



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

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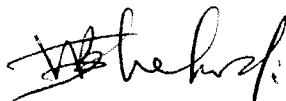
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THE SPECIAL COURT FOR SIERRA LEONE

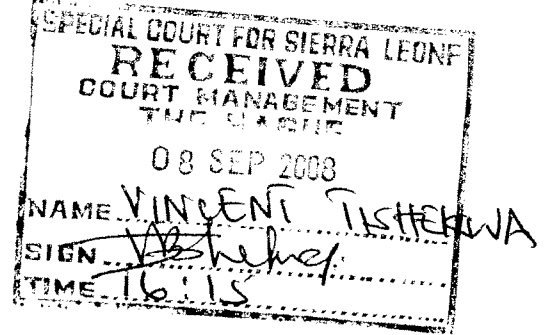
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 8 September 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO "PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION REGARDING THE TENDER OF DOCUMENTS"

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munday
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. The Defence files this response to the “*Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents*” dated 25 August 2008 (the “Application”)¹.

II. BACKGROUND

2. On 25 August 2008, the Prosecution filed an Application pursuant to Rule 73(B) of the Rules of Procedure and Evidence (the “Rules”), seeking leave to appeal the Trial Chamber’s oral decision of 21 August 2008 regarding the tender of documents in the current proceedings (the “Decision”).
3. During court proceedings on 21 August 2008, the Prosecution sought to place a document before witness TF1-367.² Defence Counsel asked the Court for “some foundation as to the basis upon which this particular document [was] being placed before the witness.”³ The Prosecution Counsel did not provide foundation and instead replied by stating; “I don’t need to place it before the witness, but I would move it now into evidence as a relevant document under 89(C).”⁴
4. Consequently, the Prosecution applied “to admit [the document] *along* with the testimony”.⁵[emphasis added] In response, the Defence concluded, “Absent [of] such foundation we submit that Rule 89 does not allow for the admission of this document through this witness...”⁶

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-568, “Confidential Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents”, 25 August 2008 (“the Application”)

² *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 21 August 2008 (“Transcript”), page 14245, lines 8-10.

³ Transcript, page 14245, lines 11-13.

⁴ Transcript, page 14245, lines 24-26. This differs from the Application’s account at, para. 5.

⁵ Transcript, page 14251, lines 20-21. The Defence submits that the Prosecution’s request to admit the document *along* with the testimony of the witness confused matters and moreso by stating that they were not sure ‘about the words *through* the witness’. Furthermore, by stating that they intended to submit the document *along* with the testimony, it is evident that they did not have in mind admitting the documents without a witness.

⁶ Transcript, page 14252, lines 26-28.

5. The Trial Chamber then issued the decision:

“We have considered the submissions in this case. If the Prosecution wishes to tender a document under Rule 89(C) through a witness, they need to lay foundation and in the instant case there is no sufficient foundation. If a document is to be tendered without a witness, then the application should be made under 92bis of the rules.”⁷

6. The Defence submits that the Application should be denied as it fails to meet the Rule 73(B) threshold for granting leave to appeal in that:

- i. The issue raised in the Application is purely an evidential and procedural issue; therefore one that cannot be dealt with under Rule 73(B).
- ii. Further/alternatively The Prosecution has failed to establish an error of law in the Trial Chamber’s decision;
- iii. Further/alternatively, the Prosecution has failed to establish *exceptional circumstances* as required under Rule 73(B) of the Rules;
- iv. Further/alternatively, the Prosecution has failed to establish *irreparable prejudice* as required under Rule 73(B) of the Rules.

III. LEGAL STANDARD

7. The Defence agrees with the Prosecution’s articulation of the applicable legal standard when considering an application for leave to file an interlocutory appeal in paragraphs 11 - 13 of the Application. The Defence however emphasises that whether to grant leave for an interlocutory appeal or not is a discretionary exercise and the threshold is very high.⁸ This is designed to ensure that interlocutory appeals only proceed in very limited and exceptional circumstances to avoid encumbering and unduly delaying trials.⁹ As Trial

⁷ Transcript, page 14253, lines 1-6.

