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SCSL-03-01-T  
(33971-33975)

33971



## 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

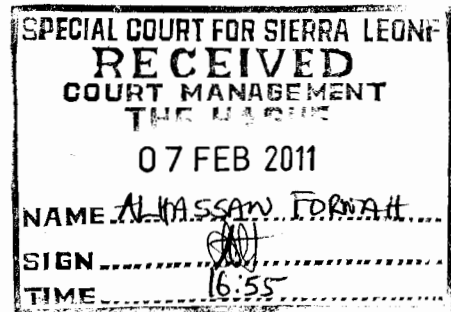
**Case No.:** SCSL03-1-T

**Date:** 7 February 2011

**PROSECUTOR**

v.

**Charles Ghankay TAYLOR**



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**DECISION ON DEFENCE MOTION SEEKING LEAVE TO APPEAL THE 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 USG CABLES**

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**Office of the Prosecutor:**

Brenda J. Hollis  
Nicholas Koumjian  
Leigh Lawrie

**Counsel for the Accused:**

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

**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);<sup>1</sup> **SEISED** of the “Defence Motion Seeking Leave to Appeal the 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 USG Cables”, filed on 31 January 2011 (“Motion”),<sup>2</sup> wherein the Defence seeks leave to appeal the Trial Chamber’s “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 USG Cables”, dated 28 January 2011 (“Impugned Decision”),<sup>3</sup> on the basis that:

- 1) “exceptional circumstances” exist in that:
  - a. The Trial Chamber’s denial of the motion overlooks the fundamental and important nature of the request to the Accused’s case and the centrality of the issues involved;<sup>4</sup>
  - b. the Trial Chamber abused its discretion by refusing to investigate itself/and or members under it in circumstances where there is *prima facie* evidence that such person(s) are or have been in secret contact with the USG, an external party that has clearly demonstrated its animosity to the Accused, and that mere evidence of contact undermines any perception of judicial independence;<sup>5</sup>
  - c. it is in the interests of justice that any issue that, *prima facie*, raises questions going to the independence and integrity of any of the organs of the court, particularly the Prosecution and Chambers, should be properly investigated;<sup>6</sup>
  - d. such allegations also raise an issue of fundamental legal importance;<sup>7</sup>
  - e. where the issues raised impacts on the Trial Chamber itself, further decision by the Appeals Chamber on the matter is conducive in the interests of justice;<sup>8</sup>

<sup>1</sup> Noting that Justice Sebutinde has voluntarily withdrawn herself from a decision on this Motion for the same reasons as stated in the Impugned Decision.

<sup>2</sup> SCSL-03-01-T-1178.

<sup>3</sup> SCSL-03-01-T-1174.

<sup>4</sup> Motion, para 2.

<sup>5</sup> Motion, para. 3(vi).

<sup>6</sup> Motion, para. 9.

<sup>7</sup> Motion, para. 10.

<sup>8</sup> Motion, para. 10.

2) the Defence would suffer irreparable prejudice if the identity of the persons in the three organs of the Court, and the nature and extent of the interactions of such persons with the USG is not established;<sup>9</sup>

**RECALLING** the “Order for Expedited Filing”, dated 1 February 2011, wherein the Trial Chamber ordered expedited filing schedules for a response and a reply in relation to the Motion;<sup>10</sup>

**NOTING** the “Prosecution Response to Defence Motion Seeking Leave to Appeal the 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 USG Cables”, filed on 4 February 2011 (“Response”),<sup>11</sup> wherein the Prosecution submits that the Motion should be dismissed on the basis that:

- 1) The Defence has failed to establish “exceptional circumstances” in that:
  - a. the mere fact that the Defence has identified possible grounds of appeal does not satisfy the first limb of Rule 73(B) as an erroneous ruling does not of itself give rise to exceptional circumstances;<sup>12</sup>
  - b. the Defence argument that decisions concerning the independence and integrity of any organ of the court automatically satisfy the “exceptional circumstances” requirement is untenable as such an interpretation would be tantamount of inserting an alternative ground for leave to appeal into Rule 73(B);<sup>13</sup>
- 2) The Defence has failed to establish “irreparable prejudice” in that;
  - a. the Defence arguments are predicated on its conclusion that it has established a prima facie case, this is a merits based argument which should be dismissed<sup>14</sup>
  - b. the issue can be remedied on final appeal, as is evident from the *Sesay et. al.* case, in which the Appeals Chamber addressed a similar issue at the appeals stage;<sup>15</sup>

**NOTING ALSO** that the Defence did not file a Reply;

<sup>9</sup> Motion, para. 11.

