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SCSL-03-01-T  
(26603-26615)

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## SPECIAL COURT FOR SIERRA LEONE

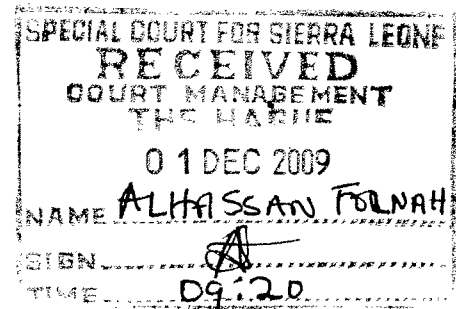
### TRIAL CHAMBER II

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

**Acting Registrar:** Binta Mansaray

**Case No.:** SCSL03-1-T

**Date:** 30 November 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

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### DECISION ON PROSECUTION MOTION IN RELATION TO THE APPLICABLE LEGAL STANDARDS GOVERNING THE USE AND ADMISSION OF DOCUMENTS BY THE PROSECUTION DURING CROSS-EXAMINATION

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**Office of the Prosecutor:**

Brenda J. Hollis  
Nicholas Koumjian  
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**Defence Counsel for Charles G. Taylor:**

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

**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

**RECALLING** the oral submissions of the parties in open court on the 11 and 12 November 2009<sup>1</sup>;

**RECALLING** the Trial Chamber’s order for formal submissions, issued orally on 11 November 2009,<sup>2</sup>

**RECALLING ALSO** the Trial Chamber’s order for an expedited filing schedule for the pleadings, issued orally on 12 November 2009;<sup>3</sup>

**RECALLING FURTHER** the Decision on the Urgent Prosecution Motion to Exceed Page Limit, filed on 13 November 2009,<sup>4</sup> wherein the Trial Chamber granted the Prosecution’s request to exceed the page limit and submit a 15-page motion,<sup>5</sup> and the Trial Chamber’s oral ruling on 16 November 2009,<sup>6</sup> wherein the Trial Chamber granted the Defence’s request to exceed the page limit and submit a 15-page response;<sup>7</sup>

**SEISED** of the “Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination”, filed on 17 November 2009 (“Motion”);<sup>8</sup>

**NOTING** the “Defence Response to the Public Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination”, filed on 23 November 2009 (“Response”);<sup>9</sup>

**NOTING ALSO** the “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”, filed on 25 November 2009 (“Reply”);<sup>10</sup>

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31619-31622; *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 12 November 2009, pp. 31635-31637.

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31623-31624.

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 12 November 2009, p. 31637.

<sup>4</sup> SCSL-03-01-T-857.

<sup>5</sup> SCSL-03-01-T-856.

<sup>6</sup> *Prosecutor v. Taylor*, Transcript 16 November 2009, p. 31640.

<sup>7</sup> *Prosecutor v. Taylor*, Transcript 16 November 2009, p. 31639-31640.

<sup>8</sup> SCSL-03-01-T-860.

<sup>9</sup> SCSL-03-01-T-862.

<sup>10</sup> SCSL-03-01-T-864.

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 73(A), 85(A), 89 and 90(F) of the Rules of Procedure and Evidence (“Rules”);

HEREBY DECIDES AS FOLLOWS:

## I. PROCEDURAL BACKGROUND

1. On 11 November 2009, the Prosecution, during cross-examination, submitted a bundle of documents to the parties and the Trial Chamber, and indicated that it intended to use these, and other documents, which had not been previously admitted, in order to challenge the credibility of the Accused’s testimony.<sup>11</sup> The Prosecution also indicated that it was possible that it might, at the admissibility stage, also seek to have these documents admitted for ‘other purposes’.<sup>12</sup> The Defence objected orally to the use of this material, submitting that the admission of such material would “ambush” the defence.<sup>13</sup> The Trial Chamber called upon the Prosecution to file formal submissions to “justify the presentation of this fresh evidence at this late stage”,<sup>14</sup> and ordered that there be an expedited filing schedule for the pleadings on this issue.<sup>15</sup>

## II. SUBMISSIONS

### Motion

2. The Prosecution requests that the Trial Chamber issue guidelines and/or an order permitting it to use “fresh evidence” during cross-examination to challenge the credibility of a witness, and permitting that evidence to be tendered and exhibited for the purpose of challenging the credibility and/or in certain circumstances for the purpose of demonstrating the guilt of the Accused.<sup>16</sup>

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<sup>11</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31619, 32623.

<sup>12</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, p. 31619.

<sup>13</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, p. 31620.

<sup>14</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31623-31624.

<sup>15</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 12 November 2009, p. 31637.

<sup>16</sup> Motion, para. 31.

3. The Prosecution submits that the correct standard for the use of “fresh evidence” is that adopted by Trial Chamber II in *Brima et al.*, where the Trial Chamber allowed the Prosecution to make use of such evidence to impeach the credibility of the witness, and later ruled that the statement was admissible.<sup>17</sup> The Prosecution submits that this standard “does not violate the fair trial rights of the Accused” and accords with the Trial Chamber’s “responsibility to utilise all its powers to facilitate the truth-finding process in the impartial adjudication of the matter between the parties.”<sup>18</sup> The Prosecution distinguishes between the “presentation” stage of the proceedings, during which it may put documents to the witness, and the “admissibility” stage during which it seeks to have these documents admitted.<sup>19</sup> The Prosecution argues that it is established practice in other international tribunals that fresh evidence can be put to an Accused or Defence witness during cross-examination by the Prosecution,<sup>20</sup> and that evidence used to impeach the credibility of the witness can be admitted into evidence.<sup>21</sup> Finally, the Prosecution submits that the recent jurisprudence of the ICTY Appeals Chamber, in particular the *Prlić* Decision, establishes that fresh evidence introduced during cross-examination can be admitted as probative of the guilt of the Accused in exceptional circumstances and in the interests of justice.<sup>22</sup>

4. The Prosecution further argues that the jurisprudence of other international tribunals establishes that the Prosecution is not under any obligation to disclose documents relating to cross-examination.<sup>23</sup> It argues that fresh evidence can be used when cross-examination commences, in order to maintain the element of surprise, and that this does not amount to a “trial by ambush”.<sup>24</sup>

5. The Prosecution submits that there are several issues that were raised during the testimony of the Accused during examination-in-chief which were tangential or irrelevant to the charges, and which it could not have anticipated, as they were not revealed in the Defence Pre-Trial brief nor had

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<sup>17</sup> Motion, paras 4-7, referring to *Prosecutor v. Brima et al.*, SCSL-04-16-T Transcript 29 June 2006 (“*Brima* Decision”), pp. 68, 78. While the Prosecution refers only to the Trial Chamber’s oral ruling during the course of the proceedings, the Trial Chamber also considered this issue in its final judgement. See *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgement, 20 June 2007 (*Brima* Judgement), paras. 143-144.

<sup>18</sup> Motion, para. 4.

<sup>19</sup> Motion, paras 9, 22, 30.

<sup>20</sup> Motion, paras 10-12, 23.

<sup>21</sup> Motion, paras 13-14.

<sup>22</sup> Motion, paras 15-21, referring to *Prosecutor v. Prlić et al.*, 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”), paras 23-24, 27-28.

<sup>23</sup> Motion, para 24.

they been put to Prosecution witnesses. It argues that the credibility of the Accused may be challenged on these matters, even if they are not directly related to the charges that are the subject of this trial.<sup>25</sup>

6. The Prosecution therefore seeks the following guidelines and/or an order consistent with the AFRC Decision and the jurisprudence of other ad hoc tribunals permitting the Prosecution to use fresh evidence during cross-examination to challenge the credibility of a witness and permitting that evidence to be tendered or exhibited for the purpose of challenging the credibility and/or in certain circumstances for the purpose of demonstrating the guilt of the Accused, namely:

