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SCSL-03-01-T
(19261 - 19276)

19261



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: 09 September 2008

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE	
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THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX A

DEFENCE OBJECTION TO "PROSECUTION NOTICE UNDER RULE 92bis FOR THE ADMISSION OF EVIDENCE RELATED TO *INTER ALIA* KONO DISTRICT - TF1-218 & TF1-304"

Office of the Prosecutor

Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for Charles G. Taylor

Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. On 3rd September 2008, the Prosecution filed a Notice,¹ under Rule 92*bis*, of its intention to seek the admission of the prior trial transcripts and related exhibits related to the respective testimonies of witnesses TF1-218 and TF1-304 (the “Witnesses”) in other proceedings before the Special Court for Sierra Leone.
2. The Witnesses are characterized by the Prosecution as “Core Predominately Crime Base Witnesses” in its Amended Witness List, filed on 7 February 2008.² The Prosecution submits that the evidence of these witnesses is relevant because it concerns, *inter alia*, crimes committed in Kono during the Indictment period, including evidence of burning, unlawful killings, sexual and physical violence, looting, and the abduction and forced labour of civilians.³ Additionally, the Witnesses will provide evidence on the RUF command structure, the AFRC/RUF command structure, and the relationship between the RUF and AFRC during the Indictment period, which the Prosecution alleges are relevant to the several forms of liability alleged in this case.⁴
3. Rule 92*bis* (A) specifically prohibits the admission of evidence that goes to proof of the acts and conduct of the accused. Furthermore, it has been established in the jurisprudence of this court that where information goes to a critical element of the Prosecution’s case, it is proximate enough to the accused as to require cross-examination, which a Chamber may in its discretion order.⁵ In the present case the Prosecution has not offered to make any of the Witnesses available for cross-examination.

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-574, “Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kono District-TF1-218 & TF1-304”, 29 February 2008 (“Notice”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-410, Prosecution’s Amended Witness List, 7 February 2008 (“Amended Witness List”).

³ Notice, paras 13-14.

⁴ Notice, para. 18.

⁵ See Notice, para. 15, and cases cited therein.

4. The Defence files this Objection to the admission of the prior testimony and related exhibits of witnesses TF1-218 and TF1-304 under Rule 92*bis*, on the grounds that:
 - a) Some of the evidence is not relevant as it falls outside the Indictment period;
 - b) Some of the evidence is purely the Witnesses' own opinions or is conclusion in nature; and
 - c) Most importantly, some of the information is "linkage" in nature and goes to proof of the acts and conduct of the accused, and cannot be admitted under Rule 92*bis* absent the opportunity for cross-examination.

5. The Defence therefore submits that:
 - a) The admission of the prior trial transcripts and related exhibits of the Witnesses must be denied.
 - b) Alternatively, if the Trial Chamber does not deny the admission of the prior transcripts and related exhibits completely under Rule 92*bis*, then only those portions of the Witnesses' prior testimony and related exhibits that are not objected to in Annex A hereto should be admitted into evidence.
 - c) Alternatively, if the Trial Chamber does not deny the admission of the prior transcripts and related exhibits completely under Rule 92*bis*, then it should exercise its discretion and order the Prosecution to ensure that witnesses TF1-218 and TF1-304 are available for cross-examination.

II. Legal Basis and Submissions

6. At the outset, the Defence notes that the admission of a prior transcript of a witness does not necessarily include exhibits and other documents related to the transcript.⁶ In Annex A hereto, the Defence therefore also objects to the admission of the exhibits related to the evidence of the Witnesses.

⁶ *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis, 13 January 2006, para. 47.

Application Should Have Been Made Under Rule 92ter

7. As the Prosecution's Notice includes information directly related to proof of the acts and conduct of the accused,⁷ it should have been brought under Rule 92ter, which requires the agreement of the parties and requires that the witness be present for cross-examination.

Rule 92ter states:

With the agreement of the parties, a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

8. The Prosecution therefore could only resort to Rule 92bis if there is no agreement between the parties, or if there is genuinely no information that goes to proof of the acts or conduct of the accused.

Objection Under Rule 92bis

9. Rule 92bis(A) states that, "[i]n addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony admit as evidence, in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused". In terms of Rule 92bis (B), the information submitted must be reliable and susceptible of confirmation.

⁷ See Annex A.

