CHAPTER 13

The Special Court for Sierra Leone's Misapplication of the European Court of Human Rights Case Law on Hearsay Evidence and Corroboration: The *Taylor* Appeal Judgment and the *Al Khawaja and Tahery* Case

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Introduction

On 26 September 2013, the Special Court for Sierra Leone Appeals Chamber issued its last and, arguably, most important Judgment.[1] The legacy of the *Prosecutor v Taylor* case to international criminal law cannot be overestimated. The significance of this Appeal Judgment is threefold. Firstly, it was the first final conviction of an acting Head of State. Secondly, it set a precedent for convicting a Head of State responsible for actions that occurred in a third State.[2] Finally, it addressed legal questions of great importance to international criminal law, in particular questions about the 'specific direction' standard of conviction for aiding and abetting,[3] and the probative value of (uncorroborated) hearsay evi-

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1 *Prosecutor v Taylor*, SCSL-03-01-A-1389, Judgment, Appeals Chamber, 26 September 2013 ('*Taylor* Appeal Judgment').

2 It would not be surprising if the *Taylor* case were to be used as a precedent when prosecuting the forthcoming crime of aggression at the ICC.

3 See, aside from the SCSL case law, the legal 'debate' in the ICTY case law on 'specific direction' among other sources in *Prosecutor v Šainović*, IT-05-87-A, Judgment, Appeals Chamber, 23 January 2014, paras 1617–1651; *Prosecutor v Perišić*, IT-04-81-A, Judgment, Appeals Chamber, 28 February 2013; as opposed to *Prosecutor v Perišić*, IT-04-81-T, Judgment, Trial Chamber, 6 September 2011, as well as the ICTY's most recent say on the question of specific direction in *Prosecutor v Stanišić*, IT-03-69-A, Judgment, Appeals Chamber, 9 December 2015, paras 104–107.

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dence in convicting an individual. This latter procedural question is at the core of this chapter.

This chapter raises arguments against the SCSL interpretation and application of the ECtHR judgment in the case of *Al Khawaja and Tahery v United Kingdom*.[4] It will examine existing international criminal standards and applicable rules relating to hearsay and the 'sole or decisive' rule derived from long-standing ECtHR case law. Then, looking at the reasoning of the SCSL Appeals Chamber when rejecting the Taylor Defence's arguments on uncorroborated hearsay, this chapter will demonstrate why, in the author's view, the SCSL misapplied relevant ECtHR case law, if not in its actual wording then at least in spirit. The key claim is that the SCSL deviated from the regular standard for conviction based on a misguided interpretation of ECtHR case law. The crux of the argument rests on the view that the ECtHR recognised a flexible application of the 'sole or decisive' prohibition to cases *originating from the UK legal system*, due to the particularly strong procedural safeguards provided for therein, as opposed to legal systems that adhere to inherently different rules of evidence.

1 The Standard of Evidence for Conviction: Hearsay Evidence and Corroboration

The SCSL Appeals Chamber's interpretation of ECtHR case law, notably the Grand Chamber's Judgment in the *Al Khawaja and Tahery* case, is flawed. To explain this position, it is necessary to (1) understand the *sui generis* nature of international criminal procedure as applicable under the SCSL RPE;[5] (2) examine the implications of the *Al Khawaja and Tahery* case to international criminal procedure, namely in terms of procedural safeguards; and (3) explain why, under the circumstances of the *Taylor* case, the Appeals Chamber applied the *Al Khawaja and Tahery* case in wording (at best) but not in spirit.

a *The Discretionary Role of the Judge in Assessing Evidence in International Criminal Procedure—and 'Procedural Safeguards' under the SCSL RPE*

International criminal procedure is of a mixed nature resulting from compromises between the common law and the continental law systems.[6] The differ-

4 *Al Khawaja and Tahery v United Kingdom*, App no 26766/05 and 22228/06 (ECtHR, 15 December 2011).

5 *Taylor* Appeal Judgment (n 1), para. 70.

6 At times qualified as *sui generis*. See eg *Prosecutor v Delalić*, IT-96-21-T, Decision on the Motion

ence between the two legal cultures is particularly significant in respect of the question of evidence. On the one hand, international criminal procedure draws on a fundamentally adversarial system.[7] On the other hand, international criminal procedure also displays significant traits borrowed from continental legal systems, in particular with respect to the admissibility and probative value of evidence.[8] SCSL procedure under its RPE is no different.[9] Therefore, almost all evidence is admissible[10] and a different probative value can be assigned to different types of evidence.[11] The judge has a crucial role in using his or her discretion to determine the weight and significance of each piece of evidence

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on Presentation of Evidence by the Accused, Esad Landzo, Trial Chamber, 1 May 1997, para. 15: an 'amalgam of both common law or civilian elements, so as to render it *sui generis*'. See also *Prosecutor v Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, Trial Chamber, 5 August 1996, para. 14.

7 Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2003) 3 International Criminal Law Review 1; See also an updated version in Kai Ambos, 'The Structure of International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' in Michael Bohlander (ed), *International Criminal Justice. A Critical Analysis of Institutions and Procedures* (Cameron May 2007) 429. For the procedure at Post World War II 'Nuremburg Trials', see Richard May and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha' (1999) 37 Columbia Journal of Transnational Law 725; Evan J. Wallach, 'The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials' (1999) 37 Columbia Journal of Transnational Law 851.

8 ICTY Rules of Procedure and Evidence, IT/32/Rev. 49, as revised on 22 May 2013, Rule 89(C) and (D); at the ICC, see RPE, Rule 63(2); Rome Statute, Article 64(9): 'A Chamber shall have the authority [...] to assess freely all evidence submitted in order to determine its relevance and admissibility'. Notably, and as outlined by Ambos (n 7), the evolution of international criminal procedure is marked by the increase in the 'mixity' of the procedure from what was originally an adversarial system to an increasingly inquisitorial or continental system. Accordingly, RPE drafted later are marked by their continental character and more prominent role for the judge, where nearly all types of evidence are admissible and freely assessed by the judge in terms of their probative value.

