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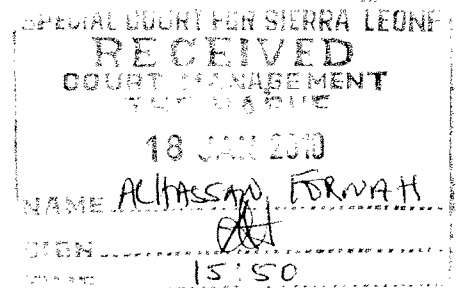
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

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.

circumstances arise if the course of justice *might* be interfered with; there is no requirement to prove that such interference *will* definitely arise. Irreparable prejudice arises where the Trial Chamber's decision is not remediable on final appeal.

IV. ARGUMENT

Exceptional Circumstances

Issue of fundamental legal importance

9. The First and Second Impugned Decisions give rise to an issue of fundamental legal importance. The Trial Chamber's application of the use test 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 as well as the Special Court.
10. As set out by the Prosecution in previous written submissions, the case law distinguishes between the presentation or use stage and the admission stage.¹³ The case law is clear that documents may be used during cross-examination in order to elicit a response from a witness,¹⁴ and that issues pertaining to the "interests of justice", "prejudice to the accused" and "exceptional circumstances" arise at the admission stage.¹⁵ A decision dated 12 January 2010 of the ICTY Trial Chamber in the *Prlić* case further supports the argument that this Trial Chamber's application of its use test is contrary to the jurisprudence.¹⁶ The ICTY Trial Chamber emphasized that different procedural rules apply to the two distinct stages of presentation/use and admission and that with regard to the former stage the Prosecution does not have to provide any justification for the use of a document in cross-examination. According to the ICTY Trial Chamber, it is only at the admission stage that a party is required to

¹³ See *Prosecutor v Taylor*, "Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", (**"Prosecution Motion - Legal Standards"**) 17 November 2009, esp. at paras. 9 and 22 – 23, and *Prosecutor v Taylor*, "Prosecution Reply to Defence Response in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", 25 November 2009, at para. 7.

¹⁴ See Prosecution Motion – Legal Standards, paras 10 – 12.

¹⁵ See Prosecution Motion – Legal Standards paras 15 – 21, referring in particular to *Prosecutor v. Prlić*, IT-04-74-T, "Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 27 November 2008, (**"Prlić Trial Chamber Decision"**) and *Prosecutor v. Prlić*, IT-04-74-AR73.14, "Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 26 February 2009 (**"Prlić Appeal Decision"**)

¹⁶ *Prosecutor v. Prlić*, IT-04-74-T, "Ordonnance portant clarification de la Décision du 27 Novembre 2008". 12 January 2010. The English version of this decision is expected to be available on 18 January 2010 and will be provided to the Defence and Trial Chamber. However, in the meantime, the Prosecution attaches the decision in French together with an unofficial translation in **Annex A**.

indicate the purpose for which a document is tendered and that arguments as to admissibility are heard. The parties in that case were specifically invited not to raise objections prematurely.

11. The use test as applied by the Trial Chamber effectively takes part of the test applied in *Prlic* at the admission stage and applies it to the use stage.¹⁷ In its application of the use test, 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.
12. As regards the First Impugned Decision, the Trial Chamber states that “the document itself was not produced in the Prosecution case but has been produced during the cross-examination of the accused”. In the Documents Decision the Trial Chamber articulated that it was only with regard to the admission stage that exceptional circumstances needed to be shown, and that this would include a consideration of factors such as when and by which means the Prosecution obtained the documents. Therefore, the First Impugned Decision unfairly raises the standard for the use of a document by permitting the same factors as should ordinarily be relevant only to the admissibility phase to be *determinative*. To the extent that this factor may be *relevant* to the interests of justice criterion, it should be noted that the Mia Farrow Declaration was not available to the Prosecution during its case-in-chief.¹⁸
13. In refusing to permit the Mia Farrow Declaration to be shown to the Accused, the Trial Chamber also relies upon the fact that the document contains multiple hearsay. The rules of evidence governing proceedings before the Special Court do not prohibit hearsay evidence. Notably, during these proceedings, the Trial Chamber has specifically ruled that if hearsay evidence is relevant then it is admissible, and that issues surrounding the nature of the evidence relate to the weight to be attached to that evidence, rather than its admissibility.¹⁹ The Trial Chamber’s suggestion that the

¹⁷ That is, the “interests of justice” and “violation of the rights of the accused” criteria are considered at the admission rather than the use stage.