(i) That fresh evidence can be put to the Accused or Defence witness for the purpose of eliciting a response from that witness; the witness' response becomes the evidence in the case and whether the new document is also admitted into evidence falls to be decided at the end of the Accused or Defence witness' testimony;

(ii) That fresh evidence which impeaches the testimony of the Accused or a Defence witness can be admitted by the Trial Chamber, and its admission should be determined on a case-by-case basis and

(iii) That fresh evidence going to the guilt of the Accused can be admitted in exceptional circumstances and in the interests of justice and its admission will be determined on a case-by-case basis.<sup>26</sup>

## Response

7. The Defence opposes the Motion and submits that it be dismissed in its entirety, on the basis that it infringes upon the fair trial rights of the Accused as guaranteed by Article 17 of the Statute. It therefore requests that the Prosecution should not be permitted to use new documents in court and/or to introduce new documents as exhibits after the Prosecution has closed its case<sup>27</sup>.

8. The Defence submits that the Prosecution circumvents the issues at stake by requesting general guidelines on the admission of new documents, rather than seeking to justify the admission of a

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<sup>24</sup> Motion, para 24.

<sup>25</sup> Motion, paras 26-29.

<sup>26</sup> Motion, para. 31.

<sup>27</sup> Response, paras 29-30.

specific document.<sup>28</sup> It submits that the principles relating to the use and tendering of new documents are clear, and that consequently the Prosecution's request for "guidelines" is unnecessary.<sup>29</sup>

9. The Defence submits that the Prosecution is obligated under Rule 85(A)(1) to present all the evidence supporting their case before the start of the Defence case, in order to enable the Accused to know the nature of the case against him. The Defence maintains that the material which the Prosecution seeks to introduce is not "fresh evidence" that was not available to the Prosecution during its case-in-chief: that is material which has become available to the Prosecution after the close of its case-in-chief that would not have been found with the exercise of reasonable diligence before the close of the Prosecution's case in chief." Rather, it is "material that was available during the currency of the Prosecution case but which has been deliberately kept up the Prosecution's sleeve in order to deny the Accused an opportunity to give the material considered thought and seek legal advice thereon, if necessary".<sup>30</sup> The Defence submits that the Trial Chamber's discretion in admitting such evidence should be exercised only in "exceptional circumstances" and "in the interests of justice".<sup>31</sup>

10. While the Defence accepts that a witness may be impeached to test the accuracy, credibility or consistency of his/her testimony, it submits that "an Accused does not stand in all respects in the same position as any other witnesses, this is because the Accused is guaranteed rights not enjoyed by other witnesses. Indeed the Accused enjoys greater protection than defence witnesses in general as he benefits from the rights enshrined in Article 17 even when appearing as a witness, such as the right not to incriminate himself." The Defence agrees with the distinction made in the *Prlić* case between new evidence used to test the credibility of an Accused and new evidence probative of his guilt and further submits that the latter can only be admitted in exceptional circumstances.<sup>32</sup>

11. The Defence further disputes the Prosecution's claim that new issues were raised during the examination-in-chief of the Accused which it could not have anticipated, arguing that the issues canvassed by the Prosecution in the Motion were raised either in the Defence Pre-Trial Brief or

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<sup>28</sup> Response, paras 4, 17.

<sup>29</sup> Response, paras 3, 18.

<sup>30</sup> Response, paras 10-13

<sup>31</sup> Response, para 13

<sup>32</sup> Response, paras 14-16.

during cross-examination of Prosecution witnesses.<sup>33</sup> The Defence submits that documents already in the Prosecution's possession, or which it reasonably could have anticipated would form an important part of its case, should have been presented during the Prosecution case, and that the admission of such documents during cross-examination would infringe the Accused's rights under Article 17(4)(a) of the Statute to challenge fully the evidence against him.<sup>34</sup>

12. In the alternative, the Defence requests that should the Trial Chamber decide that there are exceptional circumstances justifying the introduction of new material probative of the guilt of the Accused during the cross-examination of the Accused, the Defence should be granted full disclosure of all of the new documents in the possession of the Prosecution.<sup>35</sup> The Defence therefore requests:

- (i) The Trial Chamber to order the Prosecution to disclose all new documents intended for use during cross-examination to the Defence;
- (ii) Access to the accused in order to advise on the material in accordance with his Article 17 rights;
- (iii) An adjournment of 30 days to read the material and advise the Accused on the new documents;
- (iv) An opportunity to re-open direct examination to give the Accused a chance to answer the evidence against him.<sup>36</sup>

13. Finally, if the Motion is granted, the Defence seeks leave to Appeal the decision, and requests a stay of proceedings according to Rule 73(B).<sup>37</sup>

### Reply

14. In its Reply, the Prosecution submits that the Defence conflates the use of a document during cross-examination and its admission into evidence, and that there is a distinction in procedure between the two stages.<sup>38</sup> It further submits that the Defence conflates the distinction between fresh

<sup>33</sup> Response, paras 24-26.

<sup>34</sup> Response, paras 28-29.

<sup>35</sup> Response, paras 19-21.

<sup>36</sup> Response, para. 31.

<sup>37</sup> Response, para. 31.

<sup>38</sup> Reply, paras 6, 7.

evidence used to test the credibility of the Accused and fresh evidence probative of the Accused's guilt.<sup>39</sup> It also argues that the Defence does not provide any authority for the proposition that it is entitled to full prior disclosure of documents to be used in cross-examination.<sup>40</sup>

15. The Prosecution submits that it intends to use fresh evidence during cross-examination only for the purpose of impeaching the credibility of the Accused, and that it will, for the most part, tender documents for admission for this purpose. In the limited cases in which it tenders documents for admission as proof of the guilt of the Accused, it submits that it is at this stage that the Defence may make objections about the admission of the evidence, including in relation to disclosure. The Prosecution argues that this is the procedure contemplated by the Appeals Chamber in *Prlić*, and is fully consistent with the rights of the Accused.<sup>41</sup>

16. Finally, the Prosecution opposes the anticipatory forms of relief sought by the Defence in the event that the Prosecution's Motion is granted.<sup>42</sup>

### III. APPLICABLE LAW

17. Article 17 provides in relevant part:

(4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum safeguards:

- (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

18. Rule 85(A) provides in relevant part as follows:

Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution

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<sup>39</sup> Reply, paras 6, 10.

<sup>40</sup> Reply, para. 12.

<sup>41</sup> Reply, paras. 14-15.

<sup>42</sup> Reply, paras. 17-18.



- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
- (iv) Evidence ordered by the Trial Chamber

19. Rule 89 provides that:

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chamber shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

20. Rule 90(F) provides that:

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses so as to:

- (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) Avoid the wasting of time.

21. The Trial Chamber notes that, unlike the Rules of the ICTY and ICTR, the Rules of the Special Court contain no specific provision limiting the scope of cross-examination.<sup>43</sup>

#### IV. DELIBERATIONS

##### **The original oral order of the Trial Chamber:**

22. On 11 November 2009, Counsel for the Prosecution sought to introduce a bundle of documents described as “fresh evidence” which documents she indicated were part of several bundles of documents to be put to the Accused during cross-examination “in order to impeach and challenge his testimony”. Defence Counsel orally objected to the use of this “new material” on the grounds *inter alia*, that it took the Defence by surprise and infringed on the fair trial rights of the Accused as

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<sup>43</sup> Rule 90(H)(i) of the Rules of Procedure and Evidence of the ICTY and Rule 90(G)(i) of the Rules of Procedure and Evidence of the ICTR provide that “cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case”.

guaranteed under Article 17. The Trial Chamber requested that the Prosecution file formal submissions to “justify the presentation of *this* fresh evidence at this late stage”.<sup>44</sup> The Trial Chamber’s order for formal submissions was directed to the specific bundle that was introduced (and later withdrawn) by the Prosecution during the cross-examination of the Accused on 11 November 2009.<sup>45</sup> In doing so the Trial Chamber expected to receive sufficient information concerning the documents to make specific orders relevant to them. However, no specific documents were annexed to the Prosecution Motion, nor were details of any documents supplied. Instead, general directions were sought from the Trial Chamber.<sup>46</sup> The Trial Chamber’s orders must therefore be general in nature and will not be directed towards any specific documents that the Prosecution intends to put to the Accused.

### Terminology:

23. Whilst the Trial Chamber notes some disagreement between the parties in the use of the term “fresh evidence” or “new evidence”, in this decision, the Trial Chamber will follow the approach of the Appeals Chamber in *Prlić* and will use the term “fresh evidence” to refer to any documents which were not admitted during the Prosecution case, whether or not they were available to the Prosecution at the time.<sup>47</sup>

### Presentation of evidence:

24. Rule 85(A) of the Rules provides that the evidence for the Prosecution must be presented prior to evidence for the Defence unless the Trial Chamber orders otherwise. Moreover, the general principle applicable in international criminal tribunals and common-law domestic courts is that the Prosecution has a duty to adduce during its case-in-chief all of the evidence on which it intends to rely

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<sup>44</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31623-31624 (emphasis added).

<sup>45</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31623

<sup>46</sup> Motion, para. 31.

<sup>47</sup> The Defence has objected to the use of the term “fresh evidence”, arguing that it is a term of art referring to “material that was not available to the Prosecution during its case-in-chief”. Response, para. 12, relying on *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 283. However, in using this term, the Prosecution relies on the more recent case of *Prlić*, where the Appeals Chamber held that for the purposes of that decision, “fresh evidence” “refers to material that was not included in the Prosecution Rule 65ter list and not admitted during the Prosecution’s case-in-chief but that is tendered by the Prosecution when cross-examining Defence witnesses” and clarifies that “in this decision, the term is not limited to the material that was not available to the Prosecution to the case-in-chief”. *Prlić Appeal Decision*, para. 15 (emphasis in original). See also Reply, para. 3.

to prove its case before the start of the Defence case, in order to enable the Accused to know the nature of the case against him and consequently to adequately prepare his defence.<sup>48</sup>

25. It is established practice that a witness may be cross-examined to test the accuracy, credibility and consistency of his or her testimony. However, the Trial Chamber agrees with the Defence that the Accused does not stand in the same position as an ordinary witness, since he is guaranteed rights under Article 17 of the Statute that are applicable under these circumstances, including his right pursuant to Article 17(4)(a) to know the nature and the cause of the charges against him, and his right under Article 17(4)(g) not to be compelled to testify against himself or to confess to guilt.

#### Use of “fresh evidence” during cross-examination:

26. The Trial Chamber has a broad discretion in determining the admission of evidence.<sup>49</sup> The Prosecution asserts in its Motion that the bundle or bundles of documents that the Prosecution intends to use during cross-examination contain “fresh evidence”. There is an important distinction between fresh evidence which is intended solely for the purpose of impeaching the Accused’s credibility, and fresh evidence which is probative of the guilt of the Accused.<sup>50</sup> Consequently, in exercising its discretion as to whether to allow the Prosecution to use fresh evidence in cross-examination, the Trial Chamber will be particularly cautious when the subject of the cross-examination is the Accused himself, since the borderline between cross-examination as to credit and cross-examination on issues that may be probative of his guilt is difficult if not impossible to determine.<sup>51</sup>

27. In accordance with established jurisprudence, the Trial Chamber finds that where documents containing “fresh evidence” are to be used in cross-examination solely for the purpose of impeaching the credibility of the Accused, there is no statutory or procedural obligation upon the Prosecution to

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<sup>48</sup> *Prlić* Appeal Decision, para. 23; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-AR73.1, Decision on the Prosecution’s Appeal against the Trial Chamber’s Order to call Rebuttal Evidence During the Prosecution’s Case in Chief, 16 October 2008, paras 11 and 12; *Prosecutor v. Strugar*, IT-01-42-T, Decision III on the Admissibility of Certain Documents, 10 September 2004, para. 5; *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on Defence Motion for Leave to Call Rejoinder Witnesses, 30 April 2002, para. 4; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Admission of Documents used in Cross-Examination of Edouard Karemera and Witness 6, 11 November 2009, para. 4. In the United Kingdom, see *R. v. Rice*, 1 Q.B. 857, [1963] 47 Cr.App.R. 79; *R. v. Kane*, [1965] 65 Cr. App.R. 270.

<sup>49</sup> *Prlić* Appeal Decision, para. 5.

<sup>50</sup> *Prlić* Appeal Decision, para. 27. See also Justice Sebutinde’s comments during the trial proceedings on 11 November 2009. *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 11 November 2009, pp. 31626-31627

<sup>51</sup> See Blackstone’s Criminal Practice, 1996, D.14.7.

disclose those documents beforehand.<sup>52</sup> However, a document containing “fresh evidence” probative of the guilt of the Accused is subject to disclosure and its use will not be permitted during cross-examination unless (a) it is in the interest of justice and (b) it does not violate the fair trial rights of the Accused.<sup>53</sup> Furthermore, such a document will not be admitted into evidence unless the Prosecution can establish “exceptional circumstances”. In considering whether such exceptional circumstances have been established, the Trial Chamber will take into consideration (i) when and by which means the Prosecution obtained these documents ii) when it disclosed them to the Defence and (iii) why they are being offered only after the conclusion of the Prosecution case.<sup>54</sup>

#### Defence requests:

28. In light of the Trial Chamber’s findings above, the Trial Chamber is of the view that the Defence’s requests contained in paragraphs (c), (d) of the Response and the request for leave to appeal this decision with a stay of proceedings are premature at this stage.

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<sup>52</sup> See *Brima* Judgement, para. 144. See also *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, paras 280-290; *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006, para. 10; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Disclosure of Material Relating to Immigration Statements of Defence Witnesses, 27 September 2005, paras 6, 12. See also, domestically, United States Federal Rules of Civil Procedure, Rule 26(a)(1)(A)(ii), requiring a party to “provide to the other parties a copy...of all documents [ . . . ] to support its claims or defenses, unless the use would be solely for impeachment” before a discovery request is made; *U.S. v. Lambert*, 580 F.2d 740, 748 (1978); *U.S. v. Wells*, 525 F.2d 974, 976 (1976); *R. v. Halford*, [1978] 67 Cr.App.R. 318, citing Criminal Appeal Act 1968, § 19; *R. v. Parry*, (2008) N.J. No. 130, citing Canada Evidence Act, § 30.

<sup>53</sup> *Prlić* Appeal Decision, para. 23.

<sup>54</sup> *Prlić* Appeal Decision, para. 24.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER,

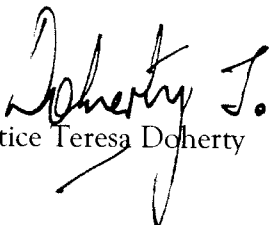
GRANTS the applications contained in the Prosecution Motion and the Defence Response in part;  
and


DIRECTS as follows:

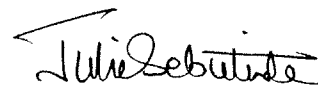
- i) The Prosecution may use documents containing fresh evidence in order to impeach the credibility of the Accused. The admission of such documents into evidence will be determined on a case-by-case basis;
- ii) In respect of documents containing fresh evidence that is probative of the guilt of the 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;
- iii) Defence Counsel may have access to the Accused to take instructions on any document falling within category (ii) above; and

DISMISSES all other applications by the parties.

Done at The Hague, The Netherlands, this 30<sup>th</sup> day of November 2009.

  
Justice Teresa Doherty

  
Justice Richard Lussick  
Presiding Judge

  
Justice Julia Sebutinde

