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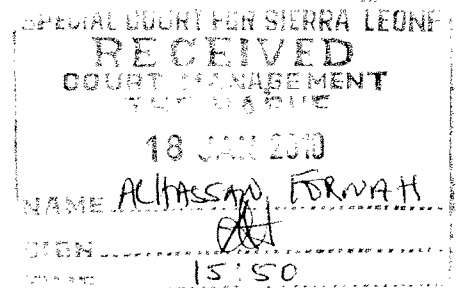
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

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: 18 January 2010



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

**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**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Nina Jørgensen
Ms. Kathryn Howarth

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 14 January 2010 refusing to allow the use of the following documents during cross-examination of the Accused:
 - i. A declaration by Mia Farrow dated 9 November 2009 (“**Mia Farrow Declaration**”);
 - ii. Page 270 of the book “ECOMOG, A Sub-Regional Experience in Conflict Resolution, management and Peacekeeping in Liberia”, by Lt. Col. F. B. Aboagye (“**ECOMOG book**”).
2. In view of the advanced stage of the cross-examination of the Accused, 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**”).¹ In this Decision the Trial Chamber devised a special regime applicable to “fresh evidence”² 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 (the “**use test**”), and a showing of “exceptional circumstances” in order for the fresh evidence to be *admitted into evidence* (the “**admissibility test**”).³ 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:

¹ *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**”).

² As defined at para. 23 of the Documents Decision.

³ Documents Decision, para. 27.

- 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.⁴
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.⁵
 5. In proceedings on 14 January 2010, the Defence objected as Prosecution Counsel sought to use the Mia Farrow Declaration. The Mia Farrow Declaration had been marked by the Prosecution as part of its disclosure obligations⁶ as potentially to be relied upon both for impeachment and as probative of guilt. After hearing the arguments of the parties, the Trial Chamber issued the following decision (“**First Impugned Decision**”):

We've considered the Defence objection to the use of the document and to the arguments put forward by the Prosecution in resisting that objection. We note that the document purports to deal with a central issue in the Prosecution case. The document itself was not produced in the Prosecution case but has been produced during the cross-examination of the accused.

The document allegedly is a statement by a person as to what she was told by a second person who was relating what she was told by third person or persons. The accused, of course, has had no chance to challenge any of the allegations in this document or to cross-examine the alleged makers of the various statements that embodied the document now before the Court.

We find that the document is highly prejudicial and we hold that the two criteria that are required to be met for the use of the document have not been met. In other words, there's nothing put before us that would allow us to say that its use in cross-examination is in the interests of justice or that it does not violate the fair trial rights of the accused. We therefore uphold the Defence objection and will not allow the document to be used in cross-examination.⁷

6. Later in the proceedings, the Prosecution attempted to present page 270 of the ECOMOG book to the Accused, at which point the Defence objected. After hearing

⁴ Documents Decision, p. 13, referring to the criteria in para. 27.

⁵ Documents Decision, para. 27.

⁶ See oral orders: *Prosecutor v. Taylor*, Trial Transcript, 3 December 2009, p. 33001; *Prosecutor v. Taylor*, Trial Transcript, 7 December 2009, pp. 33034-33035.

⁷ *Prosecutor v. Taylor*, Trial Transcript, 14 January 2010, pp. 33348-33349.

arguments from the parties, during which Prosecution Counsel emphasized that the document was being presented for impeachment purposes only, the Trial Chamber ruled as follows (“**Second Impugned Decision**”):

We would firstly say that we disagree with the Prosecution claims that they have no means to challenge and test the accused's evidence on the points in issue, and whether this document is allowed to be used or not does not affect the Prosecution's ability to effectively cross-examine. The document itself does not contain indisputable facts. It remains contentious whether the questions are put to the witness by means of the document, or whether the questions - there are questions simply put to the witness that may have been - may have arisen from the document. The nature of the document doesn't change simply because the questions are put to the witness by means of the document. Having said that, the document is obviously new, was not produced in the Prosecution case. It's incriminating in that it does go to the guilt of the accused, and we're not satisfied that the two requirements of the test have been established; that is, we're not able to say that it's in the interests of justice to use this document in cross-examination, and we're not able to say that it does not violate the fair trial rights of the accused. We uphold the objection.⁸

III. APPLICABLE LAW

7. Rule 73(B) provides that leave to appeal may be granted in “exceptional circumstances” and to avoid “irreparable prejudice” to a party. These two limbs are conjunctive and both must be satisfied if an application for leave to appeal is to succeed.⁹ As recognized by the Appeals Chamber, “the underlying rationale for permitting such appeals is that *certain matters cannot be cured or resolved by final appeal against judgment*”.¹⁰
8. The categories of exceptional circumstances are not “closed or fixed” and what constitutes such circumstances necessarily depends on, and varies with, the circumstances of each case.¹¹ Exceptional circumstances may arise “where the cause of justice might be interfered with” or where issues of “fundamental legal importance” are raised.¹² Notably, Trial Chamber I has stated that exceptional

⁸ *Prosecutor v. Taylor*, Trial Transcript, 14 January 2010, p. 33368.

⁹ *Prosecutor v. Sesay et al.*, SCSL-04-15-PT-014, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, 13 February 2004, para. 10.

¹⁰ *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, “Decision on Prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal”, 17 January 2005, para. 29; see also *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, (“**Sesay Decision**”) para.21.

¹¹ *Sesay Decision*, para. 25.

¹² *Ibid.*, para. 26.

