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SCSL-03-01-T
(24471-24484)

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SPECIAL COURT FOR SIERRA LEONE

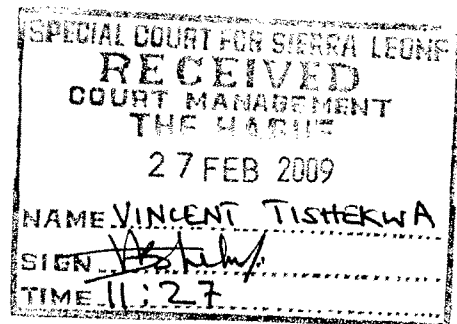
TRIAL CHAMBER II

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 NEWSPAPER ARTICLES
OBTAINED FROM THE CATHOLIC JUSTICE AND PEACE COMMISSION ARCHIVE IN
MONROVIA, LIBERIA

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”);

SEIZED of the “Prosecution Motion for Admission of Newspaper Articles Obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia”, filed on 28 November 2008 (“Motion”),¹ and “Prosecution Motion for Leave to Add an Article to the Prosecution Motion for Admission of Newspaper Articles Obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia,” filed on 1 December 2008 (“Second Motion”);²

NOTING the “Defence Response to Prosecution Motion for Admission of Newspaper Articles Obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia”, filed on 8 December 2008 (“Response”);³

NOTING ALSO, the “Prosecution Reply to Defence Response to Prosecution Motion for Admission of Newspaper Articles Obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia”, filed on 12 December 2008 (“Reply”);⁴

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”);⁵

RECALLING the Trial Chamber’s Order for Expedited Filing, dated 10 February 2009;⁶

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”);⁷

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”);⁸

COGNISANT of the Provisions of Article 17 of the Statute of the Special Court (“Statute”) and Rules 26*bis*, 73, 89 (C), 92*bis* and 95 of the Rules of Procedures and Evidence (“Rules”);

DECIDES AS FOLLOWS based solely on the written submissions of the parties;

¹ SCSL03-01-T-678.

² SCSL03-01-T-682.

³ SCSL03-01-T-687.

⁴ SCSL03-01-T-696.

⁵ SCSL03-01-T-726.

⁶ SCSL03-01-T-727.

⁷ SCSL03-01-T-730.

⁸ SCSL03-01-T-732.

I. SUBMISSIONS

Prosecution Motion

1. The Prosecution seeks admission into evidence of copies⁹ of newspaper articles the originals of which are held at the Catholic Justice and Peace Commission Archive in Monrovia (“JPC Documents”), as identified in Annex A and provided in Annex B to the Motion¹⁰ and a further newspaper article indentified in Annex A and provided in Annex B to the Second Motion.¹¹
2. The Prosecution submits that the articles should be admitted under Rule 89(C) alone,¹² 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” (“UN Documents Motion”),¹³ 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 92*bis* has been amended such that it is now limited to witness statements and transcripts; and (3) Rule 92*bis* as amended and limited does not apply to documents not prepared for legal proceedings;¹⁴
 - (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”¹⁵ Whilst admissibility under Rule 89(C) is subject to Rule 95 and to the Trial Chambers 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.”¹⁶ The Prosecution further submits that as the amendments to Rule 92*bis* 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).¹⁷
3. The Prosecution further submits that the JPC Documents are “facially relevant” as they relate to the *chapeau* elements of the crimes charged in the Indictment, the several forms of liability alleged by the Prosecution in this case and are evidence of a consistent pattern of conduct admissible

⁹ The Prosecution states that the documents tendered are photograph copies of the originals taken by officers of the Office of the Prosecution in March 2007 and in the case of the additional document referred to in the Second Motion, in September 2005. See para. 9 of Motion and para. 5 of Second Motion.

¹⁰ Motion, para. 1.

¹¹ Second Motion, paras 2-7.

¹² Motion, para. 3.

¹³ SCSL-01-03-T-650.

¹⁴ UN Documents Motion, paras 3, 16.

¹⁵ UN Documents Motion, paras 4-6.

¹⁶ UN Documents Motion, para. 8.

