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SCSL-03-01-T
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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: 26 April 2010

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

Case No. SCSL-03-01-T

PUBLIC

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

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I. INTRODUCTION

1. On 16 April 2010, at the end of the direct examination of witness DCT-306, the Prosecution made an oral motion to receive prior statements made by the witness and to postpone his cross-examination, to allow the Prosecution sufficient time to prepare to cross examine the witness 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. The Chamber refused to order the Defence to provide prior statements made by the witness and refused to grant an extension of time to the Prosecution to prepare for cross-examining witness DCT-306, beyond the "rest of [Friday]" and the two day weekend ("**Decision**").[1] On 19 April 2010, the Prosecution filed its "Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010" ("**Application**").[2]

2. The Prosecution hereby files this Reply to the Defence Response to the Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010 ("**Response**").[3]

3. The Prosecution relies on the arguments presented in its Application and the relevant oral arguments it made on 16 April 2010,[4] in addition to the following points in reply to the Defence Response.

II. APPLICABLE LEGAL STANDARD

4. The Defence Response argues that Rule 73 *ter* (B) no longer applies after the commencement of the Defence case.[5] While Rule 73 *ter* (B), as the Trial Chamber correctly pointed out in its oral decision ordering the disclosure of witness DCT-179's statement,[6] concerns orders to be made before the start of the Defence case, it is indicative that the Rules of the Special Court afford the Trial Chamber wide discretion to order disclosure of Defence witness statements in the interests of justice without any showing by the Prosecution of prejudice. In the *Norman* decision cited in the Prosecution Application, the Chamber ordered the disclosure of summaries of Defence witnesses

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript ("Transcript"), 16 April 2010, pp. 39250 – 39251.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-944, "Public Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010", 19 April 2010.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-948, "Public Defence Response to the Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010", 23 April 2010.
[4] Transcript, 16 April 2010, pp. 39232 – 39234.
[5] Response, para. 6.
[6] Transcript, 25 February 2010, pp. 36117-36118.

which were added to the Defence case *after* the commencement of its case.[7] Thus the jurisprudence relied on by the Prosecution in its Application relates to legal standards which were applied by the Special Court in relation to Defence witness summaries, after the commencement of the Defence case. Rule 73 *ter* (B) explicitly allows the Trial Chamber to order the Defence to provide the Trial Chamber and the Prosecutor with the written statements of witnesses it ***intends*** to call with nothing limiting the Trial Chamber's authority to the period before the Defence case begins. Rules must not be given interpretations that would make them illogical. It would create a lacuna were the Rules read in a manner providing for a higher threshold to be met when ordering the disclosure of Defence witness statements after the direct examination of such a witness, than when ordering such disclosure even before the Defence case has begun.

III. ARGUMENTS

Exceptional Circumstances

Issue of fundamental legal importance

5. The Defence Response argues that no issue of fundamental legal importance is raised in the Prosecution Application.[8] The issues of fundamental importance pointed out in the Application are the Prosecution's rights to a fair hearing and to effectively cross examine witnesses, and the ability of a party to effectively test the evidence so that it can be properly assessed by the Chamber in its search for truth.[9] The Prosecution reiterates its position that these are issues of fundamental importance which are affected by the Decision and amount to "exceptional circumstances" within the meaning of Rule 73 (B).

6. Moreover, the Decision assures the Defence that a witness summary containing only two sentences, simply indicating the group or unit to which a witness belonged, is sufficient. This gives no motivation to the Defence to provide adequate summaries of the facts to which its witnesses will testify. The standard as to what constitutes adequate notice of expected testimony in order to allow the opposing party the opportunity to properly prepare for cross-examination is certainly one of significant legal importance.

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[7] *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.

[8] It is noted that the Defence Response mistakenly interprets the Prosecution Application as claiming that the manner in which the Chamber exercised its discretion is an issue of fundamental legal importance. Response, para. 10.

[9] Paragraphs 10 through 13 of the Defence Response are therefore irrelevant.

The course of justice might be interfered with

7. Addressing the Prosecution allegation that there is an interference with the course of justice which constitutes "exceptional circumstances", the Defence Response claims that "[a] brief perusal of the facts underlying this witness's disclosures illustrates the derisory nature of this allegation".[10] In the following paragraphs, the Prosecution provides two examples which demonstrate how the introduction of new matters in the direct-examination of the witness has interfered with the course of justice.

8. The first example relates to the witness's testimony 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.[11] On cross examination, the witness explained that he mentioned this event to the Defence in November 2009.[12] Thus there was no reason for the Defence not to include it in the summary. Just before the commencement of court proceedings on the morning the Prosecution completed its cross-examination, the Prosecution was made aware that investigations had uncovered the fact that Mr. Tengbeh was the public relations officer for the RUF at the time of the alleged trip to Liberia, and not just a "senior citizen" from Kailahun Town.[13] Mr. Fayia admitted this fact when confronted with the information during the cross examination, which put the involvement of Mr. Tengbeh in an entirely different light and showed the witness's willingness to withhold information in order to shade his testimony in a manner favourable to the Accused. On the morning the Prosecution completed its cross-examination, it received this information, which was critical to its cross-examination of the witness. Further, in light of the voluminous body of evidence the Prosecution had to examine, it is likely that other important details, which with sufficient time could have been discovered and investigated by the Prosecution, were not discovered in this case.

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[10] Response, para. 14.

[11] This matter was referred to in para. 5 (o) of the Prosecution Application. The witness testified that he and other RUF leaders asked Sankoh to take Tengbeh with him to Liberia, as they wanted Tengbeh to verify that the relationship between Sankoh and Taylor was as strong as Sankoh described it to be. When Tengbeh returned to Sierra Leone, according to witness DCT-306, he told the witness that he met Taylor only once, for less than an hour, and that the latter refused to provide any assistance. According to witness DCT-306, Tengbeh was therefore angry with Sankoh, who led them to believe that they could rely on Taylor's support in light of the special friendship they had. Transcript, 13 April 2010, pp. 38856-38860; Transcript, 19 April 2010, pp. 39313-39316 (cross-examination); Transcript, 21 April 2010, p. 39572 (re-direct).

[12] Transcript, 19 April 2010, p. 39313.

[13] Transcript, 21 April 2010, p. 39512.

9. The second example relates to the witness's testimony concerning trips to Europe including to Belgium and The Netherlands.[14] The summary mentioned nothing about an RUF tour of Europe and there was no evidence in the record that any member of the external delegation took such a trip. In fact, the witness testified that he was accompanied by Jonathan Kposowo, who was not a member of the external delegation, so the trip was outside any notice the Prosecution had of activities of "the external delegation". Mr. Fayia testified that he met with a Mr. Schaapvel who was in charge of African Affairs at the Dutch foreign ministry, and who met the witness after inviting representatives from FAO and UNESCO. The Prosecution, after hearing the witness's testimony, contacted Mr. Schaapveld who said he was not in charge of African Affairs but rather served in the West Africa desk in 1996. In any event, he had no memory of the meeting (but could not be certain that such meeting did not take place). He said he could not imagine he would have invited UNESCO or FAO to a meeting at the Ministry. The Prosecution was particularly interested in who arranged the meeting, assuming such a meeting did take place. Mr. Schaapveld promised to research the issue and get back to the Prosecution, but he had not contacted the Prosecution by the time the cross examination was finished. Had the Prosecution been given prior notice of this event, or more time to prepare for its cross examination, it could probably have discovered relevant information which could have tested the witness's evidence, eventually promoting the truth finding objective of this Court.

