1309) SCSL-04-15-A (5064 - 5069)

SPECIAL COURT FOR SIERRA LEONE 5064

IN THE APPEALS CHAMBER

Before: **Hon. Justice Renate Winter, President,**
Hon. Justice Jon Kamanda,
Hon. Justice George Gelaga King,
Hon. Justice Emmanuel Ayoola, and
Hon. Justice Shireen Avis Fisher

Acting Registrar: **Ms. Binta Mansaray**

Date filed: **20 July 2009**

THE PROSECUTOR

V.

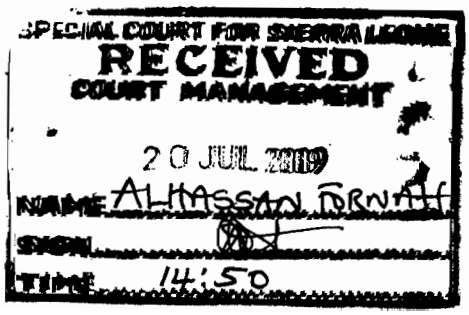
ISSA HASSAN SESAY

Case No. SCSL-04-15-A

PUBLIC

Reply to Prosecution Response to
Sesay Defence Request that the Pre-Hearing Judge Present
Additional Evidence from *Prosecutor* v. *Taylor*
Before the Appeals Chamber

Office of the Prosecutor
Mr. Vincent Wagona
Mr. Reginald Fynn



Defence Counsel for Issa Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph
Mr. Jared Kneitel

Defence Counsel for Morris Kallon
Mr. Charles Taku
Mr. Orgetto Kennedy

Court-Appointed Counsel for Augustine Gbao
Mr. John Cammegh
Mr. Scott Martin

1. The Defence replies to the "Prosecution Response to Sesay Request to Admit Additional Evidence."[1]

Meaning of available 'at trial'

2. The Prosecution relies, *inter alia,* upon two ICTY Decisions, *Stanisić* and *Haradinaj*,[2] to support the proposition that Rule 115 may only be successfully invoked in circumstances where the (requested) evidence became available after the Trial Chamber's Judgment. The Prosecution's analysis is flawed: the cases relied upon are not authority for the proposition that only evidence that came into being after the relevant decision can be considered to not have been "available."

3. It is correct that both *Stanisić* and *Haradinaj* were concerned with additional evidence (in the form of press releases, newspaper articles, affidavits, and letters) that was created *after* the Trial Chamber decision in the respective cases.[3] Logically this fact was critical to the reasoning of each decision. However, as is plain from the decisions, neither instance addressed – or in the circumstances were called to address – the separate issue, namely the exercise of discretion in the event material did exist *prior* to an impugned decision. The decisions are authority for the proposition that evidence created after an impugned decision obviously could not be considered "available" before it.

4. Equally, the Prosecution's reliance upon *Naletilić* and *Furundžija*[4] as support for the proposition that evidence was "available at trial" if it came into existence at any time prior to the delivery of trial judgment is misplaced; on the contrary, *Naletilić* and *Furundžija* tend to support an alternative interpretation. First, in *Naletilić*, the Appeals Chamber determined that an exhibit (Exhibit C-1) *was* available at trial because the trial proceedings were re-opened on an unrelated matter.[5] Exhibit C-1 was in existence prior to the re-opening of the proceedings. The appellant however, although afforded an opportunity to introduce Exhibit C-1 during the re-opened proceeding, failed to do so. As such, the Appeals Chamber found that Exhibit C-1

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[1] *Prosecutor* v. *Sesay*, SCSL-04-15-A-1308, 14 July 2009.
[2] *See*, Prosecution Response, Para. 10, footnote 17.
[3] In *Stanisić*, the evidence (a press release and a newspaper article) was dated 27 and 28 May 2008 whereas the impugned decision was issued on 26 May 2008. In *Haradinaj*, the evidence (an affirmation and letters) was dated 9 and 10 November 2005 whereas the impugned decision was issued the 3 November 2005.
[4] Prosecution Response, Para. 10, footnote 18.
[5] The Trial Proceedings were not re-opened to consider Exhibit C-1. Rather, the proceedings were re-opened to hear submissions concerning the late disclosure by the Prosecution of Rule 68 material (*Prosecutor* v. *Naletilić and Martinović*, IT-98-34-T, "Judgment," 31 March 2003, Para. 26 Procedural History at page 285). This hearing is referred to at Para. 24 of *Naletilić*.

was available at trial.[6] It follows that "availability" was interpreted purposively to include the requirement that the moving party had been provided with a real opportunity to utilize the evidence at trial. It follows that no such opportunity exists after the evidential stage of the proceedings has been completed and the Tribunal has commenced its deliberations. The proposition – that proceedings could be (continuously) reopened to accommodate the hearing of newly – discovered evidence at any time prior to judgment is unrealistic, impracticable and unwise.

5. Second, *Furundžija* concerned the reopening of the trial proceedings in "the interests of justice" and "*as the only available means* to remedy the prejudice suffered by the Defence."[7] The trial proceedings were re-opened because "the late disclosure of [Rule 68] documents [which were in the Prosecution's possession prior to the commencement of trial] prejudice[d] the Defence and that such prejudice permeated the strategy of the whole Defence case."[8] The Trial Chamber found "that there had been serious misconduct on the part of the Prosecution in breach of Rule 68"[9] and ordered the proceedings to be re-opened to deal with the new facts.[10] It is instructive that the Trial Chamber felt compelled to re-open the proceedings – to determine whether the entire testimony of one of the six[11] Prosecution witnesses was to be dismissed due to the misconduct on the part of the Prosecution[12] – rather than simply inviting the defence to file the new facts with the Trial Chamber.

6. It is therefore submitted that the Prosecution's proposition, that the availability of evidence should be assessed with respect to the date of a decision, garners little, if any, support from the aforementioned authorities.

7. Additionally, the Prosecution's proposition should be resisted as undermining the object and purpose of Rule 115, *inter alia*, to encourage judicial economy and due diligence, as well as to bring finality to the proceedings. The logical conclusion of the Prosecution's interpretation of Rule 115 would be to require: (i) the parties to continually investigate until the day of judgment; (ii) upon discovery of additional evidence to make immediate and distinct requests

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[6] *Naletilić*, Para. 24.
[7] *Prosecutor* v. *Furundžija*, IT-95-17/1-T, "Judgment," 10 December 1998, Para. 92; emphasis added.
[8] *Id.*, Para. 91. The Rule 68 documents were dated 11 July 1995 and 16 September 1995 (Para. 90). The trial commenced on 8 June 1998 (Para. 17) and the Rule 68 documents were disclosed for the first time on 29 June 1998 (Para. 90).
[9] *Id.*, Para. 22.
[10] *Id.*, Para. 22.
[11] *Id.*, Para. 17.
[12] *Id.*, Para. 22.

to re-open proceedings; (iii) for the Trial Chamber to be compelled *during its deliberations* to re-open proceedings upon receipt of arguably significant evidence; and (iv) for the parties to reconvene (at great expense) to "re-commence" the trial and thereafter for evidence to be called and supplemental submissions completed.

8. It is obvious that this would create innumerable logistical and evidential problems and encourage abuse of the finality objectives that underpin the closing of a party's case. These unwarranted and undesirable consequences can be avoided by an interpretation of Rule 115 that inhibits the parties from addressing the Chamber on evidential issues after the close of the evidential stage of the proceedings, and particularly after the commencement of actual deliberations. As noted by the Appeals Chamber at the ICTR in the case of *Nahimana*: "Rule 115 … provides for a mechanism to address 'the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.'"[13] In other words, providing the threshold criteria are satisfied, the Rule may be invoked to provide a means by which a party can adduce additional evidence that could not be placed before the court at a time when it could be *litigated.*

Diligence

9. At Paragraph 19 of the Response, the Prosecution submits that the Defence failed to exercise due diligence by failing to make "use of all of the mechanisms [of protection and compulsion] available [under the Statute and the Rules of the Tribunal] to bring evidence [on behalf of an accused] before the Trial Chamber"[14] because the Defence failed to bring to the Trial Chamber's attention that it could not locate witness Karmoh Kanneh. The Prosecution relies upon the ICTR and ICTY Appeal Chamber's statement of due diligence[15] in support of the proposition that there is an obligation upon Counsel to alert the Trial Chamber to its inability to locate witnesses. It is submitted that the Prosecution's quoting of the relevant jurisprudence is selective and the interpretation of it misconceived.

