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SPECIAL COURT FOR SIERRA LEONE

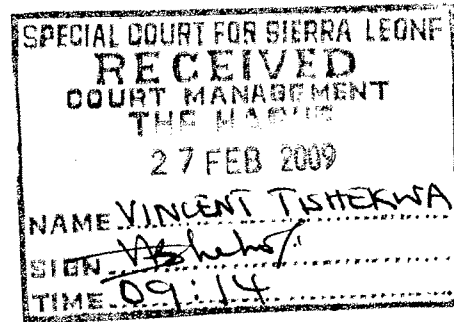
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 27 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PROSECUTION MOTION FOR ADMISSION OF DOCUMENTS SEIZED FROM RUF KONO OFFICE, KONO DISTRICT

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian

Defence Counsel for Charles G. Taylor:

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

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);
SEISED of the “Prosecution Motion for Admission of Documents Seized from RUF Office, Kono District”, filed on 13 November 2008 (“Motion”);¹

NOTING the “Defence Response to Prosecution Motion for Admission of Documents Seized from RUF Office, Kono District”, filed on 24 November 2008 (“Response”);²

NOTING the “Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents Seized from RUF Office, Kono District”, filed on 1 December 2008 (“Reply”);³

NOTING the Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, filed on 10 February 2009 (“Supplemental Request”);⁴

RECALLING the Trial Chamber’s Order for Expedited Filing, dated 10 February 2009;⁵

NOTING the Defence Response to Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, filed on 13 February 2009 (“Supplemental Response”);⁶

NOTING the Prosecution Reply to Defence Response to Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, filed on 17 February 2009 (“Supplemental Reply”);⁷

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 26*bis*, 73(A), 89(C), 92*bis* and 95 of the Rules of Procedure and Evidence (“Rules”);

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

¹ SCSL-03-01-T-667.

² SCSL-03-01-T-677.

³ SCSL-03-01-T-680.

⁴ SCSL-03-01-T-726.

⁵ SCSL-03-01-T-727.

⁶ SCSL-03-01-T-730.

⁷ SCSL-03-01-T-732.

I. SUBMISSIONS

Motion

1. The Prosecution seeks admission into evidence of documents seized from an RUF Office in Kono District in 2001 ("RUF Documents") as identified in Annex A and provided in Annex B pursuant to Rule 89 (C) or, in the alternative, Rules 89(C) and 92bis.⁸
2. The Prosecution submits that the articles should be admitted under Rule 89(C) alone,⁹ and relies on and incorporates by reference its submissions at paragraphs 4-13 in its "Public Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies"¹⁰ ("UN Documents Motion") *viz*:
 - a. because (1) Rule 89(C) is the general rule governing admission of evidence that has been used to tender documents absent a witness in other proceedings; (2) Rule 92bis has been amended such that it is now limited to witness statements and transcripts; and (3) Rule 92bis as amended and limited does not apply to documents not prepared for legal proceedings.¹¹
 - b. rule 89(C) allows experienced judges to receive into evidence relevant written material without compulsory resort to a witness subject to the necessary safeguards to prevent prejudice to the Defence. Further, that the jurisprudence of the Special Court "favour(s) a flexible approach to the issue of admissibility of evidence."¹² Whilst admissibility under Rule 89(C) is subject to Rule 95 and to the Trial Chamber's inherent jurisdiction to exclude evidence where its probative value is manifestly outweighed by its prejudicial effect a "very high standard must be met before relevant evidence is excluded."¹³ The Prosecution further submits that, as the amendments to Rule 92bis narrow its scope making it more suited to the admission of witness statements and trial transcripts rather than the reception of information, it seeks admission directly under Rule 89(C).¹⁴
3. The Prosecution also submits that each of the RUF Document relates to (i) the *chapeau* requirements of the crimes charged in the Second Amended Indictment; (ii) the several forms of liability alleged by the Prosecution in this case; and (iii) the crime base.¹⁵ The Prosecution argues that the material does not impact adversely and unfairly upon the integrity of the proceedings nor is it of such a nature that would bring the administration of justice into serious disrepute.¹⁶ The Prosecution submits that the inability of the Defence to cross-examine witnesses is a matter that goes to the weight of the evidence, not its admissibility and that the "hearsay rule does not

⁸ Motion, para. 1.

⁹ Motion, para. 3.

¹⁰ SCSL01-03-T-650.

¹¹ UN Documents Motion, paras 1, 3, 16.

¹² UN Documents Motion, paras 4-6.

¹³ UN Documents Motion, para. 8.

¹⁴ UN Documents Motion, paras 9-13.

¹⁵ Motion, para. 8.

¹⁶ Motion, para. 9.

apply but the issue of weight to be given to this evidence is very much a matter for the Tribunal".¹⁷

4. In the alternative, the Prosecution requests that the Trial Chamber admit into evidence the RUF Documents pursuant to Rule 89 (C) and 92bis, and relies on and incorporates its submissions in paragraphs 14-17 of its "Defence Response to Public Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies"¹⁸ ("UN Documents Motion")¹⁹ viz:
 - a. "for evidence comprising public documents to be admitted pursuant to both Rules, the evidence must be relevant, its reliability must be susceptible to confirmation and its admission must not unfairly prejudice the Accused."²⁰ The Prosecution states it is not required to prove that the evidence is in fact reliable at this stage, only that the reliability of the evidence is susceptible of confirmation, meaning that the information should be capable of corroboration in due course.²¹
 - b. the Prosecution further submits that the qualification in Rule 92bis that the evidence must "not go to proof of the acts and conduct of the accused" applies only to evidence contained in "witness statements and transcripts" and not to the Documents. However if the "acts and conduct qualification" also applies to non-testimonial documents then the term must be given its ordinary meaning and a distinction made between the acts and conduct of those who commit the crimes for which the Indictment alleges that the Accused is individually responsible and those of the Accused which establish his responsibility for the acts and conduct of others.²²
5. The Prosecution restates its submission that the documents relate to (i) the *chapeau* requirements of the crimes charged in the Second Amended Indictment; (ii) the several forms of liability alleged by the Prosecution in this case; and (iii) the crime base;²³ and that (iv) the Prosecution is not required to prove that the evidence is in fact reliable at this stage, only that reliability of the evidence is susceptible of confirmation;²⁴ (v) the inability of the Defence to cross-examine witnesses is a matter that goes to the weight of the evidence, not its admissibility;²⁵ and (vi) the hearsay rule does not apply but the issue of weight given to the evidence is a matter for the Tribunal.²⁶
6. The Prosecution submits that the tendered documents do not go to the acts and conduct of the Accused.²⁷ In relation to the acts and conduct of those who may be considered the immediately proximate subordinates of the Accused as referred to in the documents, the Prosecution restates

¹⁷ Motion, para. 10.

¹⁸ SCSL01-03-T-664.

¹⁹ Response, para. 3.

²⁰ UN Documents Motion, paras 14, 17.

²¹ UN Documents Motion, para. 17.

²² UN Documents Motion, para. 15.

²³ Motion, para. 12 referring to para. 8.

²⁴ Motion, para. 13.

²⁵ Motion, para. 10.

²⁶ Motion, para. 10.

²⁷ Motion, para. 15.

its submissions at paragraph 4(b) above and further argues that the material is not being put before a lay jury. It adds that it is in the interests of justice to allow the information to be brought before the Trial Chamber, and that the Chamber be allowed to assess the appropriate weight to be given to it at the conclusion of the case.²⁸

Supplemental Request

7. In the light of the recent decision of the Appeals Chamber²⁹ dealing with the tender of documents under Rules 89(C) or 92bis, the Prosecution seeks leave to file a supplemental argument which it submits “focuses on the significance of the testimony of Mr. Tariq Malik³⁰ in relation to the admissibility” of (inter alia) the subject documents under Rule 89(C).
8. In the supplemental argument attached to the Supplemental Request, the Prosecution submits that although Mr. Malik did not give any evidence as to the contents of the documents, this is not a requirement for admission, and that evidence of investigative searches can establish that the documents are relevant “because they were found at a scene or obtained from a source related to the case.”³¹ The Prosecution argues that the Appeals Chamber’s requirement for the admission of a document under Rule 89(C) – i.e. that the tendering party is required to lay a foundation of the witness’s competence to give evidence in relation to that document – has been met in that Tariq Malik established a relation to the documents as the Prosecution Evidence Custodian responsible for receiving documents and for collecting information regarding their seizure or possession prior to their arrival at the Office of the Prosecutor Evidence Unit.³²

Response

9. In its response to the Motion, the Defence opposes the motion and submits that:
 - (i) Rule 89(C) cannot be used in isolation to admit the Documents included in the motion;
 - (ii) the documents can only be admissible under Rule 89(C) in conjunction with Rule 92bis provided that any evidence that goes to the acts and conduct of the accused is inadmissible absent the opportunity for cross-examination.³³
10. In support of its submissions the Defence relies on and incorporates by reference its submissions at paragraphs 3-19 in its “Defence Response to Public Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies” (“UN Documents Response”),³⁴ viz:
 - a. the Defence refutes the Prosecution submission that there is no specific rule for admission of documentary evidence and submits that the practice of the Special Court has

²⁸ Motion, para. 16.

²⁹ SCSL03-01-AR73-721, Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’, 6 February 2009 (“Appeals Chamber Decision”); Supplemental Request, para. 3.

³⁰ *Prosecutor v. Taylor*, Transcript, 19-20 January 2009.

³¹ Supplemental Request, Annex A, para. 2.

³² Supplemental Request, Annex A, paras 3, 4.

³³ Response, paras 2, 28.

³⁴ SCSL01-03-T-664.

been to admit documentary evidence under Rules 89(C) and 92bis.³⁵ The Defence further submits that Rule 89(C) is not absolute; it is subject to the provisions of Rule 95 and the Court's inherent jurisdiction to exclude evidence where the probative value is outweighed by its prejudicial effect.³⁶

b. the Defence submits that the correct procedure for proper admission of the evidence is Rule 89(C) and Rule 92bis and that the Prosecution are mistaken in stating that Rule 92bis is exclusively limited to witness statements and transcripts as the Rule "encompasses information."³⁷

c. the Defence further submits that, contrary to the Prosecution submissions, Rule 92bis was "deliberately amended to exclude information that goes to the acts and conduct of the accused in order to protect the fair trial rights of the Accused,"³⁸ and there remains a distinction between acts and conduct of those who commit the crimes for which the indictment alleges the accused is individually responsible and the acts and conduct of the accused which establish his responsibility for the acts and conduct of those others. The first, the Defence submits, is admissible under Rule 92bis but the latter is not. The proximity of the acts and conduct of the alleged subordinate is relevant and documents pertaining to the acts and conduct of co-perpetrators should not be admitted unless a witness can be brought for cross-examination.³⁹