9 SCSL RPE applied the ICTR RPE *mutatis mutandis* with SCSL judges having the ability to make necessary amendments. See Article 14 of the SCSL Statute.

10 Under Rule 89(C) of the SCSL RPE: 'a Chamber may admit any relevant evidence'. Rule 89(C) of the ICTY RPE applies a more restrictive language: 'a Chamber may admit any relevant evidence which it deems of probative value'. See eg *Prosecutor v Martić*, IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, Trial Chamber, 19 January 2006, para. 2 of the 'Guidelines' (henceforth '*Martić* Guidelines'): '*The practice will be, therefore, in favour of admissibility*' (emphasis added).

11 See *Martić* Guidelines (n 10): 'Parties should always bear in mind the basic distinction that exists between the admissibility of documentary evidence and the weight that documentary evidence is given under the principle of free evaluation of evidence'.

in reaching a conviction or an acquittal based on his/her *intimate conviction*.[12] At this crossroads between continental and common law legal systems, where nearly every piece of evidence is admissible and its probative value dependent on the judges' discretion, the few rules limiting this discretion are of crucial importance in safeguarding a fair trial. One such central rule is that 'evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction'.[13] This general rule is often referred to as 'the sole or decisive' rule or prohibition. The Defence in the *Taylor* case relied on the 'sole or decisive' rule in its appeal submissions (Ground 1).[14] The Appeals Chamber found that 'there is no prohibition against the use of uncorroborated hearsay evidence, even if such hearsay is the basis of the conviction, provided that the Trial Chamber has subjected the hearsay evidence to a fair and proper assessment of its reliability'.[15] This ruling constitutes a misinterpretation of the relevant ECtHR jurisprudence, which led the Appeals Chamber to accept reliance on hearsay evidence without applying the 'yardsticks'[16] introduced by the ECtHR.

b *The Definition of Hearsay Evidence and the 'Sole or Decisive' Rule*

In the past, both Defence and Prosecution[17] have relied on the 'sole or decisive' rule in relation to hearsay evidence before ICTs. Even when arguing about hearsay, parties rely on case law referring to the 'sole or decisive' rule as applied

12 For one example of the principle of free evaluation of evidence in national laws, see French Code of Criminal Procedure, Article 427.

13 *Prosecutor v Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 20, where the Appeals Chamber validates the Trial Chamber's conclusion and reliance on ECtHR case law; see also *Prosecutor v Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis, 7 June 2002, fn. 34, referring to judgments of the ECtHR.

14 *Prosecutor v Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor ('Defence Appeal Brief'), 2 October 2012, paras 23–36.

15 *Taylor* Appeal Judgment (n 1), para. 91.

16 To use terminology used in Elmar Widder, The Right to Challenge Witnesses—An Application of Strasbourg's Flexible Sole and Decisive Rule to Other Human Rights (2014) 3 Cambridge Journal of International and Comparative Law 1084.

17 For the Prosecution arguments, see *Prosecutor v Popović*, IT-05-88, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 ter Exhibit List, 25 October 2007 ('*Popović* Trial Chamber Decision'), para. 42 where the Trial Chamber refers to 'Prosecution Further Submission Regarding Admissibility of the Interviews of Ljubomir Borovčanin as Evidence Against the Co-Accused' of 20 July 2007 ('Prosecution

to untested written witness statements.[18] The question is whether this case law is relevant to hearsay. The fact of the matter is that hearsay and untested witness statements are often intertwined in the case law and legal reasoning, given that in both cases the Defence right to cross-examine the source of information is limited and the original or direct source is not available for examination.[19] Revealingly, in the *Taylor* case, the Appeals Chamber applied the *Al Khawaja and Tahery* case, which involved untested witness statements[20] when responding to the Defence argument on uncorroborated hearsay. The 'sole and decisive' rule means a conviction *cannot* be based solely and decisively on evidence where the direct source of information was not cross-examined.[21] Admittedly, in order to determine whether case law referring to untested written statements is justifiably applicable to hearsay, it is necessary to draw the similarities and differences between the two and to determine the hierarchy between them, if such hierarchy exists. Hearsay evidence is evidence of facts not within the testifying witness's direct knowledge.[22] Therefore, at most, the

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Further Submission'), para. 10 and summarises the Prosecution arguments petitioning the Trial Chamber to admit the interviews into evidence stating that it would not violate the fairness of trial in light of safeguards such as the rule by which 'an accused may not be convicted solely on the basis of uncorroborated hearsay evidence'.

18 In *Popović* Prosecution Further Submission (n 17) the Prosecution relied on *Prosecutor v Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 bis(C), Appeals Chamber, 7 June 2002, fn. 34; *Prosecutor v Milutinović*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92 quater, Trial Chamber, 16 February 2007, para. 13: 'the Trial Chamber will bear in mind the jurisprudence of the Tribunal, which has clearly stated that the admission of a written statement in lieu of oral testimony cannot support a conviction all by itself where the witness does not appear for cross-examination unless the written evidence is otherwise corroborated'; *Prosecutor v Milutinović*, IT-05-87-T, Decision on Second Prosecution Motion for Admission of Evidence pursuant to Rule 92 quater, Trial Chamaber, 5 March 2007, para. 11. All references relate to untested witness statements but are used to support an argument in favour of the 'sole or decisive rule' as applicable to hearsay.

19 See eg *Popović* Trial Chamber Decision (n 17), in which the untested co-accused's interviews given prior to his indictment and where the co-accused could not be forced to testify without violating his right not to self-incriminate, were finally admitted into evidence as hearsay. See also *Prosecutor v Popović*, IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material related to Borovčanin's Questioning, 14 December 2007.

