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SCSL-03-01-T
(37604-37615)

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

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Date filed: 15 December 2011

THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

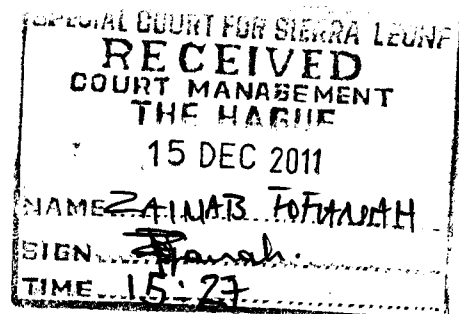
**PROSECUTION RESPONSE TO DEFENCE MOTION TO RE-OPEN ITS CASE IN ORDER TO
SEEK ADMISSION OF TWO DOCUMENTS**

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I. INTRODUCTION

1. The “Defence Motion to Re-Open its Case in order to Seek Admission of Two Documents”¹ should be dismissed. In the Motion, the Defence fails to satisfy the twofold test to reopen a case.² Specifically, the cables which the Defence seeks to have admitted are untimely filed and have little or no probative value because they contradict rather than support the Defence arguments, which the Defence has previously canvassed before this Chamber.
2. A plain reading of these cables establishes that they reflect the independent views of President Obasanjo, including that Charles Taylor was “irredeemable”³, must leave Liberia,⁴ and that West African leaders had tired of Taylor’s antics because of the extreme distress he had caused the sub-region⁵. The cables support the Prosecution position that the Accused’s criminal conduct and destabilizing actions won him the condemnation of his African neighbors, and he is rightfully before this Court because of his wilful criminal actions and failures to act and his position at the center of the criminal web he wove.
3. Further, should the Trial Chamber find that the twofold test to reopen is satisfied, the Defence request to admit the motion should be dismissed as the cables are inadmissible under Rule 92*bis*. The cables contradict the purposes for which the Defence seeks their admission and thus have no relevance to the purpose for which the Defence seeks their admission, and the June 2003 cable contains predominantly opinion evidence.
4. The Prosecution notes that in the interest of expeditious proceedings and as the *Zigiranyirazo* Chamber deemed appropriate, the Chamber may decide the Motion in the Judgement.⁶

¹ Public with Annexes A-B Defence Motion to Re-Open its Case in order to Seek Admission of Two Documents, SCSL-2003-01-T-1254, 9 December 2011 (“Motion”).

² Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, SCSL-2003-01-T-993, 29 June 2010, para. 8.

³ Motion, Annex A, para. 1.

⁴ Motion, Annex A, para. 5.

⁵ Motion, Annex A, para. 4.

⁶ *Prosecutor v. Zigiranyirazo*, ICTR-01-73-T, Judgement (TC), 18 December 2008, para. 11.

II. ARGUMENTS

The Defence does not meet the standard to reopen its case

First Threshold Test: Reasonable Diligence

5. The two cables which the Defence seeks to admit were “released during the summer of 2011, months after the Defence had closed its case.”⁷ Therefore, the Defence could not have offered these cables during its case in chief. However, the Defence failed to act with due diligence once the documents were available to it. The Defence failed to raise the issue with the Trial Chamber until 9 December, over five months after public release of the June 2003 cable and over three months after the public release of the August 2003 cable.⁸ This inactivity conflicts with a party’s duty to “submit motions that have repercussions on the conduct of the trial in ‘a timely manner’”⁹ and refutes the bold assertion that “no amount of diligence on the part of the Defence could have resulted in the earlier disclosure of the documents”¹⁰. In addition, the Defence’s delay in filing the Motion is a factor weighing against the probative value of the proposed evidence—a factor which allows the Chamber to deny the Motion under the second criterion of the test to reopen.¹¹

Second Threshold Test: Probative Value of the Proposed Evidence

6. Assuming, *arguendo*, that the first threshold test is satisfied, the Defence must still fail in its request to reopen as the probative value of the proposed evidence is non-existent or, at best, *de minimis*. In order to have probative value, evidence must, at a

⁷ Motion, para. 10.

⁸ See Motion, Annex A, p. 1 showing the document was published on 28 June 2011, and Annex B, p. 1 showing the document was released on 30 August 2011. The Trial Chamber previously noted when it allowed the Prosecution to reopen its case that the Prosecution had shown it could not, with reasonable diligence, have obtained and presented the fresh evidence during its case *but subsequently acted with reasonable diligence to obtain such evidence* (see *Prosecutor v. Brima et al.*, SCSL-2004-16-T-560, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006 (“*Brima* Decision to Reopen”), para. 17, emphasis added). The Defence has remained silent on the actions it took to diligently obtain the evidence after its release.

⁹ *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-2259, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 12 July 2010, para. 54. See also *Prosecutor v. Mbarishumana*, ICC-01/04-01/10-378, Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing”, 16 August 2011, para. 19. The ICC’s Pre-Trial Chamber I found that the Defence had failed to exercise due diligence in asserting its right to receive witnesses’ statements in a language which the suspect fully understands and speaks. The Pre-Trial Chamber found that the request for exclusion of the evidence affected by the issue identified by the Defence was not filed in a timely manner.

¹⁰ Motion, para. 10.

¹¹ *Brima* Decision to Reopen, para. 29.

minimum, be relevant to a “colourable argument” or, in other words, relate to an argument “that has some prospect of success”¹². Evidence of the two cables’ non-existent or *de minimis* probative value can be found in the Defence’s own statement that it “**simply wants it on record** that the information [in the cables] was in fact reported”¹³.

7. The Defence arguments regarding probative value must fail as they ignore or wilfully misinterpret the plain language of the documents. Rather than support the Defence’s arguments, the content of the cables clearly contradicts the Defence arguments and evidence.¹⁴ As discussed below, the cables demonstrate that President Obasanjo and other African leaders independently condemned Taylor’s conduct and viewed him as a threat to the stability of the sub-region. The Defence itself acknowledges this fact when it states, “the Cables could conveniently be taken to implicate Taylor as they on the face of it appear to support the Prosecution’s case”.¹⁵
8. The Defence assertion that the U.S. Government pressured President Obasanjo to cooperate with them to remove Taylor from power in Liberia¹⁶ is without merit. No language in the cables suggests the U.S. Government exerted any pressure over President Obasanjo; the language in fact demonstrates President Obasanjo’s independent views, his assessment of the position of other West African leaders, and his ideas on the way forward for Liberia. Indeed, it was President Obasanjo who:
 - concluded that Taylor was irredeemable and Liberia’s future could no longer be tied to Taylor’s leadership;¹⁷
 - endorsed Ambassador Jeter’s assessment of Taylor and the Liberian situation;¹⁸

¹² *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008 (“Karadžić Immunity Decision”), para. 23, referring to *Prosecutor v. Bagosora et al.*, ICTR-98-44-AR73.11, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006. The Prosecution acknowledges that these decisions relate to probative value in the context of disclosure requests. However, the general discussion of relevance and probity is still persuasive in the instant scenario.

¹³ Motion, para. 20 (emphasis added).

¹⁴ Motion, paras. 14, 15, 17.

¹⁵ Motion, para. 16. In spite of this admission, the Defence then contradicts itself by saying the cables do not contain any evidence of Taylor’s alleged complicity in the war in Sierra Leone (see Motion, para. 19) and provides its own interpretation of what the cables actually say (Motion, paras. 16-17).

¹⁶ Motion, paras. 11, 13, 16.

¹⁷ Motion, Annex A, para 1.

- said West African leaders had tired of Taylor's antics because of the extreme distress he had caused the sub-region;¹⁹
- said Taylor had sought a delay in holding the presidential election and that this was a subterfuge by Taylor to hold to power in hope that passage of time would reverse the diminution of his fortunes;²⁰
- stressed it was important that the international community speak to Taylor with one voice and that voice must tell him to leave;²¹
- foresaw the establishment of an interim national government in Liberia;²²
- was concerned that Taylor might use one of Liberia's neighbors as a road for his return;²³ and
- thought no other country in the sub-region would be acceptable as a place of asylum.²⁴

President Obasanjo was, in essence, taking and exercising decisions as a partner in a community of concerned States regarding negative developments in Liberia under Charles Taylor's leadership that, if left unchecked, would continue to poison West Africa.

9. The Defence claims that the documents show "the United States Government is working with the Prosecution to such an extent that prosecutorial independence is compromised"²⁵ is similarly without merit. No reference to or mention of the Prosecutor – express or implied, in any shape or form - is made in either cable. Nor is there any indication that the discussions reported in the cables took place with the knowledge or involvement of the Prosecutor. In fact, as this Trial Chamber has previously stated in relation to other leaked cables, the Defence has not shown any *prima facie* evidence that there was any interference with the independence and impartiality of the Court or any evidentiary basis for investigation into any organ of

¹⁸ Motion, Annex A, para. 4.

¹⁹ Motion, Annex A, para. 4.

²⁰ Motion, Annex A, para. 4.

²¹ Motion, Annex A, para. 5.

²² Motion, Annex A, para. 5.

²³ Motion, Annex A, para. 6.

²⁴ Motion, Annex A, para. 6.

²⁵ Motion, para. 15. *See also* para. 16 which states the cables provide "clear evidence that the Prosecution was feeding off the U.S. Government's trough, as the Accused has contended all along."

the Court.²⁶ In this regard, the Prosecution adopts by reference its previous arguments made in response to similar allegations of this nature²⁷ and underlines that it has always acted independently and has never sought nor received instruction from any Government or other source.

10. In addition, the June 2003 cable provides no evidence for the Defence argument that Taylor was offered immunity from prosecution at the Special Court for Sierra Leone ("SCSL").²⁸ First, this argument contradicts the argument in paragraph 15 of the Motion that the U.S. efforts included prosecution of Taylor. Second, the language of the cable makes it clear that Ambassador Jeter and President Obasanjo's discussion about immunity was speculation and conjecture, not a final plan of action, as indicated in the statement that "a deal protecting him from prosecution *might* be attractive"²⁹. Finally, nothing in the cables suggests the SCSL was offering Taylor immunity. Indeed, at the time of the meeting, the Prosecutor had already indicted Taylor.
11. Regardless, any claim that Nigeria, the U.S. or any other country made an agreement for immunity with the Accused is irrelevant to proceedings before this Court. As stated in response to Radovan Karadžić's claims to have made an immunity agreement with the U.S., the ICTY Trial Chamber considered it "well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal [is] invalid under international law"³⁰.
12. In relation to the August 2003 cable, the Defence assertion in paragraph 1 of the Motion is disingenuous, as the cable contains nothing about ousting Taylor. Rather, it discusses Taylor's arrival in Nigeria and the logistical arrangements President Obasanjo had made with Taylor.

²⁶ Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked US Cables, SCSL-2003-01-T-1174, 28 January 2011, p. 7.

²⁷ Public Prosecution Response to Defence Motion to Re-Open its Case to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, SCSL-2003-01-T-1163, 20 January 2011.

²⁸ Motion, paras. 3, 17.

²⁹ Motion, Annex A, para. 6 (emphasis added).

³⁰ Karadžić Immunity Decision, para. 25. See also Decision on Immunity from Jurisdiction, SCSL-2003-01-I-59, 31 May 2004, paras. 52-53, 58-59.

13. The Defence assertion that the August 2003 cable “provides evidence of Obasanjo’s support for the LURD rebels”³¹ is similarly disingenuous and similarly without merit. The document merely shows that President Obasanjo was working with Conneh to assure peaceful access to Freeport and talking with one of the parties to the peace agreement.³² In fact, after Conneh reportedly referred to President Obasanjo as “father”, President Obasanjo expressed that he did not want to be seen as a father to a rebel.³³ In further contradiction of the argument that President Obasanjo was supporting the LURD, the June 2003 cable states that President Obasanjo agreed that the LURD and MODEL were not the answer and were ultimately malignant factors, probably no better than Taylor.³⁴
14. The June 2003 cable, which recounts a meeting that took place less than two weeks after the killing of Sam Bockarie,³⁵ also contains numerous other contradictions of Defence arguments and evidence. These contradictions further highlight the non-existent or *de minimis* probative value of these documents, at least to support the Defence arguments. One such example is President Obasanjo’s statement in the cable that “Taylor was deathly afraid of being placed in the dock” of a war crimes tribunal.³⁶ This contradicts Taylor’s own testimony that he did not have any concerns about possible charges at the Special Court at that time, despite being named in the publicly-released Indictments against Sankoh, Bockarie and Sesay.³⁷ Rather than supporting the Defence arguments, this statement is further proof of Charles Taylor’s lack of veracity and credibility. Another statement in the cable which contradicts Defence evidence is President Obasanjo’s endorsement of Ambassador Jeter’s statement that Taylor “ravaged in Sierra Leone to gain access to its lucrative diamond fields”.³⁸

³¹ Motion, para. 1.

³² Motion, Annex B, paras. 5, 6.

³³ Motion, Annex B, para. 6.

³⁴ Motion, Annex A, para. 5.

³⁵ See Exh. D-46, which states Bockarie was killed 6 May 2003. The cable in Annex A of the Motion states that the meeting between President Obasanjo and Ambassador Jeter took place on 15 May 2003.

³⁶ Motion, Annex A, para. 6.

³⁷ See, e.g., Taylor, T. 14 September 2009 p. 28844; T. 27 October 2009 pp. 30370-71; T. 20 January 2010 pp. 33764-65; T. 28 January 2010 pp. 34403-08.

³⁸ Motion, Annex A, paras. 2, 4.

15. Additionally, the cables do not justify the re-opening of the case as they are unduly cumulative and introduce no new arguments or previously unknown allegations.³⁹ As established in the international jurisprudence, “[p]roposed evidence that is substantially similar in all important respects to evidence already admitted” does not warrant the re-opening of the case.⁴⁰

The documents are inadmissible under Rule 92bis

16. Assuming, *arguendo*, the Defence has met the twofold test to reopen its case, the documents the Defence seeks to admit are nonetheless inadmissible under Rule 92bis.

Relevance

17. Rule 92bis requires that the proposed evidence be “relevant to the purpose for which it is submitted”.⁴¹ As discussed above, the information in the cables actually contradicts the stated purposes for which the Defence seeks their admission.⁴² Thus, they are irrelevant and cannot be admitted upon Defence motion under Rule 92bis.
18. The underlying premise of the Motion is most unfortunate and worthy of comment. The Defence would seemingly have the Court believe that any West African leader who spoke against Taylor’s conduct and actions which destabilized the region was a mindless puppet of the U.S. Government. Not only does this argument strain credulity given the plain language of the cables, but it is an affront to the West African leaders who saw first-hand the detrimental impact of Taylor’s actions. Such baseless arguments further establish the documents’ irrelevance to the Defence arguments in this Motion and their similar arguments in these proceedings.

³⁹ Throughout the Motion, the Defence refers to the proposed evidence insofar as it corroborates other evidence already. See Motion, paras. 1, 13-15 & 17.

⁴⁰ *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 37. See also *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Justin Mugenzi’s Second Motion for Formal Disclosure and for Leave to Reopen his Defence, 3 November 2008, para. 8, stating that the allegation, to the extent it was relevant, was already part of the trial record; the Chamber refused to reopen the case.

⁴¹ Rule 92bis (B) states: “The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.”

⁴² Motion, para. 3.

Opinion Evidence

19. The June 2003 document is also inadmissible because this cable relates to a meeting between U.S. Ambassador Jeter and Nigerian President Obasanjo on 15 May 2003 and their opinions on the situation in the region. As the cable subject title reflects - "President Obasanjo *Believes* Taylor Must Go"⁴³ - the cable relates to assertions of opinion, not fact. This Court's jurisprudence is clear that Rule 92*bis* only permits the reception of assertions of fact, not opinion.⁴⁴
20. Examples of the opinion content of this cable are many. Paragraphs 2 and 3 of the June 2003 cable recount Ambassador Jeter's opinion of Taylor's acts and conduct as well as the Ambassador's opinion of what the other leaders in the region thought of Taylor, an opinion with which President Obasanjo agreed. Paragraph 4 recounts President Obasanjo's opinion of Taylor's acts and conduct and how other African leaders viewed Taylor. Paragraphs 5 and 6 give President Obasanjo and Ambassador Jeter's stated opinions of the merits of possible approaches for Taylor to step down from power. It is notable that paragraph 6, which mentions the possibility of immunity (discussed above), contains opinion words such as *thought*, *might*, *speculated* and *concerned*. The opening and concluding paragraphs of the cable contain the author's opinion of the nature of President Obasanjo's approach with Taylor ("heretofore avuncular") as well as President Obasanjo and Ambassador Jeter's opinions of Taylor's leadership.
21. As the predominant majority of the June 2003 cable is opinion evidence, it cannot be admitted under Rule 92*bis*.

III. CONCLUSION

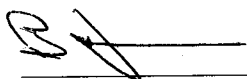
22. The Defence motion should be dismissed as without merit. The Defence has not made the requisite showing to reopen its case as the Motion is untimely filed, the cables have little or no probative value, contradict rather than support the Defence arguments and evidence, and are unduly cumulative. Further, the cables are

⁴³ Motion, Annex A, p. 1 (emphasis added).

⁴⁴ Decision on the Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, SCSL-2003-01-T-1171, 27 January 2011, p. 4; *Prosecutor v. Brima et al.*, SCSL-04-16-T-431, Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92*bis*, 18 November 2005, p. 3, *quoting Prosecutor v. Norman et al.*, SCSL-04-14-AR73-398, Fofana – Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 16 May 2005, para. 26.

inadmissible under Rule 92bis as they contradict their stated purpose and are therefore irrelevant, and the June 2003 cable is predominantly opinion, not fact.

Filed in The Hague,
15 December 2011,
For the Prosecution,

A handwritten signature in black ink, appearing to be 'B. Hollis', written over a horizontal line.

Brenda J. Hollis
The Prosecutor

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