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SCSL-03-01-T
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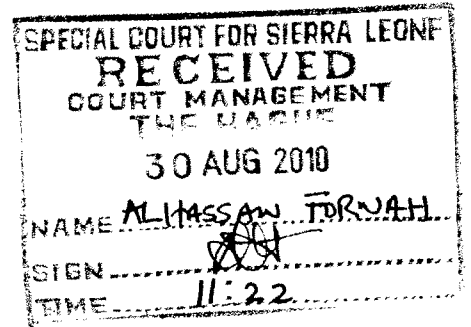
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Date filed: 30 August 2010



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

**PUBLIC WITH CONFIDENTIAL ANNEX
PROSECUTION OBJECTIONS TO PUBLIC WITH CONFIDENTIAL ANNEXES A, B, C AND D
DEFENCE MOTION FOR ADMISSION OF DOCUMENTS PURSUANT TO RULE 92bis – AUTOPSY
REPORT**

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. The Prosecution files these objections to the “Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report”¹ and corrigendum thereto.²
2. The Prosecution:
 - (i) opposes the admission of two medical documents which are properly characterised as expert statements³ (and one document⁴ which is inextricably linked to them) on the grounds that the documents do not satisfy the requirements of Rule 92bis; and
 - (ii) should the Trial Chamber be minded to admit the expert statements under Rule 92bis, requests that the Trial Chamber exercise its discretion under Rule 92bis in light of Rule 94bis(C) and require the authors of the two medical documents (DCT-414 and DCT-416) to be made available for cross-examination on the final versions of their reports.

II. ARGUMENT

Documents do not satisfy the requirements of Rule 92bis

3. The documents should not be admitted as their reliability is not susceptible of confirmation, they do not bear sufficient *indicia* of reliability, and they contain opinion. First, no evidence has been or, it would appear, will be led, which is capable of corroborating the detailed medical findings and opinions contained in the medical documents, DCT-414, DCT-415 and DCT-416. It is acknowledged that this Trial Chamber has stated that the “capable of corroboration” test does not require every point of evidence tendered under Rule 92bis to be corroborated by other evidence adduced at trial.⁵ However, all that is currently on the record are broad statements by lay witnesses of what they considered

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1061, Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report, 25 August 2010 (“**Motion**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-1063, Public Corrigendum to Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report, 27 August 2010 (“**Corrigendum**”).

³ See Motion, Annex A - DCT-414 (autopsy report of Enoch Dogolea prepared by Docteur Hélène Yapo Etti in French) and Motion, Annex C - DCT-416 (Conclusion of the Medical Report of the Late Enoch Dogolea at the Centre Medico-Chirurgical France-Ivoire).

⁴ See Motion, Annex B - DCT-415 (autopsy report of Enoch Dogolea prepared by Docteur Hélène Yapo Etti translated into English by Dr. Clotilde E. Monguya).

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-739, Decision on Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies, 20 February 2009, para. 37.

Dogolea's cause of death to be. Without expert assistance it is not clear what the medical reports conclude or how they were prepared and so whether they corroborate any witness, particularly when one is only a draft.

4. Second, while proof of reliability is not a condition of admission, the documents are still required to possess sufficient *indicia* of reliability such as to permit admission under Rule 92bis.⁶ Neither of the documents DCT-414 and DCT-416 bear such *indicia*. The Autopsy Report is only a preliminary report as it states "a final report will follow" on "receipt of anatomopathological (*sic*) and toxicological results".⁷ The Report's findings,⁸ therefore, cannot be considered conclusive. In relation to DCT-416 (Conclusion of the Medical Report), the document is purportedly dated 23 June 2000, but on page 2 refers to "Referenced attached from Wikipedia, the free encyclopaedia". Evidence sourced from an on-line encyclopaedia which was not launched until 15 January 2001,⁹ after the date of the statement in question here, self-evidently does not bear sufficient *indicia* of reliability.
5. It is well established that Rule 92bis permits the "reception of information – assertions of fact (but not opinion)".¹⁰ The final two sections of the Autopsy Report contain expressions of the author's opinion which should be excluded from admission.¹¹ This limitation is one of the effects of choosing to proceed under Rule 92bis rather than Rule 94bis alone.

DCT-414 and DCT-416 are expert statements for the purposes of Rule 94bis

6. Two of the three documents¹² which the Defence seeks to have admitted contain expert medical information and opinion apparently prepared by medical doctors.¹³ This type of information is properly expert evidence as it is "intended to enlighten the Judges on specific

⁶ *Prosecutor v. Sesay et al.*, SCSL-04-15-T-557, Decision on the Prosecution Notice under 92bis to Admit the Transcripts of Testimony of TF1-256, 23 May 2006, p. 3.

⁷ Motion, CMS p. 29967.

⁸ See Motion, CMS p. 29966, "Section IV – Discussion" includes the following phrases: "the *possible* cause of death is ..."; "The immediate cause of bleeding *might* be due to ..."; and "it is *suspected* that the death of ...".

⁹ See launch date noted at http://en.wikipedia.org/wiki/History_of_Wikipedia.

¹⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-736, Public Decision on Prosecution Motion for Admission of Liberia Search Documents, 18 February 2009, para. 18.

¹¹ The expressions of opinion are set out in the Annex hereto.

¹² Three, if the translation of the autopsy report is included.

¹³ The documents are DCT-414 (autopsy report of Enoch Dogolea prepared by Docteur Hélène Yapo Etti in French), DCT-415 (autopsy report of Enoch Dogolea prepared by Docteur Hélène Yapo Etti translated into English by Dr. Clotilde E. Monguya) and DCT-416 (Conclusion of the Medical Report of the Late Enoch Dogolea at the Centre Medico-Chirurgical France-Ivoire). DCT-414 and DCT-415 will be referred to herein collectively as "**The Autopsy Report**".

issues of a technical nature, requiring special knowledge in a specific field” and provides “a court with information that is outside its ordinary experience and knowledge”.¹⁴ It is evident from the face of the two documents that highly technical medical language is used which requires “special knowledge in [the medical] field” in order to be able to fully understand it. However, the Defence seeks to have this evidence admitted without recourse to the authors and further without the expertise of the authors being challenged. The Defence is, therefore, clearly seeking to avoid the application of Rule 94*bis* by requesting that this expert medical evidence be admitted under Rule 92*bis*. Indeed, the Defence are also effectively seeking to avoid the requirements of Rule 73*ter*(E) by varying its witness list and adding two expert witnesses via the back door.

Requirements of Rule 94*bis* cannot be avoided

7. Rule 94*bis* sets out the standard procedure to be followed for tendering and admitting expert statements.¹⁵ Rule 94*bis* is distinct from Rule 92*bis* “as it provides for a strict procedure for the tendering of expert witness statements”¹⁶ which includes inviting the opposing party to indicate if it accepts the expert witness statement or wishes to cross-examine the expert witness. Nevertheless, “the application of Rule 92*bis* to expert witnesses is not inconsistent with Rule 94*bis*.”¹⁷ The jurisprudence of the *ad hoc* tribunals¹⁸ establishes that Rule 92*bis* is the “*lex generalis* for the admission of witness statements” and Rule 94*bis* is the “*lex specialis* for expert statements.”¹⁹
8. The effect of this finding is that the terms of Rule 94*bis* cannot simply be side-stepped:

“Rule 94(C) is a specific provision regarding the admission of expert statements, and ... its application cannot be avoided simply by tendering the statements under Rule 92*bis*, where more discretion exists for the Trial Chamber.”²⁰

¹⁴ *Prosecutor v. Norma et al.*, SCSL-04-14-T-668, Decision on Fofana Application for Leave to Call Additional Witnesses, 17 July 2006, pp. 5-4.

¹⁵ *Prosecutor v. Blagojević et al.*, IT-02-60-T, Decision on Prosecution’s Motion for Admission of Expert Statements, 7 November 2003, para. 20 (“*Blagojević Decision*”).

¹⁶ *Ibid.*, para. 21.

¹⁷ *Ibid.*, para. 24 citing with approval *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 40.

¹⁸ The Prosecution acknowledges that there are differences in wording between ICTY Rule 92*bis* and SCSL Rule 92*bis* but in the context of the present discussion (the relationship between Rules 92*bis* and 94*bis*) such differences are irrelevant.

¹⁹ *Blagojević Decision*, para. 28.

²⁰ *Ibid.*, para. 27.

9. Rather, expert statements and reports can be admitted under Rule 92bis if, first, the other requirements of the Rule are satisfied and, second:

“[i]n cases in which the opposing party objects to the statement of the expert witness, the right of the opposing party to cross-examine the expert should not be determined without considering the *argumentum e contrario* of the provision of Rule 94bis(C), even when deciding upon the admissibility of an expert statement under Rule 92bis.”²¹

10. In the context of the jurisprudence set out above, the Prosecution notes that the ICTY has received autopsy reports into evidence under Rules 54 and 89(C) in the *Milošević* case to establish that the persons identified died and the manner of their death.²² However, such reports were admitted without explanatory testimony because similar reports or similar exhumations had already been the subject of examination-in-chief and cross-examination.²³ Guidance, therefore, cannot be taken from the *Milošević* decision in the present case. The Prosecution further notes that the admission of Sam Bockarie’s autopsy as D-46 in the current proceedings, opposed by the Prosecution, was used with a witness in cross-examination for impeachment purposes,²⁴ rather than the equivalent of evidence-in-chief, in contrast to the present circumstance.

Request to cross-examine the authors of the medical documents

11. Should the Chamber be minded to accept the expert statements set out in DCT-414 (as translated in DCT-415) and DCT 416 under Rule 92bis, the Prosecution advises that it does not accept these expert statements and requests that it be permitted to cross-examine the authors. The Prosecution further requests that the authors bring with them the final versions of the reports, as the basis for comparison and questioning.
12. As noted above, the Chamber’s discretion to admit expert reports under Rule 92bis must be exercised in light of Rule 94bis(C). This means that “where the opposing party does not accept the statement of the expert witness on grounds not to be considered unreasonable, the statement can only be admitted into evidence after the expert [has] been called and has

²¹ *Blagojević* Decision, para. 27.

²² *Prosecutor v. Milošević*, IT-02-54-T, Order on Prosecution Submission of Kosovo “Proof of Death” Report and Motion seeking the Admission of Additional Exhibits in relation to the Kosovo Indictment, 25 February 2004.

²³ *Prosecutor v. Milošević*, IT-02-54-T, Prosecution Submission of Kosovo “Proof of Death” Report and Motion seeking the Admission of Additional Exhibits in relation to the Kosovo Indictment, 16 February 2004, paras. 6, 7 & 9.

²⁴ Trial Transcript, 21 May 2008, pp. 10406-7.

testified in person.”²⁵ The Prosecution has reasonable grounds not to accept the expert reports and, therefore, to challenge their contents in cross-examination. First, the medical reports contain technical findings which require explanatory testimony. Second, the Autopsy Reports are preliminary and not final. Third, said reports contain matters of concern (see paragraphs 3 and 4 above) which require further elucidation and testing. Accordingly, the final versions of the medical documents should only be admitted into evidence after the authors have been called and testified in person.

13. The Prosecution observes that the Trial Chamber has an inherent power to order cross-examination under Rule 92*bis* in addition to Rule 94*bis* and, for the reasons above, requests that the Chamber exercise this discretion.

III. CONCLUSION

14. As set out above, the Prosecution opposes the admission of the proposed Defence evidence. Should the Trial Chamber be minded to admit the documents under Rule 92*bis*, then pursuant to Rule 94*bis* and Rule 92*bis*, the Prosecution requests that the Trial Chamber require that the authors of the two medical documents (DCT-414 and DCT-416) be made available for cross-examination on the final versions of their reports.

Filed in The Hague,
30 August 2010,
For the Prosecution,



Brenda J. Hollis,
The Prosecutor

²⁵ *Blagojević* Decision, para. 26.

INDEX OF AUTHORITIES

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Prosecutor v. Taylor, SCSL-03-01-T-1061, Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report, 25 August 2010

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(available on ICTY Court Records Site)



SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1 • 2265 BC LEIDSCHENDAM • THE NETHERLANDS

PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

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Name of Officer:

Alhassan Fornah

Signed: