1369) SCSL-03-01-A (10517-10526) 10517

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Vice President
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date: 12 December 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION TO PRESENT ADDITIONAL EVIDENCE PURSUANT TO RULE 115

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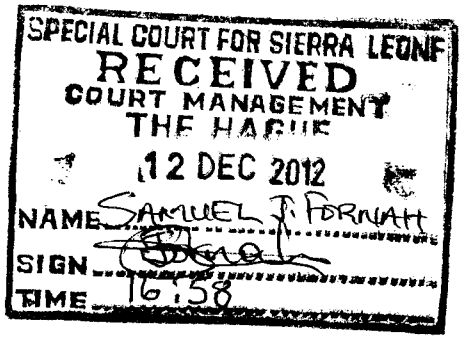

I. Introduction[1]

1. The Defence hereby replies to the *Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 115*.[2] The Response in no way undercuts the factual and legal basis which sustains the Rule 115 Motion and the additional evidence to which it pertains. The Rule 115 Motion should, accordingly, be granted.

II. Submissions

A. Requirements of Rule 115(A) and the Practice Direction[3]

2. The Rule 115 Motion complies with the requirements of Rule 115(A) and paragraph 23 of the Practice Direction.[4] Assertions to the contrary in the Response are misplaced and without merit.[5]

3. The specific findings of fact to which the proffered evidence is directed are identified with precision in paragraph 9 of the Rule 115 Motion. Two identified categories of findings of fact are relied upon in that paragraph, either "individually or as a collectivity of some or all."[6] The first category is those findings which are specifically delineated in paragraph 6994 of the Judgement.[7] Paragraph 6994(a) provides the specific crimes and factual bases underpinning Mr. Taylor's conviction for aiding and abetting; paragraph 6994(b) does the exact same thing regarding Mr. Taylor's conviction for planning. There is no requirement in either Rule 115 or the Practice Direction that a party list every adverse finding of fact made in a judgement in its additional evidence motion, where it avers that the additional evidence renders all convictions

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[1] The absence of Justice Shireen Avis Fisher's name on the cover page is in accordance with the Justice's decision to decline ruling "on any pending issue relevant to the [Defence] Rule 115 Motion," as conveyed by *Prosecutor v. Taylor*, SCSL-03-01-A-1362, Leave to Refile Urgent Defence Motion to Reclassify Part of Public Annex I to its Rule 115 Motion as Confidential, 5 December 2012, page 2.

[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1366, Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 115, 7 December 2012 ("Response"). See, also, *Prosecutor v. Taylor*, SCSL-03-01-A-1352, Defence Motion to Present Additional Evidence Pursuant to Rule 115, 30 November 2012 ("Rule 115 Motion").

[3] Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012 ("Practice Direction").

[4] See, *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, as amended on 31 May 2012 ("Rules" or "Rule"), Rule 115(A); and Practice Direction, para. 23.

[5] Response, paras. 7 - 8.

[6] Rule 115 Motion, para. 9.

[7] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement), para. 6994.

unsafe.[8] It is sufficient to specifically identify the relevant findings by reference to the paragraph number in the Judgement in which they appear.

4. The second indentified category of findings of fact (any finding underpinning the conclusion that Mr. Taylor received a fair trial) is broader than the first, and yet just as specific. There is no specific finding of fact in the Judgement that the entire trial process was fair within the meaning of Article 17 of the Statute and applicable jurisprudential principles. This does not mean that an accused could never, in such circumstances, seek to present additional evidence which explicates that the trial was manifestly unfair.[9] A similar situation arose in *Čelebići*, where the allegations pertained to a judge who slept during parts of the trial proceedings, and where the Court noted that:

> No precedent in the international context was cited in relation to the specific issue raised by this ground of appeal, and none has been discovered by the Appeals Chamber's own research. Guidance as to the legal principles relevant to an allegation that a trial judge was not always fully conscious of the trial proceedings may therefore be sought from the jurisprudence and experience of national legal systems. The national jurisprudence considered by the Appeals Chamber discloses that *proof that a judge slept through, or was otherwise not completely attentive to, part of proceedings is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or other adequate remedy.* The parties essentially agreed that these are the principles which apply to the issue before the Appeals Chamber[10] (emphasis added).

5. In this case, and much like in *Čelebići*, the issues which have been raised in Grounds of Appeal 36, 37 and 38 are such that if sustained, would *give rise to a right to a new trial or other adequate remedy*. There could not be a more substantive basis upon which to seek to present additional evidence than the allegation that the accused was denied a fair trial. Such an allegation attacks the legal and factual basis and essence of the Judgement, and recitation of every adverse

[8] See, para. 21 of the Rule 115 Motion.
[9] It is true that the Defence raised before the Trial Chamber, discrete issues which alleged that Mr. Taylor did not receive a fair trial, including: the admission of evidence falling outside the temporal and geographical scope of the Indictment (para. 17(v) of Judgement); alleged abuse of process due to financial and other inducements to potential witnesses and witnesses (paras. 17(vii), 71, 148 and 187 of Judgement); and denial of fair trial due to irreparable prejudice caused by delay in ruling on the Defence motion regarding the defective pleading of joint criminal enterprise (paras. 17(xii), 141, and 147 of Judgement). However, the raising of these discrete issues was not tantamount to a challenge that the entire trial process was unfair and any resulting convictions unsafe. Indeed, the basis for the challenge being lodged through Grounds of Appeal 36, 37 and 38 – evidence which came to light through former Judge, El Hadji Malick Sow – was not known by the Defence, nor in existence when the Defence filed its final trial brief before the Trial Chamber.
[10] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 625.

finding of fact contained in a 2500-plus page Judgement is both unnecessary and not required. Indeed, motions before this Court are limited to no more ten (10) pages or 3,000 words, whichever is greater,[11] and the Defence would have no room for written submissions, were it to list each and every adverse finding of fact from the Judgement in the body of the Rule 115 Motion. Accordingly, the contrary arguments in the Response are devoid of merit.

B. Additional Evidence in Relation to Justice Sow

(i) Relevance and Whether the Proffered Evidence Could have Rendered the Conviction Unsafe

6. The Prosecution does not contest that all six (6) items[12] of proffered additional evidence in relation to Justice Sow were not available at trial.[13] The Prosecution also does not contest the *credibility* of any of the nine (9) items of proffered evidence, whether in relation to Justice Sow or Justice Sebutinde.[14] The disagreement between the parties arises only regarding whether the proffered evidence regarding Justice Sow is relevant – as in "material" to the Trial Chamber's decision[15] - and could have rendered the conviction unsafe.[16] The Defence addresses both issues together, insofar as they are inextricably connected.

7. The evidence relating to Justice Sow touches squarely upon the issues of no deliberations as prescribed by the Rules (Ground of Appeal 36), the conduct of the trial contrary to fundamental principles of international law and international criminal justice (Ground of Appeal 37) and the irregular constitution of the Trial Chamber with a Judge of the International Court of Justice[17] (Ground of Appeal 38).[18] The Prosecution characterises this evidence as the "personal views"[19] of Justice Sow, seeking to minimise thereby, the severity of the issues raised by a

[11] Practice Direction on dealing with Documents in The Hague - Sub-Office, as amended on 25 April 2008, Article 6(C).
[12] See, Rule 115 Motion, para. 8(a) through 8(f).
[13] Response, para. 14.
[14] Response, para. 19.
[15] *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 5. See, response, paras. 19 – 20.
[16] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision On Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, para. 12. See, also, Response, paras. 23 – 25. The Prosecution agrees that, where the proffered evidence was not available at trial, the appropriate standard is whether it *could* have rendered the conviction unsafe (emphasis added). See, Response, para. 22.
[17] "ICJ."
[18] Rule 115 Motion, para. 14.
[19] Response, para. 19.

member of the Trial Chamber and ignoring the solemn declaration undertaken by that Judge, *pursuant* to Rule 14, to dispense justice without fear or favor, honestly, faithfully, impartially and conscientiously.[20]

8. The Defence has always maintained that there were no deliberations – as in no deliberations *in accordance with the Rules* (emphasis added). Justice Sow directly corroborates that averment in the New African magazine interview when he confirms that he was excluded from what meetings were held,[21] inconsistently with the requirements of Rule 16*bis*(C). The Response entirely overlooks this critical fact and its consequences for the validity and credibility of the Judgement. The conclusion that the "personal views of Justice Sow" are not "relevant to any of the findings underpinning Mr. Taylor's guilt,"[22] is accordingly alarmingly. So, too, is the proposition that Justice Sow's "personal opinion" is not relevant and could not have rendered the conviction unsafe because, as an Alternate judge, he had no vote on Mr. Taylor's conviction.[23]

9. These averments, as advanced in the Response, evidence an extremely myopic perspective of what fundamental issues undergird and sustain a conviction in a criminal case. Justice Sow's evidence is inexorably bound up with the notion of fair trial and due process and, consequently, it is relevant to all adverse findings of fact and the convictions which they sustain within the Judgement. At a minimum, it is relevant to those findings of fact identified in paragraph 9 of the Rule 115 Motion. The Prosecution fails to explain the purpose behind Rules 16*bis*(C), 26*bis*, 87, 88 and Articles 12, 13, 17(2) and 18 of the Statute,[24] and the consequences for Mr. Taylor's conviction, in the event of a proven violation of any of those provisions. It is the contravention of some or all of those provisions that Grounds of Appeal 36, 37, and 38 are aimed at demonstrating; something which, once proven, would render Mr. Taylor's convictions unsafe.

10. The Prosecution further seeks to minimise (indeed obscure) the evidence of Justice Sow by arguing that, even if Justice Sow had replaced any of the three sitting Judges, his vote would not have affected the conviction because "Mr. Taylor would still have been convicted by a

[20] See, Rule 14 of the Rules.
[21] New African magazine, December 2012 Edition, page 49.
[22] Response, para. 20.
[23] Response, paras. 23 – 24.
[24] 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 ("Statute").

majority."[25] The specious nature of that proposition is easily apparent: it entirely ignores the deliberative process and the persuasive exchanges between Justices that could sway the vote of particular judges one way or the other. Moreover, it ignores the consequences for the judicial process and the dynamics between the judges when the bench is irregularly constituted. Much of that comes through in Justice Sow's New African interview, when he says, "The president of the Court came to The Hague and had a meeting with the judges. He knew about this issue... All of the judges of the Court knew about this problem."[26] "...[W]hen I spoke in court, I was no longer in a position of an alternate judge. I was a full judge, sitting there as a full judge. The one who shouldn't have been there wasn't me..." "If being elected in a different court doesn't render a judge unable to continue sitting in the SCSL, it must be explained when an alternate judge is eligible to sit as a full judge."[27] Against the backdrop of such comments, it is far from "speculative"[28] to argue that Justice Sow's failure to copy Justice Sebutinde on his e-mail of 11 May 2012 was deliberate and buttresses views he expressed in the New African interview regarding the propriety of the constitution of the Trial Chamber during the relevant period.[29]

11. Indeed, and in respect of Justice Sow's New African magazine interview, none other than Professor William A. Schabas, an eminent scholar of international humanitarian and criminal law, has written that, "Nothing comparable has ever appeared in the history of international criminal justice."[30] For the Prosecution to now suggest that Justice Sow's evidence could not render Mr. Taylor's convictions unsafe is at best both self-serving and misplaced.