20 *Taylor* Appeal Judgment (n 1), paras 85–91.

21 See (n 13) above.

22 *Prosecutor v Halilović*, IT-01-48, Judgment, Trial Chamber, 16 November 2005, para. 15; *Prosecutor v Blagojević*, IT-02-60, Judgment, Trial Chamber, 17 January 2005, para. 21; see also

testifying source (witness) can attest to what his source *told* him and to what his *impressions* are from what his source told him. By definition, hearsay is *indirect* evidence where witness X states that Y told him something. Therefore the 'actual' or direct source of information, first-hand, is not available for cross-examination. A statement by Y would be direct evidence. Notably, if the direct source of information (Y) is available for cross-examination, then the question of hearsay as a basis for incriminating findings becomes moot, since the source of information can be challenged by cross-examination. At most, what cross-examination of hearsay can confirm is the credibility of *the hearsay witness* (*X*), not that of his source (Y). Cross-examination of X, however, does not strengthen the credibility of information provided by Y to X. Therefore, if we were to draw a hierarchy between the two, on the scale of probative value and in relation to how prejudicial they are to the Defence right to challenge evidence, hearsay evidence is arguably more prejudicial to Defence and fair trial rights than untested witness statements.[23] In the author's view, this is the underlying ratio preventing a trial chamber from reasonably relying thereon solely or decisively when entering a conviction.

This is why the Taylor Defence contended that '*A fortiori*, the prohibition must apply with even greater force in respect of hearsay with much lesser guarantees of accuracy and reliability'.[24]

The *Taylor* Appeals Chamber underlined the particular importance of the Defence's first ground of appeal relating to the assessment of hearsay evidence, as follows:

> The Defence raises two issues of law which the Special Court *has not had occasion to discuss to any extent in any of its previous judgments:* [...] and second, whether triers of fact are precluded by law from relying solely or decisively on uncorroborated hearsay evidence as the basis for incriminating findings of fact.[25]

The starting point adopted by the Appeals Chamber was to review customary international law and general principles of domestic law.[26]

Prosecutor v Aleksovski, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, Appeals Chamber, 16 February 1999, para. 14.

23 *Al Khawaja and Tahery* (n 4), para. 139.

24 Defence Appeal Brief (n 14), para. 25.

25 *Taylor* Appeal Judgment (n 1), para. 52 (emphasis added).

26 *Prosecutor v Taylor*, SCSL-03-01-A-1355, Scheduling Order, Appeals Chamber, 30 November 2012.

c *Customary International Law and General Principles on Uncorroborated Hearsay as the Basis for Incriminating Findings of Fact*

The Appeals Chamber sought to identify the rule on uncorroborated hearsay and incriminating findings under customary international law. ICTY and ICTR case law were particularly relevant to the SCSL Appeals Chamber in this context.[27] As affirmed by the ICTY Appeals Chamber:

> [u]nacceptable infringements of the rights of the Defence, in this sense *occur when a conviction is based solely, or in a decisive manner*, on the depositions of a witness *whom the accused has had no opportunity to examine* or to have examined either during the investigation or at trial.[28]

ICTR case law states as follows:

> It is well established that, as a matter of law, it is permissible to base a conviction on hearsay evidence. A Trial Chamber has the discretion to cautiously consider hearsay evidence and has the discretion to rely on it. While the weight and probative value to be afforded to that evidence *will usually be less than that accorded to the evidence of a witness who has given it under oath and who has been cross-examined, it will depend upon "the infinitely variable circumstances which surround hearsay evidence"*. Thus, the fact that the evidence regarding a specific event is hearsay evidence does not in itself suffice to render it not credible or unreliable. The source of information, the precise character of the information, ***and*** *the fact that other evidence corroborates the hearsay evidence* are relevant criteria in assessing the weight or probative value of hearsay evidence.[29]

Therefore, hearsay evidence will have lesser probative value while corroboration is needed for an incriminating finding based thereon. This was the standard applied by the ICC Trial Chamber II in the *Ngudjolo* Acquittal Judgment,[30]

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27 Article 20(3), SCSL Statute.

28 *Prosecutor v Prlić*, IT-04-74-AT73.6, Appeals Chamber, Decision on Appeals Against Decision Admitting Transcripts of Jadronko Prlić's Questioning into Evidence, 23 November 2007, para. 53.

29 *Prosecutor v Karera*, ICTR-01-74-A, Judgment, Appeals Chamber, 2 February 2009, para. 39 (internal footnotes omitted; emphasis added).

30 See *Prosecutor v Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment pursuant to Article 74 of the Statute, Trial Chamber, 18 December 2012 ('*Ngudjolo* Acquittal Judgment').

as upheld by the ICC Appeals Chamber.[31] While other factors relating to the circumstances of the case, such as the credibility of the witness, the lack of detail, and the witness's remoteness from the crime-scene admittedly played a role in the acquittal of *Ngudjolo*, the fact that crucial evidence was hearsay served as the tipping point in the Trial Chamber's Judgment. For instance, the Trial Chamber stressed that 'evidence, which is based on hearsay, must be considered with the greatest circumspection, especially as it relates to a crucial point in the Prosecution's case'.[32] The *Ngudjolo* Acquittal Judgment stated that anonymous hearsay was admissible but that its probative value would be evaluated with due consideration of 'the impossibility of cross-examining the information source'.[33] The Trial Chamber sought corroboration for hearsay on a case-by-case basis, and rejected facts because, among other reasons, they were based solely on hearsay evidence.[34] Notably, two non-hearsay elements of evidence were not enough to corroborate nine hearsay testimonies. Therefore, while hearsay was not the only factor that led the Trial Chamber to refuse to enter incriminating findings, there is no doubt that the fact that vital evidence was hearsay was significant in leading it to attach lower weight thereto. The

31 *Prosecutor v Ngudjolo*, ICC-01/04-02/12-271-Corr, Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment pursuant to Article 74 of the Statute', Appeals Chamber, 7 April 2015, paras 112, 117–118, 204, whereby it found no unreasonableness in the Trial Chamber's view that hearsay evidence on which a crucial point in the Prosecution's case is based 'must be considered with the greatest circumspection'. See also ibid paras 42–44, whereby the Appeals Chamber provides a summary of the Prosecution's first ground of appeal on the standard of proof as to hearsay evidence. According to the Prosecutor, the *Ngudjolo* Trial Chamber applied a threshold too high for conviction of 'beyond *any* doubt' instead of 'beyond any *reasonable* doubt' based on evidence, logic or common sense. The Appeals Chamber rejected the Prosecution's arguments.

