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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

SPECIAL COURT FOR SIERRA LEONE	
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COURT MANAGEMENT	
30 MAR 2007	
NAME.....	Adwoa Nsimba K.
SIGN.....	Nsimba
TIME.....	13:45

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

Registrar: Mr. Herman von Hebel, Acting Registrar

Case No.: SCSL-03-1-PT

Date: 30 March 2007

PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

DECISION ON PROSECUTION MOTION TO ALLOW
WITNESSES TO GIVE TESTIMONY BY VIDEO-LINK

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 "Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link", filed on 9 February 2007 ("Motion"),

NOTING the "Defence Response to Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link", filed on 22 February 2007 ("Response"),

NOTING the "Registrar's Submission Pursuant to Rule 33(B) Relating to Issues Pertaining to the Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link Filed on 9 February 2007". filed on 22 February 2007 ("Registrar's Submission"),

NOTING the "Prosecution Reply to the Defence Response to the Prosecution Motion to Allow Witness to Give Testimony by Video-Link", filed on 23 February 2007", ("Reply"),

MINDFUL of the provisions of Article 17.4 of the Statute of the Special Court for Sierra Leone ("Statute") and of Rules 71, 73(A), 85, 89 and 90(A) of the Rules of Procedure and Evidence ("Rules")

DECIDES as follows, based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules.

BACKGROUND

1. The Accused, Mr. Charles Ghankay Taylor, was arrested on 27th March 2006 and transferred into the custody of the Special Court in Freetown, Sierra Leone on 29th March 2006. The Accused was arraigned on 3rd April 2006 before Trial Chamber II sitting at Freetown. On 19 June 2006 the President of the Special Court issued an Order¹ changing the venue of the proceedings in the Taylor trial from Freetown to The Hague in the Netherlands and authorising the Trial Chamber and Appeals Chamber to exercise their functions in relation thereto, away from the seat of the court. The President also ordered that Mr. Taylor be transferred from the detention facility of the Special Court in Freetown to an appropriate Detention facility in The Hague. On 19 June 2007 the Registrar of the

Special Court issued an Order pursuant to Rule 64 authorising the detention of Mr. Taylor at the ICC Detention Centre in The Hague², which Order was endorsed by the President on the next day³. On 20 June 2006 the Accused was transferred to The Hague, where he is currently being held at the detention facility of the International Criminal Court in accordance with the terms of a Memorandum of Understanding between the Special Court and the International Criminal Court dated 13 April 2006. The Taylor trial in respect of which this Motion was filed is scheduled to commence on 4th June 2007.

SUBMISSIONS

Prosecution Motion

2. The Prosecution submits that they filed the Motion at this point in time "in order to ensure that the necessary technology and procedures will be in place before the commencement of the Taylor trial which is set for 4 June 2007."⁴
3. The Prosecution requests the Trial Chamber to issue:
 - a) A general order allowing the Parties to present witness testimony by video-link subject to a showing by the party opposing the use of video-link testimony, that there exists good cause for denying this method of testimony by particular individual witnesses.⁵
 - b) A practice direction outlining the procedure to follow in presenting a witness's testimony by video-link⁶.
 - c) "An order to the Registry to act immediately to ensure that the adequate technology, procedures and personnel are put in place before the commencement of trial so as to guarantee the highest quality of video-link."⁷

¹ Prosecutor vs. Charles Taylor, Case No. SCSL-03-01-PT, Order Changing Venue of Proceedings, 19 June 2006

² Order By The Registrar Pursuant to Rule 64, dated 19 June 2006

³ Prosecutor vs. Charles Taylor, Case No. SCSL-03-01-PT, Endorsement Pursuant to Rule 64, 20 June 2007

⁴ Motion, para.2

⁵ Motion Para 1 and 22

⁶ Motion Para 1

⁷ Motion Para 22

4. As an alternative to general order (a), the Prosecution seeks an order allowing the Parties to present video-link testimony in respect of the following categories of witnesses:

- i. "Witnesses who will give evidence regarding the underlying acts charged, such as murder, rape, etc.
- ii. Witnesses who will give evidence regarding the contextual elements of the crimes charged.
- iii. Witnesses who will give evidence regarding the Accused's individual criminal responsibility but who have had little if any, significant contact with the Accused.
- iv. Witnesses who are unable to be physically present in the Court by virtue physical incapacity or condition (sic).
- v. Witnesses who, because of the traumatic effect of the crimes which they survived, are only able to give a full and candid account of their evidence through the use of this technology".⁸

5. The Prosecution submits that Rule 85(D) does not preclude a party from adducing evidence by video-link technology nor does it impose any specific test to be met before such a procedure can be ordered⁹. The power vested in the Trial Chamber to order the use the video-link technology is discretionary and, in contrast to other rules, is not subject to any conditions¹⁰. Since there is no precondition in Rule 85(D) the Prosecution argues that "the Party opposing the use of video-link testimony bears the burden of showing, on a case by case basis, good cause why a specific witness should not be allowed to testify by video-link technology"¹¹.