11. The Defence submits that the Trial Chamber should deny admission to the materials as they go to the acts and conduct of the Accused, in particular the documents at Tabs 13 and 16 which refer to the Accused by name. The Defence further submits that, as well as contents of the documents, the fact that they were purportedly seized from an RUF Office goes to joint criminal enterprise and to the superior responsibility modes of liability for crimes charged in the Indictment.⁴⁰ The Defence contends that much of the material submitted in the Motion goes to such critical elements of the Prosecution's case and/or is so proximate to the Accused, that it would be unfair to admit the material without providing the Defence with a genuine opportunity for cross-examination.⁴¹ The Defence relies on *Prosecutor v. Taylor*⁴² in which the Trial Chamber held that where documentary evidence is close to subordinates of the Accused, "[I]t would not be fair to the accused to permit the evidence to be given in written form."⁴³

12. The Defence further submits that the Trial Chamber should deny admission of any documents that are partially or entirely illegible, notably the documents at Tabs 15 and 17.⁴⁴

³⁵ UN Documents Response, paras 3-6.

³⁶ UN Documents Response, paras 7-8.

³⁷ UN Documents Response, paras 10-13.

³⁸ UN Documents Response, para. 16.

³⁹ UN Documents Response, paras 14-19.

⁴⁰ Response, para. 4.

⁴¹ Response, paras 5-7.

⁴² *Prosecutor v. Taylor*, SCSL-03-01-T-556, "Decision on Prosecution Notice under Rules 92bis for the Admission of Evidence Related to *inter alia* Kenema District and on Prosecution Notice under 92bis for the Admission on the Prior Testimony of TF1-036 into evidence" 15 July 2008, ("Kenema Decision").

⁴³ Response, para. 6, citing Kenema Decision, p. 4.

⁴⁴ Response, paras 8, 16.

13. The Defence also submits that the Prosecution has not established a clear chain of custody for the documents, and contends that without such information the Prosecution cannot show that the Documents are authentic and “have sufficient indicia of reliability.”⁴⁵ It further notes that the Prosecution has not provided the Defence with such information as the location of the office the documents were seized from, the time period in which the office was operational, or who was involved in the administration of the office and under what circumstances the documents were seized.⁴⁶
14. The Defence submits that unless the documents are tendered through a witness, the Trial Chamber “will be unable to decipher their context and determine their usefulness in proceedings.”⁴⁷ For the foregoing reasons, and since the documents can no longer be tested in cross-examination, the Defence submits that the probative value of the proposed evidence is outweighed by its prejudicial effect.⁴⁸
15. Finally, the Defence maintains that the *Kordic* and *Cerkez* test is applicable to the instant motion.⁴⁹

Supplemental Response

16. The Defence opposes the request for leave to file a supplemental argument as well as the argument itself. The Defence submits that the Appeals Chamber Decision does not assist the Prosecution’s case because the Appeals Chamber ruled that “[t]he procedural scheme established by Rules 89(C) and 92bis does not allow a party to circumvent the stringency of the latter by simply tendering a document under the former.” The Defence says that this principle applies where a nominal witness such as Mr. Malik is brought forward simply as a conduit for the tendering of documents that go to the act and conduct of the Accused. The Defence further submits that a foundation of a witness’s competence to give evidence in relation to a document would form the basis for the witness’s cross-examination on the contents of the document. However, in the present case, Mr. Malik can only give evidence of the circumstances in which the documents were obtained and secured by the Prosecution. To then allow the documents to be admitted on such evidence would “clearly defeat the fundamental safeguard in Rule 89(C) or in the alternative Rule 92bis route.” The Defence contends that the Trial Chamber ought to exclude the evidence pursuant to Rule 95, since to admit documents that go to the acts and conduct of the Accused through a process that denies the Defence a chance to challenge the evidence would bring the administration of justice into serious disrepute.⁵⁰

Reply

17. The Prosecution relies on and incorporates by reference its submissions at paragraphs 2-11 in its “Public Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies” (“UN Documents Reply”)⁵¹ to

⁴⁵ Response, para. 13.

⁴⁶ Response, paras 12-15.

⁴⁷ Response, paras 8-10.

⁴⁸ Response, paras 8-11, 17-18.

⁴⁹ Response, paras 21-27.

⁵⁰ Supplemental Response, paras 8-13.

⁵¹ SCSL-01-03-T-670.

