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SCSL-03-01-T
(11251 - 11259)

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THE SPECIAL COURT FOR SIERRA LEONE

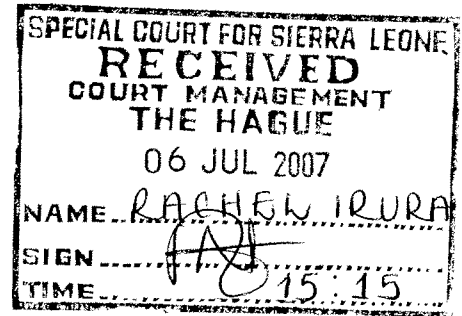
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 6 July 2007

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

REPLY TO THE PROSECUTION'S RESPONSE TO "DEFENCE MOTION TO EXCLUDE,
AND IN THE ALTERNATIVE, LIMIT THE ADMITTANCE OF STEPHEN ELLIS'
TESTIMONY AND EXPERT REPORT"

Office of the Prosecutor

Ms. Brenda J. Hollis
Ms. Ann Sutherland
Mr. Nicholas Koumjian

Interim Counsel for Charles G. Taylor

Mr. Charles Jalloh, Duty Counsel

I. INTRODUCTION

1. The *Defence Motion to Exclude, and in the Alternative, Limit the Admittance of Stephen Ellis' Testimony and Expert Report* was filed with the Registry on 4 June 2007.¹
2. The Prosecution was served with the Motion on 5 June 2007 and it filed a response on 15 June 2007, consistent with the requirements of Rule 7(C) of the *Rules of Procedure and Evidence* ("Rules").²
3. The *Principal Defender's Decision Accepting the Withdrawal of Mr. Karim Khan as Assigned Counsel to Mr. Charles Ghankay Taylor* was filed on 14 June 2007, in the period between the filing of the Motion and the Response by the Prosecution.³
4. By way of an Oral Decision on 25 June 2007, the Trial Chamber directed Duty Counsel to represent the Accused on an interim basis until the assignment of new or interim Defence counsel(s).⁴
5. In a Decision dated 3 July 2007, The Trial Chamber ordered Duty Counsel to file a reply to the Prosecution's Response by 4:00 p.m. on 6 July 2007.⁵
6. It is in response to the respective directives of the Trial Chamber that Duty Counsel now brings forth this Reply on the behalf of the Accused.

II. THE PROSECUTION'S RESPONSE IS SPECIOUS AND DEVOID OF MERIT

7. Duty Counsel initially incorporates herein by reference, every argument and averment that is contained in the Motion as if set out fully below.
8. In its Response, the Prosecution primarily argues that Mr. Stephen Ellis' testimony and report(s) be received without limitation by the Trial Chamber in the proposed field of expertise, insofar as Defence objections to the contrary implicate the weight to be given to his evidence

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-272, (hereinafter "Motion").

² See, *Prosecutor v. Taylor*, SCSL-03-01-T-297, Prosecution's Response to "Defence Motion to Exclude, and in the Alternative, Limit the Admittance of Stephen Ellis' Testimony and Expert Report," filed on 15 June 2007 (hereinafter "Response"). The Prosecution correctly notes in footnote 1 of its Response that it was served with an electronic copy of the Motion by the Registry on 5 June 2007.

³ See, *Prosecutor v. Taylor*, SCSL-03-01-T-293, Principal Defender's Decision Accepting the Withdrawal of Mr. Karim Khan as Assigned Counsel to Mr. Charles Ghankay Taylor, filed on 14 June 2007.

⁴ See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 June 2007, page 44 - 45.

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-311, Decision on Defence Office Application to Suspend all Time Limits Pending the Resolution of Issues Surrounding the Termination of Mr. Karim Khan by Mr. Charles Ghankay Taylor before the Prosecution Opening Statement on 4 June 2007, filed on 3 July 2007.

and not its admissibility.⁶ Ignoring the fundamental nature of the Defence arguments regarding the competency of Mr. Ellis, the Prosecution arrives at this misplaced conclusion by elaborating on the “[i]ntended scope” of Mr. Ellis’ testimony,⁷ its purported relevance and role in assisting the Trial Chamber, the general admissibility of hearsay evidence before the Chamber, and the appropriateness of cross-examination as a tool for challenging the overall reliability of his evidence and his impartiality.⁸

9. Duty Counsel respectfully submits that the Prosecution’s Response is specious and misplaced for several reasons. First, it ignores the applicable legal standard and prerequisites for the admissibility of expert evidence before this Trial Chamber. This is particularly true in the context of the requirement pertaining to the neutrality and independence of proposed experts. Second, it does not ameliorate expressed and valid concerns about (i) Mr. Ellis’ qualifications and competence to be qualified as an expert regarding the conflicts in Sierra Leone and Liberia, (ii) his pronouncement of opinions on ultimate issues of facts in his report, and (iii) his significant reliance on what amounts to double hearsay (in the context of opinion evidence) to arrive at his conclusions.

A. Preliminary Observations

10. Duty Counsel initially observes that the Prosecution Response misperceives the true scope of the objections that are raised in the Motion by ostensibly viewing them in a quantitative sense. This is reflected somewhat in paragraph 2 of the Response, wherein issues concerning Mr. Ellis’ neutrality are considered as falling under the rubric of objections to the reliability of information upon which his reported opinions are based.⁹ With respect, it is not for the Prosecution to attempt to compartmentalise Defence objections to Mr. Ellis’ evidence into “four” grounds which fail to appreciate the qualitative nature of those objections in their entirety and totality.

⁶ Response, paras. 12 – 13, and 16. It is noteworthy that the Response contains two separate and distinct paragraphs that have been denominated as paragraph 16. The first paragraph 16, in order of appearance, is in support of the weight vis-à-vis admissibility conclusion and the related argument that cross-examination is the appropriate mechanism for challenging Mr. Ellis’ independence and impartiality, and the subsequent “paragraph 16” is in furtherance of the admissibility of hearsay evidence before the Chamber.

⁷ Response, paras. 9 – 12.

⁸ Response, paras. 9 – 10, 12 -13, 16 -17.

⁹ The use of the phrase “reasonable bias” in paragraph 2 of the Response can only be viewed as a typographical error, given that it appears nowhere in the Motion and was perhaps recalling the phrase, “reasonable basis” in the heading for sub-section VI of the Motion.

11. For purposes of clarity, the Motion challenges the overall competency of Mr. Ellis as he has been proposed by the Prosecution – his qualifications to be admitted as an expert in the proposed and specified field of expertise, and the reliability of his opinions, his report, and any prospective testimonial evidence. It does so by first arguing that Mr. Ellis is biased because of having been a defendant in a libel action brought by the Accused, because of his failure to disclose this fact in his report, and because he already has made strong conclusions on ultimate and unresolved issues regarding the Accused’s culpability for the alleged offences. This issue of bias runs through the entire spectrum of objections relating to Mr. Ellis’ evidence – from the issue of its admissibility to that of the reliability and weight, if any, to be given to his evidence.

12. The Motion also argues that Mr. Ellis is not qualified to give expert evidence in the specific field for which he is being proffered as an expert. Furthermore, exception is taken to his transgression onto terrain that is otherwise the exclusive province of the trier of fact, inasmuch as he has arrived at conclusions about ultimate issues of criminal culpability. Though related to the issue of bias and lack of neutrality, a distinct aspect of this issue (inappropriate conclusions on “ultimate issues”) is its focus on the propriety of the subject-matter of proffered expert evidence vis-à-vis assisting the trier of fact. Then there is the objection to the lack of a “reasonable basis” for the inferences, opinions, and conclusions that are articulated in his report, in the sense that the underlying information upon which he has relied are inherently unreliable. Lastly, the Motion explicates one further implication of allowing Mr. Ellis’ evidence, namely that he attempts through his report to introduce unreliable factual statements (often double hearsay deriving from other “expert” opinion evidence and secondary sources) by proxy.

B. Applicable Legal Standards Regarding Admissibility of Expert Evidence (Bias, Subject-Matter of Expert Evidence, and Qualifications of Proposed Expert)

13. The Prosecution cites with approval the four-part test that Justice Doherty relied upon in her Separate and Concurring Opinion in *Prosecutor v. Brima et al.*¹⁰ The applicability of that standard in the context of Mr. Ellis and his proffered evidence does not, therefore, appear to be in dispute. That being the case, Duty Counsel submits that the Response is wholly inadequate in

¹⁰ See, Response, para. 8. See, also, *Prosecutor v. Brima, et al.*, SCSL-04-16-T-420, Separate and Concurring Opinion of Justice Doherty on Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis(E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine Her Pursuant to Rule 94bis, 21 October 2005, para. 52.

demonstrating how and why Mr. Ellis satisfies, *inter alia*, the fourth or bias prong of that standard.¹¹

14. There is no dispute between the parties that Mr. Ellis was a defendant in a libel action that was filed by the Accused.¹² There is also no dispute that Mr. Ellis failed to disclose this fact in his report.¹³ Significantly, and by the Prosecution's own admission, the contentious portions of Mr. Ellis' book which were at the centre of libel claim involved allegations about the Accused and alleged acts of cannibalism.¹⁴ This is as outrageous and offensive as any subject-matter in any libel action, irrespective of the ultimate outcome of the litigation in question. Faced with this dilemma in the context of the bias prong of the *Brima* standard, the Prosecution attempts to minimize the effect of the libel action by arguing that issues such as bias and impartiality which may derive from the libel action go to admissibility and not to the weight of Mr. Ellis' evidence.¹⁵ Reliance is had, in this regard, on a 2003 Decision from the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Brdanin* case.¹⁶

15. With respect, it is well settled that decisions of a trial chamber of the ICTY are merely persuasive authority that this Trial Chamber may consider, especially when there is no lacuna in this Chamber's own jurisprudence on the questions presented (see, *Brima, et al.*) and there is no dispute between the parties regarding the applicability of the Chamber's jurisprudence.

16 That being the case, Duty Counsel respectfully submits that no series of explanations can minimize the inherently volatile and prejudicial nature of the libel action and its ramifications for the independence, neutrality, and objectivity of someone like Mr. Ellis, who is now being offered as an expert to give opinion evidence about the Accused. These are matters which, properly considered, apply with equal force to the threshold question of the admissibility of

¹¹ See, *Brima et al.*, *Ibid.*, para. 52 (d): "The person purporting to be an expert must be independent and impartial."

¹² The libel case is *Charles Taylor, Claimant, v. Times Newspapers Limited, Peter Stothard, Michael Dynes, Stephen Ellis, C. Hurst and Co (Publishers) Limited, Defendants*, High Court of Justice, Queen's Bench Division, Claim No. HQ0000430, Supreme Court of England and Wales.

¹³ The Prosecution on 12 February 2007 disclosed two, single-paged documents to the Defence regarding the libel action that the Accused brought against Mr. Ellis and other defendants. In a letter dated 4 April 2007, former co-counsel for the Accused requested more information from the Prosecution regarding the lawsuit. Prosecution counsel responded by way of a letter dated 19 April 2007, indicating that no additional information regarding the lawsuit was retained by the Prosecution, save for the previously-disclosed two pages. Subsequently, however, on or about 11 May 2007, the Prosecution provided the Defence with a statement setting out the details of the libel action.

¹⁴ Response, para. 15.

¹⁵ *Ibid.* para. 16. Again, reference should also be had to the discussion in footnote 6 above regarding "paragraph 16" of the Response.

¹⁶ See, *Prosecutor v. Brdanin*, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

expert evidence, as well as the latter issue of what weight ought to be attached to any such evidence that is admitted.

17. The Prosecution's arguments that the libellous allegations are not relevant to charges in this case and that Mr. Ellis "made no comment on [their] credibility..." in his book and therefore remains impartial are devoid of any merit.¹⁷ What is at issue is Mr. Ellis' credibility, neutrality, and objectivity, and not the divergence of subject-matters between the libel action and the case *sub judice*. Mr. Ellis and the Accused are the common threads between the libel action and the present action, notwithstanding the respective subject-matters of each case. Indeed, no less of a conclusion can be drawn from the initial inclusion by an author of such allegations in a book than that he saw them fit for his audience to consider. That is, in itself, tantamount to sanctioning the wide circulation of such inflammatory allegations. Duty Counsel thus submits that the totality of the circumstances make it clear that Mr. Ellis is far from independent, neutral, and unbiased, and that he has pre-judged the Accused. In addition to the inherent bias which derives from having been sued by the Accused, the Motion explicates the many inappropriate and prejudicial conclusions that Mr. Ellis has already made vis-à-vis ultimate issues concerning the criminal culpability of the Accused.¹⁸ Accordingly, Mr. Ellis and his report should be excluded from the entire trial process in this case. Indeed, the sacrosanct fair trial guarantees contained in Article 17 of the Statute of the Court, which this Trial Chamber is obliged to uphold, demand no less.

18. By stating opinions about ultimate issues of culpability that ordinarily fall within the exclusive province of the Trial Chamber, Duty Counsel also submits that Mr. Ellis should be denied audience before the Chamber, in light of the first or "subject-matter" prong of the *Brima, et al.*, standard.

19. Justice Doherty has indicated in her opinion in *Brima* that an expert is not to take over the Trial Chamber's role as finder of fact.¹⁹ This is precisely what Mr. Ellis has done by advancing conclusions about unresolved allegations going to ultimate issues concerning the Accused's criminal culpability.²⁰ For this reason, it is submitted that his report and prospective

¹⁷ Response, para. 15.

¹⁸ Motion, para. 9.

¹⁹ *Brima et al.*, *Ibid*, para. 53.

²⁰ Motion, para. 9.

testimony (to the extent foreshadowed by his report) should be deemed inadmissible before the Trial Chamber.

20. The Prosecution and the Defence both agree that Mr. Ellis is a historian who has undertaken considerable research and written extensively about Liberia.²¹ However, the competence and qualifications of Mr. Ellis to serve as an expert on Sierra Leone remains in serious dispute. In this regard, the Response suggests that Mr. Ellis' evidence would be contextual in nature, in the sense of providing background information about the Accused's modus operandi in attaining power in Liberia (most notably his treatment of the civilian population there), and its relevance to his alleged participation in the common plan in Sierra Leone, including his intent and awareness of acts committed there against the civilian population by warring factions.²²

21. With respect, the Accused is not charged with committing, aiding and abetting, or otherwise facilitating any criminal acts against the civilian population of Liberia. It is in relation to Sierra Leone and alleged acts of commission and omission against its civilian population that the Accused stands charged of. Given that Mr. Ellis is not a historian regarding Sierra Leone, has not published any notably work about Sierra Leone, has relied extensively on secondary sources in proffering conclusory opinions about the role of the Accused in the conflicts in Sierra Leone, he cannot and should not be viewed as possessing the necessary qualifications for the sort of expert that is contemplated in the third prong of the *Brima* standard.²³ This is yet again, in Duty Counsel's view, an issue of *ab initio* admissibility of proffered expert evidence. In any event, the broad Prosecution theory of a common plan or purpose was recently held to be of no consequence by this same Trial Chamber in another case because the alleged common purpose is not a crime within the jurisdiction of this Court.

22. Reliance is had on all submissions made in the Motion regarding the lack of a "reasonable basis" for Mr. Ellis' inferences, opinions, and conclusions that in his report and its attempt to introduce unreliable factual statements (often double hearsay deriving secondary sources) by proxy.

²¹ Response, para. 9; Motion, para. 17.

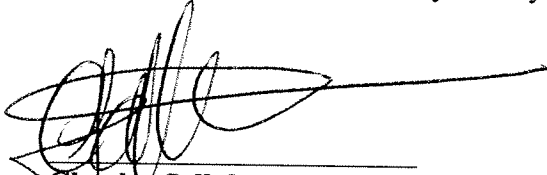
²² Response, para. 9.

²³ *Brima*, et al., *Ibid.*, para. 52. The third prong deals with the requirement that, "The person purporting to be an expert must have the necessary qualification and [have] used proper methods in their research." *Ibid.*

III. CONCLUSION

23. For all of the foregoing reasons, Duty Counsel respectfully requests that the Motion be sustained and the relief sought in paragraph 19 of the Motion be granted.

Filed in The Hague this 6th day of July 2007,

A handwritten signature in black ink, appearing to be 'C. Jalloh', written over a horizontal line.

**Charles Jalloh,
Duty Counsel**

List of Authorities

SCSL

Prosecutor v. Taylor, SCSL-03-01-T-272, Defence Motion to Exclude, and in the Alternative, Limit the Admittance of Stephen Ellis' Testimony and Expert Report, 4 June 2007.

Prosecutor v. Taylor, SCSL-03-01-T-297, Prosecution's Response to "Defence Motion to Exclude, and in the Alternative, Limit the Admittance of Stephen Ellis' Testimony and Expert Report," 15 June 2007.

Prosecutor v. Taylor, SCSL-03-01-T-293, Principal Defender's Decision Accepting the Withdrawal of Mr. Karim Khan as Assigned Counsel to Mr. Charles Ghankay Taylor, 14 June 2007.

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 25 June 2007. Online: <http://www.scs-sl.org/Transcripts/Taylor/25June2007.pdf>.

Prosecutor v. Taylor, SCSL-03-01-T-311, Decision on Defence Office Application to Suspend all Time Limits Pending the Resolution of Issues Surrounding the Termination of Mr. Karim Khan by Mr. Charles Ghankay Taylor before the Prosecution Opening Statement on 4 June 2007, 3 July 2007.

Prosecutor v. Brima, et al., SCSL-04-16-T-420, Separate and Concurring Opinion of Justice Doherty on Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis(E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine Her Pursuant to Rule 94bis, 21 October 2005.

ICTY

Prosecutor v. Brdanin, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003.