274) SCSL-03-01-PT (9630-9639)

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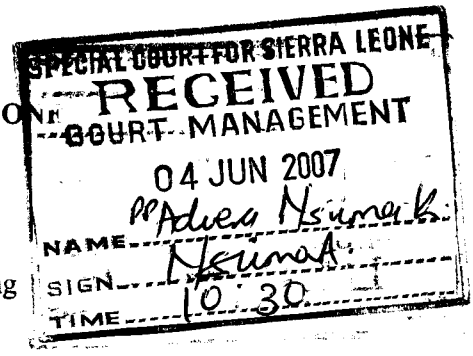
THE SPECIAL COURT FOR SIERRA LEONE



In Trial Chamber II

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

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 4 June 2007

Case No.: SCSL-2003-01-PT

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

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

Office of the Prosecutor
Mr. Stephen Rapp
Ms. Brenda J. Hollis
Mr. Mohamed Bangura
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

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

I. Introduction

1. On 22 May 2007, the Prosecution filed a *Public Prosecution's Motion for an Order Establishing Guidelines For the Conduct of Trial Proceedings* ("Prosecution Motion").[1] In this Motion, the Prosecution requests the Trial Chamber to make an order establishing guidelines with respect to the manner in which the trial proceedings will be conducted pursuant to Rules 26 *bis*, 54 and 73 of the Rules of Procedure of Evidence ("Rules"). The Defence submits 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. The Defence, therefore, requests the Trial Chamber to dismiss the Prosecution Motion in its entirety.

II. Predetermined Guidelines are unnecessary, premature, in violation of the objectives and spirit of the Rules and impinge on the Trial Chamber's discretion

2. 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 in the case-law of the Special Court for Sierra Leone ("SCSL"), the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The Trial Chamber is surely aware of the relevant Rules and case-law and is well capable of applying the principles to matters arising in the course of the trial. It is respectfully submitted that many of the guidelines proposed by the Prosecution merely state the obvious, are proposed in the abstract and serve no practical purpose at this moment in time. Accordingly, the Defence respectfully submit that the Motion should be dismissed.

3. The proposed guidelines are premature in areas where the Rules and case-law leave room for interpretation. At present, prior to the commencement of trial, it is unforeseeable whether guidelines with respect to the conduct of trial are necessary, and if so, in relation to which matters. Such guidelines cannot be established in the abstract. The rules of conduct are normally established by the Trial Chamber, guided by the Rules, in response to

[1] *Prosecutor v. Taylor*, SCSL-03-01-PT-248, Public Prosecution's Motion For an Order Establishing Guidelines For the Conduct of Trial Proceedings, 22 May 2007.

matters of dispute that arise as the trial advances. The Prosecution has failed to establish good ground to depart from this common practice.

4. The Prosecution request for an order establishing guidelines is also in clear violation of the objectives and spirit of the Rules. The Rules are intended to be flexible to give room to Trial Chambers to interpret them in the fairest manner in the specific circumstances of each case. Many Trial Chambers at various international tribunals have confirmed that '[t]he purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal'.[2]

5. Indeed, previous attempts to predetermine the principles to be applied in the course of trial have been rejected principally on the ground that such predetermination would undermine this objective. In the ICTR case of *Bagosora*, the Trial Chamber held:[3]

> This Trial Chamber observes that under rule 89(A) of the Rules, the functions of the Tribunal are such that it is not bound by any particular legal system. The basic rule is to allow flexibility and efficacy in order to permit the development of the law and not to have pre-determined Rules. This flexibility is permitted under rule 89(B) of the Rules which empowers the Trial Chamber to determine given evidential issues in the best way possible and to arrive at a fair and just decision under given circumstances.

6. The proposed guidelines further fall squarely within the Trial Chamber's discretionary power to exercise control over the conduct of the proceedings. The Trial Chamber's discretionary powers can only be interfered with by the Appeals Chamber if it has been established that the Trial Chamber made a discernable error in exercising its discretion or abused its discretion. It is not up to the parties to dictate in advance how the Trial Chamber should interpret the principles of conduct.

7. On these grounds, the Defence requests the Trial Chamber to dismiss the Prosecution's request in its entirety. In the event that the Trial Chamber is nonetheless persuaded that the

[2] *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 19 (quoted in *Prosecutor v. Kordic and Cerkez,* Case No. IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999, para 11).
[3] *Prosecutor v. Bagosora et al,* Case No. ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with the Appearance of Witness Maxwell and Nkole, 13 September 2004, page 5.

adoption of pre-determined principles is appropriate, the Defence requests that such principles be adopted after informed discussions between the Trial Chamber and the parties. The Defence object to all proposed guidelines being made the subject of an Order. This is notwithstanding the fact that, in principle, some guidelines may make some sense. For instance, the Defence supports the suggestion that the Court Management Section ("CMS") provides a copy of the draft transcript to the parties at the end of each day's hearing. This is common practice in every Tribunal and does not therefore need to be regulated.

8. The Defence particularly oppose a number of the proposed guidelines for being contrary to principles of fairness and flexibility and the case-law thereon. These most objectionable guidelines are: 2 (The presence of the Accused during proceedings), 5 (Leading questions), 7 (Disclosure of material for use in cross-examination), 8 (Admission of evidence), 10 (Reference to prior testimony or statements of a witness), 12 (Scope of cross-examination), and 13 (Length of cross-examination).

III. Proposed Guidelines are not in accordance with established principles

The presence of the Accused during proceedings

9. Rule 60 of the Rules clearly sets out the position regarding the presence of the Accused. Pursuant to Rule 60(A)(i), an accused may not be tried in his absence, unless "the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do". The Judge or Trial Chamber may proceed in the absence of the accused if "satisfied that the accused has, expressly or impliedly, waived his right to be present" (Rule 60(B)).

10. The Prosecution's proposition that the Accused can only be absent from the proceedings if the Chamber is satisfied that he has provided compelling reasons for his absence and that a waiver of his right of attendance be submitted in writing is in direct violation of the clear

language of Rule 60.[4] According to Rule 60, it is sufficient that the Accused be given an opportunity to appear but refuses to do so and his right to be present can be waived expressly or impliedly. It is not for the parties to change the Rules unilaterally or to choose to ignore them. The Defence suggests that the Prosecution submit a proposed amendment to Rule 60 in the next plenary meeting if it is dissatisfied with the Rule as it is now. Of course, it is unacceptable for the Prosecution to propose that a guideline be adopted, which is in direct violation of the Rules.

Leading Questions

11. It is a core principle of adversarial proceedings that leading questions are not permissible. The use of leading questions may expedite the proceedings but clearly undermine the weight of the answers given. The usual practice is that in areas where matters are non-contentious the opposing party may indicate to the examining party that leading questions may be asked. This rule of practice has never been regulated and has traditionally worked effectively between opposing members of the Bar in discharging their responsibilities as officers of the Court. The Defence is, therefore, rather surprised with the Prosecution's proposition to regulate the asking of leading questions in examination-in-chief. Accordingly, the Defence requests the Trial Chamber to dismiss the proposition.

Disclosure of material for use in cross-examination

12. The Defence submit that disclosure by the Prosecution of cross-examination materials at the commencement of the cross-examination of the witness is too late. It is common practice that the Prosecution disclose such materials at least 24 hours or a day before they intend to use the materials.[5] 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. The Prosecution, however, is bound by its disclosure obligations pursuant

[4] Prosecution Motion, para. 6.
[5] *Prosecutor v. Hadzihasanovic & Kubura, Case* No. IT-01-47-T, Transcript, 29 November 2004, page 12528; *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Status Conference Transcript, 13 June 2003, pages 24-25.

to Rules 66 and 68. Moreover, after the close of its case, the Prosecution is no longer entitled to present new evidence.[6]

13. The obligation to disclose cross-examination materials needs to be considered in light of the above parameters. In *Limaj et al* the Trial Chamber held:[7]

> We do, however, think that there should be some further indication given on the basis of fairness; that is, that the witness having an opportunity to read this material overnight, and ... he should have an opportunity to instruct his counsel in respect only of the content of this material. And if as a consequence of those instructions there is any reason for some change of the timetable, well, then that can be raised then.

