918) SCSL-03-01-T (28159-28170)

28159

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

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 February 2010

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

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION REQUEST FOR ORDERS IN RELATION TO THE SCHEDULING OF THE REMAINDER OF THE CASE

Office of the Prosecutor:
Ms. Brenda J. Hollis
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Counsel for the Accused:
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Mr. James Supuwood

I. INTRODUCTION

1. Pursuant to Rules 54 and 73 of the Rules, the Prosecution files this Motion requesting the Trial Chamber to issue appropriate orders with a view to concluding the case by a specified date. Such orders are desirable at this juncture and are consistent with established practice at international criminal tribunals.

2. While the Prosecution seeks orders at this stage relating to the conclusion of the Defence case, similar considerations could be given to setting limits to all remaining procedural stages in the case, including any re-opening or rebuttal that may be allowed, to ensure the expeditious conclusion of the trial proceedings.

II. PROCEDURAL HISTORY

3. Prior to the start of the Defence case, the Trial Chamber presided over a number of Status Conferences and two Pre-Defence Conferences. At the Status Conference on 7 May 2009, the Presiding Judge inquired as to the anticipated length of the Defence case. Defence Counsel responded that an initial estimate of 6 – 9 months "may very well extend up to a year".[1] At the same Status Conference, the trial Chamber ordered the Defence to file a list of witnesses, listed by name or pseudonym as well as witness summaries in respect of each of those witnesses by 29 May 2009.

4. On 29 May 2009, the Defence filed a list containing 227 witnesses, which included witness summaries in relation to some but not all of those witnesses.[2] On the 12 June 2009 the Defence filed an updated and corrected list containing 249 witnesses and witness summaries.[3]

5. At the Pre-Defence Conferences on 8 June 2009 and 6 July 2009, the Prosecution raised the issue as to the estimated length of the Defence case, given the size of the witness lists that had been provided by the Defence.[4] The Prosecution requested that the Trial Chamber order the Defence to provide a list of core and back-up witnesses by the conclusion of the Accused's testimony; which would put both the Trial

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[1] *Prosecutor v Taylor*, Trial Transcript 7 May 2009 24242.
[2] *Prosecutor v Taylor*, SCSL-01-T-784, "Public with Annexes A, B, C and Confidential Ex Parte Annex D, Defence Rule 73*ter* filing of Witness Summaries with a Summary of the Anticipated Testimony of the Accused, Charles Ghankay Taylor", 29 May 2009, paras. 7 and 8.
[3] *Prosecutor v Taylor*, SCSL-01-793, "Public with Annex A and Confidential Annex B – Updated and Corrected Defence Rule 73*ter* filing of Witness Summaries", 12 June 2009. Notably, this list included 249 witnesses.
[4] *Prosecutor v Taylor*, Trial Transcript 6 July 2009, 24272.

Chamber and the Prosecution in the position of being able to determine if a request for further orders might be appropriate.[5] In response to this request, the Trial Chamber took into consideration submissions made by Lead Defence Counsel that the Defence was not yet in a position to file a list of core and back-up witnesses, in light of on-going investigations. The Trial Chamber stated that it would revisit the issue closer to the end of the testimony of the Accused.[6]

6. Notably, at the Pre-Defence Conference on 6 July 2009, Justice Lussick also alerted the Defence to "the provisions of Rule 73*ter*(D) which enable the Trial Chamber to reduce the number of witnesses if an excessive number are being called to prove the same facts";[7] explaining that although the Trial Chamber at that stage was not contemplating any such orders, it was something the Trial Chamber could consider.[8]

7. On 10 July 2009, the Defence filed a third updated and corrected witness list and witness summaries. In this filing the Defence in fact added 25 new witnesses (DCT-257 through to DCT-282) to the list of witnesses.[9]

8. The Accused's testimony began on 14 July 2009 and his evidence-in-chief was completed on 11 November 2009. At this juncture, the Prosecution requested that the Trial Chamber order the Defence to provide the Prosecution with a list of core and back-up witnesses by 11 December 2009. Lead Defence Counsel agreed to do so and this was ordered to be done by the Trial Chamber.[10]

9. Pursuant to the Trial Chamber's order, on 11 December 2009 the Defence provided a list of 98 core witnesses.[11]

10. On 22 January 2010, the Chamber granted a Defence motion dropping 48 witnesses from its third witness list and adding 32 new witnesses.[12] Consequently, on 29 January 2010, the Defence filed the fourth version of the Defence witness list, listing

