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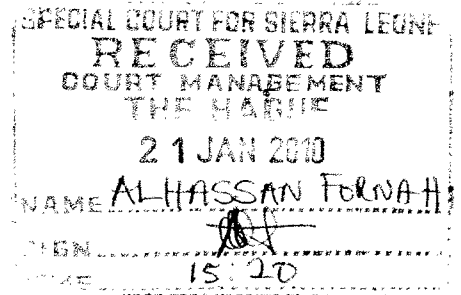
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

TRIAL CHAMBER II

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

Acting Registrar: Ms. Binta Mansaray

Date filed: 21 January 2010



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

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

Office of the Prosecutor:

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

Counsel for the Accused:

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

I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence, the Prosecution files this Motion seeking leave to appeal the oral decisions made by the Trial Chamber on 18 January 2010 refusing to allow the use of the following documents during cross-examination of the Accused:
 - i. News article entitled “West Africa, According to Mr. Taylor” dated 22 January 1999 from the periodical *Africa Confidential* (“**Africa Confidential Article**”);
 - ii. News article entitled “ECOMOG Warns ‘Warmonger Presidents’” dated 8 April 1999 from the *United Nations Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network (IRIN)* for West Africa (“**IRIN Article**”);
 - iii. Written Testimony of John Leigh, Sierra Leone Ambassador to the United States, dated 11 June 1998, before the United States House of Representatives Subcommittee on Africa (“**Leigh Testimony**”).
2. In view of the advanced stage of the cross-examination of the Accused, and the fact that this application raises similar issues to those raised in a previous Prosecution application,¹ the Prosecution requests an expedited timetable for filings and for a determination of this application.

II. BACKGROUND

3. On 30 November 2009, the Trial Chamber issued its “Decision on Prosecution Motion in Relation to the Applicable Legal Standards governing the Use and Admission of Documents by the Prosecution during Cross-Examination” (“**Documents Decision**”).² In this Decision the Trial Chamber devised a special regime applicable to “fresh evidence”³ probative of the guilt of the Accused requiring a showing that (a) it is in the interests of justice and (b) it does not violate the fair trial

¹ *Prosecutor v. Taylor*, SCSL-03-1-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.

² *Prosecutor v. Taylor*, SCSL-03-1-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**”).

³ As defined at para. 23 of the Documents Decision.

rights of the Accused in order for the fresh evidence to be *used* in cross-examination (the “**use test**”), and a showing of “exceptional circumstances” in order for the fresh evidence to be *admitted into evidence* (the “**admissibility test**”).⁴ The Trial Chamber directed that:

- i) The Prosecution may use documents containing fresh evidence in order to impeach the credibility of the Accused. The admission of such documents into evidence will be determined on a case-by-case basis;
- ii) In respect of documents containing fresh evidence that is probative of the guilt of the Accused:
 - a) the Prosecution must disclose all such documents to the Defence forthwith;
 - b) following such disclosure the Trial Chamber, on a case-by-case basis, will entertain submissions from the Parties in relation to the use and/or admission of such documents in accordance with the criteria above.⁵

4. While the Trial Chamber did not elaborate further on the test for the *use* of fresh evidence probative of the guilt of the Accused, it specified that with regard to the exceptional circumstances test for *admissibility* it would take into consideration (i) when and by which means the Prosecution obtained the documents; (ii) when it disclosed them to the Defence, and (iii) why they are being offered only after the conclusion of the Prosecution case.⁶
5. In proceedings on 18 January 2010, as Prosecution Counsel sought to use the *Africa Confidential Article*, the Defence objected to the use of portions of this document.⁷ The *Africa Confidential Article* had been marked by the Prosecution in compliance with previous Trial Chamber orders,⁸ as one it sought to use for impeachment only. After hearing the arguments of the parties,⁹ the Trial Chamber issued the following decision (“**First Impugned Decision**”):

We are of the unanimous view that the document that the Prosecution wishes to refer to first of all is new, in that it was not a document tendered by the Prosecution during its case in chief, and we do agree that with the exception of the sentence that parts have agreed, "Taylor recently boasted to journalists," et cetera, that sentence - with the exception of that sentence which in our view is quite benign, the rest of the article we're of the view

⁴ Documents Decision, para. 27.

⁵ Documents Decision, p. 13, referring to the criteria in para. 27.

⁶ Documents Decision, para. 27.

⁷ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, p. 33482.

⁸ See oral orders: *Prosecutor v. Taylor*, Trial Transcript, 3 December 2009, p. 33001; *Prosecutor v. Taylor*, Trial Transcript, 7 December 2009, pp. 33034-33035.

⁹ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, pp. 33482 – 33488.

contains material that is probative of the guilt of the accused. Now, in line with our decision of 30 November 2009 laying down the guidelines, the two-fold criteria that is to be satisfied before the Chamber will allow use of this article, we are of the view that what we've heard does not convince us that: One, it is in the interest of justice to pursue the use of this document at this stage; nor that it would not violate the fair trial rights of the accused. We therefore disallow the use of this document, except for that one sentence that I have said is benign.¹⁰

6. Later in the proceedings, the Prosecution attempted to present the *IRIN* Article, at which point the Defence objected.¹¹ The *IRIN* Article has also been marked by the Prosecution as a document it intended to use in cross-examination only for the purpose of impeaching the Accused's testimony. After hearing the arguments of the parties,¹² the Trial Chamber ruled as follows ("**Second Impugned Decision**"):

We've conferred and we've looked at the document and in particular the paragraphs that are marked in the margin, that will be on the first page and on the top of the second page, and we have no doubt that they contain material that is probative of the guilt of the accused and that goes directly to the indictment. There's also no doubt that this is new material that the Prosecution did not adduce during their case in chief. We are of the view that we have not heard anything to persuade us that its use or the use of these paragraphs would be: One, in the interests of justice; or two, that they would not be prejudicial to the fair trial rights of the accused. We therefore rule that the document cannot be used at this time.¹³

7. The Prosecution also attempted to present the Leigh Testimony.¹⁴ The Leigh Testimony had also been marked by the Prosecution as to be used for impeachment only. After hearing the arguments of the parties,¹⁵ the Trial Chamber ruled as follows ("**Third Impugned Decision**"):

The Chamber is of the unanimous view that the passage found on the fourth page of this document definitely has content that is probative of the guilt of the accused. It goes directly to the indictment. The content of this passage is new information that was not or didn't form part of the Prosecution's case in chief and it is immaterial that the Prosecution intends to use this only to prove - or to impeach the credibility of the witness. As far as the Bench is concerned, the decision of the Chamber of 30 November requires the

¹⁰ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, pp. 33488-33489.

¹¹ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, pp. 33506-33508.

¹² *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, pp. 33506-33508.

¹³ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, p. 33508.

¹⁴ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, p. 33533.

¹⁵ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, pp. 33533-33537.

Prosecution to satisfy the two-prong test and, in our view, this has not been done and so we disallow the use of this document at this time.¹⁶

III. APPLICABLE LAW

8. Rule 73(B) provides that leave to appeal may be granted in “exceptional circumstances” and to avoid “irreparable prejudice” to a party. These two limbs are conjunctive and both must be satisfied if an application for leave to appeal is to succeed.¹⁷ As recognized by the Appeals Chamber, “the underlying rationale for permitting such appeals is that *certain matters cannot be cured or resolved by final appeal against judgment*”.¹⁸
9. The categories of exceptional circumstances are not “closed or fixed” and what constitutes such circumstances necessarily depends on, and varies with, the circumstances of each case.¹⁹ Exceptional circumstances may arise “where the cause of justice might be interfered with” or where issues of “fundamental legal importance” are raised.²⁰ Notably, Trial Chamber I has stated that exceptional circumstances arise if the course of justice *might* be interfered with; there is no requirement to prove that such interference *will* definitely arise. Irreparable prejudice arises where the Trial Chamber’s decision is not remediable on final appeal.

IV. ARGUMENT

Exceptional Circumstances

Issue of fundamental legal importance

10. The importance of the issue at stake is emphasized by the cumulative nature of decisions following the same pattern of reasoning. The application of the use test in the three Impugned Decisions suggests a confusion of well-accepted legal principles related to the use and admission of documents in cross-examination. Further, the Trial Chamber has found the purpose for which a document is being used to be immaterial

¹⁶ *Prosecutor v. Taylor*, Trial Transcript, 18 January 2010, p. 33537.

¹⁷ *Prosecutor v. Sesay et al.*, SCSL-04-15-PT-014, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, 13 February 2004, para. 10.

¹⁸ *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, “Decision on Prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal”, 17 January 2005, para. 29; see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of 3rd February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005, (“**Sesay Decision**”) para.21.

¹⁹ *Sesay Decision*, para. 25.

²⁰ *Ibid.*, para. 26.

by treating all documents that may be probative of guilt in the same manner. The Prosecution notes that all three impugned decisions in the current application relate to documents intended to be used for impeachment only. The Trial Chamber's approach, resulting from an erroneous conflation of legal principles, has put the Prosecution in an unfair position throughout the cross-examination of the Accused.

11. As set out by the Prosecution in previous written submissions, the case law distinguishes between the "presentation" or "use" stage and the "admission" stage.²¹ The case law is clear that documents may be used during cross-examination in order to elicit a response from a witness,²² and that issues pertaining to the "interests of justice", "prejudice to the accused" and "exceptional circumstances" arise at the admission stage.²³ A decision dated 12 January 2010 from the ICTY Trial Chamber in the *Prlić* case further supports the argument that this Trial Chamber's application of its use test is contrary to the jurisprudence.²⁴ The ICTY Trial Chamber emphasized that different procedural rules apply to the two distinct stages of presentation/use and admission and that with regard to the former stage the Prosecution does not have to provide any justification for the use of a document in cross-examination.²⁵ According to the ICTY Trial Chamber, it is only at the admission stage that a party is required to indicate the purpose for which a document is tendered and that arguments as to admissibility are heard.²⁶ The parties in that case were specifically invited not to raise objections prematurely.²⁷
12. The use test as applied by this Trial Chamber effectively takes part of the test applied

²¹ See *Prosecutor v Taylor*, "Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", ("**Prosecution Motion - Legal Standards**") 17 November 2009, esp. at paras. 9 and 22 – 23, and *Prosecutor v Taylor*, "Prosecution Reply to Defence Response in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", 25 November 2009, at para. 7.

²² See Prosecution Motion – Legal Standards, paras 10 – 12.

²³ See Prosecution Motion – Legal Standards paras 15 – 21, referring in particular to *Prosecutor v. Prlić*, IT-04-74-T, "Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 27 November 2008, ("**Prlić Trial Chamber Decision**") and *Prosecutor v. Prlić*, IT-04-74-AR73.14, "Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 26 February 2009 ("**Prlić Appeal Decision**")

²⁴ *Prosecutor v. Prlić*, IT-04-74-T, "Order Clarifying Decision of 27 November 2008", 12 January 2010 ("**Prlić Order**").

²⁵ *Prlić* Order, pp. 3-4

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 5

in *Prlić* at the admission stage and applies it to the use stage.²⁸ In its application of the test, the Trial Chamber has incorporated factors which ought not to be determinative of the issue of the presentation or use of documentation during cross-examination.

13. In the Documents Decision the Trial Chamber articulated that it was only with regard to the admission stage that exceptional circumstances needed to be shown, and that this would include a consideration of factors such as when and by which means the Prosecution obtained the documents. Therefore, the impugned decisions unfairly raise the standard for the use of a document by permitting the same factors as should ordinarily be relevant only to the admissibility phase to be *determinative*.
14. The Trial Chamber in all three Impugned Decisions stated that the documents are “new” in that they did not form part of the Prosecution’s case-in-chief but were produced during the cross-examination of the accused. However, as stated above, the Prosecution intends to use these documents to impeach the direct testimony of the Accused. 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.
15. The *Africa Confidential* Article relates to the Accused’s assertions in his direct examination that he was the point President for peace in Sierra Leone and promoted peace in the region as a whole. The *IRIN* Article relates to the Accused’s assertions in his direct examination that other regional leaders recognized his role as “point President for peace” in Sierra Leone. The Leigh Testimony relates to the Accused’s assertions in his direct examination that the Sierra Leone government recognized his efforts as point President for peace in Sierra Leone. The Prosecution challenges all three of these assertions and should have the right to challenge the Accused on these issues using relevant documents that impeach those assertions.
16. Further, the Trial Chamber appears to have fettered its own ability to consider documentation for the limited purpose of impeachment, in circumstances where a

²⁸ That is, the “interests of justice” and “violation of the rights of the accused” criteria are considered at the admission rather than the use stage.

document also contains material that could potentially be regarded as probative of the guilt of the Accused. Professional judges are perfectly able and entitled to consider a document for a specific purpose and to disregard the evidence for other purposes.²⁹ Indeed, logically were this not so then no purpose would be served by the Defence asking the Trial Chamber to preclude the use of these documents as the Trial Chamber has already been made aware of their contents. However, the Trial Chamber, in all three Impugned Decisions, has appeared unwilling to entertain the possibility of allowing the Prosecution to use a document which the Trial Chamber would consider for impeachment only.³⁰ As a consequence, the presentation of any document that contains material potentially probative of guilt is likely to result in a successful objection by the Defence, irrespective of the fact that the purpose for its use may be impeachment only. By adopting this approach, the Trial Chamber is unnecessarily and incorrectly depriving itself of the ability to consider documentary evidence which impeaches the Accused's testimony. The Trial Chamber is therefore limiting its own truth-finding function. The intended use of material for impeachment only is a consideration that ought to form part of the Trial Chamber's assessment as to whether the use of the document would be in the interests of justice and not a violation of the Accused's fair trial rights.

17. Finally, the unduly high standard applied by the Trial Chamber is likely to be applied every time the Prosecution seeks to put a document to the Accused during the remainder of cross-examination, in circumstances where the Defence objects to that document's use. In these circumstances an issue of fundamental legal importance which has not so far been considered by the Appeals Chamber arises, giving rise to "exceptional circumstances".

Interference with the course of justice³¹

18. There is a danger that the course of justice will be interfered with because the Trial Chamber's approach prevents the Prosecution from fully exercising its right to test

²⁹ See *Prlic* Appeals Chamber Decision, para. 29, where the Appeals Chamber states that "With respect to the assessment of evidence, the Trial Chamber has the discretion to limit the purpose for which the admitted pieces of evidence may be used".

³⁰ Notably, in the Third Impugned Decision, the Trial Chamber stated that "it is immaterial that the Prosecution intends to use this only to prove – or to impeach the credibility of the witness", see the decision set out in full at p. 4 above.

³¹ See para. 9 above.

the evidence of the Accused in cross-examination. This in turn deprives the Trial Chamber of information relevant to determining what weight should be given to the testimony of the Accused, or, in some instances, of evidence that is relevant to prove guilt. The possibility that the course of justice will be interfered with gives rise to “exceptional circumstances”.

