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SPECIAL COURT FOR SIERRA LEONE

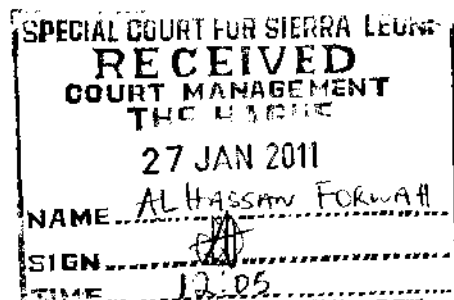
TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 27 January 2011



PROSECUTOR

v.

Charles Ghankay TAYLOR

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

Office of the Prosecutor:

Brenda J. Hollis
Kathryn Howarth
Nicholas Koumjian

Counsel for the Accused:

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

SCSL-03-01-T

27 January 2011

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");¹ SEISED of 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", filed on 10 January 2011 ("Motion"),² wherein the Defence seeks permission to re-open its case for the limited purpose of seeking admission of the following documents ("Defence Documents") into evidence pursuant to Rule 92bis:³

- (a) marked portions of a United States Government ("USG") cable, dated 10 March 2009, which was leaked through Wikileaks and published by the Guardian newspaper ("Guardian") on 17 December 2010 ("First USG Cable");⁴
- (b) the entirety of a USG cable, dated 15 April 2009, which was leaked through Wikileaks and published by the Guardian on 17 December 2010 ("Second USG Cable");⁵
- (c) the first paragraph of an article from the New Democrat, a Liberian newspaper, entitled "Sorry for the Leaks; Pres. Sirleaf Acknowledges US Ambassador's Apology", dated 23 December 2010 ("Newspaper Article");⁶

on the basis that the Defence should be entitled to re-open its case for this limited purpose as:

- (i) the evidence could not, with reasonable diligence, have been obtained and presented during its case in chief, as the cables are confidential and classified documents which were obtained by Wikileaks and published in the Guardian on 17 December 2010, five weeks after it had closed its case, and the publication of the Newspaper Article was in consequence of the leak and publication of the cables;⁷
- (ii) the probative value of the cables is significant as the cables raise grave doubts about the independence and impartiality of the Special Court's prosecution of Charles Taylor;⁸
- (iii) there would be limited delays to the trial proceedings if these documents are admitted;⁹

¹ Noting that Justice Sebutinde has appended a declaration stating that she has voluntarily withdrawn herself from a decision on this Motion

² SCSL03-01-T-1146.

³ Motion, paras 3, 23.

⁴ Motion, Annex A.

⁵ Motion, Annex B.

⁶ Motion, Annex C.

⁷ Motion, para. 12.

⁸ Motion, para. 13.

⁹ Motion, para. 14.

and submits that the documents are admissible pursuant to Rule 92bis on the basis that:

- (i) the documents are relevant as they support the Defence position that the prosecution of Mr. Taylor is political and his indictment was deliberately selective;¹⁰
- (ii) the documents are susceptible of corroboration in due course, in regard to each other, and the evidence on record;¹¹
- (iii) the portions of the USG Cables and Newspaper Article sought to be admitted do not go to the acts and conduct of the Accused and;¹²
- (iv) the information contained in the USG Cables are facts as reported by United States diplomatic personnel, as is the apology from the U.S. Ambassador to the Liberian President contained in the newspaper article, and they therefore do not constitute opinion evidence;¹³

NOTING the "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", filed on 20 January 2011 ("Response"),¹⁴ wherein the Prosecution opposes the Motion and submits that the Defence has failed to demonstrate the relevance of the Defence Documents,¹⁵ on the basis that:

- (i) the USG Cables refute, rather than support, the Defence allegations that the independence and impartiality of the Special Court is compromised by the involvement of the United States or any other government;¹⁶
- (ii) the Newspaper Article has no relevance to this trial;¹⁷
- (iii) there is nothing in any of the documents that provides any evidentiary basis for an argument that the Prosecution is in breach of its duty of independence under Article 15(1), or has sought or received instructions from the USG in relation to these proceedings;¹⁸

¹⁰ Motion, paras 16-18.

¹¹ Motion, para. 19.

¹² Motion, para. 20.

¹³ Motion, para. 21.

¹⁴ SCSL-03-01-T-1163.

¹⁵ Response, para. 5.

¹⁶ Response, paras 6-8.

¹⁷ Response, para. 11.

¹⁸ Response, paras 9-10.