32 *Ngudjolo* Acquittal Judgement (n 30), para. 496. This is notwithstanding the fact that other reasons played a role (see ibid para. 496: 'for *all* these reasons' (emphasis added)).

33 *Ngudjolo* Acquittal Judgment (n 30), para. 56.

34 *Ngudjolo* Acquittal Judgment (n 30), paras 270–272. See also, on the need for corroboration of facts alleged in human rights reports, ibid paras 294–295; and although the Trial Chamber did not question Witness P-317's honesty, ibid para. 476. Another witness's anonymous hearsay evidence was rejected relating to Ngudjolo's functions during the Bogoro attack, see ibid paras 431–433. A credible witness's statement was rejected concerning Ngudjolo's role in the Bogoro attack because it was uncorroborated hearsay and was too vague on this point, ibid para. 434. At least nine other witnesses provided hearsay evidence confirming the Accused's leading role in Bogoro and Zumbe, these were either rejected or assigned lower probative value, see ibid paras 435–442.

Trial Chamber applied this high (and appropriate) standard of caution in relation to hearsay 'especially as it relates to a crucial point in the Prosecution's case'.[35] The Trial Chamber concluded by acquitting Mr Ngudjolo on this point and, subsequently, on all charges.[36]

The case law of the ECtHR is a particularly relevant authority to ICTs when interpreting fair trial rights and the applicable law on the assessment of hearsay when entering a conviction. Thus, the ICTY Appeals Chamber recognised that:

> [T]he right to cross-examination in Article 21(4)(e) of the Statute is in *pari materia* with Article 6(3)(d) of the [ECHR] and its importance has been repeatedly stressed and its violation sanctioned by the [ECtHR]. The Appeals Chamber considers that the jurisprudence of the ECHR provides a useful source of guidance for the interpretation of the right to cross-examination and the scope of its permissible limitations.[37]

ECtHR case law is paramount in recognising the principle of an adversarial system and the principle of equality of arms,[38] in demonstrating how the right to confront evidence can be restricted by hearsay,[39] and, finally, in establishing the 'sole or decisive' rule.[40] 'In the case of a deposition that has been made

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35 *Ngudjolo* Acquittal Judgment (n 30), para. 496.

36 *Ngudjolo* Acquittal Judgment (n 30), para. 503.

37 *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, Appeals Chamber, 14 September 2006, para. 19. Article 21(4)(e) of ICTY Statute is identical to Article 17(4)(e) of SCSL Statute. Moreover in ibid para. 20, the Appeals Chamber upheld the Trial Chamber's assessment of ECtHR case law when it asserted that 'evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction, are consistent with the jurisprudence of the International Tribunal as well as that of national jurisdictions' (internal footnotes omitted); see also *Prlić* (n 28), para. 31.

38 *Rowe and Davis v the United Kingdom*, App no 28901/95 (ECtHR, 16 February 2000), para. 60; *Laukkanin and Manninen v Finland*, App no 50230/99 (ECtHR, 3 February 2004), para. 34.

39 Kai Ambos, *Treatise on International Criminal Law, Vol. III: International Criminal Procedure* (OUP 2016) 1739–1740 and references cited therein.

40 The 'sole or decisive' rule was first recognised by the ECtHR in *Unterpertinger v Austria*, App no 9120/80 (ECtHR, 24 November 1986), para. 33. Also refer to *Mild and Virtanen v Finland*, App no 39481/98 and 40227/98 (ECtHR, 26 July 2005), para. 42; *Doorsen v Netherlands*, App no 20524/92 (ECtHR, 26 March 1996), para. 76, where the ECtHR held that there was a violation of Article 6(3)(d) even where the absence of the witnesses

by a witness whom the accused had no opportunity to examine, the final assessment depends on the circumstances of the concrete case, in particular whether this deposition has been corroborated by other evidence and whether the court has relied exclusively on it'.[41]

The present examination of international case law on the 'sole or decisive' rule has thus revealed the importance of corroboration[42] and the circumstances of each case. The circumstances of reliance on hearsay evidence in the *Taylor* case by the Trial Chamber and its validation by the Appeals Chamber will be discussed in Section II below, after examining the *Al Khawaja and Tahery* case and its misguided application in *Taylor*.

II The SCSL Deviation from the 'Sole or Decisive' Rule and the Misapplication of the ECtHR Case Law

It is argued that, in the *Taylor* Appeal Judgment, the Appeals Chamber deviated from the 'sole or decisive' rule based on a misapplication of the ECtHR Grand Chamber Judgment in *Al Khawaja and Tahery*.[43] Notably, the Appeals Chamber applied the wording of the ECtHR, but misapplied the spirit of its Judgment. The pivotal point of departure is a misguided understanding of the 'procedural safeguards' as understood and applied in the *Al Khawaja and Tahery* case.

a *The Taylor Appeal Judgment on Uncorroborated Hearsay*

The Appeals Chamber rejected Ground 1 of the Defence's appeal by relying on the *Al Khawaja and Tahery* ECtHR Judgment, in particular on its paragraph 147, which it quoted only partially. The Appeals Chamber concluded that in light of the fair trial guarantees offered by the SCSL Statute and Regulations, it was satisfied that the Accused was offered a fair chance to challenge the evidence against him.[44] That evidence included uncorroborated hearsay as a decisive base for conviction.

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was justified; *van Mechelen and others v Netherlands*, App no 21363/93, 21364/93, 21427/93 and 22056/93 (ECtHR, 23 April 1997), para. 55; *Lucà v Italy*, App no 33354/96 (ECtHR, 27 February 2001), para. 40; *A.M. v Italy*, App no 37019/97 (ECtHR, 14 December 1999), para. 25; *Saïdi v France*, App no 14647/89 (ECtHR, 20 September 1993), paras 43–44.

41 *Bracci v Italy*, App no 36822/02 (ECtHR, 13 October 2005), paras 54 ff.

42 As defined in *Prosecutor v Nahimana*, ICTR-99-52-A, Judgment, Appeals Chamber, para. 428 (emphasis added).

43 *Al Khawaja and Tahery* (n 4).

44 ibid para 91.

At paragraph 85 of its Judgment, the Appeals Chamber stated as follows:

> The Appeals Chamber considers that the issue in this case in regard to hearsay evidence *turns on* whether the Defence was right in its contention that reliance on uncorroborated hearsay evidence as the sole or decisive basis for incriminating findings of fact leading to a conviction amounted to an error in law. *It is, therefore, in this context relevant and instructive to note that the ECtHR in the case of Al Khawaja and Tahery*, decided on 15 December 2011, considered and expressly rejected a similar view as that put forward by the Defence in this case. In *Al Khawaja and Tahery*, the Grand Chamber of the ECtHR held that reliance on an uncorroborated hearsay statement as the sole or decisive basis for a conviction is not precluded as a matter of law and does not *per se* violate the Accused's right to a fair trial.[45]

The Appeals Chamber disregarded the ECtHR *ratio* assessing the counterbalancing measures in the context of the case.[46] It implicitly referred to the ECtHR's reasoning that in order for a conviction decisively based on uncorroborated hearsay *not* to be in breach of Article 6(3) of the ECHR, there must be 'counterbalancing factors, including the existence of *strong procedural safeguards*' (emphasis added). Whereas the ECtHR examined the counterbalancing measures in English law existing at the time of the decision, the Appeals Chamber made an 'intellectual leap' to state that: '*There exist in the laws applied by the Special Court safeguards designed to ensure the accused's rights of fair hearing and to ensure that evidence can be fairly challenged at trial*'.[47]

The Appeals Chamber did not question existing SCSL procedural safeguards in light of the ECtHR's specific examination of English law, as opposed to other legal systems,[48] and it overlooked the intrinsic difference between the two systems on rules of evidence. It is also argued that the Appeals Chamber did not sufficiently examine the Trial Chamber's assessment of evidence in the specific circumstances of the *Taylor* case. For if it had, it would, arguably, not have applied nascent ECtHR case law, which is still subject to debate several years after its pronouncement,[49] relating to procedural rules presumably not analogous to international criminal procedure on rules of evidence—and

45 Emphasis added.

46 *Al Khawaja and Tahery* (n 4), para. 147.

47 ibid para. 87 (internal footnotes omitted; emphasis added). See also ibid para. 91.

48 *Al Khawaja and Tahery* (n 4), paras 130 ff.

49 See eg Widder (n 16), where the author applies the 'ECtHR yardsticks' to other human

applied it to 'fourth-hand hearsay'.[50] Interpretation by analogy is particularly uncalled for in international criminal law, especially when it results in serious restrictions on an individual's personal liberty and considering the spirit underlying the principle of legality,[51] which requires adherence to strict interpretation. While there is a variety of opinions on the point,[52] it is submitted that the ECtHR delivered a nuanced and sophisticated judgement in *Al Khawaja and Tahery*. In contrast, the Appeals Chamber applied a 'one-size-fits-all' standard. Indeed, a cautious examination of procedural safeguards to ECtHR 'yardsticks' is warranted in light of the ECtHR's contextual examination of the counterbalancing measures in English law.[53] In that regard the Appeals Chamber overlooked a crucial element of law with serious implications.

b *'Strong Procedural Safeguards' in the UK System as Opposed to 'Safeguards of a Fair Trial' at SCSL*

i The ECtHR *Al Khawaja and Tahery* Judgment of 2011

In the European context, the *Al Khawaja and Tahery* case offered 'fine-tuning' to existing ECtHR case law and admitted that the 'sole or decisive' rule could be applied flexibly *to the UK system*.[54] Thus, legal systems where a conviction is possible based 'solely or decisively' on uncorroborated hearsay would normally be in breach of Article 6(3) of the ECHR, whereas it would not be possible under the strict hearsay rule in the UK system.[55] However, the UK system deviated from its strict rule on the inadmissibility of hearsay in *Al Khawaja and Tahery*. Nevertheless, according to the ECtHR, 'these dilutions of the strict rule against hearsay have been accompanied by statutory safeguards and, accordingly, *the*

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rights bodies to see how they would have ruled, taking into account the common law/continental law divide.

50 Defence Appeal Brief (n 14), para. 27.

51 See eg Antonio Cassese et al., *Cassese's International Criminal Law* (OUP 2013), Chapter 2. Although the principle of legality relates directly to the scope of crimes, it is argued that its rationale suggests a cautious interpretation of other areas of law that significantly impact on an accused's fundamental rights.

52 See eg above, chapter by Yvonne McDermott.

53 *Al Khawaja and Tahery* (n 4), paras 148 ff.

54 ibid para. 146. The ECtHR fine tuning in *Al Khawaja and Tahery* (n 4) is limited to absent witnesses and does not apply to anonymous witnesses where the strict 'sole or decisive' rule would apply also in the UK system, ibid para. 137.

55 ibid para. 130.

central question in the [*Al Khawaja and Tahery*] *cases is whether the application of these safeguards was sufficient to secure the applicants' rights* under Article 6 (1) and (3)(d)'.[56]

The ECtHR examined specific safeguards in the 1988[57] and 2003[58] UK Acts. It stated for example:

> Of particular significance is the requirement under the 2003 Act that the trial judge should stop the proceedings if satisfied at the close of the case for the prosecution that the case against the accused is based "wholly or partly" on a hearsay statement admitted under the 2003 Act, provided he or she is also satisfied that the statement in question is so unconvincing that, considering its importance to the case against the accused, a conviction would be unsafe.[59]

A close reading of the decision reveals that the ECtHR finds that basing a conviction on uncorroborated hearsay evidence no longer automatically violates the accused's rights, given the very specific safeguards *applicable in the common law system in the UK*.[60] A review of the ECtHR jurisprudence clearly demonstrates that *continental or civil law legal systems* do *not* generally offer the same safeguards.[61] In those systems, the prohibition of reliance on hearsay evidence as sole or decisive evidence for conviction should be applied strictly. This is a critical point. The ECtHR admits broadening its previous case law when relevant to common law systems and the safeguards therein, continuing to confirm as valid its previous case law, developed in relation to civil law systems, on the sole or decisive rule.[62] Hence what the SCSL Appeals Chamber did in *Taylor* was the equivalent of comparing apples and oranges.

Notably, and similar to the SCSL, all continental law systems have safeguards to ensure the fair trial of defendants, including his or her right to

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56 ibid (emphasis added).

57 Sections 23 to 28 of the Criminal Justice Act 1988 ("the 1988 Act").

58 Part 11, Chapter 2 of the Criminal Justice Act 2003 ("the 2003 Act"), entered into force in April 2005.

59 ibid 149.

60 *Al Khawaja and Tahery* (n 4) paras 40, 133, and 148 ff., as examples for ECtHR review of common law safeguards.

61 According to previous ECtHR case law (see (n 40) above), safeguards existing in The Netherlands, Germany, Austria, Italy, Finland and France would not be sufficiently strong to allow deviation from the sole or decisive rule without breach of Article6(3) of the ECHR.

62 See *Al Khawaja and Tahery* (n 4), paras 118, 142.

challenge evidence. However, UK procedural safeguards and ICTs' procedural safeguards, including those at the SCSL, ICTY and ICTR, are distinct.[63] The latter call for a strict application of the 'sole or decisive' rule, unless the inability to cross-examine evidence was somehow compensated for. In *Popović*, the ICTY Trial Chamber accepted the Prosecution's arguments on the difference between ICTY safeguards and UK safeguards and admitted into evidence the co-accused's interviews conducted prior to his indictment as hearsay.[64] The Prosecution stated:

> [U]nlike jury trials in common law jurisdictions, ICTY cases are heard by professional judges who are able to consider the reliability and probative value of evidence, consider the effect of absence of cross-examination, and assign the evidence whatever weight is deemed proper.[65]

This is the underlying premise for the admission of hearsay evidence in international criminal procedure, ie the trust in the judges' best judgement. This is why the 'sole or decisive' rule is relevant in international criminal procedure, as a rule restricting judges' freedom of assessing evidence in view of fair trial rights.

At the SCSL, judges would weigh the probative value of hearsay, which in the UK system would normally not be admitted into evidence. Also, what is an exception in the UK system—that is, admission of hearsay evidence—is the rule in ICTs' procedural regulations. That is why the two systems are incomparable; they result in two distinct legal cultures and, without adequate adaptation, the wording applied by one cannot be adopted by the other. Indeed, arguably, the same language in both legal systems would result in different outcomes.

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63 In a later decision, the ECtHR stressed the 'counterbalancing measures of the common law': *Horncastle v United Kingdom*, App no 4184/10 (ECtHR, 16 December 2014), paras 102 and 115.

64 *Popović* Trial Chamber Decision (n 17), paras 56–59 where the co-accused interviews are analysed as hearsay against the other accused; ibid paras 77–80 where the Trial Chamber decides to admit the interviews into evidence.

65 Prosecution Further Submission (n 17), para. 10.

ii The Dialogue between the ECtHR and the UK Courts: Necessary Adaptation of ECtHR Case Law Seeing Inherent Procedural Safeguards in UK Law

In *Al Khawaja and Tahery*, the ECtHR took the effort to analyse relevant domestic law and practice,[66] including safeguards offered by the Criminal Justice Act 2003, the Coroners and Justice Act 2009 and the Human Rights Act 1998. When examining case law of the UK, the ECtHR focused on how UK courts have applied ECtHR case law. The first UK case examined, *R v Sellick and Sellick*, highlighted the need for UK courts to distance themselves from a strict application of ECtHR case law.[67] According to the UK Court, this distance is necessary considering that the UK system is jury-based, and the judge removes hearsay evidence at the admissibility stage. The UK court held that the existing ECtHR case law pertaining to the 'sole or decisive standard' is inadequate in light of the fact that, at the admissibility stage, it is impossible to determine whether one piece of evidence will be decisive or not at the judgment stage.

The ECtHR decision quoted Lord Philips, stating as follows:

> Indeed the rule seemed to have been created because, *in contrast to the common law, continental systems of criminal procedure* did not have a comparable body of jurisprudence or rules governing the admissibility of evidence.[68]

The second UK case examined by the ECtHR is *R. v Davis*. The ECtHR refers to Lord Bingham and holds as follows:

> [The UK Court] found that the witnesses' testimony was inconsistent with the long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence, a principle which originated in ancient Rome (Lord Bingham at paragraph 5).
>
> Moreover, this Court had not set its face absolutely against the admission of anonymous evidence in all circumstances. *However, it had said that a conviction should not be based solely or to a decisive extent on anonymous statements*. In any event, *on the facts in Davis's case, this Court would*

66 See *Al Khawaja and Tahery* (n 4), paras 40–62. For a review of 'relevant [common law] comparative law' see ibid paras 65–87.