¹⁸ Indeed this is apparent on the face of the statement, which is dated 9 November 2009.

¹⁹ *Prosecutor v. Taylor*, Trial Transcript, 16 September 2009, 29069 – 29073 (private session) see Confidential **Annex B**; See also *Prosecutor v. Taylor*, Trial Transcript, 4 November 2009, 31179 – 31184. On this occasion the Accused was allowed to give evidence in relation to interview notes made by a Mr Harry Greaves Jr in relation to his interview of Stephen Ellis, in circumstances where although Stephen Ellis was called as a witness for the Prosecution, the matters raised by the Accused in his testimony were never put to Mr Ellis during cross-examination.

use of multiple hearsay evidence is impermissible raises the bar for the use of documentary evidence during cross-examination to an unduly high level.

14. The First Impugned Decision concludes that the document is “highly prejudicial”, suggesting that this is related to the fact that it contains multiple hearsay and that the Accused has no opportunity to cross-examine the makers of the statement. However, it is clear from the jurisprudence that the issue of prejudice to the Accused is ordinarily to be considered at the admission stage.²⁰ In this regard, it is notable that the Appeals Chamber of the ICTY stated that the Defence has to be exacting about the prejudice suffered by the Accused and cannot simply rely on prejudice as a matter of principle,²¹ that the Trial Chamber must strike a balance between the rights of the Accused and the decision to admit evidence, and that the Trial Chamber will also have to consider the available measures to address any prejudice, including “for example, providing more time for [re]-examination, adjourning the session, or granting the possibility of recalling the witness”.²²
15. As regards the Second Impugned Decision, the reasons provided by the Trial Chamber for its refusal to permit the use of the document during cross-examination, appear to relate primarily to the nature of the document “which does not contain indisputable facts”. Again, this sets the standard too high for the mere use of a document. Additionally, the Trial Chamber referred again to the fact that the document was not produced in the Prosecution’s case which, as argued above, should not be determinative at the use stage.
16. Further, 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 the guilt of the Accused. Professional judges are perfectly able and entitled to consider a

Notably, at p. 31181 the Presiding Judge stated that “some of the reasons for your objections go to hearsay, you’re saying according to him these are entirely third party comments. Well, that’s covered by – that’s hearsay. The accused had no hand in making them. Well, he doesn’t have to if he’s tendering hearsay evidence. That he was not one of the parties, he doesn’t have to be. That still makes hearsay evidence admissible. And Mr Taylor has read the document and he gave evidence that makes it relevant. So in my ruling the document can be produced through this witness”; see also for example *Prosecutor v. Taylor*, Trial Transcript, 5 November 2009, 31240 – 3142.

²⁰ *Prlić* Appeals Decision, paras 24 – 26.

²¹ *Ibid.*, para. 26, in particular the Appeals Chamber notes that “the mere fact that the admitted evidence was probative of the Prosecution’s case does not mean that the accused were prejudiced”.

²² *Ibid.*, para. 25.

document for a specific purpose and to disregard the evidence for other purposes.²³ The Trial Chamber, in both the First and Second Impugned Decisions, has shown itself to be unwilling to entertain this possibility. As a consequence, the presentation of any document that contains material potentially probative of guilt is likely to result in a successful objection by the Defence, irrespective of the fact that the purpose for its use may be impeachment only. By adopting this approach, the Trial Chamber is unnecessarily and incorrectly depriving itself of the ability to consider documentary evidence which impeaches the Accused's testimony. The Trial Chamber is therefore limiting its own truth-finding function. The intended use of material for impeachment only is a consideration that ought to form part of the Trial Chamber's assessment as to whether the use of the document would be in the interests of justice and not a violation of the Accused's fair trial rights.

17. Finally, 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, in circumstances where the Defence objects to that document's use.²⁴ 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 justice²⁵

18. Further, there is a danger that the course of justice will be interfered with because the Trial Chamber's approach prevents the Prosecution from fully exercising its right to test the evidence of the Accused in cross-examination. This in turn deprives the Trial Chamber of information relevant to determining what weight should be given to the testimony of the Accused, or, in some instances, of evidence that is relevant to prove guilt. The possibility that the course of justice will be interfered with gives rise to "exceptional circumstances".
19. Mr. Taylor has consistently denied ever possessing diamonds other than in his own

²³ See *Prlic* Appeals Chamber Decision, para. 29, where the Appeals Chamber states that "With respect to the assessment of evidence, the Trial Chamber has the discretion to limit the purpose for which the admitted pieces of evidence may be used".

²⁴ See for example *Prosecutor v. Taylor*, Trial Transcript (livenote), 18 January 2010, pp. 98-105.

²⁵ See para. 8 above.

jewelry²⁶ and specifically denied possessing any diamonds on a September 1997 trip to South Africa.²⁷ By refusing to allow the Prosecution to challenge Mr. Taylor's denials with the Mia Farrow Declaration, the Trial Chamber denied the Prosecution the right to an effective cross-examination, and further precluded the Prosecution from later seeking the admission of a document that came into its possession long after the close of its case, clearly impeached the Accused's testimony and went to what the Trial Chamber saw as a "central issue."

20. The ECOMOG book was relevant to discrediting Mr. Taylor's allegations during his examination-in-chief that numerous Prosecution witnesses were lying when they testified regarding the transfer of arms from Taylor to the RUF rebels in Sierra Leone. The Accused testified that from 1997 until at least 2001, his forces were totally disarmed, he never imported any weapons into Liberia and he had no weapons to give to forces in Sierra Leone.²⁸ The portion of the text on page 270 of the ECOMOG book which was the focus of the attempt to impeach the Accused stated that "following the visit of President Taylor to South Africa in late 1997, the President was reported to have returned with a consignment of arms and ammunition."
21. The Prosecution made it clear that it would only be asking the Trial Chamber to consider this document to challenge the credibility of the Accused who claimed throughout his testimony that he had no weapons during this time period.²⁹ The Accused himself had noted that although his possession of weapons in Liberia did not form part of the charges, it was part of his defence that he had no weapons to provide to the RUF.³⁰
22. It cannot advance the course of justice for a witness, including an accused, to be able to tailor false evidence around documents already in evidence, secure in the knowledge that the Prosecution cannot present further evidence to refute his claims.

²⁶ *Prosecutor v. Taylor*, Trial Transcript, 26 November 2009, p. 32602, lines 5-6.

²⁷ *Prosecutor v. Taylor*, Trial Transcript, 14 January 2010, p. 33338, line 5.

²⁸ See *Prosecutor v. Taylor*, Trial Transcripts, 13 August 2009 p 26736; 25 August 2009, pp. 27667-27668; 3 August 2009, pp. 25797 and 25823-25824; 10 September 2009, pp. 25612-25613; 14 September 2009, p. 28735; 17 September 2009, p. 29281; and 26 November 2009, p. 32516 lines 2-5.

²⁹ *Prosecutor v. Taylor*, Trial Transcript, 33364-33366.

³⁰ As noted by Mr. Taylor himself, the fact that he had brought weapons into Liberia does not form part of the charges but his claims not to have had any weapons to give the RUF formed a critical part of his defence. See *Prosecutor v. Taylor*, Trial Transcript, 26 November 2009, 32515.

Such an artificial and asymmetrical approach to the use of documents hinders the Trial Chamber in its search for the truth.

Irreparable Prejudice

23. As explained above, the Prosecution will necessarily suffer prejudice as a result of the First and Second Impugned Decisions because the Prosecution is being prevented from fully exercising its right to test the evidence of the Accused through cross-examination. The First and Second Impugned Decisions also give rise to “irreparable prejudice” because there will be no cure available upon final appeal. The only remedy would be to re-open the trial phase of the case in order to allow for further cross-examination of the Accused in relation to the documentary evidence adduced by the Prosecution, and to allow re-examination in relation to the same. Re-opening the case, post appeal, would patently be highly undesirable. Furthermore, it is not a possibility that the Appeals Chamber has so far entertained in its judgments.³¹

V. CONCLUSION

24. 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,

18 January 2010,

For the Prosecution,


Brenda J. Hollis
Principal Trial Attorney

³¹ See e.g. *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-A-675, “Judgement”, Appeals Chamber, para. 87.

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ICTY

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Prosecutor v. Prlić, IT-04-74-T, “Ordonnance portant clarification de la Décision du 27 Novembre 2008”, 12 January 2010 (Annex A)

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ANNEX A

ANNEX A

UNOFFICIAL TRANSLATION

Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić and Pušić

Order to Clarify the Decision of 27 November 2008

12 January 2010

The Chamber was seized by the “Prosecution Motion requesting clarification regarding the use of “new” documents during cross-examination” submitted publicly on the 30th of November 2009” in which the Prosecution requested the Chamber to clarify how to apply the “Decision regarding the use of documents by the Prosecution during cross-examination of witness” of the 27th of November 2008 (“Decision of the 27th November 2008”) and more specifically the procedure with respect to the use of “new documents” during cross-examination of witnesses.

Noting the “ Joint Response of Accused Stojić, Praljak, Petković, Ćorić and Pušić to the Prosecution’s 30 November 2009 Motion for Clarification on the Use of “New” Documents During Cross-Examination” jointly submitted publicly by the defence teams of the following accused Stojić, Praljak, Petković, Ćorić and Pušić in which the joint defence request the Chamber to dismiss the Prosecution request.

Given that the Prlić defence did not submit any response to the Request,

Noting the “Decision regarding the interlocutory appeal filed against the Decision on the use of documents by the Prosecution during cross-examination of witnesses” rendered publicly by the Appeal Chamber on the 26 of February 2009 in which the Appeal Chamber confirmed the 27th November 2008 Decision,

Given that the Chamber notes that the joint defence submitted its joint response on December 8th 2009, that is to say one day after the deadline given by the Chamber, it nevertheless exceptionally decides given the importance of the Request, to allow the joint response in the interest of justice; that the Chamber nevertheless asks the parties to follow rigorously the deadlines given by the Chamber in the future,

Given that the Chamber notes that in its Request the Prosecution argues that when it wishes to “use new documents” during cross examination of a witness, it is under no obligation to reveal beforehand its intention to so, to explain it nor does it have to ask the Chamber authorisation to do so before using them; the Prosecution also submits that if it later wishes to tender these “new documents”, it must comply with the admissibility requirements set out by the Chamber in the Decision of 27th of November 2008; the Prosecution further submits that the defence teams have not proved that the use during hearings of “new documents” by the Prosecution caused any type of prejudice and that unlike the Chamber’s approach during the cross examination of witnesses by the defence teams, no limitation on the “use of new documents” were imposed by the Prosecution.

Given that in the joint response, the joint defence argues that first, the Request is an attempt from the Prosecution to challenge the 27th of November 2008 decision while hiding it under the cover of a clarification request; second, a clarification of the 27th of November 2008 Decision is not necessary since the Decision provides explicitly that the Prosecution can use “new documents” during cross examination of witnesses in order to test their credibility or refresh their memory but that the use by the Prosecution of “new documents” must be justified by exceptional reasons and requires prior authorization from the Chamber,

Given that in keeping with the submission of the Prosecution, the Chamber recognizes that using “new documents” during cross examination of witnesses and tendering “new documents” constitutes two different steps governed by different procedures,

Given that the Chamber notes that this distinction between the modalities on how to use new documents and how to admit “new documents” also applies to the defence,

Given that the Chamber recalls that when a document is used during the cross-examination of witness, may it be a new a document used in order to test the credibility of the witness or to refresh his memory or in order to establish the responsibility of one or several of the accused, the Prosecution and the Defence team are not required to divulge their strategy; therefore, they are not required to specify at that moment if they wish or not to tender the new documents at a later stage; therefore at the moment of the use of new documents during cross examination of a witness, the Prosecution and the defence teams are not required to provide justification for the use of the documents in question,

Given that the Chamber recalls that when the Prosecution and defence teams wish at a later stage to tender new documents they are then required, during the submission of their IC list, to indicate the purpose of the request to tender the new documents; in order to establish the responsibility of one of several of the accused, they must at that stage indicate the exceptional circumstances justifying the admission of “new documents,” that is to say when and how they obtained the document, the date the document was disclosed to the defence and the reasons why they are presenting the document after the closure of the presentation of their case; thus in order to clarify the matter, the Chamber recalls that adversarial debates will take place at the moment of the request of admission and the all objections made during the hearing related to the nature of the document used are therefore premature,

For all the above, the Chamber

PURSUANT to articles 20 and 21 of that Statute of the Tribunal 54 and 85 A), 89 B), 90 H) of the Rules of evidence and procedure,

RECALLS that the parties having finished presenting their case are not required to justify the use of “new documents” during the hearing when they cross examine defence witnesses, AND

INVITES the parties not to object during the hearing as to the nature of the “new documents” and to keep those objections for when and if the new documents are submitted as admissible evidence at a later stage.



Tribunal international chargé de
poursuivre les personnes présumées
responsables de violations graves
du droit international humanitaire
commises sur le territoire de
l'ex-Yougoslavie depuis 1991

Affaire n° : IT-04-74-T

Date : 12 janvier 2010

Original : FRANÇAIS

LA CHAMBRE DE PREMIÈRE INSTANCE III

Composée comme suit : M. le Juge Jean-Claude Antonetti, Président
M. le Juge Árpád Prandler
M. le Juge Stefan Trechsel
M. le Juge Antoine Kesia-Mbe Mindua, Juge de réserve
Assistée de : M. John Hocking, Greffier
Décision rendue le : 12 janvier 2010

LE PROCUREUR

c/

Jadranko PRLIĆ
Bruno STOJIC
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

PUBLIC

**ORDONNANCE PORTANT CLARIFICATION DE LA DÉCISION DU
27 NOVEMBRE 2008**

Le Bureau du Procureur :

M. Kenneth Scott
M. Douglas Stringer

Les Conseils des Accusés :

M. Michael Karnavas et Mme Suzana Tomanović pour Jadranko Prlić
Mme Senka Nožica et M. Karim A. A. Khan pour Bruno Stojic
M. Božidar Kovačić et Mme Nika Pinter pour Slobodan Praljak
Mme Vesna Alaburić et M. Nicholas Stewart pour Milivoj Petković
Mme Dijana Tomašegović-Tomić et M. Dražen Plavec pour Valentin Ćorić
M. Fahrudin Ibrišimović et M. Roger Sahota pour Berislav Pušić

LA CHAMBRE DE PREMIERE INSTANCE III (« Chambre ») du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 (« Tribunal »),

SAISIE de la « Demande de l'Accusation tendant à obtenir des éclaircissements sur l'utilisation de "nouveaux" documents au cours du contre-interrogatoire », déposée à titre public par le Bureau du Procureur (« Accusation ») le 30 novembre 2009 (« Demande »), par laquelle l'Accusation prie la Chambre de clarifier les modalités d'application de la « Décision portant sur la présentation de documents par l'Accusation lors du contre-interrogatoire des témoins à décharge » du 27 novembre 2008 (« Décision du 27 novembre 2008 ») et plus particulièrement la procédure relative à la présentation (« use ») de « documents nouveaux » au cours du contre-interrogatoire d'un témoin à décharge¹,

VU la « *Joint Response of Accused Stojić, Praljak, Petković, Ćorić and Pušić to the Prosecution's 30 November 2009 Motion for Clarification on the Use of « New » Documents During Cross-Examination* », déposée conjointement à titre public par les équipes de la Défense des Accusés Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić et Berislav Pušić (« Défense conjointe² ») le 8 décembre 2009 (« Réponse conjointe »), dans laquelle la Défense conjointe prie la Chambre de rejeter la Demande de l'Accusation³,

ATTENDU que la Défense Prlić n'a pas déposé de réponse à la Demande,

VU la « Décision relative à l'appel interlocutoire formé contre la Décision portant sur la présentation de documents par l'Accusation lors du contre-interrogatoire des témoins à décharge » rendue par la Chambre d'appel à titre public le 26 février 2009, par laquelle la Chambre d'appel a confirmé la Décision du 27 novembre 2008⁴,

¹ Demande, par. 1, 5, 10 et 22 et note de bas de page 3.

² Dans la mesure où les équipes des Défenses Stojić, Praljak, Petković, Ćorić et Pušić ont déposé une Réponse conjointe à la Demande de l'Accusation, la Chambre fera référence à la « Défense conjointe » en tant qu'entité aux fins de la présente Décision.

³ Réponse, par. 5 et 6.

⁴ *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR73.14, « Décision relative à l'appel interlocutoire formé contre la Décision portant sur la présentation de documents par l'Accusation lors du contre-interrogatoire des témoins à décharge », public, 26 février 2009 (« Décision de la Chambre d'appel du 26 février 2009 »), par. 23 à 31.

ATTENDU à titre liminaire que la Chambre relève que la Défense conjointe a déposé sa Réponse conjointe le 8 décembre 2009, soit un jour après le délai fixé par la Chambre⁵; qu'elle décide cependant, à titre exceptionnel et compte tenu de l'objet de la Demande, qu'il est dans l'intérêt de la justice d'admettre la Réponse conjointe; que la Chambre enjoint néanmoins les Parties à respecter, à l'avenir, rigoureusement les délais fixés,

ATTENDU que la Chambre relève que dans sa Demande, l'Accusation argue que lorsqu'elle souhaite présenter (« *use* ») des « documents nouveaux » lors du contre-interrogatoire d'un témoin à décharge, elle n'est pas tenue de révéler au préalable son intention ou de donner une explication ou encore de demander l'autorisation de la Chambre avant de le faire⁶; que si elle souhaite par la suite demander le versement au dossier (« *tender* ») de ces « documents nouveaux », elle doit alors se plier aux critères d'admissibilité définis par la Chambre dans la Décision du 27 novembre 2008⁷; que par ailleurs, les équipes de la défense n'ont pas établi que la présentation en audience de « documents nouveaux » par l'Accusation ait causé un préjudice quelconque et qu'à l'instar de l'approche adoptée par la Chambre lors du contre-interrogatoire des témoins à charge par les équipes de la défense, aucune limitation sur la présentation de « documents nouveaux » ne peut être appliquée à l'Accusation⁸,

ATTENDU que dans la Réponse conjointe, la Défense conjointe argue dans un premier temps que la Demande constitue une tentative de la part de l'Accusation de contester la Décision du 27 novembre 2008 sous le couvert d'une demande de clarification⁹; que dans un second temps, une clarification de la Décision du 27 novembre 2008 n'est pas nécessaire dans la mesure où ladite Décision stipule explicitement que l'Accusation peut présenter des « documents nouveaux » lors du contre-interrogatoire d'un témoin à décharge dans le but de tester sa crédibilité ou raviver sa mémoire mais que la présentation par l'Accusation de « documents nouveaux » à charge doit être motivée par des raisons exceptionnelles et requiert l'autorisation préalable de la Chambre¹⁰,

ATTENDU qu'à l'instar de la position avancée par l'Accusation, la Chambre reconnaît que la présentation de « documents nouveaux » lors du contre-interrogatoire d'un témoin à décharge

⁵ Courriel de la Chambre adressé aux Parties fixant une échéance pour le dépôt de la Demande de l'Accusation et des réponses des parties, 23 novembre 2009.

⁶ Demande, par. 5, 11-15 et 22.

⁷ Demande, par. 5, 19 et 22.

⁸ Demande, par. 7 et 8.

⁹ Réponse conjointe, par. 5 (i).

¹⁰ Réponse conjointe, par. 5 (ii) à (iv).

et la demande de versement au dossier de « documents nouveaux » par l'Accusation constituent deux étapes distinctes régies par des procédures différentes,

ATTENDU que la Chambre note d'ailleurs que cette distinction entre les modalités de présentation et celles d'admission de « documents nouveaux » s'applique également aux équipes de la défense ayant clos leur cause,

ATTENDU que la Chambre rappelle que, durant la phase de la présentation de « documents nouveaux » au cours du contre-interrogatoire d'un témoin à décharge, qu'il s'agisse d'un « document nouveau » présenté afin de tester la crédibilité de ce témoin ou de raviver sa mémoire ou en vue d'établir la culpabilité d'un ou de plusieurs accusés, l'Accusation et les équipes de la défense ayant clos leur cause n'ont pas à divulguer leur stratégie ; que par conséquent, elles ne doivent pas à ce stade spécifier si elles souhaitent ou non demander ultérieurement l'admission de ces « documents nouveaux » ; qu'en conséquence au stade de la présentation de « documents nouveaux » au cours du contre-interrogatoire d'un témoin à décharge, l'Accusation et les équipes de la défense ayant clos leur cause ne sont pas tenues de fournir de justifications relatives à la présentation de cesdits documents,

ATTENDU que la Chambre rappelle que l'Accusation et les équipes de la défense ayant clos leur cause qui souhaitent dans un second temps demander le versement au dossier de « documents nouveaux » sont alors tenues, lors du dépôt de leur liste IC respective, de préciser dans quel but elles entendent verser ces « documents nouveaux » ; que lorsqu'une partie ayant clos sa cause demande l'admission de « documents nouveaux » en vue d'établir la culpabilité d'un ou plusieurs Accusés, elle doit à ce moment là préciser les circonstances exceptionnelles justifiant l'admission de ces « documents nouveaux », à savoir la date et la source d'obtention de ces documents, leur date de communication aux équipes de la défense et les raisons pour lesquelles elles ont présenté ces documents après la clôture de leur cause respective¹¹ ; que, dans un esprit de clarification, la Chambre rappelle que le débat contradictoire aura alors lieu à ce stade, à savoir lors de la demande d'admission et que les objections en ce sens relatives notamment à la nature des documents présentés à l'audience et formulées à l'audience, sont donc prématurées ,

PAR CES MOTIFS,

¹¹ Décision du 27 novembre 2008, par. 20, 21, 23 et 24 ; Décision de la Chambre d'appel du 26 février 2009, par. 24 et 30.

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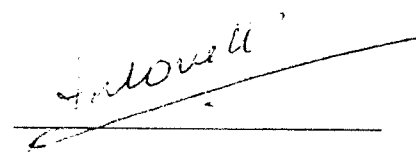
26746

EN APPLICATION des articles 20 et 21 du Statut du Tribunal 54 et 85 A), 89 B), 90 H) du Règlement de procédure et de preuve,

RAPPELLE que les parties ayant terminé la présentation de leur cause n'ont pas à justifier de l'utilisation d'un « document nouveau » à l'audience lorsqu'elles procèdent au contre-interrogatoire d'un témoin de la défense, **ET**

INVITE les parties à ne pas formuler d'objections à l'audience sur la nature des « documents nouveaux » et à réserver ces objections pour le cas où ces « documents nouveaux » feraient l'objet d'une demande d'admission,

Fait en anglais et en français, la version en français faisant foi.



Jean-Claude Antonetti
Président de la Chambre

Le 12 janvier 2010
La Haye (Pays-Bas)

[Sceau du Tribunal]



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CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T**
Document Index Number: **875**
Document Date: **18 JANUARY 2010**
Filing Date: **18 JANUARY 2010**
Document Type: **-CONFIDENTIAL ANNEX B**
Number of Pages **2** Numbers from: **26747-26748**

- Application**
- Order
- Indictment
- Response
- Other
- Correspondence

Document Title:

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

Name of Officer:

Alhassan Fornah

Signed: