motion, para. 11.
[7] Motion, para. 15.
[8] Motion, para. 20.
[9] *See* Rule 67(A)(ii)(a)(b); *see also Prosecutor v. Delalić, Mucić, Delić, Landžo*, Case No. IT-96-21-T, Decision on Motion to Specify the Documents Disclosed by the Prosecutor that Delalic's Defence intends to use as Evidence, 8 September 1997, para. 7.
[10] *See Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion for General Orders Pursuant to Rule 54, 28 July 2005, para. 20.

11. In the present case, in order to satisfy the requirements of Rule 54 of the Rules, the Prosecution has to

(i) identify the information sought or to describe it by its general nature; and

(ii) show a legitimate forensic purpose.[11]

12. It is not necessary for a party to identify "exactly what material he seeks".[12] It is sufficient for the party to identify as clearly as possible the documents or the nature of the documents to which he seeks access. However, this does not mean that a party may conduct a "fishing expedition" - that is, seek access to material in order to discover whether there is a case to make.

13. As to the second requirement, that the party must show a legitimate forensic purpose for seeking access, it must show that such access would be likely to assist the case *materially*, or that there is at least a "good chance" that it will give that assistance.[13]

14. In the instant case the Prosecution has not identified the information sought, nor even described it by its general nature. On the contrary, the Motion has the hallmarks of a fishing expedition. The Prosecution has only broadly stated that it believes that the material and documents in the personal archive generally relate to the issues in the current proceedings, i.e. material concerning the existence of a Joint Criminal Enterprise, the role of the Accused in the conflict, interactions between the Accused and persons involved in the conflict and his knowledge or intent of the crimes charged. The stated issues do not identify or describe any document, but are merely a restatement of the core elements of the charges against the Accused. Moreover, it follows that, in the absence of identification or description of any document, the Prosecution has not shown how the material in the archive would assist its case materially.

15. Accordingly, the Trial Chamber finds that the Prosecution has failed to establish any grounds for the orders sought under Rule 54.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DISMISSES** the Motion; and

**ORDERS** that the Motion and this Decision be served on the Defence.

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[11] *See also Prosecutor v.* Norman, Fofana, Kondewa, Case No. SCSL-04-14, Decision on Interlocutory Appeals against Trial Chamber decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, paras 9-10 confirming the standard applied by Trial Chamber I with regard to Rule 54, see Decision on Motions by Moinina Fofana and Sam Hinga Norman for the issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2007, paras 26-31; *see also Prosecutor v. Delalić, Mucić, Delić, Landžo*, Separate Opinion of Judge Hunt on Motion by Esad *Landžo* to Preserve and Provide Evidence, 22 April 1999, para. 4.

[12] *Prosecutor v. Hadžihasanović, Alagić, Kubura*, Case. No. IT-01-47-PT, Decision on Motion by Maria Cerkez to Confidential Supporting Material, 10 October 2001, para. 11.

[13] *Prosecutor v. Brđanin and Talić*, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 7; *Prosecutor v. Brđanin and Talić*, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, pars 5-8.

Done at The Hague, The Netherlands, this 5th day of November 2007.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]