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SCSL-03-01-A
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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 17 December 2012

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

Public

DECISION ON CHARLES GHANKAY TAYLOR'S MOTION FOR DISQUALIFICATION OF JUSTICE SHIREEN AVIS FISHER FROM DECIDING THE DEFENCE MOTION TO PRESENT ADDITIONAL EVIDENCE PURSUANT TO RULE 115

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
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Ms. Leigh Lawrie
Mr. Christopher Santora
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The Appeals Chamber of the Special Court for Sierra Leone ("Special Court");

BEING SEIZED OF Charles Ghankay Taylor's Motion for Disqualification of Justice Shireen Avis Fisher from Deciding the Defence Motion to Present Additional Evidence Pursuant to Rule 115, filed on 30 November 2012;[1]

NOTING that the Prosecution waived its right of response;

NOTING Justice Shireen Avis Fisher's Letter submitted on Charles Ghankay Taylor's Motion for Disqualification, filed on 5 December 2012;[2]

NOTING the Defence Reply to Justice Fisher's Letter in Response to Mr. Taylor's Disqualification Motion or, in the alternative, Motion for Leave to File a Reply, filed on 10 December 2012;[3]

RECALLING the Defence Motion to Present Additional Evidence Pursuant to Rule 115, filed on 30 November 2012;[4]

HEREBY DECIDES AS FOLLOWS:

1. The Motion alleges that "the words and conduct of Justice [Shireen Avis] Fisher as evidenced on the public record ... objectively justify a legitimate reason to fear that Justice Fisher lacks impartiality on the questions of whether the [Rule 115 Motion] should be granted, and whether Justice Sow should be granted a waiver of immunity by the [United Nations] to testify."[5] The Defence for Charles Taylor ("Defence") submits that three facts support its allegation.[6] First, the statements Justice Fisher made during the 25 October 2012 Status Conference and in her Scheduling Order of 4 October 2012. Second, Justice Fisher's statement that she had communicated with the United Nations Office of Legal Affairs regarding a potential waiver of immunity for Justice Sow. Third, the fact that these statements and the communications with the United Nations

[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1354, Charles Ghankay Taylor's Motion for Disqualification of Justice Shireen Avis Fisher from Deciding the Defence Motion to Present Additional Evidence Pursuant to Rule 115, 30 November 2012 ("Motion").
[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1361, Direction to File and Serve Justice Shireen Avis Fisher's Letter Submitted at the Request of the Appeals Chamber on Charles Ghankay Taylor's Motion for Disqualification, 5 December 2012.
[3] *Prosecutor v. Taylor*, SCSL-03-01-A-1367, Defence Reply to Justice Fisher's Letter in Response to Mr. Taylor's Disqualification Motion or, in the alternative, Motion for Leave to File a Reply, 10 December 2012 ("Defence Reply").
[4] *Prosecutor v. Taylor*, SCSL-03-01-A-1352, Defence Motion to Present Additional Evidence Pursuant to Rule 115, 30 November 2012 ("Rule 115 Motion").
[5] Motion, para. 8.
[6] Motion, para. 3.

were made at a time when Justice Fisher was not seized of, and therefore not empowered to consider, the Rule 115 Motion.

2. As correctly submitted by the Defence,[7] this Appeals 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."[8] The standpoint of the accused is not decisive.[9] 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.[10] Where "some indicia of bias [is found] the logical and reasonable conclusion must be that a Judge is disqualified."[11]

3. 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."[12] This "hypothetical fair-minded observer [has] sufficient knowledge of the actual circumstances to make a reasonable judgment."[13] The fair-minded observer is also aware that a Judge is trained to put out of their minds evidence other than that presented at trial.[14] "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."[15]

4. The Defence further rightly acknowledges[16] that a party seeking disqualification of a Judge at the Special Court bears the heavy burden of displacing the presumption of judicial impartiality.[17]

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[7] Motion, para. 5.
[8] *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").
[9] *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").
[10] Justice Thompson Appeal Disqualification Decision para. 10.
[11] Justice Thompson Appeal Disqualification Decision para. 13.
[12] Justice Thompson Appeal Disqualification Decision, para. 11.
[13] *Prosecutor v. Taylor*, SCSL-03-01-A-1323, Appeals Chamber, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 13 September 2012 ("First Taylor Disqualification Decision"), para. 17.
[14] First Taylor Disqualification Decision, para. 17.
[15] First Taylor Disqualification Decision, para. 17. *See* also 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).
[16] Motion, para. 7.
[17] Justice Winter Disqualification Decision, para. 25.

A party seeking disqualification must also support any application with "ascertainable facts" and firm evidence of judicial bias.[18] Evidence that is remote, irrelevant, capable of being disabused in the mind of Judges or speculative is not sufficient.[19]

5. The Defence contends that Justice Fisher's communication with the United Nations Office of Legal Affairs gives rise to a legitimate fear that Justice Fisher lacks impartiality, stating that "Justice Fisher lacks impartiality on the question[] of whether … Justice Sow should be granted a waiver of immunity by the UN to testify."[20] As stated in Rule 109(B)(i) of the Rules of Procedure and Evidence ("Rules"), Justice Fisher's duty as Pre-Hearing Judge is to "ensure that the proceedings are not unduly delayed."[21] Waiver of immunity may involve complex, time-consuming issues that may, depending the circumstances, have a significant potential to delay proceedings. However, the Pre-Hearing Judge is not competent to decide whether Justice Sow should be granted a waiver of immunity or not. That question can only be decided by the Secretary-General of the United Nations,[22] who has under Article 12(2) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("Special Court Agreement") the right and duty to waive the immunity, albeit in consultation with the President. It does not matter in which competence Justice Fisher may have communicated with the United Nations, whether as Pre-Hearing Judge or President,[23] as, in neither case, is she able to exercise a right and duty to decide on the issue of waiver of immunity. In this regard, the Defence request that Justice Fisher be required to refrain from consulting with the Secretary-General[24] is misconceived, as the Secretary-General is obliged, in regard to waiver of immunity, to exercise his right and duty to decide in consultation with the President under the Special Court Agreement.[25] Finally, Justice Fisher asked the Office of Legal Affairs whether a request for waiver of immunity had been already made.[26] A neutral question about a fact, namely if a request had been made, cannot lead to bias, as a waiver in this case is nothing but a factual prerequisite not able to influence any kind of decision.

6. The Defence further alleges that Justice Fisher's words and statements "give rise to an apprehension that she has a negative pre-disposition to, and has made an adverse pre-judgment of,

[18] Justice Thompson Appeal Disqualification Decision, para. 10.
[19] First Taylor Disqualification Decision, para. 18.
[20] Motion, para. 8. *See* also Motion, paras 21-23.
[21] Rule 109(B)(i).
[22] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 12(2).
[23] Motion, para. 23.
[24] Motion, para. 1.
[25] Agreement, Article 12(2).
[26] Appeal Transcript, 25 October 2012, p. 49820, lines 1, 2.

issues for her consideration in determining a Rule 115 Motion in respect of the availability of evidence during trial and the timing of the motion."[27] In support the Defence cites the transcript of the 25 October Status Conference and Justice Fisher's 4 October Scheduling Order.[28]

7. The transcript of the 25 October Status Conference, which must be read in its entirety to determine the context in which the cited "statements" were made, reveals that Defence Counsel understood and acknowledged that Justice Fisher's words and statements related to the management of the pre-appeal phase and the conduct of Defence Counsel, not the merits of this Rule 115 motion. Defence Counsel stated that: "In some of the decisions of the Chamber, it is clear, at least to us, that the Chamber is concerned about how to manage the case vis-à-vis any potential 115 motions we file. Madam President, you have indicated in different ways, in different orders or decisions that you do have some concerns about how we're proceeding with this."[29] The Motion also states that Justice Fisher was expressing concerns "about how the Defence was proceeding with additional evidence."[30] The discussion between Justice Fisher and Defence Counsel during the 25 October Status Conference is further clarified by Justice Fisher's concluding remarks:

> PRESIDING JUDGE: First of all, I've never heard a submission by counsel referred to as a precedent. Of course he had the right to file it when he filed it, and unfortunately from his perspective it was not a successful motion. I would prefer for the benefit of your client that we get this motion before us so that we have plenty of time to schedule it for both sides to hear it, to look at the evidence, and to hear it. Now, I see no reason if you have that evidence now why you can't file the 115. I understand your interpretation of the Rule. I disagree with it, but I understand it. I am not trying to undermine your Defence. I do, however, not appreciate the fact that you are still in trial tactic mode. We're in the appeal now. And it's not a question of letting the other side know what your tactics are. It's a question of letting the Court know and the parties know how we can schedule this most efficiently for your benefit and your client's benefit as well as the Prosecution as well as the Court. If you've got the stuff, if you've got the evidence, let's here [*sic*] it. We want to hear it. We want to be -- or at least we want to hear what you've got so we can decide whether we should hear it.[31]

8. In addition, Justice Fisher's remarks, read in the context in which they were made, during the 25 October Status Conference and in the 4 October Scheduling Order,[32] do not suggest bias or pre-judgment, particularly, as those remarks relate to matters distinct from those raised in the Rule 115 Motion.

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[27] Motion, para. 3.
[28] Motion, paras 15-18.
[29] Appeal Transcript, 25 October 2012, p. 49817, lines 5-9.
[30] Motion, para. 16.
[31] Appeal Transcript, 25 October 2012, p. 49821, lines 5-24.
[32] *Prosecutor v. Taylor*, SCSL-03-01-A-1328, Pre-Hearing Judge, Scheduling Order for Filings and Submissions, 4 October 2012 ("4 October Scheduling Order"), para. 3.

9. Finally, the Chamber notes Justice Fisher's comments that her concern during the pre-appeal phase was with the conduct of Counsel on both sides. The Chamber considers that Justice Fisher's remarks during the pre-appeal were directed to the conduct of Counsel, as may have been perceived by her, which is a distinct issue from the merits of the substantive application.

10. In Confidential Annex C to the Defence Reply, the Defence concedes that Justice Fisher's words and statements were directed to the conduct of Counsel and that the Motion relates to the interactions between Counsel and Justice Fisher regarding the conduct of Counsel. Experienced Judges, such as those of the Appeals Chamber of this Court, are definitely able to distinguish between the merits of legal issues and the conduct of those putting forward the legal issues on behalf of the client. The Defence's "fear" that Justice Fisher lacks impartiality that would impact the decision on the Rule 115 Motion, as well as Grounds of Appeal 36, 37 and 38, is, in the circumstances, not justified.

11. The words of Justice Fisher read in their context show that she tried to point out – in the presence of both Parties, and thus directed to both Parties – the importance of the term "expeditiously". The Defence's argument that there is a "fear" that Justice Fisher "has a negative pre-disposition to, and has made a negative pre-judgment upon, the [Rule 115 Motion]"[33] cannot be accepted, considering the duty of the Pre-Hearing Judge to "ensure that the proceedings are not unduly delayed."[34] It is evident that Justice Fisher was scheduling the motion in a way to ensure that the rights of the Parties would be observed, especially the right of Mr. Taylor to be tried without undue delay.[35]

12. In light of the above, the Motion is **DISMISSED**.

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[33] Motion, para. 26.
[34] Rule 109(B)(i).
[35] Statute, Article 17. *See* also International Covenant on Civil and Political Rights, Article 14; European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6; African Charter on Human and People's Rights, Article 7; Constitution of the United States of America, Sixth Amendment; Canadian Charter of Rights and Freedoms, Section 11. *See, e.g., Askov v. R.*, [1990] 2 S.C.R. 1199; *Baggetta v. Italy* (10256/83) [1987] ECHR 10 (25 June 1987); *Barker v. Wingo*, 407 U.S. 514 (1972).

Done in The Hague, The Netherlands, this 17th day of December 2012.

Justice Emmanuel Ayoola

Justice George Gelaga King

Justice Renate Winter

Justice Jon Kamanda

[Seal of the Special Court for Sierra Leone]