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SCSL-03-01-PT
(5555-5563)



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THE SPECIAL COURT FOR SIERRA LEONE

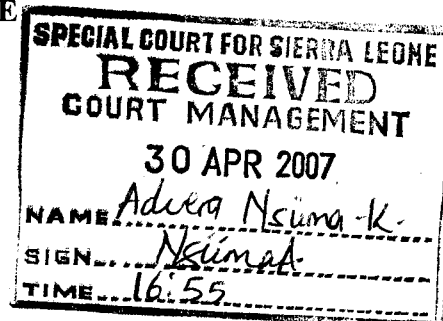
In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 30 April 2007

Case No.: SCSL-2003-01-PT



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE APPLICATION FOR LEAVE TO APPEAL THE 25 APRIL 2007
“DECISION ON DEFENCE MOTION REQUESTING RECONSIDERATION OF
‘JOINT DEFENCE MOTIONS ON ADEQUATE FACILITIES AND ADEQUATE TIME
FOR THE PREPARATION OF MR. TAYLOR’S DEFENCE,’ DATED 23 JANUARY”**

Office of the Prosecution

Mr. Stephen Rapp
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

Counsel for Charles Taylor

Mr. Karim A. A. Khan
Mr. Roger Sahota

I. Introduction

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1. The Defence for Charles Taylor (“Defence”) seek leave to appeal the Trial Chamber’s 25 April 2007 “Decision on Defence Motions Requesting Reconsideration of ‘Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor’s Defence,’ dated 23 January 2007” (“Impugned Decision”).¹
2. The Defence submit that the Trial Chamber’s decision is erroneous because it failed to give any proper regard to the uncontroverted submissions by the Defence that during three and a half months prior to the suspension of legal consultations, the Defence’s client-attorney privilege was seriously impinged due to the chilling effect of the video surveillance camera that had been installed in the conference room where legal consultations between Mr. Taylor and his Defence team take place. Instead, the Trial Chamber only compensated the Defence for preparation time lost during the eighteen days during which the Defence suspended all privileged attorney-client consultations.²
3. It is respectfully submitted that no reasonable Trial Chamber would have failed to give any compensation for the three and half months that Defence legal consultations took place but were, indeed, hampered by the chilling effect of the video surveillance camera. The Defence bases this submission on three grounds:
 - (i) In initially setting 4 June 2007 as the start date for the Taylor trial, the Trial Chamber took into consideration a number of factors in determining what would be an appropriate amount of time necessary for the Defence to adequately prepare a defence.³ The “chilling” effect of the camera during three months and a half was not part of that evaluation process and should, therefore, now be given due consideration.
 - (ii) At no stage since the Defence first complained of the video surveillance camera has any decision maker (neither the Trial Chamber, nor the Registrar, nor the President) or the

¹ *Prosecutor v. Taylor*, SCSL-03-01-PT-226, Decision on Defence Motions Requesting Reconsideration of ‘Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor’s Defence,’ dated 23 January 2007, 25 April 2007.

² Impugned Decision, pg. 4 (“...an adjournment of 18 days will be allowed to make up for preparation time lost by the Defence”).

³ *Prosecutor v. Taylor*, SCSL-03-01-PT-133, Defence Motion Requesting Removal of Camera from Conference Room, 28 November 2006.

Prosecutor challenged the Defence's primary argument that the camera had some chilling effect on the legally privileged attorney-client consultations. Therefore, the presumption is that some consideration should be given to its impact on adequate preparation for trial.

(iii) On numerous occasions the Defence has given the decision-makers notice that, if the issue of video surveillance was not expeditiously resolved, the Defence would require more time for adequate preparation for trial.

4. The Defence submit that these grounds warrant leave to appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("the Rules") of the Special Court for Sierra Leone ("SCSL"), which states:

"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..."⁴

The Trial Chamber's decision in *Prosecutor v. Sesay et al*, held that this two stage test sets a "high threshold" and "is conjunctive and not disjunctive."⁵ Furthermore, the Trial Chamber held that "'Exceptional circumstances' may exist depending upon particular facts and circumstances, where, for instance...the course of justice might be interfered with."⁶ This is in line with the Trial Chamber's ruling that "[a]n interlocutory appeal ... does not lie as of right, and the conjunctive conditions of "exceptional circumstances" and "irreparable prejudice" must be met before the Trial Chamber's discretion can be exercised."⁷

⁴ Special Court for Sierra Leone Rules of Procedure and Evidence, as amended on 24 November 2006, Rule 73(B).

