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SCSL-03-01-T  
(27164 - 27175)

27164



## SPECIAL COURT FOR SIERRA LEONE

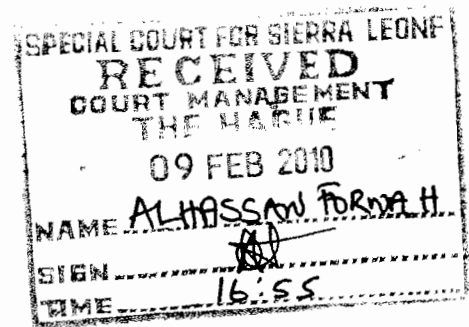
### TRIAL CHAMBER II

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

**Acting Registrar:** Binta Mansaray

**Case No.:** SCSL-03-1-T

**Date:** 9 February 2010



**PROSECUTOR**

v.

**Charles Ghankay TAYLOR**

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### DECISION ON URGENT APPLICATIONS FOR LEAVE TO APPEAL ORAL DECISIONS OF 18, 21, 25 AND 26 JANUARY 2010 ON USE OF DOCUMENTS IN CROSS-EXAMINATION

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**Office of the Prosecutor:**

Brenda J. Hollis  
Nicholas Koumjian  
Nina Jørgensen  
Kathryn Howarth  
Christopher Santora

**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");

SEISED of the "Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-Examination", filed on 21 January 2010 ("First Motion"),<sup>1</sup> wherein pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules") the Prosecution seeks leave to appeal three decisions issued orally by the Trial Chamber on 18 January 2010 disallowing the use of three documents during cross-examination of the Accused,<sup>2</sup> namely (a) a decision disallowing the use of a news article from *Africa Confidential* entitled "West Africa, According to Mr. Taylor" dated 22 January 1999 ("first impugned Decision");<sup>3</sup> (b) a decision disallowing the use of a news article from the *United Nations Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network (IRIN)* for West Africa entitled "ECOMOG Warns 'Warmonger Presidents'" dated 8 April 1999 ("second impugned Decision")<sup>4</sup> and (c) a decision disallowing the use of the written testimony of John Leigh, Sierra Leone Ambassador to the United States before the United States House of Representatives Subcommittee on Africa, dated 11 June 1998 ("third impugned Decision"),<sup>5</sup> on the grounds that:

1. Exceptional circumstances exist in that:

- (a) The Trial Chamber's application of 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" ("Decision on Documents")<sup>6</sup> in the three Impugned Decisions is the result of "an erroneous conflation" of well-accepted legal principles related to the use and admission of documents in cross-examination,<sup>7</sup> and "unfairly raises the standard for the use of a document by permitting the same factors that would ordinarily be relevant only to the admissibility phase to be determinative", which factors have put the Prosecution in an unfair position throughout the cross-examination of the Accused;<sup>8</sup>

<sup>1</sup> SCSL-03-01-T-882.

<sup>2</sup> First Motion, paras. 1, 24.

<sup>3</sup> Transcript, 18 January 2010, pp. 33488-33489.

<sup>4</sup> Transcript, 18 January 2010, p. 33508.

<sup>5</sup> Transcript, 18 January 2010, p. 33537.

<sup>6</sup> *Prosecutor v. Taylor*, SCSL-03-01-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.

<sup>7</sup> First Motion, paras 10-11.

<sup>8</sup> First Motion, paras 12-15.

- (b) By adopting this approach, the Trial Chamber is unnecessarily and incorrectly depriving itself of the ability to consider documentary evidence which impeaches the testimony of the Accused;<sup>9</sup>
- (c) The unduly high standard applied by the Trial Chamber is likely to be applied every time the Prosecution seeks to put a document to the Accused during the remainder of cross-examination, and that in these circumstances “an issue of fundamental legal importance that has so far not been considered by the Appeals Chamber arises”;<sup>10</sup>
- (d) The Trial Chamber’s strict approach is likely to interfere with the course of justice as it prevents the Prosecution from fully exercising its right to test the evidence of the Accused in cross-examination and deprives the Trial Chamber of information relevant to determining the weight to be given to the testimony of the Accused or in some instances, of evidence that is relevant to prove guilt;<sup>11</sup> and that

