412)

SCSL-03-01-T
(14612-14623)

14612

THE SPECIAL COURT FOR SIERRA LEONE

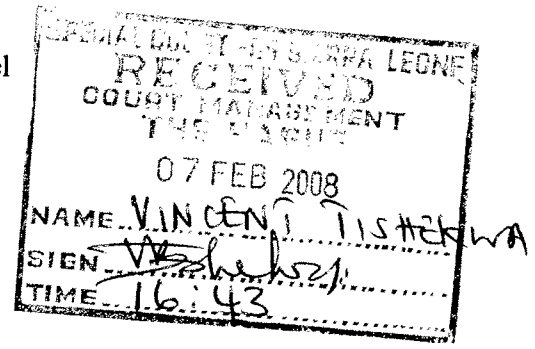
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 07 February 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE APPLICATION TO EXCLUDE THE EVIDENCE OF PROPOSED PROSECUTION EXPERT WITNESS CORINNE DUFKA, OR IN THE ALTERNATIVE, TO LIMIT ITS SCOPE

Office of the Prosecutor
Ms. Brenda Hollis
Mr. Nicholas Koumjian
Mr. Mohamed Bangura

Counsel for Charles G. Taylor
Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. The Defence files this Reply to the "Prosecution Response to Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka, or In the Alternative, to Limit its Scope"[1] ("the Application"), dated 1 February 2008.

2. In their Response the Prosecution opposed the Defence's Motion on the 5 five grounds raised to object to the expert evidence of Ms. Dufka:

   a. The Witness is not an expert
   b. The Witness's Objectivity and Impartiality are impugned by her previous role as a member of the Office of the Prosecutor and her stated position on the guilt of the Accused
   c. Her Evidence is not necessary to assist the Trial Chamber
   d. Some of her Evidence relates to issues of fact that go to the guilt of the Accused ("Ultimate issue")
   e. Her Evidence undermines the Accused's Right to a Fair Trial.

3. The Defence submits that its Application is well-founded and that the evidence of Ms. Dufka should be rejected by this Trial Chamber.

II. Limitation of the scope of the evidence

4. On this point the Defence relies on its submissions outlined at paragraphs 22, 23 and 27 of its Application[2]. If, which is denied, it is necessary to admit this evidence since it is primary evidence and it gives no greater overview of the conflict than is already in the knowledge of the Trial Chamber who have already spend a number of years considering this conflict in the AFRC case. Further, in so far as Ms. Dufka wants to put forward an overview of the conflict

[1] *The Prosecutor v. Charles Ghankai Taylor*, Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka, or In the Alternative, to Limit its Scope, Case No. SCSL-2003-01-T, 28 January 2008
[2] Ibid

and human rights abuses within Sierra Leone and West Africa, her evidence is based on sixty witnesses[3].

III. Universal test

5. The jurisprudence of International Tribunals is inconsistent in respect of the definition of an expert witness and expert evidence; in some cases it applies and upholds principles which have been settled law in both domestic and international jurisprudence for many years.[4]

IV. Field of expertise

6. The Prosecution relies on a Decision in *Kovacevic,* to justify the fact that "experts often give their opinions based on facts collected from numerous sources"[5]. Therefore, the Prosecution contends that Ms. Dufka should be admitted as an expert witness notwithstanding the fact that her evidence is based on collection of witness interview. The Defence points out that the source relied upon by the Prosecution is a transcript – not a judicial decision – which to state to the obvious, not only bears no authority but cannot be relied upon by this Chamber.

7. The Prosecution submits that since Ms. Dufka was not given the opportunity to identity the portions of MFI-10 that relied on her specific interviews by the Defence[6]. The Defence reiterates that Ms. Dufka was requested to look at the report and inform the court after the lunchtime adjournment which parts were based on her material; having had that opportunity she failed to take it.