⁵ *Prosecutor v. Sesay et al*, SCSL-04-15-T-401, Decision on Application for Leave to Appeal the Ruling (2 April 2005) on Sesay – Motion Seeking Disclosure of the Relationship Between Government Agencies of the United States of America and the Office of the Prosecutor, 15 June 2005, para. 17, citing *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-362, Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9 December 2004 on Issue of Urgent Concern to the Accused Morris Kallon, 2 May 2005 ("Sesay Appeal Decision").

⁶ Sesay Appeal Decision, para. 16, citing *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-357, Decision on Application by the Second Accused for Leave Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 26.

⁷ *Prosecutor v. Taylor*, SCSL-03-01-PT-164, Joint Decision on Motions On Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence, 23 January 2007 ("Joint Decision").

5. The procedural background and the timeline regarding video surveillance of Mr. Taylor are now well known, as the Defence has been forced to spend an inordinate amount of time attempting to resolve this issue.⁸

II. Exceptional Circumstances

6. The SCSL Registrar explicitly and the SCSL President implicitly acknowledged that the installation of the video surveillance camera in the conference room where legal consultations between Mr. Taylor and the Defence took place was improper. The Registrar has determined that Regulation 183(1) of the Regulations of the Registry of the ICC does “not justify video surveillance of visits between a detainee and his counsel”⁹ and that such video surveillance “is not applicable to the privileged communications between a detainee and his counsel”.¹⁰ The President noted that this was the most crucial submission of the Registrar on this issue.¹¹ Moreover, the Prosecution has accepted that the Defence has “established good cause for additional delay of the trial start date”.¹² Even the Trial Chamber has found that Mr. Taylor has lost preparation time “through no fault of his own”.¹³
7. Given these admissions, it is surprising that the Trial Chamber only compensated the Defence for the time during which consultations were completely suspended. The Defence respectfully submit that no reasonable Trial Chamber would have decided not to give any allowance at all for the approximately three and a half months that legally privileged consultations between Mr. Taylor and the Defence were circumscribed, given the chilling effect of the camera. In rendering the Impugned Decision, the Trial Chamber has penalized the Defence for being reasonable. It was in a spirit of good cooperation with the Court and in order to avoid excessive delays, that the Defence did not immediately suspend all legally

⁸ Please refer to the procedural history and background as outlined in the Notification, paras. 5-17 and in the Motion, paras. 3-9.

⁹ *Prosecutor v. Taylor*, SCSL-03-01-PT-189, Decision of the President on Urgent and Public Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, 21 February 2007, para. 28 (“President’s Decision on Video Surveillance”).

¹⁰ President’s Decision on Video Surveillance, para. 29.

¹¹ President’s Decision on Video Surveillance, para. 29.

¹² *Prosecutor v. Taylor*, SCSL-03-01-PT-223, Prosecution’s Response to “Defence Motion Requesting Reconsideration of ‘Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor’s Defence,’ dated 23 January 2007”, 20 April 2007 (“Prosecution Response”).

¹³ Impugned Decision, pg. 4.

privileged consultations.¹⁴ Instead, the Defence spent an inordinate amount of time, energy and effort in attempting to quickly resolve the camera obstruction. Only after the Registrar failed to abide by the clear direction of the President that the Registrar's Decision that "the use of video surveillance of the legal consultations of the Detainee Charles Taylor with his Counsel be discontinued," be complied with "forthwith,"¹⁵ did the Defence suspend all legal privileged consultations.¹⁶