- dispute the Defence interpretation of the jurisprudence relating to Rule 89(C) and Rule 92bis and recounts the background to the amendment to the latter rule and the jurisprudence of the *ad hoc* tribunals to support its previous submissions⁵²
18. The Prosecution disputes the Defence contention that the document at Tab 17 is illegible and adds that its own copy is available to the Defence for inspection but that the Defence has failed to inspect the document.⁵³
 19. The Prosecution refutes the Defence argument that the documents go to the acts and conduct of the Accused, stating that none of documents include such evidence; in particular, that the material in Tab 16 only mentions an investigation by certain journalists concerning a link between the diamond business and Charles Taylor, and that the letter in Tab 13 only refers to the Accused in a passive manner.⁵⁴
 20. In its Reply, the Prosecution argues that documents may be tendered absent a witness, and that issues of reliability, authenticity and probative value are not conditions for admission.⁵⁵ It further contends that issues raised by the Defence concerning the chain of custody go to weight rather than admissibility and the Defence's attempt to make the location of seizure of the RUF Documents grounds for exclusion is without merit.⁵⁶
 21. With regard to the probative value and prejudicial effect of the evidence, the Prosecution argues that the material submitted in the motion can be challenged by comparing the documents submitted with other evidence adduced at trial, including during the Defence case.⁵⁷ The Prosecution submits that the logical conclusion of the Defence argument would be that no evidence could be admitted under Rules 89 (C) or 92bis without cross-examination, a result inconsistent with the language and intent of the Rules.⁵⁸
 22. The Prosecution further submits that the Defence argument that the material is so critical to the Prosecution case, or proximate to the Accused, that it cannot be admitted without providing the Defence an opportunity to cross-examine witnesses, is overly broad.⁵⁹ However, the Prosecution concludes that should the Trial Chamber reject its arguments on this issue, the Trial Chamber may redact any information it considers to proximate to the Accused.⁶⁰

Supplemental Reply

23. The Prosecution disputes the objections of the Defence to the Supplemental Request⁶¹. The Prosecution claims that during Mr. Malik's testimony a link was established between him and the documents, since he had personal knowledge of how each document came into possession of the Prosecution, and with such a foundation the documents should be admitted under Rule

⁵² UN Documents Reply, paras 2-11.

⁵³ Reply, para. 4.

⁵⁴ Para. 14.

⁵⁵ Reply, paras 5-8.

⁵⁶ Reply, paras 9, 15.

⁵⁷ Reply, para. 10.

⁵⁸ Reply, para. 10.

⁵⁹ Reply, para. 16.

⁶⁰ Reply, para. 19.

⁶¹ Supplemental Reply, paras.2-11.

89(C) in conjunction with his testimony.⁶² The Prosecution submits that the Appeals Chamber decision does not restrict admission of relevant documents to only those where the party offering the document produces a witness with personal knowledge of the document itself.⁶³ Further, the Prosecution points out that the Defence cites no jurisprudence and offers no arguments to support the claim that admitting documents which go to the acts and conduct of the Accused would violate Rule 95 in that it would bring the administration of justice into disrepute⁶⁴.

II. APPLICABLE LAW

24. The general rules of evidence are contained in Rule 89, which provides:

Rule 89: General Provisions

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence.

25. Rule 92*bis* is the specific rule relating to alternative proof of facts, that is, proof of facts other than by oral evidence. Rule 92*bis* provides:

Rule 92*bis*: Alternative Proof of Facts (*amended 14 March 2004 and amended 14 May 2007*)

- (A) In addition to the provisions of Rule 92*ter*, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
- (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
- (C) A party wishing to submit information shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

26. The recent ruling of the Appeals Chamber, "Decision on 'Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents,'" dated 6 February 2009,⁶⁵ ("Appeals Chamber Decision"), wherein the Appeals Chamber upheld a decision of the Trial Chamber, confirms that:

⁶² Ibid., para. 5.

⁶³ Ibid., para. 10.

⁶⁴ Ibid., para. 11.

⁶⁵ SCSL03-01-AR73-721, "Decision on 'Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents'", 6 February 2009 ("Appeals Chamber Decision").

By its express terms, Rule 92bis applies to information tendered “*in lieu of oral testimony*”. These words must be given their ordinary meaning. Documentary evidence, by its very nature, is tendered *in lieu of oral testimony*.⁶⁶ [...]

[...]

The procedural scheme established by Rules 89(C) and 92bis does not allow a party to circumvent the stringency of the latter rule by simply tendering a document under the former.⁶⁷ [...]

[...]

The consequence of this is that any information that does not go to proof of the acts and conduct of the accused not tendered through a witness, should be submitted under Rule 92bis if it is sought to be admitted *in lieu of oral testimony*. For these reasons, we find that the Trial Chamber did not err in law in holding that Rule 92bis exclusively controls the admission of a document submitted *in lieu of oral testimony* and that such document must be channelled through a witness in order to be admissible under Rule 89(C).⁶⁸ [...]

27. The effect of Rule 92bis is to permit the reception of information – assertions of fact (but not opinion) including, but not limited to, written statements and transcripts that do not go to proof of the acts and conduct of the accused – if such facts are relevant and their reliability is “susceptible of confirmation”; proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course.⁶⁹ This leaves open the possibility for the Trial Chamber to determine the reliability issue at the end of the trial in light of the totality of the evidence by deciding whether the information is indeed corroborated by other evidence presented at trial,⁷⁰ and what weight, if any, should be attached to it.⁷¹ Simply admitting a document into evidence does not amount to a finding that the evidence is credible.⁷²

28. A distinction must be drawn between “the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible” and “the acts and conduct of the accused as charged in the Indictment, which establish his responsibility

⁶⁶ Appeals Chamber Decision, para. 30 (original footnotes omitted).

⁶⁷ Appeals Chamber Decision, para. 33 (original footnotes omitted).

⁶⁸ Appeals Chamber Decision, para. 34.

⁶⁹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL2004-14-AR73, “Fofana – Decision on Appeal Against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’”, 16 May 2005 (“Fofana Appeal Decision”), para. 26.

