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SCSL-03-01-T
(37673-37679)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

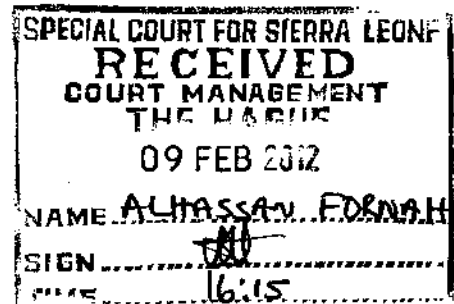
Case No.: SCSL-03-1-T

Date: 9 February 2012

PROSECUTOR

v.

Charles Ghankay TAYLOR



**DECISION ON URGENT AND PUBLIC WITH ANNEX
DEFENCE MOTION TO RE-OPEN ITS CASE IN ORDER TO SEEK ADMISSION OF
PANEL OF EXPERTS REPORT ON LIBERIA**

Office of the Prosecutor:

Brenda J. Hollis
Nina Tavakoli
Ula Nathai-Lutchman
Nathan Quick
James Pace

Counsel for the Accused:

Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
Logan Hambrick

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Urgent and Public with Annex Defence Motion to Re-Open Its Case in Order to Seek Admission of Panel of Experts Report on Liberia", filed on 31 January 2012 ("Motion");¹

RECALLING the Trial Chamber's Order for Expedited Filing, dated 1 February 2012;²

NOTING the "Prosecution Response to Defence Motion to Re-Open Its Case in Order to Seek Admission of Panel of Experts Report on Liberia", filed on 7 February 2012 ("Response");³

NOTING ALSO the "Reply to Prosecution Response to Defence Motion to Re-Open Its Case in Order to Seek Admission of Panel of Experts Report on Liberia", filed on 8 February 2012 ("Reply");⁴

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 26bis, 54, 73, 85 (A) and 92bis of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A).

I. SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence seeks the Trial Chamber's permission to re-open its case for the limited purpose of seeking admission of parts⁵ of the Panel of Experts Report on Liberia, submitted on 7 December 2011 by the United Nations Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia ("Report")⁶, into evidence, pursuant to Rule 92bis. The Defence submits that it should be permitted to re-open its case as:

¹ SCSL-03-01-T-1260.

² SCSL-03-01-T-1261

³ SCSL-03-01-T-1262.

⁴ SCSL-03-01-T-1263.

⁵ The Defence seeks the admission of pages 1-5 which provide context to the Report and summarize its findings; and Parts C, F and G of Section III, titled "Liberian mercenaries and Ivorian militia", annexed to the Motion.

⁶ "Final Report of the Panel of Experts on Liberia submitted pursuant to paragraph 6 (f) of Security Council Resolution 1961 (2010)" (S/2011/757)

- a) The evidence could not, with reasonable diligence, have been obtained and presented during the Defence's case in chief; and the Defence has acted diligently in bringing this request to the attention of the Trial Chamber;⁷
- b) the probative value of the Report is significant and there is no concern that its admission would detract from a fair trial;⁸
- c) The selected excerpts of the Report the Defence seeks to admit do not go towards proof of the acts and conduct of the Accused;⁹
- d) The excerpts of the Report the Defence seeks to admit are contextually relevant to the Defence case¹⁰ and are susceptible of confirmation,¹¹ as required by Rule 92bis; and
- e) The information in the excerpts is not unduly cumulative of other information already on the record, nor does it contain opinion evidence.¹²

Prosecution Response

2. In response, the Prosecution submits that the Defence Motion is devoid of merit and should be dismissed in its entirety on the grounds that:

- a) The Motion is untimely in that the Defence did not act with due diligence in filing the Motion;¹³
- b) The excerpts of the Report contradict the purpose for which the Defence seeks their admission; hence they have no probative value or relevance to support the Defence arguments;¹⁴
- c) Admission of the proposed evidence at this advanced stage prejudices the Prosecution which will have no opportunity to address the issues before the trial Judgement is delivered;¹⁵
- d) The excerpts of the Report include evidence related to the acts and conduct of the Accused which is inadmissible under Rule 92bis.¹⁶

⁷ Motion, paras 4, 11.

⁸ Motion, paras 4-5, 12.

⁹ Motion, para 18.

¹⁰ Motion, paras. 13-16

¹¹ Motion, para, 17, 20

¹² Motion, para. 19

¹³ Response, paras 1(i), 4-6.

¹⁴ Response, paras 1(ii), 7-10

¹⁵ Response, para. 7

¹⁶ Response, paras 1(iii), 12-14

- e) Proceedings are at an advanced stage and admitting the proposed evidence could delay the completion of the judicial process.¹⁷

Defence Reply

3. In reply, the Defence submits that:
- a) the Defence has acted diligently in bringing this request before the Trial Chamber;¹⁸
 - b) the Defence has not sought admission of paragraph 24 of the Report, which refers directly to the acts and conduct of the Accused;¹⁹ and
 - c) to the extent that the Trial Chamber finds that evidence in the Report relating to Prosecution Witness ZigZag Marzah infringes on the Appeals Chamber's determination that evidence affecting the credibility of Prosecution assertions as to the Accused's guilt are not admissible under Rule 92bis – the appropriate remedy is for the Trial Chamber to strike the offending paragraphs rather than deny the entire Defence request on that basis.²⁰

II. APPLICABLE LAW

4. The order of presentation of evidence in a trial is governed by Rule 85(A) which provides:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
- (iv) Evidence ordered by the Trial Chamber.

5. Rule 85 (A) is silent on the re-opening of a case by a party. However, although not specifically provided for in the Rules, international jurisprudence recognises that a case may be re-opened by the Chamber for the introduction of new evidence in exceptional circumstances.²¹ The moving party

¹⁷ Response, para. 11

¹⁸ Reply, paras. 3-4.

¹⁹ Reply, para. 5.

²⁰ Reply, paras 6-8.

²¹ Prosecutor v. Charles Ghankay Taylor, SCSL03-01-T-1258, Decision on Public with Annexes A-B Defence Motion to Re-Open Its Case in Order to Seek Admission of Two Documents, 21 December 2011, paras. 5,6; Prosecutor v. Charles Taylor, SCSL03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 13; See also Prosecutor v. Delalic et al., Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 288; Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 10; Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Disclosure of Documents under Rule 68 and for Re-opening of her Case, 29 April 2008, para. 49.

must show that the evidence could not, with reasonable diligence, have been identified and presented during its case in chief. In addition, the Chamber exercises its discretion as to whether to admit the evidence, taking into account the probative value of the evidence and the need to ensure a fair trial. The probative value of the new evidence should outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings.²² Factors to be considered include the advanced stage of the trial at which the evidence is sought to be adduced and the potential delay in the trial.²³

6. In testing for re-opening, reasonable diligence is a threshold inquiry. If a party cannot establish that the evidence could not, with reasonable diligence, have been obtained and presented during its case in-chief, the application fails and the Trial Chamber need not consider the probative value of the evidence.²⁴ If the reasonable diligence standard is satisfied, the Trial Chamber still has a general discretion to deny re-opening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.²⁵

7. Rule 92bis provides:

(A) In addition to the provision of Rule 92ter, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.

(B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.

(C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

²² Prosecutor v. Charles Taylor, SCSL03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 8; Prosecutor v. Delalic et al., Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 283; Prosecutor v. Nchamihigo, Case No. ICTR-2001-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses, 14 August 2007, para. 7.

²³ Prosecutor v. Delalic et al., Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 290; Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 16.

²⁴ Prosecutor v. Charles Ghankay Taylor, SCSL03-01-T-1258, Decision on Public with Annexes A-B Defence Motion to Re-Open Its Case in Order to Seek Admission of Two Documents, 21 December 2011, para.6; Prosecutor v. Charles Taylor, SCSL03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 12.

²⁵ Prosecutor v. Charles Ghankay Taylor, SCSL03-01-T-1258, Decision on Public with Annexes A-B Defence Motion to Re-Open Its Case in Order to Seek Admission of Two Documents, 21 December 2011, para. 6; Prosecutor v. Delalic et al, ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 288.





III. DELIBERATIONS

8. At the outset, it is undisputed that the Report was submitted and became available on the UN website on 7 December 2011, months after the Defence had closed its case and the proceedings were officially closed.²⁶ The Prosecution argues that the Defence failed to act with due diligence once the Report was published, taking eight weeks to file its Motion on 31 January 2012.²⁷ The Defence submits that it has acted diligently, taking into account the circumstances, namely the composition and distribution of the defence team, problems in communicating with their client, and the interceding festive holidays.²⁸

9. The Trial Chamber has the discretionary power to re-open a case for the introduction of new evidence only in exceptional circumstances. The first consideration in determining an application for re-opening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application.²⁹ Since the Report was only made available on 7 December 2011, the Defence could not with all reasonable diligence have obtained and presented it during its case in chief. Having said that, however, the Defence has not provided any reasonable excuse for why it took eight weeks to file the Motion. The Trial Chamber therefore considers that the Defence neglected its responsibility to act with due diligence once the Report became available. However, such neglect following the close of the Defence case is not necessarily fatal to the success of the Motion.

10. When it is shown that the evidence could not have been found with the exercise of reasonable diligence *before the close of the case*, the Trial Chamber exercises its discretion as to whether to grant the motion to re-open by reference to the probative value of the proposed evidence vis-à-vis the need to ensure a fair trial. Factors to be considered include the advanced stage of the trial at which the evidence is sought to be adduced and the potential delay in the trial.³⁰ The Trial Chamber considers that at this advanced stage of the proceedings, re-opening the trial would result in undue delay. With reference to the probative value of the evidence, the Trial Chamber is of the opinion that no parallels can validly be drawn between events that took place in Cote d'Ivoire during the period 2010/2011

²⁶ Motion para. 1; Response para. 4.

²⁷ Motion para. 4.

²⁸ Reply, para. 4.

²⁹ Prosecutor v. Charles Taylor, SCSL-03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, 29 June 2010, para. 9; See also Prosecutor v. Delalic et al., Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 283

³⁰ Prosecutor v. Delalic et al., Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 290; Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 16.

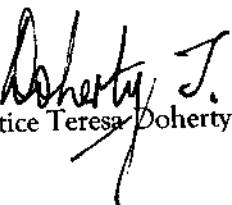
and events that took place in Sierra Leone during the Indictment period. The Trial Chamber therefore finds that the Report is not relevant to the issues to be decided in this case and has no probative value. Accordingly, the Defence has failed to establish any justification for the re-opening of its case.

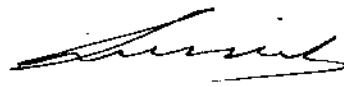
11. Having made this finding, it is not necessary for the Trial Chamber to determine the admissibility of the proposed evidence under Rule 92bis.

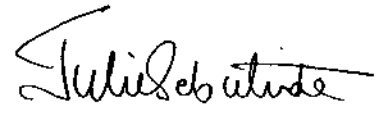
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion

Done at The Hague, The Netherlands, this 9th day of February 2012.


Justice Teresa Doherty


Justice Richard Lussick
Presiding Judge


Justice Julia Sebutinde