10. The prohibition on the admission of information that goes to proof of the acts and conduct of the accused is well-established in international law and has been affirmed in the decisions of this court. For the most part, the phrase, “acts and conduct of the accused” should be given its ordinary meaning: deeds and behaviour of the accused.⁸ In *Prosecutor v. Galic*, the ICTY Appeals Chamber sets out various examples of what should be considered acts and conduct of the accused. These include:⁹
- That the accused **committed** (that is, that he personally physically perpetrated) any of the crimes charged himself, or
 - That he **planned, instigated or ordered** the crimes charged, or
 - That he otherwise **aided and abetted** those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
 - That he was a **superior** to those who actually did commit the crimes, or
 - That he **knew or had reason to know** that those crimes were about to be or had been committed by his subordinates [relevant state of mind], or
 - That he **failed to take reasonable steps to prevent** such acts or to punish those who carried out those acts [omission to act], or
 - That he **participated in a joint criminal enterprise**, or
 - That he shared with the person who actually did commit the crimes charged the **requisite intent** for those crimes (as part of a Joint Criminal Enterprise).
11. Annex A hereto lists those portions of the relevant transcripts which contain information going to proof of the acts and conduct of the accused, which must not be admitted under Rule 92bis.
12. This Court has also decided that another consideration under Rule 92bis is whether the admission of certain information would unfairly prejudice the opposing party, because in

⁸ *Prosecutor v. Milosevic*, ICTY-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92bis, 21 March 2002, para. 22.

⁹ *Prosecutor v. Galic*, ICTY-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras. 10 and 11 (“*Galic 92bis Appeals Decision*”) (emphasis added) (copy provided with Prosecution Notice).

fairness it is too closely linked to the acts and conduct of the accused to be admitted without the opportunity for cross-examination.¹⁰

13. Trial Chamber I has also determined that acts of co-perpetrators or subordinates of the accused¹¹ is relevant in determining if cross-examination should be allowed, but not in determining if a document should be admitted under Rule 92*bis*.¹² Thus, there remains a distinction between (a) acts and conduct of those others who commit the crimes, for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others.¹³ The first is admissible under Rule 92*bis*, the latter is not. Significantly, the **proximity** of the acts and conduct of the alleged subordinate to the accused, as described in the evidence sought to be admitted, is relevant to this determination.¹⁴ Furthermore, this Trial Chamber has ruled that the absence of cross-examination would unfairly prejudice the accused and it is in the interest of justice to afford the accused such an opportunity.¹⁵
14. Specifically, the Special Court has held that where a witness statement contains information “material to the command responsibility and joint criminal enterprise allegations in the Indictment”, that information goes to a “critical element of the

¹⁰ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1049, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 Under Rule 92*bis*, or in the Alternative, Under Rule 92*ter*, 12 March 2008, pg. 2 (“Sesay 92*bis* Decision”), citing *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-447, Decision on Prosecutor’s Request to Admit into Evidence Certain Documents Pursuant to Rules 92*bis* and 89(C), 14 July 2005, pg. 4 (“CDF 92*bis* Decision”). See also *Prosecutor v. Sesay et al*, SCSL-2004-15-T-559, Decision on Prosecutor’s Notice Under Rule 92 *bis* to Admit the Transcripts of Witness TF1-334, 23 May 2006, pg. 3 (“RUF 92*bis* Decision”).

¹¹ ¹¹ For purposes of this Objection, and based generally on Prosecution allegations, the following non-exhaustive list of personalities should be considered “subordinates” of Mr. Taylor: Foday Sankoh, Sam Bockarie, Issa Sesay, Morris Kallon, Augustine Gbao, Johnny Paul Koroma, Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Benjamin Yeaten, Ibrahim Bah, Daniel Tamba Jungle, Eddie Kanneh, Zig Zag Marzah, and Savage.

¹² CDF 92*bis* Decision, pg. 4.

¹³ See Galic 92*bis* Appeals Decision, para. 9.

¹⁴ Galic 92*bis* Appeals Decision, para. 13; *Prosecutor v. Martić*, ICTY-95-11-T, Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92*bis* and of Expert Reports Pursuant to Rule 94*bis*, 13 January 2006, para. 20.

¹⁵ *Prosecutor v Taylor*, SCSL-01-556, Decision on Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pg.5, para.4

Prosecution's case" and is therefore "proximate enough to the Accused so as to require cross-examination", as is the Trial Chamber's discretion to order under Rules 26*bis* and 54.¹⁶ This is simply, but crucially, a matter of fairness.¹⁷

15. The Defence submits that through the admission of witnesses TF1-218 and TF1-304's prior testimony and related exhibits, and without offering to make the Witnesses available for cross-examination, the Prosecution is improperly attempting to introduce into evidence of the acts and conducts of alleged subordinates of Mr. Taylor.¹⁸ Based on Mr. Taylor's statutory right to a fair trial, this can not be allowed. Further, the Defence agrees that the acts and conduct of an alleged subordinate of Mr. Taylor¹⁹ cannot be equated with the acts and conduct of Mr. Taylor himself, and therefore may be admissible – but only if cross-examination of the witness is possible.²⁰ If the Witnesses are not available for cross-examination, then the portions objected to in Annex A should not be admitted into evidence.

Cross Examination

16. In the Notice, the Prosecution submits that should further cross-examination of TF1-304 be allowed, limiting it to matters not previously covered would be efficient and would not impact on the fair trial right of the Accused.²¹ This assertion is ill-conceived. This Chamber has dismissed similar arguments in other proceedings before it on the basis that

¹⁶ Sesay 92*bis* Decision, pgs. 1, 3.

¹⁷ Galic 92*bis* Appeals Decision, para. 15; *Prosecutor v. Martić*, ICTY-95-11-T, Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules, 16 January 2006, paras. 29, 33.

¹⁸ For instance, the Witnesses make allegations that Sam Bockarie, Mosquito, was in control of Tongo Fields, including the Cyborg Pit, during the Indictment Period.

¹⁹ For purposes of this Objection, and based generally on Prosecution allegations, the following non-exhaustive list of personalities should be considered "subordinates" of Mr. Taylor: Foday Sankoh, Sam Bockarie, Issa Sesay, Morris Kallon, Augustine Gbao, Johnny Paul Koroma, Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Benjamin Yeaten, Ibrahim Bah, Daniel Tamba Jungle, Eddie Kanneh, Zig Zag Marzah, and Savage.

²⁰ For instance, TCI has determined that a witness' testimony that he was released from custody by soldiers after they received a letter from Superman ordering the soldiers to stop the killing is evidence **regarding the acts and conduct of others** who committed the crimes for which the Accused [Gbao] is alleged to be responsible and **not evidence of the acts and conduct of the accused** which establish his responsibility for the acts and conduct of others. However, this testimony was only admitted because the witness was available for cross-examination. RUF 92*bis* Decision.

²¹ Notice, para.25

the Accused would be prejudiced if judicial economy were allowed to take precedence over his fair trial rights.²² The Prosecution's submission should therefore fail on the same basis.

17. The Prosecution also suggests that it would be superfluous to allow cross-examination in this case because the evidence of TF1-218 is crime based, which the Defence will not seek to challenge, while that of witness TF1-304 has already been tested by cross-examination by defence counsel in *other* proceedings [emphasize added].²³ With respect to the latter argument, it has been established in this court that a Chamber will only deny cross-examination under those circumstances if the information in the statements tendered under Rule 92bis cannot be considered to be so critical to an important issues between the parties in the present proceedings.²⁴ In this case as the information sought to be tendered goes to the acts and conduct of the accused as argued above, it is so critical to an important issue between the parties that cross examination must be allowed.
18. The prior transcripts and related exhibit of TF1-218 and TF1-304 include information which goes to the acts and conducts of the allegedly close subordinate of Mr. Taylor which is a critical element to the Prosecution's case. The Defence further submits that it is so critical to an important issue between parties and the fact that the witness has had cross-examination in other proceeding will not be a sufficient basis to limit cross-examination in this case.

The Evidence is Not Entirely Relevant

19. It is trite that all information tendered into evidence must be relevant.²⁵ In the Notice the Prosecution highlights the evidence of TF1-218 and TF1-304²⁶ relevant to the charges in

²² *Prosecution v. Taylor*, SCSL-03-01-T-458, Confidential Prosecution Reply to 'Defence Objection to Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence', 7 April 2008, para. 4.

²³ Notice, para.24.

²⁴ *Prosecutor v Sesay et al.*, SCSL-04-15-T-1125, Decision on Sesay Defence motion and Three Defence Applications to Admit 23 Witness Statements under Rule 92bis, 15 May 2008, para. 42.

²⁵ Rule 89(C) of the Rules.

²⁶ Notice, paras.13-15.

the Prosecution's Second Amended Indictment²⁷. These include charges for crimes allegedly committed in Kono District, during limited time frames; Terrorizing civilians population between about 01 February 1998 and about 31 December 1998²⁸; Unlawful Killings between about 01 February 1998 and about 31 January 2000²⁹; Sexual Violence between about 01 February 1998 and about 31 December 1998³⁰; Physical Violence between about 01 February 1998 and about 31 December 1998³¹; Abduction and Forced Labour between about 01 February 1998 and about 18 January 2002; and Looting between about 01 February 1998 and about 31 December 1998³². Therefore any evidence that falls outside these temporal jurisdictions must be excluded under Rule 92bis,³³ except where such evidence is shown to be relevant under Rule 93(A), and only to that limited extent.

The Evidence Not Susceptible of Corroboration

20. The Defence submits that all portions of the Witnesses' transcript which refer to hearsay evidence from people who are no longer alive and thus cannot be corroborated or confirmed should also not be admitted.

III. Conclusion

21. On the basis of the foregoing, the Defence request:
- a) The Trial Chamber to dismisses the Prosecution's Notice in its entirety as it should have been filed under Rule 92ter;
 - b) Alternatively, only to admit into evidence those portions of witnesses TF1-218 and TF1-304's prior testimony and/or related exhibits not objected to in Annex A.

²⁷ *Prosecutor v. Taylor*, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, 29 May 2007 ("Second Amended Indictment").

²⁸ Second Amended Indictment, para.7.

²⁹ Second Amended Indictment, para.11.

³⁰ Second Amended Indictment, para.15.

³¹ Second Amended Indictment, para.19.

³² Second Amended Indictment, para.29.

³³ See specific examples in Annex A.

- c) Alternatively, should the Trial Chamber admit the objectionable portions of witnesses TF1-218 and TF1-304's testimony and/or related exhibits, order the Prosecution to make the Witnesses available for cross-examination.

Respectfully Submitted,



SILAS CHEKERA

for Courtenay Griffiths Q.C.

Lead Counsel for Charles G. Taylor

Dated this 9th Day of September 2008

The Hague, The Netherlands.

Table of Authorities

SCSL

Prosecutor v. Taylor, SCSL-03-01-T-410, Prosecution's Amended Witness List, 7 February 2008

Prosecutor v. Taylor, SCSL-03-01-T-438, Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 14 March 2008

Prosecution v. Taylor, SCSL-03-01-T-458, Confidential Prosecution Reply to 'Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence', 7 April 2008

Prosecutor v Taylor, SCSL-01-556, Decision on Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008

Prosecutor v. Sesay, Kallon, Gboa, SCSL-2004-15-T-559, Decision on Prosecutor's Notice under Rule 92*bis* to Admit the Transcripts of Witness TF1-334, 23 May 2006

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-1049, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 under Rule 92*bis*, or in the Alternative, Under Rule 92*ter*, 12 March 2008

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T-447, Decision on Prosecutor's Request to Admit into Evidence Certain Documents Pursuant to Rules 92*bis* and 89(C), 14 July 2005

ICTY

Prosecutor v. Milosevic, ICTY-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92*bis*, 21 March 2002. Internet:
<http://www.un.org/icty/milosevic/trialc/decision-e/20321AE517364.htm>

Prosecutor v. Galic, ICTY-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002. Internet:
[http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ae4b0f7b22afa1cdc12571b500329d5e/a2755cfb491f7363e12571fe004be529/\\$FILE/Galic%20ACD%207-06-2002.pdf](http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ae4b0f7b22afa1cdc12571b500329d5e/a2755cfb491f7363e12571fe004be529/$FILE/Galic%20ACD%207-06-2002.pdf)

Prosecutor v. Martić, ICTY-95-11-T, Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92*bis* of the Rules, 16 January 2006. Internet :
<http://www.un.org/icty/martic/trialc/decision-e/060116.htm>

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Prosecutor v. Martić, IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92*bis* and of Expert Reports Pursuant to Rule 94*bis*, 13 January 2006. Internet : <http://www.un.org/icty/martic/trialc/decision-e/060113.htm>



SPECIAL COURT FOR SIERRA LEONE
BINCKHORSTLAAN 400 • 2516 BL DEN HAAG • THE NETHERLANDS
PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

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**PUBLIC WITH CONFIDENTIAL ANNEX A – DEFENCE OBJECTION TO
“PROSECUTION NOTICE UNDER RULE 92bis FOR THE ADMISSION OF
EVIDENCE RELATED TO INTER ALIA KONO DISTRICT – TF1-218 & TF1-304**

Name of Officer:

Vincent Tishekwa

Signed: 