⁷⁰ *Prosecutor v. Sesay, Kallon & Gbao*, SCSL04-15-T, “Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis”, 14 May 2008, para.30.

⁷¹ *Prosecutor v. Norman, Fofana & Kondewa*, SCSL04-14-T, “Decision on Prosecution’s Request to Admit Into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)”, 15 July 2005, p. 4; see also *Prosecutor v. Sesay, Kallon & Gbao*, SCSL04-15-T, “Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis”, 15 May 2008, para. 30.

⁷² *Prosecutor v. Norman, Fofana & Kondewa*, SCSL04-14-T, “Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis”, 9 October 2006, note 32, para. 18; see also *Prosecutor v. Sesay, Kallon & Gbao*, SCSL04-15-T, “Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis”, 15 May 2008, para. 31.

for the acts and conduct of others.” Only written statements which go to proof of the latter acts and conduct are excluded by Rule 92bis.⁷³

29. Thus, Rule 92bis excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that the accused planned, instigated, ordered, or committed any of the crimes charged, or aided and abetted in the planning, preparation or execution of such crimes, or that the accused was a superior who actually committed the crimes, or knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or failed to take the necessary and reasonable measures to prevent such crimes or to punish the perpetrators thereof.⁷⁴ Where the prosecution alleges that the accused participated in a joint criminal enterprise, Rule 92bis excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that he had participated in that joint criminal enterprise.⁷⁵
30. The “conduct” of an accused person necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that state of mind, is not admissible under Rule 92bis.⁷⁶
31. Where the evidence is “so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form.”⁷⁷

III. DELIBERATIONS

32. Dealing first with the Prosecution application for the documents to be admitted under Rule 89(C), the Trial Chamber finds that the documents must be channelled through a witness competent to give evidence in relation to the documents in order to be admissible under Rule 89(C).⁷⁸ The said documents were tendered in lieu of oral testimony and therefore should have been tendered under Rule 92bis.⁷⁹ Accordingly, the Prosecution application pursuant to Rule 89(C) must fail.
33. The Trial Chamber will now consider the merits of the Prosecution’s supplemental argument that the subject documents should be admitted under Rule 89(C) through the testimony of

⁷³ *Prosecutor v. Galic*, IT-98-29-AR73.2, “Decision on Interlocutory Appeal Concerning Rule 92bis(C)”, 7 June 2002, para. 9; see also *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1049, “Decision on Defence Application for the Admission of the Witness Statement of DIS-129 Under Rule 92bis or, in the Alternative, Under Rule 92ter”, 12 March 2008, pp. 2-3; see also *Prosecutor v. Taylor*, SCSL-03-1-T, “Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 Into Evidence”, 15 July 2008, p. 4.

⁷⁴ *Galic*, *ibid.*, para. 10; see also Prosecution’s Second Amended Indictment (“Indictment”), paras 33, 34.

⁷⁵ *Galic*, *ibid.*, para. 10, see also Indictment, para. 33.

⁷⁶ *Galic*, *ibid.*, para. 11.

⁷⁷ *Galic*, *ibid.*, para. 13. See also *Prosecutor v. Brdanin & Talic*, IT-99-36-T, “Confidential Decision on the Admission of Rule 92bis Statements”, 1 May 2002, at para. 14.

⁷⁸ Appeals Chamber Decision, para. 34.

⁷⁹ Appeals Chamber Decision, para. 34; see also *Prosecutor v. Taylor*, SCSL-03-1-T, “Decision on Prosecution Motion for Admission of Document Pursuant to Rule 89(C)”, 9 Feb. 2009, p. 3.

Witness Tariq Malik. The Prosecution sought to admit the documents pursuant to Rule 89(C) through the *viva voce* evidence of Prosecution witness Tariq Malik, the Chief of Evidence Unit on 19 and 20 January 2009. It is common ground that Mr. Malik was unable to give any evidence relevant to the contents of the subject documents. His evidence was limited to what he had been told about the circumstances in which the documents had come into possession of Prosecution Evidence Unit and how they were organised and maintained within the Unit. That evidence was not objected to and is now a matter of record.

34. However, in the opinion of the Trial Chamber, the Prosecution failed to lay a satisfactory foundation for the documents themselves to be tendered through Mr. Malik under Rule 89(C). As the Appeals Chamber has pointed out,⁸⁰ “information can be admitted as part of the oral testimony of a witness, provided it is relevant, without the restraint of rules of evidence relating to admissibility of hearsay evidence and secondary evidence, subject to the power of the Court pursuant to Rule 95 to exclude evidence that would bring the administration of justice into disrepute”. What the Prosecution is seeking to tender is in effect the information contained in the documents, not the documents as objects of the processing structure of the Prosecution’s Evidence Unit. Mr. Malik, as has been said, could not give any relevant evidence of the contents of the documents, and so the documents cannot be admitted under Rule 89(C). In the absence of any oral testimony to prove the information contained in the documents, the only recourse open to the Prosecution if it wishes to tender the information contained in the documents, is to submit the documents under Rule 92*bis*. The Trial Chamber therefore dismisses the Prosecution’s application to admit the documents through Mr. Malik.
35. The Defence have submitted that the Prosecution must produce a witness to testify as to the chain of custody as a pre-condition to admission.⁸¹ As noted above, the Prosecution called Prosecution Witness Tariq Malik, its Chief of Evidence, to testify, *inter alia*, about the chain of custody of the material submitted by the Prosecution in the instant motion.⁸² Mr. Malik testified that he believed the documents were seized from an RUF office located at Kokoayima⁸³ in Kono District, and he was able to provide information regarding some of the conditions under which the police seized the documents from the office, but he could not provide any information regarding the years in which the office was operational, and the administrative structure of the office during those years. The Trial Chamber considers that any issues regarding the chain of custody go to the weight to be accorded to the documents and not to their admissibility.
36. In regard to the Defence submissions that the documents should not be admitted into evidence on the basis that they are of poor quality and in parts unintelligible⁸⁴ the Trial Chamber considers that the material at Tab 15 is sufficiently legible to be read and understood and that apart from ERN 00025640, the material at Tab 17 is sufficiently legible to be read and understood. The Trial Chamber further notes that the Prosecution’s copies of the documents were available for inspection but the Defence failed to inspect them. The Trial Chamber does not refuse admission of the documents on this ground.

⁸⁰ Appeals Chamber Decision, para. 33.

⁸¹ Response, para. 15.

⁸² Prosecution Witness Tariq Malik, Testimony 19-20 January 2009, pp. 22914-23109.

⁸³ *Viva Voce* witnesses have testified about this location, but the Prosecution has spelled the location described by these witnesses as Kokuima.

⁸⁴ Response, paras 16, 8-10.

37. Turning now to the Prosecution's alternative application, the Trial Chamber will consider the admissibility of each of the documents provided in Annex B of the Motion under Rule 92bis.

Tab 1: Letter from War Office to the G-5 Unit, North East branch Kono.

Subject: Promotion Officers.

38. The document is a letter dated 20 July 1998 from the RUF "War Office" informing the G-5 Unit that Sam Bockarie approved promotions of named individuals. The Prosecution submits that the document is relevant to various modes of individual criminal responsibility. The Defence responds that the evidence is cumulative. The Trial Chamber finds that the information at Tab 1 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 2: Minutes of Forum Held with RUF/SL Administrative Board at Water Works Compound. 4 December 1998.

39. The document refers to administrative matters discussed at an RUF meeting, including the relationship between adjutants and clerks. The Prosecution submits that the entire document is relevant to various modes of liability. The Defence argues that the information is cumulative. The Trial Chamber finds that the information at Tab 2 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 3: Report on materials issued by 2nd Brigade G-4 Commander to 2nd Brigade Commander. 12 December 1998.

40. The document is a list of ammunition issued by a Major Christopher to Morrison (sic) Kallon. It is signed by Boston Flomo. The Prosecution submits that the document is relevant to various modes of individual criminal responsibility. The Defence responds that the information is cumulative. The Trial Chamber finds that the document does not refer to the source of the materials listed in Tab. 3, and considers that the information is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused. The Trial Chamber admits it into evidence.

Tab 4: Materials Issued to the 2nd Brigade Commander on 13 December 1998. 14 December 1998.

41. The document is a list of ammunition issued to various RUF Commanders by the RUF G-4 Commander. The Prosecution submits that the information is relevant to various modes of liability and to planning for various operations in Kono at the end of 1998. The Defence disputes that the document is relevant to the planning of these operations. The Trial Chamber concurs with the Defence that the document makes no mention of any specific operation or planning thereof. It nevertheless considers the information may be relevant to various modes of liability. The Trial Chamber finds that the document does not refer to the source of the materials listed in Tab. 4 and considers that the information is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused. The Trial Chamber admits it into evidence.

Tab 5: Report to 2nd Brigade Adjutant from G-4 Commander. 22 January 1999.

42. The document is a list of material that was transported to Kono on 15 January 1999, and refers to a request for a gun by "BFC Brigadier Issa". The Prosecution submits that the information is relevant various modes of liability and to planning for various operations in Kono at the end of

1998. The Defence argues that the information is cumulative. The Trial Chamber observes that the document makes no mention of any specific operation or the planning thereof. It nevertheless considers the information may be relevant to various modes of liability. The Trial Chamber finds that the document does not refer to the source of the materials listed in Tab. 5, and considers that the information is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused. The Trial Chamber admits it into evidence.

Tab 6: Revolutionary United Front of Sierra Leone, The office of the Headquarters Commander 2nd Inf Brigade Headquarters Bombali. Note on Forum 12 Feb. 1999.

43. According to the document, at this meeting Augustine Gbao instructed those present at a meeting to desist from referring to RUF or AFRC but instead refer to the groups as "Army," and discussed ways in which to improve coordination. The note also discusses security issues and advises against harassment and misuse of RUF property, threatening disciplinary measures. The note discusses setting up Boards of Inquiry to deal with lost government property and briefly refers to a meeting with Brigadier Mani. The Prosecution submits that the information contained at Tab 6 is relevant to various modes of liability. The Defence responds that the information is cumulative. The Trial Chamber finds that the information contained in the document at Tab 6 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 7: Report from AG Paramount Chief Pa Alimamy N'Soila Koroma, Bombali Seborra Chiefdom. 13 February 1999.

44. The document is a letter from a Paramount Chief Koroma to the RUF at Makeni. Koroma refers to rampaging soldiers molesting civilians, and asks for RUF assistance in stopping the soldiers. The Prosecution submits that the information is relevant to the *chapeau* elements of crimes against humanity and various modes of liability. The Defence responds that the information constitutes hearsay and that it is cumulative. The Trial Chamber reaffirms that concerns about hearsay evidence go to the weight to be accorded to evidence not to its admissibility. The Trial Chamber finds that the information contained in the document at Tab 7 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 8: Report from the Office of the G-4 Unit, 2nd Brigade HQ, to the office of the 2nd Brigade adjutant. 15 February 1999.

45. The document lists ammunition in stock. The Prosecution submits that the document is relevant to the various modes of liability. The Defence responds that the information is cumulative. The Trial Chamber finds that the document does not refer to the source of the materials listed in Tab. 8, and that the information is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused. The Trial Chamber admits it into evidence.

Tab. 9: Information on charges against Lt. Col. Gaylay forwarded to Joint Security for Investigation from Overall Security Commander SLPA, Lt. Col. Gbao to General Bropleh. 15 February 1999.

46. The document is the report of a disciplinary investigation against a fighter and disciplinary measures imposed on him for disorderly conduct. The report is from Augustine Gbao and is addressed to General David Bropleh. The Prosecution submits that the information is relevant

to various modes of liability. The Defence responds that the information is cumulative. The Trial Chamber finds that the information contained in the document at Tab 9 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 10: Information from the Public Relations Office to all Brigade Battalion Commanders and Combatants. 20 February 1999.

47. The document is an instruction to all RUF fighters from the Public Relations Office instructing fighters to follow orders and to respect the central chain of command. It threatens disciplinary procedures for those who fail to do so. The instruction refers to Johnny Paul Koroma and Sam Bockarie as Commanders of the "RUF/SL and the SLA now the People's Army". The Instruction is signed by Sam Bockarie and Eldred Collins. The Prosecution submits that the Instruction shows that the RUF/SLA had a centralised high command and is relevant to various modes of liability. The Defence argues that the information is cumulative and that it constitutes hearsay evidence. The Trial Chamber finds that the information contained in the document at Tab 10 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 11: Visitation of the Leader Cpl. Foday Saybana Sankoh, Representative of the International Communities and ECOMOG Securities. 22 November 1999.

48. The document is a report by an IDU Commander in the Northern Region regarding a visit by Foday Sankoh to Makeni on 14 November 1999. The report states that Sankoh addressed the crowd on behalf of AFRC/RUF and the Kabbah government, apologised for atrocities committed by RUF, AFRC, and Kamajors, and discussed action against looting of civilians. Sankoh said that there were complaints about human rights violations committed by SLAs and that he had asked Issa Sesay to come to Makeni to put "situations under control". The report also refers to a visit by Issa Sesay who confirmed his loyalty to Foday Sankoh and commitment to the Lome Peace Accord. An SLA commander also spoke saying that there were 2000 SLAs among the RUF, that the SLAs were unhappy with the absence of Johnny Paul Koroma and that "Papay Sankoh and Jhonny (sic) Paul Koroma are the same". The Prosecution submits that the information is relevant to the *chapeau* elements of Crimes against Humanity and various modes of liability. The Defence responds that the information is not sufficiently relevant, that it constitutes hearsay evidence and that it is cumulative. The Trial Chamber considers that the information contained in the document is relevant, susceptible of confirmation, does not go to the acts and conduct of the accused, and admits it into evidence.

Tab. 12: Statement of Col. John Petters taken at office of the Board of Investigation-2nd Brigade Kono District. 1 November 2000.

49. The Prosecution only seeks admission of the page at ERN 00025708. This page is a statement given by a soldier to an RUF Board of Investigation on 1 November 2000. The soldier states that he captured a bag full of currency and turned it over to Morris Kallon. The Prosecution contends that this document is relevant to various modes of liability. The Defence argues that the information is cumulative. The Trial Chamber finds that the information contained at ERN 00025708 at Tab 12 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab. 13: Letter to Charles G. Taylor signed by Issa H. Sesay. 14 November 2000.

50. The document is a letter from Issa Sesay to the Accused commending the Accused and the Government of Liberia for their efforts “rendered to a peace making solution in Sierra Leone” and informing him that Gibril Massaquoi has been replaced in the RUF external delegation by a Col. Jim Kposowa, and asking that he speak to Kposowa on RUF matters rather than Massaquoi. The document notes that Kposowa will reside with the Delegation of Seven in Monrovia. The Prosecution submits that the letter is relevant to various modes of liability and indicates the presence of the RUF in Liberia. The Defence argues that the information is cumulative. The Trial Chamber finds that the information goes to the acts and conduct of the Accused accordingly the Trial Chamber refuses to admit it into evidence.

Tab. 14: Notebook. 2 December 2000 - 6 January 2001.

51. The document is a copy of a notebook. The Prosecution seeks admission into evidence of the following: the last paragraph of ERN 00026052 which is a note to ask Gibril Massaquoi to transmit a letter from UNAMSIL to “the Lion” and ask him for advice; ERN 00026053 which includes a note that “Brigadier Superman” asked for artillery men, WACs, and supplies, and notes instructions to other commanders to organise a response, ERN 00026055-00026058 which is an RUF mission report from Madina Wula dated 4/12/2000 it includes information about materials captured including missiles, trucks and salt; casualties suffered; materials used and items to be requisitioned for an upcoming mission; ERN 0626062 which is a directive to provide personnel to monitor the washing of gravel; ERN pp. 0026068-00026069 which is a salute report from “Segbema” requesting that the area “become a brigade” and requesting supplies. The Prosecution submits that the information contained at Tab 14 is relevant to the *chapeau* elements of the crimes and to various modes of liability, and that the information at ERN 000626062 is also relevant to Forced Mining. The Defence contends that the information is cumulative. The Trial Chamber notes that the Prosecution has provided no information regarding the owner or author of the notebook or who issued the directive at ERN 000 26062, to whom it was addressed, or to which area the personnel was to be sent. However the Trial Chamber considers that these are issues which go to the weight to be accorded to the documents and not to their admissibility. The Trial Chamber considers that the information highlighted by the Prosecution at Tab 14 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab. 15: Clearance and official travelling Pass. 21 and 31 January 2001.

52. The documents would appear to be copies of two travel passes. The first pass, at ERN 0025653, was issued by the “Office of the AG. Chairman RUF/SL- General Issa H. Sesay” on 21 January 2001, and the second pass, at ERN 00025654, was issued by the “Office of the Special Assistant to the AG Chairman RUF/SL” ten days later. The first pass allows a Hassan Gbla to travel from one town to another “in search of manpower for government mining”. The second pass allows two men to travel to visit their families. The Prosecution submits that the information is relevant to the *chapeau* requirements of crimes against humanity, superior responsibility, and Enslavement. The Defence responds that the information is cumulative. The Trial Chamber finds that the information contained in the document at Tab 15 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

Tab 16: Internal Report to Gen. Issa H. Sesay from RUF/SL Defence HQ in Makeni. 2 April 2001.

53. The report alleges that former RUF spokesman Major Blackman is still posing as an RUF spokesman and is providing information to international journalists. The letter further alleges that Blackman took two journalists to Kono to investigate “the diamonds business of the RUF

and its link with President Charles Taylor.” The author of the letter recommends an investigation into Blackman’s activities. The letter is addressed to Issa Sesay but the signature and stamp of the author are illegible. The Prosecution submits that the document is relevant to various modes of liability. The Defence responds that the document is cumulative. The Trial Chamber considers that the information at Tab 16 goes to the acts and conducts of the Accused and denies its admission into evidence.

Tab. 17: Black Guard admin Notebook. Undated.

54. The document appears to be a copy of a notebook belonging to an RUF Blackguard. It is undated. The Prosecution seeks admission of the entire document save ERN 00025639 which is Exhibit P-63. The document comprises notes about radio communications, including rules, language and procedures. The Prosecution submits that the document is relevant to Superior Responsibility. The Defence argues that the information is cumulative. The Trial Chamber observes that the Prosecution has provided no information regarding the owner or author of the notebook but that this is a matter of the weight to be accorded to the document and not its admissibility. The Trial Chamber finds that the information highlighted at Tab 17 is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits the entirety of the document it into evidence with the exception of ERN 00025639 and ERN 00025640 which is illegible.

III. DISPOSITION

FOR THE ABOVE REASONS, the Trial Chamber:

DISMISSES the Prosecution’s application for admission of the documents under Rule 89(C);

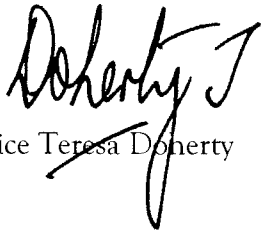
GRANTS the Prosecution’s alternative application in part and

ORDERS that:

- i. The pages at Tab 1 are admitted into evidence as Prosecution Exhibit P-369;
- ii. The pages at Tab 2 are admitted into evidence as Prosecution Exhibit P-370;
- iii. The pages at Tab 3 are admitted into evidence as Prosecution Exhibit P-371;
- iv. The pages at Tab 4 are admitted into evidence as Prosecution Exhibit P-372;
- v. The pages at Tab 5 are admitted into evidence as Prosecution Exhibit P-373;
- vi. The pages at Tab 6 are admitted into evidence as Prosecution Exhibit P-374;
- vii. The pages at Tab 7 are admitted into evidence as Prosecution Exhibit P-375;
- viii. The pages at Tab 8 are admitted into evidence as Prosecution Exhibit P-376;
- ix. The pages at Tab 9 are admitted into evidence as Prosecution Exhibit P-377;
- x. The pages at Tab 10 are admitted into evidence as Prosecution Exhibit P-378;
- xi. The pages at Tab 11 are admitted into evidence as Prosecution Exhibit P-379;
- xii. ERN 00025708 at Tab 12 is admitted into evidence as Prosecution Exhibit P-380;

- xiii. The pages at Tab 14 are admitted into evidence as Prosecution Exhibit P-381;
- xiv. The pages at Tab 15 are admitted into evidence as Prosecution Exhibit P-382;
- xv. All pages at Tab 17, with the exception of ERN 00025639 and ERN 00025640, are admitted into evidence as Prosecution Exhibit P-383.

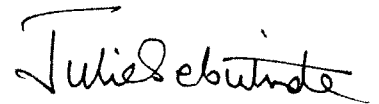
Done at The Hague, The Netherlands, this 27th day of February 2009



Justice Teresa Doherty



Justice Richard Lussick
Presiding Judge



Justice Julia Sebutinde

