SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

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

Registrar: Lovemore G. Munlo, SC

Date: 15 February 2007

PROSECUTOR **Against** **Charles Ghankay Taylor**
(Case No.SCSL-03-1-PT)

DECISION ON DEFENCE APPLICATION FOR LEAVE TO APPEAL "JOINT DECISION ON DEFENCE MOTIONS ON ADEQUATE FACILITIES AND ADEQUATE TIME FOR THE PREPARATION OF MR. TAYLOR'S DEFENCE" DATED 23 JANUARY 2007

Office of the Prosecutor:
Brenda Hollis
Anne Althaus

Defence Counsel for Charles G. Taylor:
Karim A.A. Khan
Roger Sahota

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Julia Sebutinde, Presiding Judge, Justice Richard Lussick and Justice Teresa Doherty;

SEISED of the "Defence Application for Leave to Appeal 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence' Dated 23 January 2007", filed on 26 January 2007 ("Motion");

NOTING the "Prosecution Response to 'Defence Application for Leave to Appeal 'Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence' Dated 23 January 2007'", filed on 5 February 2007 ("Response");

NOTING that the Defence has not filed a reply to the Response;

RECALLING the Trial Chamber's Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence, dated 23 January 2007 ("Impugned Decision");

MINDFUL of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone, and of Rules 26*bis* and 73 of the Rules of Procedure and Evidence ("Rules");

DECIDES as follows, based solely on the written submissions of the parties.

I. INTRODUCTION

1. At a status conference held in The Hague on 22 September 2006, Justice Sebutinde ruled that the trial would commence on 2 April 2007, but indicated that such date was tentative and subject to adjustment upon good cause being shown by either party.[1]

2. Subsequently, on 15 December 2006, the Defence filed a motion alleging good cause and requesting that the tentative trial date of 2 April 2007 be postponed to "a more realistic date", namely 3 September 2007.[2] The Prosecution, in response to that motion, while not agreeing with the date proposed by the Defence, submitted that a postponement until at least July 2007 would be in the interests of justice.[3]

3. The Trial Chamber, in the Impugned Decision, decided that the Defence had shown good cause warranting an adjustment of the date for the commencement of the trial, but that the date sought by the Defence would amount to undue delay. Upon a consideration of all the issues, the Trial Chamber decided that the appropriate date for the trial to commence was 4 June 2007.[4]

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[1] Transcript 22 September 2006, pp. 46, 54.
[2] Defence Motion on Adequate Time for the Preparation of Mr. Taylor's Defence, paras. 2, 3, 13-27; *see also* Impugned Decision, para.9.
[3] Prosecution Response to 'Defence Motion on Adequate Time for the Preparation of Mr. Taylor's Defence', filed on 8 January 2007, paras 3-12; *see also* Impugned Decision, para. 10.
[4] Impugned Decision, para. 21.

4. The present Motion seeks leave to appeal that decision on the ground that the Defence has satisfied the requirements of Rule 73(B) in that the Impugned Decision impacts the right of the Accused to a fair trial under Article 17 of the Statute and/or amounts to an abuse of the Trial Chamber's discretionary powers thereby raising a novel and substantial aspect of criminal law.[5] The Defence does not seek leave to appeal that part of the Impugned Decision relating to adequate facilities.[6]

5. The Prosecution supports the Defence application to the extent that it agrees that the requirements of Rule 73(B) have been met.[7]

II. APPLICABLE LAW

6. Rule 73(B) of the Rules provides that:

> *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. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.*

7. An interlocutory appeal therefore 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. We reiterate the restrictive test applied by the Trial Chamber in previous decisions that: "[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case much 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."[8]

8. The Appeals Chamber has ruled that "In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal".[9]

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[5] Motion, paras 3, 4.
[6] Motion, para. 2.
[7] Response, paras 3, 10-17.
[8] *See Prosecutor v. Brima, Kamara, Kanu*, SCSL-4-16-T, 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, dated 4 May 2006; *see also Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T, Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal; *see also Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.
[9] *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, dated 16 May 2005, para. 43.

III. DELIBERATIONS

9. The Defence relies on a previous decision of the Trial Chamber[10] to support its submission that the requirements of Rule 73(B) have been met in the instant case. In the earlier case, the Trial Chamber held "that in the present case the very nature of the application satisfies the conjunctive test of "exceptional circumstances" and "irreparable prejudice" by Rule 73(B) since it concerns a fundamental right enshrined by Article 17(4) of the Statute." It should be noted that that decision was based on completely different facts and issues, and was expressed as applying to that particular case. What constitutes 'exceptional circumstances' must necessarily depend on, and vary with, the circumstances of each case.[11] We therefore reject the present Defence submission.

10. Both parties submit that the Trial Chamber fell into error by not accepting either of the parties' suggested dates for the commencement of the trial. The Impugned Decision, by delaying the start of the trial to 4 June 2007, in effect granted the Defence an extra 2 months to prepare its case, instead of the extra 5 months requested by the Defence. Because the Trial Chamber did not accept the date suggested by the Defence, the Defence claims that "[t]he Trial Chamber's denial of the preparation time sought by the Defence, after accepting that the Defence needed more time to adequately prepare, amounts to an abuse of discretion."[12]. The logic of that submission is difficult to fathom.

11. The Prosecution also submits that the fact that the Trial Chamber did not agree even with the Prosecutions estimate of "at least July" as being adequate time constitutes an exceptional circumstance.[13] Apparently, according to the Prosecution, the date fixed by the Trial Chamber, *i.e.*, 4 June 2007, is an 'exceptional circumstance', whereas an extra 4 weeks would have made the decision perfectly acceptable.

