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SCSL-03-01-T
(24135-24140)

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THE SPECIAL COURT FOR SIERRA LEONE

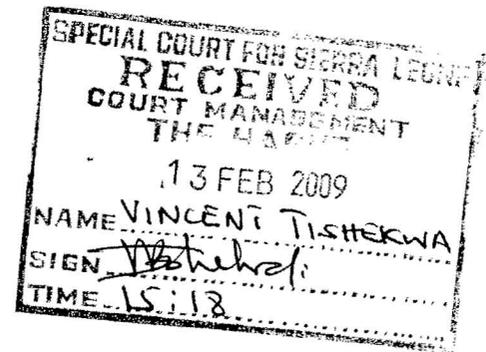
Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 13 February 2009

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO FILE
SUPPLEMENTAL ARGUMENT IN LIGHT OF THE APPEALS CHAMBER DECISION
ON "PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS CONCERNING THE
DECISION REGARDING THE TENDER OF DOCUMENTS"**

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Ula Nathai-Lutchman

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

I. Introduction

1. This is the Defence Response to the *Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents"* ("the Request")¹ filed on 10 February 2009. The Defence files this Response in accordance with the Trial Chamber's Order for Expedited Filing of the same day.²
2. In the Request, the Prosecution seeks leave to file a Supplemental Argument, which is annexed to the Request, in order to assist the Trial Chamber in deciding the admissibility of four categories of documents that are already the subject of pending motions, namely:³
 - i) "Sankoh" Documents also called "Sankoh House" Documents
 - ii) "RUF" Documents also called "RUF Office" Documents
 - iii) "Liberia Search" Documents; and
 - iv) "JPC" Documents also called "Justice and Peace Commission" Documents.
3. The Prosecution initially tried to introduce these documents through separate Motions under Rules 89(C) and/or 92bis. While these Motions were still pending, the Prosecution also tried to tender the Documents through its witness and Chief of the Evidence Unit, Mr. Taliq Malik. The court deferred the latter application pending its ruling on the Motions.
4. In the Request, the Prosecution now seeks to file supplemental arguments in relation to its deferred application. The Prosecution submits that the recent Appeals Chamber *Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents"*⁴ (the "Appeals Chamber's Decision") has a bearing on the issue of admissibility of these documents through Mr. Malik and therefore leave must be granted. In the supplemental argument, the Prosecution submits that, in accordance with the Appeal Chamber's decision, the Documents must be admitted in conjunction with the *viva voce*

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-726, Public with Annex A, Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 10 February 2009.

² *Prosecutor v. Taylor*, SCSL-03-01-T-727, Order for Expedited Filing, 10 February 2009.

³ Request, para. 2.

⁴ *Prosecutor v. Taylor*, SCSL-03-01-AR73-721, Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 6 February 2009 ("Appeals Chamber's Decision").

testimony of Mr. Taliq Malik, under Rule 89(C) as they are relevant and the witness laid sufficient foundation for their admission.

5. Notably, the Defence did not object to the addition of Mr. Malik to the Prosecution's Amended Witness List because it felt as if Mr. Malik's testimony could help the Trial Chamber assess how the Documents came into the Prosecution's possession and/or control.⁵ Yet it was never envisioned that the Prosecution would attempt to tender the Documents through Mr. Malik since, as the Prosecution concedes, he does not testify as to the contents of the Documents and thus has no significant connection to them.⁶
6. The Defence opposes the request for leave to file a supplemental argument as well as the arguments therein.

II. Submissions

7. To the extent that the Request relates to the Prosecution's application at the end of Mr. Malik's testimony on 20 January 2009, to admit the Documents in conjunction with his evidence, which application was deferred by the Trial Chamber pending its decisions on the outstanding Motions, the present Request is premature, if not superfluous, in that it relates to a matter that is comatose.
8. With respect to the substantive arguments in the supplemental argument, contrary to the Prosecution's assertions, the Appeals Chamber's Decision does not assist its case. The Prosecution misses two crucial elements in the decision. Firstly, that '[t]he procedural scheme established by Rule 89(C) and 92bis does not allow a party to circumvent the stringency of the latter rule by simply tendering a document under the former.'⁷
9. While the Appeals Chamber made this ruling in the context of an attempt by the Prosecution to tender documents under Rule 89(C) without a witness, by parity of reason, the same

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-689, Defence Objection to Prosecution Motion for Leave to Call an Additional Witness and Notice to Admit Witness' Solemn Declaration and, in the alternative, for Admission of Solemn Declaration, 8 December 2008, paras. 6-7, 11.

⁶ Request, para. 2.

⁷ Para. 33.

principle applies where a nominal witness is brought forward simply as a conduit for the tendering of documents that go to acts and conduct of the accused, as the Prosecution attempts to do with Mr. Malik.

10. Under Rule 89(C), this situation would ordinarily be addressed through the requirement that sufficient foundation must be established on a witness's competence to give evidence in relation to a particular document.⁸ That foundation would form the basis for the witness's cross examination on the contents of the document. Provenance alone falls short of that foundation.
11. In the present case, Mr. Malik is only competent to give evidence regarding the circumstances in which the Documents were obtained and secured by the Prosecution. To then allow Documents, which contain information that clearly goes to the acts and conduct of the accused simply because the Prosecution made available a witness who only had knowledge of how and where the Documents were found, would clearly defeat the fundamental safeguard in Rule 89(C) or in the alternative Rule 92*bis* route. There is nothing in the Appeals Chamber's Decision to suggest that this is what was intended in the Statute. Rather, quite to the contrary, the Appeals Chamber ruled that the provisions are mutually complementary. One therefore cannot be manipulated to defeat the other. Provenance as *indicia* of relevance is therefore not enough under Rule 89(C) as the Prosecution contends.
12. Secondly, the Prosecution's submissions in the Request also overlook the ruling by the Appeals Chamber that further to the relevance test, Rule 89(C) is also subject to the powers of the Court, pursuant to Rule 95, to exclude evidence that would bring the administration of justice into serious disrepute.⁹
13. In the present case, the Defence submits that, admitting documents which go to the acts and conduct of the accused through a process that is calculated to deny the Defence a chance to challenge the evidence (other than the tangential issue of provenance) would bring the

⁸ See Request, para. 3, citing the Appeals Chamber's Decision, para. 38.

⁹ Para. 33.

administration of justice into serious disrepute. The practical import of such a decision would be that every single document in the Prosecution's possession, no matter how far it goes to the acts and conduct of the accused, could be tendered under Rule 89(C) through Mr. Malik or any other similarly placed employee of the Prosecution. The Trial Chamber must refuse to acquiesce to that process.

III. Conclusion

14. For the foregoing reasons, the Defence submits that:

- a. The Trial Chamber must dismiss the Prosecution's Request and not consider the Supplemental Argument;
- b. Should the Trial Chamber consider the Supplemental Argument, the Documents should not be admitted through Rule 89(C) in conjunction with the testimony of Mr. Malik.

Respectfully Submitted,



 SCUS CTEKRA

Courtenay Griffiths Q.C.

Lead Counsel for Charles G. Taylor

Dated this 13th Day of February 2009

The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor, SCSL-03-01-T-727, Order for Expedited Filing, 10 February 2009

Prosecutor v. Taylor, SCSL-03-01-T-726, Public with Annex A, Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, 10 February 2009

Prosecutor v. Taylor, SCSL-03-01-AR73-721, Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, 6 February 2009

Prosecutor v. Taylor, SCSL-03-01-T-689, Defence Objection to Prosecution Motion for Leave to Call an Additional Witness and Notice to Admit Witness’ Solemn Declaration and, in the alternative, for Admission of Solemn Declaration, 8 December 2008

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 20 January 2009