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SCSL-03-01-T

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 23 April 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO THE URGENT PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION OF 16 APRIL 2010

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Kathryn Howarth
Ms. Sigall Horovitz

Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. This is the Defence Response to the Prosecution's *Urgent Application for Leave to Appeal Decision of 16 April 2010.*[1]
2. The Application concerns the sufficiency of the witness summary of DCT-306, disclosure of prior statements made by him and the extension of time for the Prosecution to prepare for the cross-examination of the witness.
3. In its oral decision of 16 April 2010, the Trial Chamber properly exercised its discretion after applying the test it had laid down in previous oral decisions[2] relating to the disclosure of Defence witness statements.[3] In the present Application, the Prosecution argues that in making the Decision the Trial Chamber did not apply the legal standards it had set out itself and as specified in Rule 73*ter*, and that the Trial Chamber erred in determining that undue or irreparable prejudice had not been demonstrated. The Prosecution argument that these errors give rise to exceptional circumstances and irreparable prejudice is without merit.[4]
4. As the Application does not meet the conjunctive standards of the exceptional circumstances and irreparable prejudice under Rule 73(B) of the Rules of Procedure and Evidence, leave to appeal should be denied.

II. APPLICABLE LEGAL STANDARD

5. The Defence agrees with the applicable law as stated by the Prosecution in paragraphs 9 to 11 of the Application.
6. However, paragraphs 12 and 13 of the Application which refer to disclosure of defence witness statements under Rule 73*ter*(B) are irrelevant. The Trial Chamber has already made it clear that, as the proceedings are well beyond the Pre-Defence Conference stage, Rule 73*ter*(B) does not apply and the Trial Chamber is exercising its discretion pursuant to its "inherent powers".[5]

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[1] *Prosecutor v. Taylor*, SCSL-03-01-944, Public Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010 ("**the Application**").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcripts, 25 February 2010, pp. 36116-36119; 10 March 2010, pp. 36924-36925; 12 March 2010, pp. 37158-37161; 24 March 2010, pp. 37949-37955; 16 April 2010, pp. 39248-39252 ("**previous oral decisions**").
[3] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 16 April 2010, pp. 39250-39251 ("**Decision**").
[4] Application, at paragraph 2.
[5] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 February 2010, pg. 36117-8.

III. ARGUMENT

7. Given the restrictive nature of interlocutory appeals, the Prosecution must meet a very high standard before leave to appeal can be granted. Trial Chamber I has stated, "that the overriding legal consideration in respect of an application of this nature is that the applicant's case must reach a level nothing short of exceptional circumstances and irreparable prejudice, having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals."[6]

8. The Prosecution's adoption of the arguments made orally on 16 April 2010, in paragraph 14 of its Application, is irrelevant to the issue for the Court to determine at this stage. The arguments the Prosecution made on 16 April 2010 were for specific relief and go to the merits of the issue. The arguments for the relief on are completely different to the arguments necessary for an application for leave to appeal. Furthermore, the arguments put forward by the Prosecution in paragraphs 16 to 19 of the Application are, more appropriately, grounds of appeal which are not relevant at this stage. These paragraphs merely argue the alleged errors of law, discretion and fact, as opposed to presenting arguments that the applicant's case has reached a level of exceptional circumstance and irreparable prejudice. This is not the stage at which to raise these arguments but the Defence will deal with it in passing, making one point: in paragraph 16 of the Application the Prosecution errs fundamentally in relying on Rule 73*bis* and *ter*, since both refer to the stage of proceedings prior to the start of the Defence case.

Exceptional circumstances

Issue of fundamental legal importance

9. Exceptional circumstances may exist where, for instance, the question in relation to which leave to appeal is sought "is one that raises *serious* issues of fundamental legal

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

importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general".[7]

10. The matters stated by the Prosecution in paragraph 15 cannot be said to raise a new and serious issues of fundamental legal importance that requires intervention by the Appeals Chamber. The issue of the sufficiency of Defence witness summaries and the remedy appropriate if they are insufficient has come up in relation to nearly every defence witness called.[8] The jurisprudence cited by the court in setting out its decisions has been clear, consistent, and dates back some 11 years to 1999, including a decision of the ICTY Appeals Chamber.[9] The application of this jurisprudence by the Trial Chamber does not give rise to a serious issue of fundamental legal importance that needs further explication by the Special Court for Sierra Leone. The only issue which arises here is the discretionary application by the Court of settled law.
11. In this regard, the Defence highlights that the Trial Chamber has consistently made a statement at the beginning of each one of its deliberations in the matter, clearly setting out the law[10] and stating that it "retains the discretion to order a disclosure of the witness statement depending on the circumstances of each case".[11]
12. The Defence submits that this discretion is best exercised by the Trial Chamber as it is in the best position to appreciate the particular circumstances of the witness and the summary, at the time when the issue arises.
13. The Trial Chamber, in exercising its discretion, has applied the law consistently. On the occasions that the testimony covered material which was not mentioned in the summary the Trial Chamber allowed the Prosecution additional time to prepare its cross-examination. The Trial Chamber made it clear on 16 April 2010 that a summary

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[7] *Prosecutor v. Sesay et al*, SCSL-2004-15-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, at paragraph 26.
[8] *Prosecutor v. Taylor*, Trial Transcripts, 25 February 2010, pp. 36101-36119; 10 March 2010, pp. 36918-36925; 11 March 2010, p. 37149- 12 March 2010, p. 37161; 24 March 2010, pp. 37931-37955; 16 April 2010, pp. 39232-39252.
[9] *Prosecutor v. Tadić*, IT-94-1-A, Judgment (Appeal), 15 July 1999, paragraphs 306-326.
[10] For example, *Prosecutor v. Taylor*, Trial Transcripts, 16 April 2010, pp. 39249-39250; 24 March 2010, pp. 37949-37950.
[11] For example, *Prosecutor v. Taylor*, Trial Transcripts, 24 March 2010, p. 37949.

has to be "*grossly insufficient*"[12] (emphasis added) to demonstrate undue or irreparable prejudice so as to trigger disclosure.[13]

Course of justice

14. If the Prosecution argument on leave to appeal is intended to rely on the ground that there is demonstrable interference with the course of justice and that such interference constitutes "exceptional circumstances" they must produce credible and explicit evidence of such a serious allegation.[14] A brief perusal of the facts underlying this witness's disclosures illustrates the derisory nature of this allegation. Firstly, the Defence disclosed the identity of DCT-306 in advance of its requirement to do so.[15] Secondly, the witness summary was provided to the Prosecution on 29 January 2010, which identified the witness to be a member of the external delegation and thus one of a very limited number of persons. Lastly, The Trial Chamber stated that the contents of DCT-306's testimony "do not take either of the parties by surprise"[16] as the testimony largely related to existing exhibits and, the Defence submits, concerned matters already in evidence.

15. The Defence also disputes the Prosecution's assertion that the Defence is "systematically failing to provide adequate summaries of the facts to which witnesses will testify".[17] On the five occasions that the issue of summaries has been raised by the Prosecution, the Trial Chamber has never ordered the disclosure of a witness statement, and in only two instances (DCT-125 and DCT-146), has afforded the Prosecution additional time for preparation of cross-examination on the basis of insufficiency.

Issue is likely to recur

16. It is submitted that this does not constitute an exceptional circumstance requiring an interlocutory appeal. Whether or not the Defence call further witnesses whose

[12] Ibid, p. 39250.
[13] *Prosecutor v. Taylor,* Trial Transcripts, 16 April 2010, pp. 39250-39251.
[14] The Prosecution made reference that the Defence has chosen the strategy of "ambush tactics" in paragraph 21 of the Application.
[15] Letter from Courtenay Griffiths to Brenda Hollis Re: Defence Witness Order, 8 March 2010.
[16] *Prosecutor v. Taylor,* Trial Transcript, 16 April 2010, 39250:18-22.
[17] Application, paragraph 21.

summaries the Prosecution object to will be determined on a case by case basis. This Trial Chamber is the appropriate forum for resolving these issues and is capable of doing so, as it has done effectively over the last two months.

Irreparable prejudice

Recent fabrication

17. In the Application, the argument is made that, "The Decision prevents the Prosecution from effectively testing the evidence of this witness for which it had no notice against statements of the witness to determine if the new evidence is recently fabricated".[18] The Decision does not prevent the Prosecution from effectively testing the evidence of this witness. Firstly, this Court has stated in the Decision[19] and in previous oral decisions, "a summary is not meant to be a complete statement of everything that the witness will attest to". The Defence adds that it does not necessarily follow that evidence that is not in the summary is suspect of being recently fabricated. A summary only provides information on what the Defence expects the witness to say. Secondly and in any event, the Prosecution should be able to effectively test the evidence of the witness with the information it has. The Prosecution has the capacity to put to the witness any suggestion that his evidence is recently fabricated.

18. The Trial Chamber, who are the primary finders of fact, stated in their oral decision on the Prosecution application for disclosure that:

> " In particular, the summary states that the witness was a former member of the external delegation. As the Defence has rightly pointed out, the external delegation comprised a very limited number of persons and a number of witnesses have already testified extensively on the role and experience of the external delegation. Furthermore, we agree with the Defence that a large portion of Mr Fayia's testimony relates to existing Defence or Prosecution exhibits, the contents of which do not take either of the parties by surprise."[20]

19. Therefore, the Trial Chamber found that there was no irreparable prejudice since much of the witness' evidence cannot have taken the Prosecution by surprise. That in itself underlines the fallacy in the Prosecution argument that they are unable to

[18] Application, paragraph 23.
[19] *Prosecutor v. Taylor,* Trial Transcript, 16 April 2010, 39250:6-7.
[20] *Prosecutor v. Taylor,* Trial Transcript, p. 39250.

determine if the evidence is recently fabricated. Simply because material evidence was not in a witness's statement does not per se indicate that he has recently fabricated it; the real issue is whether the Prosecution has been taken by surprise. The primary finders of fact have found that they have not been taken by surprise in relation to much of this witness's evidence.