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[5] *Prosecutor v Taylor*, Trial Transcript 6 July 2009, 24272 – 24273. See also Trial Transcript 8 June 2009 at 24258.
[6] *Prosecutor v Taylor*, Trial Transcript 6 July 2009, 24283.
[7] Ibid., 24285.
[8] Ibid.
[9] *Prosecutor v Taylor*, SCSL-03-01-809, "Public with Annex A and Confidential Annex B, Updated and Corrected Defence Rule 73 *ter* filing of Witness Summaries – Version Three, 10 July 2009, at letter "v" on pg. 3.
[10] *Prosecutor v Taylor*, Trial Transcript 11 November 2009, 31622.
[11] Notably, (i) the Defence did not provide a list of back-up witnesses just a list of core witnesses and (ii) 24 of those 98 witnesses were subject to a Defence Motion for leave to vary the witness list which was subsequently granted by the Trial Chamber (*supra*).
[12] *Prosecutor v. Taylor*, "Decision on Defence Motion for Leave to Vary Version III of the Defence Rule 73*ter* Witness List and Summaries," 22 January 2009, pp. 5-6.

245 witnesses by pseudonym,[13] and including the 98 witnesses previously indicated by the Defence to be core witnesses.

11. On 5 February 2010, Defence Counsel indicated that the Defence was in the process of revising its witness list with a view to reducing the number of witnesses and predicted an additional filing requesting leave of the Chamber to drop additional witnesses.[14] On 8 February 2010, Lead Defence Counsel again indicated that the number of witnesses would be reduced.[15] On this occasion the Defence was granted a one week adjournment before the commencement of re-examination, and in granting this adjournment, the Presiding Judge noted that "the Defence's commitment to review their witness list with a view to reducing the number of witnesses to be called will ultimately result in an expeditious trial."[16] In light of the Defence averments to reduce the number of witnesses, on 10 February 2010 the Prosecution sent a letter to the Defence inquiring as to which witnesses would be dropped. However, to date, the Prosecution has not received a response to this inquiry.

12. On 22 February 2010, the Defence provided notice of the names of ten of its protected witnesses,[17] pursuant to the Trial Chamber's order that their names should be disclosed to the Prosecution 21 days prior to the beginning of their testimony. This disclosure included the name of one witness whose name is not on the core witness list;[18] with no explanation for its inclusion in the list of the names of the next ten witnesses to be called.

III. APPLICABLE LAW

13. The Trial Chambers of the international criminal tribunals, including the Special Court, have in appropriate circumstances issued orders limiting the time allocated to the parties for the presentation of their cases as one aspect of the Trial Chamber's trial management function. Notably, in the RUF case, Trial Chamber I issued orders to the Defence teams for all three accused persons, requiring their respective Defence

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[13] *Prosecutor v. Taylor*, "Defence Rule 73*ter* Filing of Witness Summaries, Version IV", 29 January 2010, para. 5 ("Version IV Filing").
[14] *Prosecutor v. Taylor*, Trial Transcript 5 February, 34863.
[15] *Prosecutor v. Taylor*, Trial Transcript 8 February 2010, pp. 34874-34875.
[16] *Prosecutor v. Taylor*, Trial Transcript 8 February 2010, p. 34879.
[17] Letter dated 22 February, "RE: Disclosure of Protected Defence Witnesses' Name", from Lead Defence Counsel to the Prosecutor and Cc'ed to Trial Chamber II's Senior Legal Officer.
[18] See the discussion in relation to DCT-131 at paragraph 20 below.

cases to be concluded by specified dates.[19] The practice of setting a time limit in relation to the length of the Defence phase of the case has been approved at the appellate levels of the ICTY and ICTR.