2. The Prosecution will suffer irreparable prejudice in that:

- (a) The impugned Decisions prevent the Prosecution from fully exercising its right to test the evidence of the Accused through cross-examination,<sup>12</sup> and
- (b) There is no cure available on final appeal;<sup>13</sup>

**RECALLING** the Trial Chamber’s “Order for Expedited Filing”, dated 22 January 2010, wherein the Trial Chamber noted the urgency of the matter and ordered expedited filing schedules for the response and reply;<sup>14</sup>

**NOTING** the “Defence Response to ‘Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-Examination’”, filed on 27 January 2010 (“First Response”),<sup>15</sup> wherein the Defence opposes the First Motion and submits *inter alia*, that it does not meet the conjunctive threshold of “exceptional circumstances” (in that the Prosecution in effect impugns the Decision on Documents itself rather than “the application” of that Decision)<sup>16</sup> and “irreparable prejudice” under Rule 73(B) of the Rules;

<sup>9</sup> First Motion, para. 16.

<sup>10</sup> First Motion, para. 17.

<sup>11</sup> First Motion, paras 18-22.

<sup>12</sup> First Motion, para. 23.

<sup>13</sup> First Motion, para. 23.

<sup>14</sup> SCSL03-01-T-884.

<sup>15</sup> SCSL03-01-T-891.

<sup>16</sup> First Response, para. 9.

NOTING ALSO the "Prosecution Reply to Defence Response to 'Urgent Application for Leave to Appeal Oral Decisions of 18 January 2010 on Use of Documents in Cross-Examination'", filed on 28 January 2010 ("First Reply");<sup>17</sup>

SEISED ALSO of the "Urgent Application for Leave to Appeal Oral Decisions of 21 January 2010 on Use of Documents in Cross-Examination", filed on 25 January 2010 ("Second Motion"),<sup>18</sup> wherein pursuant to Rule 73(B) the Prosecution seeks leave to appeal two decisions issued orally by the Trial Chamber on 21 January 2010 disallowing the use of two documents during cross-examination of the Accused<sup>19</sup>, namely (a) a decision disallowing the use of footnote 19 of page 105 of a book entitled "ECOMOG: A Sub-Regional Experience in Conflict Resolution Management and Peacekeeping in Liberia" by Festus Aboagye ("fourth impugned Decision")<sup>20</sup> and (b) a decision disallowing the use of footnote 18 of page 105 in the same book ("fifth impugned Decision"),<sup>21</sup> on the grounds that:

1. Exceptional circumstances exist in that:

- (a) The Trial Chamber's application of its Decision on Documents imports an unduly high standard for the use of documents during cross-examination which is inconsistent with the case law of the *ad hoc* Tribunals and the Special Court in that the Trial Chamber has incorporated factors which ought not to be determinative of the issue of the presentation or use of documentation during cross-examination, which matters "give rise to an issue of fundamental legal importance that has so far not been considered by the Appeals Chamber";<sup>22</sup>
- (b) The Trial Chamber appears to have fettered its own ability to consider documentation for the limited purpose of impeachment in circumstances where a document also contains material that could potentially be regarded as probative of guilt, thereby limiting its own truth-finding function;<sup>23</sup>
- (c) The Trial Chamber's strict approach is likely to interfere with the course of justice as it prevents the Prosecution from fully exercising its right to test the evidence of the Accused in cross-examination and deprives the Trial Chamber of information relevant

<sup>17</sup> SCSL03-01-T-893.

<sup>18</sup> SCSL03-01-T-889.

<sup>19</sup> Second Motion, paras 1, 17.

<sup>20</sup> Transcript, 21 January 2010, p. 33818.

<sup>21</sup> Transcript, 21 January 2010, p. 33819.

<sup>22</sup> In para. 12 of the Second Motion, the Prosecution adopts its arguments set forth in paras 9-11 of its filing SCSL03-01-T-875 of 18 January 2010 and in paragraphs 10-12 of its First Motion.

