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SCSL-03-01-T
(28610 – 28621)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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: 19 April 2010

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

Case No. SCSL-03-01-T

PUBLIC

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

Office of the Prosecutor:
Ms. Brenda J. Hollis
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Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
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I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("**Rules**"), the Prosecution hereby applies for leave to appeal the Trial Chamber's oral decision of 16 April 2010:

   a. finding that "the witness summary of DCT-306, although brief, is not necessarily insufficient and that the Prosecution has not demonstrated undue or irreparable prejudice in that regard";

   b. refusing to order the Defence to provide prior statements made by the witness;

   c. and refusing to grant an extension of time beyond the "rest of [Friday]" and the two day weekend for the Prosecution to prepare for cross-examining witness DCT-306, despite a further finding that "the witness's evidence-in-chief did span over areas not specifically mentioned in the summary, and to this extent the summary could be considered as insufficient, although not grossly so". (**Decision**)[1]

2. The Prosecution seeks leave to appeal the Decision on the basis that the Trial Chamber, in reaching the Decision, did not apply the legal standard set out in Rule 73*ter* nor did it apply the legal standard it set out: that a summary "must at least provide a reasonable indication, however brief, of the evidential areas to be covered by the witness in his testimony"[2] . In concluding that the summary was not necessarily insufficient, at least not grossly so, the Trial Chamber erred by wrongly applying the above mentioned legal tests to the summary of this witness. The Trial Chamber also erred in determining that the Prosecution had not demonstrated undue or irreparable prejudice.[3] These errors of law and fact, resulting in the failure of the Chamber to grant appropriate remedies, give rise to exceptional circumstances and irreparable prejudice and thus warrant appellant intervention pursuant to Rule 73(B).

II. BACKGROUND

3. On 29 January 2010, the Defence provided the Prosecution with the witness summary of witness DCT-306. This summary states as follows:

> "Background: the witness was a former member of the external delegation. The witness is expected to discredit one of the OTP witness *[sic]* and is also expected to testify and give an explanation of Foday Sankoh's fundraising trips around the sub-region prior to the

[1] Decision, *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 16 April 2010 ("Transcript"), pp. 39250 – 39251.
[2] Decision, Transcript, p. 39250.
[3] Ibid.

Abidjan Accord."[4]

4. On 8 March 2010, the Defence disclosed DCT-306's identity to the Prosecution.[5] The Defence never provided notice of the name of the witness who was to be discredited.

5. DCT-306 began testifying on 13 April 2010; direct examination was concluded on 16 April 2010. The matters which were outside the summary included, but were not limited to, the following:

a. entry of the invading forces on 13 April 1992 in Kailahun;
b. the make-up of those invading forces, their ethnicity and what group he alleges they belong to;
c. Foday Sankoh coming nine days later to Kailahun Town;
d. the reaction of the civilian population to the RUF invasion;
e. life before the RUF invasion;
f. attitudes toward the APC government and the history of civilian relations with the APC government;
g. the witness' position as RUF Agriculture Officer in the Kailahun District;
h. the witness' appointment as the agriculture director;
i. that there was supposedly no forced farming in the RUF and how farming was organised;
j. that there was supposedly no forced conscription in the RUF;
k. that there was supposedly no terror campaign in the RUF;
l. details regarding an individual referred to as Jungle;
m. details regarding an individual named Ibrahim Balde;
n. interaction with Charles Taylor prior to the time the witness was a member of the external delegation, including his sending rice to Charles Taylor to show that Taylor was not assisting the RUF
o. that a senior citizen from Kailahun, Mr. Tengbeh, was sent to Gbarnga and spent five months in Gbarnga to test the friendship between Foday Sankoh and Charles Taylor;
p. providing a definition of vanguards which is different than other witnesses in this case;
q. Top 20, Top 40 and Top Final, giving a unique explanation of those events, claiming that Top 20 and Top 40 was fighting within the RUF;
r. details regarding Isaac Mongor, including his claimed involvement on the Liberian side in Top 20 contrary to another Defence witness
s. incident at Giehun where Jande, Foday Sankoh's concubine or girlfriend, and 350 people were killed;
t. massacre in Sandiallu where Isaac Mongor killed 30 people;
u. the military situation of the RUF throughout the 1990s and the fall of Zogoda;
v. the periods when ULIMO allegedly controlled the border;

[4] *Prosecutor v. Taylor*, SCSL-03-01-T-897, Public with Annex A and Confidential Annex B Defence Rule 73*ter* Filing of Witness Summaries – Version Four, 29 January 2010, page 169.
[5] Letter from Courtenay Griffiths to Brenda Hollis Re: Defence Witness Order, 8 March 2010.

w. his opinion about where the RUF got its arms and ammunition or whether they did or didn't get arms and ammunition, and quantities of arms and ammunition the RUF had;

x. trading weapons with Guinea and named a sergeant, a specific person, who was involved with this trading;

y. RUF's position regarding the elections and his own presence at a meeting with Foday Sankoh where Operation Stop Election was ordered;

z. a meeting in Freetown where the population and civil society rejected the idea of delaying elections and did not accept the RUF position no elections before peace;

aa. "Footpaths to Democracy", the ideology and beliefs of the RUF, how the document was written, that himself, Addai Sebo and others were involved in writing the document;

bb. Addai-Sebo and his role with the RUF with the Abidjan negotiations;

cc. the witness' activities upon being released from RUF imprisonment after the signing of the Lome Peace Agreement in 1999.

6. In regard to matters related to the external delegation, the testimony included new information, e.g., Charles Taylor's involvement with the external delegation:

   a. the trip allegedly taken at Charles Taylor's request or instruction to see Charles Taylor in Gbarnga;

   b. the trip allegedly taken with Charles Taylor to Accra;

   c. Charles Taylor's alleged presence in Abidjan and contact with the external delegation there;

   d. the witness's supposed trips to Europe including to Belgium and The Netherlands, including names of persons he supposedly met with; and

   e. the treatment of members of the external delegation upon their return to Sierra Leone in 1997.

7. On 16 April 2010, at the close of the examination-in-chief of witness DCT-306, the Prosecution orally submitted a motion requesting to receive prior statements made by witness DCT-306, and to postpone the witness's cross-examination until after the next Defence witness completed his testimony to allow the Prosecution sufficient time to prepare to cross examine on the myriad of matters not included in the summary and on new matters regarding the external delegation including the testimony related to the supposed involvement of Charles Taylor with the external delegation.

8. In arriving at its Decision the Trial Chamber noted that it had previously held that "a summary is not meant to be a complete statement of everything that the witness will

attest to but must at least provide a reasonable indication, however brief, of the evidential areas to be covered by the witness in his testimony."[6] The Trial Chamber considered that "the summary states that the witness was a former member of the external delegation",[7] and agreed with the Defence "that a number of witnesses have already testified extensively on the role and experience of the external delegation", and 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".[8]

III. APPLICABLE LAW

9. Rule 73(B) provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. As noted by this Chamber:

> "the overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals."[9]

10. However, as recognised by the Appeals Chamber, "the underlying rationale for permitting such appeals is *that certain matters cannot be cured or resolved by final appeal against judgement*"[10] (emphasis added).

11. The two limbs to Rule 73(B) – exceptional circumstances and irreparable prejudice – are conjunctive and both must be satisfied if an application for leave to appeal is to succeed. In relation to the first limb of the standard set out in Rule 73(B), what constitutes exceptional circumstances "must necessarily depend on, and vary with, the circumstances

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[6] Decision, Transcript, p. 39250.
[7] Ibid. Although, contrary to other language in this very short summary, the summary did not state the witness would testify about the external delegation or its activities.
[8] Ibid. But note that no indication was given by the Defence or the Trial Chamber as to who these supposed witnesses were or which exhibits were being referred to.
[9] *Prosecutor v. Brima et al*, SCSL-04-16-T-483, "Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal pursuant to Rule 98 of 31 March 2006", 4 May 2006, p. 2.
[10] *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on Prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal", 17 January 2005, para. 29; see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005 ("*Sesay* Decision"), para. 21.

of each case."[11] However, as Trial Chamber I observed "exceptional circumstances" may exist where the course of justice might be interfered with, or the question raises serious issues of fundamental legal importance to the Special Court for Sierra Leone.[12] This Trial Chamber has also considered whether an issue is likely to arise again with regard to other witnesses as a relevant factor in determining whether to grant leave to appeal.[13]

12. Rule 73*ter* (B) requires that, upon order of the Trial Chamber or a Judge, the Defence file "a list of witnesses the defence intends to call with ... [a] summary of the facts on which each witness will testify". Trial Chamber I has held that the summaries referred to in this provision:

> "shall include detailed summaries of the incidents and/or event which a witness is called to testify upon, exact location and date (if available) of these alleged incidents and/or event, position and/or role of a witness in relation to the crimes charged in the Indictment, nexus between the Accused and the proposed testimony of a witness and other details as Counsel deems necessary and would clearly demonstrate the essence of that testimony".14

13. Rule 73*ter* (B) also authorizes the Trial Chamber to "order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statement of each witness of whom the Defence intends to call to testify", authority which the Trial Chamber exercised in the case of *Bagosora et al* before the ICTR.[15]

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[11] *Sesay* Decision, 28 April 2005, para. 25, which was noted in *Prosecutor v. Brima et al*, SCSL-04-16-T-588, "Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to call Evidence in Rebuttal", 23 November 2006, at p. 3.

[12] *Sesay* Decision, 28 April 2005, para. 26.

[13] *Prosecutor v. Brima et al.*, SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality", 12 October 2005, p. 3.

[14] *Prosecutor v Norman et al.*, SCSL-04-14-T-566, "Order to the First Accused to Re-File Summaries of Witness Testimonies", 2 March 2006, Order no. 3. This holding was recalled in *Prosecutor v Sesay et al.*, SCSL-04-15-T-746 "Consequential Orders Concerning the Preparation and the Commencement of the Defence Case", 28 March 2007, p. 5. In addition, in the RUF status conference of 20 March 2007, the Judges asked the parties to review their summaries and remedy the deficiencies, directing them to follow the above Consequential Orders of 28 March 2007 as a guide. See *Prosecutor v Sesay et al.*, Trial Transcript of 20 March 2007, pp. 56-65.

[15] *Bagosora et al.*, ICTR-98-41-T, Decision on Alleged Deficiencies in the Kabiligi Pre-Defence Brief, 30 October 2006, para. 5. See also the *Karemera et al.* case, in which, prior to the commencement of the Defence case, the Prosecution complained that it could not investigate or prepare adequately for cross-examination because the Defence witness summaries provided insufficient details. The Prosecution further submitted that if more detailed summaries are not provided, it would have to request the appropriate remedies during the presentation of the Defence case, which could lead to trial delays. Although the Chamber declined to make a general ruling on the issue at that stage, it reiterated its prior invitation to the Defence to provide more information where possible, and further noted that "should the Prosecution show any prejudice caused by additional information elicited during the witnesses' testimony, which was not contained in the summary of the anticipated testimony, it will remain open to the Chamber to determine the appropriate remedy on a case-by-case basis." *Karemera et el.*, ICTR-98-44-T,

IV. ARGUMENTS

Exceptional Circumstances

14. The Prosecution adopts the arguments made on 16 April 2010 in connection with the requested relief. [16]

Issue of fundamental legal importance

15. The Prosecution's right to a fair hearing and its right to conduct an effective cross examination are issues of fundamental legal importance.[17] The ability of a party to effectively test the evidence put before the fact finder so that the fact finder can accurately assess what weight if any to give that evidence is also an issue of fundamental legal importance.[18] The requirement that the Prosecution be provided sufficient information as to the expected testimony of a Defence witness is key to ensuring the above rights are given actual and not just hypothetical effect. The proper exercise of discretion to order the disclosure of Defence witness statements, as that term is broadly defined in this Court, is also a matter of fundamental legal importance, as is the proper exercise of discretion to allow the affected party sufficient time to conduct required investigation prior to cross examination. The circumstances under which the Trial Chamber should exercise its discretion to order the Defence to disclose statements of its witnesses, is also a point of law of legal importance.[19]

16. In the case at hand, the Trial Chamber erred in determining that the summary in question was not so insufficient as to warrant the Prosecution being provided the statements of the witness. This was both an error of law and facts. First, the summary was legally deficient given the plain language of Rule 73*bis* and as interpreted by Trial Chamber I:[20] the

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Decision on Prosecutor's Submissions Concerning Edouard Karemera's Compliance with Rule 73*ter* and Chamber's Orders, 2 April 2008, para. 4.

[16] Transcript p. 39232 – 39234.

[17] *Prosecutor v. Taylor,* SCSL-03-01-T-865, Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination, 30 November 2009, para. 25 ("It is established practice that a witness may be cross-examined to test the accuracy, credibility and consistency of his or her testimony").

[18] *Prosecutor v. Bagosora et al,* Case No. ICTR-98-41-T, "Decision on Sufficiency of Defence Witness Summaries", 5 July 2005, para. 6 ("Testimony of Defence witnesses, unlike Prosecution witnesses, can be understood as a response to evidence that has already been presented. Nevertheless, the Chamber is mindful of the general principle, applicable to Prosecution and Defence evidence alike, that '[e]vidence whose reliability cannot adequately be tested ... cannot have probative value'").

[19] *Prosecutor v Tadic*, IT-94-1-A, Judgement (Appeal), 15 July 1999 (*Tadic* Appeal Judgement), para. 317.

[20] *Prosecutor v Norman et al.,* SCSL-04-14-T-566, "Order to the First Accused to Re-File Summaries of Witness Testimonies", 2 March 2006, Order no. 3; *Prosecutor v Sesay et al.,* SCSL-04-15-T-746 "Consequential Orders

summary, as with most of the Defence summaries in this case, gave topics and not facts as required by the Rule. Secondly, the summary made no mention by either topic or fact of multiple areas to which the witness testified. This failure violated not only the legal requirement of Rule 73*bis* but this Trial Chamber's own legal requirement, i.e., that the summary provide a reasonable indication of the multiple areas about which the witness would testify.

17. The Trial Chamber erred in its application of the law to the content of the summary when it determined that the summary was not necessarily insufficient. A review of the areas not included in the summary in paragraph 5 above makes the insufficiency of the summary clear, indeed, makes the egregious nature of the insufficiency clear. Further, the Trial Chamber later concluded that the summary was insufficient though not grossly insufficient. The Trial Chamber also erred as a matter of law in referring to other evidence in the case in determining if the summary of witness DCT 306 was sufficient. The issue in regard to sufficiency of a Defence witness summary is not what other evidence has been brought before the Trial Chamber, the issue is what notice has been provided as to the evidence this Defence witness will bring to the case.

18. The Trial Chamber further erred in concluding that the Prosecution had not been surprised. The myriad of matters about which the Prosecution had no notice constituted surprise. In addition, the Prosecution was surprised by details given in regard to matters for which topical notice was supposedly given, most notably, the testimony regarding the Accused's contacts with the external delegation.

19. The gross insufficiency of the summary gave adequate legal basis for the requested order to disclose the statements of the witness, both to provide timely information upon which to base cross examination and to determine if the new matters are recent fabrications. Disclosure of the witness' statements does not amount "to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal, including the basic notion that the Prosecution has to prove its case against the accused."[21]

20. In the alternative, the failure to include facts relating to myriad matters upon which the

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Concerning the Preparation and the Commencement of the Defence Case", 28 March 2007, p. 5; *Prosecutor v Sesay et al.*, Trial Transcript of 20 March 2007, pp. 56-65.

[21] *Tadic* Appeal Judgement, 15 July 1999, paras. 322-323.

witness testified certainly warranted granting a substantial amount of time to the Prosecution to enable it to adequately investigate those new matters, time in excess of that allowed by the Trial Chamber. The Trial Chamber erred in refusing to interpose the next witness in order to give the Prosecution time to prepare for cross examination of this witness, as it had done in relation to witness DCT 146. Granting the request to interpose another witness would not have lost any time; rather, the Prosecution would have been given the time needed to prepare to address the many matters for which the Defence failed to provide notice, and the new details regarding the matters for which notice was arguably provided.

The course of justice might be interfered with

21. Both the Prosecution and the Defence are prohibited from engaging in ambush tactics which preclude a party from effectively testing the evidence presented by the opposing party. Yet it appears this is a chosen strategy of the Defence in presenting its evidence. Systematically failing to provide adequate summaries of the facts to which witnesses will testify is a practice that is not to be condoned, certainly not to be encouraged. It impacts the ability of the affected party's ability to test the evidence, thus undermining both the truth seeking function of the trial and the fact finder's ability to properly assess credibility.[22]

Issue is likely to recur

22. This is an issue that is likely to continue throughout the Defence case. The Prosecution raised its concerns about the deficiency of the Defence summaries as early as on 8 June 2009.[23] It has repeated that concern over the course of the last 10.5 months. The great majority of the summaries provided by the Defence for its core witnesses have not been expanded upon; thus, it is likely the issue of inadequate summaries will be raised for a large number of Defence witnesses to be called.

Irreparable prejudice

23. The prejudice is immediate and long term. The Decision prevents the Prosecution from effectively testing the evidence of this witness for which it had no notice against

[22] *Ibid*, paras. 317, 321.

[23] *Prosecutor v Taylor*, Trial Transcript 8 June 2009, pp. 24257-24259 (Pre-Defence Conference). Note that the Prosecution requested that the Trial Chamber consider ordering the Defence to provide adequate summaries with more detail.

statements of the witness to determine if the new evidence is recently fabricated; this prejudice will continue with all future summaries which do not include matters to which the witness testifies. In relation to the time given to the Prosecution to prepare for cross examination, the Prosecution will be unable to adequately investigate the details provided during portions of this particular witness' testimony for which the Prosecution had no notice as well as to investigate the details of this witness's testimony which though arguably included topically in the summary are new to the case, including Charles Taylor's supposed contacts with the external delegation. Such investigations include review of the some 40,000 pages of testimony and the some 900 exhibits in the case to find agreement or disagreement with the testimony of this witness, an exercise which takes considerable time, contact with sources in the sub-region and elsewhere who could possibly confirm or rebut the details given to the Chamber by this witness. The inability to conduct such thorough investigations will prevent the Prosecution from effectively testing the credibility of this particular witness, which in turn will impact the Chamber's assessment of the weight, if any, to be given the evidence of the witness. This assessment will form part of the Chamber's decision on the merits of the case, so is not amenable to cure or resolution by final appeal.

V. CONCLUSION

24. The Prosecution has satisfied the threshold required by Rule 73(B) in order for leave to appeal to be granted. The Prosecution, therefore, requests that the Trial Chamber grant leave to appeal the Decision.

Filed in The Hague,

19 April 2010,

For the Prosecution

Brenda J. Hollis
The Prosecutor

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