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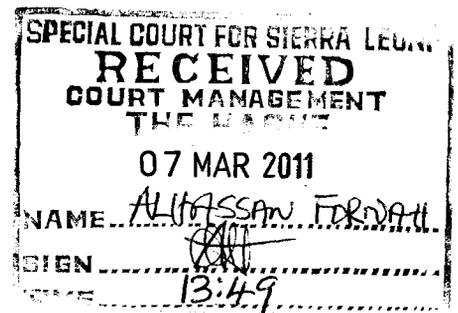
**SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR**

**TRIAL CHAMBER II**

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

Registrar: Ms. Binta Mansaray

Date filed: 7 March 2011



**THE PROSECUTOR**

**Against**

**Charles Ghankay Taylor**

Case No. SCSL-03-01-T

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**PUBLIC**

**PROSECUTION RESPONSE TO DEFENCE MOTION SEEKING TERMINATION OF THE  
DISCIPLINARY HEARING FOR FAILURE TO PROPERLY CONSTITUTE THE TRIAL CHAMBER  
AND/OR LEAVE TO APPEAL THE REMAINING JUDGES' DECISION TO ADJOURN THE  
DISCIPLINARY HEARING**

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Office of the Prosecutor:

Ms. Brenda J. Hollis  
Mr. Mohamed A. Bangura  
Ms. Ruth Mary Hackler  
Ms. Ula Nathai-Lutchman  
Mr. Nathan Quick  
Mr. James Pace

Counsel for the Accused:

Mr. Courtenay Griffiths, Q.C.  
Mr. Terry Munyard  
Mr. Morris Anyah  
Mr. Silas Chekera  
Mr. James Supuwood  
Ms. Logan Hambrick

## I. INTRODUCTION

1. The hearing at issue<sup>1</sup> concerns an ancillary and collateral matter strictly between the Trial Chamber and Lead Defence Counsel. Contrary to the assertions of Mr. Robinson and Lead Defence Counsel, this ancillary matter would, and should, have no impact on the *primary proceedings*, especially at this stage of final submissions. Nor should this ancillary hearing occasion delay in the *primary proceedings*. In fact and as discussed below, the Rules, Code of Conduct and Directive on the Assignment of Counsel provide means to continue a case without delay even in the most extreme instance such as the removal or withdrawal of counsel from a case.
2. With this Trial Chamber's permission<sup>2</sup> and for the Chamber's consideration, to the extent it may assist in resolution of the issues raised, the Prosecution files this response to the "Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing."<sup>3</sup>
3. The Prosecution suggests the motion should be dismissed in its entirety. There is no doubt that this Chamber may, in its discretion, choose to terminate the hearing. However, the Motion fails to establish that the Trial Chamber is required to terminate the hearing pursuant to Rule 46. As set out below, neither Rule 46, nor Rule 73, support this Motion.<sup>4</sup>

## II. APPLICABLE LAW

### Rule 46 H

4. Rule 46(H) allows a party to seek leave to appeal the *imposition of sanctions* under Rule 46(A)-(C). This mechanism is not triggered until sanctions have been imposed.

Decisions made by a Trial Chamber under Sub-Rules (A)-(C) above may be appealed with leave from that Chamber. Where such leave is refused, the Party may apply to a bench of at least three Appeals Chamber Judges for leave.

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<sup>1</sup> As ordered on 9 February (*Prosecutor v. Taylor*, SCSL-03-01-T-1196, Direction to Lead Counsel to Appear before the Trial Chamber, 9 February 2011), commenced on 11 February (*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 11 February 2011), and continued on 25 February (*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 February 2011).

<sup>2</sup> Email from Mr. Simon Meisenberg to Ms. Brenda J. Hollis, dated 2 March 2011.

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-1220, Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing ("Motion"), 28 February 2011.

<sup>4</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 February 2011, p. 49318.

Rule 73(A) and (B)

## 5. Rule 73 applies only to motions.

(A) Subject to Rule 72, either party may move before the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open court.

(B) Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

Rule 16(A) & (B)

## 6. Rule 16 concerns the absence and/or resignation of Judges. Rule 16(A) applies to the short-term inability of a judge to sit in a proceeding.

If a Judge is unable to continue sitting in a proceedings, trial or appeal which has partly been heard for a short duration and the remaining Judges are satisfied that it is in the interests of justice to do so, those remaining Judges may order that the proceeding, trial or appeal continue in the absence of that Judge for a period of not more than five working days.

## 7. Rule 16(B) applies to the long-term inability of a judge to sit in a proceeding.

If a Judge is, for any reason, unable to continue sitting in a proceedings, trial or appeal which has partly been heard for a period which is or is likely to be longer than five days, the President may designate an alternate Judge as provided in Article 12(4) of the Statute.

- i) If an alternate Judge is not available as provided in Article 12(4) of the Statute, and the remaining Judges are satisfied that it would not affect the decision either way, the remaining Judges may continue in the absence of that Judge.
- ii) Where a trial or appeal chamber proceeds in the absence of one Judge, in the event that the decision is split evenly a new proceeding, trial or appeal shall be ordered.

Rule 16bis(D)

## 8. Rule 16bis sets out the role and duties of Alternate Judges. Rule 16bis(D) specifies that the Presiding Judge, in consultation with the other Judges, may deem it necessary for the Alternate Judge to perform functions other than those specified.

The alternate Judge may perform such other functions within the Trial Chamber or Appeals Chamber as the Presiding Judge in consultation with the other judges of the Chamber may deem necessary.

### III. SUBMISSIONS

#### Rule 46

9. Rule 46 provides a vehicle by which a Trial Chamber can expeditiously and efficiently address potential misconduct by counsel, and thereby exercise its inherent power to control the proceedings. Such inherent power is demonstrated by the wide discretion the Trial Chamber is given in the imposition of Rule 46 sanctions. In fact, Rule 46 grants no right to representation, a hearing, or even due process before warnings or sanctions are imposed.<sup>5</sup> Sanctions could, and indeed often are, summarily and immediately applied against offending counsel.
10. Moreover, considering its underlying purpose, Rule 46 is necessarily a self-contained rule with a limited and clearly stated basis upon which leave to appeal may be requested: the imposition of sanctions against counsel under Rule 46(A)-(C).<sup>6</sup> In this case, no sanctions have yet been imposed so there is no basis under this Rule to request leave to appeal.<sup>7</sup> In its discretion to determine when and how it will decide whether to impose sanctions under Rule 46, the majority of the Chamber chose to grant a hearing, give Lead Defence Counsel time to consult outside counsel, and perhaps even allowed outside counsel rights of audience. Such discretionary decisions do not expand this hearing beyond the scope of Rule 46.

#### Rule 73

11. Rule 73 also provides no basis for the Defence pleading. That Rule allows a party to seek leave to appeal a decision on a *motion*.<sup>8</sup> Granting leave to appeal would therefore be contrary to the plain language of Rule 73. Moreover, Rule 73(B) was intended to limit applications for appeal on matters relating to the *primary proceedings*. As the Defence

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<sup>5</sup> *Prosecutor v. Muvunyi*, ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Reconsideration of the Trial Chamber's Order to Comply with the Scheduling Order, 17 June 2009, para. 21 (determining that submissions are not required before a decision under Rule 46 "so long as one of the enumerated criteria" is met).

<sup>6</sup> Rule 46(H).

<sup>7</sup> The Defence acknowledges that there is no right of appeal under Rule 46 until sanctions are imposed. Motion, para. 32.

<sup>8</sup> i.e. when a party "move[s] before the Designated Judge or a Trial Chamber for appropriate ruling or relief." Rule 73 (A). In the instant scenario, the decision to adjourn was not made in resolution of any Defence request for a ruling or relief. *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 February 2011, p. 49318.

correctly points out, Rule 73(B) was intended to ensure “that *criminal trials* [are not] heavily encumbered and consequently unduly delayed by interlocutory appeals.”<sup>9</sup> Accordingly, there is no basis for the Motion under Rule 73. In any event, Defence submissions in relation to Rule 73 are baseless.

Rules 16 and 16bis

12. Rules 16 and 16bis, concerning constitution of a Chamber and Alternate Judges, do not apply to Rule 46 hearings, unless the Chamber so determines. Even Rule 77, which concerns more serious conduct and may result in more severe penalties than Rule 46, permits this Chamber to assign a *single Judge* to hear proceedings.<sup>10</sup> Therefore, the voluntary absence of one of the Judges on Trial Chamber II does not deprive the two remaining Judges of the ability to proceed on this matter.
13. Assuming *arguendo* that any Rule other than self-contained Rule 46 applies in the instant scenario, however, Defence submissions in relation to Rules 16 and 16bis are premature and misplaced. A majority of a properly constituted Trial Chamber directed Lead Defence Counsel to appear, and thereafter began Rule 46 proceedings on 11 February 2011. Justice Sebutinde then voluntarily absented herself from the partially heard proceeding which recommenced on 25 February. In light of this development, the remaining Judges chose to adjourn the proceedings, one of the options it had at the time. Moreover, assuming any rule other than Rule 46 applies here, several options remain open under Rule 16.
14. First, the Prosecution suggests that under Rule 16(A), the two remaining Judges, in the interests of justice, could continue this partially heard proceeding. The Prosecution suggests that voluntary absences may be considered to render a Judge unable to sit during such absence. Second, the Prosecution suggests that Rule 16bis(D) gives discretion to the Presiding Judge to request the Alternate Judge to perform other functions in the Trial Chamber, such as participating in this ancillary hearing. In accordance with the Rule, this could be done if the Presiding Judge deemed it necessary after consulting with the other Judges of the Chamber.<sup>11</sup>

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<sup>9</sup> Motion, para. 17.

<sup>10</sup> Rule 77(D).

<sup>11</sup> Rule 16bis(D) (emphasis added).

15. Further, the Defence's reliance on Rule 16(B) is misplaced.<sup>12</sup> Rule 16(B) is only relevant when a judge is absent for more than five days. There is no basis to conclude that the instant hearing will take more than five days. In fact, Rule 46 matters are typically concluded immediately, or in a very short time, as they are meant to facilitate expeditious resolution of the conduct at hand and are not guided by the requirements of Rule 77.<sup>13</sup> The Prosecution notes, however, that even under Rule 77 a Chamber may "summarily deal" with misconduct at its discretion.<sup>14</sup>
16. Accordingly, the adjournment was in keeping with the Rules; it is within the Judges' discretion to conduct collateral and ancillary Rule 46 proceedings as it so decides; and the Defence has not demonstrated that the Judges will be unable to adjudicate the Rule 46 issue at a later date. There is no reason to terminate the current proceedings under Rule 16.

*Ancillary Proceedings have No Impact on the Primary Proceedings*

17. The "merely ancillary or consequential matters"<sup>15</sup> dealt with in the Motion will have no impact on the primary proceedings, especially considering that the primary proceedings are currently in the final stage before the primary hearing is declared closed. Furthermore, the Rules and Directives applicable to the primary proceedings ensure that the Accused will be adequately represented at all times, even in the event that a counsel is refused the right of audience, or even the right of representation.<sup>16</sup> In this case, Mr. Munyard was also

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<sup>12</sup> Motion, para. 25.

<sup>13</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 12 August 2010, pp. 46092-9 (Lead Defence Counsel was ordered to apologize to the Court and Prosecution Counsel for his misconduct, he refused to abide by this order, and the Court thereafter suspended his rights of audience); pp. 46102-3 (under 2.5 hours after Lead Defence Counsel initially refused to apologize, the disciplinary matter was resolved when Lead Defence Counsel apologized as ordered and his rights of audience were reinstated).

<sup>14</sup> Rule 77(C)(i).

<sup>15</sup> *Prosecutor v. Norman et al.*, SCSL-04-14-T-449, Decision on Norman Counsel's Request for Leave to Appeal Under Rule 46(H), 25 July 2005 ("**Norman 46(H) Decision**"), p. 4; *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to be of "No Effect," 24 May 2005, para. 12.

<sup>16</sup> e.g. Rules of Procedure and Evidence, Rule 45(E) ("In the event of [withdrawal by Assigned Counsel] the Principal Defender shall assign another Counsel who may be a member of the Defence Office, to the indigent Accused"); Code of Professional Conduct, Article 18 ("If representation by Defence Counsel is to be terminated or withdrawn, unless otherwise ordered by a Chamber, such termination or withdrawal shall not take effect until a replacement Defence Counsel is ... assigned by the Principal Defender, or the client has notified the Registrar in writing of his intention to conduct his own defence"); Directive on the Assignment of Counsel, Articles 24 (D) ("The Principal Defender shall immediately assign a new Counsel to the Suspect or Accused, and where appropriate, authorize the nomination of other Counsel in the Defence Team"), 25(A) (where assignment is withdrawn or services of Assigned Counsel discontinued, "Duty Counsel of the Defence Office, including the Principal Defender, shall give the Suspect or Accused legal assistance until a new Counsel is assigned"), 25(E). See also Rules of

appointed to represent Mr. Taylor. Thus assigned counsel would be available even in Lead Defence Counsel's absence. Further, the Defence has a fully resourced team, with at least two other co-counsel and several legal assistants. Any of these "other Counsel in the Defence Team shall assume responsibility for the appearance and carriage of the client's case for such time as Assigned Counsel is absent."<sup>17</sup>

18. Finally, the imposition of such sanctions does not prejudice the Accused,<sup>18</sup> given that the disciplinary hearing is entirely separate from, and collateral to, the primary proceedings. As Lead Defence Counsel himself acknowledges, the outcome of the disciplinary hearing could only be to his own detriment.<sup>19</sup>

#### IV. CONCLUSION

19. Accordingly, the Motion is without merit and all requested remedies are unavailable to the Defence under Rules 46 and 73. The Motion should be dismissed in its entirety.

Filed in The Hague,

7 March 2011

For the Prosecution,




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Brenda J. Hollis  
The Prosecutor

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Procedure and Evidence, Rule 60 (even in the absence of the Accused, the Chamber may proceed so long as it determines that the Accused has expressly or implicitly waived his right to be present). Indeed, Justice Sebutinde, in her capacity as Presiding Judge, previously stated that "the Statute, the Rules, and Directive on Assignment of Counsel do not envisage a vacuum situation whereby, after ... Assigned Counsel are withdrawn, there would be no provision made to replace counsel." *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 June 2007, p. 42.

<sup>17</sup> Directive on the Assignment of Counsel, Article 25(E) provides further that even "if other Counsel in the Defence Team is also unavailable for the appearance, Duty Counsel may appear to advise the Suspect or Accused upon receiving instructions from Assigned Counsel."

<sup>18</sup> Norman 46(H) Decision, p. 4 ("the Accused will suffer no irreparable prejudice for sanctioning his Counsel").

<sup>19</sup> Motion, para. 1.

## Index of Authorities

### SCSL

SCSL Rules of Evidence and Procedure

SCSL Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone

SCSL Directive on the Assignment of Counsel

### **Prosecutor v. Taylor, SCSL-03-01-T**

*Prosecutor v. Taylor*, SCSL-03-01-T-1220, Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing, 28 February 2011

*Prosecutor v. Taylor*, SCSL-03-01-T-1196, Direction to Lead Counsel to Appear before the Trial Chamber, 9 February 2011

### Transcripts

*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 February 2011

*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 12 August 2010

*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 June 2007

### **Prosecutor v. Norman et al., SCSL-04-14**

*Prosecutor v. Norman et al.*, SCSL-04-14-T-449, Decision on Norman Counsel's Request for Leave to Appeal Under Rule 46 (H), 25 July 2005

### ICTR

*Prosecutor v. Muvunyi*, ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Reconsideration of the Trial Chamber's Order to Comply with the Scheduling Order, 17 June 2009

<http://www.ictrcaselaw.org/docs/20090617-dco-0055A-01-en.pdf>

*Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to be of "No Effect", 24 May 2005

<http://www.ictrcaselaw.org/docs/doc64928.pdf>