<sup>10</sup> SCSL-03-01-T-1179.

<sup>11</sup> SCSL-03-01-T-1187.

<sup>12</sup> Response, para 6.

<sup>13</sup> Response, para. 7.

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

<sup>15</sup> Response, para. 10, referring to the *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-A, Judgement, 26 October 2009, para. 186

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rule 73 of the Rules of Procedure and Evidence (“Rules”);

NOTING that Rule 73(B) provides:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

NOTING therefore that (i) as a general rule, interlocutory decisions are not subject to appeal; (ii) Rule 73(B) involves a high threshold that must be met before the Trial Chamber can exercise its discretion to grant leave to appeal; (iii) a party seeking leave to appeal against an interlocutory decision must show “exceptional circumstances” and “irreparable prejudice”; (iv) the two prong test prescribed under Rule 73(B) is conjunctive and not disjunctive;<sup>16</sup> (v) even where the conjunctive test is satisfied, leave to appeal remains in the discretion of the Trial Chamber;<sup>17</sup>

RECALLING the Appeals Chamber rulings that “[a]s a general principle, interlocutory appeals are a rare exception”<sup>18</sup> and that “[i]n this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal”;<sup>19</sup>

RECALLING ALSO that this Court has held that an interlocutory appeal does not lie as of right and that “the overriding legal consideration in respect of an application of this nature is that the applicant’s case must reach a level nothing short of “exceptional circumstances” and “irreparable prejudice”, having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals”;<sup>20</sup> and

<sup>16</sup> *Prosecutor v. Brima, Kamara, Kanu*, SCSL4-16-T, Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of 31 March 2006, 4 May 2006.

<sup>17</sup> Rule 73(B) states that “in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal”; also, see for example *Prosecutor v. Popovic et al.*, IT-05-88-T, Decision on Gvero Motion Seeking Certification to Appeal the Decision on the Extension of Time for Filing the Final Trial Brief, 15 July 2009; *Prosecutor v. Stanistic & Zupljanin*, IT-08-91-T, Decision Denying Mico Stanistic’s Motion for Certification to Appeal the Oral Decision Accepting Christian Nielsen as an Expert and Requesting for a Stay of Proceedings, 20 October 2009, para 3.

<sup>18</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-1166, Decision on Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 21 January 2011.

<sup>19</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

<sup>20</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-584, Decision on Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168, 10 September 2008.

that “exceptional circumstances” may arise “where the cause of justice may be interfered with” or “where issues of fundamental legal importance” are raised;<sup>21</sup>

CONSIDERING that motions relating to the independence and integrity of a court do not *per se* give rise to exceptional circumstances;

CONSIDERING ALSO that the Motion is more concerned with arguing the merits of an appeal rather than with satisfying the conjunctive test required for leave to appeal to be granted and that merely pointing to alleged errors in law and/or fact does not of itself give rise to exceptional circumstances nor to an issue of fundamental legal importance;


CONSIDERING FURTHER that the Defence submission that it would suffer irreparable prejudice unless the identity of the persons in the Court and their interactions with the USG are established has no foundation or evidentiary basis;

FINDING therefore that the Defence has failed to satisfy the conjunctive test of exceptional circumstances and irreparable prejudice;

FOR THE ABOVE REASONS

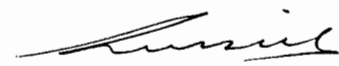
HEREBY DISMISSES THE MOTION.

Done at The Hague, The Netherlands, this 7<sup>th</sup> day of February 2011.

  
Justice Teresa Doherty  
Presiding Judge



[Seal of the Special Court for Sierra Leone]

  
Justice Richard Lussick

<sup>21</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE, 18 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents, 11 December 2008, p. 3; *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.