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SCSL-04-15-A
(5014-5039)



5014

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before: Hon. Justice Renate Winter, Pre-Hearing Judge
Acting Registrar: Ms Binta Mansaray
Date filed: 8 July 2009

THE PROSECUTOR

Against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO**

Case No. SCSL-04-15-A

PUBLIC

**PROSECUTION RESPONSE TO GBAO REQUEST UNDER RULE 115 FOR
ADDITIONAL EVIDENCE TO BE ADMITTED ON APPEAL**

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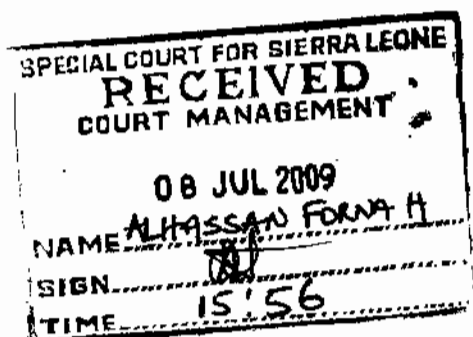
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I. INTRODUCTION

1. The Prosecution files this Response to the Gbao Defence's "Request under Rule 115 for Additional Evidence to be Admitted on Appeal" filed on 29 June 2009 ("**Gbao Rule 115 Motion**").¹
2. The Gbao Defence seeks to have admitted, pursuant to Rule 115 of the Rules of Procedure and Evidence ("**Rules**"), part of the transcript of the testimonial evidence given by TF1-314 in the case against Charles Taylor for the purpose of challenging the credibility of this witness.
3. The Prosecution submits that the Gbao Rule 115 Motion should be rejected for the reasons given below.

II. APPLICABLE LAW

4. In order for additional evidence to be admissible under Rule 115 the Applicant must demonstrate that the evidence: (i) was not available at trial; (ii) is relevant and credible; and (iii) could have been a decisive factor in reaching the decision at trial.²
5. The Applicant must set out in full the reasons and supporting evidence relied upon to establish that the proposed additional evidence was not available at trial,³ and must provide the Appeals Chamber with the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of Rule 115.⁴
6. It is clear from Rule 115 and from the jurisprudence of the *ad hoc* tribunals that the

¹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-A-1297, "Gbao – Request under Rule 115 for Additional Evidence to be Admitted on Appeal", 29 June 2009 ("**Gbao Rule 115 Motion**").

² Rule 115 (B) of the Rules.

³ Rule 115 (A) of the Rules. See for example, *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence", Appeals Chamber, 16 October 1998 ("**Tadić Decision on Additional Evidence**"), paras 45 and 53; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "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", Appeals Chamber, 8 December 2006 ("**Nahimana Decision on Additional Evidence of 8 December 2006**"), para. 33; *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.1, "Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115", Appeals Chamber, 3 March 2006 ("**Haradinaj Decision on Additional Evidence of 3 March 2006**"), para. 10; *Prosecutor v. Međakić et al.*, IT-02-65-AR11bis.1, "Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115", Appeals Chamber, 16 November 2005 ("**Međakić Rule 115 Decision**"), para. 8.

⁴ *Prosecutor v. Mrškić et al.*, IT-95-13/1-A, "Decision on Mile Mrškić's Second Rule 115 Motion", Appeals Chamber, 13 February 2009 ("**Mrškić Second Rule 115 Decision**"), para. 13; *Prosecutor v. Muvunyi*, ICTR-00-55A-A, "Decision on a Request to Admit Additional Evidence", Appeals Chamber, 27 April 2007 ("**Muvunyi Decision on Additional Evidence**"), para. 8, where the Appeals Chamber held that the Applicant should attach the relevant transcripts to his motion and should describe the content of the proposed additional evidence in enough detail. See also *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115", Appeals Chamber, 5 May 2006, para. 18; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence", Appeals Chamber, 14 February 2005 ("**Nahimana Decision on Additional Evidence of 14 February 2005**"); *Prosecutor v. Kupreškić et al.*, IT-95-16-A, "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)", Appeals Chamber, 8 May 2001, para. 5.

Applicant bears the burden of proof in a Rule 115 application.⁵ In particular, “[t]he applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and of specifying with sufficient clarity the impact the additional evidence could have had upon the Trial Chamber’s decision.”⁶

7. Finally, rebuttal material is admissible if it directly affects the substance of the additional evidence and as such, has a different test of admissibility from additional evidence admitted under Rule 115.⁷

A. Determining the availability of the evidence at trial

i. Requirement of due diligence

8. The question of whether the evidence was “not available to ... [the Defence] at the trial” is not merely a question of whether or not the evidence in question was “available” in a literal sense.⁸ It must be shown that the additional evidence was not available at trial *in any form whatsoever*,⁹ and furthermore, that the additional evidence could *not have been discovered* through the exercise of due diligence.¹⁰ It has been established that

⁵ Rule 115 (A) of the Rules. See also *Tadić* Decision on Additional Evidence, para. 52.