¹⁷ UN Documents Motion, paras 9-13.

under Rule 93.¹⁸ The Prosecution submits that the material does not impact adversely and unfairly upon the integrity of the proceedings and its admission would not bring the administration of justice into serious disrepute. Therefore, there is no undue prejudice to the Accused from the fact that a document is produced without calling a witness.¹⁹

4. In the alternative, the Prosecution seeks admission under Rules 89(C) and 92bis and relies on and incorporates by reference its submissions at paragraphs 15-17 in its UN Documents Motion,²⁰ viz:

(a) The Prosecution submits that “for evidence comprising public documents to be admitted pursuant to both Rules, the evidence must be relevant, its reliability must be susceptible of confirmation and its admission must not unfairly prejudice the Accused.”²¹ 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 confirmation²² meaning that the information should be capable of corroboration in due course;²³

(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.²⁴

5. The Prosecution restates that it is not required to prove that the evidence is reliable at this stage, only that the reliability of the evidence is susceptible of confirmation,²⁵ and reiterates its submissions that there is no undue prejudice to the Accused, that the JPC Documents do not go to the acts and conduct of the Accused nor concern the acts and conduct of the Accused’s immediately proximate subordinates. Hence it is in the interests of justice that this relevant evidence be brought before the Chamber and that the Chamber assesses the appropriate weight to be given to it.²⁶

Supplemental Request

6. In the light of the recent decision of the Appeals Chamber²⁷ dealing with the tender of documents under Rules 89(C) or 92bis, the Prosecution seeks leave to file a supplemental

¹⁸ Motion, para. 8 and Annex A.

¹⁹ Motion, paras 9-10.

²⁰ SCSL01-03-T-650.

²¹ UN Documents Motion, paras 14, 17.

²² Motion, para. 7.

²³ UN Documents Motion, para 17.

²⁴ UN Documents Motion, paras 15-16.

²⁵ Motion, para. 13.

²⁶ Motion, paras 14-16.

²⁷ 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.

argument which it submits “focuses on the significance of the testimony of Mr. Tariq Malik²⁸ in relation to the admissibility” of (inter alia) the subject documents under Rule 89(C).

7. 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.”²⁹ 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.³⁰

Defence Response

8. The Defence does not oppose the addition of the newspaper article in the Second Motion to the list of six articles in the original Motion and applies its legal and factual arguments to all seven articles in the JPC Documents.³¹
9. 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,”³² (“UN Documents Response”) viz:
- (a) 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. 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 been to admit documentary evidence under Rules 89(C) and 92bis.³³ 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;³⁴
 - (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”;³⁵

²⁸ *Prosecutor v. Taylor*, Transcript, 19-20 January 2009.

²⁹ Supplemental Request, Annex A, para. 2.

³⁰ Supplemental Request, Annex A, paras 3, 4.

³¹ Response, para. 4.

³² SCSL01-03-T-664.

³³ UN Documents Response, paras 3-6.

³⁴ UN Documents Response, paras 7-8.

³⁵ UN Documents Response, paras 10-13.

- (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 Accused’s fair trial rights”³⁶ 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.³⁷
10. In response to the Prosecution submissions relating to admission under Rule 89(C) alone the Defence further submits that the Trial Chamber must consider reliability, probative value, authenticity, repetitiveness, and prejudice as well as relevance in exercising its discretion.³⁸
11. In response to the Prosecution submissions relating to admission under Rules 89(C) and 92bis the Defence submits that articles at Tabs 1 and 2 of the JPC Documents are irrelevant as they concern events outside the Indictment period;³⁹ that all seven articles contain opinion evidence which is inadmissible under Rule 92bis⁴⁰ and a witness should be made available to assist the Chamber in assessing reliability as the articles are produced so late that witnesses who have already testified cannot be challenged on their accuracy or content.⁴¹
12. The Defence argues that “in the jurisprudence of international tribunals ‘newspaper articles generally are not considered a reliable source of evidence and are often excluded for lack of probative value’”.⁴² The Defence further argues that “the articles are from newspapers which are known more for their sensationalism rather than true investigative journalism”; that in civil war situations the media is frequently used as a propaganda tool, and that witnesses in this trial have testified that rebels manipulated the media.⁴³
13. The Defence argues that information provided in the articles at Tabs 1, 2, 4 and 6 all go directly to acts and conduct of the Accused and should therefore be excluded, a substantial number of the newspaper articles go directly to the acts and conduct of persons considered to be “direct proximates” of the Accused or to command responsibility or to joint criminal enterprise.⁴⁴ The Defence further submits that the probative value of the proposed evidence is outweighed by its

³⁶UN Documents Response, para. 16.