⁸ *Prosecutor v. Sesay et al*, SCSL-2004-15-PT-357, “Decision on Defence Application for Leave to Appeal Ruling of the 3 February 2005, on the Exclusive Statements of Witness TF1-141” 28 April 2005, para.17.

⁹ *Prosecution v Sesay et al* SCSL 04-15-PT-150 “Decision on Prosecution Application for Leave to File an Interlocutory Appeal against Decision on Motion for Concurrent Hearing of Evidence Common to cases SCSL-2004-15-PT and SCSL-2004-16-PT”, 1 June 2004, para 21.

Chamber I, *Sesay* decision demonstrates, Rule 73(B) is a restrictive provision.¹⁰

8. Further, the Defence notes that when the Prosecution cites the Appeals Chamber decision that ‘certain matters cannot be cured or resolved by final appeal against judgment’ it omits the consideration that ‘most decisions will be capable of effective remedy in final appeal’.¹¹

IV. ARGUMENTS

a) Prosecution fails to establish ‘Error of Law’

9. The Prosecution alleges that the Trial Chamber misinterpreted Rule 89(C) of the Rules in that:
 - a) the Chamber’s interpretation of Rule 89(C) is inconsistent with the established practice of the court; and
 - b) the Chamber’s interpretation imports additional requirements to the sole condition of relevance under Rule 89(C).
10. The Defence submits that the Prosecution has failed to establish any error of law in the Trial Chamber’s decision. Firstly, it not correct, as the Prosecution contends, that the Trial Chamber ruled that in order “to tender a document under Rule 89(C) it must be done through a witness”¹² [emphasis added]. This assertion misstates the Trial Chamber’s ruling entirely. The Trial Chamber’s ruling addressed a contingent situation “*if*” the Prosecution sought to admit a document under Rule 89(C) through a witness, or without a witness. [emphasis added] This arose from the uncertainty on the Prosecution’s part as to how it sought to admit the particular document at issue. It was not clear whether the Prosecution sought to introduce the document in question

¹⁰ *Prosecutor v. Sesay*, SCSL-01-03-T-1001, “Decision on Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses”, 25 February 2006, para.12.

¹¹ *Prosecutor v Norman* SCSL-04-14-T-319 “Decision on Prosecution Appeal Against the Trial Chamber’s Decision of 2 August 2004 Refusing leave to file an Interlocutory Appeal”, 17 January 2005, para 29.

¹² Application para.15

through the witness or as Counsel for the Prosecution stated, *along* with the testimony of the witness, or *without* a witness¹³. [emphasis added]

11. Secondly, the Defence disputes the Prosecution's assertion that the Trial Chamber in ruling that if the Prosecution sought to introduce the document at issue through the witness, then they ought to lay foundation first, amounted to an importation of additional requirements to interpretation of Rule 89(C). It is established in law and in practice that before a witness is questioned on the content of a document, it must be established that the witness has some knowledge of the contents of the document. Otherwise to admit a document through a witness without sufficient foundation would be tantamount to leading the witness contrary to the rules of evidence of this court.¹⁴
12. Further, the Defence submits that the 'compartmentalised' interpretation of Rule 89(C) advocated by the Prosecution is not tenable. While relevance might be the only express legal requirement in terms of the Rule, this provision is not couched in exclusive terms and may be read in conjunction with other rules of evidence as the Trial Chamber did in this case. The Prosecution's argument overlooks the inherent jurisdiction of the court to interpret any provision of the Rules in a manner that is consistent with the Accused's fair trial rights or the proper administration of justice.
13. As Trial Chamber I has ruled, the court has an "inherent jurisdiction to exclude evidence where its probative value is outweighed by its prejudicial effect".¹⁵ In that case, the Chamber held that "the Accused [would] be unfairly prejudiced if documents pertaining to their acts and conduct [were] admitted into evidence without giving the Defence the opportunity of cross-examination".¹⁶ There was therefore nothing wrong in the Trial Chamber exercising its discretion to ensure a fair trial by ruling that if the Prosecution

¹³ Transcript, pg.24245, line 8-10

¹⁴ *Prosecution v Sesay et al*, SCSL-04-15-T-313, "Ruling on the Admission of Command Structure Chart as an Exhibit", 4 February 2005, para 14. See also Transcript, pg.14251. 11-25.

¹⁵ *Prosecutor v Sesay et al*, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr Koker", 23 May 05 para 7. *Prosecutor v Norman*, "Decision on Prosecution's Request to Admit Evidence into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", 14 July 2005 p.3.

¹⁶ *Ibid* p.4.

sought to tender the document at issue through the witness under Rule 89(C), it ought to lay foundation with the witness first. Most importantly, that interpretation does not import additional requirements to Rule 89(C). It is merely an interpretation that is consistent with the inherent powers of the court in terms of the Rules.

14. Thirdly, the Defence submits that there was nothing wrong in the Trial Chamber's ruling that if a party seeks to tender a document through a witness under Rule 89(C), then it ought to lay sufficient foundation with the witness first, and if on the other hand, it seeks to introduce a document without a witness, then the available recourse would be the procedure under Rule 92*bis*.¹⁷ Quite to the contrary, it is the Prosecution's interpretation of Rule 89(C) which is fundamentally flawed both in principle and in logic. Pursued to its illogical conclusion, the Prosecution's argument is that any document which is *prima facie* relevant should automatically be admitted into evidence with or without a witness. This interpretation of Rule 89(C) widens the scope of the provision beyond recognition and opens the floodgates for a wholesale admission of any evidence that has a semblance of relevance. Further, the interpretation makes a mockery of the safeguards in Rule 92*bis* and renders that Rule obsolete. Evidence that fails the restrictive Rule 92*bis* standard could easily find its way onto the record via Rule 89(C) merely on a *prima facie* showing of relevance.

15. Further, the Prosecution's interpretation of Rule 89(C) opens the door for counsel to lead evidence from the bar contrary to established rules of evidence. If documents were admitted under Rule 89(C) without a witness simply on the basis of relevance, as Prosecution Counsel sought to do, then the party tendering the document would have to speak on the relevance of the document, thus leading evidence from the bar. This would be problematic where the other party challenges the relevance of the document as they could not cross-examine counsel opposite on the issue. The Prosecution's interpretation of Rule 89(C) is therefore not tenable as it would deny the

¹⁷ Transcript, pg. 14249, ln. 6-16

Defence its fundamental right to challenge evidence against it. As Trial Chamber I has ruled, the Accused would be unfairly prejudiced if documents pertaining to their acts and conduct were admitted into evidence without giving the Defence the opportunity of cross-examination”.¹⁸

16. The Defence also disputes the contention by the Prosecution that Trial Chamber’s interpretation of Rule 89(C) is inconsistent with the practice of this court.¹⁹ The Defence submits that the Prosecution’s argument in this regard is based on a misreading of the relevant cases. In the *Sesay* decision cited by the Prosecution,²⁰ the relevance, and thereby the admissibility of the relevant document in that case was established through a witness.²¹ [emphasis added] In the Appeals Chamber’s *Fofana* decision,²² which is also cited by the Prosecution, while the court noted that the document at issue in that case should have been admitted under Rule 89(C) without a witness, it noted that witnesses would then have to be made available for purposes of further clarification and cross-examination in relation to the documents.²³ In both cases the respective documents at issue were therefore not without a witness *per se*. There is therefore nothing in the Trial Chamber’s ruling in the present case which is inconstant with those cases.

17. The Prosecution has therefore failed to establish any error of law in the Trial Chamber’s ruling and therefore, leave to appeal must be denied.

b) The Prosecution fails to establish Exceptional Circumstance

18. As the Prosecution rightly concedes, for leave to appeal to be granted under Rule 73(B), it is not enough to merely establish an error of law in the Trial Chamber’s decision. The alleged error of law must give rise to exceptional circumstances and results in irreparable prejudice. In the Application, the

¹⁸ Ibid

¹⁹ Application, para 15.

²⁰ *Prosecutor v Sesay et al*, SCSL-04-15-T-620, “Decision on Prosecution Motion to Admit into Evidence a Document Referred to Cross-Examination”, 2 August 2006.

²¹ Ibid p.3.

²² *Prosecutor v Norman et al*, SCSL-04-14-AR65-371, “Fofana – Appeal Against Decision Refusing Bail”, 11 March 2005.

²³ Ibid para 28-30.

Prosecution contends that the alleged errors of law in the Trial Chamber's interpretation of Rule 89(C) give rise to exceptional circumstances and occasion irreparable prejudice in that:

- a) the addition of new conditions to the admission of evidence under Rule 89(C) raises an issue of fundamental legal importance;
- b) the question of the admission of documents without a witness under Rule 89(C) is a general principle to be decided for the first time at the Appellate level; and
- c) the Chamber's interpretation of Rule 89(C) restricts the Prosecution's ability to present documentary evidence which go to the acts and conduct of the accused, and thus interferes with the cause of justice.

Issue of fundamental legal importance

19. The Prosecution contends that the Trial Chamber's ruling adds new conditions to the admission of evidence under Rule 89(C) and that this creates an issue of fundamental legal importance.²⁴ As argued above, the Trial Chamber did not add new conditions *per se* to the requirement of relevance under Rule 89(C). The Chamber merely read the rule in conjunction with other established rules of evidence where a document is sought to be tendered through a witness. Secondly, the Prosecution has not established that documents have previously been submitted without witnesses and therefore that the Trial Chamber's decision is contrary to the practice of this court. The Prosecution therefore fails to establish an error of law in the Trial Chamber's decision, let alone, one that raises an issue of fundamental legal importance.

Issue of General Principle to be decided for the first time

20. The Defence disputes that the Trial Chamber's decision raises a general principle to be determined for the first time by this court. The general principle of admissibility of documents tendered in the absence of a witness was discussed at length in *Prosecutor v Norman et al.*²⁵ The general principle

²⁴ Application, para 16.

²⁵ *Prosecutor v Norman et al* SCSL-04-14-T-447 "Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", 14 July 2005, p.4.

relevant to present purposes was also discussed at the appellate level in the *Fofana* Appeals decision. As discussed above, in that case, while the Appeals Chamber suggested that the document at issue in that case could have been admitted under Rule 89(C) without a witness, the court left the window open for a witness who could speak on the document to be called for clarification purposes, and for cross examination.²⁶ Therefore, the point at issue in this case does not broach a novel legal issue of any fundamental importance which would require further articulation.

21. Further, the Defence submits that the question of the admissibility of evidence is settled in international criminal law jurisprudence. The issue therefore does not necessarily require further articulation at the appellate level as guidance could also be sought from the jurisprudence of other tribunals.²⁷ The Prosecution's case in this instance therefore does not rise to the standard of exceptional circumstances and the Application should be denied.

Cause of justice might be interfered with

22. The essence of the Prosecution's argument under this heading is that it should have access to Rule 89(C) for documents that go to the acts and conduct of the Accused where it does not wish to call a witness or is unable to do so and that denying it the opportunity to do so would interfere with the cause of justice. As argued above, it is untenable that Rule 89(C) could be used to subvert the safeguards under Rule 92bis. Quite to the contrary, the cause of justice would be interfered with if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity of cross-examination.²⁸ Therefore, the cause of justice would be interfered with if the Prosecution were not prevented from tendering documents that go to the conduct of the Accused without a witness through Rule 89(C).

²⁶ *Prosecutor v Norman et al*, SCSL-04-14-AR65-371, "Fofana – Appeal Against Decision Refusing Bail", 11 March 2005, para. 28 -30.

²⁷ *Op cit. Prosecutor v. Sesay et al*, 28 April 2005 para.19. See also *Nyiramasuhuko* Decision Case No. ICTR 98 42 AR 73.2, Decision on Pauline Nyiramasuhuko's Appeal on Admission of Evidence, 4 October 2004, para 5.

²⁸ *Ibid* p.4.

23. The Prosecution has therefore failed to establish exceptional circumstances as required under Rule 73(B) and leave to appeal must be refused.

c) Failure to establish Irreparable Prejudice

24. The Defence submits that the Prosecution contention that it would suffer irreparable prejudice if the Decision were allowed to stand in that certain documents could no longer be tendered is exaggerated and ill-conceived.²⁹ The Prosecution would still be able to tender any document through Rule 89(C) or other provisions in the Rules of the Court if proper procedures are followed. The document that Counsel for the Prosecution sought to introduce into evidence for instance could have been admitted into evidence had counsel led proper foundation with the witness. Further, as the Chamber opined, the document could still be admitted under Rule 92*bis*, subject to the requirements therein. The Prosecution's failed attempt to take the easy way out in view of the objections by the Defence on foundation could not by any stretch of imagination be considered irreparable prejudice. What the Prosecution alleges to be irreparable prejudice in this case results from its own reluctance to take appropriate alternative recourse on the admission of documentary evidence. The Prosecution therefore cannot be heard to complain.
25. Further, the Prosecution's contention that the Trial Chamber's decision will now prevent all documents without a witness going to the acts or conduct of the accused being tendered as evidence³⁰ is untenable as it is based on a misunderstanding of the application of Rule 89(C). The submission confirms the ill-conceived perception by the Prosecution that Rule 89(C) could be used to sidestep the fair trial safeguards in Rule 92*bis* on the admission of documentary evidence. Further, the Defence submits that these documents would still be inadmissible anyway on the basis of the court's inherent jurisdiction to exclude documents whose probative value is outweighed by

²⁹ Application, Para 20.

³⁰ Application, Para 20 Lines 1-4.

their prejudicial effect, as considered above. The Prosecution has therefore failed to establish irreparable prejudice as required under Rule 73(B) and leave to appeal must be refused.

26. The Defence submits further that the question raised in this case is purely an evidential and procedural issue on the admission of documents into evidence. As a matter of law, wrongful admission [or non-admission] of evidence cannot result in irreparable prejudice as a reversal can be made after the final judgment.³¹ Therefore other than failing the irreparable prejudice test, the Prosecution has pursued the wrong procedure. An application for leave to appeal under Rule 73(B) is not the correct procedure under the circumstances as the issue is capable of effective remedy in the final appeal.³²

V. CONCLUSION

27. For any one or more of the foregoing reasons, the Defence respectfully submits that the Prosecution has failed to satisfy the conjunctive standard of Rule 73(B), requiring a demonstration of both *exceptional circumstances* and *irreparable prejudice* in order for the leave to appeal the Decision to be granted. Leave to appeal must therefore be denied.

Respectfully Submitted,

Shel

SILAS CHEKERD

for **Courtenay Griffiths, Q.C.**

Lead Counsel for Charles G. Taylor

Dated this 8th Day of September 2008

The Hague. The Netherlands

³¹ Op. cit. *Prosecutor v Sesay et al* 28 April 2005, para. 30.

³² *Prosecutor v Norman* SCSL-04-14-T-319 “Decision on Prosecution Appeal Against the Trial Chamber’s Decision of 2 August 2004 Refusing leave to file an Interlocutory Appeal”, 17 January 2005, para 29.

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