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SCSL-03-01-T
(22916-22921)

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THE SPECIAL COURT FOR SIERRA LEONE

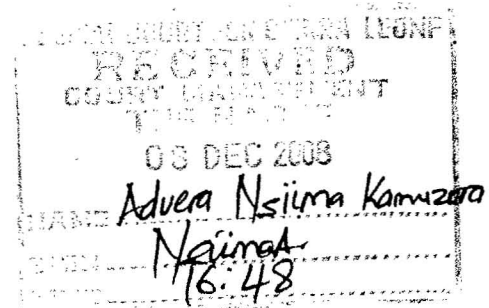
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 08 December 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**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**

Office of the Prosecutor

Ms. Brenda J. Hollis

Ms. Leigh Lawrie

Counsel for Charles G. Taylor

Mr. Courtenay Griffiths Q.C.

Mr. Terry Munyard

Mr. Andrew Cayley

Mr. Morris Anyah

I. Introduction

1. On 1 December 2008, the Prosecution filed a *Motion for Leave to Call an Additional Witness and Notice to Admit Witness' Solemn Declaration and, in the Alternative, for Admission of Solemn Declaration* ("Motion").¹ In the Motion the Prosecution seek leave to add Tariq Malik, Chief of the OTP Evidence Unit, to the Prosecution's witness list and ultimately to admit his Solemn Declaration² admitted into evidence pursuant to Rules 89(C) and 92bis, or alternatively under Rule 89(C) alone.
2. Mr. Malik's Declaration relates to the origin and custody of several sets of documents that the Prosecution is currently seeking to admit into evidence.³
3. The Defence does not oppose the addition of Mr. Malik to the Prosecution's Amended Witness List of 7 February 2008.⁴ However, if his Declaration is to be admitted under Rules 89(C) and 92bis, the Defence submits that it would unfairly prejudice the rights of the Accused if the evidence were admitted absent the opportunity for cross-examination.

II. Applicable Legal Principles

4. As the Prosecution states, Rule 73bis(E) governs requests to vary the witness list, and the Trial Chamber may grant such a request if it is *in the interests of justice*. Additionally, pursuant to Rule 66(A)(ii), late disclosure may be made to the Defence *upon good cause* being shown by the Prosecution.⁵
5. The admission of evidence is governed by Rule 89(C) and, in the case of written information, Rule 92bis.⁶

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-683, 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, 1 December 2008 ("Motion").

² Motion, Annex A, Solemn Declaration of Tariq Malik ("**Declaration**").

³ See Motion, paras. 7-10, describing the Sankoh Documents, RUF Documents, JPC Documents, and Taylor Documents (collectively "**Documents**").

⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-410, Prosecution's Amended List, 7 February 2008 ("**Amended Witness List**").

⁵ See Motion, paras. 12-13.

⁶ See Motion, paras. 14-15.

III. Submissions

No Objection to the Addition of Tariq Malik to the Amended Witness List

6. The Defence concurs that it is in the interests of justice to add Tariq Malik to the Prosecution's Amended Witness List, and thus the Declaration should be disclosed.

7. The addition of Mr. Malik as a witness is in the interests of justice because he can provide some background information as to how the Documents for which the Prosecution are seeking admission came into their possession and/or control. Such information is critical to allowing the Trial Chamber the ability to assess *inter alia* the relevance, context, reliability and authenticity of the Documents. Without having such information, the Trial Chamber cannot properly determine whether the Documents should be admitted, and if admitted, what weight should be assigned to them at the conclusion of the case.

Mr. Malik Must be Available for Cross-Examination

8. The admission of Mr. Malik's Declaration into evidence pursuant to Rules 89(C) and 92bis, absent the opportunity for cross-examination would unfairly prejudice the Defence and must not be allowed.

9. In *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, the Prosecution made an almost identical application to the one at hand.⁷ In the RUF Request, the Prosecution sought leave to add Mr. Alfred Sesay, an OTP investigator and previous employee of the Criminal Investigations Division of the Sierra Leonean Police, to the witness list; they also requested admission of a declaration relating to the origin and custody of the Sankoh Documents into evidence.⁸ However, the Prosecution in that case agreed to make the witness available for cross-examination if so requested by the Defence.⁹ Specifically, the Prosecution stated that there would be no prejudice in adding the witness since the Defence would "retain the right to cross-examine at such a time as would enable them to prepare adequately".¹⁰

⁷ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-476, Prosecution Request for Leave to Call Additional Witness and Notice to Admit Witness's Solemn Declaration Pursuant to Rules 73bis(E) and 92bis, 10 February 2006 ("RUF Request").

⁸ RUF Request, paras. 5-6.

⁹ RUF Request, paras. 1, 11.

¹⁰ RUF Request, para. 11.

10. In making a decision as to the RUF Request, Trial Chamber I considered that the Prosecution had indicated that it had no objection to the cross-examination of Mr. Sesay and ordered that he be made available for cross-examination.¹¹ The RUF Defence teams did in fact cross-examine Mr. Sesay on his declaration.¹² As a corollary then, it is clear that in this instance, not allowing the Defence to cross-examine Mr. Malik would be prejudicial to the Defence.
11. Furthermore, the contents of Mr. Malik's Declaration will attempt to add credibility to the potentially incriminatory Documents for which the Prosecution is seeking admission. His primarily second-hand knowledge about how the Sankoh House Documents, RUF Office Documents, JPC Documents and Taylor Documents came into the possession of the Prosecution could bolster the weight given by the Trial Chamber these Documents, some of which pertain to the acts and conduct of the accused, and thus adversely impact on the Defence. Thus the Defence should be given the opportunity to cross-examine Mr. Malik on each of the scenarios as they were explained to him by other people.
12. Notably, these Documents and the Declaration of Mr. Malik are being tendered very late in the Prosecution's case. Thus if the Documents and Declaration are deemed admissible by the Trial Chamber, the Defence will not have the ability to put the contents of these documents to Prosecution witnesses, thus creating further prejudice to the Defence. A small amount of this prejudice could be cured by requiring Mr. Malik to appear for cross-examination.

The Declaration Cannot Be Admitted Under Rule 89(C) Alone

13. Rule 92bis clearly governs the admission of written statements (such as the Declaration) in lieu of oral testimony. Thus the Declaration must be relevant, must possess sufficient indicia of reliability, and must not unfairly prejudice the Defence.¹³ The Defence accepts

¹¹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-534, Decision on Prosecution Request for Leave to Call Additional Witness and Notice to Admit Witness's Solemn Declaration Pursuant to Rules 73bis(E) and 92bis, 5 April 2006 ("RUF Decision").

¹² *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Trial Transcripts.

¹³ RUF Decision, pg. 4; *Prosecutor v. Norman, Kondewa, Fofana*, SCSL-04-14-T, Decision on Prosecution's Request to Admit Into Evidence Certain Documents Pursuant to Rule 92 bis and 89(C), 14 July 2005.

that the Declaration meets these criteria, as long as Mr. Malik is available for cross-examination.

14. The Prosecution reliance on the Fofana Bail Appeals Decision to support their proposition that the SCSL has previously used Rule 89(C) alone to admit a solemn declaration into evidence is misleading, since that decision was prior to the May 2007 amendments of Rule 92bis.¹⁴

15. As Rule 92bis now clearly occupies the field in relation to the admission of written statements into evidence, the Prosecution cannot admit the Declaration under Rule 89(C) alone.

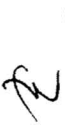
IV. Conclusion

16. The Defence does not object to the addition of Tariq Malik to the Prosecution's Amended Witness List, and disclosure of his Declaration.

17. The Defence does not object to the admission under Rules 89(C) and 92bis, provided that Mr. Malik is made available for cross-examination.

18. However, the Trial Chamber should dismiss the Prosecution's alternative request for admission of the Declaration solely under Rule 89(C) as it is not permissible according to the Rules.

Respectfully Submitted,


 SICAS CHEKERA
Courtenay Griffiths Q.C.
Lead Counsel for Charles G. Taylor
Dated this 8th Day of December 2008
The Hague, The Netherlands

¹⁴ Motion, para. 30.

Table of Authorities

SCSL Jurisprudence

Prosecutor v. Taylor, SCSL-03-01-T-410, Prosecution's Amended List, 7 February 2008

Prosecutor v. Taylor, SCSL-03-01-T-683, 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, 1 December 2008

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-476, Prosecution Request for Leave to Call Additional Witness and Notice to Admit Witness's Solemn Declaration Pursuant to Rules 73bis(E) and 92bis, 10 February 2006

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-534, Decision on Prosecution Request for Leave to Call Additional Witness and Notice to Admit Witness's Solemn Declaration Pursuant to Rules 73bis(E) and 92bis, 5 April 2006

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T, Trial Transcripts.

Prosecutor v. Norman, Kondewa, Fofana, SCSL-04-14-T, Decision on Prosecution's Request to Admit Into Evidence Certain Documents Pursuant to Rule 92 bis and 89(C), 14 July 2005