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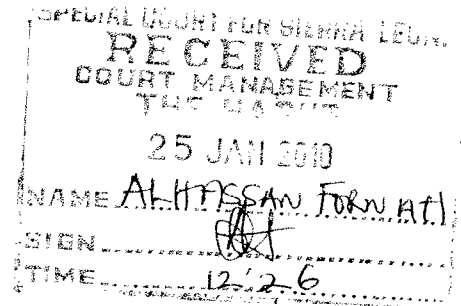
**SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR**

**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: 25 January 2010



**THE PROSECUTOR**

**Against**

**Charles Ghankay Taylor**

Case No. SCSL-03-01-T

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**PUBLIC**

**URGENT APPLICATION FOR LEAVE TO APPEAL ORAL DECISIONS OF 21 JANUARY 2010 ON USE  
OF DOCUMENTS IN CROSS-EXAMINATION**

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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 21 January 2010 refusing to allow the use of the following documents during cross-examination of the Accused:
  - i. Footnote 19 of page 105 of the book entitled *ECOMOG: A Sub-Regional Experience in Conflict Resolution Management and Peacekeeping in Liberia*, by Festus Aboagye. [hereinafter ‘**footnote 18 to page 105 of the Aboagye book**’]
  - ii. Footnote 18 of page 105 of the book entitled *ECOMOG: A Sub-Regional Experience in Conflict Resolution Management and Peacekeeping in Liberia*, by Festus Aboagye. [hereinafter ‘**footnote 19 to page 105 of Aboagye book**’]
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 previous Prosecution applications,<sup>1</sup> 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**”).<sup>2</sup> In this Decision the Trial Chamber devised a special regime applicable to “fresh evidence”<sup>3</sup> 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 rights of the Accused in order for the fresh evidence to be *used* in cross-examination

<sup>1</sup> *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, and *Prosecutor v. Taylor*, SCSL-03-1-T-882, “Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-Examination”, 21 January 2010.

<sup>2</sup> *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**”).

<sup>3</sup> As defined at para. 23 of the Documents Decision.

(the “**use test**”), and a showing of “exceptional circumstances” in order for the fresh evidence to be *admitted into evidence* (the “**admissibility test**”).<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>
5. In proceedings on 21 January 2010, as Prosecution Counsel sought to use footnote 19 to page 105 of the Aboagye book.<sup>7</sup> The Defence objected to the use of this footnote and initially phrased its objection as follows:

MR GRIFFITHS: Madam President, can I inquire, given the content of that footnote, whether this is being put forward for impeachment purposes or as proof of guilt?

PRESIDING JUDGE: Does it really matter? Does it matter?

MR GRIFFITHS: In our submission, it does because if it is for the latter purpose then it seems to us that its incumbent on my learned friend to justify the use of that material.<sup>8</sup>

6. The Presiding Judge then noted as follows:

PRESIDING JUDGE: Because, Mr Griffiths, the Chamber has consistently said in referring to passages in these document that really the intention or purpose for which a piece of a paragraph is read out is really immaterial when

<sup>4</sup> Documents Decision, para. 27.

<sup>5</sup> Documents Decision, p. 13, referring to the criteria in para. 27.

<sup>6</sup> Documents Decision, para. 27.

<sup>7</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33814

<sup>8</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33815

it comes to its use. That if you stand up and object in time to its use, the Chamber can consider those submissions regardless of the intention for which the paragraph is read. So when you ask what does the Prosecution intend to use it for, I think it's the wrong question. Are you objecting?<sup>9</sup>

7. The Defense counsel then revised his objection stating as follows:

MR GRIFFITHS: I know it's marked in the margin on page 109, but I wasn't aware that she would - my learned friend would be referring to it in conjunction with this particular passage, otherwise I would have intervened at a much earlier stage. But it seems to us, given the content of that footnote, that we are here talking about material which goes to guilt, and in our submission, it is - my learned friend should justify its admission or use at this stage.<sup>10</sup>

8. The Prosecution made its submissions, including that the material was intended for impeachment use only and noting that Defence Counsel initially objected based on intended use in line with the consistent Prosecution position. Thereafter the Chamber ruled as follows (“**the First Impugned Decision**”):

We've conferred. First of all, let me say this: In our decision of 30 November and in subsequent oral decisions, the Chamber has made it very clear that in determining objections based on the content of a document and its use in Court in cross-examination, the intention or purpose for which the Prosecution intends it is immaterial and irrelevant in our determination of whether the document will or will not be used.

What is relevant and what is important is whether potentially the passage contains material that is probative of guilt. It's not the intention for which it is meant, but rather the content. Now, in this particular case, we are of the opinion that footnote 19, read together with the passage on page 105, is definitely capable of proving the guilt of the accused, and therefore footnote 19 cannot be used in this way. Because as far as we are concerned, the two-fold test in our decision of 30 November has not been illustrated by the Prosecution.<sup>11</sup>

9. Subsequently in the same day's proceedings the Prosecution attempted to use footnote 18 to page 105 of the Aboagye book, and Defence counsel objected.<sup>12</sup> The

<sup>9</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33815

<sup>10</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33816

<sup>11</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33818

<sup>12</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33819

Chamber again disallowed the use of the material by majority stating as follows (“**the Second Impugned Decision**”):

PRESIDING JUDGE: By a majority on the Bench, we disallow the use of footnote 18 for the same reasons.<sup>13</sup>

10. The Defence did not object to the use of the information on page 105 of the Aboagye book to which both footnotes referred; the Prosecution was allowed to use and mark for identification that page.

### III. APPLICABLE LAW

11. In terms of applicable law, the Prosecution adopts and incorporates by reference its earlier filings of 18 and 21 January 2010 which addressed the same issue as the present.

### IV. ARGUMENT

#### Exceptional Circumstances

##### Issue of fundamental legal importance

12. The Prosecution adopts and incorporates by reference its arguments set forth in paragraphs 9, 10, 11, 16 and 17 of its filing on 18 January 2010 and paragraphs 10, 11, 12, 16 and 17 of its filing on 21 January 2010.
13. Both footnotes 18 and 19 of page 105 of the Aboagye book were intended for the sole purpose of challenging the Accused’s assertions in his direct examination, that he was not importing arms and ammunition into Liberia from Libya, through the Buchanan port of Liberia, while head of the NPFL. The Trial Chamber’s holding that the Prosecution’s intended use is immaterial<sup>14</sup> and irrelevant to its deliberations is an error which is recurring and of fundamental legal importance to the Prosecution’s right to challenge the Accused on this issue using relevant documents that impeach those assertions. As challenging and testing the evidence given by any witness, including the Accused is for the benefit of the fact finder, the error is also of fundamental legal importance to the ability of a fact finder to reach conclusions based on evidence which has been tested.

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<sup>13</sup> *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33819

<sup>14</sup> See para. 6 above.

14. 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 justice

15. The Prosecution relies on its arguments set forth in paragraphs 18 and 22 of its filing on 18 January 2010 and paragraphs 18 and 22 of its filing on 21 January 2010.

Irreparable Prejudice

16. The Prosecution relies on its arguments as set out in paragraph 23 of the filings of 18 and 21 January 2010.

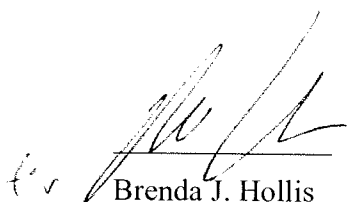
**V. CONCLUSION**

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

Filed in The Hague,

25 January 2010,

For the Prosecution,

  
Brenda J. Hollis  
Principal Trial Attorney

INDEX OF AUTHORITIES

SCSL

*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

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*Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33818

*Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33819