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SCSL-03-01-A
(228-233)

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THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice George Gelaga King
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date: 17 August 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

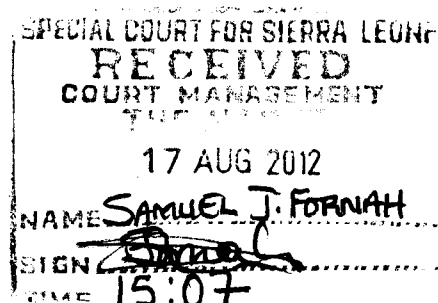
SUBMISSION IN RESPONSE TO THE ORDER FOR CLARIFICATION OF 15 AUGUST 2012

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. C3man Kenny

Counsel for Charles G. Taylor:

Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis



A. Introduction

1. On 15 August 2012, the Pre-Hearing Judge issued an *Order for Clarification of Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges*¹ ("Order"). The Order required the Defence to file a submission by 17 August 2012:

- (i) Clarifying whether the 'evidence' that the Defence avers will require a credibility assessment by the Judges of the Appeals Chamber (that would in turn lead to a reasonable apprehension of bias by a reasonable observer properly informed) is exclusively limited to the document attached as Annex A to the Motion; and if it is not²
- (ii) Describing in detail, by way of proffer, any other evidence on which the Defence intends to rely in connection with the Motion or the underlying grounds of appeal to which the Motion relates, the credibility assessment of which would lead to a reasonable apprehension of bias by a reasonable observer properly informed, if that assessment were performed by the Judges of the Appeals Chamber.³

2. The Defence files this submission to the Appeals Chamber⁴ in response to the Order.

¹ *Prosecutor v. Taylor*, Case No. SCSL-03-01-A-1317, Order for Clarification of Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 15 August 2012 ("Order"). See, also, *Prosecutor v. Taylor*, SCSL-03-01-A-1302, Public with Public Annex A and Confidential Annex B, Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 19 July 2012 ("Defence Motion"); *Prosecutor v. Taylor*, SCSL-03-01-A-1312, Prosecution Response to Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 27 July 2012 ("Prosecution's Response"); and *Prosecutor v. Taylor*, Case No. SCSL-03-01-A-1313, Defence Reply to Prosecution Response to Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 1 August 2012 ("Defence Reply").

² Order, page 1.

³ Order, page 2.

⁴ Although the Order was issued by the Pre-Hearing Judge, pursuant to, *inter alia*, Rule 109(B)(i) of the Rules, the Defence observes that it was issued on behalf of the Appeals Chamber and the Defence Motion, the Prosecution's Response, and the Defence Reply, have all been filed before the full bench of the Appeals Chamber. Consistent with this procedural posture, this submission is being filed before the full bench of the Appeals Chamber. See, Order, page 1; Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012 ("Rules"), Rule 109(B)(i); Defence Motion; Prosecution's Response; and Defence Reply.

B. Submissions

(i) Preliminary Matters

3. The Defence indicates in answer to part (i) of the Order that the evidence is not limited to Justice Sow's Statement as contained in Annex A of the Defence Motion.

4. The Defence construes, in respect of part (ii), that "or" is intended to be read conjunctively, in the sense that the Defence is to proffer any other evidence (besides Justice Sow's Statement) on which the Defence intends to rely.

5. As far as the Defence Motion is concerned, the Defence does not intend to rely on anything further not contained in the Defence Motion and the Defence Reply. The Defence observes, however, that the "evidence" which it avers in the Defence Motion will require a credibility assessment by the Judges of the Appeals Chamber is not limited to Annex A (i.e., Justice Sow's Statement), but includes all information and averments contained in Section C of the Defence Motion entitled, "Facts establishing indicia of apprehended bias."⁵

6. In respect of "the underlying grounds of appeal," the Defence Motion is concerned only with Grounds of Appeal 36 and 37 of the Notice of Appeal.⁶ As paragraph 104 of the Notice of Appeal, in relation to both Grounds of Appeal, states: "the Defence intends to file a motion under Rule 115 to present additional evidence before the Appeals Chamber"⁷ and that the inclusion of both Grounds of Appeal in the Notice of Appeal is "without prejudice to the... Motion for Disqualification."⁸

7. Rule 115(A) provides that:

A party may apply by motion to the Pre-Hearing Judge to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. The motion shall also set out in full the reasons and supporting evidence on which the party relies to establish that the proposed additional evidence was not available to it at trial. ***The motion shall be served on the other party and filed with the Registrar not later than the deadline for filing the submissions in reply.*** Rebuttal material may be presented by any party affected by the motion (emphasis added).⁹

⁵ Defence Motion, section C, paras. 8 – 24.

⁶ *Prosecutor v. Taylor*, Case No. SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012 ("Notice of Appeal"). See, Defence Motion, para. 2.

⁷ Notice of Appeal, para. 104.

⁸ Notice of Appeal, para. 103.

⁹ Rules, Rule 115(A).

8. Submissions in Reply are not due in this case until 9 November 2012.¹⁰ Inquiries and investigations are ongoing and, based on the express language of Rule 115(A) and the Time-Limits Decision, the Defence has until 9 November 2012 to conduct those inquiries and file its Rule 115 motion to present additional evidence in relation to Grounds of Appeal 36 and 37.¹¹

9. The practical effect of the Order, directing the Defence to describe “in detail” “by way of proffer,”¹² the evidence on which it intends to rely in connection with Grounds of Appeal 36 and 37 is to advance by approximately 2 months and 3 weeks, the respective deadlines for the Defence motion for additional evidence and the exposition of the additional evidence itself. Defence compliance with the Order would also give the Prosecution a tactical advantage by having sight of the Defence’s additional evidence now rather than in November 2012.

10. As Defence inquiries are still ongoing and the deadline for completion of such inquiries prescribed by Rule 115 is 9 November 2012, the Defence hereby makes the following proffer without prejudice to its rights pursuant to Rule 115 to bring forward such additional evidence as may subsequently be produced or verified.

(ii) Proffer

11. In addition to the evidence which is set forth in the Defence Motion, the Defence proffers the following as part of the evidence it expects to sustain Grounds of Appeal 36 and 37:

- (i) The Defence intends to call as a witness on appeal, former Special Court Justice El Hadji Malick Sow;
- (ii) Judge Sow is expected to testify about his statement (Annex A of the Defence Motion) that there were “no ^ deliberations” as is alleged in Ground of Appeal 36 of the Notice of Appeal, including his presence (or lack thereof) at any purported deliberations amongst the Justices of Trial Chamber II;
- (iii) The Defence’s inquiry through Justice Sow will be limited to establishing the fact of there being no deliberations as alleged in Ground of Appeal 36, and will not

¹⁰ *Prosecutor v. Taylor*, SCSL-03-01-A-1315, Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 7 August 2012 (Time-Limits Decision), page 13.

¹¹ The acknowledgement here regarding the deadline for Submissions in the Reply, as articulated in the Time-Limits Decision, is not to be read as being inconsistent with the relief sought by *Prosecutor v. Taylor*, SCSL-03-01-A-1318, Motion for Reconsideration or Review of “Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113,” 15 August 2012 (“Motion for Reconsideration or Review”).

¹² Order, page 2.

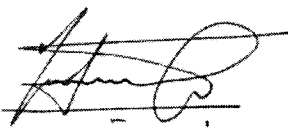
extend to the substance of any discussion between Justices which might arguably be viewed as part of a purported “deliberative” process;

- (iv) Justice Sow will also testify and expand upon his statement, in respect of Ground of Appeal 37, “that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice”¹³;
- (v) Justice Sow will further testify about the e-mail of 11 May 2012 that he wrote to all Justices of the Special Court (except Justice Julia Sebutinde), copying lead defence and prosecution counsel¹⁴; and
- (vi) The Defence intends to present evidence relating to the physical presence of the Justices of Trial Chamber II within the courthouse premises between the date of the conclusion of the last hearing before Trial Chamber II (i.e., 11 March 2011) and the date on which the Judgement was orally rendered (i.e., 26 April 2012).

C. Conclusion

12. The Defence hereby files the above proffer in compliance with the Order and without prejudice to its right to apply for and present additional evidence on appeal, pursuant to Rule 115.

Respectfully submitted,



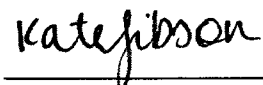
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Kate Gibson
Co-Counsel for
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Dated this 17th Day of August 2012, The Hague, The Netherlands

¹³ Defence Motion, Annex A.

¹⁴ Defence Motion, Confidential Annex B.

List of Authorities

SCSL

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012 (“Rules”).

Statute of the Special Court for Sierra Leone, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002.

Prosecutor v. Taylor, SCSL-03-01-A

Prosecutor v. Taylor, SCSL-03-01-A-1318, Motion for Reconsideration or Review of “Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113,” 15 August 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1317, Order for Clarification of Charles Ghankay Taylor’s Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 15 August 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1315, Decision on Prosecution and Defence Motions for Extension of Time and Page Limits for Written Submissions Pursuant to Rules 111, 112 and 113, 7 August 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1313, Defence Reply to Prosecution Response to Charles Ghankay Taylor’s Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 1 August 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1312, Prosecution Response to Charles Ghankay Taylor’s Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 27 July 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1302, Public with Public Annex A and Confidential Annex B, Charles Ghankay Taylor’s Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 19 July 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1297, Order Designating a Pre-Hearing Judge Pursuant to Rule 109 of the Rules of Procedure and Evidence, 21 June 2012.