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SCSL-03-01-A
(241-253)

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 13 September 2012

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC

DECISION ON CHARLES GHANKAY TAYLOR'S MOTION FOR PARTIAL VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF APPEALS CHAMBER JUDGES

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. Cóman Kenny

Defence Counsel for the Accused:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

1. The Appeals Chamber of the Special Court for Sierra Leone ("Special Court") is seized of "Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges" dated 19 July 2012.[1] The Prosecution responded on 27 July 2012.[2] The Defence replied on 1 August 2012.[3]

I. BACKGROUND

2. On 26 April 2012, a summary of the Trial Judgment in the case *Prosecutor v. Charles Ghankay Taylor* was read out in open court by Justice Richard Lussick, the Presiding Judge of Trial Chamber II.[4] Upon conclusion, Justice Lussick adjourned the proceedings.[5] Justice El Hadji Malik Sow, the Alternate Judge appointed to Trial Chamber II for the *Taylor* case, then remained in the courtroom and made a statement.[6] On 16 May 2012, Trial Chamber II held the sentencing hearing.[7] During that hearing, Justice Lussick read out the 10 May 2012 Resolution of the Plenary of the Special Court ("Plenary Resolution"). The Plenary Resolution found that Justice Sow's behaviour on 26 April 2012 constituted judicial misconduct pursuant to Rule 15*bis* of the Rules of Procedure and Evidence ("Rules").[8] On 18 May 2012, Trial Chamber II issued its Judgment in the case *Prosecutor v. Charles Ghankay Taylor*. On 30 May 2012, Trial Chamber II issued its Sentencing Judgment and a revised Judgment.[9]

3. Between 26 April and 19 July 2012, the Defence took no action and made no submissions with respect to either Justice Sow's behaviour on 26 April 2012 or the Plenary Resolution.

4. On 19 July 2012, the Defence filed a Notice of Appeal setting out forty-five (45) Grounds of Appeal.[10] Defence Grounds 36 and 37 allege "errors relating to irregularities in the judicial process", specifically that "deliberations … were not undertaken by the Trial Chamber in this

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[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1302, Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 19 July 2012 ("Motion").
[2] *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 ("Response").
[3] *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 ("Reply").
[4] Transcript, 26 April 2012.
[5] Transcript, 26 April 2012, p. 49679.
[6] Transcript, 16 May 2012, p. 49681.
[7] Transcript, 16 May 2012.
[8] Transcript, 16 May 2012, pp. 49682, 49683.
[9] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Trial Chamber, Judgment, 30 May 2012; *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Trial Chamber, Sentencing Judgment, 30 May 2012.
[10] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012 ("Defence Notice of Appeal").

case"[11] and that there were "recurring irregularities in the judicial process during the proceedings before the Trial Chamber."[12]

5. On the same date the Defence filed the Motion.

6. On 15 August 2012, Justice Shireen Avis Fisher, the designated Pre-Hearing Judge, issued a Clarification Order seeking clarification from the Defence as to the evidence related to the Motion.[13] On 17 August 2012, the Defence filed the Clarification Submission in which it stated 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 the Section of the Defence Motion entitled, 'facts establishing indicia of apprehended bias."[14]

II. SUBMISSIONS OF THE PARTIES

7. The Motion puts forward two requests. First, that pursuant to Rule 15(A), all the Judges of the Appeals Chamber should voluntarily withdraw from hearing Defence Grounds 36 and 37.[15] Second, in the alternative, that pursuant to Rule 15(B), all the Judges of the Appeals Chamber should be disqualified from hearing Defence Grounds 36 and 37.[16] The Defence invites the Appeals Chamber to refer the request for disqualification to a separate panel of judges.[17]

8. With respect to the request for disqualification pursuant to Rule 15(B), the "Motion does not allege actual bias on the part of the Appeals Chamber Judges. It submits that the issue in this matter is one of apprehended bias."[18] The Defence contends that "a reasonable observer, properly informed, would apprehend bias on the part of the Judges of the Appeals Chamber, because they have already made an adverse finding in the plenary and therefore pre-judged a critical aspect of the credibility of a source of evidence which is fundamental to [Defence Grounds 36 and 37]."[19] In support of this contention, the Defence submits that facts related to the following establish indicia