14. Such orders are not considered to impinge in any way upon the right to a fair trial, and rather assist in upholding this right by ensuring suitably expeditious proceedings. Trial management orders have included orders limiting the time allocated to the Defence for the presentation of the Defence phase of the case, such as orders specifying an end date for the conclusion of the Defence case and/ or orders requiring the Defence case to be completed within a certain number of hours of court time. Whilst a Trial Chamber has an inherent power, pursuant to its case management function, to issue orders time-tabling the case, the Trial Chamber retains a discretion to modify such orders in the event of "unforeseen circumstances" or if either party demonstrates that it would suffer "injustice" if such orders were not modified. This ensures both the efficiency and fairness of the proceedings.[20]

15. As regards the appropriate amount of time to be allocated to the Defence to present its case vis-à-vis the time allocated to the Prosecution for the presentation of its case, an Accused is not necessarily entitled to precisely the same amount of time as the Prosecution, in view of the different functions performed by the Prosecution and Defence and the fact that the Prosecution bears the burden of proof. The principle of equality of arms does not require an equivalent amount of time for the presentation of the Prosecution and Defence cases, as the parties' obligations are not similarly situated.

16. In this regard, the Appeals Chamber of the ICTY in the case of *Oric*, stated the following:

> The Appeals Chamber has long recognized that 'the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee'. At a minimum, 'equality of arms obligates a judicial body to ensure that **neither party** is put at a disadvantage when presenting its case', certainly in terms of **procedural equality**. This is not to say, however, than an Accused is necessarily entitled to precisely the same amount of time or the

[19] *Prosecutor v Sesay et al.*, Transcript 4 February 2008, 66, the Trial Chamber ordered the Sesay Defence to close their case by 13 March, and at a Status Conference held on 12 March 2008, the Kallon Defence were ordered to close their case by 30 May 2008 (Transcript 12 March 2008, pg 38) and the Gbao Defence were ordered to close their case by 30 May 2008 (Transcript 12 March 2008, pg 45).

[20] *Prosecutor v. Galic*, IT-98-29-T, Scheduling Order, 12 September 2002, p. 2.

same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of **basic proportionality**, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides".[21]

17. In the case of *Krajišnik* the Appeals Chamber also addressed the issue.[22] The Appeals Chamber rejected submissions to the effect that the Defence had been given insufficient time for the presentation of its case. The Trial Chamber initially allocated to the Defence 70% of the time taken by the Prosecution (although it indicated that 60% of the time taken by the Prosecution was in its experience a reasonable amount of time for the Defence case).[23] This initial allocation was extended on several occasions following applications for adjournments made by the Defence during their case.[24] The Appeals Chamber cited *Oric* (referring to the quotation above) and added that, although the Trial Chamber has the power to limit the length of time and number of witnesses allocated to the Defence case, that "such restrictions are always subject to the general requirement that the rights of the accused...are respected. Thus in addition to the question whether, relative to the time allocated to the prosecution, the time given to the accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights".[25] The Appeals Chamber held that it had not been shown that the time allocated to the Defence was not reasonably proportional to the time allocated to the Prosecution or that the time allocated was objectively inadequate to permit the Accused to set forth his case in a manner consistent with his rights.[26] Significantly, the Appeals Chamber approved the

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[21] *Prosecutor v. Oric*, IT-03-68-AR73.2, "Interlocutory Decision on Length of Defence Case", 20 July 2005, para. 7 ("Oric Decision").(Emphasis added.)
[22] *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment, Appeals Chamber, 17 March 2009, paras. 106-110 ("Krajišnik Judgment").
[23] *Ibid.*, para. 107.
[24] *Ibid.*, para. 107.
[25] *Ibid.*, para. 108.
[26] *Ibid.*

Trial Chamber's approach of allocating to the Defence a reasonable time frame for the completion of its case, within which it was the responsibility of the Defence to organize its case.[27]

18. Similarly, the Trial and Appellate Chambers of the ICTR have upheld Defence case time limits and end dates as justified and necessary so long as the Accused is provided adequate time and facilities.[28] By way of example, in *Karamera*, the Appeals Chamber saw no error in a Defence case end date resulting in roughly four months for each of three Accused; 15% of the Prosecution's 26 month case.[29]

IV. ARGUMENT

19. Having regard to the jurisprudence outlined above and the current stage of the proceedings in this case, it would be appropriate for the Trial Chamber to issue an order requiring the Defence to conclude the Defence phase of the case by a specific date. On the basis of the information provided by the Defence to date, the anticipated time spent by the Defence on the presentation of its evidence would far exceed the length of time taken for the presentation of evidence during the Prosecution phase of the case. On the basis of the time estimates provided by the Defence in relation to the testimony of its forthcoming witnesses, the Defence case is likely to take in total about two years. This prediction assumes that the time estimates provided by the Defence are indeed accurate and that the Defence limits itself to calling those witnesses on its core witness list.[30]

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[27] *Ibid,* where the Appeals Chamber notes that "the Defence was given considerable discretion to determine the time to spend on preparation and on presentation of evidence, as long as the Defence case closed on a certain date (which date was pushed back several times to accommodate the Defence). It was up to the Defence to organize its case within the time limits imposed".

[28] *Prosecutor v. Karamera, et al.*, ICTR-98-44-AR15bis.3, "Decision on Appeals Pursuant to Rule 15*bis* (D)", 20 April 2007, paras. 29 ("Karamera Decision") paras 25 – 29; notably *Oric* is again relied upon at paragraph 27; *Prosecutor v. Zigiranyirazo,* ICTR-2001-73-T, "Decision on Motion to Vary the Defence Witness List," 9 October 2007, para. 11 (The Defence sought leave to bring 11 additional witnesses in addition of the 35 already called, noting that the number of Defence witnesses would result in nearly double the 24 witnesses called by the Prosecution, the Trial Chamber declined to limit the number of witnesses, instead refusing to extend the Defence case end date thus leaving it up to the Defence to "manage its evidence to ensure that those witnesses most vital to its case will complete their evidence" in the time allotted.)

[29] Karamera Decision, paras. 25-26.

[30] Based upon time estimates provided by the Defence, the testimony of those witnesses listed by the Defence as their core witnesses would take approximately 288 full court days to complete (assuming that cross-examination and re-examination take the same length as the evidence in chief). The SCSL is able to sit approximately 210 days a year. Thus the remaining testimony would take approximately 1 year 4 ½ months to complete; which of course is in addition to the seven month period spent with the testimony of the Accused. However, of further concern is in light

20. However, the time estimates provided by the Defence thus far have proved to be inaccurate. Most notably, the estimate given by Lead Defence Counsel for the length of the testimony of the Accused was 6 – 8 weeks for both direct and cross examination;[31] however, the evidence-in-chief alone ran for some 13 weeks. Also of note is the fact that the time estimates for three of the first four witnesses to be called by the Defence have been extended in the weekly Defence witness order filings as contrasted to estimates provided in the earlier Rule 73*ter* filings.[32] Furthermore, in its very recent correspondence indicating the next ten witnesses to be called after DCT-179, the Defence included in this list a witness who does not in fact appear in the core witness list (DCT-131), with no indication of a corresponding reduction in the core list.[33] The Defence has simply added DCT-131 to the witness list without either seeking permission or leave of the Trial Chamber, nor even acknowledging that it has done so. This both frustrates the purpose of providing a list of core witnesses and demonstrates that Defence lists and estimates may not necessarily be relied upon. Finally, the Defence has on a number of occasions been granted adjournments on the basis of claims that time provided for preparation earlier on will result in time saved further down the line.[34] However, given that it currently appears that the Defence phase of the case will last for approximately two years, there is no indication that this promise will hold true.

21. The predicted two year period for the Defence case contrasts significantly with the time taken in court by the Prosecution for the presentation of its evidence, which was twelve and a half months from the date the first witness was called up until the date the last Prosecution witness was called, including the time required for witnesses

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of the current court sharing arrangement at the ICC and the fact that the Trial Chamber is unable to sit full days in court every day, the estimate of two years may even prove conservative!

[31] *Prosecutor v Taylor*, Trial Transcript 8 June 2009, 24261 and 1 October 2009, 30040.

[32] The time estimates for DCT-125 and DCT-179 were extended from four to five days – see *Prosecutor v. Taylor*, "Defence Witness Order and List of Exhibits for 22 February – 26 February 2010", 8 February 2010 ("Witness Order Filing I"); *Prosecutor v. Taylor*, "Defence Witness Order and List of Exhibits for 1 March – 5 March 2010", 15 February 2010 ("Witness Order Filing II") (Witness Order Filing I, Annex A, p. 4; Witness Order Filing II, Annex A, p. 4). as compared with the estimates in version IV of the Rule 73*ter* filing (Version IV Filing, Annex A, pp. 77, 101). The time estimates in respect to DCT-025 have also been increased from 2 days in the version IV of the Rule 73*ter* filing; to 3 days in the weekly filing.

