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SCSL-03-01-T  
(26847-26855)

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**THE SPECIAL COURT FOR SIERRA LEONE**

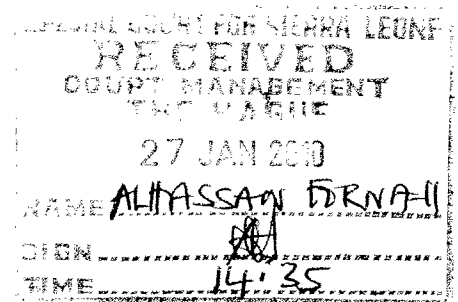
**Trial Chamber II**

**Before:** Justice Julia Sebutinde, Presiding  
Justice Richard Lussick  
Justice Teresa Doherty  
Justice El Hadji Malick Sow, Alternate

**Acting Registrar:** Ms. Binta Mansaray

**Date:** 27 January 2010

**Case No.:** SCSL-03-01-T



**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

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**PUBLIC**

**DEFENCE RESPONSE TO "URGENT APPLICATION FOR LEAVE TO  
APPEAL ORAL DECISIONS OF 18 JANUARY 2010 ON USE OF DOCUMENTS  
IN CROSS-EXAMINATION"**

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**Office of the Prosecutor:**

Ms. Brenda J. Hollis  
Mr. Nicholas Koumjian  
Ms. Nina Jørgensen  
Ms. Kathryn Howarth  
Mr. Christopher Santora

**Counsel for Charles G. Taylor:**

Mr. Courtenay Griffiths, Q.C.  
Mr. Terry Munyard  
Mr. Morris Anyah  
Mr. Silas Chekera  
Mr. James Supuwood

## I. INTRODUCTION

1. This is the Defence Response to the Prosecution's Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-examination.<sup>1</sup>
2. The Application concerns the use of three documents in court: an article from *Africa Confidential* dated 22 January 1999 ("*Africa Confidential Article*"); an article from the *United Nations Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network* dated 8 April 1999 ("*IRIN Article*"); and written testimony of John Leigh dated 11 June 1998 ("**Leigh Testimony**").<sup>2</sup>
3. In its oral decisions of the 18 January 2010, the Trial Chamber applied the test it had laid down in a previous decision relating to the use of documents containing fresh evidence during cross-examination.<sup>3</sup> In the present Application the Prosecution argues that in making those oral decisions, the Trial Chamber erred in its application of the Documents Decision test as it relates to the use of fresh evidence for purposes of cross-examination ("**the use test**"). Those errors, the Prosecution argues, amount to "exceptional circumstances" and could result in "irreparable prejudice".<sup>4</sup>
4. The Defence submits that the Application does not meet the conjunctive standards of exceptional circumstances and irreparable prejudice under Rule 73(B) of the Rules of Procedure and Evidence. Therefore, leave to appeal should be denied.

## II. APPLICABLE LEGAL STANDARD

5. The legal standard for leave to appeal is set out in Rule 73(B) which provides that:  
"[oral] decisions are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal."

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-882, "Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-examination", 21 January 2010 ("**the Application**").

<sup>2</sup> Application, para. 1.

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-865, "Decision on Prosecution Motion in Relation to the Applicable Legal Standards governing the Use and Admission of Documents by the Prosecution during Cross-Examination", 30 November 2009 ("**Documents Decision**").

<sup>4</sup> Application, paras. 10-23.

6. Trial Chamber I has ruled that an interlocutory appeal does not lie as of right. The party seeking leave to appeal must meet the conjunctive conditions of “exceptional circumstances” and “irreparable prejudice” before the Trial Chamber can exercise its discretion.<sup>5</sup> “Exceptional circumstances may exist depending upon particular facts and circumstances, where for instance... the course of justice might be interfered with or it is of fundamental legal importance.”<sup>6</sup>
7. The main purpose behind this is to ensure that interlocutory appeals only proceed in very limited and exceptional situations. Rule 73(B) is a restrictive provision.<sup>7</sup> The rationale behind this rule is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals. The Appeals Chamber has however noted that although most decisions will be capable of disposal at final appeal “the underlying rationale for allowing such appeals is that certain matters cannot be cured or resolved by final appeal against judgment.”<sup>8</sup>

### III. ARGUMENT

#### Exceptional circumstances

8. In this case, the Prosecution argues ‘exceptional circumstances’ and ‘interference with the course of justice’ in that: (i) the Trial Chamber has erred in its application of the “use test”;<sup>9</sup> (ii) the Trial Chamber has imposed an unduly high threshold for the introduction of Prosecution documents;<sup>10</sup> (iii) the Trial Chamber has fettered its own ability to consider documentation for the purpose of impeachment;<sup>11</sup> and (iv) the

<sup>5</sup> *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, para. 10.

<sup>6</sup> *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005, para. 26.

<sup>7</sup> *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, para. 11.

<sup>8</sup> *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, “Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal”, 17 January 2005, para 29.

<sup>9</sup> Application, paras. 10-12.

<sup>10</sup> Application, para. 13.

<sup>11</sup> Application, para. 16.

Prosecution is deprived of its ability to conduct an effective cross-examination.<sup>12</sup> The Defence submits that none of these arguments meet the threshold for leave to appeal to be granted. Further, to the argument in this Response; to the extent that they are applicable, the Defence also relies on the legal arguments in its Response dated 22 January 2010.<sup>13</sup>

9. Firstly, the Trial Chamber has not erred in its application of the “use test”. The test is formulated in plain and simple language:

“a document containing “fresh evidence” probative of the guilt of the Accused is subject to disclosure and its use will not be permitted during cross-examination unless (a) it is in the interests of justice and (b) it does not violate the fair trial rights of the Accused”.<sup>14</sup>

It is difficult to see how such a test could be misinterpreted. Despite this, and out of indulgence for the Prosecution, the Trial Chamber has repeatedly clarified it. As stated by the former Presiding Judge on 2 December 2009:

“if you look at our order again, which I say is in crystal clear language, the order we made in our decision of 30 November, you will not see any qualification on documents containing fresh evidence that is probative of the guilt of the accused. It does not qualify that by saying that if the Prosecution only wishes to attack credibility, the document can be used.”<sup>15</sup>

Likewise, the current Presiding Judge stated on 21 January 2010:

“in our decision of 30 November and in subsequent oral decisions, the Chamber has made it very clear that in determining objections based on the content of a document and its use in court in cross-examination, the intention or purpose for which the Prosecution intends it is immaterial and irrelevant in our determination of whether the document will or will not be used. What is relevant and what is important is whether potentially the passage contains material that is probative of guilt. It's not the intention for which it is meant but rather the content.”<sup>16</sup>

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<sup>12</sup> Application, paras. 18-22.

<sup>13</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-883, “Defence Response to the Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-examination”, 22 January 2010.

<sup>14</sup> Documents Decision, para. 27.

<sup>15</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 02 December 2009, p. 32935.

<sup>16</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 21 January 2010, p. 33818.

In applying the test, the Trial Chamber has stuck to the plain language of the test. The Prosecution contention that the Trial Chamber has erred in the application of “the use test” is therefore unfounded. Indeed, as the Prosecution argument unfolds, it becomes apparent it is not the *application* of the test which the Prosecution impugns, but the test itself.<sup>17</sup> Any critique by the Prosecution of the *application* is mere semantics designed to work around the fact that it cannot now appeal the substance of the use test, the date for any such appeal having long since passed.

10. Secondly, the Trial Chamber has not imposed an unduly high standard. In the Documents Decision, the Trial Chamber explicitly noted that the Accused does not stand in the same position as other Defence witnesses and that therefore the standard adopted is one which takes account of the Accused’s fair trial rights.<sup>18</sup> The Prosecution’s argument that this standard is somehow different to that of ICTY case law is missing the point; the standard applied in *Prlić*, for instance, is that for witnesses in general, both Prosecution and Defence, as opposed to an accused.<sup>19</sup>
11. The Prosecution argument, developed in paragraph 13 of the Application, that the Trial Chamber has considered factors not contained in the use test is incorrect. The Trial Chamber considered factors it deemed appropriate to the determination of the interests of justice and not those of exceptional circumstances, as claimed by the Prosecution. That there may be some overlap between the type of factors relevant to the interests of justice and the type of factors relevant to exceptional circumstances does not mean that the Trial Chamber has incorporated those factors relevant to exceptional circumstances into the use test.
12. Thirdly, in relation to impeachment, the Prosecution argues that it is consistent with case law that it should be allowed to use any documents in court for the purpose of impeaching the Accused during his cross-examination and that any consideration as to whether the document can also be used as evidence probative of guilt should be delayed until the admissibility stage. Arguments under this head fall for the same reasons as elucidated above: even in terms of impeachment, the Accused’s rights must be taken into consideration and thus the use test as applied by the Trial Chamber

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<sup>17</sup> Application, paras. 11-12.

<sup>18</sup> Documents Decision, para. 25.

<sup>19</sup> *Prosecutor v. Prlić*, IT-04-74-T, "Order Clarifying Decision of 27 November 2008", 12 January 2010.

was justified.<sup>20</sup> In addition, it should be noted that in many of the documents the Prosecution seeks to introduce, what constitutes impeachment evidence is substantively the same evidence which is probative of guilt. Seeking to delimit the evidence for one purpose and not the other in those circumstances thus becomes artificial. In the First Impugned Decision, for example, the Trial Chamber considered that the whole document, bar one sentence, contained evidence probative to guilt.<sup>21</sup> The Trial Chamber's refusal to accept the document merely for purposes of impeachment was therefore justified.

13. Fourthly, the Prosecution's argument that it needs to respond to issues raised in the examination-in-chief is disingenuous and consists of a series of *non sequiturs*, such as: "Since all three documents relate to assertions made by the Accused in his direct testimony, it follows logically that the Prosecution was only on notice of such assertions after the direct examination of the Accused, and therefore after the close of the Prosecution's case-in-chief".<sup>22</sup> An assertion made by the Accused does not mean the Prosecution was *only* aware of it through his testimony, since the assertion may already be a matter of public record or of the Accused's case. The Accused's assertion that he was deeply involved in the peace process, for instance, is a matter of public record. A great many of the issues raised by the Accused during his testimony, and concerning which the Prosecution now wishes to introduce "fresh evidence", are ones that could reasonably have been anticipated by any diligent Prosecution and which should have been contained in its own case.<sup>23</sup> In this respect, the Prosecution's arguments are an attempt to get the documents in by the back door, having failed in its duty to present its case at the appropriate stage.

14. There is no risk of the Trial Chamber's decision interfering with the course of justice for the simple reason that, if the proposed use of the documents in issue were simply to test the Accused's credibility, then this purpose could be achieved through other means that would not necessarily, *inter alia*, interfere with the Accused's fair trial

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<sup>20</sup> Above, paras. 9-11.

<sup>21</sup> *Prosecutor v. Taylor*, Transcript, 18 January 2010, pp. 33488-33489.

<sup>22</sup> Application, para. 13.

<sup>23</sup> *Prosecutor v. Taylor*, SCSL-03-01-862, "Defence Response to the Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-examination", 23 November 2009, paras. 24-26.

rights. As the Trial Chamber explained, "... the claims [by the Prosecution] that they have no other means to challenge and test the accused's evidence on the points in issue, and whether this document is allowed to be used or not does not affect the Prosecution's ability to effectively cross-examine."<sup>24</sup> Indeed, the very same information that is in the documents could be put directly to the Accused without recourse to the documents as independent sources of evidence.

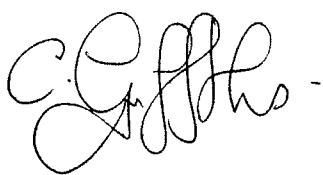
Irreparable prejudice

15. The Prosecution cannot suffer from irreparable prejudice because, in addition to the recourse as described above, it has the option to introduce "fresh evidence" by applying to re-open its own case.

**IV. CONCLUSION**

16. For all or any one or more of the foregoing reasons, the Prosecution's case fails the conjunctive exceptional circumstances and irreparable prejudice test. Leave to appeal must therefore be denied and the Defence respectfully submits that the Application should be dismissed.

Respectfully Submitted,



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**Courtenay Griffiths, Q.C.**  
**Lead Counsel for Charles G. Taylor**

Dated this 27th Day of January 2010,  
The Hague, The Netherlands

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<sup>24</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 14 January 2010, p. 33368.

**LIST OF AUTHORITIES**

**Prosecutor v. Taylor**

*Prosecutor v. Taylor*, SCSL-03-01-862, “Defence Response to the Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-examination”, 23 November 2009

*Prosecutor v. Taylor*, SCSL-03-01-T-865, “Decision on Prosecution Motion in Relation to the Applicable Legal Standards governing the Use and Admission of Documents by the Prosecution during Cross-Examination”, 30 November 2009

*Prosecutor v. Taylor*, SCSL-03-01-T-875, “Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination”, 18 January 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-882, “Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-examination”, 21 January 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-883, “Defence Response to the Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-examination”, 22 January 2010

*Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 02 December 2009

*Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 14 January 2010

*Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 21 January 2010

**RUF**

*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

*Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005

**CDF**

*Prosecutor v. Norman et al.*, SCSL-04-14-T-669, “Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal”, 17 January 2005



**ICTY**

*Prosecutor v. Prlić*, IT-04- 74-T, "Order Clarifying Decision of 27 November 2008", 12 January 2010

<http://www.icty.org/x/cases/prlic/tord/en/100112.pdf>