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SCSL-03-01-T  
(37621-37626)

37621



SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

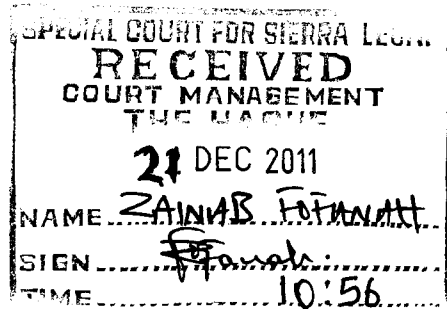
Case No.: SCSL-03-1-T

Date: 21 December 2011

PROSECUTOR

v.

Charles Ghankay TAYLOR



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DECISION ON PUBLIC WITH ANNEXES A-B  
DEFENCE MOTION TO RE-OPEN ITS CASE IN ORDER TO SEEK ADMISSION OF TWO  
DOCUMENTS

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Office of the Prosecutor:

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**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

**SEISED** of the “Public with Annexes A-B Defence Motion to Re-Open its Case in Order to Seek Admission of Two Documents”, filed on 9 December 2011 (“Motion”);<sup>1</sup>

**RECALLING** the Trial Chamber’s Order for Expedited Filing dated 9 December 2011;<sup>2</sup>

**NOTING** the “Prosecution Response to Defence Motion to Re-Open its Case in Order to Seek Admission of Two Documents”, filed on 15 December 2011 (“Response”);<sup>3</sup>

**NOTING ALSO** the “Defence Reply to Prosecution Response to Defence Motion to Re-Open its Case in Order to Seek Admission of Documents”, filed on 16 December 2011 (“Reply”);<sup>4</sup>

**COGNISANT** of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 26bis, 54, 73, 85 (A) and 92bis of the Rules of Procedure and Evidence (“Rules”);

**HEREBY DECIDES AS FOLLOWS** based solely on the written submissions of the parties pursuant to Rule 73(A).

## I. SUBMISSIONS OF THE PARTIES

### *Defence Motion*

1. The Defence seeks leave of the Trial Chamber to re-open its case for the limited purpose of tendering into evidence pursuant to Rule 92bis, two Cables dated 5 June 2003 and 12 August 2003 annexed to the Motion.<sup>5</sup> The Defence submits that it should be permitted to re-open its case and to tender the Cables into evidence pursuant to Rule 92bis as:

- a) The evidence could not, with reasonable diligence, have been obtained and presented during the Defence’s case in-chief and that no amount of diligence on the part of the Defence could have resulted in earlier disclosure of the documents;<sup>6</sup>

<sup>1</sup> SCSL-03-01-T-1254.

<sup>2</sup> SCSL03-01-T-1255.

<sup>3</sup> SCSL-03-01-T-1256.

<sup>4</sup> SCSL-03-01-T-1257.

<sup>5</sup> Annexes A and B

<sup>6</sup> Motion, para 10.

- b) The probative value of the Cables is significant and is not outweighed by the need to ensure a fair trial;<sup>7</sup> and
- c) The Cables are relevant as they support the Defence's case but do not go towards proof of the acts and conduct of the Accused;<sup>8</sup>

### *Prosecution Response*

- 2. The Prosecution submits that the Defence Motion should be dismissed on the grounds that:
  - a) The Defence failed to act with due diligence once the documents were available to it;<sup>9</sup>
  - b) The Cables have no or little probative value because they contradict rather than support the Defence arguments;<sup>10</sup>
  - c) The Cables are inadmissible under Rule 92bis since the evidence is not relevant to the purpose for which it is submitted.<sup>11</sup>

### *Defence Reply*

- 3. The Defence submits that:
  - a) It has acted diligently in obtaining these documents and seeking their admission in a timely manner;<sup>12</sup>
  - b) The probative value of the Cables is significant in the context of the evidence already on record and is not outweighed by the need to ensure a fair trial<sup>13</sup>; and
  - c) Assuming that the Cables contain opinion evidence, the Defence is not seeking admission of the evidence for the truth of the alleged opinion but rather to provide greater sub-regional and political context to the circumstances under which Charles Taylor left Liberia.<sup>14</sup>

## II. APPLICABLE LAW

- 4. The order of presentation of evidence in a trial is governed by Rule 85(A) which provides:

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<sup>7</sup> Motion, para 11.

<sup>8</sup> Motion, para 19.

<sup>9</sup> Response, paras 1, 5.

<sup>10</sup> Response, paras 1, 6-15.

<sup>11</sup> Response, paras 3, 16-21.

<sup>12</sup> Reply, para. 3.

<sup>13</sup> Reply, paras 4-8.

<sup>14</sup> Reply, para 9.





(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
- (iv) Evidence ordered by the Trial Chamber.

5. Rule 85 (A) is silent on the re-opening of a case by a party but recognises the Trial Chamber's discretion to vary the prescribed sequence if it considers that it is in the interests of justice to do so. Moreover, although not specifically provided for in the Rules, international jurisprudence recognises that in exceptional circumstances, a party may be granted leave to re-open its case in order to present new evidence not previously available to it.<sup>15</sup> The moving party must show that the evidence could not, with reasonable diligence, have been identified and presented during its case in-chief. In addition, the Trial Chamber must ensure that the probative value of the evidence does not substantially outweigh the need to ensure a fair trial.<sup>16</sup> Factors to be considered include the advanced stage of the trial at which the evidence is sought to be adduced and the potential delay in the trial.<sup>17</sup>

6. In testing for re-opening, reasonable diligence is a threshold inquiry. If a party cannot establish that the evidence could not, with reasonable diligence, have been obtained and presented during its case in-chief, the application fails and the Trial Chamber need not consider the probative value of the evidence.<sup>18</sup> If the reasonable diligence standard is satisfied, the Trial Chamber still has a general discretion to deny re-opening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.<sup>19</sup>

### III. DELIBERATIONS

<sup>15</sup> Prosecutor v. Charles Taylor, SCSL-03-1-T-993, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 13; See also *Prosecutor v. Delalic et al* ( Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 288; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 10; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Disclosure of Documents under Rule 68 and for Re-opening of her Case, 29 April 2008, para. 49.

<sup>16</sup> Prosecutor v. Charles Taylor, SCSL-03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 8; *Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 283; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses, 14 August 2007, para. 7.

<sup>17</sup> *Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 290; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 16.

<sup>18</sup> Prosecutor v. Charles Taylor, SCSL-03-1-T-993, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 12;

<sup>19</sup> *Prosecutor v. Delalic et al* ( Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 288.




7. At the outset, it is undisputed that the two Cables, while dated 5 June 2003 and 12 August 2003, were only published by the website Wikileaks on 28 June 2011 and 30 August 2011, respectively, months after the Defence had closed its case in-chief and the proceedings were officially closed.<sup>20</sup> It is also undisputed that the Defence filed its Motion on 9 December 2011, months after the public release of both Cables.<sup>21</sup>

8. The Trial Chamber recalls that it has the discretionary power to re-open a case for the introduction of new evidence only in exceptional circumstances. The Trial Chamber further recalls that the first consideration in determining an application for re-opening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in-chief of the party making the application.<sup>22</sup> In this instance, given the confidential and classified nature of the Cables, the Defence could not with all reasonable diligence have obtained and presented the said Cables during its case in-chief.

9. The Trial Chamber notes, however, that the Defence failed to justify the further delay between the disclosure of the Cables by Wikileaks in June and August 2011 and the filing of the Defence Motion in December 2011. In its Reply, the Defence submits that it has "*diligently assessed the probative value of over 50 code cables which bear some relation to the case and which were released through Wikileaks during the summer of 2011*" and that "*this process of review and internal consultation has led the defence to seek admission of a minimal amount of material these two cables.*"<sup>23</sup> However, it did not provide any reasonable explanation justifying the length of time it took to review these 50 cables. The Trial Chamber does not accept the assertion of the Defence that "*no amount of diligence on the part of the Defence could have resulted in earlier disclosure of the documents*"<sup>24</sup> and considers that the Defence neglected its responsibility to act with due diligence once the documents were published.

10. In weighing the probative value of the proposed evidence vis-à-vis the need to ensure a fair trial, the Trial Chamber has taken into account the following factors, namely,

- (i) that the proceedings are at an advanced stage;

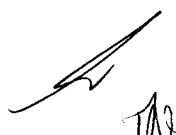
<sup>20</sup> Motion para. 10; Response para. 5; See also Motion Annex A, p. 1 showing that the document was published on 28 June 2011 and Annex B, p. 1 showing that the document was released on 30 August 2011.

<sup>21</sup> Motion para. 10; Response para. 5; See also Motion Annex A, p. 1 showing that the document was published on 28 June 2011 and Annex B, p. 1 showing that the document was released on 30 August 2011. The Defence Motion was filed on 9 December 2011.

<sup>22</sup> Prosecutor v. Charles Taylor, SCSL-03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 9; See also Prosecutor v. Delalic et al., Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 283

<sup>23</sup> Reply para 3.

<sup>24</sup> Motion para 10.





- (ii) that the probative value of the evidence the Defence seeks to introduce is not of substantial weight, noting in particular that it tends to duplicate similar evidence that has already been admitted and is part of the record; and
- (iii) that much of the evidence the Defence seeks to introduce is evidence of opinion that is inadmissible under Rule 92bis.


In the circumstances, Trial Chamber is of the view that it would not be in the interests of justice to grant the Defence Motion.

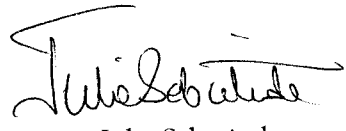
**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DENIES** the Defence's Motion

Done at The Hague, The Netherlands, this 21<sup>st</sup> day of December 2011.

  
Justice Richard Lussick

  
Justice Teresa Doherty  
Presiding Judge

  
Justice Julia Sebutinde

