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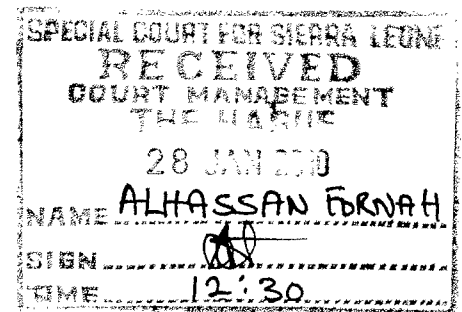
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

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: 28 January 2010



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

**URGENT APPLICATION FOR LEAVE TO APPEAL ORAL DECISIONS OF 25 AND 26 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 25 and 26 January 2010 refusing to allow the use of the following documents (grouped for ease of reference) during cross-examination of the Accused:
 - i. Group 1: Liberian Truth and Reconciliation Commission Final Report, Volume 2 (“**Liberian TRC Report**”) comprising 20 documents;
 - ii. Group 2: Truth and Reconciliation Commission of Liberia Press Releases (“**Liberian TRC Press Releases**”) comprising 7 documents;
 - iii. Group 3: **Child soldiers photographs**, comprising 3 photographs;
 - iv. Group 4: Other articles, transcripts and audio-visual material (“**Miscellaneous material**”) comprising 6 items.

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,¹ 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**”).² In this Decision the Trial Chamber devised a special regime applicable to “fresh evidence”³ 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

¹ *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; *Prosecutor v. Taylor*, SCSL-03-1-T-889, “Urgent Application for Leave to Appeal Oral Decisions of 21 January 2010 on Use of Documents in Cross-Examination”, 25 January 2010.

² *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**”).

³ 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**”).⁴ 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.⁵

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.⁶
5. In proceedings on 25 January 2010, a total of twenty-seven decisions were made by the Trial Chamber disallowing the use of documents by the Prosecution during cross-examination of the Accused. While the Prosecution’s position is that all of those decisions are erroneous, it has exercised discretion in seeking leave to appeal twenty-three of those decisions in the current application.
6. In proceedings on 26 January 2010, the Trial Chamber rendered a total of seventeen decisions disallowing the use of documents during cross-examination and the Prosecution bases the current application on eleven of those decisions.

Group 1: Liberian TRC Report

7. Early in the proceedings on 25 January 2010, the Prosecution sought to use paragraphs 3 and 4 of page 9 of the Liberian TRC Report, a document which was not

⁴ Documents Decision, para. 27.

⁵ Documents Decision, p. 13, referring to the criteria in para. 27.

⁶ Documents Decision, para. 27.

available until after the Prosecution had closed its case, and the Trial Chamber heard the arguments of the parties.⁷ The Trial Chamber ruled as follows:

We have taken note of the submissions on both sides. Firstly, regarding the objection based on the Prosecution's failure to comply with Rule 93(B) which deals with disclosure of material that shows a consistent pattern of conduct, we have noted the Prosecution's submissions that the findings of the TRC Report came out after they closed their case and so we appreciate the fact that the disclosure was done at the time it could have been done because Rule 66(A)(ii) speaks of a rolling disclosure.

Now, unless the Defence can show that this rolling disclosure didn't happen, I think we will have to take the Prosecution's word that they disclosed this material as early as they could in the circumstances.

But on the second objection of new material that goes to proof of guilt being introduced now before Mr. Taylor at this stage of the trial, we will have to uphold the objection based on the reasons that we have always given; that such material, if it is to be used in cross-examination, one, the Prosecution must demonstrate that it is in the interests of justice to do so and, secondly, they must demonstrate that it does not violate the fair trial rights of the accused. Now, in this case we are not satisfied that these two criteria have been fulfilled and for that reason, Ms. Hollis, you cannot rely or use the excerpt in paragraph 4 [and for the same reasons paragraph 3].⁸

8. Later in the proceedings on 25 January 2010 the Prosecution sought to use the following extracts from the Liberian TRC Report:
- page 7, paragraphs 3, 6 & 7;⁹
 - page 121, marked paragraph, 11 lines from the bottom of the paragraph;¹⁰
 - page 121, marked paragraph, 13 lines up from the bottom of the paragraph, starting with the words: "limited supplies";¹¹
 - pages 10, 214, 215 as marked;¹²
 - pages 212 – 213 as marked;¹³
 - page 121, marked paragraph, beginning with the words: "ethnic cleansing and ethnic profiling", 9 lines from the bottom of the paragraph;¹⁴
 - page 123, 10 lines from the bottom of the first marked paragraph on p. 123, starting with the words: "500 ethnic Mandingos";¹⁵

⁷ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33937-33941.

⁸ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33941-33942.

⁹ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33944.

¹⁰ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33952.

¹¹ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33954.

¹² *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33956.

¹³ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33958.

¹⁴ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33962.

- page 178, second entry marked from top of page, starting with: “1991 – the NPFL was responsible...”;¹⁶
 - page 179, entry for 23 October 1992;¹⁷
 - page 180, entry for May 1993;¹⁸
 - pages 128 – 129, beginning 7 lines from the bottom of the last full paragraph starting with : By 1993. Relevant portion starts with: “Buried on the Catholic...”, last paragraph on p. 128-129 (not including last sentence) and p. 180, entry for September 1993;¹⁹
 - page 197, entry no. 8, 14 January 1994;²⁰
 - page 182, 5th entry for September 1994. Also 2nd entry for September 1994, first entry for October 1994, & entry for 15 December 1994.²¹
9. The Prosecution intended to use each of the above extracts for impeachment and potentially also to prove the guilt of the Accused. The Trial Chamber disallowed the use of each of these thirteen further extracts from the Liberian TRC Report for either purpose on the basis of its prior reasoning.²²
10. In proceedings on 26 January 2010, the Prosecution sought to use the following extracts from the Liberian TRC Report as being relevant both for impeachment and to prove the guilt of the Accused:
- p. 185, second entry for September 19, 1998; & entry for 2000; and second entry for January 2000;²³
 - p. 186, entry for March 2001;²⁴
 - p. 211, paragraph as marked on bottom of page;²⁵
 - p. 173, second entry for October 1992.²⁶

¹⁵ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33972.

¹⁶ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33974.

¹⁷ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33983.

¹⁸ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34000.

¹⁹ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34009.

²⁰ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34020.

²¹ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34021.

²² See decisions at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33951; 33953; 33955; 33957; 33958; 33963; 33972; 33974; 33984; 34001; 34010; 34020; 34022.

²³ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34067.

²⁴ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34071.

²⁵ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34115.

²⁶ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34118-34119.

11. The Trial Chamber disallowed the use of each of these four extracts from the Liberian TRC Report on the basis of its prior reasoning.²⁷
12. Further, the Prosecution sought to use the following extracts of the Liberian TRC Report for the purpose of impeachment only:
 - p. 191, first entry on this page for February 2002;²⁸
 - p. 187, second entry from bottom of page relating to July 2003.²⁹
13. The Trial Chamber disallowed the use of both of these extracts from the Liberian TRC Report for either purpose,³⁰ finding in the latter case that the document “does contain material that could not only go to proof of guilt but could also show a consistent pattern of conduct on the part of the accused”.³¹

Group 2: Liberian TRC Press Releases

14. In proceedings on 25 January 2010, the Prosecution also sought to use marked portions of various Liberian TRC Press Releases for impeachment purposes only as follows:
 - NPFL Fighters Massacred 450 Civilians in Belle District: Survivor;³²
 - Taylor, Sogbandi, Musuleng-Cooper Forced Victims to Lie to UN, says Carter Camp Survivor. Entire article;³³
 - Former Deputy Public Works Minister’s Widow Testifies, 2nd page, 00101205, paragraph starting with: The only perpetrator, and next paragraph: Padmore admitted;³⁴
 - Day Five of the Truth and Reconciliation Commission of Liberia Public Hearings, p. 2 bottom of page paragraph and p. 3, first paragraph;³⁵
 - More Perpetrators Give Startling revelations, TRC Hearing day eight, 21 January 2008, p. 1, - 3rd, 4th, 5th, 6th paragraph of the article;³⁶

²⁷ See decisions at *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34068, 34071, 34118, 34119, 34075, 34085.

²⁸ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34072-34073.

²⁹ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34084.

³⁰ See decisions at *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34075, 34085.

³¹ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34085.

³² *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34002.

³³ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34010.

³⁴ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34010-34011.

³⁵ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34012-34013.

³⁶ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34023.

- Joe Tuah Ate Human Grease and Flesh... Witness Tells TRC Bong Hearings, specifically relating to the killings in Foloblah or Foloblai, 4th, 5th, 6th paragraphs on the 1st page; first 3 paragraphs; as well as 7th and 8th paragraphs.³⁷
- 15. The Trial Chamber disallowed the use of each of the six listed press releases on the basis of its prior reasoning.³⁸
- 16. Further, in proceedings on 26 January 2010, the Prosecution sought to use the following Liberian TRC Press Release for impeachment purposes only:
 - More Revelations on Mahel Massacre – Babies Heads Smashed, Pregnant Women Disembowelled, 30 April 2008.³⁹
- 17. The Trial Chamber relied on its previous reasoning to disallow the use of the document.⁴⁰

Group 3: Child soldier photographs

- 18. In proceedings on 26 January 2010, the Prosecution sought to use, for the purpose of impeachment only:
 - Colour photo of Taylor’s SBUs in “Rape, Loot and Murder, Liberian Civil War, a journalist photodiary”;⁴¹
 - Colour photo of the author’s nephew Little Kokulo in “Rape, Loot and Murder, Liberian Civil War, a journalist photodiary”;⁴²
 - Human Rights Watch, Youth, Poverty and Blood, photo and caption on p. 55.⁴³
- 19. The Trial Chamber disallowed their use on the basis that the Prosecution had not fulfilled the two-pronged use test.⁴⁴

Group 4: Miscellaneous material

- 20. In proceedings on 25 and 26 January 2010, the Prosecution also sought to use marked portions of the following items for the purpose of impeachment only:
 - Murder of Five American Nuns, by Gabriel Williams;⁴⁵

³⁷ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34025.

³⁸ See decisions at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34002, 34010, 34012, 34014, 34024, 34025.

³⁹ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34080.

⁴⁰ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34081.

⁴¹ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34110.

⁴² *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34110.

⁴³ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34112.

⁴⁴ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34111 and 34112-34113.

⁴⁵ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33988.

- New Vision, Tears of Sorrow at TRC Hearings in Liberia, 29 January 2008;⁴⁶
 - Transcript of Statement by Honourable Tom Woewiyu, Minister of Labour, Liberia National Transitional Government, 19 July 1994, p. 343 – last paragraph, continuing to the end of paragraph on that page;⁴⁷
 - Transcript of Statement by Honourable Tom Woewiyu, p.343, second full paragraph, beginning with: over the years, in particular 8 lines from the bottom of the paragraph: those young children... ending with the end of that paragraph;⁴⁸
 - Video clip ‘An Uncivil War’;⁴⁹
 - UNHCR, Liberia: Information on the new government’s human rights record and information on the conditions of members of the Krahn ethnic group under the new government, paragraph beginning with: ‘Country Reports 1997’.⁵⁰
21. The Trial Chamber disallowed their use on the basis that the items contained material that went to proof of guilt and the use test had not been satisfied.⁵¹

III. APPLICABLE LAW

22. In terms of the applicable law, the Prosecution adopts and incorporates by reference its earlier filings of 18 and 21 January 2010.

IV. ARGUMENT

Exceptional Circumstances

Issue of fundamental legal importance

23. The Prosecution adopts and incorporates by reference its arguments set forth in paragraphs 9, 10, 11, 12, 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.
24. In relation to Group 1, it must be emphasized that the Liberian TRC Report was not available during the Prosecution’s case-in-chief.⁵² Similarly, in relation to Group 3,

⁴⁶ Relevant portions referred to at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34016-34018.

⁴⁷ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34029.

⁴⁸ *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34030.

⁴⁹ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34119.

⁵⁰ *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34142.

⁵¹ See decisions at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33991-33992, 34019, 34030, 34031 and decisions at *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34122, 34146.

⁵² See also argument at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33940.

the book “Rape, Loot and Murder, Liberian Civil War, a journalist photodiary” was published in 2009 and was therefore unavailable during the Prosecution’s case-in-chief.

25. The Prosecution sought to use the extracts from the Liberian TRC Report that are the subject of this application to challenge the Accused’s assertions during his examination-in-chief on matters such as the scale on which crimes were committed by the NPFL, the systematic nature of these crimes, and the targeting of persons of particular ethnic groups. The information contained in all but two of the extracts⁵³ was also put forward as being relevant for guilt.
26. All the documents in Groups 2-4 were intended for the sole purpose of challenging the Accused’s assertions in his examination-in-chief and the Prosecution reiterates its argument as to exceptional circumstances including the Trial Chamber’s unwillingness to consider the intended purpose for the use of a document in applying its two-pronged use test.⁵⁴ Furthermore, exceptional circumstances arise from the Trial Chamber’s repeated unwillingness to consider portions of a document individually so that paragraphs that may not be probative of guilt in any way are deemed to be so when read in their full context, thereby excluding the possibility of using any portion of the document to challenge the Accused’s credibility.⁵⁵
27. The Trial Chamber appears to be applying an ever higher standard. Prosecution evidence is necessarily “prejudicial to the Accused”⁵⁶ in so far as any evidence presented by the Prosecution is or ought to be relevant to proving that the Accused is responsible for the crimes charged in the Indictment. The Trial Chamber’s reasoning that documents are probative of guilt and therefore “prejudicial”, irrespective of the use to which they are to be put, makes it unclear as to which factors might result in a successful attempt to use a document that is hypothetically probative of guilt.
28. Furthermore, the notion of what the Prosecution could have presented during its case-in-chief continues to be stretched too far. There is no reason why the Prosecution

⁵³ See para. 12 above.

⁵⁴ See for example decisions at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34002 and 34031.

⁵⁵ See for example decision at *Prosecutor v. Taylor*, Trial Transcript, 26 January 2010, 34146.

⁵⁶ See *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 33992: the document “Murder of Five American Nuns, by Gabriel Williams” would be “prejudicial to the accused within the meaning that we gave in our decision of 30 November”. See also *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34012.

would have presented evidence that it does not deem to be probative of guilt in its case-in-chief.⁵⁷ Further, as to the material which the Prosecution requested be considered for impeachment only, the Prosecution should not be expected to present impeachment evidence before the witness whom it intends to impeach has testified.

29. 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

30. 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

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

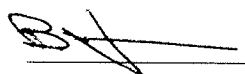
V. CONCLUSION

32. For these reasons the Prosecution seeks leave to appeal the decisions rendered on 25 and 26 January 2010 described herein and requests an expedited timetable for a resolution of this application.

Filed in The Hague,

28 January 2010,

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

⁵⁷ See for example decision at *Prosecutor v. Taylor*, Trial Transcript, 25 January 2010, 34146 and arguments at 34142-34145.

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

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.

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Prosecutor v. Taylor, Trial Transcript, 25 January 2010.

Prosecutor v. Taylor, Trial Transcript, 26 January 2010.