1124)

SCSL-03-01-T
(31018-31026)

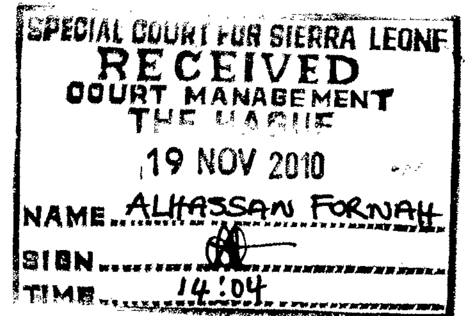
31018

**SPECIAL COURT FOR SIERRA LEONE**
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Ms. Binta Mansaray

Date filed: 19 November 2010




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

Case No. SCSL-03-01-T

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**PUBLIC**

**PROSECUTION RESPONSE TO "PUBLIC WITH DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON THE DEFENCE MOTION FOR ADMISSION OF DOCUMENTS AND DRAWING OF AN ADVERSE INFERENCE RELATING TO THE ALLEGED DEATH OF JOHNNY PAUL KOROMA"**

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## I. INTRODUCTION

1. The Prosecution files this Response to the *"Public Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma"*("Application").[1]

2. The Prosecution opposes the Application. No "exceptional circumstances" arise and the decisions in issue do not give rise to "irreparable prejudice" as the decisions are remediable upon final appeal. The Application for leave to appeal should therefore be denied.

## II. ARGUMENTS

3. By way of a preliminary point, it is of note that the Defence utilizes a considerable portion of the Application arguing the merits of the appeal.[2] The issue before the Trial Chamber on an application for leave to appeal is; however, whether the party seeking leave to appeal can meet the conjunctive conditions of "exceptional circumstances" and "irreparable prejudice" pursuant to Rule 73(B).[3] It is patently not for the Trial Chamber to make its decision on the basis of the merits of the appeal at the leave to appeal stage.[4]

4. In respect of interlocutory appeals relating to the admissibility of evidence, the Appeals Chamber of the ICTR has stated that "[i]t is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial, it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the **absolute exception** when deciding the admissibility of evidence."[5] Further, in its delineation of the applicable

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1122, "Public Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inferences Relating to the Alleged Death of Johnny Paul Koroma", 15 November 2010 ("**Application**").

[2] The Application at pp.4, 5 and 6 addresses the "Grounds of Appeal".

[3] *Prosecutor v Sesay et al.*. SCSL-2004-15-PT-14, "Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder", 13 February 2004 ("Sesay Decision on Motions for Joinder"), para.10.

[4] As noted by the Defence in previous filings, this Court has condemned the practice of re-litigating the decision at issue at the certification stage of proceedings. See *Prosecutor v. Taylor,* SCSL-03-01-T-548, "Confidential Defence Response to 'Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168', 30 June 2008, para.12, referring to *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005 ("**Sesay Decision on Exclusion of Statements**"), para.15..

[5] *Nyiramasuhuko v. The Prosecutor,* Case No. ICTR-98-42-AR73.2, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October 2004, para 5. Emphasis added.

law,[6] the Defence omits significant language from the 28 April 2005 Trial Chamber I decision concerning the test for granting leave to appeal interlocutory decisions under Rule 73 (B).[7] In that Decision, Trial Chamber I quoted with approval its own prior decision which stated that "[a]s a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a **high threshold** that must be met before this Chamber can exercise its discretion to grant a leave to appeal."[8] The Defence has not demonstrated that this request for leave to appeal rises to either this "high threshold" or the level of an "absolute exception".

*Failure to establish Exceptional Circumstances*

5. The Defence fails to establish "exceptional circumstances". The Defence arguments in support of such alleged "exceptional circumstances" in paragraphs 11 and 13 are circular. All evidence offered by the Defence is presumably - in its view - exculpatory, or the Defence would not be seeking its admission. Therefore the fact that, in the view of the Defence, the evidence it seeks to admit pursuant to Rule 92*bis* is exculpatory cannot of itself constitute "*exceptional* circumstances".

6. Moreover, the Defence fails to demonstrate that a question of fundamental legal importance arises that would justify leave to appeal. The argument in paragraph 12 is irrelevant to the threshold for leave to appeal ,as it is an issue of the Defence's own creation. The Decision was not premised on the statement of DCT-032 being relevant to an omission of the Accused. Rather, the Majority properly assessed the statement in light of its intended use and correctly determined that the statement was intended to refute Prosecution witnesses' testimonial evidence of the murder of Johnny Paul Koroma by subordinates of the Accused on his orders.[9] There is no issue, therefore, regarding the application of Rule 92*bis* to omissions to act. Even were this non-issue to be of relevance, there already is case law, including from

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[6] Application, paras.4-7.

[7] Sesay Decision on Exclusion of Statements. Cited at para.6 of the Application.

[8] Sesay Decision on Motions for Joinder, para.10. Cited at para.17 of the Sesay Decision on Exclusion of Statements. Newspaper Decision page 4; *Prosecutor v. Bagasora* et al. , ICTR-98-41-T, "Decision on the Prosecutor's Motion for Admission of Written Witness Statements Under RUle 92 *bis*", 9 March 2004, para. 16. Emphasis added.

[9] *Prosecutor v. Taylor*, SCSL-03-01-T-1119, "Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", 11 November 2010, Judge Julia Sebutinde dissenting ("**Decision**"). para.25

this Trial Chamber, to the effect that the prohibition in Rule 92*bis* relating to acts and conduct of the Accused applies to omissions.[10] The Defence did not seek leave to appeal this decision.

7. Further, the Defence's argument regarding the interpretation of the prohibition on admission under Rule 92*bis* as being limited to statements submitted by the Prosecution or Co-Accused and going to *prove* acts or conduct of the Accused[11] is defeated by the plain language of the rule and by case law, including of this Trial Chamber. Both make clear that the prohibition applies to evidence introduced by both parties to "prove or disprove" the Accused's acts or conduct.[12] The Appeals Chamber has analyzed Rule 92*bis* in the context of this case. [13] In that analysis, the Appeals Chamber examined the wording of Rule 92*bis* (A)[14] in terms of its ordinary meaning. The Appeals Chamber stated that "by its express terms, Rule 92*bis* applies to information tendered "in lieu of oral testimony" and that "these words must be given their natural and ordinary meaning".[15] Likewise the Appeals Chamber looked to the ordinary meaning to determine that the use of the word "including" implied there is no express limitation on the form of the "information" that can be admitted under the rule.[16] Exactly the same analysis is appropriate in the instant case, to determine that Rule 92*bis* excludes information that goes to "proof of the acts and conduct of the accused", irrespective of whether an application is made by the Prosecution or the Defence. In this regard, the Appeals Chamber observed that Rule 92*bis*, "only applies to a special type of information, namely, information that does not go to the acts and conduct of the accused" according to its ordinary

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[10] *Prosecutor v. Taylor*, SCSL-03-1-T-1099, "Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92*bis*- Newspaper Article", 5 October 2010 ("Newspaper Decision"), p.4 (citing at footnote 13 to *Prosecutor v. Galić*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)", 7 June 2002 ("**Galić Interlocutory Appeal Decision**"), para.11).

[11] Application para.8a citing to Dissenting Opinion of Judge Julia Sebutinde, paras.3-4 and 5-8

[12] Newspaper Decision, p.4, citing at footnotes 12 and 14 to *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1125, "Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements Under Rule 92*bis*", 15 May 2008, paras.34-35) and *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92bis", 9 March 2004, Para. 16.

[13] *Prosecutor v. Taylor*, SCSL-03-01-T-721, "Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 6 February 2009 ("**Taylor Documents Decision**"); *Prosecutor v. Norman et al*, SCSL-2004-14-AR73, "Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005 ("**Fofana Documents Decision**").

[14] Rule 92bis (A) provides that: "In addition to the provisions of Rule 92*ter*, a Chamber may, *in lieu* of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused".

[15] Taylor Documents Decision, para.30.

[16] Taylor Documents Decision, para.31.

meaning.[17]

8. Furthermore, the more general analysis of the Appeals Chambers of both the Special Court[18] and the ad hoc tribunals[19] makes plain that Rule 92*bis* was primarily intended for "crime-base" evidence and to promote the efficiency of the trial by enabling such information to be tendered in documentary form. In the circumstances of this Application, the information does not relate to "crime-base" evidence but rather is intended to refute evidence of a murder by the Accused's subordinates on his order. Given that the Appeals Chamber jurisprudence supports an ordinary reading of the wording of Rule 92*bis* and considering that the primary intention of the rule was to receive information pertaining to "crime-base evidence," and that admission of evidence under the rule is discretionary, no fundamental issue of law can reasonably be said to arise.

9. Moreover, as the Decision points out, in this case the Defence seeks to admit an affidavit of DCT-032 even though the witness was available and even previously scheduled to testify.

10. In these circumstances, the Majority correctly found that there cannot be exceptional circumstances to justify admission of written evidence in lieu of the witness's oral evidence.[20] For the same reason the Defence has not established exceptional circumstances justifying certification to appeal a discretionary ruling on evidence admission

*Failure to establish Irreparable Prejudice*

11. The Defence fails to establish that the decision will result in irreparable prejudice.[21] Irreparable prejudice only arises where the Trial Chamber's decision is not remediable on final appeal.[22] However, the decisions in question are capable of being cured or resolved on final appeal against judgment.

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[17] Taylor Documents Decision, para.33. Also note Decision, para.21, where the Majority states that it is "trite law that the words of a statute must be given their ordinary meaning".
[18] See for example, Fofana Documents Decision, Separate Opinion of Justice Robertson, paras. 12-14,
[19] Galić Interlocutory Appeal Decision, para.12
[20] Decision, para 27.
[21] The Defence argument that the material sought to be admitted pursuant to Rule 92*bis* is so crucial to their case that leave must be granted now is undermined by the Defence's argument that the material is not significant enough to warrant cross-examination by the Prosecution . *Prosecutor v. Taylor*, SCSL-03-01-T-1114, "Public with Confidential Annex One Defence Reply to Confidential Prosecution Response to Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", 4 November 2010, para.16. (As cited in the Decision, para 13).
[22] *Prosecutor v. Norman et al.*, SCSL-04-14-T-319 "Decision on Prosecution Appeal against the Trial Chamber's Decision of 2 August 204 Refusing Leave to File an Interlocutory Appeal", 17 January 2005, ("**Norman Interlocutory Appeal Decision**"), para. 29

12. The first issue raised in the Application concerns the Majority's refusal to admit the affidavit of DCT-032, which concerns the allegation that the Accused ordered his subordinates to kill Johnny Paul Koroma. However, should the Trial Chamber in its Judgement make a finding that the Accused ordered the killing of Johnny Paul Koroma by his subordinates, the Defence can challenge this finding, including by arguing that the Majority erroneously refused to admit the affidavit of DCT-032. In its Judgement, the Appeals Chamber could then decide to admit the documentation and consider it in relation to relevant findings.

13. The second issue raised in the Application concerns the Majority's refusal to admit the record of disbursements made by the Prosecution to DCT-032 and the indemnity letter written by the Prosecution to DCT-032. Similarly, should the Trial Chamber ultimately make findings on these issues in relation to which the Defence takes issue, the Defence can make the relevant arguments on appeal, including an argument that the Majority erroneously refused to admit this ancillary documentation. On appeal, the Appeals Chamber could decide to admit the documentation and consider it in relation to related findings.

14. In relation to both impugned decisions, the issue is one of non-admission of evidence by the Trial Chamber. In this regard, the Appeals Chamber has previously held that:

> *"[i]t may, however, be pointed out that, as a matter of law, wrongful admission of evidence cannot cause, "irreparable prejudice" to the rights of an Accused person to a fair trial since it can, depending on the particular facts and circumstances of the case and the nature of the evidence, properly be a ground for reversal, in the event of a conviction. It cannot therefore plausibly be contended that the wrongful admission of evidence is a matter that "cannot be cured or resolved by final appeal against judgement".*[23]

Even though that decision referred to the admission, rather than the non-admission, of evidence, it is submitted that the same analysis applies in circumstances where, as is the case here, the documentation has been adequately identified such that on appeal the Appeals Chamber is able to consider whether any prejudicial error was made by the Trial Chamber in refusing to admit the same.

15. Further, the Appeals Chamber has stated that:

> *"[t]he underlying rationale for permitting such [interlocutory] appeals is that certain*

[23] Sesay Decision on Exclusion of Statements, para.30. The Appeals Chamber further stated that "it cannot, therefore, be plausibly contended that the wrongful admission of evidence is a matter that "cannot be cured or resolved by final appeal against judgement".

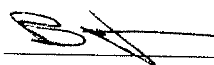
*matters cannot be cured or resolved by final appeal against judgment. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules".*[24]

16. For the reasons stated above, the decisions at issue in this application for leave to appeal fall squarely within this category of "most interlocutory decisions… capable of effective remedy in a final appeal".[25] Thus, "irreparable prejudice" does not arise and the Defence Application should be dismissed.

## III. CONCLUSION

17. As the Defence has failed to satisfy either of the two conjunctive branches of the threshold required by Rule 73(B), the Prosecution respectfully requests that the Trial Chamber dismiss the Application.

Filed in The Hague,
19 November 2010
For the Prosecution,



Brenda J. Hollis
The Prosecutor

[24] Norman Interlocutory Appeal Decision, para. 29.
[25] Ibid.

# Index of Authorities

## SCSL

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*Prosecutor v. Taylor,* SCSL-03-01-T-548, "Confidential Defence Response to 'Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168', 30 June 2008

*Prosecutor v. Taylor,* SCSL-03-01-T-1119, "Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", 11 November 2010

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**ICTY**

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