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RSCSL-03-01-ES
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RESIDUAL SPECIAL COURT FOR SIERRA LEONE
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LEONE

Before: The Honourable Justice Jon Kamanda, President

Registrar: Ms. Binta Mansaray

Date: 14 July 2020

In the matter of

PROSECUTOR Against **CHARLES GHANKAY TAYLOR**

Case No. RSCSL-03-1-ES

Public

PRINCIPAL DEFENDER'S REPLY TO THE PROSECUTION'S RESPONSE TO "THE PRINCIPAL DEFENDER'S REQUEST FOR THE WITHDRAWAL AND/OR RECUSAL OF HON. JUSTICE TERESA DOHERTY OF THE UNITED KINGDOM (UK) AS THE DUTY JUDGE ON THE APPLICATION OF CHARLES G. TAYLOR TO BE TEMPORARILY TRANSFERRED TO A SAFE THIRD COUNTRY TO CONTINUE HIS IMPRISONMENT DUE TO THE MASSIVE OUTBREAK OF COVID-19 IN THE UK"

Office of the Prosecutor:

Mr. James C. Johnson

Mr. Mohamed Bangura

Defence Office:

Mr. Ibrahim Yillah

Mr. Hassan Sherry

Counsel for Mr. Charles G. Taylor

Mr. Essa M. Faal

RESIDUAL SPECIAL COURT FOR SIERRA LEONE	
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NAME	Francesca Ngaboh-Sma
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Introduction

1. The Principal Defender, acting on the instructions of Mr. Charles G. Taylor, files this Reply in answer to the Prosecutor's Response to his motion filed on the 1st July 2020 seeking the removal of the Designated Judge Hon. Teresa Doherty of the UK and or in the alternative the recusal of the Learned Judge from sitting as the designated Judge on Mr. Taylor's application because among other things her lady shall be presiding over an application which will warrant presiding over her country's response to covid-19 within one of its prisons where Mr. Taylor is currently serving imprisonment. In his submissions, the Principal Defender noted that such an application may warrant a scheduling order requiring a response from UK Authorities and such a situation would place her lady in a difficult situation no matter the professional balance she may seek to apply and in any case would leave the reasonable observer to question the impartiality of not only the designation process but the possible outcome of the application given the multitude of judges from other jurisdictions available on the Court's register. It is against the above-mentioned background that the Principal Defender filed his application.
2. On the 8th July, 2020, the Prosecutor sought and was granted leave by the Impugned Judge to respond to the Principal Defender's Request on the ground that the proposed response "raises a novel issue relating to disqualification/recusal of a Judge from a matter of apparent bias based on her nationality. If considered favourably, the decision will impact on the settled principles on this subject in the jurisprudence of international courts and tribunals and as well, those of the most advanced legal systems of the world."¹
3. The Principal Defender questions the authority of the Impugned Designated Duty Judge to issue the decision granting the Prosecutor leave to respond to the Principal Defender's request because by doing so, the Impugned Designated Judge has effectively ruled on the

¹Decision of the Designated Judge granting the Prosecutor leave to file Response to the Principal Defender's Request for removal/recusal of duty Judge, Teresa Doherty, RSCSL 03-01-ES (12740-12741)

Principal Defender's request and the Principal Defender submits that this procedure amounts to the Impugned Designated Duty Judge acting as a judge in her own cause. When the Principal Defender filed his request, he properly considered the procedure applicable to disqualification/recusal applications and addressed his request first to the President for disqualification of the Impugned Designated Judge and second to the Impugned Judge to consider the issues raised in the request and for her lady to voluntarily recuse herself from the matter.

4. It was the expectation of the Principal Defender and Mr. Taylor considering the past practice of this court's predecessor that the Impugned Judge would file a statement or respond by affidavit evidence on oath in response to the factual allegations set forth in the disqualification/recusal application which statement would evince her lady's position as to whether she intends to continue sitting on the application or not. With the greatest respect, it is legally incorrect for the Impugned Judge to continue sitting on any ancillary application arising from the Principal Defender's main application for disqualification/recusal as her Lady has done in the Decision Granting Leave to the Prosecutor to respond to the disqualification/recusal motion because to do so amounts to her lady effectively granting a ruling on the main application by conduct.
5. What would have been the appropriate course of action the Principal Defender submits is for the Impugned Designated Judge to have handed the file over to the President or some other Judge appointed by the President to rule on ancillary applications arising from the Principal Defender's request and not for the Impugned Designated Judge to do. It is Mr. Taylor's position that by the President allowing the Impugned Designated Judge to continue sitting on applications arising from the Principal Defender's main request, the President has effectively ruled on the Principal Defender's main request by conduct and this state of affairs has the potential for Mr. Taylor to lose confidence in the Court's ability to render him impartial justice especially considering his upcoming application for review of his judgment.

6. To be fair, the Prosecutor in his response to the Principal Defender's request ensured in the concluding part of his response that he directed his request to the President to rule and not to the Impugned Designated Judge. By requesting the intervention of the President in the concluding part of his response, the Prosecutor clearly agrees with the Principal Defender's position in that it is the President or some other Judge appointed by the President that should sit on ancillary applications arising from the main applications otherwise the ends of justice will be defeated.
7. To date, the Principal Defender notes that the Impugned Designated Judge has not issued a statement or an affidavit on oath contradicting the factual allegations contained in the Principal Defender's request. Rather, it is the Prosecutor who has transformed his Office into a spokesperson for the Impugned Designated Judge given the extent to which the Prosecutor has offered what the Principal Defender considers to be "personal statements on behalf of the Impugned Judge" in a manner which leaves a reasonable observer with the impression that the Prosecutor has provided more than a legal resume but has also offered to provide a biographical factual information on the Impugned Judge way beyond the "novel legal issues that would impact on the settled legal principles" for which his Office was granted leave to respond and far exceeding what the Principal Defender could obtain from open source searches on the Judge from the world wide web. The Principal Defender submits that to the extent that the Prosecutor's response provides factual information on the Impugned Designated Judge in relation to her work and her election of Irish citizenship as a result of the Belfast agreement, those submissions should be rejected as they go beyond the novel legal issues for which the Prosecutor was granted leave.
8. It is further submitted that allowing the Prosecutor's submissions on factual background relating to the Impugned Judge to stand will transform the Office of the Prosecutor into a spokesperson for the Impugned Judge and there is no better person to provide the best evidence/response to the factual allegations contained in the Principal Defender's request than the Impugned Judge. At best, the factual statements of the Learned Prosecutor on the Impugned Judge can be described as second hand hearsay evidence and this court should disregard that aspect of the Prosecutor's response especially in circumstances where the

Impugned Designated Judge is available to provide a written statement or evidence on oath responding to the Principal Defender's request.

9. What the Learned Prosecutor left out in his response and which is central to the determination of the issues raised in the Principal Defender's request is the fact that the Impugned Judge has consistently sat on almost all applications filed by Mr. Taylor. It is in the public domain that the Impugned Designated Judge sat on the Trial Chamber that convicted Mr. Taylor and also sat on the panel post Mr. Taylor's appeal which rejected the latter's application to be transferred from UK to continue his imprisonment in Rwanda.² Mr. Taylor's instructions are that the consistent empanelling of the Impugned Designated Judge on his applications that he has filed with this court post his appeal and leave him to wonder whether there is any particular reason for the exercise of this discretion by the President. It is for these reasons amongst others that immediately upon receipt of the order designating the Impugned Judge that he immediately called up the Principal Defender to express his concern and instructed the application which gave rise to the Principal Defender's request for the disqualification/recusal of the Impugned Designated Duty Judge. .

The Principal Defender directs this Reply to the President and Not the Designated Judge

10. For the reasons stated above and which will not be rehearsed to avoid repetition, the Principal Defender directs this Reply to the President and not the Impugned Designated Judge who issued the decision granting the Prosecutor leave to respond to a non-contentious motion because to do otherwise would amount to the Principal Defender submitting to the jurisdiction of the Impugned Designated Judge who the Principal Defender had requested be removed from sitting on his application. . It is for this same reason that the Principal Defender shall be appealing the decision granting the Prosecutor leave to respond to the Request for Disqualification/Recusal by the Impugned Judge because not addressing such procedural lapse on appeal would not bode well for the

²"Decision On Public With Public And Confidential Annexes Charles Ghankay Taylor's Motion For Termination Of Enforcement Of Sentence In The United Kingdom And For Transfer To Rwanda" of 30th January 2015.

administration of international criminal justice. The Principal Defender commends the concluding part of the Prosecutor's response in which his office sought its relief from the President of the court for to do otherwise would amount to his office assisting a judge to sit on his/her own cause. .

The Prosecutor misunderstands the scope and direction of the Principal Defender's Request

11. The Principal Defender is familiar with the jurisprudence cited by the Prosecutor relating to subjective and objective impartiality and there is no need to recite them here because the Principal Defender does not dispute the judicial findings contained therein and does not intend to re-invent the wheel by his application. The main contention in the Principal Defender's request is not solely **NATIONALITY** as the Prosecutor contends in his response but is rather hinged on a second limb namely; that the process and procedure which this Court may undertake to resolve the expert/scientific/global issues raised in Mr. Taylor's application on covid-19 may necessitate some judgment/assessment to be passed on the UK and it may not bode well for such to emanate from a judicial officer nominated by that country especially given the fact that the Impugned Designated Judge was nominated by the UK to sit on this fact, a fact that has not been challenged in the Prosecutor's response. It is submitted that the

12. It is against the afore-mentioned process that Mr. Taylor envisages that he cautiously seeks the removal of the UK Judge on his application in order to pre-emptively avoid matters of conflicts of interests that may possibly arise from the perspective of a reasonable observer. . It boggles the mind to observe how the Prosecutor strenuously submits that her lady changed her nationality to Irish and yet contradictorily submits that nationality should not be considered as a factor in determining subjective or objective bias in determining requests relating to disqualification/recusal. The Principal Defender understands that nationality gauged by itself is not a ground for disqualification otherwise judges would not be sitting on cases in their national courts. What distinguishes the Principal Defender's application is that judgment/assessment may have to made on the Government's response to covid - 19 generally and within its prison systems in particular, a fact which did not arise in any of the case law jurisprudence cited by the Learned Prosecutor.

13. Moreover, it is in the public domain that the Impugned Judge is from Northern Ireland and Northern Ireland is part of the UK³. The Principal Defender notes that his recent check reveals that Northern Ireland is still part of the UK and although the response speaks to the Judge having an Irish nationality, it is not clear whether the Prosecutor meant Republic of Ireland or Northern Ireland nationality. Whatever the case, the best evidence on the matters raised in the Principal Defender's request would come from the Impugned designated Judge and not through a third party such as the Prosecutor. There is a UK Government which is headed by a Prime Minister and it is that Government that deals with Foreign Policy and international Relations and not the individual countries which make up the Kingdom. Curiously, the Principal Defender observes that the Prosecutor has not responded to the country that nominated her lady to this court and the impact of such nomination on Mr. Taylor's application for temporary transfer.

14. What makes this request different from those relating to **Judge Orié⁴** and **Justice Solomon⁵** in the cases cited by the Prosecutor in his response is that independent international organizations such as the World Health Organization (WHO) may be asked to file submissions on UK's response to covid-19 within its Prison systems generally and within the specific prison where Mr. Taylor is serving imprisonment in particular for the court to appreciate the scope and details of Mr. Taylor's request. This may in turn generate response from UK national authorities and experience has shown that there is every

³See link to an article in the Commonwealth website: <https://thecommonwealth.org/our-member-countries/unitedkingdom#:~:text=The%20UK%20is%20a%20union,Scotland%2C%20Wales%20and%20Northern%20Ireland.>

Note also that in the list of Commonwealth countries, mention is made of the United Kingdom as a member, and not "northern Ireland" or any other entity comprising the UK – see Commonwealth web address:

<https://thecommonwealth.org/member-countries>

⁴*Prosecutor v. Mladic*, Case No. IT-09-92-PT, "Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphonse Orié and a Stay of Proceedings", 15 May 2012.

²⁹*Idem*, note 28, Per Judge Alphonse Orié: "I am a national of the Netherlands. I was elected as a judge of this Tribunal by the General Assembly of the United Nations. I am remunerated for my work for this Tribunal by the United Nations. In no way do I feel or consider that I have any identification or partiality with the Netherlands, its Government, any of its officials, or any individual of Dutch nationality in the performance of my duties. What binds me is the solemn declaration that I made when I undertook to fulfill my duties, "honourably, faithfully, impartially and conscientiously"", at Annex 60.

⁵*Prosecutor v Moinina Fofana*, RSCSL 04-14-ES-839 correctly referenced in footnote 31 of the Prosecutor's Response

possibility of tension arising from the different submissions as the UK Government may seek to protect its response purely as a matter of political expediency. The Prosecutor's reliance on the *Fofana* matter is distinguishable from the instant application because in that case, *Mr Fofana* who was represented by Mr. Melron Nicol Wilson and the Principal Defender did not contest the allegations against him but admitted violating the terms of his conditional early release and I submit it is not helpful to the Prosecutor's submissions because in that application there was no application filed for recusal and it was a non-contentious hearing as the defendant admitted violating the terms of his conditional early release. .

15. Properly considered, the Principal Defender requested disqualification/removal of the Impugned Designated Judge not solely on the basis of NATIOANLITY but having in main the nature of the process/procedure that would accompany the application in that the Defence may seek leave and it intends to do so for WHO to file submissions on UK Prison System response to covid-19 and its impact on prisoners of advanced age such as Mr. Taylor and the counter responses to be filed by UK Authorities which may have political rather than independent coloration. Mr Taylor similarly anticipates that submissions/briefs may be filed by independent prison watch entities such as Amnesty International (AI) or Human Rights Watch (HRW) given their independence. It is with this anticipated procedure in mind that Mr Taylor seeks to have a different judge determine his application in addition to the fact that the Impugned Judge sat on his trial and his conviction and also sat on his application for transfer to serve his imprisonment in Rwanda post the judgment on his appeal.
16. Had the Prosecutor considered these matters at great length, he would have come to the conclusion that the nature of the request is as novel as covid-19 as it is not based on traditional underpinnings of subjective/objective impartiality but based on an issue which may put the sentencing enforcement country, the UK on trial on a single issue, namely; assessing its response to covid-19 within its prison system and this calls for independent assessment which will be better carried out by a Judge detached from the country, whose response system to COVID-19 is under review in the application. It is for the same reason

of maintaining independence that the Defence shall be seeking leave for independent entities such as AI, HRW and WHO to file submissions on the questions raised in Mr. Taylor's application for temporary transfer due to the massive outbreak of covid-19 in the UK.

17. None of the authorities cited by the Prosecutor in his response deal with the issues raised in the request apart from the NATIONALITY of the Impugned Judge and his response falls apart because his focus has been solely to respond to the issue of NATIONALITY and not the process which will be followed by the Designated Judge in the scheduling order which may invite responses from the UK, WHO, AI and HRW and which process will be instigated by Defence applications. By this Reply, the Principal Defender puts the court on notice that the Defence shall be requesting amicus submissions of independent entities to file submissions on UK's response to covid-19 within its prison system.

Conclusion

18. For all the reasons stated above, the Principal Defender respectfully submits that the Decision Granting Leave to the Prosecutor to respond to the Principal Defender's Motion is tainted and therefore should be disregarded because it was issued by the Impugned Designated Judge and for similar reasons, the Prosecutor's response should be disregarded because it flowed from a faulty order. The Principal Defender reiterates his request that the Impugned Designated Judge be disqualified from sitting on Mr. Taylor's application for all the reasons contained herein and in the initial Request filed by the Principal Defender

Respectfully Submitted this 14th day of July 2020



Ibrahim Sorie Yillah
Principal Defender