67 Namely, *Lucà* (n 40), para. 40.

68 *Al Khawaja and Tahery* (n 4), para. 58 (emphasis added).

> *have found a violation of Article 6: not only was the anonymous witnesses evidence the sole or decisive basis on which Davis had been convicted, but effective cross-examination had been hampered.*[69]

The UK system contains an internal 'sole or decisive' rule. The *Al Khawaja and Tahery* judgment reconfirmed previous ECtHR case law, stating that:

> [*If*] *effective cross-examination is hampered and anonymous witness evidence is the sole or decisive basis for conviction, there would still be a violation of Article 6 of the ECHR.* Moreover, at paragraph 142 of the *Al Khawaja and Tahery* judgment, the ECtHR confirmed that '[w]ith respect to the Government's final argument, the Court is of the view that the two reasons underpinning the sole or decisive rule that were set out in the *Doorson* judgment *remain valid*'.[70]

Finally, the Grand Chamber went to considerable lengths in examining *R. v Horncastle* and others.[71] It reports the conclusions of Lord Philips as follows:

> Lord Phillips instead concluded that the 2003 Act made such a rule *unnecessary in English criminal procedure* because, if the 2003 Act were observed, there would be no breach of Article 6(3)(d) even if a conviction were based solely or to a decisive extent on hearsay evidence. To demonstrate this point, Annex 4 to the judgment analysed a series of cases against other Contracting States where this Court had found a violation of Article 6(1) when taken with Article 6(3)(d). *In each case, had the trial taken place in England and Wales, the witness's testimony would not have been admissible under the 2003 Act either because the witness was anonymous and absent or because the trial court had not made sufficient enquiries to ensure there was good reason for the witness's absence. Alternatively, had the evidence been admitted,* ***any conviction would have been quashed*** *on appeal.*[72]

In the UK, the 'sole or decisive' rule is applicable and hearsay evidence is generally regarded as unreliable and inadmissible. The Judge also directs the jury not to rely on hearsay evidence. Only a few limited situations justify a

69 ibid para. 49 (emphasis added).

70 ibid para. 142. See also ibid paras 118–119.

71 ibid paras 51–62.

72 Emphasis added.

departure from this rule under UK law. One example is provided by Lord Philips in *R. v Horncastle and others*, where he argues against a strict application of the ECtHR 'sole or decisive' rule when evidence is verifiable such as an untested witness testimony reporting a car registration number, when the car is red and the owner has a beard;[73] all of which have been verified by police afterward.

This illustrates the limited extent to which hearsay evidence could be reliable—that is, when it is provided by the (deceased) victim who is a *direct* witness, and the information he provides is accurate and *testable*/tested. In practice, this would amount to a tested witness statement, perhaps by other tested testimony, ie corroboration. As the ECtHR stated:

> Experience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination. The dangers inherent in allowing *untested hearsay evidence* to be adduced are all the greater if that evidence is the sole or decisive evidence against the defendant.[74]

iii The Post-*Al Khawaja and Tahery* Case Law—A Cautious Approach

Admittedly, more recent ECtHR case law stresses the *Al Khawaja and Tahery* 'yardsticks' result in case specific (and different) outcomes.[75] While pre-*Al Khawaja and Tahery* case law offered a clear-cut 'indiscriminate' 'sole or decisive' rule, post-*Al Khawaja and Tahery* case law calls for an assessment by the ECtHR of the overall fairness of the trial.[76] In every case, the ECtHR observes whether there was good reason for the absence of the witness (first step), whether admitted hearsay played a sole (or decisive) role in conviction (second step), and whether sufficient counterbalancing measures existed in each legal system (third step).[77] Subsequent cases confirm the *Al Khawaja and Tahery* judgment as an adaptation of existing case law to the UK's strong procedural safeguards.[78] The ECtHR declared a breach of Article 6(3) of the ECHR when

73 ibid para. 60.

74 ibid para. 142 (emphasis added).

75 *Schatschaschwili v Germany*, App no 9154/10 (ECtHR, 15 December 2015), para. 113.

76 ibid para. 112.

77 ibid paras 125–131 for a list of procedural safeguards sought in ECtHR case law; ibid paras 145–165 for available safeguards and how they were applied in the specific case.

78 The ECtHR reiterated its *Al Khawaja and Tahery* (n 4) findings in a recent case, see *Horncastle* (n 64). The ECtHR found that even assuming that the written statement of the victim had been 'decisive', there had been sufficient safeguards in UK law to protect their right to a fair trial. In relation to two other applicants, the Court concluded that the

hearsay was a sole or decisive base for conviction without sufficient safeguards in a traditionally continental law system (Russia) in *Sigbatullim v Russia*[79] and *Karpenko v Russia*.[80] In *Schatschaschwili*,[81] the ECtHR concluded that there was a breach of Article 6(3) of the ECHR, since German courts did not apply safeguards available in domestic law.[82] After close examination of the latter, it seems that the 'sole or decisive' rule is as relevant as always. Thus, the ECtHR found a violation of Article 6(3) of the ECHR considering that the evidence was decisive and, therefore, the Accused should have been given the chance to cross-examine the absent witnesses.[83]

iv *Al Khawaja and Tahery* as Applied by SCSL in the *Taylor* Case

The Appeals Chamber did not proceed as cautiously as the ECtHR when applying *Al Khawaja and Tahery* to the *Taylor* case. The casuistic factors, ie the ECtHR three step approach,[84] that should have been applied to the *Taylor* case and are relevant when determining the legality of reliance on hearsay would have necessitated the following analysis.

