1147)

SCSL-03-01-T
(31361 - 31373)

31361

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Ms. Binta Mansaray
Date filed:	10 January 2011

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

Case No. SCSL-03-01-T

PUBLIC WITH CONFIDENTIAL ANNEX A
PROSECUTION RESPONSE TO 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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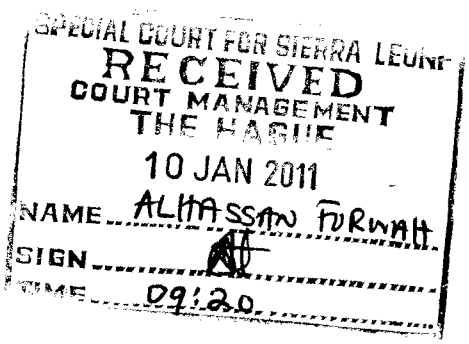

I. INTRODUCTION

1. On the last day of the court calendar for 2010 the Defence filed "Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses" ("Motion").[1]

2. For the reasons set out below the Defence Motion should be dismissed in its entirety.

II. ARGUMENTS

The Defence Motion is Untimely

3. On 13 September 2010 the Trial Chamber set 24 September 2010 as a deadline for the Defence to file any remaining Motions.[2] Pursuant to this order the Defence filed a number of Motions before the Trial Chamber. The Defence did not seek additional time to file this or any additional motions on the basis that there were outstanding issues that would prevent the Defence from complying with the Trial Chamber's order. The Defence ought to have complied with the Trial Chamber's order and/or have sought leave for and justified additional time to file the Motion in question. In light of these failures the Trial Chamber should refuse to consider the Motion.

4. The Defence asserts at paragraph 3 of the Motion that "the Defence has made the issue of improper inducements to prosecution witnesses, including unwarranted promises of relocation, a mainstay of cross-examination and argumentation."[3] As such the Defence has been seized of this issue since the first Prosecution witness was called in January 2008, almost three years ago. Nevertheless, it is apparent from Annex A that the Defence waited until January 2009 to raise the issue with Mr. Vahidy (the Chief of the Witnesses and Victims Section). The Defence then proceeded to sleep on this issue until near the end of the Defence case. Only in October 2010, some 9 months later and after the date by which all remaining motions were to be filed, did the Defence again raise the issue with the Witnesses

[1] *Prosecutor v. Taylor*, SCSL-2003-01-T-1142, "Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses", 17 December 2010.
[2] *Prosecutor v. Taylor*, TT Status Conference, 13 September 2010, p. 48323.
[3] Motion, para. 3.

and Victims Section (See Annexes B, C and D to the Motion). Notably, on 12 November 2010, the same day the Defence closed its case, it raised this issue with the Registrar[4] but failed to make any mention of this issue to, or seek any relief from, the Trial Chamber at that time.

5. The Defence has therefore been seized of this issue for years and has failed to diligently pursue the issue or seek relevant orders from the Trial Chamber within the evidential phase of the case. The Defence case ran for 16 months, which included a generous period of time from the end of the evidence of DCT-008 on 8 September 2010 – whom the Defence then announced would be in all likelihood be the last witness,[5] until it called the next witness, Sam Kolleh, on 1 November 2010. Had the Defence filed a request for relief in a timely manner, the seven weeks the courtroom sat dark could have been used to hear additional evidence if the application had been successful. Through these failures, the Defence has failed to act with due diligence. Further, at this very late stage in the case, with Final Trial Briefs having been scheduled for submission on 14 January 2011,[6] this Motion flies in the face of the efforts made to complete the case expeditiously (see further the argument in relation to Judicial Economy below).[7] The Trial Chamber should refuse to consider this Motion because of its untimely and dilatory nature.

The Defence Motion Amounts to a Request for Re-opening the Defence Case

6. The Defence boldly asserts that the Motion does not amount to a request for re-opening. However, what this assertion possesses in audacity it lacks in substance. The Defence Motion amounts to a request for re-opening.

7. First, should Mr. Vahidy be called to give evidence, as the Defence so request, he would be called as a Defence witness. The Defence seeks to support its argument that Mr. Vahidy would not be a Defence witness by alluding to the Prosecution's characterization of Naomi Campbell as a "court" witness.[8] However, it is to be

[4] Annex E to the Motion.
[5] *Prosecutor v. Taylor*, TT Status Conference, 13 September 2010, p. 48312.
[6] Final Trial Briefs are to be filed on 14 January 2011, *Prosecutor v Taylor*, TT Status Conference, 22 October 2010, p. 48362.
[7] Judicial Economy is one of those factors to be considered in relation to any application for recalling witnesses (see *Prosecutor v. Brima et al*, SCSL-04-16-T-425, Decision on Defence Motion for Leave to Recall Witness TF1-023", ("*Brima* Decision) 25 October 2005 para.15, and is addressed at para. 13 below).
[8] Motion, para.17 and footnote 19.

recalled that the Presiding Judge made plain that she was a Prosecution witness.[9] As such this example lends no support to the Defence's contention. Further, and somewhat surprisingly, the Defence avers that, should the Motion be granted, the Defence intends to cross-examine Mr. Vahidy. This assertion is equally misguided. Had the Defence sought to re-open its case, and assuming such a request were granted, the Defence would only be permitted to cross-examine Mr. Vahidy if the Trial Chamber declared him to be a hostile witness.

8. The Defence cites Decisions from two cases in support of the argument that seeking to recall Prosecution witnesses after the closure of the Defence case does not amount to an application to re-open.[10] However, neither Decision assists the Defence argument. The first Decision, from the case of *Prosecutor v. Karemera et al.* at the ICTR, does not support the Defence proposition. It is plain from even a cursory reading of this Decision that the Trial Chamber granted the request of the Defence in that case to recall a witness in circumstances where the Prosecution case had not yet been completed.[11] The second Decision cited by the Defence, in the case of *Prosecutor v. Popović et al.*,[12] does not discuss the issue in question, and thus similarly fails to provide any support for the Defence argument.

9. For the reasons set out above, the Motion amounts to a request to re-open the Defence case. The Defence has failed to either address or meet the test for re-opening of their case.[13] Therefore the Trial Chamber should reject the Defence Motion on the basis that it is wrongly characterized as a request to recall/call witnesses, when it is obviously a back door request to re-open the Defence case.

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[9] *Prosecutor v. Taylor,* TT 5 August 2010, p. 45514.
[10] Motion, para. 16.
[11] *Prosecutor v. Karemera et al*, ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH" 12 March 2008, para. 7, where the Trial Chamber states that the witness was to be recalled "before the commencement of the Defence case." The Defence's attempt (at footnote 17 of the Motion) to rely on para. 9 where the Trial Chamber states that "As Witness BTH is a Prosecution witness his recall on the request of Joseph Nzirorera must be considered as a re-opening of the cross-examination by the Defence" in support of its argument, is therefore either negligent or misleading. Further of note is the fact that the Defence application in this case was not opposed by the Prosecution.
[12] *Prosecutor v. Popović et al.,* IT-05-88-T, "Partial Decision on Gvero Motion Seeking the Recall of Certain Prosecution Witnesses and the Reopening of the Case", 15 June 2009.
[13] The Prosecution adopts by reference the law and its arguments concerning the test for reopening a case set out in *Prosecutor v. Taylor,* "Prosecution Motion to Call Three Additional Witnesses", SCSL-03-01-T-962, 20 May 2010, paras. 3 -7.

The Defence Fail to Satisfy the High Standard Required to Mandate the Recalling of the Prosecution Witnesses

10. The Motion is both untimely and amounts to an application to re-open the Defence case and should be dismissed for the reasons addressed in the paragraphs above. Should the Trial Chamber refrain from dismissing the Motion on either or both of these grounds, the Motion should nonetheless be dismissed. The Defence fails to meet the high standard required for the Trial Chamber to order the proposed Prosecution witnesses to be recalled. Leave to recall a witness should only be granted in "the most compelling circumstances."[14] The Defence fails to demonstrate that the most compelling circumstances exist. Further, the moving party must show good cause as to why the witnesses must be recalled. In assessing whether good cause has been demonstrated the Trial Chamber must carefully consider: (i) the purpose of the proposed testimony; (ii) the party's justification for not offering the evidence when the witness originally testified; and (iv) judicial economy.[15] For the reasons set out below the Defence fails to establish that good cause exists.

11. As regards the purpose of the proposed testimony, promises or disbursements to witnesses after their testimony are irrelevant, as any such subsequent promises or disbursements cannot impact upon testimony that has already been given by a witness. Notably the Defence requests to the Witnesses and Victims Unit relate to, what the Defence characterise as "post-testimony benefits,"[16] in other words, benefits or promises of benefits made *after* the witnesses gave evidence, and not benefits or promises of benefits made *before* the witnesses testified. As regards the latter, the Defence had the opportunity to cross-examine Prosecution witnesses on the issue of any alleged promises of relocation when the witnesses were here during the Prosecution phase of the case,[17] and shouldn't at this late stage be permitted a second bite at the cherry. The Defence did pursue that line of questioning with TF1-590, for example, asking him whether he had received any promise of

[14] *Brima* Decision para.16.
[15] *Brima* Decision para. 15. Notably, (iii) the right of the accused to be tried without undue delay is also a factor, although the Accused appears to have waived this right with respect to this issue (Motion, para. 23).
[16] Annexes A, D and E to the Motion.
[17] *Prosecutor v. Taylor*, SCSL-03-1-T-1118, "Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators", 11 November 2010, para.127, where the Trial Chamber states that "Abu Keita testified as a Prosecution witness in this case in January 2008 and that the Defence had ample opportunity to cross-examine him in relation to these allegations, in particular his alleged "deals" with the Prosecution on relocation. The Defence cannot therefore claim prejudice in this regard".

relocation.[18] Also in relation to TF1-276, the Defence asked that witness whether he had received promises about relocation to The Netherlands.[19]

12. The Defence's attempted justification for not raising the issue when the witnesses originally testified must fail. First, as noted above, there is no reason why the Defence could not have explored with the witnesses in question the issue of any alleged promises, as the Defence describe the issue as "a mainstay of cross-examination."[20] Furthermore, any testimony about promises made before testimony was given would be much more reliable if asked at the time of the witnesses' testimony, rather than asking these questions over two years later. Secondly, for the reasons discussed in Confidential Annex A of this Response, the information contained in Confidential Annex J of the Motion provides no basis for relief. In this regard the Prosecution can state that the Defence fail to provide any credible evidence to support its assertions about witnesses being "rewarded" for their testimony.

13. The Defence have not made a showing to justify the requested relief and in these circumstances, the request is inconsistent with judicial economy. In the case of *Prosecutor v. Bagosora*, relied upon by this Trial Chamber in the relevant decision in the case of *Prosecutor v. Brima*,[21] a Trial Chamber of the ICTR stated that "concerns of judicial economy demand that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature."[22] In the Motion, the Defence attempt to belittle the significance of judicial economy as a relevant consideration by characterising it as a "secondary concern."[23] However, the quotation from the *Bagosora* Decision demonstrates that judicial economy dictates that "only the most compelling circumstances" justify disregarding the consideration. No such compelling

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[18] *Prosecutor v Taylor*, TT 16 June 2008, p. 11906.
[19] *Prosecutor v Taylor*, TT 24 January 2008, p.2153.
[20] Motion, para.3, and noted above at para. 4 and footnote 3.
[21] *Brima* Decision.
[22] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Bagosora Defence Motion to Recall Witness Frank Claeys for Additional Cross-Examination, 19 February 2007, para. 3; See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *Prosecutor v. Simba*, ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.
[23] See the sub-heading for paragraphs 24 and 25 titled: "Judicial Economy is a Secondary Concern given the Compelling Circumstances."

circumstances exist in the context of this application.[24] Further granting the Motion at this extremely late stage in the proceedings would fly in the face of judicial economy.[25] If granted the Motion would result in serious and significant delay to the completion of the trial and further strain the very limited resources of the Special Court. In terms of completion of the trial, the Defence estimates that it would require at least a week of court time to call five witnesses.[26] However, should the Defence be allowed to "recall" and call[27] these witnesses, the Prosecution would require additional court time for re-examination and cross-examination. Further the Prosecution would also assert its right to present relevant evidence and call rebuttal witnesses, for example, in relation to threats made against the Prosecution witnesses in question as well as the general security situation faced by witnesses who have testified against Mr. Taylor in this case. Specifically, in order to show the reasonableness of concerns for witness protection, the Prosecution would present evidence of death threats apparently made by Taylor supporters to members of the Defence team and measures taken to respond to this threat. Certainly there is no reason that witnesses, who are at much greater long-term risk, would deserve any less protection than lawyers. Thus significantly more than a week of additional court time would be required to comply with a dilatory request for relief.

The Defence Motion Defeats the Purpose of the Protective Measures Regime

14. Finally, the Defence Motion frustrates the purpose of the Protective Measures regime. The framework of the protective measures regime permits the Witness and Victims Service under the auspices of the Registry to make the necessary risk assessments in relation to the relocation of witnesses after their testimony. This is an absolutely proper function, as the Court has a duty to ensure that the safety and security of witnesses isn't simply disregarded the moment they leave the court room. The Defence requests information about the whereabouts of witnesses whom the Witness and Victims Service have deemed at risk and in need of relocation. However, the provision of information about the whereabouts of witnesses who have been relocated would result in an increased risk to those witnesses and any dependants. The Defence request thus undermines the important protections

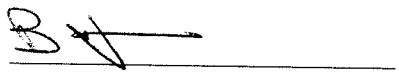
[24] In this regard the Prosecution relies on the arguments already set out in the paragraphs above.
[25] Recall also the arguments already made in this regard at para. 5 above, that for reasons of economy will not be repeated here.
[26] Motion, para. 4.
[27] Mr. Vahidy would be examined in chief by the Defence. See the argument at para. 7 above.

provided by the court for witnesses who have had the courage to testify in these proceedings. The unfounded and unwarranted characterization of the Witnesses and Victims Service as, in effect , mere agents of the Office of the Prosecutor does not negate the responsibility and authority of that unit to take action based on its assessments of security needs.

III. CONCLUSION

15. For the reasons set out above the Defence Motion should be dismissed.

Filed in The Hague,
10 January 2011,
For the Prosecution,



Brenda J. Hollis
The Prosecutor

INDEX OF AUTHORITIES

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Prosecutor v. Taylor, SCSL-2003-01-T-1142, "Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses," 17 December 2010

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Trial Transcripts and Exhibits

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Prosecutor v. Taylor, TT 16 June 2008

Prosecutor v. Taylor, Testimony of Alice Pyne, TT, 20 June 2008

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Prosecutor v. Taylor, TT Status Conference, 13 September 2010

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Exhibit D-468

Prosecutor v Brima et al.

Prosecutor v. Brima et al., SCSL-04-16-T-425, Decision on Defence Motion for Leave to Recall Witness TF1-023," 25 October 2005

ICTR

Prosecutor v. Karemera et al, ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH" 12 March 2008

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Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T**
Document Index Number: **1147**
Document Date: **10 January 2011**
Filing Date: **10 January 2011**
Document Type: **Response**
Number of Pages: **3** Number from: **31371 – 31373**

☐ Application
☐ Order
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Document Title:

Public with confidential Annex A Prosecution response to Defence motion to recall four Prosecution witnesses and to hear evidence from the Chief of WVS regarding relocation of Prosecution witnesses

Name of Officer:

Alhassan Fornah

Signed: