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SCSL-03-01-A
(9851- 9905)

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Pre-Hearing Judge

Registrar: Ms. Binta Mansaray

Date: 30 November 2012

Case No.: SCSL-2003-01-A

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH PUBLIC ANNEXES A-E, G-K AND CONFIDENTIAL ANNEX F

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
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
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Ms. Leigh Lawrie
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Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

I. INTRODUCTION

1. The Defence files this motion to present evidence that was not available to it at trial before the Appeals Chamber, pursuant to Rule 115 of the Rules.[1] The filing of this motion before the Pre-Hearing Judge, Justice Shireen Avis Fisher, consistent with the requirements of Rule 115(A),[2] is without prejudice to *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* which is being filed contemporaneously with this motion.

2. The evidence sought to be presented meets the requirements of Rule 115 and paragraph 23 of the Appeals Practice Direction,[3] and substantiates Grounds of Appeal 36, 37, and/ or 38 in the Notice of Appeal[4] and Appellant's Submissions[5] of Charles Ghankay Taylor. Authorisation should, consequently, be given for the presentation of the said evidence before this Chamber.

II. APPLICABLE LAW

3. In establishing the requirements for admission of additional evidence under Rule 115, Justice Winter of this Chamber has previously applied the jurisprudence of the ICTY and ICTR.[6] Three elements must be satisfied for additional evidence to be admissible on appeal. First, the Appellant must show that the evidence was not available at trial. Evidence is deemed to have been available if it could have been discovered through the exercise of due diligence.[7] The duty to act diligently includes "making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring

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[1] *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, as amended on 31 May 2012 ("Rules"), Rule 115.
[2] See Rule 115(A) of the Rules.
[3] Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012 (hereinafter, "Appeals Practice Direction"), para. 23.
[4] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012, paras. 104 and *Prosecutor v. Taylor*, SCSL-03-01-A-1304, Corrigendum to Notice of Appeal of Charles Ghankay Taylor, 23 July 2012 (collectively, "Notice of Appeal"), see Grounds of Appeal 36, 37 and 38.
[5] *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012; Confidential Annex A and Public Annexes B and C to *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012; and *Prosecutor v. Taylor*, SCSL-03-01-A-1348, Amended Book of Authorities to the Defence Rule 111 Submissions, 31 October 2012 (collectively, "Appellant's Submissions"), see Grounds of Appeal 36, 37 and 38.
[6] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision On Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, paras. 7-9.
[7] *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010, para. 6.

evidence on behalf of an accused before the Trial Chamber."[8] Evidence will be deemed to have been available unless the moving party can "put forward valid reasons..." as to why it was not.[9]

4. Secondly, the evidence must be relevant and credible.[10] Evidence is relevant if it relates to an issue which is material to the Trial Chamber's decision.[11] The moving party must "clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed."[12] Evidence is credible if it appears to be reasonably capable of belief of reliance.[13] The ICTY Appeals Chamber has held that evidence to be admitted pursuant to Rule 115 is sufficiently credible unless it is "devoid of *any* probative value."[14] However, a finding that the evidence is credible does not indicate how much weight it is to be afforded.[15]

5. Thirdly, the party seeking to adduce the evidence must show that it could have been a decisive factor in reaching the decision at trial.[16] This requirement is satisfied if the evidence could have impacted the verdict, demonstrating that the conviction was unsafe.[17]

6. Importantly, where the requirements in Rule 115 cannot be satisfied because the evidence was available at trial or could have been discovered through the exercise of due diligence, Appeals Chambers have drawn on their inherent power to consider the evidence. Thus, Justice Winter has held that such evidence may nevertheless be admissible, provided that its exclusion

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[8] *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010, para 6. *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 4.

[9] *Semanza v. Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, para. 37.

[10] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision On Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, para. 11.

[11] *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 5.

[12] Rule 115 (A).

[13] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision On Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, para. 11. *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010, para 7. *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nikola Šainović's Motion Requesting Additional Evidence Pursuant to Rule 115 of the Rules, 28 January 2010, para. 6. *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 5.

[14] *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 17 [emphasis in the original].

[15] *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 17. *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision on Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, para. 11.

[16] Rule 115(B). *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 8.

[17] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision On Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, para. 12.

would lead to a miscarriage of justice.[18] This can be shown where, had the additional evidence been admitted at trial, it *would* have affected the verdict.[19] This inherent power has also been acknowledged by Appeals Chambers of the ICTY and ICTR.[20]

7. Similar to the jurisprudential requirements of Rule 115 are those of paragraph 23 of the Appeals Practice Direction which additionally requires the applicant to present a precise list of the evidence sought to be presented and arguments in support of the requirement that the additional evidence be admitted in the interest of justice.[21]

III. SUBMISSIONS

8. The additional evidence the Defence seeks to present through this motion is as follows: (a) testimonial evidence from former Special Court Justice, El Hadji Malick Sow; (b) the complete interview of Justice Sow contained in the December 2012 edition of the New African magazine (and the cover page of the said magazine)[22]; (c) an image of the LiveNote transcript of 26 April 2012, containing the statement made by Justice Sow in open court immediately after the oral pronouncement of the Judgement;[23] (d) the Declaration of Michael Herz[24] regarding Justice Sow's statement and the LiveNote transcript of 26 April 2012;[25] (e) a video of parts of the oral pronouncement of the Judgement, depicting portions of Justice Sow's Statement in open court on 26 April 2012;[26] (f) an e-mail dated 11 May 2012 from Justice Sow to all Justices of the Special

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[18] "Although Rule 115 of the Rules (at the Special Court or the other international courts) does not explicitly provide for this, the ICTY and ICTR Appeals Chambers consider that even if relevant and credible evidence were available at trial, it may nonetheless be admitted on appeal if the applicant can establish that the exclusion of it would lead to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been admitted at trial, it *would* have affected the verdict." *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision on Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009, para. 13 (*Sesay et al.* Decision).

[19] *Sesay et al.* Decision.

[20] *Prosecutor v. Jelisić*, IT-95-10-A, Decision on Motion to Admit Additional Evidence, 15 November 2000. *Prosecutor v. Mejakić et al.*, IT-02-65-AR11bis.1, Decision on Joint Defence Motion to Admit Additional Evidence before the Appeals Chamber Pursuant to Rule 115, 16 November 2005, para. 11; *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, para. 10. *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nikola Šainović's Motion Requesting Additional Evidence Pursuant to Rule 115 of the Rules, 28 January 2010, para. 8. *Prosecutor v. Kupreškić*, IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001, para. 7. *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 8.

[21] Appeals Practice Direction, para. 23.

[22] Hereafter, "New African Interview," appended in Annex B.

[23] Hereafter, "Justice Sow's Statement" or "Statement," appended in Annex C. See, also, *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement"), para. 71 of Annex B.

[24] A Legal Assistant on the Taylor Defence Team.

[25] Hereafter, "Herz Declaration," appended in Annex D.

[26] Hereafter, "Statement Video," appended in Annex E.

Court, except Justice Julia Sebutinde, copying the Prosecutor and lead trial Defence counsel;[27] (g) a biographical profile of Judge Julia Sebutinde, as taken from the ICJ website;[28] (h) a biographical profile of Judge Bernardo Sepúlveda-Amor, as taken from the ICJ website;[29] and (i) the Declaration of Ms. Alexandra Popov,[30] appending three images of a reception for the Judges of Trial Chamber II of the Special Court held on 31 May 2012.[31]

9. The specific findings of fact to which the proffered evidence (individually or as a collectivity of some or all) is directed are: (i) all findings of fact in, and underpinning, paragraph 6994 (a)[32] and (b)[33] of the Judgement[34] and (ii), to the extent it might be concluded from the Judgement 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,[35] the proffered evidence is directed at controverting that conclusion.

A. Unavailability

(i) Additional Evidence in relation to Justice Sow

10. All of the proposed additional evidence relating to Justice Sow (paragraph 8(a) through 8(f) above)[36] was unavailable at trial. Trial proceedings were concluded on 11 March 2011 with the presentation of final rebuttal arguments[37] and the hearing was on that same day declared closed by the Presiding Judge of Trial Chamber II.[38] The pronouncement of the oral judgement was on 26 April 2012,[39] and it was on or after that date that *all* of the evidence relating to Justice Sow[40] became available. No sensible argument could be made to suggest that Justice Sow was "available" before 26 April 2012 for purposes of the request that he give testimonial evidence on appeal, insofar as the issues regarding which his proposed evidence pertains and is relevant to (i.e., Grounds of Appeal 36, 37 and/ or 38) only came to the attention of the Defence on 26 April

[27] Appended in Confidential Annex F.
[28] Appended in Annex G.
[29] Appended in Annex H.
[30] A Legal Assistant on the Taylor Defence Team.
[31] Appended in Annex I.
[32] Aiding and Abetting.
[33] Planning convictions.
[34] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement"), para. 6994.
[35] *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002 ("Statute")
[36] Testimonial evidence by Justice Sow, as well as, Annexes B through E, and Confidential Annex F.
[37] See, Annex B, para. 70 of the Judgement.
[38] Trial Transcript, 11 March 2011, 49622, lines 12 – 15. See, also, Rule 87(A) of the Rules.
[39] See, Annex B, para. 71 of the Judgement.
[40] See, paragraph 10(a) through 10(f) above.

2012 and subsequently. The same is true of the Herz Declaration:[41] it is relevant to and addresses events which transpired on 26 April 2012 (namely, Justice Sow's Statement) in conjunction with the oral pronouncement of the Judgment.

11. Furthermore, the New African Interview was published last week and became available to the Defence on 22 November 2012, and the image of the LiveNote transcript[42] and the video of portions of the oral pronouncement,[43] both came into existence and first became available to the Defence on 26 April 2012. The e-mail sent by Justice Sow was transmitted on 11 May 2012[44] and was therefore unavailable at trial. The non-existence and unavailability at trial of all evidence sought to be presented in relation to Justice Sow,[45] *a fortiori*, renders them incapable of being discovered through the exercise of due diligence.

(ii) Additional Evidence in relation to Justice Sebutinde

12. The Popov Declaration (and accompanying images) [46] were not available at trial, insofar as the issues to which they relate occurred on 31 May 2012. The biographical profiles of Judges Sebutinde and Sepúlveda-Amor,[47] as taken from the ICJ website, could have been available at trial, insofar as the ICJ membership of Judge Sebutinde commenced on 6 February 2012[48] and that of Judge Sepúlveda-Amor even earlier. However, whilst the Defence was aware of Justice Sebutinde's ICJ membership during the trial, the Defence had no concrete way of knowing whether Justice Sow had been substituted in place of Judge Sebutinde in relation to the adjudication of the merits of the case until 26 April 2012 when it became clear that no such substitution had taken place. The onus was on the Trial Chamber to advise the parties of the dual roles being played by Justice Sebutinde, interrupt any purported deliberations it was engaged in, and re-open the hearing to allow the parties to be heard on the issue.[49] As such, and considering the significant issues that the evidence implicates, avoidance of a miscarriage of justice warrants its admission.[50]

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[41] Annex D.
[42] Annex C.
[43] Annex E.
[44] Confidential Annex F.
[45] Justice Sow's testimonial evidence and Annexes B to E, and Confidential Annex F.
[46] Annex I.
[47] See Annexes G and H, respectively.
[48] See Annex G.
[49] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, para. 55.
[50] *Sesay et al.* Decision. The Prosecution's Response Brief erroneously argues in paragraph 686 that the Defence failed to make a timely objection regarding this issue, since lead Defence counsel was a member of the trial Defence

B. Relevant, Credible, and could have been a Decisive Factor Demonstrating that Mr. Taylor's Conviction is Unsafe

13. The additional evidence being proffered is credible, relevant to issues which are material to the Judgement, and have the ability to demonstrate that Mr. Taylor's conviction is unsafe.

14. The Defence refers to and incorporates by reference, the arguments advanced under Grounds 36 and 37 of the Appellant's Submissions. These statements address both the factual basis for these grounds and the reasons why Justice Sow's evidence is relevant, credible and why it renders the conviction of Mr. Taylor unsafe as a matter of law. The factual basis of those submissions is Justice Sow's Statement. Justice Sow has subsequently confirmed this statement and provided additional explanations on its meaning in the New African Interview. The New African Interview is direct, relevant, credible and compelling evidence which is not available from other sources on the issue of whether Mr. Taylor received a fair trial in accordance with the fundamental principles of international law, international criminal justice and the applicable law of the SCSL.

15. Through his testimony Justice Sow could confirm both his statements in court and during this interview. He could provide further detail and clarity regarding the Defence submission, based on his statements, that there was failure to deliberate according to the Rules and that the trial against Mr. Taylor was not consistent with the values of international criminal justice. If admitted and given due weight by the Appeals Chamber, this evidence would render the conviction against Mr. Taylor unsafe. The admission of the Herz Declaration and the Statement Video is sought in order to corroborate Justice Sow's Statement.

16. The New African Interview is also being proffered as evidence relevant to Ground 38, insofar as Justice Sow discusses irregularities in the constitution of the Trial Chamber, in consequence of Justice Sebutinde's simultaneous membership of the ICJ and Trial Chamber II of the Special Court.[51] The same is true of the 11 May 2012 e-mail by Justice Sow, inasmuch as his failure to copy Justice Sebutinde on that e-mail was (as the Defence will seek to establish)

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team and the issue could have been raised before 26 April 2012. However, this specious argument has no bearing on the "unavailability" requirement of Rule 115 *vis-á-vis* and the Popov Declaration and both ICJ profiles in question. Current lead Defence counsel was a co-counsel and not the lead counsel during the trial phase of the case and was consequently not empowered to make any decisions of the Defence team on the Accused's behalf at any time before the Trial Chamber divested itself of jurisdiction.

[51] New African Interview, page 48 (Annex B).

deliberate and buttresses views he expressed in the New African Interview regarding the propriety of the constitution of the Trial Chamber during the relevant period.[52]

17. Admission of the biographical profiles of Judges Sebutinde and Sepúlveda-Amor,[53] as taken from the ICJ website, and the Popov Declaration (and accompanying images),[54] is sought in order to substantiate, in evidentiary terms, (i) the election of Justice Sebutinde to the ICJ and the date her membership commenced (i.e., 6 February 2012)[55] and (ii) remarks made by Justice Sebutinde on 31 May 2012 during the farewell reception for Judges of the Trial Chamber that she was given an exemption or exception by the ICJ to continue sitting in the Taylor trial while simultaneously serving as an ICJ Judge. Those remarks have been cited to and relied upon in footnote 1995 in the Prosecution's Response Brief[56] without the Prosecution having followed the proper procedure under Rule 115 to have them admitted as additional evidence.

18. The evidence in question is relevant to Ground 38, credible, and if admitted and given due weight by the Appeals Chamber, would substantiate Ground 38 and render Mr. Taylor's conviction unsafe.

C. Immunity and Adjudicative Privilege of Justice Sow

19. The Defence has sought a waiver of any immunity Justice Sow presumably continues to enjoy as a former official of the United Nations ("UN").[57] Lead Defence counsel wrote on 19 November 2012 to the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Ms. Patricia O'Brien, requesting that the Secretary-General waive any such immunity in the interests of justice, in order to allow Justice Sow testify before this Chamber.[58] A follow-up letter was sent on 26 November 2012, after the publication of the New African

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[52] See Confidential Annex F. See, also, New African Interview, page 48 (Annex B).
[53] See Annexes G and H, respectively.
[54] Annex I.
[55] See, Annex G. Para. 762 of the Appellant's Submissions mistakenly gives the year as 2011 instead of 2012, but the necessary correction has been pointed out in the *Prosecutor v. Taylor*, SCSL-03-01-A, Submissions in Reply of Charles Ghankay Taylor, 30 November 2012, regarding Ground of Appeal 38.
[56] *Prosecutor v. Taylor*, SCSL-03-01-A-1350, Prosecution Respondent's Submissions, November 2012 ("Prosecution's Response Brief"), see, page 237 (CMS page 7216), f.n. 1995.
[57] See, f.n. 8 of the Judgement, indicating that Justice El Hadji Malick Sow (Senegal) was appointed as Alternate Judge by the Secretary-General of the United Nations and by the Government of Sierra Leone. See, also, *Prosecutor v. Taylor*, SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007, page 2. See, also, *Convention on Privileges and Immunities of the United Nations*, 1 UNTS 15, 13 February 1946 and 1961 Vienna Convention on Diplomatic Relations. See, also, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-AR73(B), Decision on Prosecution Appeal Against Confidential Decision on Defence Application Concerning Witness TF2-218, 26 May 2006 (Norman Appeals Decision), paras. 7-8 (recognising that UN officials, as fact witnesses at trial, have functional immunity before the Special Court).
[58] See Annex A.

Interview.[59] In a response dated 26 November 2012, Ms. O'Brien indicates that, "it is premature for the Secretary-General to consider the request for the waiver of the immunity of Justice Sow. The waiver request would be considered only after there is an indication that the Appeals Chamber will admit additional evidence and hear witness testimony."[60] As such, a decision by this Chamber on this motion has been made a condition-precedent by the UN to the consideration of a waiver of Justice Sow's immunity. Noteworthy in this regard, is Ms. O'Brien's re-affirmation of the UN's longstanding "policy of cooperating to the maximum extent possible with international criminal tribunals, and the prosecutors and defence counsel who appear before them."[61] Significantly, however, is the fact that a waiver of immunity is not a pre-condition to the presentation of additional evidence, pursuant to Rule 115.

20. The Defence is cognizant of any adjudicative or judicial privilege that could be invoked in order to avoid the giving of evidence by Justice Sow. However, no available precedent deals with the scenario where the official is not a current employee of the tribunal and what precedents that are available confirm that whilst such a privilege may be invoked, it is not absolute and can be waived to permit the giving of testimony, if the evidence is not available from other sources.[62] In this regard, the Defence reaffirms that it does not intend to question Justice Sow on any matter that might be considered secret or non-public.[63] Second, and to the extent that any statements made thus far by Justice Sow may be considered confidential or privileged, they are now a matter of public record[64] and therefore confidentiality or privilege can no longer be invoked to prevent their disclosure during public testimony. Thirdly, the proposed testimony of the Judge

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[59] See Annex J.

[60] See Annex K.

[61] See Annex K. See, also, *Prosecutor v. Karadžić*, IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary-General in Charge of the Office of Legal Affairs, 2 March 2011, p 2; *Prosecutor v. Karadžić*, IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary- General in Charge of the Office of Legal Affairs, 2 March 2011, p 6 (acknowledging the "long-established practice of the United Nations is to waive immunity to allow officials to testify").

[62] *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on Motion of the Appellant Esad Landzo for Permission to Obtain and Adduce Evidence on Appeal, 7 December 1999. See, also, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mučić Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997; *In the case against Florence Hartmann*, IT-02-54-R77.5. Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to Amicus Curiae Prosecutor, 3 February 2009; *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on Motion of the Appellant Esad Landzo for Permission to Obtain and Adduce Evidence on Appeal, 7 December 1999.

[63] See, *Prosecutor v. Taylor,* SCSL-03-01-A-1319, Submission in Response to the Order for Clarification of 15 August 2012, para 11 (iii). See, also, Annexes A and L.

[64] New African Interview. See, e.g., Reuters, "Former Liberian president Taylor should be a 'free man': judge," 25 November 2012, http://www.reuters.com/article/2012/11/25/us-sierraleone-taylor-judge-idUSBRE8AO09F20121125.

could nonetheless be made subject to the condition that if Justice Sow were asked any question, the answering of which would compromise any judicial privilege, he be given permission to answer in a manner which does not undermine the said privilege or the interests of justice. Lastly, the Defence observes that the applicability of any adjudicative or judicial privilege is not a pre-condition to the presentation of additional evidence, pursuant to Rule 115.

D. Interest and Miscarriage of Justice

21. The foregoing additional evidence are directed towards Grounds of Appeal 36, 37 and/ or 38.[65] The errors alleged in those grounds of appeal are egregious, and if sustained, would warrant a reversal of all adverse findings against Mr. Taylor, a quashing of all convictions and vacatur of the Judgement[66] and Sentencing Judgement.[67] The Defence submits that it is in the interest of justice to authorise the presentation of the proffered additional evidence and denial of this motion would occasion a miscarriage of justice.

IV. CONCLUSION

22. For the foregoing reasons, the Defence respectfully requests that this motion be granted.

Respectfully submitted,

Morris Anyah **Lead Counsel for** **Charles G. Taylor**	Eugene O'Sullivan Co-Counsel for Charles G. Taylor	Christopher Gosnell Co-Counsel for Charles G. Taylor	Kate Gibson Co-Counsel for Charles G. Taylor

Dated this 30th Day of November 2012, The Hague, The Netherlands

[65] See Grounds of Appeal 36, 37 and 38 of Notice of Appeal and Appellant's Submissions.
[66] Judgement.
[67] *Prosecutor v. Taylor,* SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").

List of Authorities

SCSL

Statute of the Special Court for Sierra Leone, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002

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

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

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

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

Prosecutor v. Taylor, SCSL-03-01-A-1350, Prosecution Respondent's Submissions, November 2012

Prosecutor v. Taylor, SCSL-03-01-A-1348, Amended Book of Authorities to the Defence Rule 111 Submissions, 31 October 2012, 8 October 2012

Prosecutor v. Taylor, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012

Prosecutor v. Taylor, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012

Prosecutor v. Taylor, SCSL-03-01-A-1325, Prosecution's Appellant's Submissions with Confidential Sections D & E of the Book of Authorities, 1 October 2012 ("Prosecution's Appellant's Submissions").

Prosecutor v. Taylor, SCSL-03-01-A-1319, Submission in Response to the Order for Clarification of 15 August 2012

Prosecutor v. Taylor, SCSL-03-01-A-1304, Corrigendum to Notice of Appeal of Charles Ghankay Taylor, 23 July 2012.

Prosecutor v. Taylor, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

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

Prosecutor v. Taylor, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").

Prosecutor v. Taylor, SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007

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

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

***Prosecutor v. Fofana et al.*, SCSL-04-14**

Prosecutor v. Norman et al., Case No. SCSL-04-14-AR73(B), Decision on Prosecution Appeal Against Confidential Decision on Defence Application Concerning Witness TF2-218, 26 May 2006

ICTY

Prosecutor v. Popović et al., IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 http://icty.org/x/cases/popovic/acdec/en/111020.pdf

Prosecutor v. Karadžić, IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary-General in Charge of the Office of Legal Affairs, 2 March 2011

Prosecutor v. Šainović et al., IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 http://icty.org/x/cases/milutinovic/acdec/en/100212.pdf

Prosecutor v. Šainović et al., IT-05-87-A, Decision on Nikola Šainović's Motion Requesting Additional Evidence Pursuant to Rule 115 of the Rules, 28 January 2010 http://www.icty.org/x/cases/milutinovic/acdec/en/100128.pdf

In the case against Florence Hartmann, IT-02-54-R77.5. Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to Amicus Curiae Prosecutor, 3 February 2009 http://www.icty.org/x/cases/contempt_hartmann/tdec/en/090203.pdf

Prosecutor v. Krajišnik, IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008 icty.org/x/cases/krajisnik/acdec/en/081016.pdf

Prosecutor v. Mejakić et al., IT-02-65-AR11bis.1, Decision on Joint Defence Motion to Admit Additional Evidence before the Appeals Chamber Pursuant to Rule 115, 16 November 2005
http://icty.org/x/cases/mejakic/acdec/en/051116-2.htm

Prosecutor v. Kupreškić, IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001
http://www.icty.org/x/cases/kupreskic/acdec/en/010411.htm#5

Prosecutor v. Jelisić, IT-95-10-A, Decision on Motion to Admit Additional Evidence, 15 November 2000
http://www.icty.org/x/cases/jelisic/acdec/en/01115AE314047.htm

Prosecutor v. Delalić et al., IT-96-21-A, Order on Motion of the Appellant Esad Landzo for Permission to Obtain and Adduce Evidence on Appeal, 7 December 1999

Prosecutor v. Delalić et al., IT-96-21-T, Decision on the Motion *Ex Parte* by the Defence of Zdravko Mučić Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997

ICTR

Nahimana et al. v. Prosecutor, ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007
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http://www.unictr.org/Portals/0/Case%5CEnglish%5CSemanza%5Cdecisions%5C310500.pdf

Other

Convention on Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946 and 1961 Vienna Convention on Diplomatic Relations
http://www1.umn.edu/humanrts/instree/p&i-convention.htm

Reuters, "Former Liberian president Taylor should be a 'free man': judge," 25 November 2012,
http://www.reuters.com/article/2012/11/25/us-sierraleone-taylor-judge-idUSBRE8AO09F20121125.

Public Annex A

Letter to the Under-Secretary-General for Legal Affairs, dated 19 November 2012

DEFENCE FOR CHARLES TAYLOR
SPECIAL COURT FOR SIERRA LEONE
The Hague Sub-Office
Dokter van der Stamstraat 1, 2265BC Leidschendam, The Netherlands
Telephone: +31 70 [redacted], +31 70 [redacted]; Facsimile: +31 70 [redacted]
E-mail: Morris Anyah (Lead Appeals Counsel): [redacted]
Szilvia Csevár (Case Manager): [redacted]

DATE: 19 November 2012

TO: Her Excellency Patricia O'Brien
Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations
Office of Legal Affairs,
United Nations Headquarters
New York, New York 10017

BY E-MAIL TO: [redacted]

CC: H. E. Ban Ki-moon, Secretary-General United Nations (e-mail: [redacted])
H. E. D. Stephen Mathias, Assistant Secretary-General for Legal Affairs (e-mail: [redacted])
H. E. El Hadji Malick Sow, Juge, la *Cour d'Appel de Dakar*, République du Sénégal; former Judge, the Special Court for Sierra Leone (e-mail: [redacted])
Ms. Michèle Doré, Secretary to the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations (e-mail: [redacted])

FROM: Mr. Morris A. Anyah, Lead Counsel for Charles Taylor

RE: Request for the Waiver of Immunity of Judge El Hadji Malick Sow for purposes of giving Testimony in the Appeal of Charles Taylor before the Special Court for Sierra Leone (The Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-A)

Dear Madam,

I write as the lead appeals counsel to former Liberian president, Charles Ghankay Taylor, in his appeal from conviction and sentence before the Special Court for Sierra Leone (SCSL). On behalf of Mr. Taylor, the Defence requests that the Secretary-General of the United Nations (UN) waive the immunity of Justice El Hadji Malick Sow, a Senegalese National and a former Alternate Judge in Trial Chamber II of the SCSL from May 2007 until May 2012. We understand that Justice Sow was appointed by the UN Secretary-General.[1] It appears, therefore, that he may be considered an official of the UN who is covered by the Convention on Privileges and Immunities of the United Nations of 13 February 1946 ("Convention").[2]

Article V, Section 20 of the Convention provides that "The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." Accordingly, the Secretary-General has the duty to waive the immunity of Justice Sow, if a failure to do so would impede the course of justice and doing so would not prejudice the interests of the UN.

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012, fn. 8: "Justice El Hadji Malick Sow (Senegal) appointed as Alternate Judge by the Secretary General of the United Nations and by the Government of Sierra Leone." Special Court for Sierra Leone, Justice El Hadji Malick Sow of Senegal Sworn in as Alternate Judge, Press Release, 9 May 2007 < http://www.sc-sl.org/LinkClick.aspx?fileticket=SIQl4Ssen%2Bc%3D&tabid=110 >.
[2] *Convention on Privileges and Immunities of the United Nations*, 1 UNTS 15, 13 February 1946.

We note that the official and publicly stated position of the Secretary- General of the UN, as enunciated by the Office of Legal Affairs (OLA), is that it has "a long-standing policy of maximum co-operation with the international tribunals, including Defence counsel appearing before them."[3] In furtherance of this position, OLA has stated that the "long-established practice of the United Nations is to waive immunity to allow officials to testify."[4] We further note that "hundreds of waivers of immunity have been granted at the request of the prosecution, defence and trial chambers" of international tribunals.[5]

During the proceedings against Mr. Taylor, the Secretary-General has reiterated his policy of maximum co-operation with the Defence and has issued at least 10 waivers for high ranking military personnel, such as generals, and high ranking civilian officials, such as Special Representatives of the Secretary-General, an Assistant Secretary-General and a Special Envoy of the Secretary-General.

Assuming Justice Sow is covered by the Convention, we request that the Secretary-General waive Justice Sow's immunity under the Convention in order to permit him to testify on behalf of the Defence before the Appeals Chamber of the SCSL. The subject-matter of the testimony before the Appeals Chamber will be based on a public statement made by Justice Sow in the SCSL court room on 26 April 2012 in open court, after the oral delivery of the trial Judgment in the Taylor case. During the course of that statement, Justice Sow said, among other things, that "[t]he only moment where a Judge can express his opinion, is during deliberations or in the courtroom, and pursuant to the Rules, *where there is no ^ deliberations*, the only place left for me [*sic*] in the courtroom." He also said that "*the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure*" (emphasis added).[6]

These statements are the subject of two grounds of appeal or errors in Mr. Taylor's appeal proceedings before the SCSL.[7] The first error is that the Trial Chamber failed to deliberate pursuant to the Rules of the SCSL. The second error is that the process was conducted in a manner inconsistent with fundamental principles and values of international criminal law. Justice Sow would appear to be the only informed source for his statement and a failure to grant a waiver in these circumstances would therefore impede the course of justice, especially since a grant of the requested waiver would in no way prejudice the interests of the UN.

Consistent with past practice, both generally and in this case, the testimony could be made subject to the condition that if Justice Sow were asked any question, the answering of which would prejudice the interests of the UN, he be given permission to answer without disclosing prejudicial information and in a manner which does not undermine the fundamental interests underlying the privileges and immunities granted.[8] In particular, the Defence does not intend to question Justice Sow regarding the substance of deliberations which are considered private or secret under the Rules of the SCSL.[9] Furthermore, and to ameliorate any concerns in this regard, attached hereto is a Consent to Testify form which delineates

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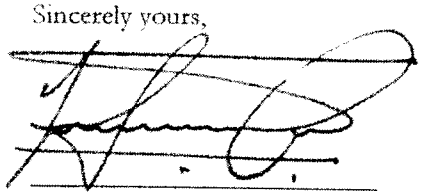
[3] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary- General in Charge of the Office of Legal Affairs, 2 March 2011, p 2.
[4] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary- General in Charge of the Office of Legal Affairs, 2 March 2011, p 6.
[5] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary- General in Charge of the Office of Legal Affairs, 2 March 2011, p 6.
[6] Public Annex C ("Statement of Justice El Hadji Malick Sow on 26 April 2012") to *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012. See also, *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012 and *Prosecutor v. Taylor*, SCSL-03-01-A-1348, Amended Book of Authorities to the Defence Rule 111 Submissions, 31 October 2012.
[7] Grounds of Appeal 36 and 37 in *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012.
[8] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary- General in Charge of the Office of Legal Affairs, 2 March 2011, p 7.
[9] Rules 29 & 87(A) of the Rules. Rule 29 of the Rules provides that "deliberations are to take place in private and remain secret" and Rule 87(A) states that deliberations after the conclusion of the evidence in the case in order to consider the guilt of the accused beyond a reasonable doubt, are to be conducted "in private."

certain core parameters in respect of the subject-matter of the proposed areas of questioning the Defence intends to put to Justice Sow. Provision is made in the Consent form for any additional condition that the Secretary-General and/ or Justice Sow might deem appropriate as a pre-condition to the proposed testimony, with the hope that no such condition would impede the course of justice.

Testimonial evidence from Justice Sow may form the basis for an application for the admission of additional evidence in the appeal of Mr. Taylor. As the Defence wishes to make such an application in a manner that does not delay appellate proceedings, we kindly request that you provide us with your response within 7 days of the date of this letter.

Sincerely yours,



Morris A. Anyah
Lead Counsel for Charles G. Taylor
The Hague, The Netherlands

Enclosure: Consent to Testify

Public Annex B

New African Magazine Article

Sierra Leone: Taylor trial judge spills the beans Obama: The tenacity of hope!
South Africa: Steve Biko, the enigma Uganda: He who dares impersonate Museveni
Nigeria: Wole Soyinka interview Football: The man who wants Hayatou's job

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December 2012 • N°523
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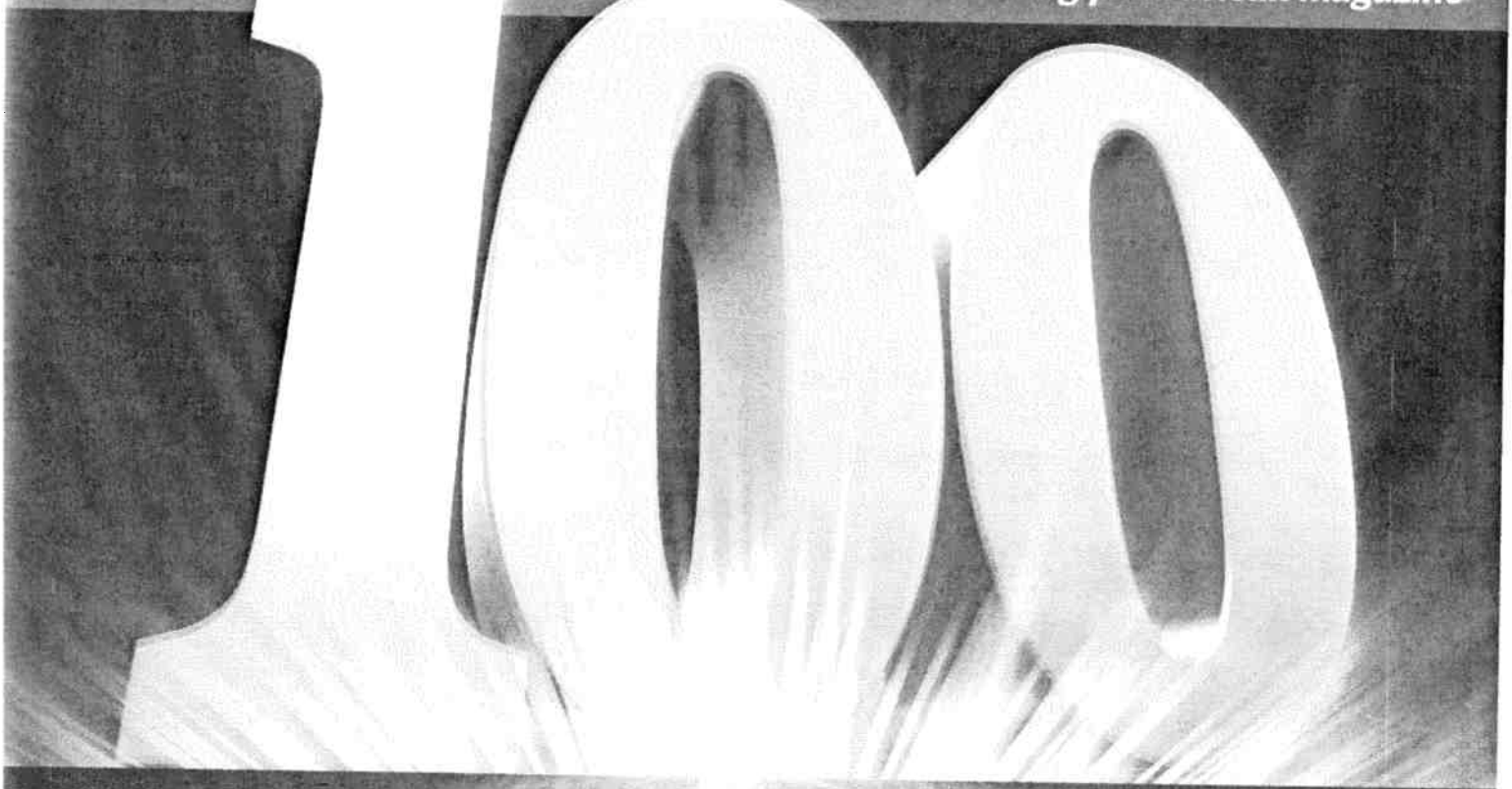
The bestselling pan-African magazine



most influential Africans
(and what they did & what they said)

Inside African Football

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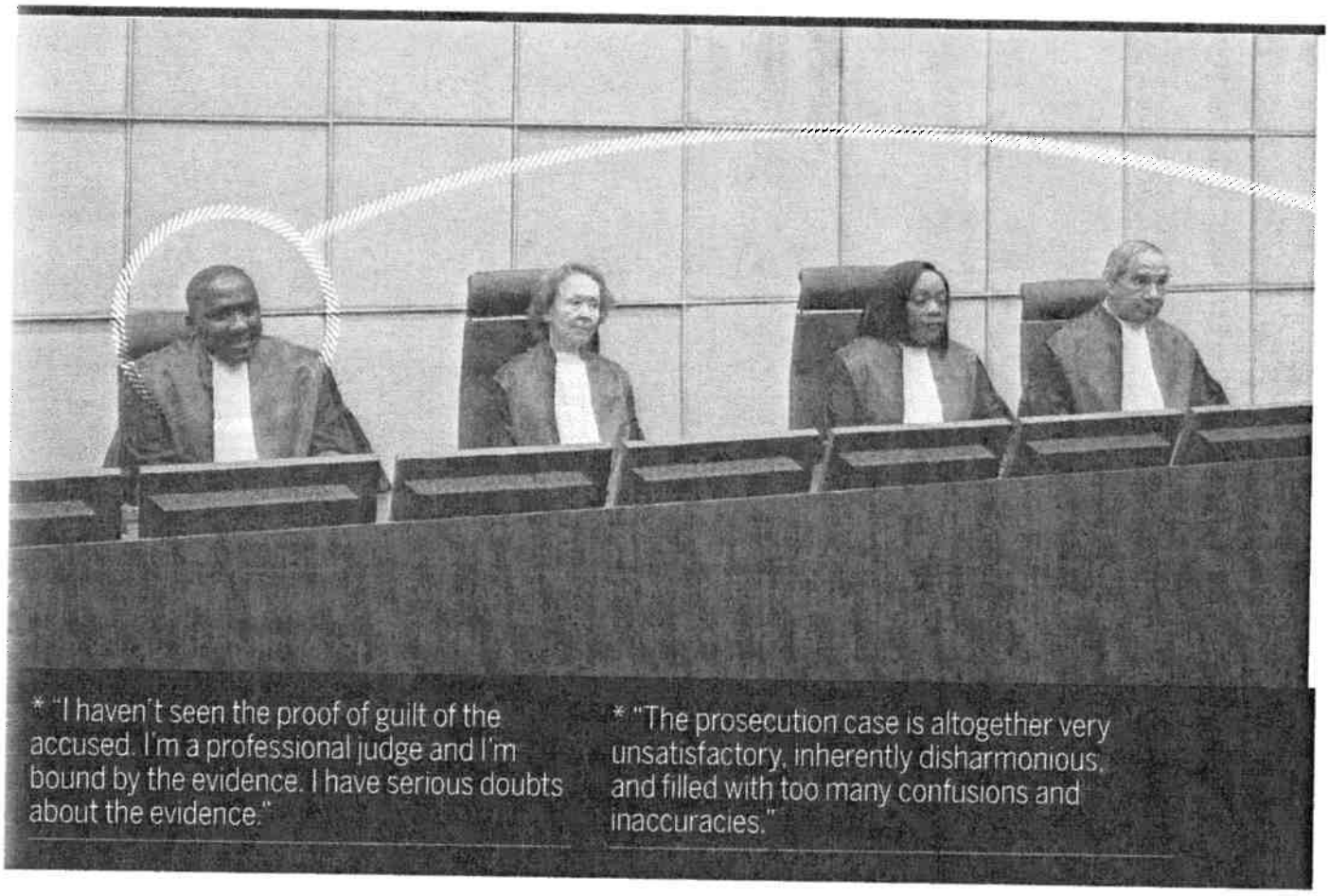
• Euro Zone €4.50 • UK £3.00 • USA $4.95 • Algeria DA 300 • Angola 700 Kwanza (AOA) • Australia A$ 7.50 • Bahrain BD 2.00 • Canada $6.50 • CFA Zone CFA 2,500 • Cyprus 3.85 • Denmark DKr 35 • Egypt E£ 20 • Ethiopia R 50 • Gambia Da 100 • Ghana GH¢ 5.00 • Indonesia R35,000 • Jamaica $350 • Jordan JD 3.500 • Kenya KShs 300 • Kuwait KD 1.500 • Lebanon LL 7500.00 • Malaysia RM 15.90 • Mauritius MR 150 • Morocco Dh 30 • Nigeria N 500 • Norway NOK 59 • Oman OR2.00 • Qatar QR 20 • Rwanda RWF 3000 • Saudi Arabia Rls 20 • Sierra Leone LE 15000 • Singapore $7.50 • South Africa R30.00 (inc. tax) • Other Southern African Countries R 26.30 (excl. tax) • Sweden SKr 33 • Switzerland SFr 8.70 • Tanzania TShs 5,400 • Tunisia TD 3500 • Turkey 10.00YTL • UAE Dh 20 • Uganda USh 8,700 • Zambia K 16000



* "I haven't seen the proof of guilt of the accused. I'm a professional judge and I'm bound by the evidence. I have serious doubts about the evidence."

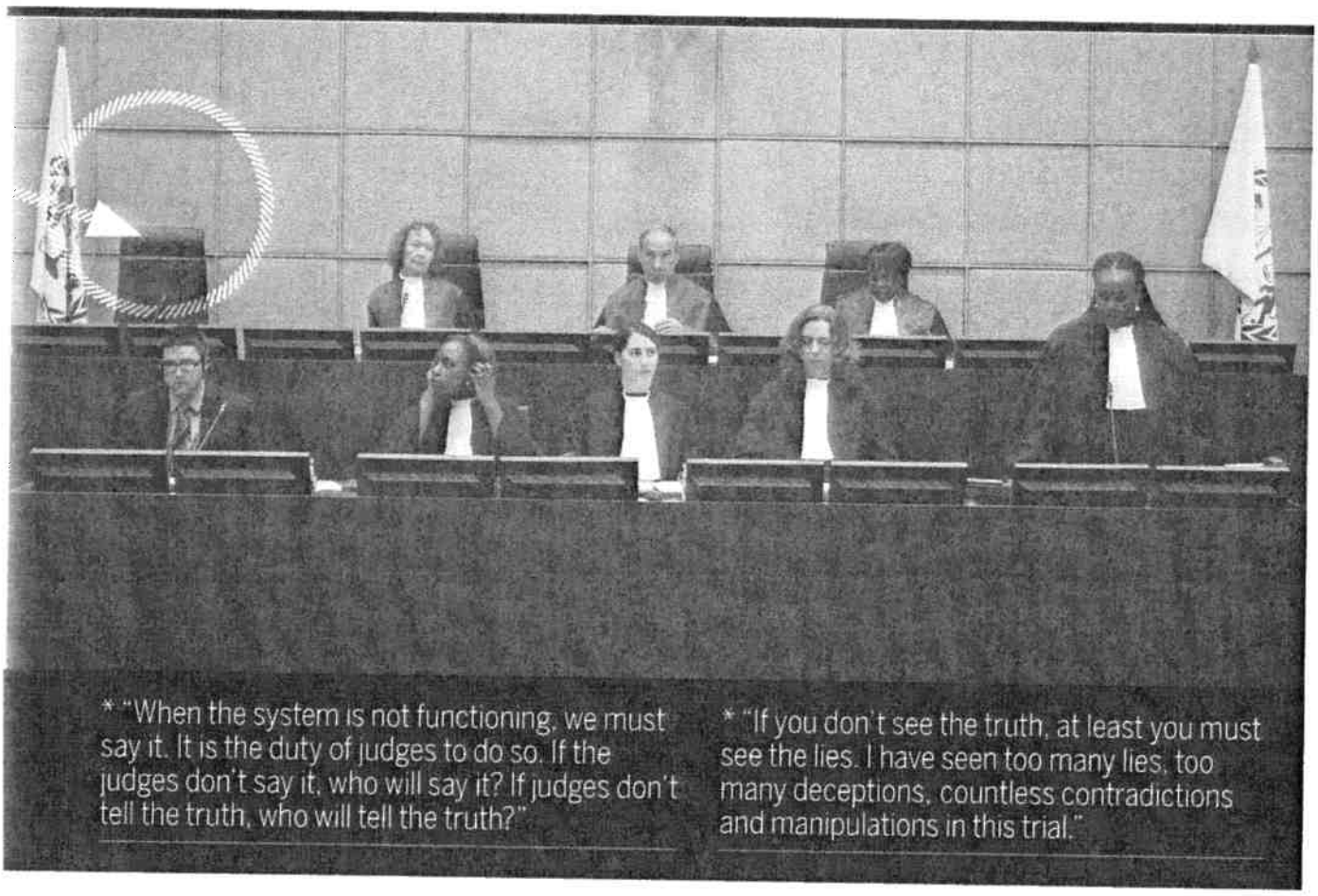
* "The prosecution case is altogether very unsatisfactory, inherently disharmonious, and filled with too many confusions and inaccuracies."

Justice Sow

'Charles Taylor should have walked free'

THE SENEGALESE JUDGE, JUSTICE El Hadji Malick Sow, served as an alternate judge for Trial Chamber II of the Special Court of Sierra Leone that tried the former Liberian president, Charles Taylor. For the five years that the trial lasted, Justice Sow sat on the bench with three other "main" judges who presided over the trial in rotation. As alternate judge, Justice Sow's job was to step in and act as a "main" judge whenever any of the three main judges was unable to sit. He says during the five years, he "worked harder than anybody else because I took it very seriously, for me it was a very important trial because I was the only judge from the West African sub-region, and as such, I couldn't come back home, face my people, and tell them lies about what I didn't see or cannot justify."

Justice Sow's conscientiousness and determination to apply the law as demanded by the Statutes of the Special Court and the international criminal justice system, made him unpopular with the other judges on the case, to the extent that they isolated



* "When the system is not functioning, we must say it. It is the duty of judges to do so. If the judges don't say it, who will say it? If judges don't tell the truth, who will tell the truth?"

* "If you don't see the truth, at least you must see the lies. I have seen too many lies, too many deceptions, countless contradictions and manipulations in this trial."

A justice comes to judgment: Opposite page: 26 April 2012, Justice El Hadji Malick Sow (circled) sits on the Bench of Trial Chamber II of the Special Court for Sierra Leone with his colleague judges, but his seat was empty on 16 May 2012 (above) when the Court sentenced Charles Taylor to 50 years in prison. Justice Sow's dissenting opinion read in court on 26 April had earned him the displeasure of the other judges who sanctioned him from sitting until the appointing authority decided on his status as alternate judge

him at the crucial "deliberations" stage of the trial where the guilt or innocence of the accused was decided by the judges.

It, therefore, came as no surprise that on 26 April 2012 when the three main judges announced their summary judgment (Taylor was found guilty and subsequently sentenced to 50 years imprisonment, of which he is appealing), Justice Sow read a Dissenting Opinion, saying: "The only moment where a judge can express his opinion is during the deliberations or in the courtroom, and pursuant to the Rules, when there is no serious deliberations, the only place left for me is in the courtroom."

He continued: "I disagree with the findings and conclusions of the other judges, because for me under any mode of liability, under any accepted standard of proof, the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure."

It was a brave statement in the circumstances, but the other judges were not best pleased. As soon as Justice Sow started delivering his Dissenting Opinion, the three other judges stood up and walked out of the courtroom. Justice Sow's microphone was subsequently cut, the curtains of the public gallery were drawn down, his statement was later removed from the official court record, and he was subsequently sanctioned by a majority of the judges of both the Trial and Appeals chambers of the Court for alleged "misconduct".

As punishment, Justice Sow was ordered by the other judges "to refrain from further sitting in the proceedings pending a decision from the appointing authority [to whom the judges had asked to decide the further status of Justice Sow]".

Since the judges' decision in May 2012, Justice Sow has not had the opportunity to tell his side of the story to a mass audience. It is in this light that *New African* went to interview him in his Dakar home. The interview – conducted by our Senegalese correspondent **Sheriff Bojang Jnr** – is a real shocker! How a court established by international law, supposedly to execute justice in a fair manner, could behave in the way Justice Sow describes here, is utterly shocking. Please sit back, for this is a very serious matter!

Q: At a time when the world was watching the live footage of the deliberations of the long-awaited judgement in the Taylor trial, you entered a Dissenting Opinion to the Trial Chamber's unanimous judgment. What went wrong that prompted you to take that step?

A: What went wrong was the secret plan concocted by the other judges of Trial Chamber II to reduce me to silence. Orders were given to the court officer to turn off my microphone, and to the technicians to pull down the curtains. Telling the Sierra Leonean people that the president of Liberia, the neighbouring country, is criminally responsible for the crimes committed in Sierra Leone is a serious matter. And the proof of that must be clear, convincing, and must be without much dispute.

What I said was that the prosecution did not prove beyond reasonable doubt the guilt of the accused. Also, it was a total surprise to me to hear that it was a unanimous decision because in each of the very few times we discussed anything, there were very different opinions. I was very surprised to see them coming up with this summary judgment talking about a unanimous decision. Even the drafts I received always changed. The other judges knew that I didn't agree with the decision, that is why they wanted to force me to keep silent.

Q: In your Dissenting Opinion, you said: "*And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.*" As an alternate judge, you were present throughout the entire five-year trial. At what stage did you realise that "this whole thing" was "headed for failure"?

A: The fundamental principles of International Criminal Law are contained in the statutes of the different courts and they are the same: All start with the presumption of innocence. Also, the only acceptable standard of proof is proof of guilt beyond reasonable doubt. The third principle is a general principle of criminal law as enunciated in the Latin expression "*In Dubio Pro Reo* (doubt will benefit the accused). These principles were trampled underfoot in the Charles Taylor trial.

But before we go further, let me make this very clear: That when I spoke in court, I was no longer in a position of an alternate judge. I was a full judge, sitting there as a full judge. The one who shouldn't have been there wasn't me. One of the judges of the Trial Chamber was elected as a judge of the International Court of Justice (ICJ), that judge took the solemn declaration and was sitting as a judge in that jurisdiction, in the International Court of Justice.

As if nothing had happened, and concomitant to her sitting in the ICJ, that judge was kept in her former position as a judge of the Special Court of Sierra Leone (SCSL). I don't believe that these two positions are compatible. If being elected in a different court doesn't render a judge unable to continue sitting in the SCSL, it must be explained when an alternate judge is eligible to sit as a full judge.

I went through unimaginable difficulties to put the issue of the interpretation of Article 12 of the Statute of the Court, and of Rule 16 on the agenda of the plenary meeting of the judges held in September 2008. My request was rejected by the same judges who ferociously attacked me in what they called a disciplinary procedure. The minutes of the two plenary meetings are available.

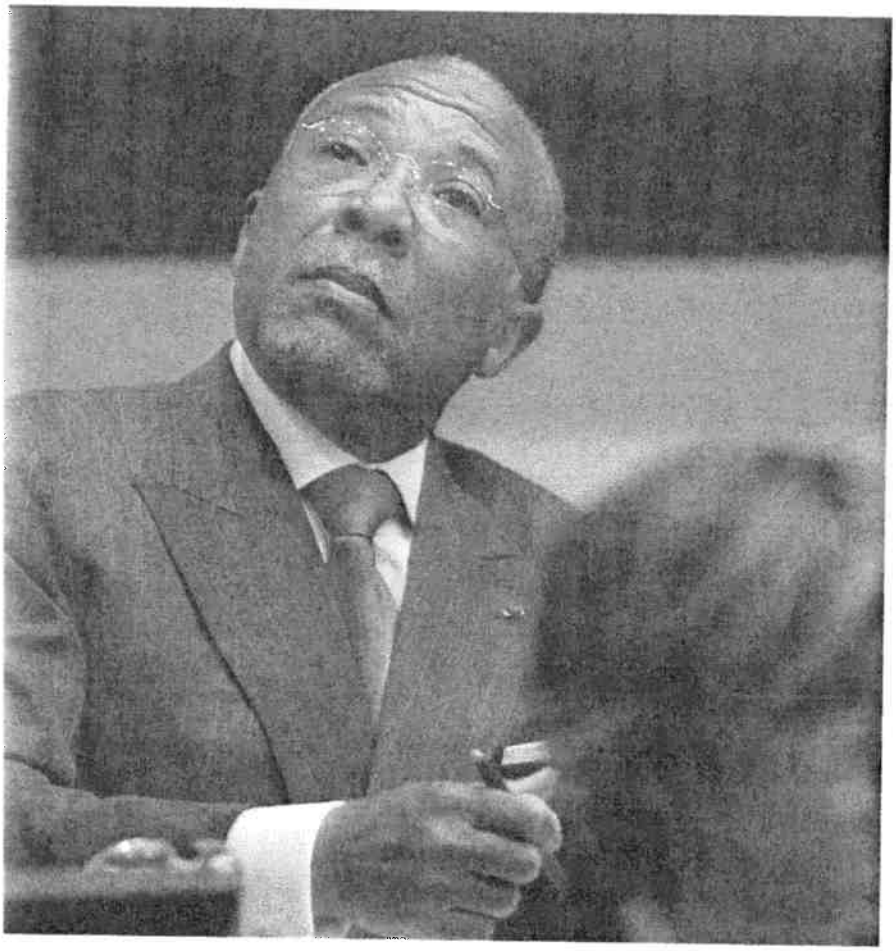
Q: The argument is whether you had a mandate to express such an opinion in public as you did.

A: I don't know why nobody talks of Article 18 of the Statute of the Special Court, and Rule 88 of the Rules of Procedure and Evidence which are the only specific provisions talking about the Judgment and opinions accompanying the Judgment. Article 18 of the Statute says clearly that: "*The Judgment shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.*"

Right, from above: The defendant: Charles Taylor. The lead prosecutor: Brenda Hollis. The dissenting judge: Justice El Hadjj Malick Sow

Then Rule 88 of the Rules of Procedure and Evidence provides very clearly that: "*The Judgment shall be rendered by a majority of the judges. It shall be accompanied by a reasoned opinion in writing. Separate or dissenting opinions may be appended.*".

Also, Rule 16Bis(c) states that "*an alternate judge shall be present during the deliberations of the Trial Chamber or the Appeals Chamber to which he or she has been designated, but shall not be entitled to vote*



"International justice cannot be based on rumours. These are mass crimes... We must have the highest standard of proof."

thereat." How can one then say that during "deliberations" an alternate judge does not have the right to make an opinion and thus cannot express his opinion?

It is a general principle of law that exclusions and limitations must be expressly provided for. Here it's not about voting at deliberations. It's about my opinion about this trial, and unlike Rule 16Bis(c) there is no limitation, no ban or exclusion in the superior norm which is the Statute of the Court, nor in Rule 88 for the expression of opinions on the Judgment.

Q: You alleged in your statement that there were "no serious deliberations" before the Judgment was pronounced. Did you mean there were deliberations but that they were not serious enough to justify a guilty verdict?

A: I have said it, and I wait for the proof of the contrary. The president of the Court came to The Hague and had a meeting with the judges. He knew about this issue. I did mention during that meeting, in the presence of the other judges and the president of the Court, that I did not know when, where, and how it was decided that the drafting of the different parts of the Judgment will be divided between the three other judges. I was told then that other meetings will be organised later to discuss the drafts but that never happened.

All the judges of the Court knew about this problem. It is when we reached the most important part of the deliberations – which was the criminal responsibility of the accused – that the other judges started to hold meetings, but not in the deliberation rooms, but in their offices. And I wasn't called to those meetings.

But I knew of those meetings because the legal officers told me about them. That's how I discovered that they were hiding to meet, and I did complain in writing. I did not hear much about why all the legal officers who attended the trial, except one, left before the Decision was written. Why did all these people go? It is true that I was forwarded drafts of the Judgment but not all of them. I received different versions about the same issues, and in the end it was impossible to know who gave the instructions to draft one way or the other, and which draft was the final one.

Q: So why do you think these legal officers who started the trial didn't stay till the end?

A: Maybe you should go and ask them if they are available. Maybe they will talk. I'm not the only one who found that the charges against the accused were not proved beyond reasonable doubt by the prosecution. From the drafts they prepared, it appeared that they didn't have the same opinion as the judges.

During the disciplinary procedure against me after my Dissenting Opinion, I was accused of giving counter instructions to the legal officers. The one who made the affirmation knew very well that it was a lie. These very hard working people are lawyers too. They knew everything. They had seen all the evidence produced by the parties. I don't think that they were convinced by the evidence produced by the prosecution.

Q: Do you agree, as Taylor's Appeal Defence has put it, that "deliberations after the close of proceedings are the most solemn and significant aspect of the decision-making process of a court

whereby the guilt or innocence of the accused is discussed in light of the relevant evidence and law, and the fate of the accused is finally decided in terms of both guilt and sentence. The importance of deliberations therefore is not only a requirement of law and procedure but is also a fundamental aspect of a fair trial"?

A: When the totality of the evidence is gathered, closing arguments presented, the judges declare solemnly the hearing closed and they retire in private for deliberations. It is the segment of the trial where judges meet in secrecy and confidentiality to weigh the evidence, and to determine guilt or innocence.

Deliberations are the crucial stage where judges must express their own convictions and positions, and explain why. That's where judges express opinions about the trial. The Appeal Defence is right to put it that way. It's the crucial stage, the heart of the trial. It is where you have the totality of the evidence reviewed, analysed, and weighed against the law and the facts.

Q: So you agree that a failure of deliberations constitutes a denial of the fair trial rights of an accused, and has implications about the conduct of judges?

A: Fairness is about a trial in all its different segments. Let me first come back to your earlier question when you asked about principles. It's like a triangle sustaining the whole system. It starts with the presumption of innocence. When the accused is not presumed innocent at the beginning, there is a problem because the trial is already biased. From this presumption of innocence, you move to find if guilt has been proved beyond reasonable doubt. It goes to the quality, quantity, and the pertinence of the evidence to establish guilt or innocence. It's like a scale. The evidence produced by the parties should reach this level of quasi-certainty leading the judge to be firmly convinced of the accused's guilt.

But failure of proving guilt beyond reasonable doubt, the only conclusion is to declare the accused not guilty. "*In Dubio Pro Reo*". These are the basic and intangible principles of any criminal trial. Now let people see for themselves from the Judgment if these principles were respected in this trial. When comments like "why is Issa Sesay coming to testify... why is this man coming to testify? To let the accused of the hook?", you may ask what the presumption of innocence means for those who said it. Assessing the general credibility of specific witnesses, why did the other judges choose only Issa Sesay and DCT 008 from the 21 witnesses called by the defence?

