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SCSL-03-01-T
(25221 - 25232)

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THE SPECIAL COURT FOR SIERRA LEONE

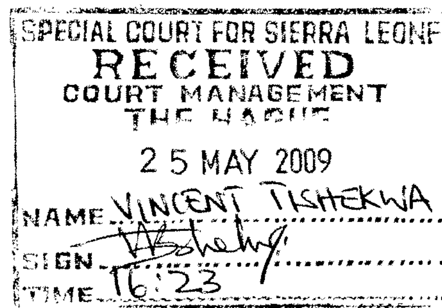
Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 25 May 2009

Case No.: SCSL-2003-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH ANNEX A

DEFENCE REPLY TO PROSECUTION RESPONSE TO 'PUBLIC WITH ANNEX A DEFENCE APPLICATION FOR LEAVE TO APPEAL THE 4 MAY 2009 ORAL DECISION REQUIRING THE DEFENCE TO COMMENCE ITS CASE ON 29 JUNE 2009'

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah
Mr. Silas Chekera

I. Introduction

1. This is the Defence's Reply[1] to the "Prosecution Response to 'Public with Annex A Defence Application for Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009'".[2] The Defence Application for leave was itself filed on 11 May 2009.[3]
2. The Defence has considered the Prosecution Response and is left with the unwavering conviction that it only serves to reinforce why the relief sought by the Application should be sustained.

II. Arguments

A. The Standard of Review

3. The standard of review articulated by the Response for this particular stage of the leave to appeal process is inaccurate. The Response submits the standard as one of "an abuse of the Trial Chamber's discretion",[4] which is the standard of review on appeal, not the standard of review for leave to appeal. The Application and this Reply are concerned with leave to appeal, and thus the standard in question is one of "exceptional circumstances" and "irreparable prejudice".[5] The Defence does not have to prove an abuse of the Trial Chamber's discretion at this stage in the appeals process, and the focus of the Response on an irrelevant standard distracts from the crucial issues at hand. The case-law cited in the Response in relation to the standard of review is equally irrelevant.[6]

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[1] (**"Reply"**)

[2] *Prosecutor v. Taylor*, SCSL-03-01-T-780, "Prosecution Response to Public with Annex A Defence Application for Leave to Appeal the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 20 May 2009 (**"Response"**).

[3] *Prosecutor v. Taylor*, SCSL-03-01-T-777, "Public with Annexes Defence Application for Leave to Appeal the Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 11 May 2009 (**"Application"**).

[4] Response, para. 4.

[5] Rule 73(B) of the Rules of Procedure and Evidence. The standard of review for interlocutory appeals is given in: *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, "Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder", 13 February 2004, para. 10.

[6] For example, *Augustin Ngirabatware v. The Prosecutor*, ICTR-99-54-A, "Decision on Augustin Ngirabatware's Appeal of Decision Denying Motions to Vary Trial Date", 12 May 2009 and *The Prosecutor v. Slobodan Milosevic*, IT-02-54-AR73.6, "Decision of the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case", 20 January 2004, are both to do with the merits of their respective appeals and do not tackle the conjunctive test of exceptional circumstances and irreparable prejudice. Further, Trial Chamber I has already questioned the usefulness of case-law of the other tribunals in determining whether the threshold of

B. Exceptional Circumstances

4. The view is expressed in the Response that the Defence has failed to demonstrate the existence of exceptional circumstances warranting leave to appeal within the meaning of Rule 73(B).[7] In doing so, the Response emphasises the matter as one of "case management" and "trial management".[8] The Defence submits that such characterisations are wrong and misleading. What is at stake are substantive issues that pertain to the reasonableness/ fairness, or the lack thereof, of the Impugned Decision in relation to the denial of the Accused's fair trial rights. To relegate the Accused's fair trial rights to a "case management" issue is to trivialize the issues which are at stake. Nevertheless, the Prosecution draws upon three arguments to suggest that the Defence has not demonstrated the existence of exceptional circumstances, namely that: (i) the Trial Chamber has already considered the Defence's submissions;[9] (ii) the Defence has already had adequate time and resources to investigate the case;[10] and (iii) the Defence cannot claim comparison with other cases before this Court as they are distinct.[11]
5. As for the first line of argument, the Defence has submitted that the lack of adequate time to prepare the Accused's case infringes Article 17(4)(b), and thus interferes with the cause of justice -- one of the reasons put forward by Trial Chamber I as giving rise to exceptional circumstances.[12] The Defence's argument is not predicated on whether or not the Trial Chamber has previously considered it; moreover, whether the Trial Chamber has in fact done so is irrelevant. Accordingly, it is submitted that the Prosecution's argument is misconceived.
6. Turning to the second line of argument, the Response contends that the Defence benefits from significant resources not afforded to the Defence teams in other cases.

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exceptional circumstances and irreparable prejudice has been met for the simple reason that the Rules of the other tribunals do not have the same conjunctive test, see *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, "Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder", 13 February 2004, para. 12.

[7] Response, paras. 6-14.
[8] Response, paras. 2, 6 and 19.
[9] Response, paras. 8-10.
[10] Response, paras. 11-13.
[11] Response, para. 14.
[12] *Prosecutor v. Sesay et al.,* SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141," 28 April 2005, para. 26.

But it can hardly be disputed that due to the nature of the case, and the fact that the witnesses are spread across West Africa and elsewhere, the Accused in the present case requires greater resources than those allocated to other accuseds before the Court. Yet the relevant question is not "how large are the accused's resources?" but rather, "do the accused's resources enable the Defence to prepare the accused's case adequately within the allocated time within the meaning of Article 17(4)(b)?" The answer to this question must be "no" in the circumstances of this case. The difficulties of field work in West Africa are such that irrespective of what resources are available to the Defence, it nevertheless takes time to interview a large number of witnesses. The Defence has four counsel and three legal assistants in West Africa, and they can only interview so many witnesses per day.[13] Once that information is assembled, the Defence must then analyse it. The Defence has stated previously that it would have finished interviewing potential witnesses by the end of May; and according to the current timetable, the Defence will have four weeks to analyse all potential witnesses (possibly more than a hundred in number) and synthesize its case. The Defence submits this does not constitute adequate time and that the start-date ordered by the Trial Chamber gives rise to exceptional circumstances within the meaning of Rule 73(B).

7. The Response suggests that Defence counsel have had since before the start of the trial to investigate witnesses, but this ignores the fact that before April 2009, all Defence counsel were working on the Prosecution's case and the Defence's Rule 98 Motion. The last few months have provided the only opportunity for Defence counsel to undertake any detailed investigation. The Defence has had investigators operating in West Africa since before the start of the trial, but those investigators were unable to carry-out the necessary legal and oversight functions currently being undertaken by Defence counsel because: (i) they are investigators and not lawyers; (ii) the Defence needed to know the Prosecution's case before it could properly interview witnesses;

[13] Footnote 20 of the Response cites an Internet Website, "http://for-taylor.net," as support for a misleading assertion that the Defence earlier this year had "eight lawyers", interns, a Case Manager, and other resources. In the first instance, the cited Website is not connected to any members of the Defence team, nor does it provide an accurate breakdown of the composition (past or present) of the current Defence team. Secondly, and more significantly, it is misleading to say that the team had "eight lawyers" without distinguishing between those that are Counsel, those that were or were not called to the Bar, and those that were temporary hands (such as interns), many of whom have since departed the team.

and (iii) some witnesses understandably wanted to be interviewed by Defence Lead Counsel. This impacts on the overall preparation of the Defence case and should be taken into account when deciding what constitutes adequate time.

8. The Defence reiterates its submission that the decision of the Appeals Chamber in the JCE Appeal[14] has led the Defence to consider new witnesses. Contrary to what is alleged in the Response, the Defence was prepared to address JCE as a mode of liability. However, and as the Defence has consistently stated, the precise nature of the JCE alleged was not clear-cut, especially with reference to the distinction between "means" and "objective". The Prosecution is being disingenuous by suggesting that the Defence's submissions on this issue are "abstruse".[15] It is quite plain that there was genuine dispute – testified to by the fact that the Trial Chamber took almost a year to produce a Decision and even then, the Defence was granted leave to appeal that decision. The Defence did not have the resources to investigate all possible connotations before the final decision was made. Now that a final decision has been made, the Defence must concentrate its investigations on the specific JCE alleged and consider new witnesses to address it. A similar argument applies in relation to the decision of the Trial Chamber on the Defence's Rule 98 Motion.[16] The Defence was, of course, preparing to answer all the charges against the Accused, but the decision of the Trial Chamber has illustrated the evidence the chamber places greatest reliance on and the Defence must address this, also impacting on what constitutes adequate time.

9. In respect of the third line of argument, the Response claims that the CDF and RUF cases are distinct from the present case because Trial Chamber I was simultaneously engaged in two trials. The running of two trials, while a complex administrative procedure, was not, and has not been offered as, a reason for the length of time allocated to those two cases for the Defence teams to prepare their respective cases.[17]

[14] See, *Prosecutor v. Taylor*, SCSL-03-01-T-775, "Decision on Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment," 1 May 2009.

[15] Response, para. 13.

[16] Transcript, page 24211.

[17] *Prosecutor v. Norman et al.*, SCSL-04-14-T-474, "Order Concerning the Preparation and Presentation of the Defence Case", 21 October 2005; *Prosecutor v. Norman et al.*, SCSL-04-14-T-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", 28 November 2005; and *Prosecutor v. Sesay et al.*, SCSL-04-15-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case", 30 October 2006.

The Trial Chamber was not engaged in multiple trials in the AFRC case.[18] Furthermore, the Response misses the point vis-à-vis the reliance on those cases as a basis of comparison when determining "adequate time". As stated in the Application, those cases took place in Sierra Leone, where the witnesses were located, and so avoided the logistical problems specific to the Defence in the present case. Logic and fairness dictate that the Accused in the present case should enjoy at least as much time as the accuseds in the other cases, and it would even be reasonable for the Accused to enjoy more. That the Accused at bar has been given less time should, accordingly, give rise to "exceptional circumstances" in that the accused has been treated exceptionally.

10. Finally, the Defence is entitled to make an opening statement at the start of the Accused's case. While doing so is not mandatory, it is nevertheless a right. If the Defence has not been given sufficient time to adequately prepare its case, the opening statement would have little effect and the right to an opening statement would be meaningless. Furthermore, the function of the opening statement is to assist the Trial Chamber and also the Prosecution to better understand the structure of the Defence case. An ill-prepared opening statement will, as such, offer no such assistance and may even hinder both the Trial Chamber's and the Prosecution's understanding of the Defence case, making the trial less efficient and future delay more likely.

C. Irreparable Prejudice

11. The Prosecution contends that "It is difficult to envision that denial of the two additional weeks that the Defence is now stating it must have would result in irreparable prejudice."[19] The Defence would naturally prefer more time to prepare its case. Defence Lead Counsel, on 4 May 2009, sought a start-date in mid-August.[20] However, and being mindful of its own responsibilities, the Defence has tried and is still trying to be reasonable, while acknowledging the difficulties faced by the Court in relation to funding.[21] Therefore, rather than seek an extended amount of time, the Defence seeks a start-date in mid-July as it has previously and consistently

[18] *Prosecutor v. Brima et al.*, SCSL-04-16-T-478, "Order for Disclosure Pursuant to Rule 73 *ter* and the Start of the Defence Case", 26 April 2006.
[19] Response, para. 15.
[20] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of Proceedings, 4 May 2009, p. 24214.
[21] Letter entitled *Memorandum* dated 26 March 2009 (enclosed in **Annex A**)

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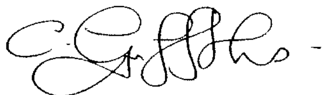
contemplated. As all parties know, the work which can be accomplished in two weeks is considerable, especially when the total time is itself only about three months, from 6 April 2009 to 29 June 2009. Two additional weeks would still not be ideal for the Defence, but it does consider that a start-date in mid-July would better safeguard the Accused's fair trial rights that the current date in late June. Indeed, the absence of this additional time would result in irreparable prejudice for the reasons submitted in the Application.

12. In relation to the Accused's evidence, the Defence agrees that it has had in its possession the Accused's documentary archives since late August of 2007. The archives are voluminous, extending to tens of thousands of pages of material. As Defence counsel have been occupied preparing for cross-examination of Prosecution witnesses, the task of examining the archives has largely been in the hands of interns, who are only with the Defence team for several months at a time, and who have many other duties to attend to themselves. Thus the Accused and Lead Defence Counsel have much to do in terms of organising the Accused's evidence in addition to other preparatory tasks. Therefore, the Defence's submission that it needs more time to prepare for the Accused's evidence is far from "unmeritorious";[22] it is indeed self-evident.

III. Conclusion

13. For all the foregoing reasons, the Defence respectfully submits that it has satisfied the conjunctive standard of Rule 73(B), requiring a demonstration of both exceptional circumstances and irreparable prejudice and respectfully requests that the Trial Chamber grant it leave to appeal the Impugned Decision.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 25th Day of May 2009,
The Hague, The Netherlands

[22] Response, para. 17.

List of Authorities

SCSL

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 04 May 2009

Prosecutor v. Taylor, SCSL-03-01-T, "Decision on Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment," 1 May 2009.

Prosecutor v. Norman et al.

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Prosecutor v. Norman et al., SCSL-04-14-T-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case," 28 November 2005.

Prosecutor v. Sesay et al.

Prosecutor v. Sesay et al., SCSL-2004-15-PT, "Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder," 13 February 2004.

Prosecutor v. Sesay et al., SCSL-2004-15-T, "Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141," 28 April 2005.

Prosecutor v. Sesay et al., SCSL-04-15-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case," 30 October 2006.

Prosecutor v. Brima et al.

Prosecutor v. Brima et al., SCSL-04-16-T-478, "Order for Disclosure Pursuant to Rule 73ter and the Start of the Defence Case," 26 April 2006.

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Annex A

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SPECIAL COURT FOR SIERRA LEONE
OFFICE FOR THE DEFENCE OF CHARLES TAYLOR

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MEMORANDUM

To: Herman von Hebel, Binta Mansaray, Gregory Townsend, Claire Carlton-Hanciles, Will Romans, Simon Meisenberg, Stephen Rapp, Brenda Hollis, Saleem Vahidy, Elaine Bola-Clarkson

From: Courtenay Griffiths, QC

Cc: Terry Munyard, Andrew Cayley, Morris Anyah, Silas Chekera

Date: 26 March 2009

Subject: Defence Case Start Date

Dear All -

I am rounding up a 2 week trip to West Africa during which I met with a number of important witnesses and various team members and SCSL personnel (including WVS). Thus I am now in a better position to indicate how much time our team is likely to need to ensure that we have adequate time for the preparation of the defence case. I am writing to all parties informally, because I know that the time we need for preparation has important administrative and budgetary implications for the court. We are particularly conscious that given the current state of the global economy, many of the countries which have historically supported the SCSL may now adjust their priorities.

Nonetheless, for reasons which I develop below, my considered view is that the earliest we will be able to start our defence case is 15 July. To start any earlier would be a false economy. It is fairer to all parties concerned, and a more efficient use of time and resources, to be fully prepared upfront, rather than to request multiple adjournments throughout the defence case, which would be the inevitable result of a forced premature start. Silas had indicated to the Management Committee in November of last year that our team would need approximately six months from the end of the Prosecution case to the beginning of the defence case. This estimate is proving to be accurate.

My team in The Hague as well as the teams in Freetown and Monrovia are fully committed and working diligently. Since the last Prosecution witness testified, myself and co-counsel have been involved in a comprehensive review of the evidence, not only for Rule 98 purposes, but with a view to establishing how to streamline the defence

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case. That review has an impact on the course of the ongoing investigations – some witnesses are no longer necessary while other have to be found.

Of course, linkage witnesses like ours are more time-intensive than crime-based witnesses, because they are often high-profile and enlisting their assistance takes extra effort. Often they demand discussion with Lead Counsel directly, and this has been difficult to accommodate while the Prosecution case was in full swing and counsel were in court every day. Additionally, our linkage witnesses are not conveniently located in a crime base area, and thus require travel throughout Africa. The recent death of our International Investigator Ambassador Iroha has further complicated the investigations aspect of our case preparation.

I envisage that my team will spend the time between now and 15 July as follows:

- Now to 6 April – Finalize Rule 98 preparation and arguments
- Mid-April to end of May – Terry Munyard, Morris Anyah and one Legal Assistant will be based in Freetown and Monrovia; I will travel between the two and elsewhere as necessary. We will undertake extensive witness interviews, make final selections, compile the required documentations, and prepare all witnesses for trial (witnesses not to exceed 50).
- End of May to mid-July – I meet with Mr. Taylor to prepare him for testimony. This requires an extensive analysis of exhibits and personal knowledge. This will take 4 to 6 weeks, as I anticipate his testimony will take the same. You will appreciate that it was not possible to prepare Mr. Taylor to give testimony during the Prosecution case because he was in Court every day.
- June and July will be used to compile results of the field work and put all logistics in place for the travel of the witnesses.
- Andrew and Silas will stay in The Hague to oversee filings, prepare the pre-defence case materials, and coordinate disclosure obligations, etc.

We are aware of the resource-implications of the matters set out above, but would observe that it would be wise and fair to consider them in light of:

- The Article 17 rights of the accused and the statutory guarantee of adequate time for the preparation of the defence case.

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- The disparity of resources between the defence and the prosecution, even **now** that the prosecution has closed its case.
- The fact that the change representation which occurred in June 2007 has meant that the accused's current team of lawyers have had out of necessity to prepare to deal with the prosecution case whilst in tandem preparing the defence case, in a situation where all potential witnesses are a continent away. In this regard the prosecution had the luxury of five years in which to prepare their case whilst we have had in effect 18 months.
- Further the time requested is less than that granted in all other cases heard before this court.
- Finally, it should be borne in mind that the prosecution were allowed to present their case without any pressure being placed on them as to the duration and content of their case, even though, in the event, their case lasted twice as long as indicated, thus creating the pressures currently acting upon the proceedings.

I am sure this time-line will be discussed at length at the appropriate time; however, I thought it helpful to make all parties aware of the work we have already undergone and the work that lies ahead.

Yours,

C Griffiths

Courtenay Griffiths Q.C.
Lead counsel