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SCSL-03-01-T
(26832-26837)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate Judge

Acting Registrar: Ms. Binta Mansaray

Date filed: 25 January 2010

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION REPLY TO DEFENCE RESPONSE TOAPPLICATION FOR LEAVE TO APPEAL ORAL DECISIONS OF 14 JANUARY 2010 ON USE OF DOCUMENTS IN CROSS-EXAMINATION

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I. INTRODUCTION

1. In accordance with the Trial Chamber's Order for Expedited Filing dated 20 January 2010,[1] the Prosecution files this Reply to the "Defence Response to the Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination" filed on 22 January 2010 ("**Response**").[2]

2. The Prosecution relies on the arguments presented in its Application for Leave to Appeal the Trial Chamber's Oral Decisions of 14 January 2010[3] in addition to the following points in reply to the Defence Response.

II. ARGUMENT

Exceptional Circumstances

Issue of fundamental legal importance

3. It should be noted at the outset that the Response tends to deviate from a discussion of the exceptional circumstances test and in substantial part prematurely addresses the merits of an eventual appeal.[4]

4. The Prosecution's argument is not erroneously premised on the principle of precedent.[5] However, the SCSL Appeals Chamber is required under Article 20(3) of the Statute to be guided by the appellate jurisprudence of the ICTY and ICTR and this jurisprudence has in general also informed the SCSL Trial Chambers. The significant departure from the wealth of jurisprudence by the Trial Chamber in this instance, through the introduction of an unduly high standard for the use of documents during cross-examination of Defence witnesses, is not justified. It is

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-881, "Order for Expedited Filing", 20 January 2010.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-883, "Defence Response to the Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on use of Documents in Cross-Examination, 22 January 2010 ("**Response**").
[3] *Prosecutor v. Taylor*, SCSL-03-1-T-875, "Public with Annex A and Confidential Annex B, Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination", 18 January 2010 ("**Prosecution Application for Leave to Appeal**").
[4] See especially paras 13-16 of the Response.
[5] See para. 11 of the Response.

furthermore not the case, as asserted by the Defence,[6] that the jurisprudence fails to address the issues before the Chamber.[7]

5. Contrary to the Defence assertion at paragraph 10 of the Response, the Prosecution argument that the Trial Chamber's application of the use test imports an unduly high standard for the use of documents during cross-examination does not equate to a suggestion that "the Trial Chamber should have blindly allowed the documents in issue to be used in the cross-examination of the Accused regardless of the uncontested fact that they are probative of the guilt of the Accused". First, the established body of jurisprudence does not necessitate any form of judicial myopia – if it did then it undoubtedly would have been overturned rather than endorsed at the appellate level. Secondly, it was not an "uncontested fact" that the documents in issue are probative of the guilt of the Accused. In this regard, the Prosecution specifically indicated that the extract of the ECOMOG book was being presented for impeachment purposes only and argued that to the extent that the use test should even be applied, it is too wide an interpretation to consider that hypothetically in some scenario the document could be probative of guilt.[8]

6. It does not add to the Defence argument to recite at paragraph 15 of the Response a subsequent statement by the Presiding Judge concerning the irrelevance of the purpose for which a document is to be used. Indeed, prior to the cited clarification by the Presiding Judge, Defence Counsel had appeared to recognize the relevance of the purpose for which a document was being used by raising precisely the question of its intended use.[9] The Trial Chamber's approach – including its holding that such a factor is irrelevant - constitutes a core issue giving rise to exceptional circumstances[10] in respect of which a decision of the Appeals Chamber is sought.

7. The Defence is incorrect to assert at paragraph 18 of the Response that in its Application for Leave to Appeal the Prosecution "acknowledges the propriety of the

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[6] Response, para. 13.
[7] See *Prosecutor v. Taylor*, "Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", 17 November 2009, paras 10-12, and see also paras 13-21.
[8] *Prosecutor v. Taylor*, Trial Transcript, 14 January 2010, pp. 33364-33365.
[9] *Prosecutor v. Taylor*, Trial Transcript, 21 January 2010, p. 33815.
[10] See para. 16 of the Prosecution Application for Leave to Appeal.

test" but then goes on to challenge the substance of the test. The Prosecution challenges the application of the test and the unduly high standard that it imports.

8. As regards the comments made in the Response in relation to the Trial Chamber's refusal to permit the use of the Mia Farrow Declaration because it contains multiple hearsay,[11] the Defence fails to make any substantive argument but rather merely asserts that the Trial Chamber did not err in refusing to allow the use of the evidence because it inculpates the Accused and affects the Accused's fair trial rights.

Interference with the course of justice

9. At paragraph 27 of the Response the Defence suggests that because the Prosecution is able to put the information contained in the document to the witness albeit without explicitly referring to the document itself, the Prosecution is not hindered in its ability to cross-examine. This assertion is deliberately naive. If the Prosecution is limited to putting a question to the Accused, without use of a document, then only the Accused's response becomes evidence in the case, and only this response can be relied upon by the Trial Chamber in making a determination as to the Accused's credibility. Thus, only if the Accused agrees with, or accepts, the information (based on the document) contained in the question does that information become evidence. If the document is subsequently admitted, however, the Trial Chamber may consider the document in assessing the witness's credibility on the matter to which the document relates, irrespective of the Accused's answer to the question to which the document relates. If the document cannot even be used, this forecloses the possibility of subsequent admission. Thus, the Trial Chamber is deprived of relevant documentary evidence which could be used to reach a finding that the Accused's testimony is not credible.

10. As regards the comments made at paragraph 25 of the Response, the Defence misstates the Prosecution's arguments. Contrary to what is asserted by the Defence, the Prosecution has been clear at all times as to the purpose for which it would seek to use each document. The Prosecution sought to use the Mia Farrow Declaration both to establish guilt and to impeach the Accused's testimony. However, in the

[11] Response, para. 19.

event the Trial Chamber did not allow it to be used to establish guilt, the Prosecution's position was that the Trial Chamber could nonetheless allow the use of the document for the limited purpose of impeachment. The Prosecution has at all times been clear that the paragraph in the ECOMOG book was to be used for the purpose of impeachment alone.

Irreparable Prejudice

11. In relation to the second limb of the test under Rule 73(B), the Defence relies on the same reasons as given for exceptional circumstances, and fails to address the arguments in the Prosecution Application for Leave to Appeal regarding irreparable prejudice.

III. CONCLUSION

12. For the reasons given in its Application for Leave to Appeal and in this Reply, the Prosecution seeks leave to appeal the three oral decisions rendered by the Trial Chamber on 14 January 2010.

Filed in The Hague,

25 January 2010,

For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

INDEX OF AUTHORITIES

SCSL

Prosecutor v. Taylor, SCSL-03-01-T-881, "Order for Expedited Filing", 20 January 2010.

Prosecutor v. Taylor, SCSL-03-01-T-883, "Defence Response to the Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on use of Documents in Cross-Examination, 22 January 2010.

Prosecutor v. Taylor, SCSL-03-1-T-875, "Public with Annex A and Confidential Annex B, Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination", 18 January 2010.

Prosecutor v Taylor, "Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", 17 November 2009

Prosecutor v Taylor, "Prosecution Reply to Defence Response in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", 25 November 2009

Prosecutor v. Taylor, Trial Transcript, 14 January 2010, pp. 33364-33365.

Prosecutor v. Taylor, Trial Transcript, 21 January 2010, p. 33815.