<sup>23</sup> In para. 12 of the Second Motion, the Prosecution adopts its arguments set forth in paras 16-17 of its filing SCSL03-01-T-875 of 18 January 2010 and in paras 16 and 17 of its First Motion.

to determining the weight to be given to the testimony of the Accused or in some instances, of evidence that is relevant to prove guilt;<sup>24</sup> and that;

2. The Prosecution relies on the arguments it made in its First Motion in submitting that it will suffer irreparable prejudice;<sup>25</sup>

**RECALLING** the Trial Chamber's "Order for Expedited Filing", dated 26 January 2010, wherein the Trial Chamber noted the urgency of the matter and ordered expedited filing schedules for the response and reply;<sup>26</sup>

**NOTING** the "Defence Response to 'Urgent Application for Leave to Appeal Oral Decisions of 21 January 2010 on Use of Documents in Cross-Examination'", filed on 29 January 2010 ("Second Response"),<sup>27</sup> wherein the Defence opposes the Second Motion and submits that it does not meet the conjunctive requirements of "exceptional circumstances" and "irreparable prejudice;"<sup>28</sup>

**NOTING ALSO** that the Prosecution indicated that it did not intend to file a Reply;<sup>29</sup>

**SEISED ALSO** of the "Urgent Application for Leave to Appeal Oral Decisions of 25 and 26 January 2010 on Use of Documents in Cross-Examination", filed on 28 January 2010 ("Third Motion"),<sup>30</sup> wherein pursuant to Rule 73(B) the Prosecution seeks leave to appeal decisions issued orally by the Trial Chamber on 25 and 26 January 2010 disallowing the use of several documents during cross-examination of the Accused, namely: (a) decisions disallowing the use of the Liberian Truth and Reconciliation Final Report, Volume 2 comprising 20 documents ("sixth group of impugned Decisions");<sup>31</sup> (b) decisions disallowing the use of the Truth and Reconciliation Commission of Liberia Press Releases comprising 7 documents ("seventh group of impugned Decisions");<sup>32</sup> (c)

<sup>24</sup> In para. 15 of the Second Motion, the Prosecution adopts its arguments set forth in paras 18 and 12 of its filing SCSL-03-01-T-875 of 18 January 2010 and in paras 18 and 22 of its First Motion.

<sup>25</sup> In para. 16 of the Second Motion, the Prosecution also adopts its arguments set forth in para. 23 of its filing SCSL-03-01-T-875 of 18 January 2010.

<sup>26</sup> SCSL-03-01-T-890.

<sup>27</sup> SCSL-03-01-T-896.

<sup>28</sup> In paras. 6-8 of the Second Response, the Defence adopts the arguments in its filing SCSL-03-01-T-883 of 22 January 2010 and in the First Response.

<sup>29</sup> E-mail from Office of the Prosecutor to Senior Legal Officer of Trial Chamber II and the Defence, dated 29 January 2010.

<sup>30</sup> SCSL-03-01-T-892.

<sup>31</sup> Transcript, 25 January 2010, pp. 33941-33942; 26 January 2010, pp. 34068, 34071, 34075, 34085, 33951, 33953, 33955, 33957, 33958, 33963, 33972, 33974, 33984, 34001, 34010, 34020, 34022, 34118, 34119.

<sup>32</sup> Transcript, 25 January 2010, pp. 34002, 34010, 34012, 34014, 34024, 34025; 26 January 2010, p. 34081.

decisions disallowing the use of 3 photographs (“eighth group of impugned Decision”);<sup>33</sup> and (d) decisions disallowing the use of other articles, transcripts and audio-visual materials comprising 6 items (“ninth group of impugned Decisions”)<sup>34</sup> on the grounds that:

1. Exceptional circumstances exist in that:

- (a) The Trial Chamber’s application of its Decision on Documents imports an unduly high standard for the use of documents during cross-examination which is inconsistent with the case law of the *ad hoc* Tribunals and the Special Court in that the Trial Chamber has incorporated factors which ought not to be determinative of the issue of the presentation or use of documentation during cross-examination, which matters “give rise to an issue of fundamental legal importance that has so far not been considered by the Appeals Chamber”;<sup>35</sup>
- (b) The Trial Chamber appears to have fettered its own ability to consider documentation for the limited purpose of impeachment in circumstances where a document also contains material that could potentially be regarded as probative of guilt, thereby limiting its own truth-finding function;<sup>36</sup>

2. The Prosecution relies on the arguments its First and Second Motions in submitting that it will suffer irreparable prejudice;<sup>37</sup>

**RECALLING** the Trial Chamber’s “Order for Expedited Filing”, dated 29 January 2010, wherein the Trial Chamber noted the urgency of the matter and ordered expedited filing schedules for the response and reply;<sup>38</sup>

**NOTING** the “Defence Response to ‘Urgent Application for Leave to Appeal Oral Decisions of 25 and 26 January 2010 on Use of Documents in Cross-Examination’ filed on 3 February 2010 (“Third Response”),<sup>39</sup> wherein the Defence opposes the Third Motion and, relying on the arguments made in its First and Second Responses, submits that it does not meet the conjunctive standards of “exceptional circumstances” and “irreparable prejudice” and furthermore, that the Prosecution simply

<sup>33</sup> Transcript, 26 January 2010, pp. 34111, 34112-34113.

<sup>34</sup> Transcript, 25 January 2010, pp. 33991-33992, 34019, 34030, 34031; 26 January 2010, pp. 34112, 34146.

<sup>35</sup> In para. 23 of the Third Motion, the Prosecution adopts its arguments set forth in paragraphs 9-12 of its filing SCSL-03-01-T-875 of 18 January 2010 and in paragraphs 10-12 of its First Motion.

<sup>36</sup> In para. 12 of the Second Motion, the Prosecution adopts its arguments set forth in paragraphs 16-17 of its filing SCSL-03-01-T-875 of 18 January 2010 and in paragraphs 16 and 17 of its First Motion.

<sup>37</sup> Third Motion, para. 30.

<sup>38</sup> SCSL-03-01-T-895.

<sup>39</sup> SCSL-03-01-T-899.

reiterates its argument that the Trial Chamber erred in rejecting the Prosecution's intended use of the document over and above the nature of the material in the document, which argument has already been rejected by the Trial Chamber;<sup>40</sup>

**NOTING ALSO** the "Prosecution Reply to Defence Response to 'Urgent Application for Leave to Appeal Oral Decisions of 25 and 26 January 2010 on Use of Documents in Cross-Examination'", filed on 4 February 2010 ("Third Reply"),<sup>41</sup> where the Prosecution submits that on its face, the test set out in the Trial Chamber's Decision on Documents did not incorporate a standard that "was unprecedented in its strictness", and that it was only through the application of the test that exceptional circumstances arose,<sup>42</sup> and that the Prosecution has continued to suffer "irreparable prejudice" as a consequence of the use of this unduly high standard, particularly with respect to documents intended only for impeachment;<sup>43</sup>

**RECALLING** the Trial Chamber's Decision issued orally on Friday 5 February 2010 that:

With regard to each of the three Motions 882, 889 and 892, the Chamber is of the opinion that none of the Motions fulfil the criteria laid out in Rule 73(B) of the Rules of Procedure and Evidence and that therefore leave to appeal is denied in respect of each of those Motions. The detailed reasons would be published [in this written Decision];<sup>44</sup>

**COGNISANT** of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 73(A) and (B) of the 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;

**RECALLING** the Appeals Chamber ruling that:

In 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>45</sup>

<sup>40</sup> Third Response, paras. 6-7, referring to *Prosecutor v. Taylor*, SCSL-03-01-898, Decision on 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", 29 January 2010.

<sup>41</sup> SCSL-03-01-T-900.

<sup>42</sup> Third Reply, para. 3.

<sup>43</sup> Third Reply, para. 4.

<sup>44</sup> Transcript, 5 February 2010, p. 34845 ln.27- p. 34846 ln. 3.

<sup>45</sup> *Prosecutor v. Norman, Kondewa, Fofana*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

RECALLING ALSO that this Trial Chamber has also 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>46</sup> and that “exceptional circumstances” may arise “where the cause of justice may be interfered with” or “where issues of fundamental legal importance” are raised;<sup>47</sup>

CONSIDERING the well-established principle that Trial Chambers exercise broad discretion in evidentiary matters and that the Appeals Chambers generally defer to them in such matters;<sup>48</sup>

RECALLING the Trial Chamber’s Decision on Documents, wherein the Trial Chamber held that it should be “particularly cautious when the subject of the cross-examination is the Accused himself, since the borderline between cross-examination as to credit and cross-examination on issues that may be probative of his guilt is difficult if not impossible to determine” and laid down clear guidelines regarding the use and admission of “fresh evidence”<sup>49</sup> during cross-examination of an accused person, holding *inter alia*, that:

[...] where documents containing “fresh evidence” are to be used in cross-examination solely for the purpose of impeaching the credibility of the Accused, there is no statutory or procedural obligation upon the Prosecution to disclose those documents beforehand. However, a document containing “fresh evidence” probative of the guilt of the Accused is subject to disclosure and its use will not be permitted during cross-examination unless (a) it is in the interest of justice and (b) it does not violate the fair trial rights of the Accused. Furthermore, such document will not be admitted into evidence unless the Prosecution can establish “exceptional circumstances”. In considering whether such exceptional circumstances have been established, the Trial Chamber will take into consideration (i) when and by which means the Prosecution obtained these 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>50</sup>

<sup>46</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.

<sup>47</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.

<sup>48</sup> *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgement, 28 May 2008, para. 34, quoting *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Judgement, 23 October 2001, para. 30.

<sup>49</sup> “Fresh evidence” refers to “any documents which were not admitted during the Prosecution case, whether or not they were available to the Prosecution at the time.” See Decision on Documents, para. 23.

<sup>50</sup> Decision on Documents, para. 27.



**NOTING** that the arguments raised by the Prosecution in the First, Second and Third Motions in support of “exceptional circumstances” and “irreparable prejudice” are identical to those raised earlier in the Prosecution’s “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”, filed on 18 January 2010;<sup>51</sup> which Motion was denied;

**RECALLING** the Trial Chamber’s “Decision on 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”, dated 29 January 2010 (“Decision on Leave to Appeal”),<sup>52</sup> wherein the Trial Chamber denied the Prosecution Motion noting, by a majority, that “while neither party appealed the Decision on Documents within the time allowed by the Rules, the Prosecution in effect seeks to challenge the very principles laid down in that decision and not merely ‘their application’”;<sup>53</sup> and held that in its oral decisions disallowing the use of documents in cross-examination on 14 January 2010, the Trial Chamber had properly applied the two-pronged test set out for use of documents containing fresh evidence probative of the guilt of the accused as referred to in paragraph 27 of its Decision on Documents;<sup>54</sup>

**NOTING** that in the Motions in the instant case, the Prosecution in effect similarly seeks to challenge the principles laid down in the Decision on Documents and not merely “their application”;

**CONSIDERING** that, in each of the impugned decisions the Trial Chamber was simply applying the two-pronged test for the use of documents containing fresh evidence probative of the guilt of the accused during cross-examination set out in paragraph 27 of its Decision on Documents and that any other factors mentioned in the said oral decisions were taken into consideration in assessing those two criteria;

**CONSIDERING ALSO** that in this case, the evidence of the Accused can be effectively tested through means other than by a use of documents which contravenes the principles laid down in the Decision on Documents and that the Prosecution has not exhausted such other means;

**HOLDING** therefore that the Prosecution has not satisfied the conjunctive conditions of “exceptional circumstances” and “irreparable prejudice”;

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<sup>51</sup> SCSL-03-01-T-898.

<sup>52</sup> SCSL-03-01-T-898.

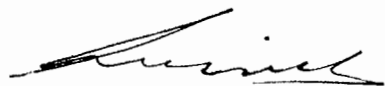
<sup>53</sup> Decision on Leave to Appeal, p. 5.

<sup>54</sup> Decision on Leave to Appeal, p. 6.

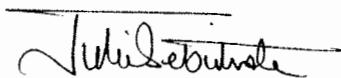
HEREBY DENIES the First, Second and Third Motions.

Justice Doherty appends a Separate and partially Dissenting Opinion.

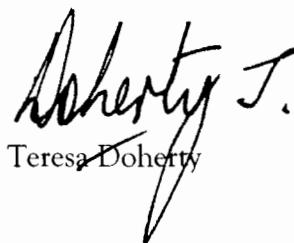
Done at The Hague, The Netherlands, this 9<sup>th</sup> day of February 2010.



Justice Richard Lussick



Justice Julia Sebutinde  
Presiding Judge



Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]



## SEPARATE AND PARTIALLY DISSENTING OPINION OF JUSTICE TERESA DOHERTY

1. I agree with the conclusions of the majority that leave to appeal should be denied in the instant cases with the exception of two *ex tempore* decisions - the majority decision on 21 January 2010 to disallow the use of footnote 18 at page 105 of the book entitled “*ECOMOG: A Sub-Regional Experience in Conflict Resolution Management and Peacekeeping in Liberia*” by Festus Aboagye (“second Impugned Decision”) and the majority decision on 26 January 2010 to disallow the use of a Refworld/UNHCR document (“ninth group of Impugned Decisions”).

2. As noted in my partially dissenting opinion on the “Decision on 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, dated 29 January 2010:<sup>55</sup>

In my view, the Prosecution seeks to show that the Trial Chamber’s application of the test applies an unduly high standard for use of documents in cross-examination and does not challenge the test itself. I am of the opinion that even if a party does not challenge a decision setting out a legal standard, it may still appeal individual decisions in which the Trial Chamber applies and/or interprets this legal standard.

3. I dissented from the two *ex tempore* decisions. I note that the fact that there is a dissenting opinion does not, *per se*, constitute “exceptional circumstances” and “irreparable prejudice” and therefore, does not automatically result in the granting of leave to appeal.<sup>56</sup>

4. As the *ex tempore* decisions were rendered orally, there was limited opportunity to fully express a reasoned dissenting opinion. Prior to considering whether the requirements of Rule 73(B) have been met, I therefore consider that it is incumbent upon me to explain the reasons for my original dissent.

5. In the case of the second Impugned decision, the content of footnote 18 makes no mention of the Accused, the movement he led or his associates and is outside the temporal scope of the Indictment. It relates to a paragraph in the book which was also put to the Accused in the course of cross examination without challenge. In my view, footnote 18 is too vague and remote and its link to the Indictment too tenuous to be probative of guilt of the Accused or to violate his fair trial rights if it were put to him in cross-examination.

6. In the case of the Refworld/UNHCR document my learned colleagues ruled:

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<sup>55</sup> SCSL-03-01-T-898.

<sup>56</sup> *Prosecutor v. Norman et al*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

We are by a majority inclined to agree with the observations made by Mr. Griffiths on behalf of the Defence that a lot of what is contained in this paragraph is material that could have been put to Mr. Bility, being one of the Prosecution witnesses that appeared, and thereby would have given or afforded the Accused an opportunity in all fairness to cross-examine relating to the information contained in here. Now, that did not happen and, as a result, introducing this evidence now here would pose new evidence that goes to the guilt of the Accused.<sup>57</sup>

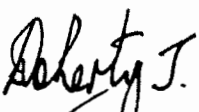
7. To my mind, such a criteria places an obligation on the Prosecutor to anticipate what the Accused would testify to in his evidence-in-chief, in this case, the issue of freedom of the press in Liberia. In effect it obliges a Prosecutor to anticipate detailed aspects of a witness's evidence, in particular evidence that does not go directly to issues in the Indictment. I consider this is too onerous a duty to impose before allowing fresh evidence to be put to impeach a witness, including an accused as a witness on his own behalf.

8. The application of the two-prong test defined in the Decision on Documents, that consists of an assessment of the interests of justice and the fair trial rights of the accused, involves a balancing of the Trial Chamber's duties to ensure evidence is properly presented whilst also ensuring the rights of an accused to know the case against him and have adequate time and facilities to prepare his defence.

9. The two *ex tempore* decisions call into question the interpretation of the two-prong test, and the standard of its application in future instances. The application of the test set out in the Decision on Documents may ultimately limit the possibility of effective cross-examination and truth-finding, and as such, raises issues of fundamental legal importance which cannot be cured on final appeal. Consequently, in my opinion, these two *ex tempore* decisions satisfy the requirements of exceptional circumstances and irreparable prejudice to the Prosecution as set out in Rule 73(B).

10. For these reasons, I would have allowed an appeal of these two *ex tempore* decisions.

Done at The Hague, The Netherlands, this 9<sup>th</sup> day of February 2010.

  
Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

<sup>57</sup> Transcript, 26 January 2010, p. 34146.