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SCSL-03-01-T
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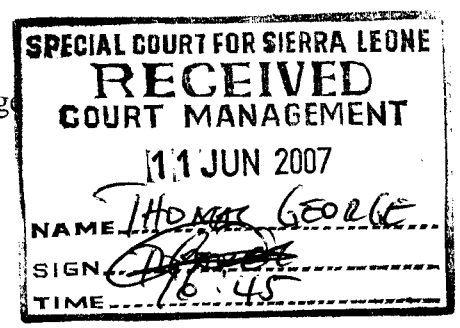
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone

9884

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 11 June 2007



THE PROSECUTOR

Against

Charles Taylor

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION'S REPLY TO "DEFENCE RESPONSE TO 'PROSECUTION'S MOTION FOR AN ORDER ESTABLISHING GUIDELINES FOR THE CONDUCT OF TRIAL PROCEEDINGS'"

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Ann Sutherland

Counsel for the Accused:
Mr. Karim A.A. Khan

Copy to:
Office of the Principal Defender

I. INTRODUCTION

1. Mr. Karim Khan filed the “Defence Response to ‘Prosecution’s Motion for an Order Establishing Guidelines for the Conduct of Trial Proceedings’”¹ as lead defence counsel for the Accused. The Prosecution, therefore, files this reply pursuant to Rule 7 of the Rules of Procedure and Evidence (“Rules”).
2. The Defence seek to have the Prosecution’s motion dismissed in its entirety,² and in support asserts that “the proposed guidelines are unnecessary, premature, in violation of the objectives and spirit of the Rules, and excessively impinge on the Trial Chamber’s discretion to exercise control over the conduct of the proceedings.”³ The Defence further asserts that the proposed guidelines are unnecessary because they “simply reflect the principles that are laid out in the Statute and the Rules and have been interpreted by the case-law of the Special Court for Sierra Leone (“SCSL”), the [ICTR] and the [ICTY].”⁴ Finally, the Defence assert that “previous attempts to predetermine the principles to be applied in the course of the trial have been rejected principally on the ground that such predetermination would undermine this objective.”⁵ The Defence particularly oppose a number of the proposed guidelines for being contrary to the principles of fairness and flexibility and the case-law thereon: proposed guidelines numbered 2, 5, 7, 8, 10, 12 and 13.⁶
3. The Prosecution disagrees with the above assertions for the reasons set out below.

II. SUBMISSIONS IN REPLY

4. Contrary to the Defence assertion, the proposed guidelines are not set out in the Statute and the Rules, nor the jurisprudence of the SCSL. Apart from

¹ *Prosecutor v. Taylor*, SCSL-03-01-PT-274, “Defence Response to ‘Prosecution’s Motion for an Order Establishing Guidelines for the Conduct of Trial Proceedings’ (“Defence Response”), filed 4 June 2007.

² Defence Response, para. 1.

³ Defence Response, para. 1.

⁴ Defence Response, para. 2. “ICTY”: International Criminal Tribunal for the Former Yugoslavia; “ICTR”: International Criminal Tribunal for Rwanda.

⁵ Defence Response, para. 5, citing to an ICTR decision in the *Prosecutor v. Bagasora* case, ICTR-98-4-T in support.

⁶ Defence Response, para. 8.

referring to Rule 60 (regarding the presence of the Accused during proceedings) and Article 17 of the Statute regarding the rights of the Accused, the Trial Chamber's attention has not been drawn to any other Articles or Rules in which any of the principles relating to the proposed guidelines are set forth.

5. The Prosecution agrees with the Defence that the setting of trial practice guidelines "fall[s] squarely within the Trial Chamber's discretionary power to exercise control over the conduct of the proceedings."⁷ The issuing of trial practice guidelines is not new to international courts; a number of Trial Chambers at the ICTY have issued same⁸ and one Trial Chamber at the ICTR.⁹
6. Trial efficiency, trial fairness and the administration of justice throughout the trial can be better served if the parties are on notice from the very beginning of the trial of the rules which the Trial Chamber will apply to evidence and how the proceedings will be conducted generally. Nothing contained in the proposed guidelines impinges on the Accused's right to a fair trial.
7. With respect to the proposed guidelines which the Defence find "most objectionable" the Prosecution states the following.
8. Proposed guideline 2 (the presence of the Accused during proceedings). The Defence assert that the proposed guideline is in direct violation of the

⁷ Defence Response, para. 6.

⁸ See e.g. on various trial practice matters: *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Order on Procedure and Evidence ("Milutinović Order"), Tr. Ch. III, 11 July 2006; *Prosecutor v. Prlić*, Case No. IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings ("Prlić Decision"), Tr. Ch. II, 28 April 2006; *Prosecutor v. Orić*, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, Tr. Ch. II, 21 October 2004; *Prosecutor v. Martić*, Case No. IT-95-11-T, Revised Version of the Decision Adopting Guidelines on the Standard Governing the Admission of Evidence, Tr. Ch. I, 19 May 2006; *Prosecutor v. Stakić*, Case No. IT-97-24-PT, Order on the Standards Governing the Admission of Evidence and Identification, Tr. Ch. II, 25 February 2002; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, Tr. Ch. II, 15 February 2002.

⁹ See e.g. *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Scheduling Order, 5 June 2002; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Scheduling Order, 26 March 2003 (both dealing with the length of examination and cross-examination of witnesses) ("Nahimana Scheduling Orders").

SCSL Rule 60.¹⁰ However, the Prosecution submits that the proposed guideline¹¹ protects the efficiency and integrity of proceedings and alleviates any delay in the proceedings which would be caused by counsel not being able to take instructions from the Accused.

9. Proposed Guideline 5 (leading questions). The Prosecution seeks a guideline with respect to leading on non-contentious matters, which the Defence agrees is permissible.¹² The second part of the proposed guideline relates to witnesses who appear to be having difficulty communicating their evidence.¹³ In this regard, the Prosecution submits that to the extent to which counsel is allowed to utilize leading questions under these circumstances is a matter of discretion for the Trial Chamber which may also consider the form of the question in determining the weight to attributed to the answers to leading questions.
10. Proposed Guideline 7 (material to be provided by the cross-examining party). The Defence assert that “the Defence and Prosecution are not in an equal position in respect of the disclosure of cross-examination materials. The Defence has “no obligation of disclosure and is, therefore, entitled to put documents to a Prosecution witness without any prior disclosure.”¹⁴ First, disclosure obligations may be asymmetrical at international courts, but they are not entirely one-sided.¹⁵ Fairness does not require that the Defence be allowed to ambush the Prosecution. Such ambush tactics may delay the proceedings while the Prosecution determines what additional questions or other evidence it needs to address the surprise Defence evidence. Secondly, there is a well established precedent for a Trial Chamber, in the interests of trial fairness and efficiency, to require the Defence to provide documents it plans to use to the Prosecution in advance of cross-examination.¹⁶ Recent

¹⁰ Defence Response, para. 10.

¹¹ *Prosecutor v. Taylor*, SCSL-03-01-PT-248, Prosecution’s Motion for an Order Establishing Guidelines for the Conduct of Trial Proceedings (“Motion”), filed 22 May 2007, para. 6.

¹² Motion, para. 9; Defence Response, para. 11.

¹³ Motion, para. 10.

¹⁴ Defence Response, para. 12.

¹⁵ *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Decision on Notification of Cross-Examination Material (“*Haradinaj* Decision”), Tr. Ch. I, 31 May 2007, para. 8.

¹⁶ *Haradinaj* Decision, para. 8. See fn. 4-8: citing *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence

practice at the ICTY has required the Defence to disclose these documents immediately after the swearing in of a witness.¹⁷ The Prosecution in this case, however, proposes a guideline which requires the parties to wait until the commencement of the cross-examination of the witness to disclose the documents it intends to use.

11. Proposed Guideline 8 (admission of evidence). The Defence assertion that “the Prosecution proposes to shift the burden [of proof]”¹⁸ is without merit. Obviously, the moving party must first show relevance to the charges in the Indictment, as required by Rule 89 (C) of the Rules. The Prosecution, in paragraph 16 of the Motion,¹⁹ simply requests that the party objecting to the admission of evidence state the reason(s) for doing so, in order that the other party is in a position to offer a reasoned response.²⁰ This is in keeping with fundamental rules of procedure in most jurisdictions, requiring the party opposing the admission of evidence to clearly articulate the basis for its objections, thereby assisting the Trial Chamber to determine the merits of the objection, and ensure that objections are well founded.
12. Proposed Guideline 10 (reference to prior statements of a witness). The Defence is of the view that the proposed guideline requesting the parties to

(“*Milutinović* Decision”), Tr. Ch. III, 16 August 2006 (“A list of documents or other material to be used by a party when cross-examining a witness must be disclosed to the opposing party or parties at the commencement of the direct examination of that witness and after he or she has made the solemn declaration. ... At the same time, the cross-examining party must release to the opposing party or parties ... any documents or other material not already in the possession of the opposing party or parties that form part of the list.”); (for similar wording to *Milutinović* Decision): *Prosecutor v. Popović*, Case No. IT-05-88-T, Order on Production of Defence Documents Used in Cross-Examination of Prosecution Witnesses, Tr. Ch. II, 24 August 2006; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Time-Limits for Disclosure of Documents to be Used During a Witness’s Testimony, Tr. Ch. I, 18 January 2007. *And further: Prosecutor v. Prlić*, Case No. IT-04-74-T, Oral Decision, Tr. Ch. II, 8 May 2006, T. 1475; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1, Tr. Ch. II, Oral Decision, 6 December 2005; *Prosecutor v. Martić*, Case No. IT-95-11-T, Oral Decision, 20 February 2006, T. 1578-1579; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Decision on the Accused Naletilić’s Request for Enforcement of Trial Chamber’s Order Regarding Documents During Cross-Examination, Tr. Ch. I, 3 May 2002; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Oral Decision, 28 April 2004, T. 8406-8407. *Cf. Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, 9 May 2005, para. 9 (“The Defence is therefore entitled to provide the Prosecution only with those documents actually used in court during cross-examination, at the time the documents are shown to the witness.”).

¹⁷ *Haradinaj* Decision, para. 9, citing *Milutinović* Decision, para. 4.

¹⁸ Defence Response, para. 16.

¹⁹ Motion, para. 26.

²⁰ This principle is not novel, see e.g. *Milutinović* Order, para. 5; *Prlić* Decision, para. (i).

avoid interpreting or paraphrasing what a witness has previously either testified or stated is unnecessary. The Prosecution disagrees for the reasons stated in paragraph 23 of the Motion. In addition, at its most fundamental, a trial is a regulated truth seeking process. A part of that process is to allow opposing counsel to test the accuracy of the evidence presented by a witness and to test the reliability of that evidence. Proposed Guideline 10 ensures that this testing process is based on what has actually been said by a witness.

13. Proposed Guideline 12 (scope of cross-examination). The Defence state that the scope of cross-examination cannot be pre-determined but must be considered in the course of trial.²¹ The Prosecution submits that guidelines can be established. As stated in paragraph 26 of the Motion, the Trial Chamber may, in the exercise of its discretion, permit the opposing party to enquire into additional matters not set out in any guidelines.²²
14. Proposed Guideline 13 (length of cross-examination). The Defence assert that the Prosecution's suggestion to limit a cross-examining party to 60% of the time allotted for the examination-in-chief is completely unfair and unnecessary.²³ Trial Chambers in both the ICTR and ICTY have regulated, in advance, the allocation of time for cross-examination.²⁴ The Prosecution reiterates its position stated in paragraph 28 of the Motion, i.e. that a certain amount of flexibility is required where circumstances require lengthier cross-examination.

III. CONCLUSION

15. For the reasons stated above, the Prosecution requests that the Trial

²¹ Defence Response, para. 18.

²² See Motion, paras. 25-27.

²³ Defence Response, para. 19.

²⁴ ICTR: *Nahimana* 5 June 2002 Order; *Nahimana* 26 March 2003 Order; ICTY: fn. 25 of the Motion.

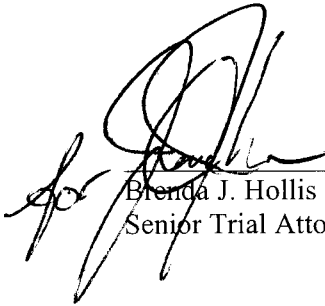
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Chamber grant the Prosecution's Motion for an Order Establishing
Guidelines for the Conduct of Trial Proceedings filed on 22 May 2007.

Filed in Freetown,

11 June 2007

For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

LIST OF AUTHORITIES

SCSL – Prosecutor v. Taylor – SCSL-03-01

Prosecutor v. Taylor, SCSL-03-01-PT-248, Prosecution’s Motion for an Order Establishing Guidelines for the Conduct of Trial Proceedings (“Motion”), filed 22 May 2007.

Prosecutor v. Taylor, SCSL-03-01-PT-274, “Defence Response to ‘Prosecution’s Motion for an Order Establishing Guidelines for the Conduct of Trial Proceedings’ (“Response”), filed 4 June 2007.

Prosecutor v. Taylor, SCSL-03-01-PT-279, Prosecution’s Motion Regarding Legal Representation of the Accused, filed 7 June 2007.

ICTR

Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Scheduling Order (“*Nahimana* 5 June 2002 Order”), 5 June 2002.

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<http://www.un.org/icty/milutino87/trialc/order-e/060711a.pdf>

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<http://www.un.org/icty/prlic/trialc/decision-e/060428.htm>

Prosecutor v. Prlić, Case No. IT-04-74-T, Oral Decision, Tr. Ch. II, 8 May 2006, T. 1475.

<http://www.un.org/icty/transe74/060508ED.htm>

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<http://www.un.org/icty/martic/trialc/decision-e/060519.pdf>

Prosecutor v. Martić, Case No. IT-95-11-T, Oral Decision, 20 February 2006, T. 1578-1579.

<http://www.un.org/icty/transel1/060220IT.htm>

Prosecutor v. Orić, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, Tr. Ch. II, 21 October 2004.

<http://www.un.org/icty/oric/trialc/order-e/041021.htm>

Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, Oral Decision, Tr. Ch. I, 28 April 2004, T. 8406-8407.

<http://www.un.org/icty/transe60/040428IT.htm>

Prosecutor v. Stakić, Case No. IT-97-24-PT, Order on the Standards Governing the Admission of Evidence and Identification, Tr. Ch. II, 25 February 2002.

<http://www.un.org/icty/stakic/trialc/order-e/020225.pdf>

Prosecutor v. Brđanin, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, Tr. Ch. II, 15 February 2002.

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Prosecutor v. Mrkšić, Case No. IT-95-13/1, Tr. Ch. II, Oral Decision, 6 December 2005;

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Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Decision on the Accused Naletilić's Request for Enforcement of Trial Chamber's Order Regarding Documents During Cross-Examination, Tr. Ch. I, 3 May 2002.

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Prosecutor v. Halilović, Case No. IT-01-48-T, Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, Tr. Ch. I Section A, 9 May 2005.

<http://www.un.org/icty/halilovic/trialc/decision-e/050509.htm>