8. The Prosecution submits that the "clear pattern" put forward by Ms. Dufka "can only be drawn with a detailed and specialized knowledge of the conflicts and human rights abuses within Sierra Leone and Liberia". The Defence submits that the prosecution is elevating the

---

[3] West Africa: Youth, Poverty and Blood, MF1-6

[4] R. v. Bonython (1984) 38 S.A.S.R. 45, King C.J; See also R. v. Hodges [2003] 2 Cr.App.R.15, CA See also R. v. Ibrahima [2005] Crim.L.R. 887, CA; See also R. v. Robb, 93 Cr.App.R.161, CA; See also R.v. Clarke (R.L.) [1995] 2 Cr. App.R. 425 at 430 CA; See also R v. G. [2004] 2 Cr. App.R.38, CA;

[5] Prosecutor v. Kovacevic, IT-97-24-T, TT 6 July 2000.

[6] The Prosecutor v. Charles Ghankai Taylor, Prosecution's Response to Defense Application to Exclude the Evidence Proposed Prosecution Expert Witness Corinne Dufka, or in the Alternative, to Limit its Scope, Case No. SCSL-03-01-T, para 15

obvious to "expertise" and that these "clear patterns" are for the most part matters of trite comment. It does not require expertise to say that a common factor in the involvement of youth in conflicts is poverty and lack of opportunity.

V. Impartiality

9. An expert witness owes her primary duty to the Court and not to the party who calls her. An expert is in a privileged position in being allowed to express her opinion in Court. That privilege is rooted in objectivity and impartiality which are the *imprimatur* of the expert[7].

10. The Defence agrees that the mere fact that an expert witness is employed or paid by a party - in this case the Prosecution - should not in itself disqualify him or her to testify as an expert[8]. However, this does not mean that expert witnesses are immune from being disqualified because of the nature of their work for a party.

11. In some circumstances lack of objectivity is a threshold admissibility issue for expert opinion evidence. The line is not always a clear one. There are different types of lack of objectivity. Merely being a consistent proponent of a particular interpretation of events might not by itself disqualify an expert from giving her opinion to the Court. Association with a party to the litigation is more troublesome but not always decisive. But a combination of these two factors will obviously more closely imperil admissibility of the evidence.

---

[7] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgment* (2 September 1998) at para. 26 referring to *Decision on Defence Motion for the Appearance of an Accused as an Expert Witness*, 9 March 1998: "the Tribunal is of opinion that in order to be entitled to appear, an expert witness must not only be a recognised expert in his field, but must also be impartial in the case."; See also *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Decision on Expert Witnesses for the Defence, Rules 54, 73, 89 and 94 bis of the Rules of Procedure and Evidence* (11 November 2003) at para. 8: "in contributing special knowledge to assist the Chamber, the expert must do so with the utmost neutrality and with scientific objectivity"; See also *Prosecutor v Brima et al*, No. SCSL-04-16-T, *Separate and Concurring Opinion of Justice Doherty on Prosecution Request for leave to Call an Additional Witness Pursuant to Rule 73 bis (E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross Examine her Pursuant to Rule 94 bis*, 21 October 2005: "An expert does not take the side of any party. The expert is to assist the Tribunal of fact"

[8] *The Prosecutor v. Charles Ghankai Taylor*, Prosecution's Response to Defence Application to Exclude the Evidence Proposed Prosecution Expert Witness Corinne Dufka, or in the Alternative, to Limit its Scope, Case No. SCSL-03-01-T, para 25; To support that proposition see *Prosecutor v Blagojevic et al*, No. IT-02-60-T, *Decision on Prosecution's Motion for Admission of Expert Statements*, 7 November 2003, at para. 37.

12. Ms. Dufka has entered the fray by assisting in investigations and in the recruiting of and preparing testimony of witnesses in this case. She has crossed the line from being simply a proponent and has become a protagonist and therefore her objectivity and impartially is compromised. In the words of the Federal Court of Appeal, in *Mugasera v. Canada*, "(the witness) testified much more as an activist than as a historian."[9] The same can be said of Ms. Dufka.

13. The Prosecution further submits that "there is no basis to support a claim that Ms. Dufka is impartial because she has a view that the accused is guilty." With respect, this statement seems to be inaccuarate. A potential expert witness who openly expresses the view in court that she believes the Accused to have committed the crimes with which he is charged reveals a lack of impartiality and independence or appearance of bias, rendering her evidence inadmissible[10]. It is an egregious misstatement of the evidence to suggest that at most her evidence led her to conclude that the Accused had a case to answer. She clearly, if reluctantly, admitted that in her view the Accused was involved in, meaning he had "committed" the offences he was charged with. We have referred to this part of her evidence in our Application; no-one who listened to her evidence on this point could be in any doubt, we submit, as to her view that the Accused had committed the offences.

14. The participation of an expert witness in a previous case, especially as an employee or investigator, *may* be such that the evidence of the expert cannot be accepted in a subsequent one.[11]

---

[9] *Mugasera v. Canada,* [2004] 1 F.C.R. 3, 2003 FCA 325

[10] The *Prosecutor v. Vujadin Popovich*, Case No. IT-05-88-AR73.2 (30 January 2008) at p.11
See also *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert witness, 9 March 1998, p.2 in which the trial Chamber dismissed a Defence Motion for the appearance of a person accused in another case before the ICTR for crimes related to those in the its case, on the ground, inter alia, that "an expert must not only be a recognized expert in his field, but must also be impartial in the case

[11] See also *The Prosecutor v. Milutinovic, Sainovic and Ojdanic*, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, Case No. IT-05-87-T, 30 August 2006, paras 1-10 where the Trial Chamber found that the proposed expert witness was "too close to the team, in other words, to the Prosecution presenting the case, to be regarded as an expert" and that "it could not regard his opinion as bearing the appearance of impartiality on which findings crucial to the determination of guilt of criminal charges might confidently made made"

15. Many national courts have similarly held that objectivity is a threshold issue for the admissibility of expert opinion evidence[12]. In Canada for example, in *Fellowes, McNeil v. Kansa General International Insurance* (1998) 40 O.R. 456, Macdonald, J. rejected the defendant's attempt to call its lawyer as an expert to testify about the alleged negligence of its former lawyers:

> I turn briefly to the case law in the role of an expert. Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court. [Emphasis added]

16. Therefore the Defence submits that Ms. Dufka's previous involvement with the OTP is in this actual case as well as other cases before the Special Court, gives the clear appearance of bias and, coupled with her expressed views on the guilt of the Accused, raises a sufficient basis to disqualify her as an expert witness.

VI. Evidence is Necessary to Assist the Trial Chamber

17. The Defence submits that Ms. Dufka's evidence is no more than obvious primary evidence of the same class as evidence already called and yet to be called and as evidence in the knowledge of the court's own consideration of the conflict.

---

[12] In England the leading case is *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1995] 1 L.L.R. 455, where Cresswel, J. set out the well-known "Ikarian Rules" on the duties and responsibilities of expert witnesses The first two of these rules are particularly germane: "Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation". (See Whitehouse v Jordan [1981] 1 WLR 246, at p.256, per Lord Wilberforce). "An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. V. Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr Justice Garland and *Re J*, [1990] F.C.R. 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate" This principle was applied by the High Court of Justice in *Liverpool Roman Catholic Archdiocesan Trust v. Goldberg* [2001] E.W.J. 4006: "It seems to me that this admission rendered Mr Flesch's evidence unacceptable as the evidence of an expert on grounds of public policy that justice must be seen to be done as well as done. This is clear from the passage in the speech of Lord Wilberforce in *Whitehouse v Jordan* cited by Neuberger J where he says:- *"While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the Court should be, and should be seen to be the independent product of the expert, un-influenced as to form or content by the exigencies of litigation."* (my emphasis added)

VII. Evidence does not go to the Ultimate issues or is beyond the scope of the Indictment.

18. The Defence further submits that even if the evidence of the witness were to be admitted in principle, at least part of Ms. Dufka's evidence should be held inadmissible on the ground that the matters she deals with go to the ultimate issue the Court has to decide. Indeed, Ms. Dufka makes reference to the criminal responsibility of the Accused in her report, for instance when she states that "finding of command responsibility must lead back ultimately to the accused." The language used by Ms. Dufka plainly expresses her opinion that the Accused is responsible for the crimes she refers to. Annex 1 refers to other parts of the report where the potential witness expresses her opinion on the guilt of the Accused.

19. The Prosecution submits that since Ms. Dufka's Report and testimony "consider human rights violations within Sierra Leone and Liberia as committed by all the various warring factions" she does not address the ultimate issue to be determined by this Court[13]. The Prosecution misses the point here. In fact, describing violations by all sides does not absolve her from committing the error of straying into the ultimate issue.

VIII. Evidence Does not Undermine the Accused's Rights

A) Hearsay

20. The witness does not supply this Chamber with "specialized knowledge"[14] but rather presents hearsay evidence. While the Defence recognized that hearsay is not *per se* not admissible before this court it submits that hearsay in the form of summarizing testimonies of victims does not constitute "specialized knowledge" which expert witnesses are called to testify on.

B) Reliability

21. The Prosecution rely on an Appeal Chamber decision in *Norman et al.* to support their proposition that there is not requirement in Rule 89 that there must be definite proof of reliability in order for evidence to be admissible[15].

---

[13] The *Prosecutor v. Charles Ghankai Taylor*, Prosecution's Response to Defense Application to Exclude the Evidence Proposed Prosecution Expert Witness Corinne Dufka, or in the Alternative, to Limit its Scope, Case No. SCSL-03-01-T, para 29

[14] *Prosecutor v. Semanza*, ICTR-97-20-A, Appeals Judgement, 20 May 2005, para 303. *Prosecutor v. Sesay*, SCSL-03-05-PT- Decision on the Prosecution's Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 23 May 2002, para 11.

[15] Prosecutor v. Norman et al. SCSL-04-14-AR65

22. The Defence submits that this general statement of law has been taken out of context and misconstrued by the Prosecution. In this case the Appeal Chamber ruled on the issue of the best evidence rule when examining whether relevant statements or submissions had to be signed in order to be admissible. It did not pertain to the admission of expert evidence.

23. In *Popovich*, the Trial Chamber, examining the application of rule 89 (C) and (D) of the Rules[16] stated that although it had a broad discretion in assessing admissibility of evidence they deemed relevant, this discretion was not without limits[17]. In fact, where prima facie proof of reliability cannot be established, the evidence is not probative and therefore inadmissible. The Trial Chamber emphasized that such a determination must be made on a case by case basis.

24. The methodology used by Ms. Dufka must be considered when assessing the reliability of her report. The Defence submits that Ms. Dufka's methodology does not meet the degree of transparency and accuracy required at the stage of admission[18]. With respect to Ms. Dufka's Report, the fact that the identity of the victims and witnesses was concealed shows an obvious forensic problem in establishing prima facie proof of reliability, most obviously because both the identity of the victims and witnesses was concealed and she could not at least account the number of persons she had interviewed. Therefore the Defence submits that the burden to show the *prima facie* reliability of Ms. Dufka's evidence has not been met by the Prosecution.

25. Further, it is well established in the jurisprudence of international tribunals that expert witnesses may be disqualified on the basis of the nature of their involvement in the cases

---

[16] ICTY Rules of Procedure and Evidence

[17] The *Prosecutor v. Vujadin Popovich*, Case No. IT-05-88-AR73.2 (30 January 2008), page 11

[18] In The *Prosecutor v. Stanislav Galic*, Decision on the Expert witness statement submitted by the Defence", Case No. IT-98-29-T, 27 January 2007, The trial Chamber, commenting on the application of Rule 94bis and 89 of the ICTY Rule stated that "a minimum degree of transparency in the sources and methods used is [...] required a the stage of admission in order for the trial Chamber to determine whether it deems the statements to have probative value within the meaning of Rule 89. It further held that [...] in determining whether the minimum degree of transparency required a the stage of admission is met, the Trial Chamber takes into consideration the subject matter of the statement, the type of type of expertise concerned, as well as whether the statement refers to specific events explicitly charged in the Indictment, or to background information"

being tried. Indeed, in the *Boskovski* decision, the Trial Chamber stated that "the active involvement of a proposed expert witness in the investigation of the case on behalf of the Prosecution is a factor capable of affecting the reliability of that witness's Report and potential evidence [...] the involvement in a particular case may be such that the reliability of the opinions of the expert cannot be accepted.[19] Therefore, the Defence submits that in light of the applicable jurisprudence, Ms. Dufka's work for the OTP is capable of disqualifying her as an expert witness and on the facts of this case, in the light of her evidence, should do so.

26. The Prosecution further submits that the Defence has failed to demonstrate that Ms. Dufka's work is unreliable. They argue that the Defence makes generalizations as to who was interviewed or the precise number of persons interviewed by Ms. Dufka in order to misconstrue the evidence.

27. The Prosecution misunderstand or misconstrue the Defence point here. The witness did not write the report MFI-2, "Sowing Terror". Therefore she cannot testify as to the reliability or otherwise of the anonymous persons interviewed. It is outwith her ability to validate in any but the most general way. The Prosecution omit any reference here to MFI-10, a report based partly on testimonies collected by her which she failed to detail, despite being given the chance to.

28. The Defence did not seek information as to the numbers interviewed in the other two reports either authored or jointly authored by the witness for the obvious reason that they dealt with matters outside the geographical, temporal and indeed factual scope of the Indictment. These are MFI-3 "Liberia – Back to the Brink" and MFI-4, "Guinea- Liberian refugees in Guinea, Refoulement "(sic) etc. These reports both concern matters outside the scope of the Indictment and cannot possibly be said to be relevant to the charges.

29. The witness was not the author of any other reports tendered by the Prosecution. They did submit several press releases and other short documents through her, none of which have the

[19] Ibid

status or title of Reports and are documents so patently marginal as to be irrelevant for these purposes. Indeed, it seems that they were submitted as to the issue of Notice even though they do not demonstrate that they were ever actually served on or drawn to the attention of the Accused.

IX. Conclusion

30. The Defence submits that Ms. Dufka is not qualified as an expert witness and her evidence is irrelevant, in total or in part to this Trial Chamber.

31. Accordingly, the Defence submits that

a) The Defence's Application should be granted and that Ms. Dufka's evidence should be declared inadmissible in its entirety
b) In the alternative, the Defence submits that the parts of Ms. Dufka's evidence identified in Annex A should be excluded.

Respectfully Submitted,

Elizabeth Dubyk for

Courtenay Griffiths Q.C.
Lead Counsel for Charles G. Taylor

Dated this 7th Day of January 2008
The Hague, The Netherlands.

Table of Authorities

International Cases

Prosecutor v Akayesu, No. ICTR-96-4-T, Judgment, 2 September 1998

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert witness, 9 March 1998

Prosecutor v Brima et al, No. SCSL-04-16-T, Separate and Concurring Opinion of Justice Doherty on Prosecution Request for leave to Call an Additional Witness Pursuant to Rule 73 bis (E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross Examine her Pursuant to Rule 94 bis, 21 October 2005,

Prosecutor v Blagojevic et al, No. IT-02-60-T, Decision on Prosecution's Motion for Admission of Expert Statements, 7 November 2003

Prosecutor v Gacumbitsi, No. ICTR-2001-64-T, Decision on Expert Witnesses for the Defence, Rules 54, 73, 89 and94 bis of the Rules of Procedure and Evidence (11 November 2003)

Prosecutor v. Kovacevic, IT-97-24-T, TT, 6 July 2000.

The Prosecutor v. Stanislav Galic, Decision on the Expert witness statement submitted by the Defence", Case No. IT-98-29-T (27 January 2007)

The Prosecutor v. Milutinovic, Sainovic and Ojdanic, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, Case No. IT-05-87-T, 30 August 2006,

Prosecutor v. Semanza, ICTR-97-20-A, Appeals Judgement, 20 May 2005

Prosecutor v. Sesay, SCSL-03-05-PT-, Decision on the Prosecution's Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 23 May 2002

The Prosecutor v. Vujadin Popovich, Case No. IT-05-88-AR73.2 30 January 2008

Domestic Cases

Mugasera v. Canada, [2004] 1 F.C.R. 3, 2003 FCA 325

National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1995] 1 L.L.R. 455,

Whitehouse v Jordan [1981] 1 WLR 246

Polivitte Ltd. V. Commercial Union Assurance Co. Plc., [1987] 1 Lloyd's Rep. 379

Liverpool Roman Catholic Archdiocesan Trust v. Goldberg [2001] E.W.J. 4006

R. v. Bonython (1984) 38 S.A.S.R. 45, King C.J

R. v. Hodges [2003] 2 Cr.App.R.15, CA

R. v. Ibrahima [2005] Crim.L.R. 887, CA

R. v. Robb, 93 Cr.App.R.161, CA

R.v. Clarke (R.L.) [1995] 2 Cr. App.R. 425 at 430 CA

R v. G. [2004] 2 Cr. App.R.38, CA;