14. Given the jurisprudence on this matter, the Prosecution's disclosure obligations and the disparity of resources, the Defence submit that a period of 24 hours between the disclosure of a document and the commencement of the cross-examination is the absolute minimum length of time required. However, depending on the nature of the document and its importance for the cross-examination and the facts in issue, a longer time may be appropriate. These are matters to be discussed and determined at a later stage. In any event, the Defence requests that the Prosecution proposition to disclose these materials at the commencement of the cross-examination of the witness be dismissed.

Admission of Evidence

15. The Defence submit that there is no need for any guidelines on the admissibility of evidence. The Trial Chamber may be guided by ample case-law interpreting Rule 89(C). Most of the Prosecution's propositions in regard to the admissibility of evidence are stating the obvious and should, therefore, be rejected.

16. At paragraph 16 of the Prosecution Motion, the Prosecution proposes to shift the burden to demonstrate that a document sought to be tendered by one of the parties to the party

[6] *Prosecutor v. Delalic et al*, Case No. IT-96-21-A, Appeals Chamber Judgment, 20 February 200, para. 275; *Prosecutor v. Krstic*, Case No. IT-98-33-T, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance, 4 May 2001, para. 9.
[7] *Prosecutor v. Limaj et al*, Case No. IT-03-66, Transcript, 23 May 2005, page 6115.

objecting to its admission. This proposition is completely contrary to the very clearly established principle that the party seeking the admission of a document needs to prove, on the balance of probabilities, that the document meets the criteria for admission pursuant to Rule 89(C).[8] In particular, the relevance of the document to the charges against Mr. Taylor needs to be established. It would be completely unfair to shift this burden to the opposing party.

Reference to prior testimony or statements of a witness

17. The Defence respectfully does not agree with the proposition that a party cannot paraphrase or interpret what a witness says. The Defence agrees that mischaracterising the evidence is not permissible. If this occurs, the opposing party can raise an objection. This is the manner in which such matters are ordinarily resolved. There is absolutely no reason why the Taylor case should be conducted differently. It is unnecessary and will needlessly delay proceedings. Thus, the Defence requests that this proposition be rejected.

Scope of cross-examination

18. The scope of cross-examination clearly cannot be pre-determined but must be considered in the course of trial.

Length of cross-examination

19. The Defence submit 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. The cross-examination needs to relevant but cannot and should not be framed in time. In accordance with fair trial principles set out in Article 17 of the SCSL Statute, a cross-

[8] *Prosecutor v. Musema*, Case No. ICTR-96–13-A, Judgment and Sentence, 27 January 2000, paras 55-56; *Prosecutor v. Musema*, Case No. ICTR-96–13-A, Appeal Judgment, 16 November 2001, para 39; *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with the Appearance of Witness Maxwell and Nkole, 13 September 2004, para. 7; *Prosecutor v Hadzihasanovic & Kubura*, Case No. IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, 22 June 2005, para. 21.

examining party should be able to able to continue a cross-examination as long as the questions are relevant. The Prosecution relies on the ICTY case of *Krajisnik* as authority for this proposition. The severe limitations by the Trial Chamber in *Krajisnik* on the right to cross-examination in violation of fair trial principles is a controversial issue on appeal. Until the Appeals Chamber has made a determination on the legitimacy of such limitations of the right to cross-examination, there is no authority for such an unfair proposition.

20. Of course there will be some witnesses that the Defence will be able to cross-examine in much less than 60% of the time that the Prosecution examines the witness in Chief. There may, however, be some that will require a longer and more detailed cross-examination. It is submitted that counsel on both sides of this case are experienced and principled. They will not abuse their respective roles by labouring unnecessary and irrelevant points in either examination in chief or cross-examination. They should therefore be allowed a degree of latitude to freely present their respective cases within the bands of relevance. If during the course of the trial it becomes apparent that either party is unnecessarily labouring a point it will, as ever, be open to the Trial Chamber to exercise its discretion as the custodians of fairness and move the party on. The Defence, therefore, urge the Trial Chamber to reject this proposition.

IV. Conclusion

21. On the grounds stated in this Response, the Defence requests that guidelines proposed by the Prosecution be dismissed.

Respectfully Submitted,

Karim A. A. Khan
Counsel for Mr. Charles Taylor
Dated this 4th Day of June 2007

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