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SCSL-03-01-T
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THE SPECIAL COURT FOR SIERRA LEONE

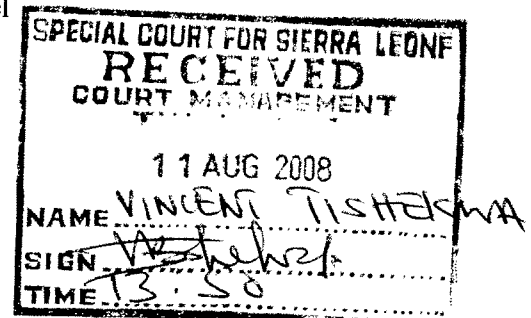
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 11 August 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

—v—

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO "PROSECUTION MOTION FOR LEAVE TO CALL TF1-036 TO GIVE
EVIDENCE-IN-CHIEF & CROSS-EXAMINATION *VIVA VOCE*"**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. The Defence files this Response in opposition to the “Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross-Examination *Viva Voce*.”¹

II. Background

2. On 14 March 2008,² the Prosecution filed a Motion under Rule 92*bis*, seeking leave to submit the RUF trial transcripts and related exhibits of witness TF1-036, in lieu of oral testimony. In the Motion, the Prosecution stated that it would not seek to examine TF1-036 in-chief, if the transcripts of his prior testimony were admitted into evidence.³
3. The Defence objected to the rote admission of TF1-036’s prior testimony and requested an opportunity to cross-examine the witness.⁴
4. In its Reply of 7 April 2008, the Prosecution again explicitly submitted that it “does not wish to call [TF1-036]”⁵ and, without citing any authority, sought to limit any cross-examination to “relevant areas of inquiry not previously examined.”⁶
5. The Trial Chamber issued its decision on 15 August 2008. Employing its “inherent power . . . under Rules 26*bis* and 54 to order cross-examination,”⁷ the Chamber ruled that:

The nature of the information contained in the transcripts sought to be tendered by the Prosecution is sufficiently proximate to the Accused that its admission in the absence of an opportunity to

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-558, “Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross Examination *Viva Voce*,” 17 July 2008.

² *Prosecutor v. Taylor*, SCSL-03-01-T-438, “Public with Confidential Annexes A & B Prosecution Notice under Rule 92*bis* for the Admission of Prior Testimony of TF1-036 into Evidence,” 14 March 2008 (“Notice”).

³ Notice, para. 19.

⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-449, “Public, with Confidential Annex A, Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence,” 31 March 2008.

⁵ *Prosecution v. Taylor*, SCSL-03-01-T-458, “Confidential Prosecution Reply to ‘Defence Objection to Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence,’” 7 April 2008, para. 4 (“Reply”).

⁶ Reply, para. 17.

⁷ *Prosecutor v. Taylor*, SCSL-03-01-T-556, “Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence,” 15 July 2008, p. 4 (“Decision”).

cross-examine the makers of the statements would unfairly prejudice the Accused and that it is therefore in the interests of justice to afford the Accused such an opportunity.⁸

The Chamber thus granted the Prosecution's request to admit the evidence of TF1-036 "provided the Prosecution . . . make the said Witness available for cross-examination by the Defence."⁹

6. On 17 July 2008, the Prosecution filed a Motion seeking to undo its earlier request. The Prosecution now seeks leave to call TF1-036 for evidence-in-chief *viva voce*.¹⁰

III. Submissions

7. The Defence opposes the Prosecution's Motion on three grounds. Firstly, on the basis of *res judicata*; secondly, on the grounds that the Prosecution has not established any legal basis for its Motion; and thirdly, on the grounds that there are other alternatives available to the Prosecution which comport with the Chamber's decision.

Res Judicata

8. The Defence submits that the Chamber has already pronounced itself on the question of whether Witness TF1-036 can be called to give oral evidence. At the specific request of the Prosecution, the Chamber allowed the Prosecution to submit transcripts of the witness' prior evidence in lieu of evidence-in-chief, subject to Defence's right to cross-examine. The court has pronounced itself. As a result, the Prosecution cannot be heard to want to go back on that decision. There has to be a finality to the issue.
9. If the Prosecution finds fault with the Chamber's decision, it could seek leave to appeal. Subject to all necessary legal requirements, it could also request the Chamber to reconsider or review its decision. The Prosecution has done neither. Rather, it simply wants the Chamber to turn back the clock to the pre-decision stage as far as Witness TF1-036 is concerned.

⁸ Decision, p. 5.

⁹ Decision, p. 6.

¹⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-558, "Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross Examination *Viva Voce*," 17 July 2008.

10. It would be unfortunate if the invocation of Rule 92*bis*, itself intended to expedite proceedings, would result in further unnecessary proceedings. It would be positively perverse, however, if this invocation leads to a disregard for *res judicata*, the basic legal principle that assures judicial efficiency by rendering final judgments with certainty.¹¹

Insufficiency of Prosecution Explanation for its Change of Course

11. It is not clear on what legal basis the present Motion rests. The Prosecution only advances two tenuous reasons for its request for leave to call TF1-036 *viva voce*. If those reasons have been put forth as grounds for the Chamber to reconsider its Decision, then it is submitted that neither explanation warrants a reconsideration of the Chamber's earlier ruling. Although not expressly provided for in the Rules, the Chamber has a limited ability to reconsider its previous decision in exceptional circumstances, such as where the impugned decision was erroneous in law or there was an abuse of discretion when decided, or where new material circumstances have arisen since the decision was issued.¹² These criteria are not met in the Motion.
12. Firstly, the Prosecution states that it is "no longer of the view that submission . . . via Rule 92*bis* will achieve sufficient efficiency to forego calling the witness."¹³ The Defence submits that it was incumbent on the Prosecution to have considered the variety of outcomes that could emerge before it filed its initial motion. Furthermore, the Defence maintains that the current state of affairs, as enunciated in the Decision of 15 July 2008, still advances the Prosecution's stated objective of expediting the proceedings.¹⁴ The Prosecution made this point in its initial motion, stating:

The jurisprudence of the SCSL also supports the view that expedient and fair trials are promoted where sworn testimony before the Court is admitted in a subsequent trial *in lieu of the*

¹¹ See generally *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of His Right to Trial without Undue Delay, 29 May 2007.

¹² *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-507, Decision on Urgent Motion for Reconsideration of the Ordes for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005, paras. 9-14.

¹³ *Ibid.*, para. 5.

¹⁴ The benefit of foregoing a Prosecution examination-in-chief is not negligible. For example, examination-in-chief of the Witness TF1-388, the final witness prior to summer recess, required portions of five court days.

*Prosecution carrying out a second examination-in-chief over several days. (emphasis added)*¹⁵

13. Secondly, the Prosecution claims that “recent evidentiary developments in this case require additional information not covered in the RUF trial transcripts from this witness.”¹⁶ The Prosecution offers no elaboration of what these “recent evidentiary developments” have been. The Chamber is therefore not sufficiently placed in a position to evaluate the alleged change of circumstances to enable it to properly exercise its discretion.
14. It is incumbent on the Prosecution to know its case before the trial begins. This principle ensures that the Accused is aware of the case against him and has adequate opportunity to prepare his defence. The Prosecution should have known its case, and therefore for what purpose it wanted to submit TF1-036’s evidence, before filing its initial motion on 14 March 2008.

Prosecution alternative to calling TF1-036 viva voce

15. The Defence also submits that in view of the fact that the Chamber has already ruled on the matter, the Prosecution could move (without prejudice to the Defence’s right to object) to have additional statements from TF1-036 admitted under Rules 92*bis* or 92*ter*, should it now wish to tender additional information from Witness TF1-036.

IV. Conclusion

16. The Defence opposes the Prosecution’s motion for leave to call TF1-036 for examination-in-chief *viva voce* for all of the foregoing reasons. The effectiveness of the ongoing proceedings depend, in large measure, on respect for the finality of the Court’s decisions. In the present case, the Prosecution has not sought leave to appeal the Chamber’s decision, nor has it established any legal basis for the Chamber to review or reconsider its own decision. In the interest of finality to proceedings, the Prosecution’s Motion should be dismissed.

¹⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-438, “Public with Confidential Annexes A & B Prosecution Notice under Rule 92*bis* for the Admission of Prior Testimony of TF1-036 into Evidence,” 14 March 2008 (“Notice”).

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-558, “Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross Examination *Viva Voce*,” 17 July 2008, para. 5.

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Respectfully Submitted,


SILAS CHERAKA

Mr. Courtenay Griffiths, QC
Lead Counsel for Mr. Charles Taylor
Dated this 11th Day of August 2008
The Hague, The Netherlands

Table of Authorities

SCSL

Prosecutor v. Taylor, SCSL-03-01

Prosecutor v. Taylor, SCSL-03-01-T-438, “Public with Confidential Annexes A & B Prosecution Notice under Rule 92*bis* for the Admission of Prior Testimony of TF1-036 into Evidence,” 14 March 2008.

Prosecutor v. Taylor, SCSL-03-01-T-449, “Public, with Confidential Annex A, Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence,” 31 March 2008.

Prosecution v. Taylor, SCSL-03-01-T-458, “Confidential Prosecution Reply to ‘Defence Objection to Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence,’” 7 April 2008.

Prosecutor v. Taylor, SCSL-03-01-T-556, “Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence,” 15 July 2008.

Prosecutor v. Taylor, SCSL-03-01-T-558, “Prosecution Motion for Leave to Call TF1-036 to Give Evidence-in-Chief & Cross Examination *Viva Voce*,” 17 July 2008.

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T-507, Decision on Urgent Motion for Reconsideration of the Ordes for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005.

ICTR

Prosecutor v. Bizimungu et al, ICTR-99-50

Prosecutor v. Bizimungu et al, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of His Right to Trial without Undue Delay, 29 May 2007.