[33] Letter dated 22 February 2010.

[34] See for example: *Prosecutor v. Taylor*, Trial Transcript 7 May 2009, 24227-24229; *Prosecutor v. Taylor*, and Trial Transcript 5 February 2010, 34875.

whose evidence the Prosecution had unsuccessfully requested be provided via Rule 92*bis*.[35] Thus, the Trial Chamber is faced with a Defence case that could last nearly twice as long as the Prosecution case. In these circumstances, the potential length of the Defence case cannot be regarded as anywhere near "proportionate" when compared to the length of the Prosecution case[36] in the sense that word in used in the jurisprudence.[37]

22. In light of the projected length of the Defence phase of the case coupled with the various factors mentioned above pointing to the unreliability of Defence estimates, it is appropriate for the Trial Chamber to impose an end date for the completion of the Defence phase of the case. Any imposed limitation is both appropriate and consistent with the rights of the Accused. Furthermore, the Trial Chamber retains the discretion to alter any deadline should "unforeseen circumstances" arise or should the Defence make a showing that it would suffer "injustice" if held to the deadline.[38]

23. As regards an appropriate end date for the Defence phase of the case, the Prosecution suggests that the 1st June 2010 would provide the Defence with a "proportionate" amount of time which would also be "objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights."[39] An end date 1 June 2010 would provide the Defence with a total period of eight and a half months for the presentation of the Defence evidence; which is over 80% of the time taken by the Prosecution for the presentation of its evidence. This is more generous than the time accorded to the Defence teams in those cases considered by the Appeals Chambers of the ICTY and ICTR referred to above. Notably, 60% of the length of the Prosecution phase has been acknowledged as a reasonable guideline at the ICTY[40] and the ICTR Appeals Chamber upheld end dates potentially limiting each Accused's Defence case length to 15% of the prosecution's case. Thus the imposition of an end date of 1 June 2010 is a reasonable limitation consistent with the Accused's fair trial rights.

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[35] The first Prosecution witness was called on the 7 January 2008 and the last Prosecution witness was called on the 30 January 2009.
[36] On the basis of the above estimates the time taken for the Defence phase of the case would be 192% of the time taken during the Prosecution phase of the case. This contrasts dramatically with the 60% guideline given by the Trial Chamber in *Krajisnik*.
[37] See paras. 16 – 19 above.
[38] See the *Krajisnik* case (above).
[39] See paras. 17 and 18 above.
[40] *Krajisnik*, para. 107.

24. The lack of finality concerning the Defence witness list also raises the issue of the Trial Chamber's power under Rule 73*ter*(D) of the Rules of Procedure and Evidence to order the Defence to reduce the number of witnesses if an excessive number is being called to prove the same facts.[41] At present, because of the vagueness of the summaries provided by the Defence to the Prosecution, it is difficult to say with any specificity which witnesses, if any, are being called to prove the same facts; although it does appear that some witnesses are providing potentially duplicitous evidence.[42] In the circumstances, the Prosecution reserves the right to make any additional argumentation in this regard should the evidence of Defence witnesses prove to be unduly cumulative.

25. However, in the first instance an order that the Defence case end by a specified date would provide the Defence with a reasonable and definite amount of time in which to call those witnesses it deems fit; thus allowing the Defence due flexibility and placing the onus on the Defence to determine how best to allot its time and resources.[43]

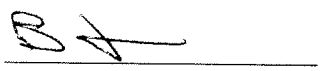
V. CONCLUSION

26. For the above reasons, the Prosecution requests that the Trial Chamber order the Defence to conclude its case by a specific date, namely by 1 June 2010.

Filed in The Hague,

26 February 2010,

For the Prosecution



Brenda J. Hollis
The Prosecutor

[41] See para. 7 above.
[42] See previous submissions made by the Prosecution in "Public Prosecution Response to Defence Motion for Leave to Vary Version III of the Defence Rule 73ter Witness List and Summaries", 11 January 2010, para. 22, in relation to proposed Defence witnesses who will give evidence in relation to radio communications.
[43] This approach was approved by the Appeals Chamber in *Krajišnik*, para. 108.

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Correspondence

Letter dated 22 February, "RE: Disclosure of Protected Defence Witnesses' Name", from Lead Defence Counsel to the Prosecutor and Cc'ed to Trial Chamber II's Senior Legal Officer