12. We reject these submissions. The Trial Chamber was not obliged to accept either party's estimate of an appropriate trial date. The discretion to fix a trial date rests with the Trial Chamber as part of its case management function, and while it should consider the views of the parties in this regard, it is not bound by them. It cannot be said that this discretion was exercised arbitrarily, since the Impugned Decision sets out the considerations which the Trial Chamber took into account in arriving at what it considered to be an appropriate date for hearing.[14] The fact that the Prosecution, Defence and Trial Chamber all had differing views on an appropriate date for commencement of the trial does not amount to 'exceptional circumstances' within the meaning of Rule 73(B), since the ultimate discretion rests with the Trial Chamber. Nor, for that matter, does it raise any novel and substantial issue of international criminal law.

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[10] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-367, Decision on Brima – Kamara Application for Leave to Appeal From Decision on the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel, dated 5 August 2005, p. 3.
[11] *See Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-357, Decision on Defence Application for Leave to Appeal Ruling of the 3rd. February, 2005 on the Exclusion of Statement of Witness TFI-141, dated 28 April 2005, para. 25; see also Prosecutor v. Brima, Kamara, Kanu, SCSL-04-16-T, Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, dated 23 November 2006, p. 3.
[12] *See* Motion, para. 12.
[13] *See* Response, para. 14.
[14] Impugned Decision, paras 20, 21.

13. In regard to the latter issue, the Defence submits that "[i]n balancing what the Trial Chamber considers to be competing interests, the Trial Chamber has implicitly concluded that the right to be tried without undue delay takes precedence over the right to adequate time to prepare."[15] This submission is disingenuous to say the least. The Impugned Decision did not state that the right to be tried with undue delay was in competition with the right to adequate time to prepare, nor did it, by implication, conclude that the former took precedence over the latter. The Impugned Decision clearly distinguished between the two rights, finding that a trial date of 4 June 2007 allowed the Defence adequate time to prepare, but that any delay beyond that date would be 'undue delay'.[16] (For the benefit of the Defence, the ordinary meaning of 'undue' is "more than is reasonable or necessary; excessive".[17]) In conclusion, we regard the claim by the Defence that "the new trial date was set seemingly arbitrarily, without explanation, or consideration of the positions of both parties" as a deliberate distortion of the Impugned Decision.[18]

14. Also in support of its submission that the Impugned Decision raises novel and substantial issues of international criminal law, the Defence has put forward the following argument: "The instant case can be distinguished from *Prosecutor v. Milošević*[19] where the Appeals Chamber relied on Article 20 of the ICTY Statute. Article 20 has no parallel provision in the SCSL Statute. Thus the Appeals Chamber in *Milošević* did not, as purported in the Impugned Decision, attempt to balance the Accused's right to adequately prepare for trial with his right to be tried without undue delay. Rather, the Chamber considered the need for expeditiousness of the proceedings pursuant to Article 20 of the ICTY Statute."[20]

15. The Defence omits to mention that Article 20(1) of the ICTY Statute is in almost identical terms to Rule 26*bis* of the Rules.

Article 20(1) of the ICTY Statute provides:

> *"The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses".*

Rule 26*bis* of the Rules provides:

> *"The Trial Chamber and the Appeals Chambers shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."*

16. Under the ICTY Statute, the "rights of the accused" include the right enshrined in Article 21(4)(b) of the ICTY Statute "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." The ICTY Appeals Chamber was obliged to

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[15] Motion, para. 13.
[16] Impugned Decision, para. 20.
[17] Paperback Oxford English Dictionary.
[18] *See* Motion, para. 13; *see also* Impugned Decision, paras. 20,21.
[19] *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, dated 20 January 2004.
[20] Motion, para. 14.

consider this right along with the right of the accused to a fair and expeditious trial. The appeal before it was against a decision of the Trial Chamber allowing the accused 3 months to prepare his defence.[21] The ICTY Appeals Chamber found that the Trial Chamber, in balancing the need for the accused to have adequate time for the preparation of his case and for an expeditious trial,[22] had emphasised the relevant considerations[23] and that there had been "no violation of the accused's right to a fair trial by the time limits imposed".[24]

17. We therefore find that the Defence contention that *Milošević* is not pertinent to the present case has no foundation.

18. With regard to the Defence claim of irreparable prejudice, we point out that it is the Prosecution which must open its case on 4 June 2007, not the Defence. We assume that since the Defence Lead Counsel was first assigned to represent the Accused on 5 April 2006[25] the Defence is not claiming that it would not be able to meet any part of the Prosecution case at all by 4 June 2007. In the event that, after the opening of the Prosecution case, the Defence finds itself in a position that it is not prepared to answer certain Prosecution evidence, then it should be remembered that the Trial Chamber has a continuing obligation to ensure that the Accused receives a fair trial. As a part of that obligation, the Trial Chamber may consider allowing the Accused additional adjournments in the future upon a showing of good cause.[26]

19. Accordingly, we find that the Defence has failed to establish either of the conditions of "exceptional circumstances" and "irreparable prejudice" required by Rule 73(B).

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES THE MOTION.

Done at Freetown, Sierra Leone, this 15th day of February 2007.

Justice Richard Lussick | Justice Julia Sebutinde, Presiding Judge | Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

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[21] *Milošević*, fn. 19 *supra*, para. 3.
[22] *Ibid.*, para. 8.
[23] *Ibid.*, para. 12.
[24] *Ibid.*, para. 20.
[25] Principal Defender's Decision to Provisionally Assign Counsel to Charles Ghankay Taylor, dated 5 April 2006.
[26] *Ibid.*, para. 20.