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SCSL-03-01-T
(28872-28891)

28872

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

Registrar: Ms. Binta Mansaray

Date filed: 20 May 2010

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC WITH CONFIDENTIAL ANNEXES A AND B
PROSECUTION MOTION TO CALL THREE ADDITIONAL WITNESSES

Office of the Prosecutor:
Ms. Brenda J. Hollis
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Ms. Sigall Horovitz

Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. The Prosecution hereby seeks leave to call three additional witnesses regarding a single incident: the Accused's gift of rough diamonds to Ms. Naomi Campbell in September 1997 in South Africa while the Accused was on a trip to various countries. The proposed additional witnesses are Ms. Naomi Campbell, Ms. Carole White, and Ms. Mia Farrow.

2. This evidence was unknown to the Prosecution when it formally closed its case on 27 February 2010. It concerns "a central issue"[1] in the Prosecution case: the Accused's possession of rough diamonds. When considered in the context of the totality of the Prosecution evidence, the proposed evidence supports the Prosecution allegations that the Accused used rough diamonds for personal enrichment and arms purchases for Sierra Leone, particularly during the AFRC/RUF period. The proposed evidence also rebuts the Accused testimony that he never possessed any rough diamonds. The Prosecution estimates that the direct examinations for each of these three witnesses will be completed within two hours, so hearing this evidence will not unduly prolong the trial. The Prosecution therefore seeks leave to reopen its case to present the testimony of these witnesses, or in the alternative, to call the witnesses in rebuttal.

II. REOPENING THE CASE

Applicable Law

3. Although the Rules of Procedure and Evidence ("**Rules**") do not afford a *right* to the Prosecution to reopen its case, international jurisprudence allows for such a possibility in certain circumstances. In this regard, the ICTY Appeals Chamber in *Čelebići* held:

> "the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89(D) of the

[1] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2010, p. 33348.

Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial".[2]

4. This Trial Chamber has previously adopted the *Čelebići* definition of "fresh evidence" in this context, describing it "not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time."[3]

5. There are therefore two questions to be addressed when considering whether to permit the Prosecution to reopen its case to present fresh evidence. The first "threshold"[4] question is whether, despite due diligence, the Prosecution would not have been able to identify and present the evidence during its case-in-chief. If this threshold test is met, the second question is whether, in the exercise of the Trial Chamber's discretion, the probative value of the evidence is *substantially* outweighed by the need to ensure a fair trial.

6. In relation to the first question, the Trial Chamber in *Milošević* stated that "where the party seeking reopening was ignorant of the very existence of a proposed item of evidence until well into its case or after the close of its case, as long as such ignorance is reasonable under the circumstances, the party's delay in commencing its efforts to obtain the evidence should not necessarily lead to the conclusion that it was not reasonably diligent."[5]

7. This Trial Chamber took the view in the AFRC case that the stage in the trial at which fresh evidence is sought to be adduced is not a matter for consideration under the first criterion of "reasonable diligence", but is rather a highly relevant consideration in weighing the probative value of such evidence against the fairness of the trial of the accused (the second

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[2] *Prosecutor v. Delalić* et al., (*Čelebići* case), IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 ("***Čelebići* Appeal Judgement**"), para. 283. The principles articulated in *Čelebići* were reaffirmed by the ICTY Appeals Chamber in *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004, para. 222. These principles were also adopted by this Trial Chamber in *Prosecutor v. Brima et al.*, SCSL-04-16-T-560, "Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional prosecution Witness", 28 September 2006 ("***AFRC* Reopening Decision**"), paras. 15, 17, 18.

[3] *AFRC* Reopening Decision, para. 20; taken from *Prosecutor v. Delalić* et al., (*Čelebići* case), IT-96-21-T, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case", 19 August 1998 ("***Čelebići* Trial Judgement**"), para. 26 and affirmed in *Čelebići* Appeal Judgement, para. 286.

[4] *AFRC* Reopening Decision, para. 21; *Prosecutor v. Milošević*, IT-02-54-T, "Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex", 13 December 2005 ("***Milošević* Decision**"), para. 22.