³⁷ UN Documents Response para 14-19

³⁸ Response, para. 8

³⁹ Response, para. 9.

⁴⁰ Response, para. 10.

⁴¹ Response, paras 13-15.

⁴² Response, para. 12 citing *Prosecutor v. Norman et al.*, SCSL04-14-T-447, “Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89 (C)”, 14 July 2005, p. 4.

⁴³ Response, para. 12.

⁴⁴ Response, paras 16-17 citing *Prosecutor v. Sesay et al.*, SCSL04-15-T-1049, “Decision on Defence Application for the Admission of Witness Statement DIS-129 under Rule 92bis, or in the alternative, under Rule 92ter”, 12 March 2008, pp. 1 and 3 (“Sesay”).

prejudicial effect and that the “newspaper articles have no significant weight as they make bald statements without any evidence and are also in many instances opinionated.”⁴⁵

14. In response to Prosecution submissions on admission pursuant to Rule 89(C) the Defence, relying on the exclusionary conditions set out in the *Kordic and Cerkez* test, submits that the JPC Documents are cumulative, have been available to the Prosecution for the duration of its case and should have been admitted through witnesses during the case, that they are not sufficiently significant to warrant admission so late in the proceedings, do not add to the volume of material already in evidence, and are based on anonymous or hearsay statements;⁴⁶ additionally, in relation to each document, there are issues of illegibility, of unavailability of the original or incompleteness.⁴⁷

Supplemental Response

15. 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.⁴⁸

Prosecution Reply

16. The Prosecution relies on and incorporates by reference its submissions at paragraphs 2-11 in its “Public Prosecution Reply to Defence Response to Public Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies,”⁴⁹ and disputes the Defence interpretation of the jurisprudence relating to Rules 89(C) and 92bis. The Prosecution recounts the background to the amendment to the latter rule and the jurisprudence of the *ad hoc* tribunals to support their previous submissions.⁵⁰

⁴⁵ Response, paras 18-21, citing *Prosecutor v. Norman et al.*, SCSL-04-14-T-447, “Decision on Prosecution’s request to Admit into Evidence certain documents Pursuant to Rules 92bis and 89(C)”, 14 July 2005, p. 3 (“CDF”).

⁴⁶ Response, paras 23-27 citing *Prosecutor v. Kordic and Cerkez*, Appeals Judgement, No.IT-95-14/2-A 17 December 2004.

⁴⁷ Response, para. 28.

⁴⁸ Supplemental Response, paras 8-13.

⁴⁹ SCSL-01-03-T-670.

⁵⁰ Reply, paras 2-12.

17. The Prosecution further submits that whilst Rule 89(C) is discretionary it is not only the content of the document which is relevant but the fact that such reports highlight that there was general knowledge and awareness that crimes were occurring in Sierra Leone.⁵¹
18. In reply to objections on grounds of illegibility and incompleteness the Prosecution sets out which documents are complete, which are redacted and which parts the Prosecution does not seek to have admitted.⁵²
19. The Prosecution submits that evidence can be admitted “concerning events not charged in the Indictment as corroborating evidence establishing acts charged in the indictment”. The Rules do not exclude admission of evidence outside the temporal limits of the Indictment provided that it is relevant to the case, and such evidence may be the basis from which to draw inferences.⁵³
20. The Prosecution refutes the Defence argument that the JPC Documents are opinion evidence or are cumulative and argues that the Defence Response is contradictory, noting that the Defence does not identify a specific instance of opinion. Further the arguments that the newspaper articles are “sensationalized” are negated by the Defence’s own argument that the information provided in the articles is cumulative.⁵⁴
21. The Prosecution submits that the Defence misinterprets and misapplies the *Kordic and Cerkez* test; that the Defence arguments regarding the unreliability of media reports are negated by their arguments that the evidence is cumulative and, as the Prosecution itself has identified the relevance, that there is no requirement for a witness to speak to the contents and relevance of the newspapers. Further these concerns of the Defence go to weight to be accorded to the documents.⁵⁵
22. The Prosecution further submits that none of the information goes to acts and conduct of the Accused or a critical element of the Prosecution case and that the Defence interpretation of those phrases is overly broad. However should the Trial Chamber decide that the JPC Documents contain evidence which goes to the acts and conduct of the Accused or evidence that goes to a critical element of the Prosecutions case proximate to the Accused then such evidence may be redacted.⁵⁶

Supplemental Reply

23. The Prosecution disputes the objections of the Defence to the Supplemental Request⁵⁷. 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 89(C) in conjunction with his testimony.⁵⁸ The Prosecution submits that the Appeals Chamber decision

⁵¹ Reply, para. 4.

⁵² Reply, para. 5.

⁵³ Reply, para. 7.

⁵⁴ Reply, paras 8-10.

⁵⁵ Reply, paras 11-17.

⁵⁶ Reply, paras 17-23.

⁵⁷ Supplemental Reply, paras 2-11.

⁵⁸ *Ibid.*, para. 5.

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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.⁵⁹ 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 disrepute⁶⁰.

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

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

- (A) In 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.
- (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 2009,⁶¹ ("Appeals Chamber Decision"), wherein the Appeals Chamber upheld a decision of the Trial Chamber, confirms that:

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.⁶² [...]

⁵⁹ Ibid., para. 10.

⁶⁰ Ibid., para. 11.

⁶¹ SCSL-03-01-AR73-721, "Decision on 'Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents'", 6 February 2009 ("Appeals Chamber Decision").

⁶² Appeals Chamber Decision, para. 30 (original footnotes omitted).

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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.⁶³ [...]

[...]

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).⁶⁴ [...]

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.⁶⁵ 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 trial⁶⁶, and what weight, if any, should be attached to it⁶⁷. Simply admitting a document into evidence does not amount to a finding that the evidence is credible⁶⁸.
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 for the acts and conduct of others." Only written statements which go to proof of the latter acts and conduct are excluded by Rule 92bis⁶⁹.

⁶³ Appeals Chamber Decision, para. 33(original footnotes omitted).

⁶⁴ Appeals Chamber Decision, para. 34.

⁶⁵ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-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.

⁶⁶ *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-T, "Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis", 15 May 2008, para.30.

⁶⁷ *Prosecutor v. Norman, Fofana & Kondewa*, SCSL-04-14-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*, SCSL-04-15-T, "Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis", 15 May 2008, para. 30.

⁶⁸ *Prosecutor v. Norman, Fofana & Kondewa*, SCSL-04-14-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*, SCSL-04-15-T, "Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis", 15 May 2008, para. 31.

⁶⁹ *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.

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.⁷⁰ 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.⁷¹
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.⁷²
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.”⁷³

III. DELIBERATIONS

Preliminary Matter:

32. The Trial Chamber notes that the Defence does not oppose the addition of the article in the Second Motion to the list of six articles in the original Motion and considers that it would be expedient to allow the Prosecution to do so. Accordingly the Trial Chamber will consider the seven articles submitted by the Prosecution together.
33. 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)⁷⁴. The said documents were tendered in lieu oral testimony and therefore should have been tendered under Rule 92bis⁷⁵. Accordingly, the Prosecution application pursuant to Rule 89(C) must fail.
34. 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 19th and 20th January 2009. It is common ground that Mr. Malik was unable to give any evidence relevant to the

⁷⁰ *Galic*, *ibid.*, para. 10; see also Prosecution’s Second Amended Indictment (“Indictment”), paras 33, 34.

⁷¹ *Galic*, *ibid.*, para. 10, see also Indictment, para. 33.

⁷² *Galic*, *ibid.*, para. 11.

⁷³ *Galic*, *ibid.*, para. 13. See also *Prosecutor v. Bradanin & Talic*, IT-99-36-T, “Confidential Decision on the Admission of Rule 92bis Statements”, 1 May 2002, at para. 14.

⁷⁴ Appeals Chamber Decision, para. 34.

⁷⁵ 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.

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.

35. 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,⁷⁶ "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 92bis. The Trial Chamber therefore dismisses the Prosecution's supplemental argument.
36. Turning to the Prosecution's alternative application the Trial Chamber will consider the admissibility of the individual documents under Rule 92bis.
37. The Trial Chamber has reviewed the JPC Documents and the notes that the only article that is entirely legible is at Tab 4 of Prosecution Annex B. However, all the documents can be read and understood and as the Defence has been able to provide substantive responses to the issues raised in all these documents. The Trial Chamber, therefore does not reject the admission of information on this ground.

Relevance

38. The Trial Chamber notes that the articles at Tabs 1 and 2 of the JPC Documents provide information outside the geographical and temporal scope of the Indictment. The Prosecution argues that information outside the scope of the Indictment may be proof of a consistent pattern of conduct or go to an issue relevant to the Indictment such as "motive, opportunity, intent, preparation, plan, or knowledge"⁷⁷ but does not explain how these particular articles go to any of those elements. The Trial Chamber is not satisfied that the information contained in the articles at Tabs 1 and 2 is relevant to the instant case.

Susceptibility of Confirmation

39. The Trial Chamber considers that the information contained in all the articles submitted by the Prosecution is susceptible of confirmation.

⁷⁶ Appeals Chamber Decision, para. 33.

⁷⁷ *Prosecutor v. Strugar*, IT-01-42-T, "Decision on Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence", 22 January 2004.

Reliability of the Source

40. The Trial Chamber considers that the reliability of the source is not a condition of admissibility.

Tab 1: The Inquirer: "Taylor's Aide de Camp, others surrender" 20 March 1995"

41. The article states that Senior Commanders of the NPFL disarmed because they did not believe Taylor would disarm. The information goes to the acts and conduct of the Accused; the Trial Chamber is not satisfied that the information is relevant; the prejudicial effect of the material manifestly outweighs its probative value. Accordingly the Trial Chamber refuses to admit this information into evidence.

Tab 2: New Democrat Weekly: "Taylor's General Drop Arms-Claim Ritualistic Killings, Deception. List includes 16 Generals, 14 Special Force Commandos 30 Nov-5 Dec. 1995"

42. The article states that top commanders resigned saying that the Accused was responsible for the crisis in Liberia and claiming ritualistic killings. The information goes to the acts and conduct of the Accused. Accordingly the Trial Chamber refuses to admit this information into evidence.

Tab 3: The Inquirer: "Thousands Trapped in Freetown...Foday Sankoh flown to Guinea; Rebels still Burning Buildings 13 January 1999."

43. The article reports on the January 1999 invasion of Freetown. 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 4: The News. "Embassy of Nigeria-Statement on the Situation in Sierra Leone" 19 January 1999.

44. The article claims to contain a full text of a statement issued by the Federal Government of Nigeria and refers to the "nefarious role of Liberia" during the January 1999 invasion of Freetown. The information goes to acts and conducts of the Accused. Accordingly the Trial Chamber refuses to admit this information into evidence.

Tab 5: The News: "As the Fighting Rages on in Sierra Leone, Ceasefire Fails, Catholic bishop, Nuns and Others taken Hostage" 20 January 1999.

45. The article refers to crimes committed by the RUF during the January 1999 Freetown invasion and states "Despite pronouncement last week by President Taylor that he had secured a cease-fire in Sierra Leone and a subsequent confirmation by rebel spokesman Sam Bockarie...." The information goes to the acts and conduct of the Accused. Accordingly the Trial Chamber refuses to admit this information is not admitted into evidence.

Tab 6: The News: "3 AFL Soldiers Captured in Sa. Leone."

46. The article refers to claims by the Sierra Leonean authorities that the Liberian Government has been supporting the RUF. The information goes to the acts and conduct of the Accused. Accordingly the Trial Chamber refuses to admit this information into evidence.

Daily Times "In Sierra Leone: 52 burned Alive as Junta goes on a Rampage" 20 February 1998.

47. This is the additional article submitted on 1 December 2008. The article refers to crimes committed by retreating forces following the ECOMOG intervention in February 1998. The Trial

Chamber finds that the information is relevant, susceptible of confirmation and does not go to the acts and conduct of the Accused, and admits it into evidence.

FOR THE ABOVE REASONS THE TRIAL CHAMBER

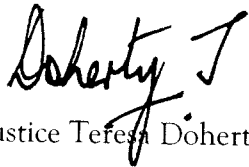
DISMISSES the Prosecution's application for admission of the documents under Rule 89(C);

GRANTS the Prosecution's alternative application in part and

ORDERS that:

- i. The document at Tab 3 is admitted into evidence as Prosecution Exhibit P-384;
- ii. The additional article is admitted into evidence as Prosecution Exhibit P-385;

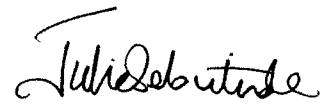
Done at The Hague, The Netherlands, this 27th day of February 2009.



Justice Teresa Doherty



Justice Richard Lussick
Presiding Judge



Justice Julia Sebutinde