8. It is highly significant that at no stage since the Defence first raised the video complaint did any of the organs of the Court at any time seek to controvert the primary submissions of the Defence that the installation of the video surveillance camera had a "chilling effect" on the legal consultations between Mr. Taylor and his defence team. That being the case, it has not been disputed at any stage that the Defence have suffered loss of time and have been prejudiced by being unable to discuss important matters germane to Mr. Taylor's defence during three and half months.¹⁷
9. Yet, the Trial Chamber failed to give any consideration to the fact that, notwithstanding that legally privileged attorney-client consultations were continuing between 10 November 2006 and 3 March 2007 in the presence of the camera, the Defence's attorney-client privilege had been violated causing significant delays in the preparation of an adequate defence. It is untenable for the Trial Chamber to maintain this position not only when the Defence have repeatedly complained of the chilling effect of the camera, but also of the need for more time if not resolved expeditiously. All the decision-makers and organs of the Court were on unequivocally put on notice. The Defence has been absolutely candid and open not only of the chilling effect and violation of legal privilege but also of the consequences thereof. Thus, it was completely foreseeable that this Motion was going to be filed. They were notified, and still the issue was not expeditiously resolved.

¹⁴ See also, Motion, para. 21.

¹⁵ President's Decision on Video Surveillance, para. 31.

¹⁶ Notification.

¹⁷ *Prosecutor v. Taylor*, SCSL-03-01-PT-133, Defence Motion Requesting Removal of Camera from Conference Room, 28 November 2006, para. 10.

For the reasons advanced previously, there are exceptional circumstances justifying leave to appeal, given that the course of justice would be interfered with if the Trial Chamber does not give any allowance for the delay caused by the “chilling effect” of the camera.

III. Irreparable Prejudice

10. The continual infringement of legally privileged consultations has clearly caused prejudice to the Defence preparation time considered reasonable by the Trial Chamber in its Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor’s Defence.¹⁸ The time needed in order to adequately prepare has been significantly eroded due to the intervening effect of the unwarranted video surveillance of legal consultations. Even apart from the suspension, the Trial Chamber should have given some time to compensate the Defence for not being able to hold fully productive consultations with the client and discuss highly sensitive matters critical to the defence case.¹⁹ It is submitted that this prejudice can only be remedied by allowing more preparation time. If the Defence are denied immediate relief and adequate time to prepare for trial, the prejudice caused cannot subsequently be remedied, save with an order for retrial. Appellate review at the close of the proceedings will not be able to cure the lack of adequate preparation caused by the chilling effect of the camera.

11. The Defence therefore submit that the prejudice caused by the Impugned Decision meets the threshold of Rule 73(B). As the Appeals Chamber has ruled:

“the underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgement. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules”.²⁰

¹⁸ Joint Decision, paras. 20, 21.

¹⁹ Motion, para. 21.

²⁰ *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal, Appeals Chamber, 17 January 2005, para. 29.

12. Given that the prejudice to the Defence can only be effectively remedied at this stage in the proceedings, the present request is clearly in compliance with the underlying rationale for permitting interlocutory appeals.

IV. Conclusion

13. Accordingly, for the reasons adumbrated above the Defence respectfully requests the Trial Chamber to certify the Defence Application for Leave to Appeal the 25 April 2007, "Decision on Defence Motion Requesting Reconsideration of "Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence, dated 23 January 2007".

Respectfully submitted,



Karim A. A. Khan

Lead Counsel for Mr. Charles Taylor

Dated this 30th Day of April 2007

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Prosecutor v. Taylor, SCSL-03-01-PT-189, Decision of the President on Urgent and Public Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, 21 February 2007

Prosecutor v. Taylor, SCSL-03-01-PT-197, Notification of Suspension of Legally Privileged Attorney-Client Consultations with Mr. Taylor, 5 March 2007

Prosecutor v. Taylor, SCSL-03-01-PT-220, Defence Motion Requesting Reconsideration of "Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence," dated 23 January 2007

Prosecutor v. Taylor, SCSL-03-01-PT-223, Prosecution's Response to "Defence Motion Requesting Reconsideration of 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence,'" dated 23 January 2007," 20 April 2007

Prosecutor v. Taylor, SCSL-03-01-PT-225, Defence Reply to Prosecution's Response to "Defence Motion Requesting Reconsideration of 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence,'" dated 23 January 2007," 23 April 2007

Prosecutor v. Taylor, SCSL-03-01-PT-226, Decision on Defence Motions Requesting Reconsideration of 'Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence,' dated 23 January 2007, 25 April 2007

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