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SCSL-03-01-T
(32417 - 32425)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Date filed: 2 February 2011

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

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION RESPONSE TO DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON DEFENCE MOTION TO RECALL FOUR PROSECUTION WITNESSES AND TO HEAR EVIDENCE FROM THE CHIEF OF WVS REGARDING RELOCATION OF PROSECUTION WITNESSES

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I. INTRODUCTION

1. This response to the "Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS regarding Relocation of Prosecution Witnesses" ("**Application**")[1] is filed pursuant to the "Order for Expedited Filing".[2]

2. As argued more fully below, the Application should be dismissed as it fails to satisfy the well established conjunctive test of "exceptional circumstances" and "irreparable prejudice" required for the grant of leave to appeal. A further related preliminary point is that the Rule 73(B) threshold, particularly in relation to decisions concerning the admissibility of evidence, is high as such "matters ... are the responsibility of the Trial Chamber, as triers of facts, and therefore the Appeals Chamber may not assume this responsibility".[3]

II. ARGUMENTS

General failures of the Defence Arguments

3. "[A] request for certification is not a further opportunity for [a Party] to inform the Trial Chamber that it disagrees with a decision it has made".[4] Accordingly, those Defence submissions[5] which do not relate to the criteria for certification set forth in Rule 73(B) but instead focus on the merits of potential arguments at the appeal stage should be ignored.[6] Indeed, the mere fact that the Defence has identified purported "procedural errors and/or errors of law and/or fact" does not *of itself* give rise to "exceptional circumstances" and "irreparable prejudice". The accepted jurisprudence of this Court is clear that even an

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1173, "Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS regarding Relocation of Prosecution Witnesses", 27 January 2011.

[2] *Prosecutor v. Taylor*, SCSL-03-01-T-1176, "Order for Expedited Filing", 31 January 2011.

[3] *Prosecutor v. Ndayambaje*, ICTR-96-8-T, "Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006", 5 October 2006, para. 16 cited with approval in *Prosecutor v. Sesay et al.*, SCSL-04-15-T-703, "Decision on Application for Leave to Appeal the Decision on Defence Motion for a Ruling that the Prosecution Moulding of Evidence is Impermissible", 2 February 2007, para. 14.

[4] *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, "Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy", 17 May 2005, para. 14.

[5] Paragraphs 2, 3 and 4 of the Application specifically focus on the merits. However, other paragraphs such as paragraph 9 also effectively boil down to an argument on the merits.

[6] This Court has condemned the practice of re-litigating the decision at issue at the certification stage of proceedings (see *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005 ("**TF1-141 Certification Decision**"), para. 15).

erroneous ruling does not *of itself* constitute exceptional circumstances.[7]

4. A further related failure of the majority of the arguments made in the Application is that they do not substantiate why exceptional circumstances and irreparable prejudice are established.[8] Reference simply to terms taken from the oft quoted passage from this Court's jurisprudence which considers what might amount to "exceptional circumstances"[9] without further detailed argument is obviously insufficient to satisfy the high threshold required before leave to appeal interlocutory decisions will be granted. This failure is telling as it highlights the Application's overall lack of merit.

Failure to establish "Exceptional Circumstances"

5. The Defence's first argument under this limb of Rule 73(B) - that the Trial Chamber's refusal to allow witnesses to be tested with the "new information" amounts to an interference with the interests of justice, is flawed for the reasons given in paragraphs 3 and 4 above. Indeed, this argument is completely unsupported and seems to rely simply on the fact that the Defence found the impugned Decision[10] "startling".[11] However, when considered in the context of this case, the Decision is neither "startling" nor exceptional. Rather, the Decision recognizes that the Defence has consistently made the issue of supposed benefits to witnesses an issue in this trial by finding that it "had ample opportunity to raise issues of relocation during cross-examination of the four witnesses".[12] The Decision, therefore, is based on a sound understanding of the evidence and issues raised in this case and so there has been no interference with the interests of justice.

6. The second argument which the Defence attempts to deploy in paragraph 9 of the Application is also unsupported and simply states that the Decision is a "cursory dismissal ... on a technicality [which] amounts to exceptional circumstances."[13] The Defence seems to have the view that whenever the law and Rules are contrary to the Defence's wishes, then such law and Rules are "technicalities" that the Chamber should ignore. The plain fact is that the Trial Chamber issued a reasoned decision, identifying the core Defence arguments

[7] *Prosecutor v. Norman et al.*, SCSL-04-14-T-643, "Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone", 28 June 2006, para. 11.
[8] See Application, paras. 11, 12 and 15 and the arguments made thereon at paragraphs 8, 9 and 13 of this Response.
[9] TF1-141 Certification Decision, para. 26.
[10] "Decision" is defined at Application, footnote 1.
[11] Application, para. 9.
[12] Decision, p. 6.
[13] Application, para. 9.

and rejected them with a clear explanation.

7. The Defence argument in paragraph 10 of the Application is meretricious relying as it does on a series of misstatements about the evidence. It is instructive to go back to the actual transcript of 24 January 2008 and analyse exactly what was put to the witness during cross-examination. Contrary to the Defence's stance in the Application, a plain reading of the transcript shows that the Defence did not "put to Keita that he and his family could be relocated to the Netherlands if he agreed to cooperate with the Prosecution."[14] Rather, the Defence put to the witness statements allegedly made by the witness to an Idrissa Kargbo that, if Kargbo cooperated with the OTP, Kargbo and his family would be given asylum when Kargbo travelled to the Netherlands.[15] Having raised the issue during cross-examination, the Defence did not ask Keita directly about any alleged offers of relocation made to him, but, as noted by the Trial Chamber, had ample opportunity to do so.[16] The next misstatement of the evidence by the Defence is the averment that Keita denied the allegation that he was cooperating with the Prosecution in order to secure relocation.[17] As the question was never posed, there was no denial. More importantly, the Defence assertion that Keita "lied under oath" is baseless.[18] Rather than ask Keita about the issue of relocation/asylum, the Defence proceeded to cross-examine Keita instead on disbursements received by him.[19] Therefore, when placed in the context of an accurate review of the evidence, it is clear that the September 2009 article detailing Keita's alleged complaints is not new significant evidence which contradicts Keita's sworn testimony. What the article shows is a man afraid for his safety and that of his family all because he testified against Charles Taylor.[20] The Defence argument in paragraph 10 of the Application, therefore, must fail as it is built on a series of misstatements of the evidence.

8. In paragraph 11 of the Application the Defence presents an opaque and unfounded argument to the effect that the Trial Chamber's conclusion is "opaque". As argued in paragraph 4 above, bald criticisms of the Decision without further elucidation do not establish an "interference with the interests of justice" amounting to exceptional

[14] Application, para. 10.
[15] Trial Transcript, 24 January 2008, pp. 2151-54.
[16] Decision, p. 6.
[17] Application, para. 10.
[18] Application, para. 10.
[19] Trial Transcript, 24 January 2008, pp. 2154-56.
[20] Defence Exhibit D-468.

circumstances for the purposes of Rule 73(B). As also argued in paragraph 6 above, an analysis of the Decision shows that the Defence criticisms are unsupported and that the Trial Chamber issued a reasoned decision based on an awareness of factors such as timing. Issues of credibility were properly not considered by the Chamber since the new information related simply to relocation, an issue which the Defence had or could have raised during cross-examination of the four witnesses, and so no further assessment was necessary.

9. At paragraph 12 of the Application, the Defence erroneously argues that the Trial Chamber failed to give adequate consideration to "factors in the interests of the Accused" or his fair trial rights. This unfounded argument is simply a reiteration of the oft repeated Defence theme that any adverse ruling is *per se* contrary to the fair trial rights of the Accused. An analysis of this argument also shows that it is self-defeating as the Defence is forced to acknowledge that "the Trial Chamber recalled the threshold of good cause and compelling circumstances for the recall of witnesses".[21] As explicitly stated in the Decision and, it would appear, deliberately ignored by the Defence, this threshold involves the "right of the accused to be tried without undue delay ... and whether failure to cross-examine the witness would violate the fair-trial rights of the Accused".[22] The Application seems to argue that this recalling of the law without further findings was deficient but fails to identify what more the Chamber was required to do. In any event, similar erroneous and unsubstantiated arguments invoking fair trial rights such as the principle of equality of arms have been dismissed in the past as being insufficient to constitute "exceptional circumstances".[23]

10. The final attempt by the Defence in support of its claim to have established "exceptional circumstances" is to refer to other cases from other tribunals involving completely different circumstances.[24] The fact that other tribunals are looking into issues related to witnesses in their cases does not establish "exceptional circumstances" in this case. If the issue is not being considered at the Special Court it is because the parties, in this case the Defence, have failed to bring adequate evidence before the Chamber to support their allegations. Moreover, the Defence argument ignores this Court's existing jurisprudence on the issue of

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[21] Application, para. 12.
[22] Decision, p. 5.
[23] *Prosecutor v. Norman et al.*, SCSL-04-14-T-611, "Decision on Urgent Fofana Request for Leave to Appeal the 7 December 2005 Decision of Trial Chamber 1", 8 June 2006, p. 3.
[24] Application, para. 13.

witness disbursements and protective relocation.[25] In any event, even if this Court's existing jurisprudence is pushed momentarily to one side, the Defence argument is again self-defeating. Given that other international tribunals are considering the issue, a body of law currently exists and thus no issue of fundamental importance arises such as to merit further delay in this trial.