⁶ *Prosecutor v. Milošević-Dragomir*, IT-98-29/1-A, “Decision on Dragomir Milošević’s Further Motion to Present Additional Evidence”, Appeals Chamber, 9 April 2009 (“*Milošević-Dragomir Second Decision on Additional Evidence*”), para. 8; *Mrškić* Second Rule 115 Decision, para. 8; *Prosecutor v. Milošević-Dragomir*, IT-98-29/1-A, “Decision on Dragomir Milošević’s Motion to Present Additional Evidence”, Appeals Chamber, 20 January 2009 (“*Milošević-Dragomir First Decision on Additional Evidence*”), para. 8; *Prosecutor v. Krajišnik*, IT-00-39-A, “Decision on Appellant Momčilo Krajišnik’s Motion to call Radovan Karadžić Pursuant to Rule 115”, Appeals Chamber, 16 October 2008 (“*Krajišnik Rule 115 Decision of 16 October 2008*”), para. 7; *Prosecutor v. Kanyarugika*, ICTR-2002-78-R11bis, “Decision on Request to Admit Additional Evidence of 1 August 2008”, Appeals Chamber, 1 September 2008 (“*Kanyarugika Decision on Additional Evidence*”), para. 6; *Prosecutor v. Stanišić and Simatović*, IT-03-69-AR65.4, “Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115”, Appeals Chamber, 26 June 2008 (“*Stanišić and Simatović Decision of 26 June 2008*”), para. 6; *Muvunyi* Decision on Additional Evidence, para. 6; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 6; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, “Decision on Motions Relating to the Appellant Hassan Ngeze’s and the Prosecution’s Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB”, Appeals Chamber, 27 November 2006 (“*Nahimana Decision on Additional Evidence of 27 November 2006*”), para. 20; *Mejakić* Rule 115 Decision, para. 22; *Prosecutor v. Nikolić-Momir*, IT-02-60/1-A, “Decision on Motion to Admit Additional Evidence”, Appeals Chamber, 9 December 2004 (“*Nikolić-Momir Decision on Additional Evidence*”), para. 23; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, “Appeal Judgement”, Appeals Chamber, 23 October 2001 (“*Kupreškić Appeal Judgement*”), para. 69.

⁷ Rule 115 (A) of the Rules and *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 44; *Prosecutor v. Blaškić*, IT-95-14-A, “Decision on Additional Evidence”, Appeals Chamber, 31 October 2003 (“*Blaškić Decision on Evidence*”).

⁸ *Mrškić* Second Rule 115 Decision, para. 6.

⁹ *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 40, referring to *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, “Decision on ‘Requête en extreme urgence aux fins d’admission de moyen de preuve supplementaire en appel’”, Appeals Chamber, 9 February 2006, para. 6; *Mejakić* Rule 115 Decision, para. 8; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, “Decision on Prosecution Motion for Admission of Additional Evidence”, Appeals Chamber, 10 December 2004 (“*Ntagerura Decision on Additional Evidence*”), para. 9.

¹⁰ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 5; *Mrškić* Second Rule 115 Decision,

“additional evidence is not admissible under Rule 115 in the absence of a reasonable explanation as to why it was not available at trial. Such an explanation must include compliance with the requirement that the moving party exercised due diligence.”¹¹ In other words, the question is “whether the [applicant] could, by exercising due diligence, have obtained the *information* [...] at an earlier date.”¹²

9. Furthermore, what constitutes compliance with the due diligence requirement has been discussed in detail in the case law of the *ad hoc* tribunals. Specifically, “[t]he applicant’s duty to act with due diligence includes ‘making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the Tribunal to bring evidence on behalf of an accused before the Trial Chamber’.”¹³ The ICTR Appeals Chamber went into more detail on what constitutes acting with due diligence. It held that:

Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, *and his or her ability to locate certain witnesses*. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded *contemporaneously*.¹⁴

The ICTY Appeals Chamber had also previously stated that “[a]ny difficulties, including those arising from intimidation, or *inability to locate witnesses*, should be brought to the attention of the Trial Chamber.”¹⁵ Thus, an applicant who follows these

para. 6; *Milošević-Dragomir* First Decision on Additional Evidence, para. 6; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 4; *Kanyarukiga* Decision on Additional Evidence, para. 6; *Stanišić and Simatović* Decision of 26 June 2008, para. 6; *Muvunyi* Decision on Additional Evidence, para. 6; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 5; *Nahimana* Decision on Additional Evidence of 27 November 2006, para. 19; *Mejakić* Rule 115 Decision, para. 8; *Nikolić-Momir* Decision on Additional Evidence, para. 21; *Prosecutor v. Krstić*, IT-98-33-A, “Decision on Applications for Admission of Additional Evidence on Appeal”, Appeals Chamber, 5 August 2003 (“**Krstić Decision on Additional Evidence**”); *Blaškić* Decision on Evidence.

¹¹ *Tadić* Decision on Additional Evidence, para. 45.

¹² *Mrškić* Second Rule 115 Decision, para. 6 (emphasis added), citing *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 16. See also *Tadić* Decision on Additional Evidence, para. 47.

¹³ *Tadić* Decision on Additional Evidence, para. 47; *Milošević-Dragomir* Second Decision on Additional Evidence, para. 5; *Mrškić* Second Rule 115 Decision, para. 6; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 4; *Kanyarukiga* Decision on Additional Evidence, para. 6; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 5; *Mejakić* Rule 115 Decision, para. 8; *Nahimana* Decision on Additional Evidence of 14 February 2005; *Ntagerura* Decision on Additional Evidence, para. 9; *Krstić* Decision on Additional Evidence; *Kupreškić* Appeal Judgement, para. 50.

¹⁴ *Ntagerura* Decision on Additional Evidence, para. 9 (emphasis added), cited in *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 5. See also *Nikolić-Momir* Decision on Additional Evidence, para. 21; *Krstić* Decision on Additional Evidence.

¹⁵ *Tadić* Decision on Additional Evidence, para. 40 (emphasis added); *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, “Decision on Appellant Mario Čerkez’s Motion for Additional Evidence Pursuant to Rule 115”, Appeals Chamber, 26 March 2004: “this obligation to report to the Trial Chamber is intended not only as a first step in exercising due diligence but also as a means of self-protection, in that a contemporaneous

steps will, in the usual case, be deemed to have acted with due diligence.¹⁶ Conversely, an applicant may not have exercised due diligence if he claims that certain witnesses could not be located but did not bring that difficulty to the attention of the Trial Chamber.

ii. Meaning of available “at trial”

10. The question of whether or not evidence was available *at trial* should be assessed with respect to the end of trial proceedings, i.e. the date of the trial decision.¹⁷ The critical issue is whether the evidence could have been made known to the Trial Chamber before the trial decision was delivered such that the Trial Chamber could have considered the evidence in question in reaching its verdict. It has been held that “the fact that a document was issued after the close of the hearings does not prevent a re-opening of the case in the interests of justice should new and crucial evidence come to light”.¹⁸ The Prosecution submits that at any time before a trial judgement is delivered, any new evidence may be brought by the applicant to the attention of the Trial Chamber for its consideration. Thus, an applicant cannot justify the failure to exercise due diligence in locating and bringing to the attention of the Trial Chamber additional evidence by reference to the date on which the hearing closed.

B. Relevance and credibility

11. The applicant must also demonstrate that the evidence is both relevant to a material issue and credible.¹⁹ The case law on Rule 115 clearly shows that evidence is “relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were *crucial or instrumental* to the conviction or sentence”²⁰ and it is “credible

record then exists that the cooperation of the prospective witness had not been obtained.” See also *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, “Decision on the Request for Presentation of Additional Evidence”, Appeals Chamber, 18 November 2003, paras 8-9.

¹⁶ *Nikolić-Momir* Decision on Additional Evidence, para. 21.

¹⁷ *Stanišić and Simatović* Decision of 26 June 2008, paras 13 and 18, where the Appeals Chamber compares the relative dates of the impugned decision and the discovery of the new evidence. See also *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 16.

¹⁸ *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, “Decision on Naletilić’s Consolidated Motion to Present Additional Evidence”, Appeals Chamber, 20 October 2004, para. 24. See also *Prosecutor v. Furundžija*, IT-95-17/1-T, “Judgement”, Trial Chamber, 10 December 1998, para. 92.

¹⁹ Rule 115 (B) of the Rules; *Milošević-Dragomir* Second Decision on Additional Evidence, para. 6; *Mrškić* Second Rule 115 Decision, para. 7; *Milošević-Dragomir* First Decision on Additional Evidence, para. 7; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Kanyarukiga* Decision on Additional Evidence, para. 6; *Stanišić and Simatović* Decision of 26 June 2008, para. 6; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 6; *Nahimana* Decision on Additional Evidence of 27 November 2006, para. 19; *Ntagerura* Decision on Additional Evidence, para. 9; *Krstić* Decision on Additional Evidence.

²⁰ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 6 (emphasis added); *Mrškić* Second Rule 115 Decision, para. 7; *Milošević-Dragomir* First Decision on Additional Evidence, para. 7; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Stanišić and Simatović* Decision of 26 June 2008, para. 7;

if it appears to be reasonably capable of belief or reliance.”²¹

12. A finding that evidence is credible has no bearing on the weight to be accorded to such evidence.²² Any evidence that is admitted “shall not be assessed in isolation but in the context of the evidence given at the trial.”²³

C. Impact on the decision at trial

13. If the additional evidence is relevant and credible and was demonstrated to be unavailable at trial, it must then be determined whether the evidence *could* have been a decisive factor in reaching the decision at trial.²⁴ This requires the applicant to demonstrate that if the evidence is “considered in the context of the evidence given at trial, it could show that the decision was unsafe,”²⁵ in that “[...] there is a realistic possibility that the Trial Chamber’s verdict might have been different if the new evidence had been admitted.”²⁶
14. Moreover, the applicant should not only demonstrate that the decision *could* have been different, but should also “specify *why* the Trial Chamber could have come to a different conclusion despite the existence of the evidence it relied upon in the Trial Judgement.”²⁷
15. In the *Tadić* case, the ICTY Appeals Chamber considered that in applying the relevant criteria, “any doubt should be resolved in favour of the Appellant in accordance with the

Nahimana Decision on Additional Evidence of 27 November 2006, para 19; *Kupreškić* Appeal Judgement, para. 62; *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 26.

²¹ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 6; *Mrškić* Second Rule 115 Decision, para. 7; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Stanišić and Simatović* Decision of 26 June 2008, para. 7; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 6; *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 26; *Kupreškić* Appeal Judgement, para. 63; *Ntagerura* Decision on Additional Evidence, para. 22.

²² *Milošević-Dragomir* Second Decision on Additional Evidence, para. 6; *Mrškić* Second Rule 115 Decision, para. 7; *Milošević-Dragomir* First Decision on Additional Evidence, para. 7; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Nahimana* Decision on Additional Evidence of 27 November 2006, para 19; *Kupreškić* Appeal Judgement, para. 63.

²³ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 9; *Mrškić* Second Rule 115 Decision, para. 10; *Milošević-Dragomir* First Decision on Additional Evidence, para. 9; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 6; *Stanišić and Simatović* Decision of 26 June 2008, para. 7; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 7; *Nahimana* Decision on Additional Evidence of 27 November 2006, para 22; *Krstić* Decision on Additional Evidence; *Mejakić* Rule 115 Decision, para. 10; *Ntagerura* Decision on Additional Evidence, para. 9; *Kupreškić* Appeal Judgement, paras 66 and 75.

²⁴ Rule 115 (B) of the Rules; see also *Kanyarukiga* Decision on Additional Evidence, para. 6; *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 6; *Nahimana* Decision on Additional Evidence of 14 February 2005; *Ntagerura* Decision on Additional Evidence, para. 10.

²⁵ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 7; *Mrškić* Second Rule 115 Decision, para. 8; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 6; *Stanišić and Simatović* Decision of 26 June 2008, para. 7; *Muvunyi* Decision on Additional Evidence, para. 6; *Nikolić-Momir* Decision on Additional Evidence, para. 23; *Krstić* Decision on Additional Evidence.

²⁶ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 7; *Stanišić and Simatović* Decision of 26 June 2008, para. 7; *Mejakić* Rule 115 Decision, para. 10.

²⁷ *Milošević-Dragomir* Second Decision on Additional Evidence, para. 19 (emphasis in original).

principle *in dubio pro reo*".²⁸

D. Safeguard against a miscarriage of justice

16. Although the Rules do not provide for any exception, the jurisprudence on Rule 115 motions holds that where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence,²⁹ "the Appeals Chamber may still admit the evidence if the applicant shows that the exclusion of the additional evidence *would* lead to a miscarriage of justice, in that if it had been available at trial, it *would* have affected the verdict."³⁰ This has generally been applied "only in the most exceptional circumstances"³¹ when the evidence is of such "substantial importance to the success of the appeal such as its exclusion would lead to a miscarriage of justice."³²

III. ADDITIONAL EVIDENCE

A. Availability of the evidence at trial

17. Witness TF1-314 testified in the trial of *Prosecutor v. Taylor* (the "*Taylor trial*") on 20 October 2008. She previously testified in the trial in the present case (the "*RUF trial*") on 2, 4 and 7 November 2005.
18. The Gbao Defence notes that the testimony of TF1-314 in the *Taylor* trial was disclosed to the Gbao Defence on 27 October 2008.³³ The Gbao Defence fails to acknowledge, however, that the Prosecution at the same time brought this evidence to the attention of the Trial Chamber in the interests of justice. The relevant correspondence is attached as Annex B to this Response. Thus, both the Gbao Defence and the Trial Chamber itself were *actually in possession* of the proposed additional evidence more than four months before the Trial Judgement was given in this case. The Gbao Defence never sought to reopen the trial proceedings in order to have the evidence added to the trial record or to

²⁸ *Tadić* Decision on Additional Evidence, para. 73.

²⁹ *Kanyarukiga* Decision on Additional Evidence, para. 7.

³⁰ *Mrškić* Second Rule 115 Decision, para. 9; *Milošević-Dragomir* First Decision on Additional Evidence, para. 10; *Kanyarukiga* Decision on Additional Evidence, para. 7; *Muvunyi* Decision on Additional Evidence, para. 7; *Stanišić and Simatović* Decision of 26 June 2008, para. 8; *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 11; *Mejakić* Rule 115 Decision, para. 11; *Prosecutor v. Galić*, IT-98-29-A, "Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115", Appeals Chamber, 21 March 2005, para. 14; *Nahimana* Decision on Additional Evidence of 14 February 2005; *Ntagerura* Decision on Additional Evidence, para. 11; *Nikolić-Momir* Decision on Additional Evidence, para. 24; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, "Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence", Appeals Chamber, 28 October 2004, para. 11; *Krstić* Decision on Additional Evidence; *Kupreškić* Appeal Judgement, para. 58.

³¹ *Mejakić* Rule 115 Decision, para. 11.

³² *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 31.

³³ Gbao Rule 115 Motion, para. 10. The evidence was in any case given in public session and was therefore accessible to the Defence.

make any submissions on it.

19. The Gbao Defence had the opportunity to raise arguments before the Trial Chamber well before the judgement in the *RUF* trial was issued. The Gbao Defence has therefore failed to demonstrate that the proposed additional evidence was “not available to ... [the Defence] at the trial” (see paragraphs 8 to 10 above).

B. Impact of the evidence on the decision at trial

20. If the Pre-Hearing Judge were nonetheless to find that the evidence was not available to the Gbao Defence at trial and to consider it to be relevant and credible, it is submitted that the evidence could not have been a decisive factor in reaching the decision at trial.
21. The Trial Chamber found TF1-314 to be “largely credible” overall, while noting that her evidence required corroboration insofar as it related to the acts and conduct of any of the Accused.³⁴ The Gbao Defence seeks to introduce portions of the witness’s testimony in the *Taylor* trial “for the sole purpose of further challenging” her credibility.³⁵
22. The Gbao Defence argues that it has been found “that a witness who admits to lying under oath should have his/her testimony disregarded,”³⁶ relying on jurisprudence from the ICTR. The jurisprudence relied upon can only be taken as authority for the proposition that a witness who has admitted to lying under oath *may* have portions of his/her testimony, or even his/her entire testimony disregarded depending on the particular circumstances of the case.³⁷ The Prosecution submits that the new evidence in the current case is not such that it could result in the dismissal of the entire testimony of TF1-314.
23. A Trial Chamber has the discretion to accept a witness’s evidence, or parts thereof,

³⁴ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1234, “Judgement”, Trial Chamber, 2 March 2009 (“**Trial Judgement**”), para. 594.

³⁵ Gbao Rule 115 Motion, para. 10.

³⁶ Gbao Rule 115 Motion, para. 12.

³⁷ In the *Seromba* case it was held as follows: “The Trial Chamber also considers that the contradictory testimony given by Witness FE3 does not impugn the credibility of Witness CBJ. No question was put to Witness CBJ on FE36’s account of the events. The Chamber also notes that Witness FE36 is not credible, as he admits having lied before the Chamber. In this connection, the Chamber notes, in particular, that Witness FE36 testified that CBJ stated that his entire family had been killed, whereas CBJ had, in fact, only stated that certain members of his family were dead.” *Prosecutor v. Seromba*, ICTR-2001-66-I, “Judgement”, Trial Chamber, 13 December 2006, para. 92. In the *Nahimana* case the witness was found, for a number of reasons including for the reason that she had lied repeatedly in her testimony, to have made such a “deplorable impression on the Chamber” that her testimony was rejected in its entirety. *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, “Judgement and Sentence”, Trial Chamber, 3 December 2003, para. 551. The Appeals Chamber in that case found that the “Trial Chamber could reasonably hold that the [...] discrepancies, silences and evasions discredited [the witness’s] testimony in its entirety”. *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, “Judgement”, Appeals Chamber, 28 November 2007, para. 820.

notwithstanding inconsistencies.³⁸ It has been noted that it is “normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and depending on the questions posed to the witness by the Prosecution”.³⁹ It has moreover been recognised that “the individual circumstances of the witness, including the witness’ possible involvement in the events and the risk of self-incrimination” are relevant to an evaluation of the evidence.⁴⁰ The Prosecution refers, in addition, to the arguments at paragraphs 4.34 to 4.41 of the Prosecution Response Brief.⁴¹

24. TF1-314 gave inconsistent evidence in the *RUF* trial and the *Taylor* trial on the specific issue of whether she carried a gun while on food-finding missions. In the *Taylor* trial, she provided an explanation for her inconsistent evidence on this point, namely that she feared self-incrimination and being arrested.⁴² There is thus a credible explanation for the inconsistency. The fear of self-incrimination could reasonably relate to her experiences as a child soldier and the carrying and/or use of a weapon as opposed to her experiences as a “bush wife” and victim of rape. The only inconsistency between the evidence in the two cases which the Gbao Defence points to is that specifically referred to in the Rule 115 Motion. The Gbao Defence has not suggested that there is any other inconsistency or alleged lie told during the course of TF1-314’s testimony in the *RUF* trial which is revealed by her testimony in the *Taylor* trial.
25. Furthermore, the question of whether the witness carried a gun during food-finding missions was already explored during cross-examination in the *RUF* trial. In particular, a previous inconsistent statement on the matter was put to the witness by both the Sesay Defence⁴³ and the Gbao Defence.⁴⁴ The additional evidence from the *Taylor* trial, which suggests that the witness reverted to a previous version of events on the specific issue of whether she carried a gun, could not have led the Trial Chamber to a different conclusion on any material matter.
26. The Gbao Defence argues that the testimony of TF1-314 should be dismissed where it

³⁸ *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, “Judgement,” Appeals Chamber, 23 May 2005, para. 96: “it is up to the Trial Chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.” See also *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, “Judgement”, 16 November 1998, paras 596-597.

³⁹ *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, “Reasons for the Decision on Request for Admission of Additional Evidence”, Appeals Chamber, 8 September 2004, para. 31.

⁴⁰ *Prosecutor v. Halilović*, IT-01-48-T, “Judgement”, Trial Chamber, 16 November 2005, para. 17.

⁴¹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1290, “Prosecution Response Brief”, 24 June 2009.

⁴² TF1-314, *Taylor* Transcript 20 October 2008, p. 18782, lines 8-15.

⁴³ TF1-314, Sesay et al. Transcript 4 November 2005, pp. 41-43.

⁴⁴ TF1-314, Sesay et al. Transcript 4 November 2005, pp. 11-13.

was relied upon at paragraphs 1406-1407, 1412 and 1460-1461 and 1475 of the Trial Judgement. As a result, the Gbao Defence submits that since only TF1-314 and TF1-093 were specifically relied upon to establish the widespread nature of the crimes under Counts 7-9 in Kailahun, and since TF1-093's testimony required corroboration, the admission of the evidence has the potential impact of contributing to reversing the convictions against Gbao under Counts 7-9 in Kailahun District.

27. The Prosecution submits that the admission of the additional evidence could not lead to such a result. The Trial Chamber appropriately relied on the evidence of TF1-314's personal experiences of being forcibly married as well as the evidence of TF1-093's personal experiences as a "bush wife".⁴⁵ The inconsistency revealed by TF1-314's later testimony in the *Taylor* trial does not cast doubt on her testimony as to her personal experiences of being forcibly married. Furthermore, aside from the individual experiences of two witnesses, the Trial Chamber found further corroboration in the testimony of other witnesses,⁴⁶ which cannot be dismissed as being of an "unspecified nature" as proposed by the Gbao Defence.⁴⁷

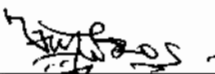
IV. CONCLUSION


28. For these reasons, the Prosecution submits that the Gbao Rule 115 Motion should be dismissed.

Filed in Freetown,

8 July 2009

For the Prosecution,


 For Christopher Staker


 Vincent Wagana

⁴⁵ See Trial Judgement, para. 603 for the Trial Chamber's assessment of TF1-093's credibility.

⁴⁶ Trial Judgement, paras 1409-1413.

⁴⁷ Gbao Rulc 115 Motion, para. 18.

Annex A

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(Filed Confidentially)

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Annex B

**Disclosure Correspondence of 27 October 2008 to the Judges of
Trial Chamber I**

5031

Vincent Wagona /SCSL
27/10/2008 11:53

To Candice Welsch/SCSL@SCSL
cc Reginald Fynn/SCSL@SCSL
bcc
Subject For the attention of the Judges of Trial Chamber I

Dear Candice,

The Prosecution forwards this communication and attachment for the attention of the Judges.

Thanks.

Vincent
RUF Prosecution Team



Correspondence, 27.10.08, 3A.csd.doc CT 20.DCT 08 EXCERPT.pdf

5032



SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

128 JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
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27 October 2008

Mr. Wayne Jordash
C/- Defence Office
Special Court for Sierra Leone

Dear Mr. Jordash,

The Prosecutor against Issa Hassan Sesay; SCSL-2004-15-T

Witness TF1-314 testified in the trial of *Prosecutor v. Taylor* on 20 October 2008, having previously testified in the RUF trial from 2 – 7 November 2005. Her *Taylor* testimony having been in public session is accessible to all Defence Teams and is thus not subject to mandatory Rule 68 disclosure.

However, in the interests of justice, part of the said testimony of TF1-314 of 20 October 2008 is brought to your attention. The relevant parts of the transcript are pages 18702, 18780 – 18783. A copy of the full transcript is hereby attached for your reference.

Due to the fact that the case is now in deliberations, a copy of this communication and only the relevant excerpt is being provided to the Judges.

Stephen Rapp
The Prosecutor



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27 October 2008

Chief Charles Taku
C/- Defence Office
Special Court for Sierra Leone

Dear Chief Taku,

The Prosecutor against Morris Kallon; SCSL-2004-15-T

Witness TF1-314 testified in the trial of *Prosecutor v. Taylor* on 20 October 2008, having previously testified in the RUF trial from 2 – 7 November 2005. Her *Taylor* testimony having been in public session is accessible to all Defence Teams and is thus not subject to mandatory Rule 68 disclosure.

However, in the interests of justice, part of the said testimony of TF1-314 of 20 October 2008 is brought to your attention. The relevant parts of the transcript are pages 18702, 18780 – 18783. A copy of the full transcript is hereby attached for your reference.

Due to the fact that the case is now in deliberations, a copy of this communication and only the relevant excerpt is being provided to the Judges.

A handwritten signature in black ink, which appears to read 'Stephen Rapp', is positioned above the typed name.

Stephen Rapp
The Prosecutor

5034



SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

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27 October 2008

Mr. John Cammegh
C/- Defence Office
Special Court for Sierra Leone

Dear Mr Cammegh,

The Prosecutor against Augustine Gbao; SCSL-2004-15-T

Witness TF1-314 testified in the trial of *Prosecutor v. Taylor* on 20 October 2008, having previously testified in the RUF trial from 2 – 7 November 2005. Her *Taylor* testimony having been in public session is accessible to all Defence Teams and is thus not subject to mandatory Rule 68 disclosure.

However, in the interests of justice, part of the said testimony of TF1-314 of 20 October 2008 is brought to your attention. The relevant parts of the transcript are pages 18702, 18780 – 18783. A copy of the full transcript is hereby attached for your reference.

Due to the fact that the case is now in deliberations, a copy of this communication and only the relevant excerpt is being provided to the Judges.

Stephen Rapp
The Prosecutor

- 1 Q. And help me, please: For how long did you remain with
2 Hawa?
- 3 A. Well, I cannot tell, but I took some time with her.
- 4 Q. Are we talking about years or months?
- 11:09:16 5 A. It was not up to one year.
- 6 Q. So bearing in mind that you were captured in 1994, would it
7 be fair to say that by 1995 you had already left Hawa's house?
- 8 A. I was still with her, because CO Ray and myself - all of us
9 were under CO Scorpion's command, so we were all at the same
11:09:56 10 house.
- 11 Q. And apart from going on two food finding missions you were
12 never involved in combat?
- 13 A. No.
- 14 Q. Can I take it then that you were never required to carry a
11:10:18 15 gun?
- 16 A. But I carried a gun when we went on food finding missions,
17 but from the time we left the food finding missions I never
18 carried a gun any more.
- 19 Q. So just so that we're clear, when you went on those two
11:10:42 20 food finding missions you, Edna Bangura, carried a gun, did you?
- 21 A. Yes.
- 22 Q. Thank you. And whilst there in Buedu you've told us on
23 more than one occasion the commanders there were Scorpion, is
24 that right?
- 11:11:09 25 A. Yes, he was my boss.
- 26 Q. And you saw him with your own eyes, did you?
- 27 A. Yes, all of us were at the same house.
- 28 Q. And you also saw CO Issa, did you?
- 29 A. Well, CO Issa, I did not see him. Just like I said,

- 1 A. It was not 2000.
- 2 Q. when was it?
- 3 A. well, I cannot recall the year now, but I don't know if it
4 was in 2000 or not. I cannot recall the year now.
- 15:44:13 5 Q. Now, after that first interview did you begin having
6 confidence in the people who were asking you questions about your
7 experience?
- 8 A. No, I still had fear. In fact the other time they even
9 went to look for me and I hid. I said maybe there was trouble,
10 so I hid.
- 15:44:30 10
- 11 Q. Now, do you remember telling me this earlier this morning,
12 that you'd carried a gun on those two food finding missions?
- 13 A. Yes.
- 14 Q. And if we now have a look, please, behind divider 2, the
15 last bullet point on that page: "I fought during the war in
16 surrounding villages of Buedu. We were doing food finding and I
17 carried a gun. I fired a gun." Is that true?
- 15:45:12 15
- 18 A. Yes.
- 19 Q. And that is something you said again on oath before this
20 Court this morning, isn't it?
- 15:45:51 20
- 21 A. Yes.
- 22 Q. So help me, please. Let's go behind divider 5. Why did
23 you say on 26 of October 2005: "During the food finding missions
24 the witness was not armed as stated in the interview notes of 30
25 June 2004". Why did you say that?
- 15:46:25 25
- 26 A. I did not say that. I said we went on the food finding
27 missions and I had a gun, I said that. But I did not say this
28 other one, that I did not have a gun.
- 29 Q. So how does it come about that on 26 October 2005, somebody