[5] *Milošević* Decision, para. 27.

criterion).[6] It has been noted that: "Any Prosecution motion to reopen will – by definition – arise at an advanced stage of the proceedings and will involve late introduction of evidence to the prejudice of the accused. What must be considered therefore is whether, in the particular case, the circumstances are such that the overall fairness of the trial is negatively affected".[7] Possible delay caused by a reopening of the case[8] and the probative value of the evidence to be presented constitute further factors that may be relevant under the second criterion.[9] In relation to this latter factor, a Trial Chamber will consider, for instance, whether the fresh evidence is direct evidence or merely circumstantial.[10]

Due Diligence

8. On 30 January 2009 the Prosecution completed its evidence and on 27 February 2009, formally closed its case. Several months later, in June 2009, the Prosecution received information that the Accused gave Naomi Campbell a diamond during a visit to South Africa. This information was provided to the Prosecution on a confidential basis for the purposes of generating new evidence, in accordance with Rule 70 (B). Thereafter, as discussed below, the Prosecution exercised due diligence in investigating the matter further.

9. Upon receiving this Rule 70 information, the Prosecution tried to contact Naomi Campbell, by contacting various agencies publicly identified as her representatives. After persistent efforts to speak to Ms. Campbell, in July 2009, a representative of Ms. Campbell directed the Prosecution to speak to Ms. Campbell's solicitor. The Prosecution then held several conversations with the solicitor who repeatedly indicated that his client would consent to neither an in-person nor a telephone interview.

10. In January 2010, after reading a public statement by a representative of Ms. Campbell that she was cooperating with the Prosecution,[11] further attempts were made to contact Ms.

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[6] *AFRC* Reopening Decision, para. 29.
[7] *Prosecutor v. Popović* et al., IT-05-88-T, "Decision on Motion to Reopen the Prosecution Case", 9 May 2008 ("***Popović* Decision**"), para. 35. (Upheld on appeal).
[8] In the *Čelebići* case, one of the factors that led the Trial Chamber to refuse leave to the prosecution to reopen its case was the estimate that this would lead to a delay in the trial of some three months. See *Čelibići* Trial Judgement, paras 35-36 and *Čelebići* Appeal Judgement, paras 291-292.
[9] See e.g. *Prosecutor v. Hadžihasanović*, IT-01-47-T, "Decision on the Prosecution's Application to Re-Open its Case", 1 June 2005, para. 45.
[10] *Čelebići* Appeal Judgement, para. 289.
[11] The New York Times, "Star Turns at Liberian's War Crimes Trial", by Marlise Simons, 18 January 2010, available at http://www.nytimes.com/2010/01/18/world/africa/18taylor.html ("Debora Cunha, a spokeswoman for

Campbell through her solicitor. Phone messages were left with his office and e-mails sent to an address with which there had been previous correspondence. However, Ms. Campbell's solicitor did not respond to any of the phone messages or emails. On 20 January, Acting Prosecutor Joseph Kamara sent a letter copied by email to the solicitor which also remains unanswered.[12]

11. Page 205 of Exhibit D-141 ("The Presidential Papers") indicates that Mr. Taylor attended a dinner for the Nelson Mandela Children's Fund in which Ms. Campbell and various celebrities, including Mia Farrow, were present. On 10 August 2009, the Prosecution sent an email to Mia Farrow, who agreed to speak with the Prosecution by phone and subsequently provided a written declaration which was disclosed to the Defence on 4 December 2009.[13] This declaration is attached to the motion as Confidential Annex A. Ms. Farrow confirmed to the Prosecution that she attended the dinner party which took place at Mandela's residence in South Africa, and recalled:

> "The next morning when the other guests, my children and I met for breakfast, Naomi Campbell was there and had an unforgettable story. She told us the [sic] she had been awakened in the night by knocking at her door. She opened the door to find two or three men – I do not recall how many- who presented her with a large diamond which they said was from Charles Taylor."[14]

12. On 26 April 2010, while pursuing its investigation, the Prosecution received a phone call from the lawyer of Carole White, who was Naomi Campbell's agent in 1997. The lawyer explained that Ms. White was with Naomi Campbell at Nelson Mandela's residence in September 1997, and had information about the diamonds that Charles Taylor had given to Ms. Campbell. On 13 May 2010, the Prosecution interviewed Carole White and obtained a statement. Ms. White was present at the dinner party at Mandela's residence in South Africa. She personally heard Mr. Taylor say that he wanted to give diamonds to Ms. Campbell and she personally saw the diamonds delivered to Ms. Campbell by men on behalf of Mr. Taylor. Ms. White's statement was prepared in final typed form and filed

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Ms. Campbell, said she could not comment on the story or the fate of the diamond. "It's with the lawyers," she said. "Naomi has been assisting the special prosecutor where possible, but beyond that has nothing to add."").

[12] Letter to Mr. Gideon Benaim from the SCSL Prosecutor, dated 20 January 2010.

[13] Strictly Confidential Letter from Brenda Hollis to Courtenay Griffiths entitled "Fresh Evidence to be used in Cross Examination of the Accused", 4 December 2009. Annexed to this letter was the Declaration of Mia Farrow, dated 9 November 2009 ("**Declaration of Mia Farrow**"). Also annexed to the letter was a list of the disclosed materials, which indicated that the Declaration of Mia Farrow will be used by the Prosecution not only for impeachment purposes but also for proof of guilt.

[14] Declaration of Mia Farrow, para. 5.

with the Prosecution evidence unit on Tuesday 18 May 2010. It was disclosed to the Defence on 19 May 2010, and is attached to the present motion as Confidential Annex B.

13. The Prosecution had no reason to investigate Mr. Taylor's dealings with Ms. Campbell prior to the close of its case, as it had no indication that such dealings were relevant to the charges, until it received the above information in June 2009. When the Prosecution received the information, it repeatedly tried to contact Ms. Campbell but she refused to cooperate. The Prosecution obtained Mia Farrow's declaration on 9 November 2009. On 13 May 2010, when Mia Farrow's evidence regarding what Naomi Campbell had told her was corroborated by the direct eyewitness evidence of Ms. White, the Prosecution determined it would request leave to reopen its case.

14. In these circumstances where no information about the incident was known to the Prosecution until June 2009, the Prosecution was reasonably diligent and cannot be faulted for failing to obtain the evidence before the close of the Prosecution case.[15]

Trial Chamber's Discretion

Probative Value

15. The proposed evidence is highly probative and material to the Indictment. It is direct evidence of the Accused's possession of rough diamonds from witnesses unrelated to the Liberian or Sierra Leone conflicts and corroborates Prosecution evidence that the Accused received diamonds from the AFRC/RUF Junta during the Indictment period. Further, the Accused testified that on this trip in September 1997 he went on from South Africa to several other countries, including Libya and Burkina Faso. The evidence that the Accused was traveling with rough diamonds supports Prosecution evidence that the Accused arranged the shipment of arms from Burkina Faso that was delivered to the Sierra Leone Junta at the Magburaka airfield in October 1997. Further, the Accused's possession of rough diamonds goes to the heart of the joint criminal enterprise allegation. Finally, in his testimony the Accused denied ever having possessed rough diamonds and the evidence directly contradicts his testimony on this central issue. In the present circumstances, the

[15] *Milošević* Decision, para. 27. It is also recalled that when the Prosecution sought to introduce fresh evidence after the Defence cases commenced, even the Defence asserted that "the remedy for the Prosecution, where, as here, new material has come to light, is in due course to seek to re-open their case." See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 January 2010, p. 33944.

high probative value of the proposed evidence warrants its admission at this stage of the proceedings. There are no fairness considerations which *substantially* outweigh the significant contribution of this evidence to the Prosecution case and to the Chamber's ultimate search for truth.

16. This Trial Chamber has already recognized that evidence of the Accused's gift of a rough diamond to Naomi Campbell in September 1997 is highly relevant to the charges. When the Trial Chamber prohibited the Prosecution from using the written declaration of Mia Farrow during the cross-examination of the Accused on 14 July 2010, it held that the declaration "purports to deal ***with a central issue*** in the Prosecution's case" (emphasis added).[16]

Fairness to the Accused

17. The Defence was notified of Mia Farrow's evidence when the Prosecution disclosed her declaration on 4 December 2009, along with notice that it was intended for use to both impeach and prove guilt.[17] The Defence was also put on notice of the significance of the evidence during the course of the Prosecution's submissions on the use of the declaration,[18] and by the Chamber's subsequent ruling that the declaration "purports to deal with a central issue in the Prosecution's case".[19] It therefore had over five months to investigate the allegation that the Accused gave diamonds to Ms. Campbell. Furthermore, it has always been the Prosecution case that the Accused received diamonds from the AFRC/RUF Junta. The Defence presented evidence in its own case on 18 August 2009 asserting that the Accused has never possessed diamonds.[20] Further, the Defence learned of Carole White's

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[16] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2010, p. 33348. It is recalled that the Prosecution intended to use the declaration both for impeachment purposes and for establishing the guilt of the Accused.

