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SCSL-03-01-T
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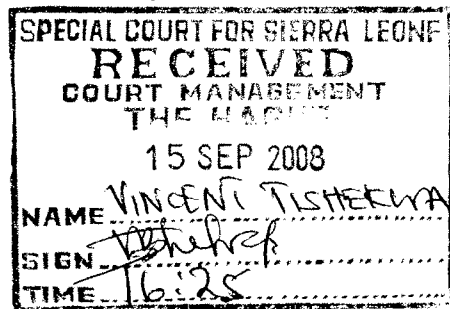
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 15 September 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO “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

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Reply to the “*Defence Response to ‘Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents’*”.¹
2. The Response identifies three grounds on which the Defence assert that the threshold for leave to appeal has not been met by the Prosecution: failure to establish an error of law, failure to establish exceptional circumstances, and failure to establish irreparable prejudice. In relation to these three grounds, the Prosecution replies as follows.

II. ARGUMENTS

“Establish” an Error of Law

3. The Defence Response erroneously argues that the Prosecution has failed to “establish” an error of law. In an application for leave to appeal an interlocutory decision it is necessary for the moving party to *identify* the alleged error of law, but inappropriate for the parties to re-litigate the substance of the Chamber decision.
4. The Prosecution in its Application identified two alleged errors of law for which it sought leave to appeal.² The first alleged error of law was the Chamber’s ruling that “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.”³ The Prosecution in both its oral arguments during court proceedings and in its Application made clear its position that if a document is relevant, no further foundation is required for the admission of a document.⁴
5. The second alleged error of law identified by the Prosecution is the Chamber’s ruling that “If a document is to be tendered without a witness, then the application should be made under Rule 92*bis* of the Rules.”⁵ The Prosecution’s position is that relevant documents can be admitted under Rule 89(C) without testimony from a witness who has seen the document before or has knowledge relevant to its authenticity or reliability as long as the

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-577, “Defence Response to ‘Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents’”, 8 September 2008 (“**Response**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-568 ‘Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents’, 25 August 2008 (the “Application”), para. 15

³ *Ibid*, para. 10

⁴ *Ibid*, para 15

⁵ *Ibid*, para. 10

document is capable of corroboration. In relation to a document such as that in the instant case, a witness may have evidence that is relevant to understanding the document and/or the document may corroborate the witness' testimony or the witness may corroborate the contents of the document. The Prosecution position is that such a document should be admitted under Rule 89(C) so that the document can be considered in relation to the relevant testimony.

Exceptional Circumstances

6. The Response concedes that the Prosecution has accurately stated standards for consideration of leave to appeal.⁶ As stated in the Application, jurisprudence from the Special Court recognizes that one of the situations in which exceptional circumstances exist is where the uncertainty as to the point of law could interfere with the cause of justice.⁷ The cause of justice is affected if the parties are operating under differing standards for the presentation of their evidence. To date, the Prosecution has taken a consistent position as to both Defence and Prosecution exhibits, based upon its understanding of the jurisprudence of the Special Court. This understanding is that all relevant documents are to be admitted and foundational issues of reliability and authenticity go to weight to be considered by the Chamber at the end of the case in light of all the evidence. The Defence, on the other hand, has taken inconsistent positions. Contrary to its argument that Prosecution documents cannot be admitted or even discussed with a witness without the witness providing "foundation" for the document, the Defence has itself sought the admission of many documents where the witness has stated unequivocally that they have no knowledge of the document or contents, arguing in these cases that the standard is relevance.⁸
7. The Prosecution is now approaching the latter part of the presentation of its case. It is thus important that the standards for the admission of documents be clarified in order that all

⁶ Response, para, 7

⁷ Application, para, 13

⁸ Examples of documents where the Defence sought admission based on relevance only include D-7, a letter that the witness testified he had never seen (Transcript page 3835, lines 11-29); D-50, a Personal Statement not authored by the witness and which the witness said he had no knowledge of (Transcript page 10827, lines 11-12 and 10831, lines 19-21); D-46, an autopsy report which the lay witness had no knowledge of and D-47, an Affidavit of a person not testifying which was prepared during the testimony of the witness (see Defence argument for admission, Transcript, page 10408 line 22-10409 line 7).

relevant and admissible documents are presented to the Trial Chamber for consideration and that the documents be presented in such a way that the relevant documents can be considered in conjunction with related testimony. This second point is particularly important where the evidence is as complex and voluminous as in the current trial. In such a situation, all parties benefit when documents are presented in conjunction with relevant testimony.

8. The Defence further argue that the issues addressed in the Application do not raise an issue of general principle to be decided for the first time. According to the Response, the principles raised in the application have already been decided in a decision in *Prosecutor v. Norman*.⁹ In fact, this Decision¹⁰ does not concern the issues raised in the Application. The cited Decision involved an application to admit documents under Rule 92*bis* and does not address in any way either the foundation required for the admission of documents during the testimony of a witness or under Rule 89 (C) or the issue of admission of documentary evidence outside the framework of Rule 92*bis*. The Defence has cited no jurisprudence on these issues, which further demonstrates that the issues addressed in the Application are, in fact, general principles to be decided for the first time in an International Criminal Tribunal.

Irreparable Prejudice

9. The Response relies upon dictum from a decision of Trial Chamber I to argue that irreparable prejudice cannot result from a decision on the admissibility of evidence.¹¹ However, the decision from Trial Chamber I involved a very different situation - a Defence motion to exclude statements of a witness on the basis of violations of disclosure obligations.¹² In that Decision, the Trial Chamber found that exceptional circumstances had not been established but then noted - in *dictum* - that the denial of admission of relevant evidence cannot result in irreparable prejudice since reversal can be made in the

⁹ Response, para. 20

¹⁰ *Prosecutor v. Norman et al* SCSL-04-14-T-447, "Decision on Prosecution's Request to admit into Evidence Certain Documents Pursuant to Rules 92*bis* and 89 (C)", 14 July 2005, p.4 .

¹¹ Response, para. 26

¹² *Prosecutor v. Sesay et al.* "Decision on Defence Application for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005.

final judgment¹³ The Response conflates the situation where a document is wrongfully admitted with the issue for determination in the current Application, where the Prosecution submits that the Chamber erred in failing to admit a relevant document. In the former situation, the Court does not have the evidence before it; in the latter, it has the evidence but can later refuse to consider it or find it inadmissible. These are very different situations given the distinct burdens on appeal that the parties face in order to reverse a final judgment.¹⁴ An Appeal Chamber could reverse a conviction that relied on such wrongfully admitted evidence and enter an acquittal. However, the situation is different where the Prosecution is denied the admission of relevant evidence during the trial stage. Should acquittals be entered in a final judgement, the burden would be on the Prosecution to show that if the relevant documents had been admitted, no reasonable Chamber would have found the charges not proven beyond a reasonable doubt.

10. Moreover, the Defence Response fails to appreciate that the fundamental issues arising in this ruling affect not only the document in question but also the ability of the Prosecution to present to the Chamber all relevant documents in a way that efficiently ties the documents to relevant points in the presentation of *viva voce* evidence. Many documents can be particularly relevant to a witness' testimony although the witness has never before seen the document and can provide no evidence as to its authenticity or reliability, (both of which may be established through other evidence).

III. CONCLUSION

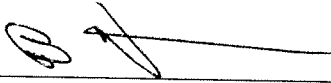
11. The arguments and assertions set out in the Response are without merit.

¹³ *Ibid.* para 30

¹⁴ In order to reverse an acquittal on any charge, the Appeal Court would have to find that no reasonable Trial Chamber would find a reasonable doubt that the charges were proven.

12. As the Prosecution has satisfied the threshold required by Rule 73(B) in order for leave to appeal to be granted, it respectfully requests that the Trial Chamber grant leave to appeal the Decision.

Filed in The Hague,
15 September 2008
For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

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LIST OF AUTHORITIES

SCSL Cases

Prosecutor v. Taylor, Case No. SCSL-03-01-T

Prosecutor v. Taylor, SCSL-03-01-T-568, “Confidential Prosecution Application for Leave Regarding the Tender of Documents”, 25 August 2008

Prosecutor v. Taylor, SCSL-03-01-T-577, “Defence Response to ‘Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents’”, 8 September 2008

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

Prosecutor v. Sesay et al, “Decision on Defence Application for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005