Right: Taylor's lead defence lawyer Courtenay Griffiths and (below) presiding judge Richard Lussick who allowed no comment after taking two hours to read his summary Judgment

Q: You mean the presumption of innocence until proven guilty was never observed in this trial?

A: The only important document is now the Judgment where the reasoning is supposed to be, so let everyone read and make their own conclusions. I stand by what I have said in the courtroom.

Q: In all your years as a judge, have you come across a case as big as Charles Taylor's where "no serious deliberations" took place before judgment was pronounced?

A: No. I have never participated in any case like this one. This is the first time. But before I joined this Court, I was presiding over the criminal chamber of the Court of Appeals of Dakar. We have specific dates for deliberations and a room for deliberations. And every single judge would say what he thought about any case submitted to the chamber.

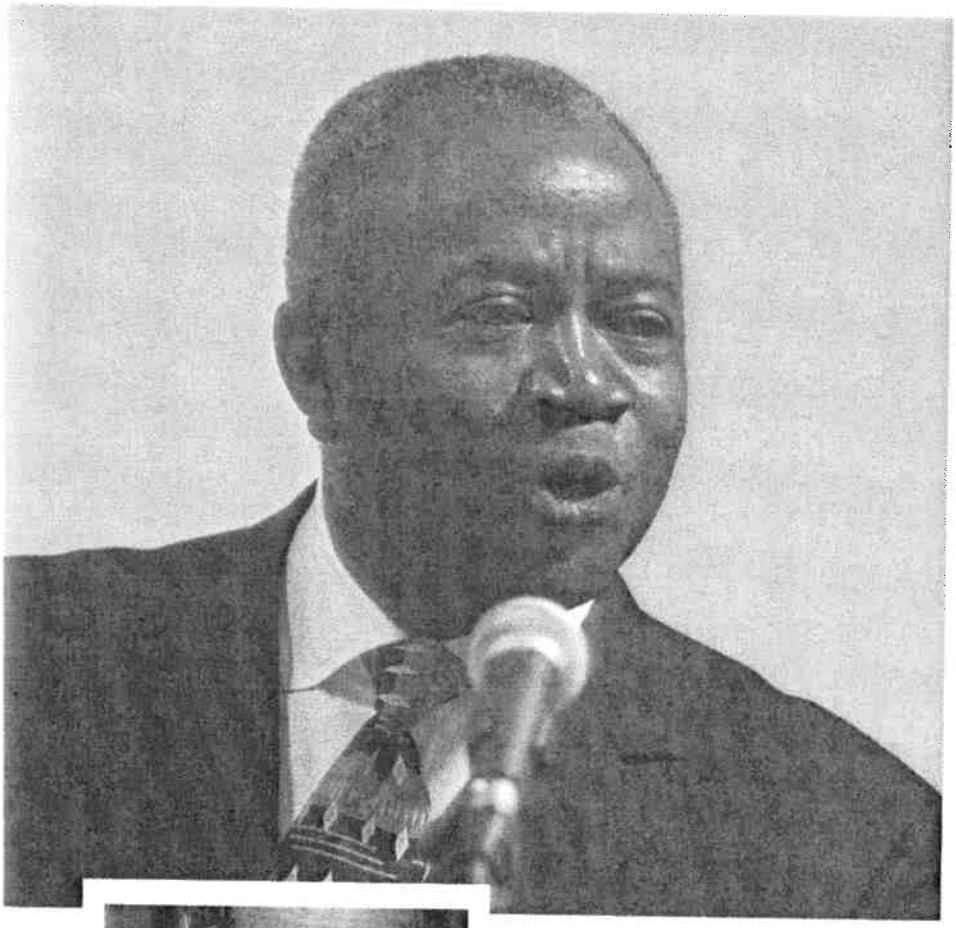
Q: And why do you think "no serious deliberations" took place in Taylor's case? What was the rationale?

A: I don't know. Those who were hiding to meet and hiding drafts of the Judgment should answer that question. At the pretrial stage, the first lawyer of the accused said very clearly that the critical question in the case was not so much whether the crimes in Sierra Leone were indeed committed, but whether Mr Taylor was criminally responsible for them.

And let me tell you, if you take from the evidence received in the trial the part on Liberia, you don't have much left. There were lots of confusions. It started from the initial stage – the indictment. There was a first indictment which was the original one. Then followed the first amended indictment. And finally, the third one, which is the second amended indictment. There is nothing wrong about that. But it gives an indication about the joint criminal enterprise mode of responsibility. The only question was just one – how to prove the link between Charles Taylor and the crimes committed in Sierra Leone, and not in Liberia. You asked me at the beginning why I entered my Dissenting Opinion. It's because I couldn't be indulgent in the face of the countless contradictions, lies deceptions and manipulations in this trial, and conclude that the accused was guilty beyond reasonable doubt of the crimes he was charged with. You cannot conclude that there was no doubt in your mind when you see all this money spent on witnesses, and part of the money you didn't know the origin of. I didn't know where it came from.

Q: Were the other judges aware of your Dissenting Opinion plans before you made them?

A: They knew from the beginning that I didn't agree with their own interpretations of the law, and their appreciation of the



"When you see it [the truth], you must say it. This is the oath you take as a judge, and you must do it without any fear."

evidence. I did not send to the other judges my written opinion. I have no obligation to do that. Why were they expecting me to show them my Dissenting Opinion?

What I said about the system is that international justice cannot cope and put up with the very low standard of proof applied in this case. International justice cannot be based on rumours. These are mass crimes. This is where we must have the highest standard of proof. It's about proving the guilt of the accused beyond reasonable doubt. But they didn't even reach the lowest standard of proof.

Most importantly, the accused came with very official papers, with witnesses who were at the frontline, witnesses who were main actors of this whole conflict. How can you compare these witnesses with those people who didn't get even close to the scene? The prosecution's case by itself is so insufficient, so unreliable. It's about people contradicting themselves, people denying what they had said in previous statements.

Q: As soon as you started making your Dissenting Opinion, the three judges walked out of the room, the court technicians turned off your microphone and brought down the curtains of the public gallery. Would you say that was a coincidence or a calculated move to silence you?

A: It was a very bad calculation. Their anxiety to leave the courtroom is an illustration of their plans to reduce me to silence, but the plan failed lamentably. If it had been a coincidence, there would have been some confusion in the courtroom but all went very smoothly. Except that the one who recorded what I said was not warned in advance.

The presiding judge read his summary Judgment for two hours and then declared adjournment without even giving anyone the possibility to say a word. Then in a concerted and very coordinated move, the other judges stood up and walked ostentatiously out of Court. They were still in the courtroom when I mentioned that I had something to say, and if they did not know what I was going to say as they claimed later, there would have been no reason for them to act the way they did.

What were they afraid of? They were afraid of something else and that's why they walked away. They asked the court officer to cut my microphone. They asked the technicians to pull down the curtains, to isolate me. They wanted to make a fool of me but they made fools of themselves. And what was meant to be my public humiliation became their lack of not just respect but also intelligence.

Q: What went on behind the scenes after your Dissenting Opinion? How did the other judges react?

A: Let's call this whole thing pure and simple wickedness. You see, I prefer to let them live with their own consciences. It was pure wickedness. My name was removed from the cover of the Judgment, and my dissenting statement was removed from the transcript. Their claim that I wanted to discredit the Court is just part of the same enterprise of annihilation. You may have seen the decision of the Appeals Chamber and the later Dissenting Opinion of Justice George Gelaga King who did not agree with the Appeals Chamber's disciplinary decision against me [in May 2012].

Let me read to you part of what Justice

King said in a "separate opinion" he wrote on 13 September 2012 about his Dissenting Opinion of May 2012. He said: "At the start of the deliberations *[of the disciplinary action against Justice Sow]* on the first day of the Emergency Plenary, ie 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. The Appeals Chamber judges of the Emergency Plenary were only appraised of this statement at the time it was read out by Justice Sebutinde, who was not the presiding judge of Trial Chamber II.

"*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. I *[Justice King]* 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 Jusrice 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."

Yes, it was a perversion of justice. I have a lot of respect and admiration for Justice George Gelaga King. He is a man of principle and a great judge. The minutes of the first day of the disciplinary meeting are nowhere to be seen, they don't exist anymore. It is easy to hide behind confidentiality or secrecy to slander me, to insult me. It's about my integrity. It's about my honour, and I shall respond. When the system is not functioning we must say it. It is the duty of judges to do so. If the judges don't say it, who will say it? If judges don't tell the truth, who will tell the truth?

Right: The prosecution team of (l-r) Brenda Hollis, Nicholas Koumjian and Mohammed Bangura. Their case by itself was "so insufficient, so unreliable", claims Justice Sow

Q: If you had a vote as a judge, do you think your action could have at least changed the outcome of the trial, or was it merely to discredit the Court as alleged by your accusers?

A: I would never have accepted this appointment and I would not have advocated, as technical advisor to the minister of justice, then the minister of foreign affairs, of Senegal for the creation of the International Court of Justice if I did not believe in international justice. My sole interest is still to protect the fundamental principles of justice.

It was important to have the record rectified in the Taylor trial. It had nothing to do with the image of the Court or the system, but only justice and principles. After all, this was not the first time a judge was making observations about the law or the judicial system. The outcome of the Taylor trial would have been the same because there were already two judges who had decided that the accused was guilty. I would have remained the minority opinion.

Q: There is a feeling in some quarters, especially in Liberia, that Taylor's arrest, indictment and conviction were the work of powerful Western governments. Have you felt there was any conspiracy theory in the whole affair?

A: You see, judges don't get into these considerations. Judges are bound by the evidence. People can say whatever they want. If the guilt of the accused was proved beyond reasonable doubt, I would have been the first one to say it. I did not see the proof of guilt. I am not getting into this conspiracy theory issue because I have no proof of it.

Q: But did the Bench, including you, ever discuss the possibility of the Court being used by powerful Western governments to settle a score with Taylor?

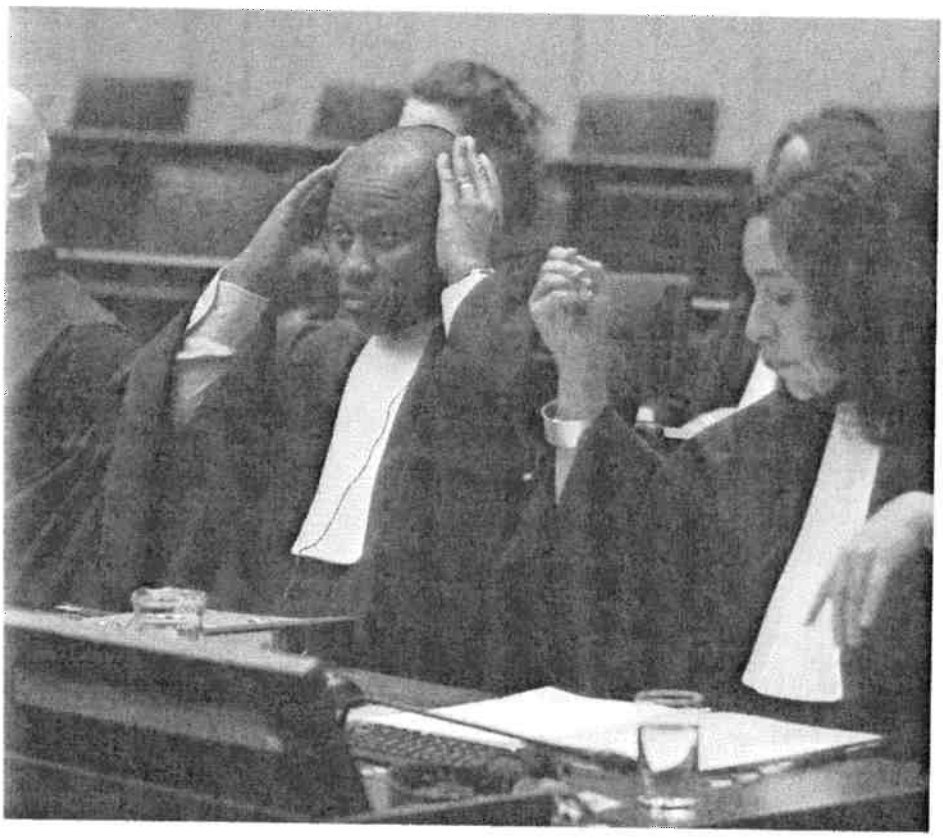
A: I wouldn't have participated in this kind of discussions. If they took place, I wasn't there. I don't know.

Q: If you were one of the three main judges with a right to vote at the deliberations stage, what would you have done differently?

A: I have said it earlier. It's about the evidence. You cannot have such a trial and base your decision on the questionable evidence that we have received in this trial. Ask around, ask those who have read the 2,500-page Judgment. This is a record. This is unprecedented. We have two thousand five hundred pages just to show that the accused was only *aiding and abetting*, and *planning* the crimes.

Let people read the parts of the Decision on the criminal responsibility of the accused because the judges have expressed their opinions in their Decision. People should concentrate on the Decision and read it and see for themselves if it is compatible with the evidence they heard in court. Let's take for instance the Naomi Campbell issue which was the most sensational part of Taylor's trial. Everybody heard her testimony. Who can conclude that the accused gave diamonds to Naomi Campbell? The diamonds were still available to be tested for the determination of their origin.

Q: As far as you are concerned, should Taylor have been convicted of a much



"You cannot have such a trial and base your decision on the questionable evidence that we have received in this trial."

lesser crime and sentenced to a much lesser prison term, or should he have been freed?

A: The standard of proof is proof beyond reasonable doubt. It's a very high level of proof. This is the essence of criminal justice. As a judge you must be firmly convinced that what you are doing is the right thing. A reasonable person reading the Judgment should also be convinced that the accused is guilty. You must also convince the accused that he is guilty. Even the accused must be convinced that he is guilty of the crimes. I am unable to agree with the reasoning, the rationale, and the standard of proof. Even in domestic jurisdictions, such a standard of proof is unacceptable.

Q: So what you are saying is that Taylor should have walked out a free man?

A: He should have been a free man at this stage *[of the trial, pending appeal]* because I haven't seen the proof of guilt of the accused. This is what I have said. I'm a professional judge and I'm bound by the evidence. I have serious doubts about the evidence. The prosecution case is altogether very unsatisfactory, inherently disharmonious, and filled with too many confusions and inaccuracies; and this, to my opinion, is fatal to the prosecution's case. If you don't see the truth, at least you must see the lies. I have seen too many lies, too many deceptions, and I haven't seen any proof of guilt of this accused.

Q: From what you saw of the Special Court of Sierra Leone during the five years you sat on the bench, are the ad hoc courts of the international criminal system worth the money spent on them – in terms of dispensing proper justice?

A: Good justice is worth any sacrifice. People have to read the Judgment of the Taylor case to know how this matter was settled by the other judges. We know that money can be spent on witnesses but for acceptable reasons. We understand protection of witnesses. We understand that justice is about means, money. But it was not only about the role money played in this trial, it was not only money because we also saw offers of grace, we saw witnesses being taken from prison to come and testify, people being promised to be relocated. We have seen all that. Were the witnesses testifying truthfully or were they influenced by the money?

I saw, in the evidence presented, too many contradictions and lies, and many witnesses denied what was attributed to them. Were they influenced by the payments they received?

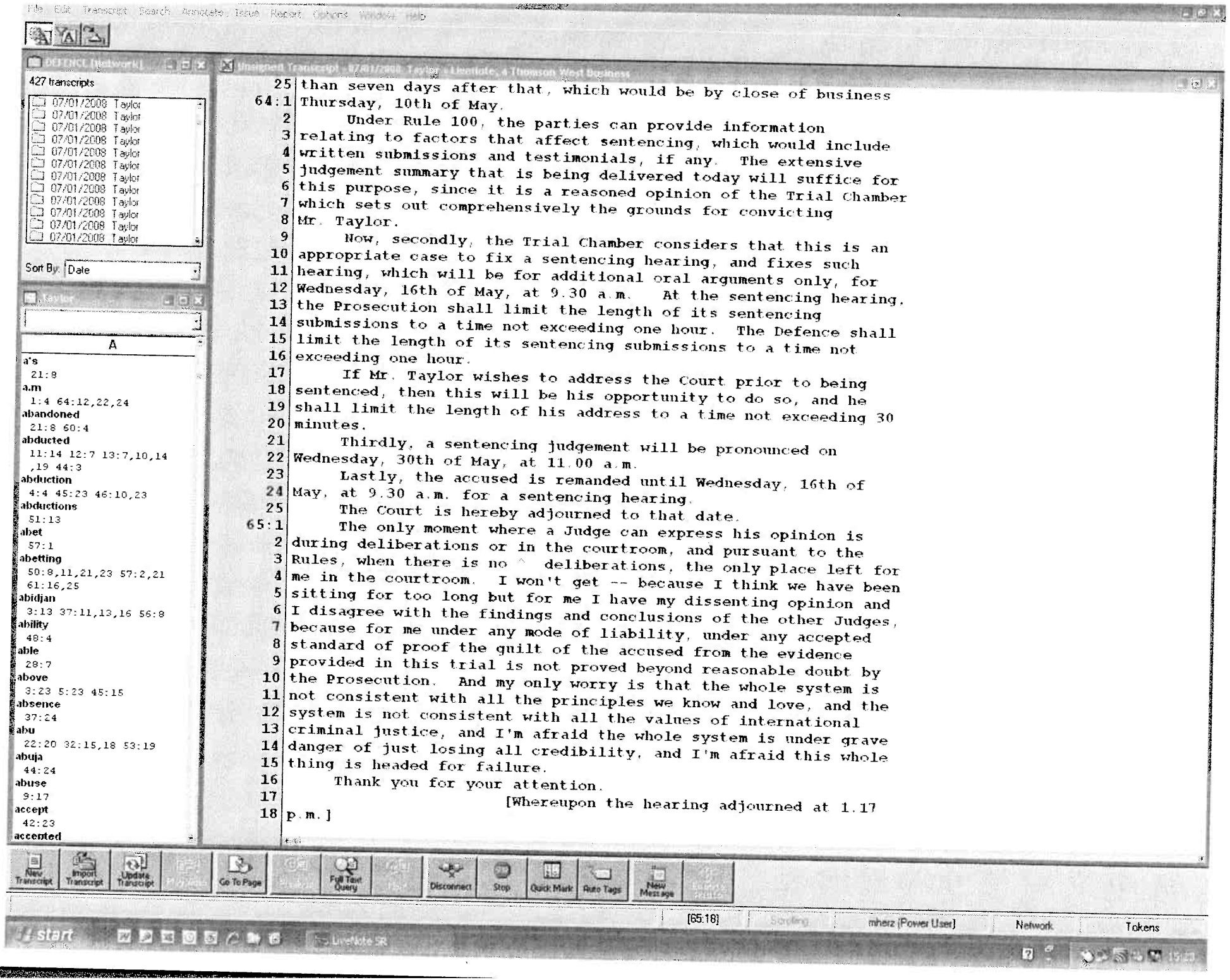
The defence brought up the issue of the origin of some of the money spent in this trial, and produced documents to show that in many instances there were no explanations for the money spent on witnesses. It may bring at least suspicion or doubt. And when you see such things, you must ask yourself what role did money play in this trial? And this is a very critical issue in this trial.

We do have a management committee that can see how and when the money came in, because I think it was a problem in this trial. How did we get the money from donors and from other countries just to finish the trial? As a judge, I am not concerned about this issue. I'm concerned with the evidence, what is the evidence, what is the truth? And when you see it, you must say it. This is the oath you take as a judge, and you must do it without any fear.

Before the trial started, people already had their own opinions about it. During the trial, people had their own opinions. After the trial, people still have their own opinions. And people will always have their own opinions on the law and on the system, and also on the innocence and the guilt of the accused. As for a judge who attended this trial for five good years, and who worked harder than anyone else – I worked harder than anybody else because I took it very seriously – for me, it was a very important trial because I was the only judge from the West African sub-region, and as such, I couldn't come back home, face my people, and tell them lies about what I didn't see, or cannot justify. ■NA

Public Annex C

Image of LiveNote transcript of 26 April 2012 containing the statement made by Justice El Hadji Malick Sow



than seven days after that, which would be by close of business Thursday, 10th of May.

Under Rule 100, the parties can provide information relating to factors that affect sentencing, which would include written submissions and testimonials, if any. The extensive judgement summary that is being delivered today will suffice for this purpose, since it is a reasoned opinion of the Trial Chamber which sets out comprehensively the grounds for convicting Mr. Taylor.

Now, secondly, the Trial Chamber considers that this is an appropriate case to fix a sentencing hearing, and fixes such hearing, which will be for additional oral arguments only, for Wednesday, 16th of May, at 9.30 a.m. At the sentencing hearing, the Prosecution shall limit the length of its sentencing submissions to a time not exceeding one hour. The Defence shall limit the length of its sentencing submissions to a time not exceeding one hour.

If Mr. Taylor wishes to address the Court prior to being sentenced, then this will be his opportunity to do so, and he shall limit the length of his address to a time not exceeding 30 minutes.

Thirdly, a sentencing judgement will be pronounced on Wednesday, 30th of May, at 11.00 a.m.

Lastly, the accused is remanded until Wednesday, 16th of May, at 9.30 a.m. for a sentencing hearing.

The Court is hereby adjourned to that date.

The only moment where a Judge can express his opinion is during deliberations or in the courtroom, and pursuant to the Rules, when there is no ^ deliberations, the only place left for me in the courtroom. I won't get -- because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.

Thank you for your attention.

[Whereupon the hearing adjourned at 1.17 p.m.]

Public Annex D

Declaration of Michael Herz

DECLARATION OF MICHAEL HERZ, LEGAL ASSISTANT
DEFENCE FOR CHARLES TAYLOR

1. I, **Michael Herz**, am a Legal Assistant on the Defence for Charles Taylor (the "Defence") in the case of *Prosecutor v. Taylor*, SCSL-03-01 before the Special Court for Sierra Leone (the "Special Court"). I have worked for the Defence since November 2009.

2. On 26 April 2012, I was in the courtroom of the Special Court in Leidschendam, the Netherlands, for the oral delivery of the Judgement by Trial Chamber II in the Taylor case (the "hearing");

3. Throughout the hearing, I was logged onto the Thomson West LiveNote ("LiveNote") transcript which recorded what was said during the proceedings as transcribed by the court stenographer;

4. At approximately 13:15, Justice El Hadji Malick Sow began addressing the courtroom, at which point the other Judges of Trial Chamber II stood up and left. I observed that the court stenographer continued to transcribe as Justice Sow was speaking, as a result of which Justice Sow's statement to the courtroom ("Justice Sow's statement") was recorded on the LiveNote transcript;

5. After the post-hearing press conference, on the advice of a colleague, I returned to the courtroom, logged back onto LiveNote and took a screenshot of the LiveNote transcript showing Justice Sow's statement. Justice Sow's statement as recorded on LiveNote was unchanged since it had been transmitted earlier. I saved the screenshot as an image in a .jpeg format ("image") and then e-mailed this image to my colleagues on the Defence[1];

6. I confirm that the print-out of this image was attached as Annex A to *Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges*[2] and as Public Annex C to *Appellant's Submissions of Charles*

[1] Appended to this Declaration.
[2] *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.

Ghankay Taylor[3]. I also confirm that the print-out of this image is attached as Annex C to this filing;

7. I am over 18 years of age, competent in all respects to make this declaration, and do so freely and voluntarily and on the basis of my personal knowledge.

Dated this 30th day of November 2012.

Signed: Michael Herz
Legal Assistant
Defence for Charles Taylor

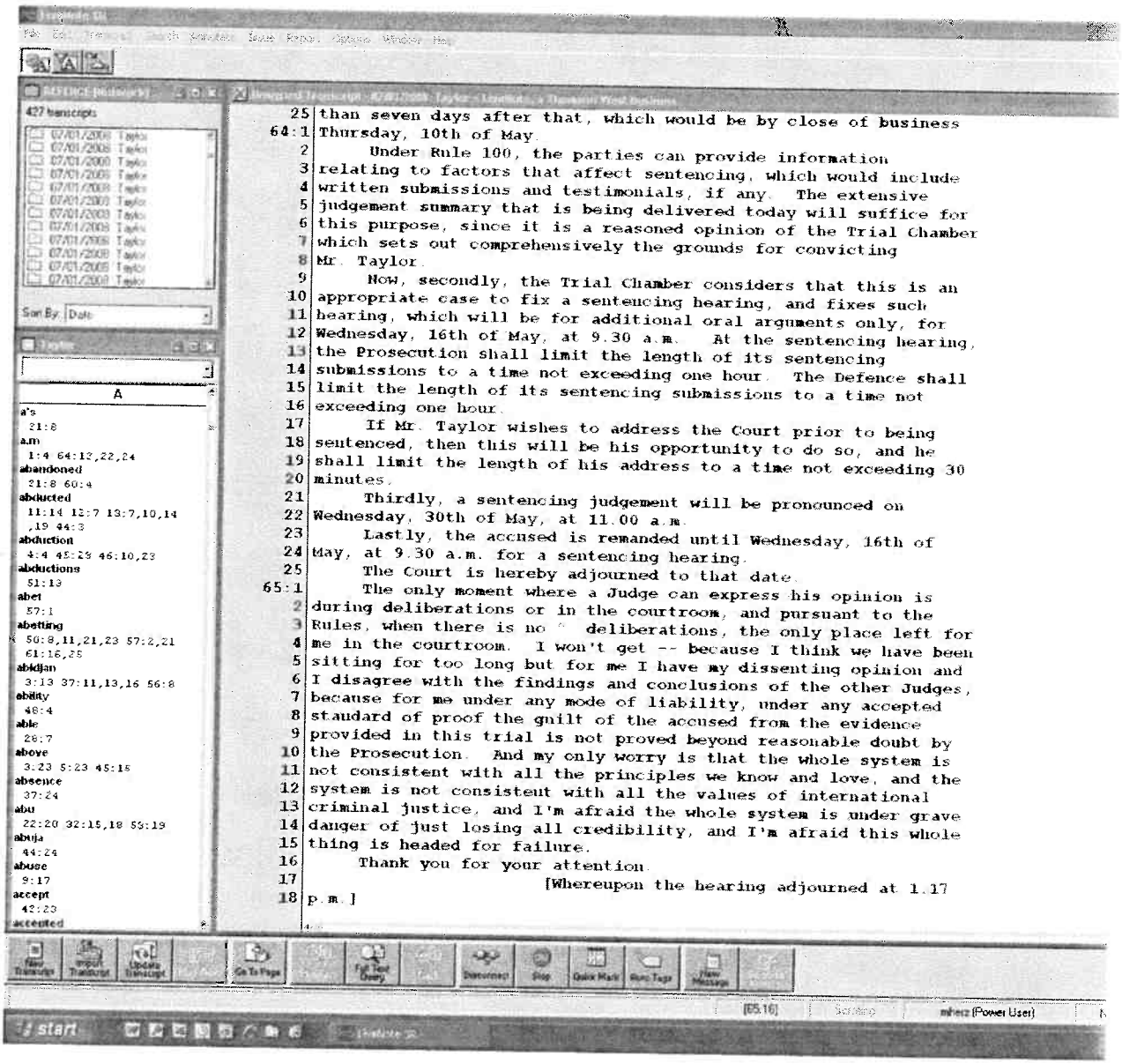
[3] *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012.

Morris Anyah

From: "Michael Herz" <[redacted]>
Date: Thursday, April 26, 2012 2:44 PM
To: "Logan Hambrick" <[redacted]>; "Terry Munyard" <[redacted]>; "Courtenay Griffiths" <[redacted]>; "Morris Anyah" <[redacted]>; "Silas Chekera" <[redacted]>; "Claire Carlton-Hanciles" <[redacted]>; "James Kamara" <[redacted]>; "A Popov" <[redacted]>; "Szilvia Csevár" <[redacted]>; "Habibatou Gani" <[redacted]>
Attach: Justice Sow's Dissenting Opinion.JPG, Justice Sow Dissenting Opinion.doc
Subject: Justice Sow's Dissenting Opinion - LiveNote

[redacted]

Michael



than seven days after that, which would be by close of business Thursday, 10th of May.

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Thirdly, a sentencing judgement will be pronounced on Wednesday, 30th of May, at 11.00 a.m.

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The Court is hereby adjourned to that date.

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Thank you for your attention.

[Whereupon the hearing adjourned at 1.17 p.m.]

Public Annex E

Copy of video footage of the last 11 minutes 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section

Public Annex G

Biographical profile of Judge Julia Sebutinde, as taken from ICJ website

The Court

Current Members

Judge Julia Sebutinde

(Member of the Court since 6 February 2012)

Download high resolution image

Born in Entebbe, Uganda, on 28 February 1954.

Doctorate of Laws, *honoris causa*, University of Edinburgh, U.K., for distinguished service in the field of international justice and human rights (2009); Master of Laws Degree with Distinction (LL.M.), University of Edinburgh, U.K. (1990); Bachelor of Laws Degree (LL.B.) Makerere University, Uganda (1977); Post-Graduate Diploma in Legal Practice, Law Development Centre, Uganda (1978); Certificate in Legislative Drafting, University of Colombo, Sri Lanka in conjunction with the Commonwealth Fund for Technical Co operation (CFTC) (1983); Certificate in Advanced Leadership Studies, Haggai Leadership Institute, Singapore (1998); Certificate in Alternative Dispute Resolution (ADR) Skills, National Judicial College, University of Nevada, Reno, USA (1997).

Previous Judicial and Legal Positions: Judge of the Special Court for Sierra Leone (SCSL) (2005 2011); Presiding Judge of Trial Chamber II of the SCSL (2007 2008, 2010-¬2011), handling several high profile war crime trials including the *Prosecutor v. Charles Ghankay Taylor*; Judge of the High Court of Uganda with original and appellate jurisdiction in civil and criminal cases (1996-2011); Chairperson, Judicial Commission of Inquiry into Corruption in the Uganda Police Force (1999 2000); Chairperson, Judicial Commission of Inquiry into Mismanagement in the Uganda People's Defence Forces (2001); Chairperson, Judicial Commission of Inquiry into Corruption in the Uganda Revenue Authority (URA) (2002); Chairperson, Technology Planning Committee of the Uganda Judiciary (1998-2002); Legislative Consultant seconded by the Commonwealth Secretariat to the Republic of Namibia responsible for amendment and replacement of the country's apartheid laws and training of Namibian legislative drafters (1991 1996); Principal State Attorney and Principal Parliamentary Counsel, Ministry of Justice, Uganda (1978 1990) and Legislative Consultant on the multilateral committees responsible for drafting and amendment of the treaties establishing the Common Market for Eastern and Southern Africa (COMESA) and the Intergovernmental Authority on Drought and Development (IGADD) (1980 1990); Member of the Uganda Bar and Advocate of the Courts of Judicature of Uganda since 1979.

Previous Academic Positions: Trainer and resource person on the International Civilian Peace keeping and Peace building Training Programme (IPT) of the Austrian Study Centre for Peace and Conflict Resolution, Stadtschlaining, Austria (2008-2011); Member of Advisory Board of the Research Centre on International Criminal Law and Justice, University of Copenhagen (2011); Lecturer/trainer at the International Law Institute of Uganda (ILI) under the auspices of the State University of New York (SUNY) (1997-2004); Trainer and resource person for the Jurisprudence of Equality Programme for East Africa in conjunction with the International Association of Women Judges (IAWJ), responsible for training of East African judges, magistrates and paralegals in the implementation of regional and international human rights instruments (1997 2004); Trainer and resource person at the Post-Graduate Bar Course, Law Development Centre of Uganda (1980 1990).

Other Positions/Honours: Chancellor of the International Health Sciences University (IHSU), Uganda (2008-2011); Member, Commonwealth Association of Legislative Drafters (1980-2011); Goodwill Ambassador for the United Nations Population Fund (UNFPA) (1996 2011); Member, National Association of Women Judges Uganda (NAWJU) (1996-2011); Member, International Association of Women Judges (IAWJ) (1996-2011); Member, Advocates International (AI) (1980-2011); Represented Uganda Women at the opening of the United Nations Decade for Women in Addis Ababa, Ethiopia (1975); Chairperson, Board of Directors of the Acid Survivors Foundation Uganda (2000-2004); Recipient of the "Good Samaritan Award" at the Congress of Advocates International (2004); the Lifetime Achievement Award of the Uganda British Alumni Association (UBAA) (2006) and a Special Award of the Uganda Law Society in recognition of her "courageous and exemplary contribution to the promotion of justice in Uganda" (2001); Honouree of the American Biographical Institute in their seventh edition of "Who's Who of the Professionals 2000"; Named one of "Top 100 Africans of the Year" in the *Africa Almanac 2000*.

Author of various papers and lectures including: "International Criminal Justice: Balancing Competing Interests: The Challenges Facing Defence Counsel and Counsel for Victims and Witnesses", Keynote Address at the Eighth ICC Seminar of Counsel, The Hague (May 2010); "Security Sector Reform: Transitional Justice Instruments: A Chance for Women", Stadtschlaining, Austria (November 2010); "Celebrating Ten Years of the Rome Statute: Does Uganda Have Reason to Join the Party?", Abu Mayanja Memorial Lecture, Kampala, Uganda (September 2008); "The Importance of Outreach When Trials for War Crimes and Crimes against Humanity Are Conducted Away from the Country Where the Crimes Were Committed", Institute for War and Peace Reporting, Hague chapter (April 2008); "Making Violence against Women Accountable: Case Study of Sierra Leone and Uganda", Stadtschlaining, Austria (October 2008); "Advancing the Rule of Law in 21st Century Africa", lecture given at the Fourth Global Convocation of Advocates International in Virginia, USA (November 2004); "Worth Your Salt: Combating Corruption", lecture given at the South African Christian Leaders Conference in Pretoria, South Africa (July 2003).

Public Annex H

Biographical profile of Judge Bernardo Sepúlveda-Amor, as taken from ICJ website

The Court

Current Members

Vice-President Bernardo Sepúlveda-Amor (Mexico)

Vice-President Bernardo Sepúlveda-Amor

(Member of the Court since 6 February 2006 ; Vice-President of the Court since 6 February 2012)

Download high resolution image

Born in Mexico City on 14 December 1941. Law degree, National University of Mexico (1964) *(magna cum laude)*; LL.M. (Cantab.) (1966); Diploma in International Law (Cantab.) (1965); Honorary Fellow of Queens' College, University of Cambridge (1990); Honorary Doctorate from the University of San Diego (1982) and from the University of Leningrad (now St. Petersburg) (1987); Rockefeller Foundation Fellowship (1964-1966).

Professor of International Law and International Organizations at El Colegio de Mexico since 1967, where he was also Associate Research Fellow (1993-2006). Lecturer in a number of academic institutions: Faculty of Political and Social Sciences (National University of Mexico); Institute of Legal Research (National University of Mexico); Centro de Investigaciónes y Docencia Economica (CIDE); Instituto Tecnológico Autónomo de Mexico (ITAM); Instituto Matías Romero de Estudos Diplomáticos (Mexican Foreign Office); Hague Academy of International Law (Regional Programme, Mexico City, 2002); Institute of European Integration Studies (El Colegio de Mexico, 1994-1996).

Deputy Director for Legal Affairs, Secretary of the Presidency (1968-1970); Director of the Foreign Investment Program (1971-1975) and then Director General for International Affairs (1976-1980) at the Secretary of the Treasury. Principal Adviser on International Affairs to the Secretary of the Budget (1981).

Ambassador of Mexico to the United States of America (1982).

Secretary of Foreign Relations of Mexico (1982-1988).

Ambassador of Mexico to the United Kingdom and, concurrently, to Ireland (1989-1993).

President of the Mexican delegations to the General Assembly of the United Nations and to the General Assembly of the Organization of American States, as well as of other international regional and global organizations (1982-1988).

Co-Chairman of the Mexico-United States Bi-national Commission, together with the United States Secretary of State (1982-1988).

As Foreign Secretary, he was responsible for the Mexican participation in the Central American peace process that took place from 1982 to 1988. For those purposes and together with Venezuela, Colombia and Panama, he established the Contadora Group as a diplomatic instrument to bring peace and stability to the area.

Together with the Foreign Ministers of Argentina, Brazil, Colombia, Panama, Peru, Uruguay and Venezuela, he took part in the creation of the Group of Eight, now the Rio Group, an institution devoted to promoting Latin American co-operation; under its auspices, presidential summits have taken place since 1987.

Member of a number of Mexican delegations to United Nations conferences, where he attended, among others, the United Nations Conference on the Law of the Sea, the Vienna Conference on the Law of Treaties and several United Nations conferences on disarmament. He was a member of the Mexican delegation to the 1981 Cancun Meeting of Heads of State and Government.

In 1980 he became President of the United Nations Commission on Transnational Corporations; elected Rapporteur of the Inter-governmental Working Group on a Code of Conduct for Transnational Corporations (1978-1980); he was the Mexican representative to the Commission on Transnational Corporations (1977-1981).

Member of the Mexican delegations to the annual meetings of the International Monetary Fund, the World Bank and the Inter-American Development Bank, as well as the Group of 24 (1976-1980).

Member of the United Nations International Law Commission (1996-2005).

General Counsel of Grupo ICA, the largest construction company in Mexico (1997-2005).

Judge *ad hoc* of the International Court of Justice in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*.

Member of the Board of Trustees of the Permanent Court of Arbitration Financial Assistance Fund (2006-).

Member of the Panel of Arbitrators of the International Center for Dispute Resolution (ICDR), the international division of the American Arbitration Association. Member of the Institute for Transnational Arbitration (ITA), a division of the Center for American and International Law. Member of the Commission of Arbitration of the Mexican Chamber of Commerce. President of an arbitral tribunal in an ICC case and in an ICSID case.

President of the Latin American Society of International Law, elected in February 2010.

Member of the Executive Council of the American Society of International Law (1974-1975). President of the Mexican Branch of the International Law Association (ILA) (2000-2005).

Member of the Executive Council of Transparencia Mexicana, a non-governmental organization linked to International Transparency.

Member of the Executive Board of the Mexican Council of Foreign Relations.

Former member of the Editorial Board of *Foro Internacional*, the journal of international affairs of El Colegio de Mexico. He has written a

considerable number of books and articles on the United Nations, international law, foreign policy, and international economic issues.

In 1984, he received from King Juan Carlos of Spain the Principe de Asturias Prize in the field of international co-operation. In 1985, Unesco awarded him the Simón Bolivar Prize. He is the recipient of a number of orders, decorations and medals awarded by foreign governments, which include, among others, the Knights Grand Cross of the Order of Saint Michael and Saint George; the Grand Cross, Order of Isabel la Católica; the Grand Cross, Order of General San Martin; Ribbon, Order of Kwang-Wha; the Grand Cross, Order of Cristo; Order of the Republic of Egypt, First Class; the Grand Cross of the Order of Cruzeiro do Sul; the Grand Cordon, Order of the Rising Sun; Grand Officer, Ordre de la Légion d'Honneur.

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(For the text of the Opinions, see www.icj-cij.org)

— Separate Opinion of Judge *ad hoc* Bernardo Sepúlveda-Amor in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004.*

— Dissenting Opinion of Judge Bernardo Sepúlveda-Amor in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America),* Judgment of 19 January 2009.

— Separate Opinion of Judge Bernardo Sepúlveda-Amor in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua),* Judgment of 13 July 2009.

Public Annex I

Declaration of Alexandra Popov

DECLARATION OF ALEXANDRA POPOV, LEGAL ASSISTANT
DEFENCE FOR CHARLES TAYLOR

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1. I, Alexandra Popov, am a Legal Assistant on the Defence for Charles Taylor (the "Defence") in the case of *Prosecutor v. Taylor,* SCSL-03-01 before the Special Court of Sierra Leone (the "Special Court"). I have worked for the Defence since September 2010.

2. I was invited to and attended (with several of my colleagues) the farewell reception (or send-off) for the Judges of Trial Chamber II of the Special Court, held on the evening of 31 May 2012 at the Hampshire Greenpark Hotel in Leidschendam;

3. In this regard, Figure 1, appended to this declaration, is a copy of the email invitation to this event shown to me by a colleague at the time;

4. Figure 2 is a photograph taken during the send-off, depicting, in the foreground and from left to right, Justice Julia Sebutinde, Justice Bernardo Sepúlveda-Amor (Vice-President of the International Court of Justice), Justice Renate Winter, and Justice Jon M. Kamanda, then President of the Special Court. I am in the background on the right-hand side in this photograph (Figure 2);

5. I heard several officials of the Registry, the Prosecution and the Defence, and all three Trial Chamber II judges speak during the reception, using a microphone;

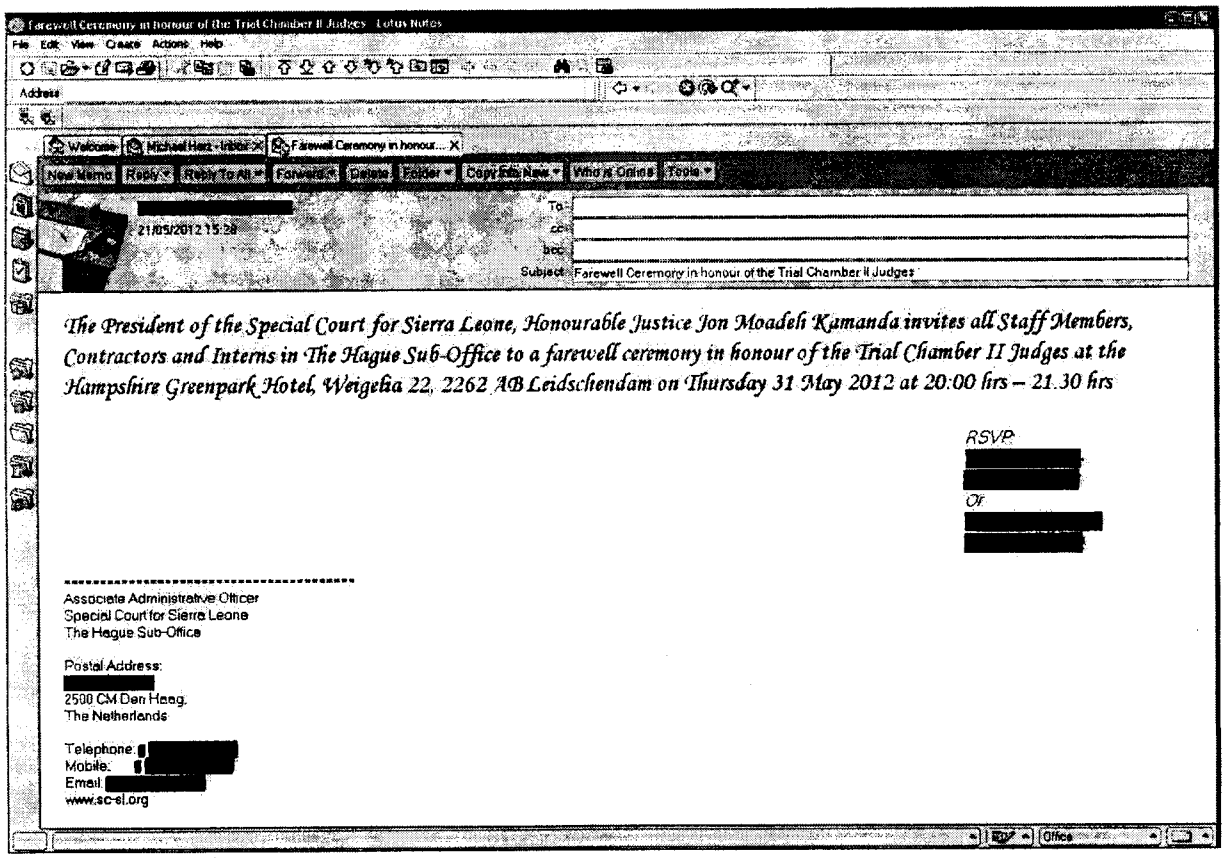
6. During her speech, Justice Julia Sebutinde thanked the previous speakers for the congratulations extended to her for her new appointment as Judge at the International Court of Justice (ICJ). She then spoke words to the effect that, it was regrettable that Vice-President Sepúlveda-Amor had already left the reception, as she wished to express her thanks, in his presence, for the exception or exemption made by the ICJ on her account, in order to allow her to continue to sit as a Judge at the Special Court up until the end of the Taylor case, while being a member of the ICJ;

7. Figure 3 is a photograph taken during Justice Julia Sebutinde's speech that evening; and

8. I am over 18 years of age, competent in all respects to make this declaration, and do so freely and voluntarily and on the basis of my personal knowledge.

Dated this 30th day of November 2012.

Signed: Alexandra Popov
Legal Assistant
Defence for Charles Taylor


Farewell Ceremony in honour of the Trial Chamber II Judges - Lotus Notes
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To:
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The President of the Special Court for Sierra Leone, Honourable Justice Jon Moadeli Kamanda invites all Staff Members, Contractors and Interns in The Hague Sub-Office to a farewell ceremony in honour of the Trial Chamber II Judges at the Hampshire Greenpark Hotel, Weigelia 22, 2262 AB Leidschendam on Thursday 31 May 2012 at 20:00 hrs – 21.30 hrs
RSVP
[redacted]
Or
[redacted]
Associate Administrative Officer
Special Court for Sierra Leone
The Hague Sub-Office
Postal Address:
[redacted]
2500 CM Den Haag,
The Netherlands
Telephone: [redacted]
Mobile: [redacted]
Email: [redacted]
www.sc-sl.org
Office

Figure 1

Figure 2.

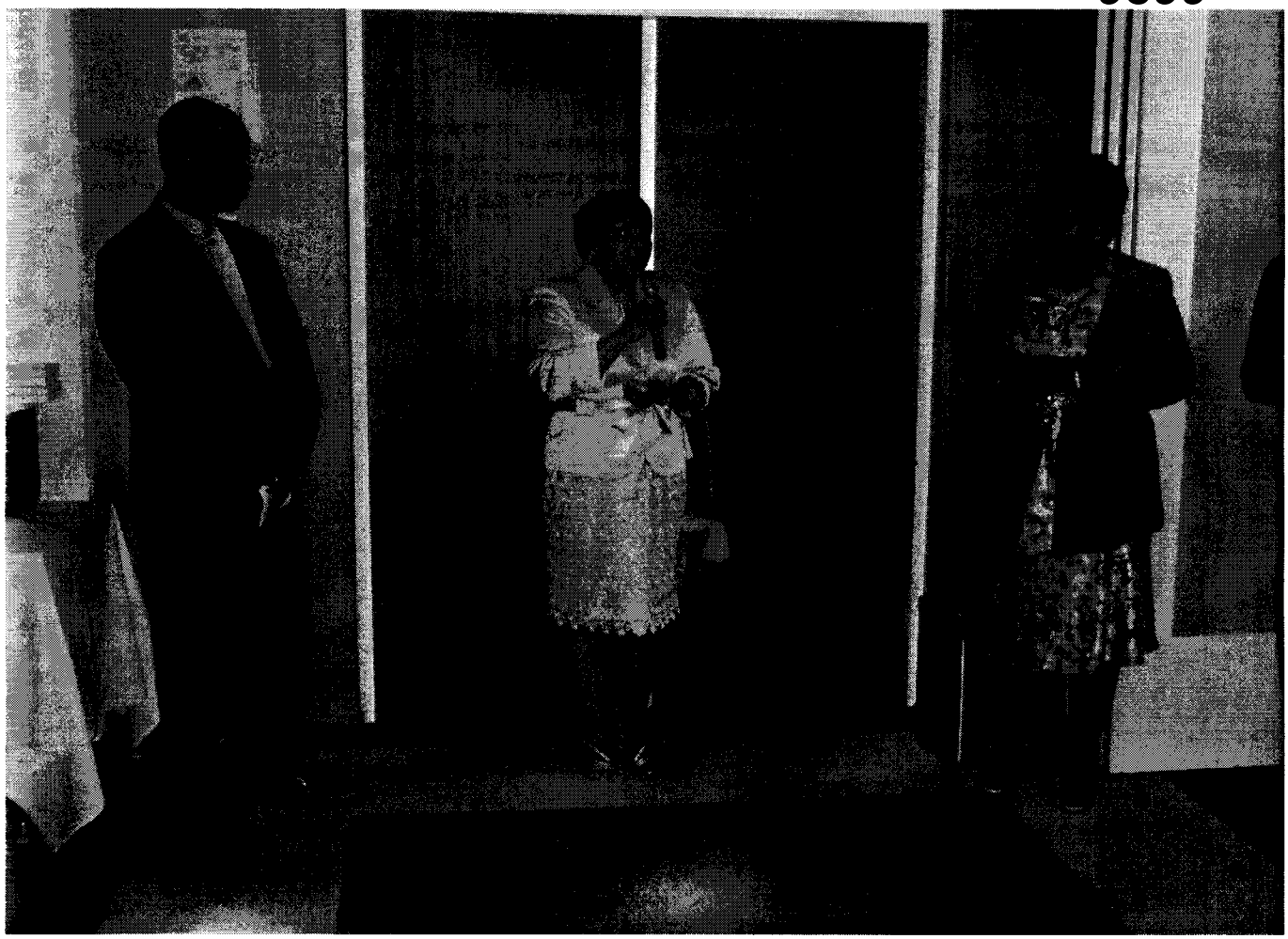

Figure 3.

Public Annex J

Letter to the Under-Secretary-General for Legal Affairs, dated 26 November 2012

DEFENCE FOR CHARLES TAYLOR
SPECIAL COURT FOR SIERRA LEONE
The Hague Sub-Office
Dokter van der Stamstraat 1, 2265BC Leidschendam, The Netherlands
Telephone: +31 70 [redacted], +31 70 [redacted]; Facsimile: +31 70 [redacted]
E-mail: Morris Anyah (Lead Appeals Counsel): [redacted]
Szilvia Csevár (Case Manager): [redacted]

DATE: 26 November 2012

TO: Her Excellency Patricia O'Brien
Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations
Office of Legal Affairs,
United Nations Headquarters
New York, New York 10017

BY E-MAIL TO: [redacted]

CC: H. E. Ban Ki-moon, Secretary-General United Nations (e-mail: [redacted])
H. E. D. Stephen Mathias, Assistant Secretary-General for Legal Affairs (e-mail: [redacted])
H. E. El Hadji Malick Sow, Juge, la *Cour d'Appel de Dakar*, République du Sénégal; former Judge, the Special Court for Sierra Leone (e-mail: [redacted])
Ms. Michèle Doré, Secretary to the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations (e-mail: [redacted])

FROM: Mr. Morris A. Anyah, Lead Counsel for Charles Taylor

RE: Request for the Waiver of Immunity of Judge El Hadji Malick Sow for purposes of giving Testimony in the Appeal of Charles Taylor before the Special Court for Sierra Leone (The Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-A)

Dear Madam,

I refer to my previous correspondence regarding the above-referenced matter, dated 19 November 2012.

I am writing in order to update you regarding recent developments which are relevant to your consideration of the Defence's request for a waiver of immunity of Judge El Hadji Malick Sow for purposes of giving testimony in the appeal of former Liberian president, Charles Taylor, before the Special Court for Sierra Leone (SCSL).

An interview conducted with Judge Sow was published in the New African magazine, December 2012 issue, titled *Charles Taylor Should Have Walked Free* (Justice Sow's Interview or Interview). A copy of the interview is attached to this letter.

In the Interview, Justice Sow directly confirms and further explains the public statements he made in the SCSL court room on 26 April 2012 in open session, after the delivery of the Trial Judgement. As such, and in our view, he confirms the basis of two grounds of appeal or errors in Mr. Taylor's appeal proceedings before the SCSL.[1]

[1] Grounds of Appeal 36 and 37 in *Prosecutor v. Taylor*, SCSL-03-01-A-1331, Corrigendum to Appellant's Submissions of Charles Ghankay Taylor, 8 October 2012.

Regarding the first error that the Trial Chamber failed to deliberate, pursuant to the Rules of the SCSL, the statements of Justice Sow confirm this in significant ways, such as "[i]t is when we reached the most important part of the deliberations -which was the criminal responsibly of the accused- that the other judges started to hold meetings, but not in the deliberation rooms, but in their offices. And I wasn't called to those meetings."[2] This is in direct contravention of the legal requirement that an Alternate Judge must be present during deliberations,[3] and a breach of the fundamental fair trial rights of Mr. Taylor.

The second error, alleging that the process was conducted in a manner inconsistent with fundamental principles and values of international criminal law, is also confirmed by statements made by Justice Sow in the Interview, such as, "The fundamental principles of International Criminal Law are contained in the statutes of the different courts and they are the same: All start with the presumption of innocence. Also the only acceptable standard of proof is proof beyond reasonable doubt. The third principle is a general principle of criminal law as enunciated in the Latin expression "In *Dubio Pro Reo* (doubt will benefit the accused). *These principles were trampled underfoot in the Charles Taylor trial.*"[4]

Accordingly, the contents of Justice Sow's Interview is direct, relevant, and compelling evidence which is not available from other sources on the appellate issue of whether Charles Taylor received a fair trial in accordance with the fundamental principles of international law, international criminal justice and the applicable law of the SCSL. Indeed, an eminent scholar of international humanitarian and criminal law, Professor William A. Schabas, wrote on 23 November 2012 regarding Justice Sow's interview that, "Nothing comparable has ever appeared in the history of international criminal justice."[5]

In our view, it is noteworthy that Justice Sow's Interview does not address the substance of deliberations which are considered private or secret under the Rules of the SCSL.[6] As such, Justice Sow has not undermined any obligation of confidentiality or secrecy. To the extent that any of the statements made by Justice Sow in the Interview may be considered confidential in any other respect, they are now a matter of public record[7] and therefore confidentiality can no longer be invoked to prevent their disclosure during public testimony.

However, and as stated previously, the proposed testimony of the Judge could nonetheless be made subject to the condition that if Justice Sow were asked any question, the answering of which would prejudice the interests of the UN, he be given permission to answer without disclosing prejudicial information and in a manner which does not undermine the fundamental interests underlying the privileges and immunities granted.[8] Furthermore, the Defence reiterates that it does not intend to

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[2] Justice Sow's Interview, p. 49.

[3] Rule 16*bis* (C) of the Rule of Procedure and Evidence of the SCSL (Rules) provides that "An alternate Judge shall be present during the deliberations of the Trial Chamber or the Appeals Chamber to which he or she has been designated but shall not be entitled to vote thereat." Article 12(4) of the Statute of the SCSL states: "If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting."

[4] (Emphasis added to last sentence).Justice Sow's Interview, p. 48.

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

[6] Rules 29 & 87(A) of the Rules. Rule 29 of the Rules provides that "deliberations are to take place in private and remain secret" and Rule 87(A) states that deliberations after the conclusion of the evidence in the case in order to consider the guilt of the accused beyond a reasonable doubt, are to be conducted "in private."

[7] See, e.g., Chicago Tribune, "Former Liberian president Taylor should be a 'free man': judge," 25 November 2012, http://www.chicagotribune.com/news/sns-rt-us-sierraleone-taylor-judgebre8ao09f-20121125,0,3104289.story

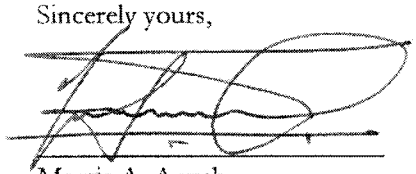
[8] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Letter from Stephen Mathias, Assistant Secretary- General in Charge of the Office of Legal Affairs, 2 March 2011, p 7.

question Justice Sow regarding the substance of deliberations which are considered private or secret under the Rules of the SCSL.[9]

A failure to grant a waiver for Justice Sow's testimony, in light of his original statement in court and the Interview, would impede the course of justice and serve to unjustifiably cloak any egregious errors during in the legal process during the trial of Mr. Taylor. At a minimum, a failure to grant the requested waiver would result in much speculation regarding both the reasons for the refusal, and the credibility and reliability of the Taylor Trial Judgement. Accordingly, the interests of the United Nations would not be prejudiced by the testimony of Justice Sow, but would be reinforced by a grant of immunity, permitting these matters to be ventilated, tested and resolved in a transparent manner, consistent with the highest principles of international justice.

Please accept, Your Excellency, the assurances of my highest consideration.

Sincerely yours,



Morris A. Anyah
Lead Counsel for Charles G. Taylor
The Hague, The Netherlands

Enclosure: New African magazine, December 2012 Edition

[9] Rules 29 & 87(A) of the Rules. Rule 29 of the Rules provides that "deliberations are to take place in private and remain secret" and Rule 87(A) states that deliberations after the conclusion of the evidence in the case in order to consider the guilt of the accused beyond a reasonable doubt, are to be conducted "in private."

Public Annex K

Response from the Under-Secretary-General for Legal Affairs, dated 26 November 2012

United Nations Nations Unies

HEADQUARTERS • SIEGE NEW YORK, NY 10017

TEL.: I (212) [redacted] • FAX: I (212) [redacted]

REFERENCE:

26 November 2012

Dear Mr. Anyah,

I refer to your letters of 19 and 26 November 2012, in which you request that the Secretary-General waive the immunity of Justice El Hadji Malick Sow so that he may give testimony in the appeal in the case of the *Prosecutor v Charles Taylor* before the Special Court for Sierra Leone.

As an alternate judge of the SCSL, Justice Sow enjoys the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations, pursuant to article 12, paragraph 1 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. Pursuant to paragraph 2 of the same article, the privileges and immunities are accorded in the interest of the SCSL and not for the personal benefit of the individuals themselves; and the right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President of the SCSL.

The United Nations does indeed pursue a policy of cooperating to the maximum extent possible with international criminal tribunals, and the prosecutors and defence counsel who appear before them. In the present case, it is premature for the Secretary-General to consider the request for the waiver of the immunity of Justice Sow. The waiver request would be considered only after there is an indication that the Appeals Chamber will admit additional evidence and hear witness testimony.

Yours sincerely,

Patricia O'Brien
Under-Secretary-General for Legal Affairs
The Legal Counsel

Mr. Morris Anyah
Lead Counsel for Mr. Charles Taylor
Special Court for Sierra Leone
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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-A**
Document Index Number: **1352**
Document Date: **30 November, 2012**
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Number of Pages: **2** Number from: **9885-9886**

☐Application
☐Order
☐Indictment
■**Motion**
☐Other
☐Correspondence

Document Title:

Public with public Annexes A-E, G-K and confidential Annex F Defence motion to present additional evidence pursuant to Rule 115

Name of Officer:

Zainab T. Fofanah

Signed: Fofanah.