1 writes down something which totally contradicts what you told us
2 today? Can you help us as to how that came about?
3 A. well, sometimes it was the way questions would be asked of
4 you, that was the way you could respond to them. Maybe if it was
15:47:14 5 the way that question you asked it, if it was that same way the
6 question was asked then you would answer it that same way. But
7 you know there are so many people asking me questions. So this
8 person would come and ask you a question a different way and some
9 other person else may come and ask you a question a different
15:47:34 10 way. So that was how attention could get confused and how I just
11 responded to the questions the way they were asked of me.
12 MR GRIFFITHS: I'm slightly confused, Madam President.
13 Could I have of a moment to check a reference, please?
14 Yes. Could we go, please, behind divider 7, page 43. This
15:49:12 15 was on a previous occasion when you were asked the question.
16 Line 1:
17 "Q. Did you tell the Prosecution that you had gone on food
18 finding and carried a gun and fired it?
19 A. No. I only told her that I was taught how to fire a
15:49:34 20 gun."
21 Do you remember saying that on a previous occasion?
22 A. Yes.
23 Q. So now we have you repeating what you'd said on 26 October
24 2005, that you had not in fact had a gun when you went on food
15:49:56 25 finding missions. So which of them is right? Did you have a gun
26 or didn't you?
27 A. well, I held a gun when we went on the food finding
28 mission. I held a gun when we went on the food finding mission.
29 It was the person who wrote it must have made this mistake.

1 Q. No, no, but here you were being asked questions in a
2 different situation altogether to that where you were being asked
3 questions by an investigator. And all I'm trying to get your
4 assistance with is when you were asked that particular question
15:50:39 5 on 4 November 2005 why did you say no for a second time?

6 A. I forgot. But I had a gun.

7 Q. How could you forget having a gun as a child?

8 A. I was afraid. In fact even when I went to the Court - even
9 when they had given me confidence I was still afraid. That's why
15:51:15 10 I said I did not have a gun. I just thought that afterwards they
11 would still go and arrest me. But I actually had a gun.

12 Q. So did you on two occasions deliberately lie and say you
13 didn't have a gun because you were frightened of being arrested?

14 A. Yes. I thought that if anybody admitted having a gun that
15:51:46 15 person would be arrested. That was the fear that I had.

16 Q. Now, you know before you started giving evidence today you
17 took an oath to tell the truth and nothing but the truth. Do you
18 remember that?

19 A. Yes.

15:52:04 20 Q. Did you understand the importance of that oath?

21 A. Yes, I do.

22 Q. And you held the Bible whilst you did it, didn't you?

23 A. Yes.

24 Q. Because you appreciated it was a solemn oath you were
15:52:21 25 taking?

26 A. Yes, and I was risking my life.

27 Q. And do you remember taking a similar oath on a previous
28 occasion?

29 A. Yes.

- 1 Q. And when you took the oath on that previous occasion, did
2 you take it seriously?
- 3 A. Yes, very seriously.
- 4 Q. So tell me: why then did you tell a lie and say you didn't
15:52:56 5 have a gun?
- 6 A. I was afraid. I was afraid because I had - I had first
7 said it in the statement but later I had the fear. That's why I
8 did not say it.
- 9 Q. So just so that we fully understand, on a previous
15:53:17 10 occasion, despite taking an oath on the Bible to tell the truth,
11 you lied?
- 12 A. Well, that was up to me because I don't think I will come
13 here to take an oath on the Bible and put my life at stake,
14 because if you take an oath on the Bible it has to do with God
15:53:43 15 and my life. So I know that when I came here and took the Bible
16 with my right hand and if I tell a lie afterwards, that that
17 would affect me.
- 18 Q. But you did precisely that on a previous occasion in
19 november 2005. why did you do that?
- 15:54:03 20 A. I have said because I was frightened. I had a fear in me.
21 Even now, as I am here, I still have fear in me.
- 22 Q. So through fear on a previous occasion in November 2005 you
23 deliberately told a lie even though you had taken an oath, is
24 that right?
- 15:54:25 25 A. Yes.
- 26 Q. Now you feared the kamajors as being cannibals, didn't you?
- 27 A. While we were in the bush?
- 28 Q. Yes, you heard that the kamajors ate people, didn't you?
- 29 A. Yes, if you attempted to escape.