10. It is plain from the jurisprudence on this issue, arising from comments made by the Appeals Chamber in the case of *Tadic* and quoted approvingly by a number of cases at the ICTY and

[13] *Prosecutor* v. *Nahimana*, ICTR-99-52-A, "Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence," 8 December 2006, Para. 4 (internal citation omitted).
[14] The Prosecution first refers to this standard at Pargraph 9 of the Response quoting, *inter alia*, *Tadic*.
[15] Response, Para. 9.

the ICTR since that time,[16] that the requirement that a party alert the Trial Chamber to difficulties in locating witnesses presupposes that this would be an appropriate means to obtain a remedy. Hence the Appeals Chamber in *Tadic* did not state that a party must bring to the Courts attention *every* difficulty as the Prosecution mistakenly claims.[17] Rather, it stated the following:

> The compulsory and protective machinery of the International Tribunal may not always be able to give total assurance that witnesses will be both available and protected if necessary. That is all the more reason why the machinery at the disposal of the International Tribunal should be used. A party seeking leave to present additional evidence should show that it has sought protection for witnesses from the Trial Chamber where appropriate, and that it has requested the Trial Chamber to utilise its powers to compel witnesses to testify if appropriate. Any difficulties, including those arising from intimidation or inability to locate witnesses, should be brought to the attention of the Trial Chamber.[18]

11. In other words *Tadic* was actually concerned with a situation whereby witness cooperation was the issue – not the wider issue of an outright inability to locate a witness at all. The resulting ICTR and ICTY jurisprudence thus mandates that a moving party demonstrate that it took *appropriate* steps to secure evidence, that is, those that made "*appropriate* use of all mechanisms and compulsion available under the Statute and Rules of the Tribunal to bring evidence on behalf of an accused before the Trial Chamber."[19] There are mechanisms and means of compulsion in the situation where an uncooperative witness (including those seeking to avoid cooperating with a party by concealing their whereabouts) can be demonstrated to have material evidence and the party can demonstrate that it has taken reasonable steps to obtain cooperation.[20] Conversely there are none if a witness has not been found and the moving party cannot demonstrate that the witness has material evidence.[21]

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[16] *See*, Response, footnotes 13-15 and the jurisprudence therein.
[17] Response, Para. 9.
[18] *Tadic*, IT-94-1, "Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence," 15 October 1998, Para. 40.
[19] *Inter alia*, *Tadic* Decision on Additional Evidence, para. 47; emphasis added.
[20] *See*, for example, Rule 54 of the Rules of Procedure and Evidence: "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." The jurisprudence shows that "with respect to subpoenas directed at individuals, the Defence must demonstrate that it has made 'reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful.'" (*Prosecutor* v. *Sesay et al.*, SCSL-04-15-T-1189, "Written Reasoned Decision on Motion for Issuance of a Subpoena To H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone," 30 June 2008, Para. 16, citing *Prosecutor* v. *Bagosora*, ICTR-98-41-T, "Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana," 23 June 2004, Para. 4)
[21] For a party to be successful on a request to subpoena an individual, the party "must have a reasonable belief that the prospective witness can materially assist in the preparation of its case." *Prosecutor* v. *Sesay et al.*, SCSL-04-15-T-1189, "Written Reasoned Decision on Motion for Issuance of a Subpoena To H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone," 30 June 2008, Para. 16, citing *Prosecutor* v.

12. It would be wholly inappropriate for a party to raise each and every problem with its investigation. In most instances the Trial Chamber would have no means by which it could provide a remedy and no mechanisms to compel that which cannot be found. Trial Chamber I had no means by which it could locate witnesses and a party raising the issue would have been wasting the Court's time, rather than taking *appropriate* steps to obtain targeted evidence.

RELIEF REQUESTED

13. The Defence reiterates its requests that the Pre-Hearing Judge present the additional evidence from *Taylor* before the Appeals Chamber.

Dated 20 July 2009

pp.

Wayne Jordash
Sareta Ashraph
Jared Kneitel

Bagosora, ICTR-98-41-T, "Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana," 23 June 2004, Para. 4.