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JUDGMENT SUMMARY: SPECIAL COURT FOR SIERRA LEONE

PROSECUTOR V. CHARLES GHANKAY TAYLOR, APPEALS JUDGMENT (No. SCSL-03-01-A)

On September 26, 2013, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) upheld Trial Chamber II's conviction of former Liberian President Charles Ghankay Taylor and affirmed his sentence of fifty years imprisonment. Taylor, who ruled Liberia from 1997 to 2003, was convicted May 30, 2012 on all eleven counts of the indictment. This included five counts of crimes against humanity punishable under Article 2 of the SCSL Statute (murder, rape, sexual slavery, other inhumane acts, and enslavement); five counts under Common Article 3 and Additional Protocol II punishable under Article 3 of the Statute (acts of terrorism; violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment; outrages upon personal dignity; and pillage); and one count of serious violations of international humanitarian law punishable under Article 4 of Statute (conscripting and enlisting child soldiers under fifteen years old). Specifically, Taylor was convicted of aiding and abetting and planning crimes carried out by the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) in the districts of Bombali, Kailahun, Kenema, Kono, Port Loko, and Freetown, and the Western Area. Both the Prosecution and Taylor appealed the Trial Chamber's decision, with the Prosecution raising four grounds and Taylor forty-five.

JUDGMENT REGARDING PROSECUTION'S APPEALS

Among the Prosecution's grounds for appeal was a claim that Trial Chamber II erred by failing to find that, in addition to aiding and abetting and planning the charged crimes, he was responsible for ordering and instigating those crimes. The Appeals Chamber declined to entertain the substance of this challenge, however, finding that even if it were to grant the grounds for appeal, "this would have no impact on the existing convictions and Taylor would not be convicted of more crimes than he already has been." According to the Appeals Chamber, the convictions of Taylor based on aiding and abetting and planning liability "fully capture[d] Taylor's "culpable acts and conduct," and thus the Prosecution had failed to demonstrate an error occasioning a miscarriage of justice with regard to this challenge.

The Prosecution also challenged the Trial Chamber's decision to exclude evidence relating to crimes allegedly committed in locations not specifically mentioned in the indictment. Specifically, the Prosecution maintained that the use of certain phrases in the indictment, such as "various locations" in a district and "throughout a district," was sufficient to put the accused on notice that he was being charged with crimes in locations not expressly named. In response, the Appeals Chamber began by acknowledging that, in *Sesay, et al.*, it had held that "[i]n some cases, the widespread nature and sheer scale of crimes make it unnecessary and impracticable to require a high degree of specificity" in the indictment. Nevertheless, the Chamber

also reiterated that it is for the Trial Chamber to decide, on a case-by-case basis, whether such "inclusive pleading of locations" in fact provided the accused with sufficient notice to prepare a defense, taking into account "the fair trial rights of the accused, the Prosecution's obligation to plead clearly the material facts it intends to prove, the particulars of the case and the interests of justice." Here, the Appeals Chamber was satisfied that the Trial Chamber undertook the necessary analysis and thus did not overturn its decision to exclude evidence relating to crimes not specifically pleaded in the indictment. The Appeals Chamber also upheld the Trial Chamber's decision holding that the Prosecution had failed to adequately "cure" the defective indictment, despite the Prosecution's claims that it had provided clear, consistent, and timely information that would have placed the Defense on notice of the additional charges. According to the Appeals Chamber, a Trial Chamber is not *required* to find that a defective indictment has been cured, but rather it must act in the interests of justice and consistently with the rights of the accused. Here, the Trial Chamber acted within its discretion in declining to find that the indictment had been adequately cured.

Finally, the Prosecution appealed the sentence, arguing that the fifty-year prison sentence handed down by the Trial Chamber was woefully inadequate given the nature and severity of Taylor's crimes. The Appeals Chamber disagreed, noting that the Trial Chamber carefully reviewed the nature and gravity of the crimes, as well as any aggravating and mitigating circumstances, and concluded that the Trial Chamber's sentence was "fair and reasonable in light of the totality of the circumstances."

JUDGMENT REGARDING TAYLOR'S APPEALS

The Chamber categorized Taylor's grounds for appeal into seven categories, namely: systematic errors in the evaluation of evidence; errors that invalidate the planning convictions; errors that invalidate the aiding and abetting convictions; irregularities in the judicial process; errors undermining the fairness of the proceeding; "miscellaneous" errors; and errors relating to the sentence. This summary will only address the Appeals Chamber's response to a handful of these challenges.

First, regarding the challenges to the Trial Chamber's evaluation of the evidence, Taylor contended, *inter alia*, that the Prosecution inappropriately relied on uncorroborated, hearsay evidence from biased witnesses who received benefits for testifying against him. The Appeals Chamber began its analysis of the Defense's various claims relating to evidence by stressing that Rule 89 of the SCSL's Rules of Procedure and Evidence broadly provides that "[a] Chamber may admit any relevant evidence," and that this provision "is in consonance with the recognition that flexibility in admitting and evaluating evidence in trials for violations of international criminal law is justified by the *sui generis* nature of these trials." It also stressed that the rules governing the SCSL do not require corroboration of any single witness's testimony or other piece of evidence, nor do

they exclude hearsay evidence or prevent a Trial Chamber from relying on the testimony of “insider” witnesses. Rather, corroboration, the hearsay nature of evidence, and the circumstances of the witness are all factors to be considered by the Trial Chamber in assessing the *credibility* of evidence and the *reliability and weight* to be given that evidence. Finally, the Appeals Chamber recalled that it will uphold a Trial Chamber’s findings relating to the credibility of evidence unless it finds that no reasonable trier of fact could have reached the same conclusion. Applying these general principles, the Appeals Chamber dismissed each of the Defense’s evidentiary challenges.

Next, the Appeals Chamber turned to Taylor’s claim that the Trial Chamber erred in its assessment of aiding and abetting liability. The Trial Chamber had found that Taylor satisfied the requirements for such liability because he lent assistance to the RUF and AFRC, that this assistance had a substantial effect on the commission of the crimes, and that he acted with knowledge that his assistance would have a substantial impact on the commission of crimes and with knowledge of the physical perpetrators’ intention to carry out the crimes. According to the Defense, this approach violated the “principle of personal culpability” by: “(i) criminalising any contribution made to a party to an armed conflict; (ii) failing to distinguish between neutral and intrinsically criminal assistance; and (iii) improperly characterising the RUF/AFRC as a criminal organization.” Further, the Defense challenged the Trial Chamber’s application of a “knowledge” standard rather than a “purpose” standard in evaluating the requisite *mens rea* for aiding and abetting. Before turning to the specifics of these challenges, the Appeals Chamber recalled that the SCSL Statute does not “expressly establish” the *actus reus* and *mens rea* elements of the modes of liability. However, it noted, Rule 72bis of the Court’s Rules of Procedure and Evidence makes clear that the “principles and rules of international customary law” are applicable sources of law to which the Appeals Chamber may resort in giving effect to the object and purpose of the Statute.

Against this background, the Appeals Chamber first considered the *actus reus* element of aiding and abetting liability. As an initial matter, the Appeals Chamber rejected the Defense’s position that the Trial Chamber was required to find that Taylor provided assistance to the *specific individual* who physically perpetrated each *specific act* underlying a crime. Rather, the Appeals Chamber held that the *actus reus* of aiding and abetting “is established by assistance that has a substantial effect on the crime, not by the particular manner in which such assistance is provided.” In addition to this analysis, the Appeals Chamber considered whether “specific direction” is an element of the *actus reus* of aiding and abetting liability. While the Defense did not raise this argument on appeal, the Appeals Chamber addressed it in light of the recent judgment issued by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Perišić*. In that judgment, the ICTY acquitted Serbian and former Yugoslavian Chief of Staff General Momilo Perišić of aiding and abetting war crimes based on a finding that the assistance Perišić provided to the Bosnian

Serb army – an organization that was engaged in both lawful and unlawful activity during the conflict in the former Yugoslavia – was not “specifically directed” towards the army’s criminal activities. However, the SCSL Appeals Chamber rejected this approach after conducting an independent review of the customary international law status of aiding and abetting liability and finding no support for the Perišić judgment’s requirement of “specific direction.”¹ Lastly, the Appeals Chamber dismissed the Defense’s challenge relating to the *mens rea* of aiding and abetting liability, refusing to adopt the notion that the Trial Chamber should have been required to find that Taylor actively *willed* or *desired* the commission of the crimes because such requirement would be inconsistent with the customary international law definition of aiding and abetting liability.

Next, the Appeals Chamber considered the Defense’s challenge to the Trial Chamber’s findings regarding planning liability, which was based on a claim that the Trial Chamber erred by failing to require that the Prosecution prove he planned particular, “concrete crimes.” Specifically, the Defense cited to *Brđanin*, a case tried before the ICTY, in which the Trial Chamber held: “Where there is evidence of an accused having formulated a plan that does not constitute a plan to commit concrete crimes, this does not give rise to a liability through the mode of liability of ‘planning.’” However, the SCSL Appeals Chamber declined to follow the *Brđanin* Trial Chamber, noting not only that subsequent ICTY jurisprudence had rejected this approach, but also that the Special Court’s own Trial Chamber held in *Brima, et al.* that the *Brđanin* interpretation was “an overly narrow construction of the responsibility for planning.” Instead, the Appeals Chamber held that the requirement that the accused participated “in designing an act or omission and thereby had a substantial effect on the commission of the crime” was “sufficient to establish the culpable link between the accused and the crimes.” Note, however, that the Appeals Chamber did overturn certain counts of the Trial Chamber’s planning conviction based on a finding that the Trial Chamber failed to provide a reasoned opinion in its judgment in relation to Taylor’s guilt for planning certain crimes occurring in the Kono District. This holding had no effect on Taylor’s sentence.

Taylor is currently serving his sentence in a maximum-security prison in Great Britain, as his requests to be transferred to Rwanda were denied. He is the only head of state to be convicted of war crimes or crimes against humanity by an international tribunal since the Nuremberg trials.

Written by Patty Walsh, a first-year law student at American University Washington College of Law, and edited by Katherine Cleary Thompson, Assistant Director of the War Crimes Research Office.

¹ It should be noted that the ICTY Appeals Chamber has recently adopted the same position as the SCSL Appeals Chamber in another case, calling into question the validity of the holding in *Perišić* even as it pertains to the ICTY. See *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, ICTY Appeals Judgment (23 January 2014).