11. In summary, as argued above, none of the Defence's arguments either individually or collectively gives rise to "exceptional circumstances".[26]

Failure to establish "Irreparable Prejudice"

12. Since the Defence fails to establish "exceptional circumstances", the question of whether "irreparable prejudice" can be demonstrated is irrelevant.[27] However, *esto* the Defence is found to have satisfied the first condition of Rule 73(B) (which is denied), then the Application should be rejected as the Defence fails to satisfy the second condition of the Rule - irreparable prejudice.

13. The stated purpose of the underlying Defence Motion[28] is to bring more evidence before this Trial Chamber regarding the credibility of four Prosecution witnesses and to challenge the Prosecution's *modus operandi* in relation to its witnesses.[29] But these issues, as recently acknowledged by the Appeals Chamber and now the Trial Chamber in its Decision, have been more than adequately canvassed by the Defence. The Appeals Chamber's complete statement on this issue is instructive:

> "The Trial Chamber has permitted evidence throughout this trial on the treatment of witnesses by the Prosecution and it has accepted evidence, disclosed by the Prosecution and proffered by the Defence, relevant to these allegations as they affected the instant case. It appears to be undisputed that the Prosecution has disclosed, and the Trial Chamber has admitted, evidence of Prosecution payments to all Prosecution witnesses, and has ruled in favour of the Defence on disclosure pertaining to Prosecution payments to Defence witnesses. Evidence of Prosecution treatment of witnesses and potential witnesses which is relevant to this case is before the Trial Chamber and has been used in examination and

[25] See for example the following Trial Chamber judgements: *Prosecutor v. Brima et al.*, SCSL-04-16-T, "Judgement", 20 June 2007, paras. 126-130; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, "Judgement", 2 March 2009, paras. 523-526. See also the Appeals Chamber Judgement: *Prosecutor v. Sesay et al.*, SCSL-04-15-A, "Judgement", 26 October 2009 ("**RUF Appeal Judgement**"), paras. 183-201.

[26] Application, para. 14.

[27] See for example: *Prosecutor v. Sesay et al.*, SCSL-04-15-T-703, "Decision on Application for Leave to Appeal the Decision on Defence Motion for a Ruling that the Prosecution Moulding of Evidence is Impermissible", 2 February 2007, para. 15; and *Prosecutor v. Sesay et al.*, SCSL-04-15-T-401, "Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor", 15 June 2005, para. 21.

[28] "Defence Motion" is defined at Application, footnote 2.

[29] Defence Motion, para. 18.

cross-examination of the witnesses to which it pertains. The Defence does not suggest that it is unable to argue the weight of this evidence and its effects in their upcoming closings, if it so chooses."[30]

Set in this context, it is clear the Decision does not cause irreparable prejudice.

14. In addition, the Decision does not result in irreparable prejudice as it is remediable on final appeal. An example of a similar decision being considered on final appeal is provided in the RUF case. During the appeals stage, the *Sesay* Defence team argued that the Trial Chamber's dismissal of the *Sesay* Defence's "Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payment to Witnesses"[31] was an error of law, fact and/or procedure.[32] The submission was dismissed because the argument failed to identify the actual errors made by the Trial Chamber and not because such an issue could not be considered on final appeal.[33]

III. CONCLUSION

15. As the Defence fails to satisfy the threshold required by Rule 73(B) in order for leave to appeal to be granted, the Prosecution respectfully requests that the Trial Chamber dismiss the Application.

Filed in The Hague,
2 February 2011
For the Prosecution,

Brenda J. Hollis
The Prosecutor

[30] *Prosecutor v. Taylor*, SCSL-03-01-T 1166, "Decision on Public Notice of Appeal and Submissions regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators", 21 January 2011, para. 47 (emphasis added, footnotes omitted).
[31] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1185, "Decision on Sesay Motion to Request Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses", 25 June 2008. Trial Chamber I recalled in this decision that "Counsel for the First Accused had, in the course of his Examination in Chief of witnesses called by the Prosecution, the opportunity to put these questions to the said witnesses and did exercise that right with some witnesses" (p. 2, emphasis added).
[32] RUF Appeal Judgement, paras. 196-197.
[33] Ibid, para. 197.

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