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SCSL-03-01-A
(2279-2288)

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

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 5 October 2012

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR
(Case No. SCSL-03-01-A)

PUBLIC

**URGENT PROSECUTION MOTION FOR RECONSIDERATION OR REVIEW OF THE
PRE-HEARING JUDGE'S 4 OCTOBER 2012
"SCHEDULING ORDER FOR FILINGS AND SUBMISSIONS"**

Office of the Prosecutor:

Ms. Brenda J. Hollis
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I. INTRODUCTION

1. The Prosecution urgently files this Motion requesting that the Appeals Chamber reconsider or review and reverse the Pre-Hearing Judge's "Scheduling Order for Filings and Submissions" issued on 4 October 2012 ("Impugned Decision").¹ Reconsideration or review is necessary to prevent an injustice, as the Impugned Decision is based on clear errors of reasoning, including the failure to ensure a fair hearing as guaranteed by Rule 109(B)(i), and the erroneous assertion that in appellate proceedings, a moving party's decision to file a Rule 115 submission is dependent upon the non-moving party's Rule 112 Respondent's Submissions. The Prosecution requests that the Appeals Chamber reverse the Impugned Decision and reinstate the original timetable it issued on 21 August,² making all Respondent's Submissions due on 23 November 2012.
2. As this matter impacts immediate deadlines affecting both Parties, the Prosecution requests an expedited filing schedule in order to decide this matter as soon as possible.

II. APPLICABLE LAW

3. The Appeals Chamber has an inherent jurisdiction to reconsider its own decision.³ Such a power is discretionary⁴ and is appropriate, *inter alia*, to avoid an injustice,⁵ or

¹ Scheduling Order for Filings and Submissions, SCSL-03-01-A-1328, 4 October 2012.

² Decision on Defence Motion for Reconsideration or Review of "Decision on Prosecution and Defence Motions for Extension of Time and Page Limits Pursuant to Rules 111, 112 and 113" and Final Order on Extension of Time for Filing Submissions, SCSL-03-01-A-1320, 21 August 2012 (21 August Decision).

³ See, e.g., *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005 (*Norman* January 2005 Appeal Decision), para. 40; *Prosecutor v. Norman et al.*, SCSL-04-14-T-507, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005 (*Norman* December 2005 Appeal Decision), paras. 11-14.

⁴ See, e.g., *Norman* December 2005 Appeal Decision, para. 12; *Prosecutor v. Mucić et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003 (*Mucić* Sentence Appeal Judgement), para. 49.

⁵ *Norman* January 2005 Appeal Decision, para. 40; *The Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 (*Barayagwiza* Appeal Decision), p. 2; *Mucić* Sentence Appeal Judgement, para. 49.

where a clear error of reasoning has been demonstrated,⁶ or when the Chamber is persuaded that its previous decision was erroneous and has caused prejudice.⁷

4. In this case, the Impugned Decision was issued by the Pre-Hearing Judge in her capacity under Rule 109 to represent the Chamber in procedural matters in order to prepare the case for a fair and expeditious hearing. As Rule 109(D) allows the Appeals Chamber to exercise any of the functions of the Pre-Hearing Judge,⁸ it is properly placed to reconsider her decision issued on the Chamber's behalf.⁹
5. Should the Appeals Chamber determine that "reconsideration" is permissible only by the Pre-Hearing Judge,¹⁰ review of the Impugned Decision would nevertheless be appropriate, as the Chamber is properly seised of these proceedings and has the ability to exercise its inherent powers in the interest of justice absent express statutory provisions covering such a situation.¹¹

III. SUBMISSIONS

6. On 7 August 2012, the Pre-Hearing Judge found that based on the "*complexity of the issues raised in the grounds of appeal and the size of the trial record*", the Parties had established good cause and exceptional circumstances for the extension of time limits pursuant to Rule 116 in respect of this appellate process.¹² The Pre-Hearing Judge considered that "in the specific circumstances of this case, as the Appellant's Submissions will raise complex issues of law and fact, both the Prosecution and Defence will require time *equal* to that provided for the Appellant's Submissions in order to prepare their Respondent's Submissions."¹³ On 21 August 2012, the Appeals

⁶ See, e.g., *Norman* January 2005 Appeal Decision, para. 35; *Norman* December 2005 Appeal Decision, paras. 11, 13; *Barayagwiza* Appeal Decision, p. 2.