[11] Defence Notice of Appeal, Ground 36.
[12] Defence Notice of Appeal, para. 107.
[13] *Prosecutor v. Taylor*, SCSL-03-01-A-1317, Appeals Chamber (Pre-Hearing Judge) Order for Clarification of Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 15 August 2012 ("Clarification Order").
[14] *Prosecutor v. Taylor*, SCSL-03-01-A-1319, Submission in Response to the Order for Clarification of 15 August 2012, 17 August 2012 ("Clarification Submission"), para. 5.
[15] Motion, para. 2.
[16] Motion, para. 2.
[17] Motion, para. 2.
[18] Reply, para. 2.
[19] Motion, para. 3.

of apprehended bias: (i) Justice Sow's statement;[20] (ii) the removal of Justice Sow's statement from the official transcript;[21] and (iii) the Plenary Resolution.[22]

9. With respect to the statement of Justice Sow, the Defence submits that the statement is "the fundamental evidentiary basis for [Defence Grounds 36 and 37]" and that "any consideration of [Defence Grounds 36 and 37] will necessarily involve an assessment of the [s]tatement and the credibility of its source, Justice Sow."[23] With respect to the "removal" of Justice Sow's statement from the official transcript, the Defence notes that the official transcript "records the Presiding Judge's last statement that court was adjourned and in the next line states that the hearing was adjourned at 1:17 P.M."[24] The Defence notes that the official transcript does not contain Justice Sow's statement.[25] The Defence suggests that "it may be concluded from the foregoing that Justice Sow's statement was deliberately removed from the official record."[26]

10. The majority of the Defence's submissions concern the Plenary Resolution. The Defence submits that "even though the [Plenary Resolution] was formally reached by the Plenary and not the Appeals Chamber, in this case the Judges making the decision are one and the same."[27] The Defence contends that "any purported distinction" between the Plenary and the Appeals Chamber "is artificial and belies the reality of the situation."[28] The Defence argues that the Plenary Resolution "is not simply a general administrative decision relating to the internal functioning of the Court," as it was expressly made pursuant to Rule 15*bis*.[29] The Defence submits that the Plenary Resolution "is directly relevant to and forms part of the trial record in the proceedings against Mr. Taylor" and "would be viewed by a properly informed reasonable observer as a decision in the trial proceedings against Mr. Taylor."[30] The Defence concludes that "[w]hile the issues before the Plenary and the issue before the Appeals Chamber may not be formally expressed in the same way, the specific issue for consideration is overlapping: the credibility of Justice Sow."[31]

11. The Defence then contends that the Plenary Resolution "constitutes an adverse finding on the professional credibility of Justice Sow" and that "at a minimum, it amounts to finding in these

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[20] Motion, paras 9, 10. *See* also Reply, para. 4.
[21] Motion, para. 11. *See* also Reply, para. 4.
[22] Motion, paras 12-24. *See* also Reply, para. 4.
[23] Motion, para. 10.
[24] Motion, para. 11.
[25] Motion, para. 11.
[26] Motion, para. 11.
[27] Motion, para. 15.
[28] Motion, para. 15.
[29] Motion, para. 20.
[30] Motion, para. 17.
[31] Motion, para. 24.

circumstances that the judge has extremely poor ability to make professional judgments and was unprofessional in his conduct."[32] The Defence suggests that "the declaratory effect of the [Plenary resolution] constitutes a particularly severe sanction because it seriously and publicly damages Justice Sow's professional reputation and standing."[33] The Defence concludes that "[a] reasonable observer, properly informed, would reasonably apprehend bias because the Judges of the Appeals Chamber, sitting in plenary, have already passed an adverse judgment on an aspect of Justice Sow's credibility and as such they have pre-judged the issue of his credibility as a source of critical evidence on appeal."[34]

12. The Prosecution responds that the Motion is without merit and should be dismissed.[35] The Prosecution contends that the Motion "contains not a single fact or even a single allegation that would cause a reasonable informed observer to doubt the impartiality of any of the Judges of the Appeals Chamber of the Special Court for Sierra Leone."[36] The Prosecution further rejects the Defence claim that the Judges of the Appeals Chamber have already made an adverse finding on Justice Sow's credibility.[37] The Prosecution submits "it is clear that the subject of the decision of the plenary did not concern the credibility or rationality of the Alternate Judge's statement;"[38] rather "the issue before the Plenary … was his behaviour"[39] which was "unprecedented", "manifestly improper" and "clearly inappropriate".[40] In addition, the Prosecution argues that in accordance with the jurisprudence, disqualification will only be justified where rulings are, or would reasonably be perceived as, a pre-disposition against an applicant.[41]

13. The Defence replies that the Motion does not allege actual bias but only the appearance of bias.[42] Regarding the nature of the Plenary Resolution, the Defence argues that the Prosecution's characterizations of Justice Sow's behaviour as "inappropriate" and "manifestly improper" "would [also] be made by a reasonable observer reading [the Plenary Resolution];"[43] the Defence submits that "[i]t is no answer to assert that these findings were objectively correct because such an assertion reflects precisely the perception of pre-judgment claimed by the Defence."[44] The Defence

[32] Motion, para. 18.
[33] Motion, para. 21.
[34] Motion, para. 24.
[35] Response, para. 1.
[36] Response, para. 2.
[37] Response, paras 3, 4.
[38] Response, para. 6.
[39] Response, para. 8.
[40] Response, paras 6-8.
[41] Response, para. 10.
[42] Reply, para. 2.
[43] Reply, para. 6.
[44] Reply, para. 6.

further contends that the proposed distinction between Justice Sow's behaviour and the credibility of his statement is "artificial" as Justice Sow's behaviour was making the statement.[45]

III. APPLICABLE LAW

14. Article 13(1) of the Statute provides that:

> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

15. Rule 15 provides that:

> (A) A Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground.
>
> (B) Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground.

16. This Chamber has held that to determine whether the surrounding circumstances objectively give rise to an appearance of bias, "the applicable test … is whether an independent bystander or reasonable person will have a legitimate reason to fear that the judge in question lacks impartiality, in other words whether one can apprehend bias."[46] The standpoint of the accused is not decisive.[47] Rather, it must be demonstrated that there is a legitimate reason to fear that the Judge in question lacks impartiality which can be objectively justified.[48] Where "some indicia of bias [is found] the logical and reasonable conclusion must be that a Judge is disqualified."[49]

17. This Chamber has further held that "the reasonable man is an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold."[50] This "hypothetical fair-minded observer [has] sufficient knowledge of the actual circumstances to make a reasonable judgment."[51] The fair-minded observer is also

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[45] Reply, para. 7.
[46] *Prosecutor v. Norman*, SCSL-2004-14-PT-112, Appeals Chamber, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para. 22 ("*Justice Winter* Disqualification Decision").
[47] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-956, Appeals Chamber, Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 24 January 2008, para. 10 ("*Justice Thompson* Appeal Disqualification Decision").
[48] *Justice Thompson* Appeal Disqualification Decision para. 10.
[49] *Justice Thompson* Appeal Disqualification Decision para. 13.
[50] *Justice Thompson* Appeal Disqualification Decision, para. 11.
[51] *Prosecutor v. Krajisnik*, IT-00-39-PT, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, para. 14 ("*Krajisnik*

aware that a Judge is trained to put out of their minds evidence other than that presented at trial.[52] "Therefore a Judge's prior judicial contact with the facts of a case (or indeed with the accused) alone would generally not be sufficient to find an unacceptable appearance of bias. A fair-minded observer would know that a Judge's role can differ from one judicial context to another."[53]

18. In determining whether a Judge's prior association with another case gives rise to a legitimate fear that the Judge may be biased or may have prejudged the instant matter, the Appeals Chamber endorses and adopts the holding that "what matters is that he or she has not taken any stand or expressed any view that may [reasonably be perceived as] prejud[ing] his or her position on the guilt or innocence of the accused in the proceedings at bar."[54]

19. A party seeking disqualification of a Judge at the Special Court bears the heavy burden of displacing the presumption of judicial impartiality.[55] A party seeking disqualification must also support any application with "ascertainable facts" and firm evidence of judicial bias.[56] Evidence that is remote, irrelevant, capable of being disabused in the mind of Judges or speculative is not sufficient.[57]

Disqualification Decision"). *See* also *Kabiligi v. Prosecutor,* ICTR-97-34-I, International Criminal Tribunal for Rwanda, Trial Chamber, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection based on Lack of Jurisdiction, 4 November 1999, para. 33; *Prosecutor v. Karemera et al.* ICTR-98-44-T, International Criminal Tribunal for Rwanda, Trial Chamber, Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and stay of Proceedings, 20 February 2009, para. 5; *Prosecutor v. Furundžija*, IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 21 July 2000, para. 185 (*Furundžija* Appeal Judgment) (citing the Supreme Court of Canada); *Prosecutor v. Karadžić*, IT-95-05/18-PT, International Criminal Tribunal for the former Yugoslavia, Chamber Convened by Order of the Vice-President, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009, para. 16 (*Karadžić* Decision).

[52] *Prosecutor v. Šešelj*, IT-03-67-T, International Criminal Tribunal for the former Yugoslavia, President, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, 14 January 2008, para. 25 (*Šešelj* Harhoff Disqualification Decision). *See also Prosecutor v. Galić*, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 30 November 2006, para. 44 (*Galić* Appeal Judgement).

[53] CH/PRES/2010/08, Special Tribunal for Lebanon, President, Decision on Mr. El Sayed's Motion for the Disqualification of Judge Riachy from the Appeals Chamber pursuant to Rule 25, 5 November 2010, para. 32 (*El Sayed* Riachy Disqualification Decision). *See* also *Karadžić* Decision, para. 19; *Prosecutor v. Šešelj*, IT-03-67-R77.3, International Criminal Tribunal for the former Yugoslavia, President, Decision on the Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 22 June 2010, para. 32.

[54] *El Sayed* Riachy Disqualification Decision, para. 69 (emphasis omitted), *citing Šešelj* Harhoff Disqualification Decision, para 21; *Karadžić* Decision, para. 24; *Krajisnik* Disqualification Decision.

[55] *Justice Winter* Disqualification Decision, para. 25.

[56] *Justice Thompson* Appeal Disqualification Decision, para. 10.

[57] *Furundžija* Appeal Judgment, para. 197.

IV. ANALYSIS

20. The Motion presents three issues for determination:

(i) Whether any Judge of the Appeals Chamber believes that he or she individually should voluntarily recuse him/herself with respect to Defence Grounds 36 and 37;

(ii) If every Judge does not individually and voluntarily recuse him/herself, who is empowered to decide on the request for disqualification under the Statute and Rules;

(iii) Whether a reasonable observer would apprehend indicia of bias with respect to Defence Grounds 36 and 37 on the part of the Judges of the Appeals Chamber.

A. Recusal

21. Each Judge of the Appeals Chamber, having considered Article 17(2) of the Statute and Rule 15(A), has declined to voluntarily withdraw with respect to Defence Grounds 36 and 37.

B. Procedure

22. Rule 15(B) plainly provides that a motion for disqualification of a Judge shall be decided by "the Chamber of which the Judge is a member".[58] Neither Rule 15(B) nor any other Rule empowers another person or body to decide on this request for disqualification.

23. The right to a fair trial is enshrined in Article 17 of the Statute and reflects the right to an impartial tribunal.[59] The Statute guarantees this right by providing that the "[J]udges shall be persons of high moral character, impartiality and integrity" and that they "shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government

[58] The Defence does not cite any provisions of the Rules in support of its invitation otherwise. No provision is made in the Statute or the Rules to refer the request for disqualification to any other panel of judges.

[59] The right to a fair trial is universally recognized by the international community and the international tribunals. *See e.g.* Article 10 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on Civil and Political Rights; Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 8(1) of the American Convention on Human Rights; Article 7(1)(d) of the African Charter on Human and Peoples' Rights. *See* also Article 67(1) of the Rome Statute of the International Criminal Court; Article 21(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(2) of the Statute of the International Criminal Tribunal for Rwanda; Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea. *See* also *Furundžija* Appeal Judgement, para. 177; *Galić* Appeal Judgement, para. 37.

or any other source."[60] The Judges of the Special Court further make a solemn declaration to serve "honestly, faithfully, impartially and conscientiously."[61]

24. Rule 15 is an instrument to safeguard the impartiality of the Chamber. Rule 15(A) requires each Judge to constantly and faithfully assess whether or not he or she may sit at a matter. Rule 15(B) provides the parties the opportunity to request the disqualification of a judge.

25. A number of national jurisdictions consider that the impartiality of a judge of the highest appellate courts is fully safeguarded by the judge him/herself.[62] The parties may not request another judge or body to disqualify a judge, and the parties cannot appeal the decision of the judge not to recuse him/herself. Likewise, the European Court of Human Rights does not permit the parties to move for the disqualification of a judge or participate in any process for the disqualification of a judge.[63] Among jurisdictions that provide for disqualification by another judge or body, disqualification has been described in some as an "incidental" administrative process[64] – as opposed to an adversarial process – in which the judges concerned have no personal stake.[65]

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[60] Article 13(1) of the Statute.

[61] Rule 14(A).

[62] In the United States of America, the United Kingdom, Australia, Canada and Uganda, for example, judges of the highest appellate courts decide on their own whether or not to recuse themselves. The parties may file a motion for disqualification, but the Judge or Judges concerned decide on the motion. *See e.g.* United States of America, *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J. as single Justice); *Cheney v. US District Court*, 541 U.S. 913 (2004) (Scalia, J. as single Justice); Canada, *Arsenault-Cameron v. Prince Edward Island,* 2000 SCC 1; [2000] 1 S.C.R. 3 (January 13, 2000); Australia, *Bainton v. Rajski* [1992] 29 NSWLR 539; Uganda, *Rtd. Col. Dr. Kiiza Besigye & 5 Others v. Attorney General*, Constitutional Application No. 7 of 2005, Uganda Constitutional Court; *Uganda Polybags Ltd v. Development Finance Company of Uganda*, [1999] 2 EA 337. *See* also R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62, 4, Wash. & Lee L.Rev. at,1820 (2005). The suggestion that disqualification is a right contained in the Trial Chamber's decision on the disqualification of Justice Thompson is erroneous. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-909, Trial Chamber, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007, para. 41. The Appeals Chamber considers that the Trial Chamber's findings in paras 26-44 must be read and interpreted in the context of the discussion regarding the judicial immunity claimed by Judge Thompson.

[63] Rule 28 of the Rules of Court of the European Court of Human Rights. The issue of a judge's disqualification for determination by other judges will only arise when the concerned judge and the President disagree as to whether the concerned judge should recuse him/herself.

[64] The Italian Constitutional Court has held that the process of disqualification consists of an incidental control of the necessary conditions for a trial to be conducted according to the fundamental principle of impartiality of the Judges. *See* Corte Cost., Sent. n. 78 del 21 Marzo 2002, para. 4 (Constitutional Court, 21 March 2002, n. 78, para. 4). The Colombian Constitutional Court has held that "[t]his incidental process at no time settles a dispute between the parties, what it resolves is the situation of the administrator of justice within the proceedings in question." *See* Corte Constitucional de Colombia, Sentencia C-323/06, Referencia D-6008, 24 de abril de 2006, pp. 16 – 17 (Colombian Constitutional Court, Judgment no. C-323/06, Ref. D-6008, 24 April 2006, pp. 16-17). The Internal Regulations of the Brazilian Supreme Court also refer to this process as being incidental in Article 283. Likewise, Spanish legislation refers to this process as an "incidente". *See e.g.* Articles 62, 62, 65, 67 and 69 of Ley de Enjuiciamiento Criminal (*Spanish Criminal Procedure Law*). The "incidental" nature of the disqualification process is further demonstrated by the fact that in a number of jurisdictions, the judges responsible for deciding on the disqualification may not themselves be disqualified from such proceedings. *See* Italy, Art. 40(3) Codice di Procedura Penale (*Code of Criminal Procedure*); Albania, Art. 21(3) Kodi i Procedurës Penale i Republikës së Shqipërisë (*Albanian Code of Criminal Procedure*); Moldova, Art. 34(3) Codul de Procedura Penala al Republicii Moldova (*Moldovan Code of Criminal Procedure*); Mexico, Art. 459(III) Código Federal de los Procedimientos Penales (*Criminal Procedure Code*); Peru, Art. 309(1)

26. The disqualification process pursuant to Rule 15(B) is a tool to verify a judge's impartiality by providing the parties the opportunity to request a reasoned decision in writing from the concerned Chamber whether the conditions of Rule 15(A) are satisfied in respect of that Judge. Both the plain meaning of Rule 15(B) and the object and purpose of the Rule require the conclusion that the Appeals Chamber is the only body empowered to decide on the request for disqualification under the Statute and Rules.

C. Appearance of Bias

27. Both Parties agree that the Judges of the Appeals Chamber are free from bias with respect to Defence Grounds 36 and 37. The Defence has clarified that it considers the Judges of the Appeals Chamber are not actually biased.[66] The Prosecution concurs.[67] The sole issue presented then is whether a reasonable observer, properly informed, would share the view of the Parties. The Appeals Chamber concludes that a reasonable observer would.

28. It is clear from the resolution entered into the record and the circumstances, and the Appeals Chamber underscores, that the question before the Plenary was whether Justice Sow's behaviour constituted misconduct.[68] Justice Sow's credibility, professional or otherwise, was not before the Plenary and was not judged by the Plenary.

29. The Appeals Chamber recalls that in determining whether "one can apprehend bias", what matters is that the Judge has not taken any position or expressed any view that may be reasonably perceived as prejudging his or her position on the guilt or innocence of the Accused.[69] The Plenary Resolution regarding Justice Sow's conduct did not involve and cannot reasonably be perceived as

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Código Procesal Civil (*Civil Procedure Code*); Nicaragua, Art. 33 Código Procesal Penal (*Code of Criminal Procedure*); Ecuador, Art. 875 Código de Procedimiento Civil (*Civil Procedure Code*); Colombia, Art. 61 Código de Procedimiento Penal (*Code of Criminal Procedure*); Panama, Art. 719 *Código de Procedimiento Civil* (*Civil Procedure Code*).

[65] Neither the judge whose disqualification is sought nor the judges deciding on the matter are considered to have personal interests in the matter. The judge whose disqualification is sought is seen as the object of the proceedings and not as a subject. *See* Corte Constitucional de Colombia, Sentencia C390/93, 16 Septiembre 1993, p. 6 (Colombian Constitutional Court, Judgment C390/93, 16 September 1993, p. 6) ("[i]n the disqualification process the Judge whose disqualification is being sought is not a party"). *See* also Article 152 Código de Procedimiento Civil (*Colombian Civil Procedure Code*); Morales Molina, Hernando, Curso de Derecho Procesal Civil (*Manual of Civil Procedure*), Parte General, Décima Edición. Editorial ABC. Bogotá, 1988, p. 120. In Brazil, a judge who has declined to recuse him/herself on one ground can impartially decide on the disqualification of another judge based on the same ground. *See e.g.* Article 281 of the Internal Regulations of Superior Tribunal de Justiça (*Superior Tribunal of Justice*), Article 284 of the Internal Regulations of Supremo Tribunal Federal (*Federal Supreme Court*), Article 289 of the Internal Regulation of Tribunal Regional Federal da 3ªRegião (*Regional Federal Tribunal of the Third Region*), and Article 162 of the Internal Regulations of Tribunal de Justiça do Estado de Ceará (*Tribunal of Justice of the State of Ceará*).

[66] Reply, para. 2.

[67] Response.

[68] Transcript, 16 May 2012, p. 49682, 49683.

[69] *Supra* para. 18.

involving Charles Taylor's guilt or innocence. The Plenary was not seized of, did not pronounce on nor express any views concerning the guilt or innocence of Mr. Taylor. In the language of the Motion, the Plenary was not seized of, did not pronounce on nor express any views concerning the content of Justice Sow's statement. The Plenary Resolution concerned only "Justice Malick Sow's behaviour in court on the 26th of April 2012".[70] A reasonable observer would not consider these distinctions "artificial"[71] but intrinsically judicial, reflecting the professional skills and responsibilities of Judges.[72]

30. The Appeals Chamber further holds that sanctioning judicial misconduct in a trial does not constitute nor give rise to the appearance of prejudgment of the guilt or innocence of the respective accused. In accordance with Article 17 of the Statute, the Plenary protects the fair trial rights of both parties and the integrity of the proceedings by considering serious allegations of judicial misconduct and taking appropriate action where misconduct is established.[73] The parties' rights would be severely violated were the Plenary to allow judicial misconduct only because sanctioning it could be falsely imagined as benefiting or harming a particular party. In deciding on allegations of judicial misconduct, the Plenary considers only whether such misconduct is established.[74] This Appeals Chamber firmly rejects any suggestion that the Plenary may or should do otherwise.

31. Many of the Defence's submissions do not address the impartiality of the Appeals Chamber, but the consequences of the Plenary Resolution. The Defence suggests that the Plenary Resolution "constitutes an adverse finding on the professional credibility of Justice Sow"[75] and that "the declaratory effect of the [decision] constitutes a particularly severe sanction because it seriously and publicly damages Justice Sow's professional reputation and standing."[76] The Defence proposes that "[i]t is no answer to assert that these findings were objectively correct because such an assertion reflects precisely the perception of pre-judgment claimed by the Defence."[77]

32. This is not pre-judgment nor the appearance of pre-judgment – the independence of judges would be fatally undermined if observers' perceptions of the consequences of judicial acts were considered indicia of bias.[78] Once seized of a complaint of misconduct, the Plenary considered it on

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[70] Transcript, 16 May 2012, p. 49682.
[71] Motion, para. 15; Reply, para. 7.
[72] *Supra* para. 17 ("A fair-minded observer would know that a Judge's role can differ from one judicial context to another.").
[73] Rule 15*bis*; Rule 24.
[74] Rule 15*bis*.
[75] Motion, para. 18
[76] Motion, para. 21.
[77] Reply, para. 6.
[78] *See El Sayed* Riachy Disqualification Decision, para. 57.

its merits alone, without regard to extraneous considerations. Justice Sow's credibility, including as it may bear on any matters involving the guilt or innocence of Mr. Taylor, has not been judged by the Appeals Chamber. In any event, the Defence's characterizations of Justice Sow's credibility, professional reputation and standing are unwarranted and bordering on defamatory.

33. Likewise, the Defence's submissions with respect to the trial record are ill-founded.[79] The hearing of 26 April 2012 officially concluded when it was adjourned by the Presiding Judge of Trial Chamber II.[80] The official transcript accordingly ends with that adjournment, and could not have included further statements made after the hearing was officially closed.[81] On 16 May 2012, the Presiding Judge described for the record Justice Sow's behaviour following the adjournment.[82] The Plenary Resolution regarding Justice Sow's behaviour was further entered into the official record.[83] The Defence is fully aware of the content of Justice Sow's statement.[84] There is no basis to suggest that the official transcript is anything but accurate and transparent.

34. The Plenary did not consider any matters related to Charles Taylor's guilt or innocence nor the content of Justice Sow's statement. A reasonable observer would properly appreciate this fact, as both Parties do. The Appeals Chamber concludes that no reasonable observer, properly informed, would reasonably apprehend bias with respect to the Appeals Chamber's consideration of Defence Grounds 36 and 37. The Motion must therefore be dismissed.

35. In closing, the Appeals Chamber endorses the words of Judge Antonio Cassese, former President of the Special Tribunal for Lebanon, and draws the attention of the Parties and the public to them:

> I firmly believe that, while Judges must be absolutely free and appear to be free from any preconceived beliefs, it is also necessary for them to be sheltered from mere innuendoes as to their professional past or their current attitude. If they were not so safeguarded, they would be unable to discharge their difficult mission with equanimity. Charges of bias unsupported by compelling evidence can only sow confusion and uncertainty in the mind of all those who watch the unfolding of international justice, as well as trouble the conscience of Judges, thereby affecting their serenity. The Tribunal will firmly reject any attempt at guesswork or speculation intended to project onto the Tribunal political motivations that instead are, and shall always remain, extraneous to it, as is fitting and appropriate for any court of law.[85]

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[79] Motion, para. 11.
[80] Transcript, 26 April 2012, p. 49679.
[81] Transcript, 26 April 2012, p. 49679.
[82] Transcript, 16 May 2012, pp 49681, 49682.
[83] Transcript, 16 May 2012, pp 49682, 49683.
[84] Motion, Annex A.
[85] *El Sayed* Riachy Disqualification Decision, para. 72

V. DISPOSITION

36. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

Done in The Hague, The Netherlands, this 13th day of September 2012.

Justice Shireen Avis Fisher
Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Jon Kamanda

Justice King files a separate opinion.

[Seal of the Special Court for Sierra Leone]

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 13 September 2012

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC

SEPARATE OPINION OF JUSTICE GEORGE GELAGA KING ON DECISION ON CHARLES GHANKAY TAYLOR'S MOTION FOR PARTIAL VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF APPEALS CHAMBER JUDGES

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. Cóman Kenny

Defence Counsel for the Accused:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

SPECIAL COURT FOR SIERRALEONE
RECEIVED
COURT RECORDS
NAME Francess Ngaleh-Smart
SIGN
TIME 18:57

1. On 7 and 10 May 2012, the President of the Special Court for Sierra Leone ("Special Court"), at the time, Justice Jon M. Kamanda, convened an Emergency Plenary Meeting of Judges pursuant to Rule 15*bis* (B) of the Rules of Procedure and Evidence of the Special Court ("Rules"), which mandates the President to refer an allegation of unfitness of a Judge to sit to the Council of Judges. Should the Council determine that (i) the allegation is of a serious nature and (ii) that there appears to be a substantial basis for same, "it shall refer the matter to the Plenary Meeting which will consider it and, if necessary, **make a recommendation to the body which appointed the Judge."** (Emphasis added)

2. The Plenary was **seized** of a Complaint, dated 26 April 2012, submitted by Justice Richard Lussick, Presiding Judge of Trial Chamber II, on behalf of the Judges of Trial Chamber II, against Justice Malick Sow, Alternate Judge in that Chamber, alleging misconduct and "Unfitness to Sit" pursuant to Rule 15*bis*.

3. The Complaint before the Plenary was contained in an email dated 26 April 2012 addressed to the President by the Presiding Judge of Trial Chamber II, Justice Richard Lussick, which said Complaint was published to the Judges constituting the Emergency Plenary.

4. Justice Malick Sow responded to the Complaint via email to the President dated 1 May 2012, which said Response was also before the Plenary.

5. At the start of the deliberations on the first day of the Plenary i.e. 7 May 2012, Justice Julia Sebutinde of Trial Chamber II read a written 6 page statement on behalf of Trial Chamber II, which purported to be a Complaint against Justice Malick Sow.

6. The Appeals Chamber Judges of the Emergency Plenary were only apprised of this statement at the time it was read out by Justice Julia Sebutinde, who was not the Presiding Judge of Trial Chamber II.

7. A *fortiori*, Justice Malick Sow, against whom the allegations in the statement were made was not given prior notice of it and, consequently, had not been given the opportunity to respond.

8. I objected to the procedural irregularity, which patently impinged on Justice Malick Sow's right to be heard, stating that it was against basic principles of natural justice, and submitted that the Emergency Plenary could not deliberate on the matter and that the views and recommendations of the Judges could not be sought when Justice Malick Sow had not been given an opportunity to

respond to what were to all intents and purposes 'new' allegations against him. I warned the Teleconference that unless Justice Malick Sow was given time to reply to the sudden and scurrilous allegations made against him by Justice Julia Sebutinde, the refusal to give him time to respond was tantamount to "a perversion of justice". I informed my colleagues that, accordingly, I was not, from that moment, taking any further part in the Emergency Plenary. I then walked out of the conference room and the Emergency Plenary.

9. The statement by Justice Julia Sebutinde was, however, already on the record and in my opinion, subsequent attempts to expunge it did not detract from the fact that it had been published.

10. I did not participate in any further deliberations either on 7 or 10 May 2012 or in any decision taken by the Plenary on the matter.

11. I opine that it is inaccurate and misleading to state in the so-called "Resolution On Complaint by Trial Chamber II against Justice Malick Sow", that

> "THE JUDGES of the Special Court for Sierra Leone ... HAVE REACHED the following conclusions:
>
> 1. The Plenary DECLARES that Justice Malick Sow's behaviour in Court on the 26th April 2012 amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court.
>
> 2. The Plenary RECOMMENDS to the appointing authority pursuant to Rule 15bis (B) to decide upon the further status of Justice Malick Sow.
>
> 3. Pursuant to Rule 24(iii), the Plenary DIRECTS Justice Malick Sow to refrain from further sitting in the proceedings pending a decision from the appointing authority."

I was not one of those Judges of the Emergency Plenary who allegedly passed that Resolution and I did not resolve as alleged or at all.

DISPOSITION

12. For the foregoing reasons, I decline to voluntarily withdraw with respect to Defence Grounds 36 and 37 in the Appellate proceedings in *Prosecutor v. Charles Ghankay Taylor.*

Done in Freetown, Sierra Leone, this 13 day of September 2012.

Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]