(iv) the Defence argument that the documents are relevant to the Defence theory of selective prosecution has no merit, as the Prosecution acted squarely within the bounds of its discretion pursuant to Article 1(1) of the Statute in bringing an Indictment against Charles Taylor as one of those who bears the "greatest responsibility";¹⁹

NOTING that the Prosecution further submits that the documents contain matters of opinion rather than matters of fact, and that they are therefore inadmissible under Rule 92bis;²⁰

NOTING FURTHER that the Prosecution requests that should the Trial Chamber permit the Defence to re-open its case in order to admit the documents, the entire March 2009 cable should be admitted;²¹

NOTING ALSO the "Defence Reply to 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", filed on 25 January 2011 ("Reply");²²

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 92bis and 73(A) of the Rules of Procedure and Evidence ("Rules");

COGNISANT of the provisions of Rule 92bis which states:

Rule 92bis: Alternative Proof of Facts

- (A) In addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
- (B) 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.
- (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

NOTING that the Appeals Chamber has ruled that the effect of Rule 92bis "is to permit the reception of 'information' - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation." This phraseology was chosen to make clear that proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course. It is for the trial chamber to decide whether the information comes in a form, or is of a kind, that is "susceptible of

¹⁹ Response, paras 12-16.
²⁰ Response, para. 17.
²¹ Response, para. 18.
²² SCSL03-01-T-1170.



confirmation". It follows, of course, from the fact that its reliability is "susceptible of confirmation", that it is also susceptible of being disproved, or so seriously called into question that the court will place no reliance upon it";²³

RECALLING that the Trial Chamber has previously held that a party seeking to re-open a case must (i) meet the threshold test of establishing that the evidence could not, with reasonable diligence, have been obtained and presented during its case in chief, and (ii) if the first prong of the test is met, the party must demonstrate that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial;²⁴

FINDING, given that (i) the Defence closed its case on 12 November 2010; (ii) the two USG Cables were published in the Guardian on 17 December 2010, and (iii) the Newspaper Article was published on 23 December 2010, that these documents could not, with reasonable diligence, have been obtained and presented by the Defence during its case-in-chief;

FINDING FURTHER that the admission of these documents will not have any bearing on the fairness of the trial since the Defence does not request the calling of any *viva voce* evidence and since either party may, if necessary, apply for leave to make supplementary submissions in relation to the documents;

FINDING ALSO, in relation to the admissibility of the documents, that:

- (i) the two USG Code Cables can be related to submissions made by Defence Counsel as well as sworn evidence by the Accused and that they therefore meet the requirements of Rule 92bis(A) & (B) in that (i) they do not go to proof of the acts and conduct of the Accused, (ii) are relevant to the purpose for which they are submitted, and (iii) their reliability is susceptible of confirmation;
- (ii) the First USG Code Cable should be admitted in its entirety in order to fully understand its context;
- (iii) the Newspaper Article merely reports an apology by the US Ambassador to President Sirleaf and, as such, is not relevant to the present case and thus fails to satisfy the requirements of Rule 92bis;

²³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Fofana - Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 16 May 2005, para. 26.

²⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-993, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 8. See also *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006, para 17-18, 21.

HEREBY ALLOWS the Motion in part; and

GRANTS leave to the Defence to re-open its case for the limited purpose of admitting the following documents into evidence pursuant to Rule 92bis:

- (a) The United States Government ("USG") cable dated 10 March 2009, contained in Annex A of the Motion, is admitted into evidence as Defence Exhibit D-481;
- (b) The USG cable dated 15 April 2009, contained in Annex B of the Motion, is admitted into evidence as Defence Exhibit D-482; and

DISMISSES the remainder of the Motion.

Justice Sebutinde appends a declaration.

Done at The Hague, The Netherlands, this 27th of January 2011.

Justice Teresa Doherty
Presiding Judge

Justice Richard Lussick



DECLARATION OF JUSTICE JULIA SEBUTINDE

1. For the reasons set out below, it is my considered opinion that it would be in the interests of justice for me to voluntarily withdraw myself from a decision on this Motion. The USG Code Cable contained in Annex B of the Motion involves a statement that un-named "sources in the Prosecution, Chambers and the Registry" of the Special Court allegedly made certain specific allegations against me.

2. In the Motion, the Defence requests that this document be admitted into evidence pursuant to Rule 92bis of the Rules. Indeed, the Defence has observed that "[t]he only sign of how seriously some members of this Court have taken the matter is through the personal response of Justice Julia Sebutinde to the allegations in one of the cables which impinge on her integrity, as reported in the media".¹

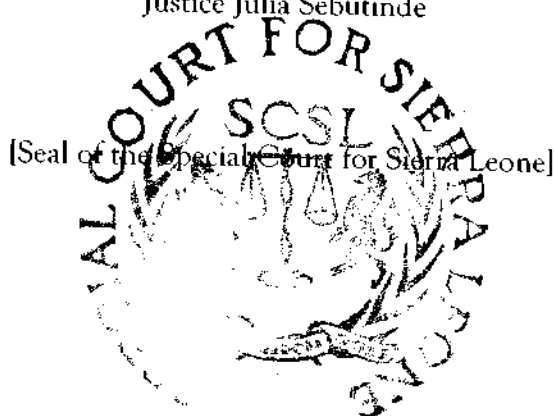
3. I declare that while I am completely innocent of the allegations contained in the USG Code Cable and consider myself to be impartial and free of bias in relation to the issues at stake in this Motion, it is my considered view that in order for justice to be seen to be done, I should not participate in the deliberations or decision relating to this Motion.

4. Accordingly, I voluntarily withdraw from participating in the deliberations and the Decision on this Motion.

Done at The Hague, The Netherlands, this 27th day of January 2011.

Julia Sebutinde

Justice Julia Sebutinde



¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Public with Annex A Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65bis and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011, para. 13.