⁷ *Mucić* Sentence Appeal Judgement, para. 49. See also *Prosecutor v. Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, paras. 10, 13, 14.

⁸ SCSL Rules of Procedure and Evidence, amended on 31 May 2012. Rule 109(D) states, "The Appeals Chamber may of its own initiative exercise any of the functions of the Pre-Hearing Judge."

⁹ The Appeals Chamber recently reconsidered another decision by the Pre-Hearing Judge, see 21 August Decision.

¹⁰ See *The Prosecutor v. Bagilishema*, ICTR-95-1A-A, Decision: Motions for Review of the Pre-Hearing Judge's Decisions of 30 November and 19 December 2001, 6 February 2002.

¹¹ *Norman* January 2005 Appeal Decision, para. 32.

¹² Decision on Prosecution and Defence Motions for Extension of Time and Page Limits For Written Submissions Pursuant to Rules 111, 112 and 113, SCSL-03-01-A-1315, 7 August 2012 (First Decision on Time and Page Limits for Written Submissions), paras. 18 and 25.

¹³ First Decision on Time and Page Limits for Written Submissions, para. 27 (emphasis added).

Chamber issued a further Decision giving the Parties a “final” extension of time to file their Appellant’s Submissions. The Chamber also ordered the Respondent’s Submissions to be filed on 23 November 2012.¹⁴

7. Since the Appeals Chamber set the timetable for filing the written submissions, and specifically set the Response deadline to 23 November 2012, the factors cited by the Pre-Hearing Judge and the Appeals Chamber in support of the deadline extensions have not changed. Specifically, the complexity of the issues raised by Mr. Taylor in his appeal and the size of the record have remained the same as at 21 August 2012. Moreover, Mr. Taylor has filed a 310-page Appellant’s Submission. It is therefore unreasonable and an error of reasoning to require the Prosecution to file its Respondent’s Submissions to multiple Defence Appeal Grounds one month earlier than previously ordered when the complexity of this appeal has not decreased. In this regard, the Prosecution emphasises that the duty of the Pre-Hearing Judge under Rule 109(B)(i) is not only to prepare the case for an expeditious hearing but also a fair one. The Impugned Decision violates the Prosecution’s exercise of this latter right.
8. Moreover, should Mr. Taylor be successful in his possible Rule 115 Motion, the complexity of this Appeal will increase, not decrease. Consequently, at a minimum, the schedule set by the Appeals Chamber on 21 August 2012 should be retained.
9. The Impugned Decision severely shortens the Prosecution’s right to file a comprehensive response to Mr. Taylor’s Appeal Brief by requiring the Prosecution to file its Rule 112 Response to Grounds 7, 8, 9, 15, 16, 23, 32, 33, 36, 37 and 38 of Mr. Taylor’s Appeal Brief by 26 October. It is clear the Pre-Hearing Judge chose these grounds for disparate treatment based on paragraph 15 of Mr. Taylor’s Appeal Brief, where Mr. Taylor gave bare notice that he intended to file a motion under Rule 115 to present additional evidence in support of his appeal, for grounds which “include but are not limited to” the eleven grounds now subject to the Impugned Decision.
10. The Impugned Decision fails to take into account that these eleven grounds also incorporate by reference the arguments contained in a number of other grounds in Mr.

¹⁴ 21 August Decision, paras. 2, 4.

Taylor's Appeal Brief. By Mr. Taylor's own admission,¹⁵ the first five grounds of his Appeal Brief dealing with complex appellate issues regarding uncorroborated hearsay evidence, the reliability of hearsay sources, the credibility of witnesses, the burden of proof, and assistance to witnesses, underpin the issues raised in a number of the grounds which the Prosecution has now been ordered to respond to within a truncated time-frame.¹⁶ Therefore, the eleven stated grounds rescheduled by the Pre-Hearing Judge for early Rule 112 Submissions cannot be responded to in isolation as it will in effect require the Prosecution to address substantive and complex issues raised by Mr. Taylor in those other grounds. Consequently, compliance with the Impugned Decision requires that the Prosecution's Rule 112 Submission respond to sixteen and not eleven of Mr. Taylor's Grounds of Appeal in just 25 days,¹⁷ leaving little more than a single day to analyse and prepare each ground. Such a time-period is manifestly prejudicial to the Prosecution's right to properly present its Response addressing complex issues of law and fact,¹⁸ and violates the obligation which inheres in the Pre-Hearing Judge to issue decisions to ensure the preparation of the case for a "fair" hearing.¹⁹ The Impugned Decision has therefore occasioned an injustice, for which the Prosecution seeks reconsideration or review.

11. Further, the cherry-picking of certain grounds contained in Mr. Taylor's Appeal Brief based solely on Mr. Taylor's previously stated intention to adduce additional evidence pertaining to these grounds is an entirely arbitrary separation and isolation of appellate grounds which are grouped together on a thematic basis by Mr. Taylor and which are inherently and inextricably linked to other grounds contained in his Appeal Brief.

¹⁵ See, e.g., Appellant's Submissions of Charles Ghankay Taylor, SCSL-03-01-A-1326, 1 October 2012 (Mr. Taylor's Appeal Brief), paras. 37, 42, 53, 76, on p. 10 the heading introducing Grounds of Appeal 1 through 5 is entitled "Arguments in Support of *Each* Ground of Appeal" (emphasis added).

¹⁶ See, e.g., Ground 8 of Mr. Taylor's Appeal Brief refers back to Ground 3; Ground 15 refers back to Grounds 1 and 2; Ground 23 refers back to the entire first section of Mr. Taylor's Appeal Brief, encompassing Grounds 1 through 5.

¹⁷ From 2 October to 26 October 2012.

¹⁸ For instance, the Appeals Chamber at the ICTY quashed a judgement of the Trial Chamber because the Trial Chamber had "inappropriately prioritised logistical considerations over the Prosecution's right to a fair trial." See *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010, paras. 39-41, 43, 46, 48-50.

¹⁹ Rules of Procedure and Evidence, Rule 109(B)(i).

12. For the Prosecution to respond to Grounds 7, 8 and 9 in relation to the *actus reus* of planning, and Ground 15, which deals with the *mens rea* of planning, separately and four weeks before responding to four other grounds also relating to the *actus reus* and one other ground relating to the *mens rea*,²⁰ is both unrealistic and severely impinges the Prosecution's ability to prepare a focused Response. A response to a holistic appeal which addresses discrete but intrinsically connected points which together form the basis of a conviction on a particular mode of liability cannot as a matter of practice be divided into constituent parts.
13. The same is true of the section of Mr. Taylor's Appeal Brief dealing with aiding and abetting. To extract a single appeal ground relating to the applicable *mens rea* and require it to be addressed distinctly and individually from the four remaining appeal grounds pertaining to the *mens rea* for this mode of liability represents an artificial interference in the manner in which the Prosecution can prepare its Respondent's Submissions. The Impugned Decision therefore represents an unfair infringement of the Prosecution's right to present its case. It has therefore occasioned an injustice, for which the Prosecution seeks reconsideration or review.
14. It would appear that the Impugned Decision is based on an interpretation of Rule 115 which demonstrates a clear error of reasoning. In paragraph 5 of the Impugned Decision, the Pre-Hearing Judge finds that Rule 115 "takes into account that the moving party's decision as to the necessity for the additional evidence it alleges was previously unavailable *may depend* on the non-moving party's Response pursuant to Rule 112." The Defence has never stated that whether it will file a Rule 115 motion depends on the Prosecution's Rule 112 Respondent's Submissions.²¹ Indeed, there is nothing in the Statute, Rules or jurisprudence to support this position.
15. The Prosecution agrees that the proceedings must not be unduly delayed. However, in order to achieve this, it is open to the Pre-Hearing Judge or the Appeals Chamber to order the Defence to file any Rule 115 Motion as it deems fit. Rule 115 provides that a party shall file any Rule 115 motion for presentation of additional evidence which

²⁰ Mr. Taylor's Appeal Brief, Part II, Grounds 7-15.

²¹ Mr. Taylor's Appeal Brief, para. 16.

was not available at trial “not later than” the deadline for its Rule 113 submission. This ultimate deadline does not provide a right to a party to delay the proceedings by withholding notice of evidence in its possession or knowledge until the very last moment allowed under Rule 115. Nor does the language in Rule 115 stating that any motion shall be filed “not later than” the date of the Rule 113 submission preclude the Appeals Chamber from managing the setting of deadlines to ensure the efficient progress of the proceedings and imposing an earlier deadline for a motion regarding evidence **already known** to the Defence. It is clear that it is within the power of the Appeals Chamber to order the Defence to immediately file its motion under Rule 115 to present whatever additional evidence it is now contemplating to present on appeal. In the event that the Defence was to discover yet more evidence before its Rule 113 submission was due which was not available during the five-year trial nor the appeals process to date, it would have a right to file an additional motion to present such evidence and explain why it was not available during the trial or in the months since the Judgement was delivered.

16. The fair trial right of the Prosecution to present its Response to Mr. Taylor’s Grounds of Appeal should not be curtailed because Mr. Taylor may or may not file a request to introduce new evidence which may or may not be granted by the Appeals Chamber. Consequently, it is patently unjust to expedite the filing schedule for the Prosecution’s Respondent Submissions on the basis of a hypothetical situation. This is a clear error of legal reasoning.
17. Moreover, the Prosecution recalls that in his first submission on this issue, Mr. Taylor himself requested 165 extra days to file all of his submissions,²² meaning his Rule 113 Submission in Reply would have been due on 9 February 2013. Therefore, by maintaining the original appeals timetable set on 21 August 2012 that would conclude all written submissions on 30 November 2012, Mr. Taylor would in no way be prejudiced nor would his right to an expeditious trial be violated, as the due date is well before the 9 February 2013 date which he originally requested. Indeed, the only

²² Defence Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, SCSL-03-01-A-1305, 24 July 2012, para. 1.

right that would and has been breached by the Impugned Decision is the Prosecution's right to a fair hearing.

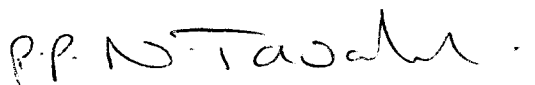
IV. CONCLUSION

18. For the reasons set out above, the Prosecution respectfully requests reconsideration or review and reversal of the Impugned Decision, and reinstatement of the original timetable issued on 21 August, making all Respondent's Submissions due on 23 November 2012.

Filed in The Hague,

5 October 2012

For the Prosecution,



Brenda J. Hollis
The Prosecutor

List of Authorities

SCSL

Special Court for Sierra Leone Rules of Procedure and Evidence, amended on 31 May 2012.

Prosecutor v. Taylor, SCSL-03-01

Scheduling Order for Filings and Submissions, SCSL-03-01-A-1328, 4 October 2012

Appellant's Submissions of Charles Ghankay Taylor, SCSL-03-01-A-1326, 1 October 2012

Decision on Defence Motion for Reconsideration or Review of "Decision on Prosecution and Defence Motions for Extension of Time and Page Limits Pursuant to Rules 111, 112 and 113" and Final Order on Extension of Time for Filing Submissions, SCSL-03-01-A-1320, 21 August 2012

Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, SCSL-03-01-A-1315, 7 August 2012

Defence Motion for Extensions of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, SCSL-03-01-A-1305, 24 July 2012

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

Prosecutor v. Norman et al., SCSL-04-14-T-507, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005

Prosecutor v. Norman et al., SCSL-04-14-T-319, Decision on Prosecution Appeal against the Trial Chamber's decision of 2 August 2004 refusing Leave to File an Interlocutory Appeal, 17 January 2005

ICTR

The Prosecutor v. Nahimana et al., ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005

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Prosecutor v. Haradinaj et al., IT-04-84-A, Judgement, 19 July 2010
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Prosecutor v. Mucić et al., IT-96-21Abis, Judgment on Sentence Appeal, 8 April 2003
<http://www.icty.org/x/cases/mucic/acjug/en/cel-aj030408.pdf>

Prosecutor v. Galić, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001
<http://www.icty.org/x/cases/galic/acdec/en/11214DE317061.htm>