The time given to the Prosecution to prepare for cross-examination

20. The Defence submits that there is no irreparable prejudice as alleged in paragraph 23 of the Application with regard to the time the Prosecution was given to prepare for cross-examination. The Trial Chamber stated as part of the Decision, "As mentioned in previous rulings, the proper remedy in that case is to allow the Prosecution some time to prepare its cross-examination in relation to those areas not contained in the summary."[21] The time given to the Prosecution to prepare for cross-examination was sufficient, especially when considering the information the Prosecution had available to it.

21. DCT-306 began to give evidence at 12:34 p.m. on Tuesday, 13 April 2010. Court was adjourned at 3.17 p.m. on Friday 16 April 2010 at the conclusion of the witness' evidence-in-chief. The Prosecution had the rest of that day and two full days before the commencement of the cross-examination at 9.00 a.m. on Monday, 21 April 2010. For the sake of clarity, the Defence submits that the Saturday and Sunday count as days the Prosecution had to prepare, pursuant to the interpretation in Rule 7(B)[22] of the Rules of Procedure and Evidence, which provides the time limits "for the doing of any act". In addition, Monday, 21 April 2010 and Tuesday, 22 April 2010 were shortened half days when court adjourned at 1.30 p.m. The Defence submits that these half days can also be taken into account as part of the time that the Prosecution had to prepare its cross-examination.

22. The witness summary of DCT-306 was provided to the Prosecution as early as 29 January 2010. This summary stated that the witness was "a former member of the

[21] *Prosecutor v. Taylor,* Trial Transcript, p. 39251.
[22] Which states: "Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and Public Holidays shall be counted as days."

external delegation."[23] The Trial Chamber agrees with the Defence that "the external delegation comprised a very limited number of persons and a number of witnesses have already testified extensively on the role and experience of the external delegation."[24]

23. Charles Taylor was indicted on 7 March 2003. The Prosecution has had since then to conduct the investigations in the case. The Prosecution has called another member of the external delegation as its witness; TF1-168, whose evidence is not too dissimilar to that of DCT-306. The Prosecution has had the chance to conduct all the investigations it requires on the matter, both as part of its general case preparation and preparation for TF1-168. Furthermore, the Prosecution had included another member of the external delegation listed among the witnesses disclosed to the Defence, but chose not to call him. It was, therefore, very cognisant of the issues likely to be raised by this Defence witness. The Prosecution would have voluminous amounts of material and research upon which it can establish a large number of the issues it says it needs to find "agreement or disagreement with the testimony of this witness"[25]. The Prosecution had more notice than required by the court to contact its "sources in the sub-region and elsewhere"[26].

24. The Prosecution suggestion that it has to "review" the 40,000 pages of testimony and 900 exhibits is disingenuous. The preparation is likely to involve the use of investigative search tools to search for elements or phrases out of the 40,000 pages of testimony and 900 exhibits, only the results of which would be necessary to review. It is expected that a small fraction of the number of pages of testimony and exhibits in the entire case could only potentially be relevant.

25. Given the amount of time and resources the Prosecution has had to its disposal over the duration of the entire case, the information the Defence provided about the witness and the fact that the all the material disclosed by the witness has been in the public arena for a long time, it is submitted that the Prosecution was or

[23] *Prosecutor v. Taylor*, SCSL-03-01-897, Public with Annex A and Confidential Annex B Defence Rule 73*ter* Filing of Witness Summaries – Version IV, 29 January 2010, p. 169.
[24] *Prosecutor v. Taylor*, Trial Transcript, 16 April 2010, 39250:15-18.
[25] Application, paragraph 23
[26] Ibid

should have been able to adequately prepare before DCT-306 began testifying, as well during the additional days it had before cross-examination and, therefore, suffered no irreparable prejudice. If there was prejudice, the adjournment granted was the appropriate cure in the matter.

IV. CONCLUSION

26. For the foregoing reasons, the Prosecution's case fails the conjunctive test of exceptional circumstances and irreparable prejudice. Leave to appeal must therefore be denied and the Defence respectfully submits that the Application should be dismissed.

Respectfully submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 23rd Day of April 2010
The Hague, The Netherlands

LIST OF AUTHORITIES

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-897, Public with Annex A and Confidential Annex B Defence Rule 73*ter* Filing of Witness Summaries – Version IV, 29 January 2010.

Prosecutor v. Taylor, SCSL-03-01-944, Public Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 25 February 2010.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 10 March 2010.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 11 March 2010.

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

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 24 March 2010.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 16 April 2010.

Prosecutor v. Sesay et al

Prosecutor v. Sesay et al, SCSL-2004-15-PT, Decision on the Prosecution'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-2004-15-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005.

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Prosecutor v. Tadić, IT-94-1-A, Judgment (Appeal), 15 July 1999.
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OTHER

Letter from Courtenay Griffiths to Brenda Hollis Re: Defence Witness Order, 8 March 2010.