[17] See footnote 11 above.

[18] It was argued by the Prosecution: "This document [the declaration] impeaches that categorical denial by this witness that he ever had any diamonds during the time he was in the NPFL or President of Liberia ... ... Secondly it is also relevant to guilt ... in particular because of the timing of giving this diamond to Naomi Campbell. This trip occurs in September, the locations visited include South Africa, Libya, Burkina Faso. He comes back and makes a statement to his Senate about the trip on 3 October and the evidence before this Court, what else happens in October, the Magburaka shipment to the junta happens in October, and the evidence before your Honours is that this shipment was procured at least in part by diamonds the junta provided to Charles Taylor and by money they provided to him to pay for the plane. So the timing of this occurrence is indeed relevant to an ultimate determination of guilt in this case." See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2010, pp. 33344-5.

[19] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2010, p. 33348.

[20] On 18 August 2009, during his examination-in-chief, the Accused testified that he never "at any stage" possessed diamonds. See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 August 2009, pp. 27105-6. During his cross-examination, on 26 November 2009, the Accused testified that aside from a few jewelry items containing

evidence before the Prosecution[21] and was served with a copy of her statement on 19 May 2010.

No Unreasonable Delay

18. Granting the present motion will not unduly prolong the trial. Only a dozen Defence witnesses have testified to date. It is clearly within the Trial Chamber's discretion, after consulting with the parties, to determine when it will hear the proposed Prosecution witnesses, and could decide to hear the witnesses interposed between Defence witnesses. The Prosecution can assure the Trial Chamber that it can complete the direct examination of all three witnesses within one court day.

III. REBUTTAL EVIDENCE

19. Alternatively, should the Chamber deny the Prosecution's request to reopen its case, the Prosecution seeks permission to present the proposed evidence in rebuttal.

Applicable Law

20. Rule 85(A) provides that after the Defence case the Prosecution can present "evidence in rebuttal, with leave of the Trial Chamber". Although not of right, "evidence to refute a particular piece of evidence which has been adduced by the defence" may be permitted in the Chamber's discretion.[22] This rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated.[23]

21. This Chamber accordingly confirmed that the Prosecution, in seeking to present rebuttal evidence, must establish the following two elements: (i) that the evidence sought to be

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diamonds, he did not posses diamonds. See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 26 November 2009, p. 32602. Still on cross-examination, the Accused denied that he took any diamonds with him to South Africa in September 1997. See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2010, pp. 33337-8.

[21] Daniel Bright, attorney for Ms. White indicated he called the ICC on 23 April 2010 asking to speak to the Taylor Prosecution. When his call was transferred he explained to the gentlemen who answered that he was a lawyer from New York who had a client with information relevant to the case. The gentleman told Mr. Bright that the issue of Taylor's gift of a diamond to Naomi Campbell was "nonsense." Eventually the gentleman asked Mr. Bright who he was seeking to speak to and when Mr. Bright responded the Prosecution, the gentleman identified himself as Defence Counsel. He went on to tell Mr. Bright that the matter was moot as the Prosecution had closed its case over a year ago and the court had already ruled the incident was not admissible. Mr. Bright was only able to reach the Prosecution three days later, on 26 April 2010.

[22] *Prosecutor v. Brima et al.*, SCSL-04-16-T-582, "Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006", para. 32 ("***AFRC* Rebuttal Decision**"), relying on *Čelebići* Appeal Judgement, para. 273.

[23] *AFRC* Rebuttal Decision, para. 33.

rebutted arose directly *ex improviso* during the presentation of the Defence case in-chief and could not, despite the exercise of reasonable diligence, have been foreseen; and (ii) that the proposed rebuttal evidence has significant probative value to the determination of an issue central to the determination of the guilt or innocence of the Accused.[24]

Probative Value

22. The Prosecution relies on its submissions in paragraphs 15-16 above, establishing that the proposed evidence has significant probative value.

Evidence Arose During Defence Case and Could Not have been Foreseen

23. The Defence evidence referred to below could not have been foreseen and, in any event, the proposed evidence could not have been presented in the Prosecution case-in-chief as it only came to light after the close of the Prosecution case.[25]

24. The Prosecution could not have foreseen that the Accused would claim as part of the Defence case that he was too busy with the demands of his Presidency to be involved in supporting the AFRC/RUF Junta. On 28 July 2009, during his examination-in-chief, the Accused testified that he travelled to South Africa in September 1997, shortly after he became the President of Liberia.[26] This evidence was used by the Defence to show that the Accused was unable, due to inadequate time and pressures of a new president's internal and external agenda, to be "running the AFRC".[27] The proposed evidence refutes this Defence claim because, when considered in light of the totality of the Prosecution evidence, it indicates that although the Accused travelled during his first two months as President, some of these efforts were exerted on behalf of the AFRC/RUF Junta.

25. Moreover, although significantly smaller than those of Sierra Leone, Liberia itself also has diamond resources. On 18 August 2009, during his examination-in-chief, the Accused testified that he never "at any stage" possessed diamonds.[28] Subsequently, during his cross-

[24] *AFRC* Rebuttal Decision, para. 34.
[25] This Trial Chamber previously ruled that "[e]vidence which goes to a matter that forms a fundamental part of the case which the Prosecution is required to prove in relation to the charges brought in the Indictment should be brought as part of the Prosecution case-in-chief and not in rebuttal". See *AFRC* Rebuttal Decision, para. 35. But in this case, this ruling would seem inapplicable as the evidence was not available to the Prosecution before it closed its case.
[26] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 28 July 2009, pp. 25430-1.
[27] *Ibid.*
[28] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 August 2009, pp. 27105-6.

examination, on 26 November 2009, the Accused testified that aside from a few jewelry items containing diamonds, he never possessed diamonds.[29] The Prosecution could not have anticipated that the Accused would so categorically divorce himself from any involvement in the diamond industry.

26. The Prosecution could not be expected to anticipate *all* possible defences. Just as *reasonable* diligence is required when considering a request to reopen, this Chamber should take into consideration "the realities facing the parties, not measured by what a party with infinite time and limitless investigative resources might have discovered or understood."[30]

27. Thus the proposed evidence directly rebuts Defence evidence raised *ex improviso* during the Defence case and which could not have been reasonably anticipated, that: 1) the Accused was unable, due to inadequate time and pressures of a new president's internal and external agenda, to be "running the AFRC" and 2) the Accused never possessed diamonds.

IV. CONCLUSION

28. For these reasons, the Prosecution seeks leave to call three additional witnesses, Naomi Campbell, Carole While and Mia Farrow, by reopening its case, or alternatively, in rebuttal.

Filed in The Hague,

20 May 2010,

For the Prosecution,

Brenda J. Hollis,
The Prosecutor

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[29] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 26 November 2009, p. 32602 ("Q. Did you possess lots of diamonds? A. None whatsoever... In terms of jewellery with diamonds on it, not a lot. I have a couple of rings with diamonds on it, that's it.").

[30] *Popović* Decision, para. 31. Even the Defence recognized that if a matter arises *ex improviso* during its case, relevant Prosecution material can be presented in rebuttal. See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 11 November 2009, p. 31620 ("It is [the Prosecution's] duty and obligation to place before the Court all materials that they intend to rely upon during the currency of their case, unless a matter arises ex improviso, and in that situation, material can be put in in rebuttal").

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Letter to Mr. Gideon Benaim from the SCSL Prosecutor, dated 20 January 2010.

The New York Times, "Star Turns at Liberian's War Crimes Trial", by Marlise Simons, 18 January 2010, available at http://www.nytimes.com/2010/01/18/world/africa/18taylor.html.

Strictly Confidential Letter from Brenda Hollis to Courtenay Griffiths entitled "Fresh Evidence to be used in Cross Examination of the Accused", 4 December 2009 (and annexed Declaration of Mia Farrow dated 9 November 2009).

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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

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

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☐ Application
☐ Order
☐ Indictment
☐ Response
☒ **Motion**
☐ Correspondence

Document Title:

Public with confidential Annexes A and B Prosecution motion to call three addition witnesses

Name of Officer:

Alhassan Fornah

Signed: