1342) SCSL-03-01-A (2704-2715) 2704

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Pre-Hearing Judge

Registrar: Ms. Binta Mansaray

Date: 17 October 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH CONFIDENTIAL ANNEX A AND *EX PARTE* CONFIDENTIAL ANNEX B

MOTION FOR LEAVE TO FILE A SUR-REPLY TO PROSECUTION REPLY TO DEFENCE RESPONSE TO URGENT PROSECUTION MOTION REGARDING THE DEFENCE'S FAILURE TO COMPLY WITH THE PRACTICE DIRECTION

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. James Pace

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

I. INTRODUCTION

1. On 12 October 2012, the Prosecution filed the *Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction.*[1] On the same day, the Pre-Hearing Judge ordered the Defence to file any response 15 October 2012 and the Prosecution file any reply by 16 October 2012.[2]

2. The Defence seeks leave to file a Sur-Reply to the *Public Prosecution Reply to Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction.*[3] By providing the basis of the allegations contained in the Original Motion[4] only in the Prosecution Reply, the Prosecution denied the Defence the opportunity to meaningfully respond to the allegations in the *Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction.*[5]

3. Additionally, irregularities in the service of CD-ROMs purportedly forming part of the Prosecution Reply, necessitated that the Defence refuse service of the said CD-ROMs by the Court Management Section (CMS).

II. SUBMISSIONS

The Prosecution Denied the Defence an Opportunity to Meaningfully Respond

4. The Prosecution made allegations in the Original Motion that Defence Counsel violated the Practice Direction on dealing with Documents in The Hague - Sub-Office[6] as part of a "clear effort to circumvent the Court-ordered limit imposed"[7] regarding the length of its Rule 111

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[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1335, Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 12 October 2012 ("Original Motion").
[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1336, Scheduling Order for Response and Reply Regarding the "Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction," 12 October 2012 ("Scheduling Order"), page 2.
[3] *Prosecutor v. Taylor*, SCSL-03-01-A-1340, Public Prosecution Reply to Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 16 October 2012 ("Prosecution Reply").
[4] See Original Motion, paras. 3, 4, 5 and 8.
[5] *Prosecutor v. Taylor*, SCSL-03-01-A-1337, Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 12 October 2012 ("Defence Response").
[6] As amended on 25 April 2008.
[7] Original Motion, para. 4. See also paras. 3, 4, 5 and 8.

Submissions. The Prosecution asserted that it "noticed"[8] and "noted"[9] that the typeface of the *Appellant's Submissions of Charles Ghankay Taylor*[10] is 11.5 for the main text and 9.5 for the footnotes. However, it provided no substantive basis or proof for the allegations and averments made.

5. The Defence attempted to provide Microsoft Word "read-only" versions of the Appellant's Submissions, first directly to the Chamber's Senior Legal Officer, and secondly through the CMS, without success on 15 October 2012, in order that the Pre-Hearing Judge could confirm that the main text is 12-point and the footnotes are 10-point in size. However, the Defence was unable to do so for reasons outlined in the *Notification regarding the Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction.*[11] As a result, it indicated that the Defence Response was "submitted to the Chamber for decision, resting on the signed rebuttal by Defence Counsel."[12] This pronouncement was made before the Defence had sight of the Prosecution Reply, which was served on the Defence at 09:19 on 17 October 2012.

6. It was only in the Prosecution Reply that the Prosecution made any attempt to provide a factual basis for the allegations in the Original Motion. The Prosecution stated that it "resorted to a number of measures to try to ascertain if the typeface was compliant before contacting the Defence [via e-mail] and subsequently filing the [Original] Motion."[13] These measures included "[c]opying excerpts" from PDF onto Microsoft Word and using "subscription to professional software to convert all six parts of the PDF version... the result being again that the typeface of the main text was 11.5 and the footnotes 9.5."[14] The Defence notes that copying excerpts to Microsoft Word or converting the version of the Appellant's Submissions as distributed by Court Management Section (CMS) will provide no conclusive indication of the actual size of the Appellant's Submissions as per the Microsoft Word version it used, and it is not for the Defence

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[8] Original Motion, para. 3.
[9] Original Motion, para. 4.
[10] *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012 and *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012 ("Appellant's Submissions").
[11] *Prosecutor v. Taylor,* SCSL-03-01-A-1341, Notification regarding Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 16 October 2012 ("Notification"), filed at 16:46, 16 October 2012.
[12] Notification, para. 5.
[13] Prosecution Reply, para. 3.
[14] Prosecution Reply, paras. 3 and 4.

to "explain why only the Defence Rule 111 submissions"[15] were converted into 11.5 point by the Prosecution's unspecified software or plug-in.[16]

7. Having failed to mention any of these measures in the Original Motion or in the e-mail,[17] the Prosecution has deprived the Defence of the opportunity to respond to the substance of the allegations of the Original Motion. Such a procedural irregularity should not be allowed.[18] The Pre-Hearing Judge is respectfully invited to grant leave to the Defence to file a Sur-Reply to the Prosecution Reply, in order to properly preserve the right of the Defence to respond[19] to the Original Motion.

8. Since the Defence was not afforded the opportunity to file a meaningful response to the Original Motion, and for avoidance of doubt and for purposes of assisting the Pre-hearing Judge with the determination of the truth, the Defence hereby files as Confidential *ex parte* Annex B, a CD-ROM containing the Microsoft Word "read-only" versions of its Appellant's Submissions and annexes thereto. The basis for the ex parte filing of the said annex is as follows:

> Only the Chamber ought to pass on whether or not the Appellant's Submissions meet the requirements of the Practice Direction.[20] The Defence does not wish to acquiesce to, or countenance a regime whereby the party that makes serious allegations of misconduct against opposing counsel stands to receive the contested documents and be placed in a position to pass judgment on whether or not the documents meet the requirements of the Practice Direction, all as a by-product of efforts to contest the allegations. Neither should the Prosecution obtain the benefit of having the flexibility of working with the Microsoft Word versions of the Defence's Appellant's Submissions as a by-product of having made the serious allegations at issue, especially when the Defence does not have a copy of the Microsoft Word version of the Prosecution's Appellant's Submissions.[21]

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[15] Prosecution Reply, para. 1.

[16] In terms of the Defence's reference to printer scaling, the Defence requests that the Prosecution turn its attention to the sizes of its own borders in recent hard copies of filings: all are, presumably, in compliance with the Practice Direction, and yet are printed to a margin far below that required by the Practice Direction, and would, on any OCR software, be rendered in a larger font than the Defence filings, printed with appropriate borders.

[17] Original Motion, Annex A. In fact, in the e-mail, the Prosecution Senior Case File Manager stated that the Prosecution was "unable to determine whether it uses a 12-point... or 11.5-point font."

[18] On the same basis with which the Prosecution argued (at para. 5 of *Prosecutor v. Taylor*, SCSL-03-01-A-1311, Prosecution Reply to Defence Response to Prosecution Consolidated Motion Pursuant to Scheduling Order for Written Submissions Regarding Rules 111, 112 and 113, 27 July 2012) that it should be granted a right to file an additional reply to *Prosecutor v. Taylor*, SCSL-03-01-A-1310 the Defence Reply to Prosecution Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 27 July 2012.

[19] See Rule 7(C) and Rule 73 of the Rules of Procedure and Evidence.

[20] See, Article 4(G) of the Practice Direction on Dealing with Documents in The Hague.

[21] *Prosecutor v. Taylor*, SCSL-03-01-A-1325, Public Prosecution Appellant's Submissions with Confidential Sections D & E of the Book of Authorities, 1 October 2012.

Irregularities in the Service of the Prosecution Reply

9. Furthermore, there were irregularities in the service of the Prosecution Reply, as a result of which the Defence refused service of the CD-ROMs which purportedly make up "Public Annex A, Electronic copy of the PDF conversion into Word format." The Pre-Hearing Judge ordered, as per the Scheduling Order, that "[t]he Prosecution shall file any reply to any response no later than 16 October 2012."[22]

10. The Declaration of Szilvia Csevár, Case Manager and Legal Assistant to the Charles Taylor Defence Team, is attached to this Motion as Confidential Annex A and details the service of the Prosecution Reply on the Defence.

11. The Defence was served with the paper-only hard-copy of the Prosecution Reply at 09:19 on 17 October 2012.[23] No CD-ROMs or DVDs were attached to the Prosecution Reply served to the Defence. Furthermore, the cover page of the Prosecution Reply had no notation about any annexes thereto. At approximately 10:15, two Defence representatives enquired with a CMS representative with regard to what was purportedly a "Public Annex A" to the Prosecution Reply. The CMS representative informed the Defence representatives that the Prosecution Reply, as was served on the Defence earlier, was the version submitted by the Prosecution to CMS. Furthermore, he had no knowledge of any annexes. The Defence therefore took service of the entire document as filed by the Prosecution at 16.02 on 16 October 2012.

12. Approximately one hour later, the CMS representative attempted to serve on the Defence two CD-ROMs purportedly forming part of the Prosecution Reply. On the basis that the Defence had already accepted service of the entirety of the Prosecution Reply and been informed that that was the entire document as filed with CMS the previous day, the Defence refused to accept service of the CD-ROMs.

13. Accordingly, due to these irregularities, the Defence does not consider the CD-ROMs to form proper part of Public Annex A of the Prosecution Reply, and if the CMS representatives' statements are correct, the obligation would lie with the prosecution to move for leave to supplement the Prosecution Reply with the CD-ROMs.

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[22] Scheduling Order, p. 2.

[23] The time-stamp at submission indicated 16.02, 16 October 2012, which is within the deadline set by the Pre-Hearing Judge in her Scheduling Order.

III. CONCLUSION

14. For the foregoing reasons, the Defence respectfully requests that the Pre-Hearing Judge grant the Defence leave to file a Sur-Reply to the Prosecution Reply.

Respectfully submitted,

Morris Anyah **Lead Counsel for** **Charles G. Taylor**	Eugene O'Sullivan Co-Counsel for Charles G. Taylor	Christopher Gosnell Co-Counsel for Charles G. Taylor	Kate Gibson Co-Counsel for Charles G. Taylor

Dated this 17th Day of October 2012, The Hague, The Netherlands

List of Authorities

SCSL

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012.

Practice Direction on dealing with Documents in The Hague - Sub-Office, as amended on 25 April 2008.

***Prosecutor v. Taylor*, SCSL-03-01-A**

Prosecutor v. Taylor, SCSL-03-01-A-1341, Notification regarding Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 16 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1340, Public Prosecution Reply to Defence Response to Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 16 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1337, Defence Response to *Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction*, 15 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1336, Scheduling Order for Response and Reply Regarding the "Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction," 12 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1335, Urgent Prosecution Motion regarding the Defence's Failure to Comply with the Practice Direction, 12 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1325, Public Prosecution Appellant's Submissions with Confidential Sections D & E of the Book of Authorities, 1 October 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1311, Prosecution Reply to Defence Response to Prosecution Consolidated Motion Pursuant to Scheduling Order for Written Submissions Regarding Rules 111, 112 and 113, 27 July 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1310 the Defence Reply to Prosecution Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 27 July 2012.

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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-A**
Document Index Number: **1342**
Document Date: **17 October, 2012**
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Number of Pages: Number from: **2711-2714**

☐Application
☐Order
☐Indictment
■**Motion**
☐Response
☐Correspondence

Document Title
Public with confidential Annex A and ex-parte confidential Annex B motion for leave to file a sur-reply to Prosecution reply to Defence response to urgent Prosecution motion regarding the Defence's failure to comply with the Practice Direction

Name of Officer:

Samuel Fornah