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SCSL-03-01-A
(10741-10750)

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THE SPECIAL COURT FOR SIERRA LEONE

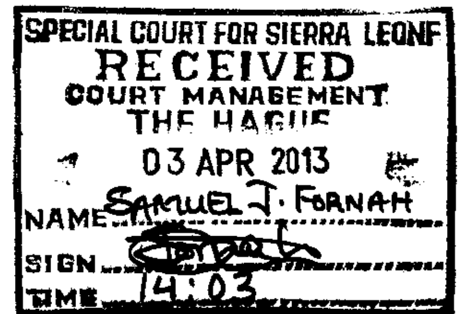
THE APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date: 3 April 2013

Case No.: SCSL-2003-01-A



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

REQUEST FOR LEAVE TO AMEND NOTICE OF APPEAL

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Ruth Mary Hackler
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Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
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A. INTRODUCTION

1. Charles Taylor respectfully requests leave to amend his notice of appeal[1] to add a single ground of appeal. The amendment is justified by a clarification of the law of aiding and abetting in customary international law, as reflected in the Judgement of the ICTY Appeals Chamber in *Prosecutor v. Perišić*, rendered on 28 February 2013.[2] The proposed additional ground would read as follows:

> Ground 20*bis*: The Trial Chamber erred in law by failing to require that the alleged acts of assistance be specifically directed towards the alleged crimes.

2. The amendment is justified by good cause, for two reasons. First, the *Perišić* affirmation that "specific direction" is a distinct legal element of aiding and abetting was not reasonably foreseeable. The ICTY Appeals Chamber has now characterized the pronouncement in *Mrkšić* to the contrary as "misleading"[3] and that "the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement."[4] Charles Taylor's Defence was guided by the "misleading" pronouncement in *Mrkšić* and formulated its grounds of appeal accordingly.

3. Second, the new ground of appeal is of the utmost relevance to the disposition of the appeal; indeed, it is intrinsic to the disposition. The Trial Judgement proceeded on the basis that "[t]he *actus reus* of aiding and abetting does not require 'specific direction.'"[5] That is directly contrary to the ICTY Appeals Chamber's holding in *Perišić*, by which this Appeals Chamber "shall be guided."[6] The Trial Chamber, as a result of this legal error, did not analyse whether the

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[1] *Prosecutor v. Taylor,* SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012; *Prosecutor v. Taylor,* SCSL-03-01-A-1304, Corrigendum to *Notice of Appeal of Charles Ghankay Taylor*, 23 July 2012 ("Notice of Appeal").
[2] *Prosecutor v. Momčilo Perišić,* Case No. IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").
[3] *Perišić* Appeal Judgement, para. 41.
[4] *Perišić* Appeal Judgement, para. 43.
[5] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Trial Judgement"), para. 484.
[6] Statute of the Special Court for Sierra Leone, Article 20 (3): "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone."

assistance was "specifically directed" to the crimes, which clearly "invalidates the decision" reached.

4. Should leave to add the proposed additional ground of appeal be granted, Charles Taylor respectfully requests leave to file brief submissions in support of the new ground of appeal. The Defence is mindful of the stage of the proceedings, but permission to file brief supplemental submissions will not unduly delay the proceedings. Any additional time required to analyze the additional ground and supporting submissions would be more than outweighed by the broader interests of justice that would be served by ensuring (i) fundamental fairness to the accused and (ii) that the Appeals Chamber considers the legal position in respect of grounds of appeal that reflects the current state of the law.

B. SUBMISSIONS

(i) The Appeals Chamber has Inherent Jurisdiction to Permit Amendments to Notices of Appeal based on a Showing of Good Cause, which may Arise from Legal Developments

5. The Appeals Chamber has an inherent jurisdiction to permit an amendment of a notice of appeal.[7] The standard for such amendments prescribed by Rule 108 of the Rules of the ICTY and ICTR is "good cause,"[8] which has been interpreted as "encompass[ing] both good reason for including the new or amended grounds of appeal sought and good reason why those grounds were not included (or were not correctly articulated) in the original notice of appeal."[9] The party seeking to amend its notice of appeal is required to "explain precisely what amendments are sought and why, with respect to each such amendment, the 'good cause' requirement of Rule 108

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[7] *Prosecutor v. Sesay et al.*, SCSL-04-15-A-1274, Decision on "Motion by the Appellant Kallon for Leave to File an Amended Notice and Grounds of Appeal", 12 May 2009.

[8] ICTY Rules of Procedure and Evidence, Rule 108; ICTR Rules of Procedure and Evidence, Rule 108.

[9] *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Second Motion to Amend his Notice of Appeal, 4 December 2009 ("*Ojdanić* Decision of 4 December 2009"), para. 6; Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009 ("*Pavković* Decision of 22 September 2009"), para. 7; Decision on Dragoljub Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009 ("*Ojdanić* Decision of 2 September 2009"), para. 5.

is satisfied."[10] Amendments may even be permitted in the absence of "good cause," where they are "of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if the grounds were excluded."[11]

6. Good cause may arise from developments in the law since the filing of the notice of appeal. The ICTR Appeals Chamber has held that "a development of the Tribunal's jurisprudence subsequent to the filing of a notice of appeal may, in some circumstances, constitute good cause for an amendment."[12]

(ii) There is Good Reason to Include the Additional Ground of Appeal and Good Reason for its Non-Inclusion in the Original Notice of Appeal

7. Charles Taylor's Notice of Appeal from the Trial Judgement was based on the best view of the law as it existed on 19 July 2012. The Trial Judgement, expressly relying on the *Mrkšić* Appeal Judgement, stated that "[t]he *actus reus* of aiding and abetting does not require 'specific direction.'"[13] The exact proposition from the *Mrkšić* Appeal Judgement was that "the Appeals Chamber has confirmed that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."[14] The Defence had no reason to believe that the ICTY Appeals Chamber would recant this apparently unequivocal pronouncement.

8. The Defence expressly contested the correctness of the *Mrkšić* pronouncement within the context of Ground 16 of its appeal, concerning *mens rea*.[15] In so doing, however, the Defence

[10] *Ojdanić* Decision of 4 December 2009, para. 5; *Pavković* Decision of 22 September 2009, para. 6; *Ojdanić* Decision of 2 September 2009, para. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005, para. 7; *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 9.

[11] *Ojdanić* Decision of 4 December 2009, para 7; *Pavković* Decision of 22 September 2009, para. 8; *Ojdanić* Decision of 2 September 2009, para. 6; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Decision on Renzaho's Motion to Amend Notice of Appeal, 18 May 2010 ("*Renzaho* Decision"), para. 14.

[12] *Renzaho* Decision, para. 11.

[13] Trial Judgement, para. 484, citing *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić* Appeal Judgement"), para. 159.

[14] *Mrkšić* Appeal Judgement, para. 159.

[15] *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-

was able to rely on several other sources of customary international law to show that the ICTY approach to *mens rea* was erroneous.[16] By contrast, no other sources of law were available to argue that *Mrkšić* constituted an incorrect pronouncement of the *actus reus* standard of aiding and abetting.

9. That has now changed. On 28 February 2013, the ICTY Appeals Chamber declared that "no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly."[17]

10. The Appeals Chamber explained that the element of "specific direction" might be so obvious as to require no explicit analysis, as where the accused is "physically present during the preparation or commission of crimes committed by principal perpetrators and made a concurrent substantial contribution."[18] By contrast:

> Where an accused aider and abettor is remote from the relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction. In such circumstances, the Appeals Chamber, Judge Liu dissenting, holds that explicit consideration of specific direction is required.[19]

11. The factors that could be relevant to remoteness include "temporal distance between the actions of an accused individual and the crime he or she allegedly assisted" and "geographic distance."[20]

12. The Defence could not have foreseen that the ICTY Appeals Chamber would clarify *Mrkšić* as it did. The Appeals Chamber itself "emphasise[d] that the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić and Šljivančanin* Appeal Judgement"[21] which it characterized as "misleading."[22] The Defence, therefore, had "good

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1348, Amended Book of Authorities to the Defence Rule 111 Submissions, 31 October 2012 (collectively, "Appeal Brief"), paras. 356-358.

[16] Unlike, for example, the arguments presented in Ground 16 that are grounded in other available sources of law including the Rome Statute of the International Criminal Court, state practice and general principles of law. See Appeal Brief, paras. 319-397.

[17] *Perišić* Appeal Judgement, para. 36.

[18] *Perišić* Appeal Judgement, para. 38.

[19] *Perišić* Appeal Judgement, para. 39.

[20] *Perišić* Appeal Judgement, para. 40.

[21] *Perišić* Appeal Judgement, para. 43.

reason" not to have been in a position to make arguments on the basis of an unforeseeable reversal of the law.

13. The new legal position is of substantial importance to the present appeal, which constitutes good cause for the addition of the proposed new ground of appeal. The Trial Judgement expressly adopts a legal standard that has now been rejected as erroneous. The consequence of that erroneous standard is that it failed to analyze whether the alleged assistance provided by Charles Taylor was "specifically directed" to the alleged crimes. Indeed, the ICTY Appeals Chamber explained that "the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators."[23] This is precisely the error that was committed by the Trial Chamber in this case – presuming that no specific direction was required and that, accordingly, general assistance was sufficient to impose liability for aiding and abetting.

14. The Defence does not deny that some of the pronouncements in the *Perišić* Appeal Judgement are highly relevant to Ground 16 and other grounds of Charles Taylor's appeal. The majority opinion, supported by four judges, does imply that there is a connection between "specific direction" and *mens rea.*[24] Two of those four judges, Judges Meron and Agius, were prepared to go further, explaining that "were we setting out the elements of aiding and abetting outside of the context of the Tribunal's past jurisprudence, we would consider categorising specific direction as an element of *mens rea.*"[25] Judge Ramaroson's opinion also perceptively draws the connection between "specific direction" and the knowledge standard[26] as argued under Grounds 16 and 19, in particular paragraphs 369-375 and 438-443, of the Appeal Brief.

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[22] *Perišić* Appeal Judgement, para. 41.
[23] *Perišić* Appeal Judgement, para. 44.
[24] *Perišić* Appeal Judgement, para. 48 ("the Appeals Chamber acknowledges that specific direction may involve considerations that are closely related to questions of *mens rea*. Indeed, as discussed below, evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes.")
[25] *Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theodor Meron and Carmel Agius, para. 4.
[26] *Perišić* Appeal Judgement, Opinion Séparée du Juge Ramaroson sur la Question de la *Visée Spécifique* dans la Complicité par Aide et Encouragement, paras. 7, 10.

15. Even though these statements provide strong support for the existing grounds of appeal, in particular Ground 16, those grounds of appeal do not squarely reflect the holding of the *Perišić* Appeal Judgement. That holding, despite significant reservations and qualifications, maintained specific direction as a component of *actus reus*. Grounds 21 through 34, which do concern *actus reus*, all concern whether the "substantial contribution" requirement was satisfied. Again, although the "specific direction" is indirectly relevant to all of those grounds, the fact remains that the Appeals Chamber does not now have before it any ground of appeal that squarely corresponds to the law as proclaimed in *Perišić*. The Appeals Chamber ought to have the freedom to directly consider the correctness of the Trial Judgement in light of the *Perišić* Appeal Judgement.

(iii) Even Assuming an Absence of Good Cause, the Perišić Pronouncement is of Substantial Importance to this Appeal and a Miscarriage of Justice would Arise from Failing to Permit an Amendment Accordingly

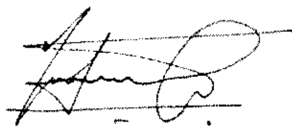
16. Charles Taylor's appeal cannot be fairly adjudicated unless the primary holding in the *Perišić* Appeal Judgement is directly considered by the Appeals Chamber of the Special Court for Sierra Leone. Momentous issues of policy are at stake, to say nothing of the coherence of international criminal law and the avoidance of a miscarriage of justice. No reasonable person could doubt that the conditions for the application of the "specific direction" standard, as articulated by the *Perišić* Appeals Chamber, are not applicable to the facts as found against Charles Taylor. An appeal judgement in this case that does not squarely address the requirements of the law set out by the ICTY Appeals Chamber would vitiate the fairness of the appeals proceedings and likewise be a considerable loss for the progressive and consistent development of international criminal law. Adjudicating his appeal without giving him the benefit of those developments would occasion a miscarriage of justice.

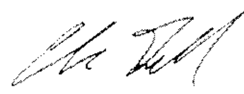
C. CONCLUSION

17. For the reasons set out above, Charles Taylor respectfully requests leave to amend his notice of appeal to add a single ground of appeal, Ground 20*bis*, as articulated in paragraph 1

above. Should leave be granted, Mr. Taylor respectfully requests leave to file submissions in support of the new ground of appeal.

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 3rd Day of April 2013, The Hague, The Netherlands

List of Authorities

SCSL

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

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.

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Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force 1 July 2002).