C. Additional Evidence in Relation to Justice Sebutinde

(i) Availability at Trial, Relevance and Whether the Proffered Evidence Could or Would have Rendered the Conviction Unsafe

12. The Prosecution does not challenge the *credibility* of any of the three (3) items of additional evidence being proffered, in respect of Justice Sebutinde.[31] However, the Prosecution

[25] Response, para. 24.
[26] New African magazine, page 49.
[27] New African magazine, page 48.
[28] See, Response, para. 25.
[29] See Rule 115 Motion, para. 16 and Confidential Annex F thereto.
[30] Schabas, William, A., OC MRIA, "Justice Sow Interviewed on Taylor Trial," PhD Studies in Human Rights blog post, last accessed on 23 November 2012 http://humanrightsdoctorate.blogspot.com.au/2012/11/judge-sow-interviewed-on-taylor-trial.html.
[31] Response, para. 19. See, also, Rule 115 Motion, para. 8(g)(h) and (i).

challenges the necessity for those items to be admitted because it is willing to undertake (or stipulate) that the facts to which they are aimed at proving occurred.[32]

13. To the extent the Chamber is satisfied that the Prosecution has admitted the occurrence of the facts to which the three items[33] of additional evidence are offered to establish, and that those facts are now matters on record for purposes of this appeal, the Defence accepts the Prosecution's undertakings.[34] An error appears, however, in the Response in relation to the date upon which Justice Sebutinde became a member of the ICJ – it should be 6 February 2012 and not 2011.[35]

14. The Defence disagrees with the averment that it bore the onus and failed to exercise reasonable diligence to raise issues regarding Justice Sebutinde's ICJ membership before the Trial Chamber.[36] The Defence could not have interfered with what was then thought to be ongoing deliberations to raise such an issue because of the absence of the issuance of an Order from the Presidency, designating Justice Sow to replace Justice Sebutinde as a full Judge of the Trial Chamber. It was only on the date of the pronouncement of the Judgement (26 April 2012) that the Defence first had concrete proof that Justice Sebutinde was part of the Justices who voted and signed the Judgement. As such, the Defence could not have raised the issue any sooner than 26 April 2012.

15. The Prosecution's arguments that the items relating to Justice Sebutinde are neither relevant, nor could or would they render Mr. Taylor's convictions unsafe[37] are far from persuasive. The arguments result from artificial distinctions between one item of proposed evidence from another, and a failure to appreciate that seemingly discrete items of evidence are being offered to prove a factual occurrence that is, in itself, part of a larger factual matrix.

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[32] Response, paras. 9 – 10.
[33] See Response, paras. 9 – 10; see, also, Rule 115 Motion, para. 8(g)(h) and (i).
[34] In this regard, and on the same terms and conditions, the Defence would also accept the Prosecution's undertakings regarding the screen shot of Justice Sow's statement of 26 April 2012, the video of parts of the 26 April 2012 statement by Justice Sow, and the Herz Declaration. See, Response, para. 11; see, also, Rule 115 Motion, para. 8(c), (d) and (e).
[35] Response, paras. 10 and 27. Cf. Rule 115 Motion, Annex G.
[36] Response, para. 16.
[37] Response, para. 18.

III. Conclusion

16. For all of the foregoing reasons, the Defence respectfully requests that the Rule 115 Motion be granted.

Respectfully submitted,

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Dated this 12th Day of December 2012, The Hague, The Netherlands.

List of Authorities

SCSL

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

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012

Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012

Practice Direction on dealing with Documents in The Hague - Sub-Office, as amended on 25 April 2008

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

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Prosecutor v. Taylor, SCSL-03-01-A-1362, Leave to Refile Urgent Defence Motion to Reclassify Part of Public Annex I to its Rule 115 Motion as Confidential, 5 December 2012

Prosecutor v. Taylor, SCSL-03-01-A-1352, Defence Motion to Present Additional Evidence Pursuant to Rule 115, 30 November 2012

Prosecutor v. Taylor, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012

***Prosecutor v. Sesay et al.*, SCSL-04-15**

Prosecutor v. Sesay et al., SCSL-04-15-A-1311, Decision On Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009

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Other

Schabas, William, A., OC MRIA, "Justice Sow Interviewed on Taylor Trial," PhD Studies in Human Rights blog post, last accessed on 23 November 2012 http://humanrightsdoctorate.blogspot.com.au/2012/11/judge-sow-interviewed-on-taylor-trial.html.