(1) First step—Existence of good reason for the absence of the direct source:

In the *Taylor* case, Sam Bockarie's words were reported through hearsay. Sam Bockarie is reportedly dead. Therefore the direct source was never available for cross-examination or for an untested recorded witness testimony by a stenographer. Even though eight different witnesses, regardless of their reliability, reported Bockarie's words, there is no testing of Bockarie's reliability.[85]

(2) Second step—How was hearsay used? Was it decisive to any incriminating finding?[86]

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statement had been neither the sole nor decisive basis of their conviction and, accordingly, that there had been no violation of their defence rights. The ECtHR reconfirms the 'sole or decisive' rule at ibid para. 151.

79 *Sigbatullim v Russia*, App no 1413/05 (ECtHR, 24 April 2012), paras 50–59.

80 *Karpenko v Russia*, App no 5605/04 (ECtHR, 13 March 2012), paras 70–77, for conviction based on pre-trial depositions.

81 *Schatschaschwili* (n 76).

82 ibid paras 162–165.

83 ibid paras 163–164.

84 *Horncastle* (n 64), para. 139.

85 Defence Appeal Brief (n 14), para. 28.

86 ibid para. 134.

Uncorroborated hearsay evidence was decisively relied upon by the Trial Chamber in *Taylor* when entering the conviction of planning and aiding and abetting insofar as, 'coupled together, you would not have a *mens rea* finding for planning without those two pieces of hearsay'.[87] The two pieces of hearsay to which the Defence was referring in its oral pleading was Isaac Mongor's testimony (1) that he heard from Sam Bockarie (deceased) that the accused told him to make the operation fearful, and (2) that Sam Bockarie told him that the Revolutionary United Front should use all means to get to Freetown. So, in fact, there is hearsay from one witness (not two) from one source and on which the Trial Chamber found the accused had *mens rea* for planning.[88] The Defence Appeal Brief reported in Ground 1 that this 'error was committed repeatedly' and in one case an incriminating finding even relied on 'fourth-hand hearsay' where the witness overheard Mohamed Kabbah allegedly in a conversation via satellite in Buedu with Sam Bockarie who allegedly spoke with Yeaten who was allegedly told by the Accused to release the Pademba Road prisoners.[89] The Appeals Chamber did not make a finding as to whether or not the Trial Chamber relied on hearsay solely or decisively. Rather, it focused on the Trial Chamber's liberty to do so considering the procedural safeguards in the SCSL RPE.[90]

(3) Third step—Counterbalancing measures: enshrined in the SCSL RPE and applied by the Trial Chamber:

The Appeals Chamber did not conduct an in-depth review of how the Trial Chamber applied SCSL procedural safeguards. Admission of hearsay at the SCSL is the rule not the exception.[91] Existing counterbalancing measures are listed in the case law and are according to international standards of fair trial rights. In order to examine the legality of the Trial Chamber's assessment and reliance on hearsay evidence, it is necessary to look into the specific circumstances of the case. To follow the criteria applied by the ECtHR in the *Schatschaschwili* case,[92] the Trial Chamber at the beginning of the Judgement purported to instruct itself that it must approach hearsay evidence with 'cau-

87 Transcripts of 23 January 2013, p. 49994, lines 7–8 (Counsel for Taylor).

88 ibid, p. 49993, line 24 to p. 49994, line 8.

89 See Defence Appeal Brief (n 14), para. 27, based on *Taylor* Appeal Judgment (n 1), para. 3588.

90 *Taylor* Appeal Judgment (n 1), paras 85–91.

91 Rule 89(C) of the SCSL RPE.

92 *Schatschaschwili* (n 76), paras 132–165.

tion',[93] the accused was given a chance to provide his own version.[94] However, it is argued that the fact that the Taylor Defence never had a chance to cross-examine Sam Bockarie, directly or indirectly, at trial or pre-trial, would have led the ECtHR to find that the Taylor Trial Chamber judgement did not respect the accused's fair trial rights.[95] This is because the hearsay in *Taylor* is unverifiable and the safeguards in the SCSL procedural system are clearly insufficient, as demonstrated by their comparison to those in the UK system. Consequently, this evidence could not provide a sufficiently credible source for an incriminating finding.[96]

III Conclusion

The Trial Chamber based Taylor's conviction for planning on unverifiable uncorroborated hearsay evidence. It did so by misapplying nascent ECtHR case law based on the *Al Khawaja and Tahery* case. The ECtHR replaced the strict 'sole or decisive' rule by a flexible application to each legal system and the application of the procedural safeguards therein, to compensate for the accused's inability to test the direct source of information. Where the accused was not accorded the ability to test a direct source and where a court based a conviction on an indirect source's hearsay evidence, the ECtHR would find that the trial was, overall, unfair. Whereas in the UK system, as examined in the *Al Khawaja and Tahery* case, such evidence would not have been admitted into evidence and if it were to have been (for the sake of argument) and decisively relied upon by the UK court, the UK appellate chamber would have quashed the decision.

Admittedly, the *Al Khawaja and Tahery* case introduces a flexible approach where parties have less certainty as to the outcome of ECtHR review of fair trial rights. Nevertheless, a close observation of the ECtHR approach leads to the conclusion that it is still incorrect to base a conviction solely and decisively without an accused ever having had the chance to test the direct source of the information. The ECtHR reviews each procedural (domestic) system and its application by the respective court. The Appeals Chamber 'flattened' the nuances introduced by the *Al Khawaja and Tahery* judgment and applied it thoughtlessly to the *Taylor* case. The danger is that other ICTs would be tempted to rely on the *Taylor* case. Instead, the author calls for a cautious approach.

93 *Schatschaschwili* (n 76), para. 163.

94 ibid.

95 *Schatschaschwili* (n 76), paras 162, 164–165.

96 *Taylor* Appeal Judgement (n 1), paras 166–169, and Defence Appeal Brief (n 14), para. 29.