10. As is clear from the above examples, following the surprise evidence provided by the witness about these matters, the Prosecution made attempts to investigate them in the extremely limited time it had. But the information it managed to obtain in this limited time merely indicates that further investigation was necessary to adequately prepare for an effective cross examination of the witness on these matters. Such further investigation would have served the course of justice and promoted the ultimate objective of establishing the truth about the allegations in the Indictment. To remedy the Prosecution's lack of prior notice about these events and enable it to be properly prepared for cross examination, it should have received a postponement of the cross examination

[14] This matter was referred to in para. 6 (d) of the Prosecution Application.

and the witness's prior statements.[15]

11. Contrary to the Defence claim in paragraph 15 of its Response, the Chamber did order the disclosure of a Defence witness statement, in the above-mentioned case of witness DCT-179.[16] The order in the case of DCT-179 (where the Trial Chamber cited both the inadequacy of the summary and an inconsistency between the testimony and summary) demonstrates that the Chamber considers this remedy appropriate in certain cases. If the Chamber orders the disclosure of a statement made by a witness whose summary was quite detailed, as in the case of witness DCT-179, it cannot logically *afortiori* reject the idea that a statement be disclosed in cases of insufficient summaries. Otherwise, this will send a message to the Defence that a witness summary containing two sentences simply mentioning topics is sufficient, and the Defence will be encouraged to include no facts that could lead to contradictions—as in the case of DCT-179—in their summary. Thus granting the sought leave to appeal can rectify any interference with the course of justice which may have been caused by the Chamber's decision of 16 April 2010.

Issue is likely to recur

12. The examples above demonstrate the risks of providing overly general and insufficiently detailed witness summaries. An Appeals Chamber ruling on this issue would assist the Trial Chamber in deciding future Prosecution requests for remedies required due to insufficient summaries. Such requests can be expected in the future, given the Prosecution's consistent complaints about insufficiency of Defence witness summaries.

Irreparable Prejudice

13. The Defence correctly quotes the Chamber's holding that "a summary is not meant to be a complete statement of everything that the witness will attest to".[17] However, the summary in this case did not even suggest that the witness would testify about many of the issues he eventually testified about. Thus the Prosecution was surprised by many new details it could not have investigated in the extremely limited time it had at its disposal. Two examples are provided above. The consequent inability of the Prosecution to adequately prepare an effective cross examination resulted in irreparable prejudice.

14. In light of the above, the Defence claim that the Prosecution had sufficient time to

[15] This also shows that the other submissions made by the Defence in paragraph 14 of its Response are erroneous.
[16] Transcript, 25 February 2010, pp. 36117-36119.
[17] Response, para. 17.

prepare for cross examination is also wrong.[18] It is not an easy task to verify information with external sources on a Friday afternoon and over a two-day weekend. Even if the Prosecution works all weekend, most offices of other organizations are closed (such as foreign ministries of The Netherlands and Belgium), so it is very difficult to carry out any investigation over a weekend. The above example of Mr. Scaapveld illustrates this point. In addition, even if the external delegation comprised a limited number of people, some of the evidence referred to meetings involving persons not in the external delegation, for example, as in the case of Mr. Jonathan Kposowo.

15. The Defence Response correctly states that only a small part of the 40,000 page transcript and 900 exhibits are relevant.[19] But preparation requires searching this body of evidence to find the relevant parts after comparing it with the witness's testimony, which requires additional time than was granted. In addition, the resources which the Prosecution collected over the course of its case are irrelevant in this respect, as the Prosecution could not investigate testimony that it had not been given when no summary of such testimony was provided. Besides, the current Prosecution resources are extremely limited and less than those available to the Defence.

IV. CONCLUSION

16. For the reasons given in its Application and in this Reply, the Prosecution seeks leave to appeal the Decision rendered orally by the Trial Chamber on 16 April 2010.

Filed in The Hague,

26 April 2010,

For the Prosecution

Ruth Mary Hackler

For Brenda J. Hollis
The Prosecutor

[18] Response, paras. 20-25.
[19] Response, para. 24.

LIST OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-948, "Public Defence Response to the Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010", 23 April 2010.

Prosecutor v. Taylor, SCSL-03-01-T-944, "Public Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010", 19 April 2010.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 21 April 2010, pp. 39512, 39572.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 19 April 2010, pp. 39313-39316.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 16 April 2010, pp. 39232 – 39234, 39250 – 39251.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 13 April 2010, pp. 38856-38860.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 25 February 2010, pp. 36117-36119.

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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.