1376) SCSL-03-01-A (10548-10556) 10548

SCSL

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: 18 January 2013

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

Public

DECISION ON DEFENCE MOTION TO PRESENT ADDITIONAL EVIDENCE PURSUANT TO RULE 115

Office of the Prosecutor:
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Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
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SPECIAL COURT FOR SIERRA LEONE
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1. The Appeals Chamber of the Special Court for Sierra Leone ("Special Court"), acting in accordance with Rule 109(D) of the Rules of Procedure and Evidence ("Rules") and the "Notice to the Parties,"[1] dated 18 January 2013, is seized of the Defence Motion to Present Additional Evidence Pursuant to Rule 115 ("Motion"), dated 30 November 2012, filed by the Defence for Charles Taylor ("Defence").[2] The Prosecution responded on 7 December 2012,[3] and the Defence replied on 12 December 2012.[4]

A. Submissions of the Parties

2. The Motion seeks the admission on appeal of nine additional pieces of evidence.[5] The Defence submits that "[t]he evidence sought to be presented meets the requirements of Rule 115 and paragraph 23 of the Appeals Practice Direction, and substantiates Grounds of Appeal 36, 37 and/or 38 in the Notice of Appeal and Appellant's Submissions of Charles Ghankay Taylor."[6] The Defence avers that the specific findings of fact to which the proffered evidence "is directed are: (i) all findings of fact in, and underpinning, paragraph 6994(a) and (b) of the Judgment and (ii) to the extent it might be concluded from the Judgment that Charles Taylor received a fair trial with due process of law and in accordance with the provisions of Rules 26*bis*, 16*bis*, 14, 16, 87 and 88 of the Rules, and Articles 12, 13, 16, 17 and 18 of the Statute, the proffered evidence is directed at controverting that conclusion."[7]

3. The Prosecution responds that "[t]he Motion fails to meet the requirements of Rule 115 and paragraph 23 of the Practice Direction, and all nine proposed pieces of evidence should be rejected."[8] The Prosecution contends that the Motion should be summarily dismissed because the Defence has failed to plead the alleged impact on the verdict in the context of the evidence admitted at trial, and cannot simply reference its Appeal to fulfil that requirement.[9] The Prosecution also submits that the Defence fails to clearly identify with precision the specific findings of fact made by the Trial Chamber to which the additional evidence is directed.[10] The Defence replies that as it

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[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1375, Appeals Chamber, Notice to the Parties, 18 January 2013.
[2] *Prosecutor v. Taylor*, SCSL-03-01-A-1352, Defence Motion to Present Additional Evidence Pursuant to Rule 115, 30 November 2012.
[3] *Prosecutor v. Taylor*, SCSL-03-01-A-1366, Prosecution Response to the Defence Motion to Present Additional Evidence Pursuant to Rule 115, 7 December 2012 ("Response").
[4] *Prosecutor v. Taylor*, SCSL-03-01-A-1369, Defence Reply to Prosecution Response to the Defence Motion to Present Additional Evidence Pursuant to Rule 115, 12 December 2012 ("Reply").
[5] Motion, para. 8.
[6] Motion, para. 2.
[7] Motion, para. 9.
[8] Response, para. 2.
[9] Response, para. 7.
[10] Response, para. 8.

"avers that the additional evidence renders all convictions unsafe," "[t]here is no requirement … that [it] list every adverse finding of fact made in a judgment in its additional evidence motion."[11]

4. The Defence avers that all of the proposed additional evidence was unavailable at trial. The Prosecution responds that for certain of the proposed evidence, the Defence bore the onus of raising the issue at the time it became aware of it, and that the Defence fails to demonstrate it exercised due diligence by making appropriate use of all mechanisms available to it to bring the proffered evidence and its submissions before the Trial Chamber at that time.[12] The Defence replies that it "could not have interfered with what was then thought to be ongoing deliberations to raise such an issue."[13]

B. Applicable law

5. Rule 115(A) provides as follows:

> 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 submission in reply. Rebuttal material may be presented by any party affected by the motion.

6. Article 23 of the Practice Direction on the Structure of Grounds of Appeal Before the Special Court provides as follows:

> A party applying to present additional evidence must do so by way of motion, in accordance with the Rules, stating:
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> (a) the specific Rule by which the application is made;
> (b) a precise list of the evidence sought to be presented;
> (c) an indication of the specific finding of fact made by the Trial Chamber to which the additional evidence is directed;
> (d) the reasons and supporting evidence relied on to establish that the proposed additional evidence was not available at trial as required by the Rule;
> (e) the arguments in support of the requirement that the admission of the requested additional evidence should be in the interest of justice.

7. The Appeals Chamber recalls that it has previously set forth the requirements that must be met in order for additional evidence to be admissible under Rule 115.[14] The Appeals Chamber notes

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[11] Reply, para. 3.
[12] Response, para. 16.
[13] Reply, para. 14.
[14] *Prosecutor v. Sesay, et al.*, SCSL-04-15-A-1319, Appeals Chamber, Decision on Sesay Request to Admit Exhibit MFI-134 from *Prosecutor v. Taylor* ("Sesay Rule 115 Decision"), 14 October 2009, para. 6, and references cited

that Rule 115 is materially similar to the Rule 115 of the Rules of Procedure and Evidence of the ICTY and ICTR,[15] and that it has previously established that Rule 115 will be applied in a manner consistent with the corresponding procedure at the ICTY and ICTR.[16]

8. Rule 115 applies where the proposed evidence relates "to a fact or issue *already litigated at trial.*"[17] The jurisprudence has recognized from the very outset that "Rule 115 is applicable provided that the new evidence goes to prove an underlying fact that was at issue in the original trial."[18] Conversely, Rule 115 is not applicable where the "new evidence [is] concerned with facts not at issue at trial."[19] For admission under Rule 115, the proposed new evidence must be "*additional* to evidence adduced at trial in respect of what [can be] variously termed, 'a fact that was considered at trial', 'a fact which was known at trial' or 'facts put in issue at trial.'"[20] In other words, Rule 115 "deal[s] with the situation where a party is in possession of material that was not before the court of first instance and *which is additional evidence of a fact or issue litigated at trial.*"[21]

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therein; *Prosecutor v. Sesay, et al.*, SCSL-04-15-A-1311, Pre-Hearing Judge, Decision on Gbao Motion to Admit Additional Evidence pursuant to Rule 115 ("Gbao Rule 115 Decision"), 5 August 2009, para. 9, and references cited therein.

[15] Gbao Rule 115 Decision, para. 8.

[16] Gbao Rule 115 Decision, para. 7, *endorsed* by Sesay Rule 115 Decision, paras. 6-11.

[17] *Prosecutor v. Kupreškić et al.*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-16-A, Appeals Chamber, Appeal Judgment, 23 October 2001 ("*Kupreškić* Appeal Judgment"), para. 57.

[18] *Kupreškić et al.* Appeal Judgment, para. 49 (citing *Prosecutor v. Dusko Tadić*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1-A, Appeals Chamber, Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, 15 October 1998 ("*Tadić* Rule 115 Decision")).

[19] *Kupreškić* Appeal Judgment, para. 55, fn. 96.

[20] *Kupreškić* Appeal Judgment, para. 49 (emphasis in original).

[21] *Prosecutor v. Kupreškić et al.*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-16-A, Appeals Chamber, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001 ("*Kupreškić* Decision of 8 May 2001"), para. 5 (emphasis added). *Accord Prosecutor v. Hategekimana*, International Criminal Tribunal for Rwanda, Case No. ICTR-00-55B-R11*bis*, Appeals Chamber, Decision on Request to Admit Additional Evidence, 2 October 2008, para. 5; *Prosecutor v. Kanyarukiga*, International Criminal Tribunal for Rwanda, Case No. ICTR-2002-78-R11*bis*, Appeals Chamber, Decision on Request to Admit Additional Evidence of 18 July 2008, 1 September 2008 ("*Kanyarukiga* Rule 115 Decision"), para. 5; *Prosecutor v. Muvunyi*, International Criminal Tribunal for Rwanda, Case No. ICTR-00-55A-A, Appeals Chamber, Decision on a Request to Admit Additional Evidence, 27 April 2007, para. 6; *Prosecutor v. Nahimana, et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4; *Prosecutor v. Nahimana, et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Decision on Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 ("*Nahimana* 27 November Decision"), para. 19; *Prosecutor v. Nahimana, et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Decision on Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006 ("*Nahimana* 5 May 2006 Decision"), para. 20; *Prosecutor v. Nahimana, et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation, 23 February 2006, para. 40; *Prosecutor v. Nahimana, et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 ("*Nahimana* 3 May 2005 Decision").

9. This clear and consistent jurisprudence directly follows from the plain language of Rule 115, which states that additional evidence may be admitted under that Rule where the evidence "was not available at trial" and is directed to "a specific *finding of fact made by the Trial Chamber*."[22] This plain language reflects the purpose of Rule 115. A miscarriage of justice rendering a conviction unsafe may result "where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable."[23] In such circumstances, there is "objectively an incorrectness of fact": while the Trial Chamber's decision may have been reasonable based upon the evidence before it, the Trial Chamber may nonetheless have convicted an innocent person and occasioned a miscarriage of justice, which would be demonstrated by the additional evidence that is not identified until after the close of the trial.[24] While Rule 115 may also apply on appeal to factual findings that go to matters other than the ultimate guilt or innocence of the accused,[25] the principle remains the same: Rule 115 serves to address potential situations where a factual determination made by the Trial Chamber is objectively incorrect because the Trial Chamber did not have before it evidence that is later discovered.

10. It is well-established that "[w]here a party seeks to call a witness at the appellate stage, it needs to provide a statement or other documentation of the potential witness's proposed evidence."[26] "The Rule does not permit a party to simply request that a particular person be summoned to give evidence at the appellate stage."[27] The provision of a statement of the witness's proposed evidence is essential to the Appeals Chamber's consideration of the request: "a party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the

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[22] Rule 115(A) (emphasis added).
[23] *Kupreškić* Appeal Judgment, para. 44.
[24] *Tadić* Rule 115 Decision, paras 37, 38.
[25] *See Prosecutor v. Stanišić and Simatović*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-03-69-AR65.1, Appeals Chamber, Decision on Stanišić's Applications Pursuant to Rule 115 to Present Additional Evidence in his Response to the Prosecution's Appeal, 26 June 2008 ("*Stanišić* Rule 115 Decision), para. 5.
[26] *Prosecutor v. Bagosora, et al.*, International Criminal Tribunal for Rwanda, Case No. ICTR-98-41-A, Appeals Chamber, Decision on Theoneste Bagosora's motion for admission of additional evidence, 7 February 2011 ("*Bagosora* Rule 115 Decision"), para. 8. *See* also *Nahimana* 5 May 2006 Decision, para. 20; *Prosecutor v. Galić*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-98-29-A, Appeals Chamber, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber, 30 June 2005 (*Galić* Rule 115 Decision), para. 87; *Prosecutor v. Naletilić and Martinović*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-98-34-A, Appeals Chamber, Decision on the Request for Presentation of Additional Evidence, 18 November 2003 (*Naletilić* Rule 115 Decision), para. 13. While the ICTY Appeals Chamber did not require such a statement in its decision in the *Krajišnik* appeal, the Appeals Chamber considers that this is an exceptional situation explained by the facts that the proposed witness, Radovan Karadzic, was found by the Trial Chamber to be a participant in the joint criminal enterprise with the appellant Krajišnik and the Trial Chamber made "extensive" findings on Mr. Karadzic's role in that case. *Prosecutor v. Krajišnik*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-00-39-A, Appeals Chamber, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008.
[27] *Kupreškić et al.* Decision of 8 May 2001, para. 5. *See* also *Bagosora* Rule 115 Decision, para. 8; *Nahimana* 5 May 2006 Decision, para. 20.

requirements of relevance and credibility."[28] It is obvious that the statement is the basis on which the Appeals Chamber can determine whether the proposed testimony satisfies the requirements of Rule 115[29] and "whether calling the witness to testify is necessary."[30] Where the applicant fails to provide a statement, the applicant "fail[s] to provide any basis on which the Appeals Chamber could evaluate [the] request and [consequently fails] to facilitate the Appeals Chamber's consideration of the proposed evidence of this potential witness."[31] For this reason, motions that request the testimony of a proposed witness but which fail to provide a statement of the proposed testimony are subject to dismissal on that basis alone.[32]

C. Discussion

11. The Motion fails to identify the "specific finding of fact made by the Trial Chamber to which the additional evidence is directed."[33] The Motion and the evidence proposed therein do not relate to a fact litigated at trial or a factual finding made by the Trial Chamber.[34] Paragraph 6994, the only paragraph of the Trial Judgment cited by the Defence, is the conclusory disposition section of the Judgment. The Motion contains no reference to any finding of fact made by the Trial Chamber. The plain language of Rule 115 would be rendered meaningless if the Disposition of a Trial Judgment or an implicit finding that a trial was fair were considered a "factual finding" for the purposes of that Rule. Accordingly, Rule 115 is unavailing and the Motion cannot succeed.

12. This interpretation of the unambiguous language of Rule 115 is in accord with the legal principles underpinning the Rule and the clear and consistent jurisprudence regarding the Rule. Nor does the Motion provide any substantive arguments or precedent in support of any other interpretation. The Prosecution challenges the Motion on that basis and submits that it should be summarily dismissed.[35] In its Reply, the Defence relies on a single pronouncement of the ICTY

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[28] *Hategekimana* Rule 115 Decision, para. 7. *See* also *Prosecutor v. D. Milošević*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-98-29/1-A, Appeals Chamber, Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009 ("*Milosevic* Rule 115 Decision"), para. 18 ("The Appeals Chamber reiterates that a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted."); *Nahimana* 5 May 2006 Decision, para. 18.

[29] *See Prosecutor v. Kvočka, et al.*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-98-30/1-A, Appeals Chamber, Decision on Appellants' Motions to Present Additional Evidence Pursuant to Rule 115, 16 February 2004; *Prosecutor v. Semanza*, International Criminal Tribunal for Rwanda, Case No. ICTR-97-20-A, Appeals Chamber, Decision on Defence Motion for Leave to Present Additional Evidence and to Supplement Record on Appeal, 12 December 2003.

[30] *Bagosora* Rule 115 Decision, para. 8. *See* also *Delalić* 31 May 2000 Order.

[31] *Galić* Rule 115 Decision, para. 87. *See* also *Hategekimana* Rule 115 Decision, para. 7; *Kanyarukiga* Rule 115 Decision, para. 9.

[32] *Bagosora* Rule 115 Decision, para. 9; *Galić* Rule 115 Decision, para. 87; *Naletilić* Rule 115 Decision, para. 13. *See* also *Hategekimana* Rule 115 Decision, para. 8.

[33] Rule 115.

[34] Motion, para. 9.

[35] Response, paras 7, 8.

Appeals Chamber to support the Motion.[36] The cited case does not support and in fact is largely contrary to the Defence's position.[37] In particular, the cited decision did not involve Rule 115, as the ICTY Appeals Chamber did not admit additional evidence on appeal relevant to the issue, relying instead solely on the trial record.[38] Moreover, that decision held it was necessary for the appellant to identify actual, specific prejudice due to the alleged fair trial violation, and rejected the appellant's reliance on general assertions of prejudice applicable to the entirety of the trial.[39] In this regard, the ICTY Appeals Chamber has held that where an appellant seeks to adduce additional evidence on appeal in support of a challenge to the fairness of the proceeding, "Rule 115 [is] inapplicable."[40]

13. The Motion fails to provide arguments in support of its procedural validity. The plain language of Rule 115, the legal principles underpinning the Rule and the clear and consistent jurisprudence regarding the Rule all lead to the conclusion that the Motion is procedurally invalid. Furthermore, the *Delalić* Appeal Judgment, put forward by the Defence in reply to support the procedural validity of the Motion, not only fails to do so, but confirms the conclusion that the Motion is procedurally invalid.

14. The Motion also fails to establish that the proposed evidence and fair trial issues could not have been raised before the Trial Chamber. In the case relied on by the Defence in its Reply, the ICTY Appeals Chamber noted that the appellant's fair trial contentions could have been but were not raised before the Trial Chamber, holding that "the requirement that the issue must have been raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief."[41] Likewise, the Defence avers that it

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[36] Reply, paras 2-5 (citing *Prosecutor v. Delalić, et al.*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-21-A, Appeals Chamber, Appeal Judgment, 20 February 2001 ("*Delalić* Appeal Judgment")). There is a clear question whether such submissions made for the first time in reply should be accepted, as such a practice has the effect of the depriving the opposing party of its right to respond. Most of the Defence's substantive arguments are presented in its Reply.

[37] The ICTY Appeals Chamber held that in light of the numerous flaws in the appellant's submissions, "[t]he Appeals Chamber is satisfied that the use now of the secondary complaint concerning the judge's inattention during the trial to found Landžo's fourth ground of appeal is opportunistic." *Delalić* Appeal Judgment, para. 650.

[38] *Delalić* Appeal Judgment, paras 620-623.

[39] *Delalić* Appeal Judgment, paras 634-639.

[40] *Kupreškić* Appeal Judgment, para. 55, *citing Prosecutor v. Furundzija*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-17/1-A, Appeals Chamber, Order on Defendant's Motion to Supplement Record on Appeal, 2 September 1999 and *Prosecutor v. Delalić, et al.*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-21-A, Appeals Chamber, Order on Esad Landzo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare and Present Further Evidence, and (3) that the Appeals Chamber take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 October 1999. *See* also *Prosecutor v. Delalić, et al.*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-21-A, Appeals Chamber, Order on Motion of Appellant, Esad Landzo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000 ("*Delalić* 31 May 2000 Order").

[41] *Delalić* Appeal Judgment, para. 641.

seeks to call Justice Sow to testify,[42] but fails to either indicate the proposed witness's willingness to testify[43] or to support the request with a statement of the proposed evidence to be elicited from the witness.[44]

15. Relying on the jurisprudence of the ICTY Appeals Chamber, the Prosecution submits certain of the evidence proposed by the Defence need not be admitted because the facts may be established by the Prosecution's undertakings.[45] The Prosecution submits that it agrees that Justice Sebutinde became a member of the ICJ on 6 February 2012 and that she, at an event held on 31 May 2012, thanked the ICJ for allowing her to continue her duties as a judge of Trial Chamber II of the SCSL.[46] The Defence accepts the Prosecution's undertaking.[47] Further, the Prosecution submits that it agrees that Justice Sow made a statement at the oral pronouncement of the summary Judgment on 26 April 2012, and does not contest that the content of that statement is accurately set out at Annex C to the Motion.[48] The Defence accepts the Prosecution's undertaking.[49] The Appeals Chamber accepts that the Parties have agreed to these facts.[50]

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[42] Motion, para. 8.

[43] *See Prosecutor v. Delalić, et al.*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-21-A, Appeals Chamber, Order on Motion of the Appellant, Esad Landzo, for Permission to Obtain and Adduce further Evidence on Appeal, 7 December 1999 ("*Delalić* 7 December 1999 Order") ("the general principles of law recognise an adjudicative privilege or judicial immunity from compulsion to testify in relation to judicial deliberations and certain other related matters"; "it is an inherent quality of an independent judicial institution such as the International Tribunal that it be able to maintain confidentiality in relation to its basic judicial functions"; "the independence of judges and other officers of the Tribunal exercising judicial functions should be safeguarded from being drawn into the controversies before it by being compelled to testify on behalf of any of the parties to proceedings before it"; "judicial deliberations and observations in relation to matters on which the judges are required to adjudicate should not be the subject of compelled evidence before the International Tribunal or exposure in any forum other than the proper forum of published reasons for decision in a particular matter"). *See* also Appeal Transcript, 25 October 2012, p. 49819, lines 18-26 ("MR ANYAH: Now, all of us know that before you seek to obtain testimony from a former Judge there are various steps you go through. There are legal ramifications. You have to do your research. And what we seek to elicit information from the Judge about occurred on the 26th of April of this year. So it is not something that we knew beforehand during the course of this case, and we are diligently pursuing all avenues to obtain the evidence we need, but we must do so thoroughly, and we must do so with respect for judicial principles that we value.").

[44] *See* Appeal Transcript, 25 October 2012, p. 49824, lines 18-26, p. 49825, lines 20-24 ("MS HOLLIS: We want to be sure that we're -- that when the motion is filed, the evidence that will be presented is a part of that motion, whether it's an offer of proof, whether it's a statement, whether it's a document, and that we're not faced with some general what we hope we'll get or generally what people will say but a comprehensive inclusion of the evidence that they are seeking to have admitted, because without that we cannot even do what we believe we need to do in order to respond to that 115 motion without knowing what it covers. [...] MR ANYAH: If Ms Hollis is saying that we must present the entirety of what additional evidence we have in a complete fashion so that they have the opportunity to investigate and provide rebuttal evidence, that is consistent with our understanding of the Rule.").

[45] Response, para. 9, *citing Delalić* 7 December 1999 Order.

[46] Response, para. 10.

[47] Reply, para. 13.

[48] Response, para. 11.

[49] Reply, para. 13, fn. 34.

[50] The Parties' agreement as to these facts is accepted pursuant to Rule 109(C) and will be considered by the Appeals Chamber accordingly. While the Prosecution conditionally stipulated to the admission of Annex B, that condition has not been fulfilled, and in any event the Defence did not accept the Prosecution's undertaking in this respect. *See* Reply, para. 13. The Motion fails to offer any foundation for the exhibit. There is no attempt to establish the origin or circumstances under which the article was written, edited and published, the legitimacy of the publication or, most

16. For the foregoing reasons, the Motion is **DISMISSED**.

Done in The Hague, The Netherlands, this 18 day of January 2013.

Justice Shireen Avis Fisher
Presiding

Justice Emmanuel Ayoola

Justice George Gelaga King

Justice Renate Winter

Justice Jon Kamanda

[Seal of the Special Court for Sierra Leone]

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importantly, that the words purported to be those of Justice Sow actually were his words, and that they were the only words uttered in the interview relevant to the issues.