19. The First Impugned Decision deprives the Prosecution of the right to effectively cross-examine the Accused on his assertion that he was working for peace within the West Africa sub region.
20. The Second Impugned Decision deprives the Prosecution of the right to effectively cross-examine two assertions by the Accused: i) that he was recognized as a peacemaker by other West African governments in relation to the conflict in Sierra Leone and ii) that he did not possess a significant quantity of arms and ammunitions from 1997 – 2001. With regards to this second assertion, it should be noted that during the Prosecution’s case-in-chief, the Prosecution presented evidence that arms and ammunition were transferred from the Accused to the AFRC/RUF. However, it was not the intention of the Prosecution to prove violations of the United Nations embargo on the importation of arms into Liberia, as such violations fall outside the jurisdiction of the court and arguably would have been both irrelevant and prejudicial. However, given that the Accused has now testified that it was impossible for him to have supplied arms and ammunition as he had none to give, it is critical that the Prosecution be allowed to challenge these assertions by presenting evidence which would directly contradict his testimony.
21. The Third Impugned Decision deprives the Prosecution of the right to effectively cross-examine the Accused on his assertion that he was working for peace in Sierra Leone and that his positive efforts towards peace building were well known and recognized by President Kabbah and the Government of Sierra Leone who he claims were informed of his role in meeting Sam Bockarie on several occasions in 1998. The Leigh Testimony, which contains testimony by a representative of the Sierra Leone government, directly contradicts the Accused’s assertion in this regard. Again, the Accused raised this assertion in his direct examination thus making it a relevant area for impeachment.

22. It cannot be in the interests of justice to allow a witness, including an accused, to be able to tailor false evidence around documents already in evidence, secure in the knowledge that the Prosecution cannot present further evidence to refute his claims. Such an artificial and asymmetrical approach to the use of documents hinders the Trial Chamber in its search for the truth.

Irreparable Prejudice

23. As explained above, the Prosecution will necessarily suffer prejudice as a result of the First, Second and Third Impugned Decisions because the Prosecution is being prevented from fully exercising its right to test the evidence of the Accused through cross-examination. The First, Second and Third Impugned Decisions also give rise to “irreparable prejudice” because there will be no cure available upon final appeal. The only remedy would be to re-open the trial phase of the case in order to allow for further cross-examination of the Accused in relation to the documentary evidence adduced by the Prosecution, and to allow re-examination in relation to the same. Re-opening the case, post appeal, would patently be highly undesirable. Furthermore, it is not a possibility that the Appeals Chamber has so far entertained in its judgments.³²

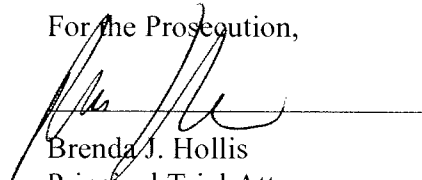
V. CONCLUSION

24. For these reasons the Prosecution seeks leave to appeal the First, Second and Third Impugned Decisions and requests an expedited timetable for a resolution of this application.

Filed in The Hague,

21 January 2010,

For the Prosecution,


Brenda J. Hollis
Principal Trial Attorney

³² See e.g. *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-A-675, “Judgement”, Appeals Chamber, 22 February 2008, para. 87.

INDEX OF AUTHORITIES

SCSL

Prosecutor v Taylor, “Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination”, 17 November 2009

Prosecutor v Taylor, “Prosecution Reply to Defence Response in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination”, 25 November 2009

Prosecutor v. Taylor, SCSL-03-1-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, Trial Transcript, 18 January 2010, pp. 33482-33489, 33506-33508, 33533-33537.

Prosecutor v. Norman et al.

Prosecutor v Norman et al., SCSL-04-14-T-319, “Decision on Prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal”, 17 January 2005.

Prosecutor v. Brima et al.

Prosecutor v. Brima, Kamara and Kanu, SCSL-2004-16-A-675, “Judgment”, Appeals Chamber, 22 February 2008.

Prosecutor v. Sesay et al.

Prosecutor v Sesay et al., SCSL-04-15-PT-014, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, 13 February 2004.

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

ICTY

Prosecutor v. Prlic, IT-04-74-T, “Decision on Presentation in Cross-Examination of Defence Witnesses”, 27 November 2008. (referred to in SCSL-03-01-T-860).

Prosecutor v. Prlić, IT-04-74-AR73.14, “Decision on the Interlocutory Appeal against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses”, 26 February 2009 (referred to in SCSL-03-01-T-860).

Prosecutor v. Prlić, IT-04-74-T, “Order Clarifying Decision of 27 November 2008”, 12 January 2010 (provided as Annex C in SCSL-03-01-T-879).