6. The Prosecution acknowledges that other *ad hoc* tribunals have stated that the general rule or preference is for witnesses to be physically present in court to give testimony but that the use of video-link testimony does not violate the accused's right to examine or have examined the witnesses against

⁸ Motion Para 22

⁹ Motion Para 7

¹⁰ Motion Para 9

¹¹ Motion Para 10

him¹². Further, it provides the flexibility required by the special circumstances in which the Special Court operates.¹³

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7. The Prosecution cites two conditions which have been applied in the ICTY and the ICTR to allow use of video-link testimony viz:

- a) "The testimony of a witness is shown to be sufficiently important to make it contrary to the interests of justice to proceed without it;" and
- b) "The witness is unable or unwilling to come to the International Tribunal".¹⁴

8. The Prosecution argues that these conditions should not be applied in this case as the jurisprudence has developed since the *Prosecutor v. Delalic et al* decision. Instead, the only condition precedent should be that such a method of testimony is in the interests of justice."¹⁵

As an extension of that argument, the Prosecution submits that "at a minimum" it is in the interests of justice that the witnesses in the five categories referred to in paragraph 2 above should be allowed to give evidence by video-link.

Defence Response

9. In response the Defence "strongly" opposes the Motion and submits that the Prosecution is mistaken and misrepresents the law by inviting the Trial Chamber to adopt an unacceptable test for allowing video-link testimony¹⁶.

10. The Defence submits that it is a general principle of criminal law that oral testimony is "the preferred method by which a witness should give evidence in a court, and thus this preference must be given consideration by the Trial Chamber".¹⁷ Further, the fact that Rule 85(D) is discretionary and does not explicitly include the term "in the interests of justice" does not mean that it not subject to any condition or limitation. The Defence submits that, as oral testimony is the preferred method

¹² Motion Para 1

¹³ Motion Para 14

¹⁴ Motion Para 11

¹⁵ Motion Para 18 citing *Prosecutor v Milosevic*

¹⁶ Response Para 1

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by which witnesses should give evidence, evidence by video-link should only be authorised if it is in the interests of justice to do so. The Defence submits that facts to be considered include the importance of the testimony, the inability or unwillingness of the witness to be present at the court and whether good reasons have been given for that inability or unwillingness.¹⁸

11. The Defence cites in support the ruling in *Prosecutor v Tadic*, where the Trial Chamber held that it could not stress "too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal."¹⁹ The Defence further relies on the case of *Prosecutor v Bagosora, et al*²⁰ where it was held that the general principle, and the Chambers strong preference, is that most witnesses should be heard in court.²¹ The Defence cites the decision on the *Prosecutor v Ziranyirazo*²² in support of the submission that "live testimony is a critical aspect of an Accused's trial"²³.

12. The Defence, relying on the jurisprudence of the Supreme Court of United States of America submits that video-link testimony also impacts upon the accused's fundamental right to confront the witnesses against him and should only be used when it is in the interests of justice to do so.²⁴

13. The Defence also relies on the jurisprudence of the ICTY and ICTR to show that video-link testimony is only justified when in "the interests of justice".²⁵ The Defence refutes the Prosecution proposition that the burden is upon the opposing party to show good cause why witnesses should not be permitted to give video-link evidence and submits that it is "a complete reversal of the test set out in international criminal law jurisprudence on this issue". The Defence maintains that the onus is on the party seeking to use video-link testimony "to satisfy the test".²⁶

¹⁷ Response Para 2

¹⁸ Response Para 2

¹⁹ Response Para 3 citing *Prosecutor v Tadic*, Case No. IT-94-1-2, Decision on the Defence Motion to Protect Defence Witnesses 16 August 1996.

²⁰ *Prosecutor v. Bagosora et al* ICTR-98-41-T Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 Oct. 2004 para 15

²¹ Response Para 4

²² Response Para 8 citing *Prosecutor v Ziranyirazo* ICTR-2-1-73-3, Decision on Defence and Prosecution Motions Related to Witness ADE: Rules 46,66,68 and 75 of the Rules of Procedure and Evidence 31 January 2006

²³ Response Para 8

²⁴ Response Para 5 and 6 citing *Coy v. Iowa* 487 US 1012 (1988).

²⁵ Response Para 13

²⁶ Response Para 14

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14. The Defence further submits that the analysis of what constitutes "the interests of justice" must be done on a case by case basis and it is entirely insufficient for the Prosecution to put forward five broad categories of witnesses when requesting permission to use video-link testimony.²⁷ Such analysis will depend on a particular witness's factual situation or the specific reasons for which a video-link evidence is sought.²⁸ The Defence stresses that issues of judicial economy and efficiency can never be used to over-ride the statutory rights of the accused.²⁹

Registrar' Submission

15. The Registrar filed a submission pursuant to Rule 33(B) setting out the logistical and budgetary implications of installing video-link facilities. He submitted that this may necessitate procuring additional satellite capacity ("Bandwidth") between Freetown and Brindisi, Italy. Such capacity is not available on the United Nations satellite used by the Special Court and the topology of the land on which the Special Court is constructed means that the existing connection cannot be moved to another satellite link.³⁰ An alternative solution such as asking other peace-keeping operations linked to the same satellite to move their links, involves significant political and technical difficulties.³¹ The link between Brindisi and The Hague has the requisite capacity but the speed and quality of the "video feed" are not known, so an extra or new cable link may be required.³²

16. The Registrar states that the timelines necessary for establishing the required video-link facilities are: 2 to 4 weeks for the design phase and about 2 months for the procurement of the video-link equipment for the satellite link between the Special Court and Brindisi, although should a new link become necessary between Brindisi and The Hague, then a total period of 4 months would be required. After the procurement, there is an implementation and testing phase which would take between 4 to 6 weeks. It would therefore take approximately 6 months for a video-link between the ICC in The Hague and the Special Court in Freetown to become fully operational,³³ which would be 3 months or more after the start of the trial (4 June 2007) .

²⁷ Response Para 16

²⁸ Response Para 17

²⁹ Response Para 18

³⁰ Registrar's Submission Para 6

³¹ Registrar's Submission Para 7

³² Registrar's Submission Para 8 and 9

³³ Registrar's Submission Para 10-15

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17. The Registrar estimates that the maximum total cost for installation and running of video facilities for 18 months would be approximately \$USD300,000.³⁴ This would mean that, for the video-link facilities to be viable, at least 190 witnesses – i.e. above 60% of the total number of witnesses - would need to testify through video-link.³⁵

Prosecution Reply

18. The Prosecution submits that the Defence ignores the evolution of the ICTY Rules, which has broadened the means by which witness testimony may be introduced into evidence. The ICTY Rules have been amended over time to allow video-link testimony and evidence from written statements or prior testimony.³⁶ The Prosecution submits that this progressive evolution away from a previous preference for in-court testimony supports an expanded use of video-link testimony.³⁷

19. The Prosecution seeks to distinguish the case of *Prosecutor v Ziranyirazo* as the Appeal Chamber did not find the use of video-link testimony violated the accused's right to examine or have examined the witnesses against him. The Prosecution stresses that the Trial Chamber in that case was concerned about the quality of transmission impairing the testimony.³⁸

20. The Prosecution stresses that the right of the accused is not to "confront" his accuser but "to examine and have examined the witnesses against him" and distinguishes the USA authorities relied on by the Defence on this basis.³⁹

21. The Prosecution submits that the Defence argument that judicial economy and efficiency can never be used to override the fundamental rights of the Accused misperceives the Motion, since the Prosecution recognizes the rights of the Accused.⁴⁰ The Prosecution says that the Motion is not based on monetary matters but rather on matters related to a good and fair administration of justice.⁴¹

³⁴ Registrar's Submission Para 16-21

³⁵ Registrar's Submission Para 25-26

³⁶ Reply Para 2

³⁷ Reply Para 3

³⁸ Reply Para 4,6

³⁹ ReplPara 8,9

⁴⁰ Reply Para 10

⁴¹ Reply Para 12

DELIBERATIONS

22. In our view, the Rules clearly reflect a preference for witnesses give evidence directly in court.

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Rule 85(D) provides:

- (D) Evidence may be given directly in court, or via such communications media, including video, closed-circuit television, as the Trial Chamber may order.

Likewise, Rule 90(A) states:

- (A) Witnesses may give evidence directly, or as described in Rules 71 and 85(D).

23. Rule 71 empowers a Trial Chamber to order that a deposition be taken for use at trial, but only in "exceptional circumstances and in the interests of justice". Under Rule 71(D), a deposition may be given by means of a video-conference. The conjunctive conditions of "exceptional circumstances" and "interests of justice" indicate that this method of adducing evidence is not generally available to a party wishing to present evidence.

24. It can be seen that giving evidence directly in court is the only method of adducing evidence mentioned in the Rules referred to above which does not require a specific order from the Trial Chamber.

25. Whilst we accept the Prosecution submission that the Statute does not use the term "confront" when stating the right of the accused to examine or have examined the witnesses against him or her (Article 17 4.e.) it does not follow that a witness need not be present in the court room. The terms "to confront a witness" or "confrontation between the witness and the accused" are used in the decision of the *Prosecutor v Delalic*⁴². They are also used in the line of cases decided by the Supreme Court of the United States of America, cited by both Counsel. The 6th Amendment to the Constitution of the USA provides for a right of an accused "to be confronted with the witnesses against him."⁴³ We approach the United States authorities with caution as the cases referred to specifically deal with the application of the 6th Amendment to the Constitution to State legislation

⁴² *Prosecutor v Delalic et al*, ICTY IT-96-21-A , Para 15, Decision on the motion to allow witnesses K, L, and M to give their testimony by means of video-link conference 28 May 1997

⁴³ *Coy v Iowa* 487 US 1012 (1988)

providing the method of adducing testimony of juvenile witnesses in criminal trials. However, we note the general principle enunciated in *Coy v Iowa*⁴⁴ and *Maryland v Craig*⁴⁵ that policy interests should not overcome the defendant's rights. The U.S. Supreme Court held that the term "to confront plainly means to encounter face to face"⁴⁶. While the Statute confers a right to examine witnesses or to have them examined, we are of the view that this does not extend to an outright "face to face" confrontation between the accused and every individual witness. It is clear from the Rules cited above that this is not intended.

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25. We do not agree with the submission of the Prosecution that Rule 85(D) imposes no limitation on a party wishing to use video-link technology to elicit the evidence of a witness⁴⁷. While it is correct that Rule 85(D) does not contain a condition such as "in the interests of justice"⁴⁸, a Trial Chamber is not entitled ignore such a fundamental principle of law when considering an application to give evidence by video-link.

26. The Prosecution maintains that the Trial Chamber is entitled to issue an order allowing the general use of video-link testimony of witnesses without a showing of any conditions precedent⁴⁹. Again, we do not agree. That would be tantamount to the Trial Chamber making an order of that nature for no reason at all. In our opinion, the onus is on the party applying for an order under Rule 85(D) to give evidence by video-link to establish to the satisfaction of the Trial Chamber that the witness concerned is unable to give evidence directly in court. Any order made by the Trial Chamber in the exercise of its discretion under Rule 85(D) would, as a matter of course, take into account the interests of justice. Applications made under Rule 85(D) would be considered on a case by case basis, taking account of the particular circumstances of the witness or witnesses concerned.

27. In reviewing the jurisprudence, we note that in all of the cases referred to by the parties, the subject witness was an individual person. We have not been referred to, nor found, any case where a court allowed a class of potential witnesses, such as those in the categories specified by the Prosecution in the Motion, to adduce evidence by means other than oral evidence in court. We do

⁴⁴ Ibid

⁴⁵ 110 S.Ct.3157 (1990)

⁴⁶ *Maryland v Craig* Ibid

⁴⁷ Motion, para. 9.

⁴⁸ See Motion, para. 9.

⁴⁹ Motion, para. 13.

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not consider that it is in the interests of justice, or appropriate, in the instant case to issue a general order permitting witnesses falling within the broad categories specified by the Prosecution to give evidence by video-link conference.

28.Regarding the timing of this Motion, we can only express surprise that neither the Prosecution nor the Registrar has explored the possibility of installing video link facilities until now, even though the option of video-link testimony was in the circumstances, a reasonably foreseeable consequence of the transfer of proceedings from the Seat of the Court to The Hague. Despite the fact that both the Accused and the trial proceedings were officially transferred to The Hague a year ago, the Prosecution has waited until two months before the trial is set to commence to make this application. Given that no video-link facilities presently exist, it is premature to issue any practice directions on procedures of the kind sought by the Prosecution.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER
DISMISSES THE MOTION**

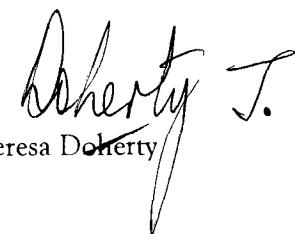
Done at Freetown, Sierra Leone, this 30th day of March 2007.



Justice Richard Lussick



Justice Julia Sebutinde
Presiding Judge



Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

