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SCSL-03-01-T
(21085-21098)

21085



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: 06 October 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* FREETOWN AND WESTERN AREA- TF1-024, TF1-081, AND TF1-084"

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. The Defence hereby files its Objection to the Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Freetown and Western Area. The Defence submits that the Notice is defective in several respects and is therefore objectionable.
2. On 30 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 of witnesses TF1-024, TF1-081, and TF1-084 (the “Witnesses”) in other proceedings before the Special Court for Sierra Leone, including supplemental statements of TF1-084.
3. 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 as it concerns, *inter alia*, crimes committed in Freetown and the Western Area during the Indictment period.³ In addition, the witnesses will provide evidence relevant to the chapeau requirements of the crimes charged in the Second Amended Indictment.⁴
4. 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

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-611, “Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Freetown & Western Area – TF1-024, TF1-081, and TF1-084”, 30 September 2008 (the “Notice”).

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

³ Notice, para. 17

⁴ Notice, para. 18-19

Prosecution's case, it is proximate enough to the accused as to require cross-examination, which a Chamber may, in its discretion, order.⁵

5. The Defence files this Objection to the admission of the prior testimony and related exhibits of witnesses TF1-024, TF1-081, and TF1-084, and the supplemental statements of TF1-084, under Rule 92*bis*, on the grounds that:
 - a) The prior trial transcripts, related exhibits of the witnesses, and particularly supplemental statement of TF1-084, should be submitted under 92*ter*;
 - b) Some of the evidence reflects the witnesses' own respective opinions or conclusions; 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, therefore, be admitted under Rule 92*bis* without the opportunity for cross-examination.

6. The Defence therefore submits that:
 - a) The admission of the prior trial transcripts, related exhibits of the witnesses and the supplemental statement of TF1-084 must be denied.
 - b) Alternatively, if the Trial Chamber does not deny the admission of the prior transcripts, related exhibits, and the supplemental statement of TF1-084 under Rule 92*bis* completely, then only those portions of the witnesses' prior testimony, related exhibits and supplemental statement 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, related exhibits and the supplemental statement under Rule 92*bis* completely, then it should exercise its discretion and order the Prosecution to ensure that the witnesses are all available for cross-examination.

⁵ See Notice, para. 25, and cases cited therein.

II. Legal Basis and Submissions

Prosecution's right of Reply

7. The Defence notes that under Rule 92*bis* (C), the Prosecution does not have an automatic right to reply to this Objection. Should it be inclined to reply to this Objection, the Prosecution must therefore seek leave of the court.⁶

Application Should Have Been Made Under Rule 92*ter*

8. As the Prosecution's Notice includes TF1-084's witness supplemental statements and information directly related to proof of the acts and conduct of the accused,⁷ it should have been brought under Rule 92*ter*, which requires the agreement of the parties and that the witness be present for cross-examination. Rule 92*ter* 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.
9. The Prosecution therefore could only resort to Rule 92*bis* where there is no agreement between the parties, or where there is genuinely no information that goes to proof of the acts or conduct of the accused.

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⁷ Notice, para.22 and Annex G

Objection Under Rule 92bis

10. 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.
11. 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).

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”).

12. Notwithstanding the Prosecution's assertions, that the prior trial transcripts, related exhibits and supplemental statements in the Notice do not go to proof the act and conduct of the Accused¹⁰, the Defence 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.
13. 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.¹¹ Therefore in Annex A, the Defence also objects to the admission of any exhibits related to the evidence of the witnesses.
14. 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 fairness it is too closely linked to the acts and conduct of the accused to be admitted without the opportunity for cross-examination.¹²
15. Trial Chamber I has also determined that acts of co-perpetrators or subordinates of the accused¹³ is relevant in determining if cross-examination should be allowed, but not in determining if a document should be admitted under Rule 92bis.¹⁴ Thus,

¹⁰ Notice, para.24.

¹¹ *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.

¹² *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 92bis, or in the Alternative, Under Rule 92ter, 12 March 2008, pg. 2 ("Sesay 92bis 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 92bis and 89(C), 14 July 2005, pg. 4 ("CDF 92bis 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 92bis Decision").

¹³ 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.

¹⁴ CDF 92bis Decision, pg. 4.

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.¹⁵ 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.¹⁶ 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.¹⁷

16. More 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 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 54.¹⁸ This is simply, but crucially, a matter of fairness.¹⁹
17. The Defence submits that through the admission of the prior testimony and related exhibits of witnesses TF1-024, TF1-081, and TF1-084, particularly the supplemental statements of TF1-084, without the opportunity for cross-examination, the Prosecution is improperly attempting to introduce into evidence of the acts and

¹⁵ See Galic 92*bis* Appeals Decision, para. 9.

¹⁶ 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.

¹⁷ *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

¹⁸ Sesay 92*bis* Decision, pgs. 1, 3. See also *Prosecutor v. Taylor*, SCSL-01-556, Supra Note 16, p.4

¹⁹ 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.

conducts of alleged subordinates of Mr. Taylor. On the basis of the Accused's statutory right to a fair trial, this can not be allowed. The Defence agrees that the acts and conduct of an alleged subordinate of Mr. Taylor²⁰ cannot be equated with the acts and conduct of Mr. Taylor himself, and therefore may be admissible. The Defence however reiterates the caveat that this is only if cross-examination of the witness is possible.²¹ If the witnesses are not available for cross-examination, then the Defence submits that the relevant portions objected to in Annex A should not be admitted into evidence.

Cross Examination

18. In the Notice, the Prosecution submits that should further cross-examination of the witnesses be allowed, limiting it to matters not previously covered would be efficient and would not impact on the fair trial right of the Accused.²² This assertion is ill-conceived. This Chamber has dismissed similar arguments in other proceedings before it on the basis that the Accused would be prejudiced if judicial economy were allowed to take precedence over his fair trial rights.²³ The Prosecution's submission should therefore fail on the same basis.
19. The Prosecution also suggests that it would be superfluous to allow cross-examination in this case because the evidence of the witnesses is crime based,

²⁰ 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, and Zig Zag Marzah.

²¹ 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.

²² Notice para. 29.

²³ *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, para. 4.

which the Defence would not seek to challenge.²⁴ Further, that the evidence has already been tested in cross-examination by defence counsel in *other* proceedings anyway [emphasize added].²⁵ With respect to the first issue, it is mischievous for the Prosecution to assert with such authority what the Defence may or may not do. The right of cross examination is the Defence's absolute prerogative in each case.²⁶ With respect to the second issue, 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.²⁷ In this case as the information sought to be tendered goes to the acts and conduct of the accused as argued above, it is critical to an important issue between the parties and cross examination must be allowed.

20. Moreover, the Defence submits, the mere fact that a witness has been subjected to cross examination in previously proceedings does not of itself constitute a sufficient basis to limit cross-examination in this case. It must be shown that the line of defence and the scope of cross examination in the previous proceedings coincides with that of the Defence in the present proceedings. Issues crucial to the present Defence would otherwise go unchallenged. Furthermore, in this case, the evidence in the supplemental statements of TF1-084 has not been challenged at all. The Prosecution's argument therefore simply cannot stand.

²⁴ Notice, para. 25.

²⁵ Notice, para. 26.

²⁶ The Defence submits that the statements by its Counsel on its attitude towards the cross-examination of crime based witnesses did not and could not amount to a blanket waiver of the right to cross examine all crime based witnesses, as the Prosecution contends. More so, where the evidence of the so-called crime based witnesses venture into the acts and conduct of the accused.

²⁷ *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.

III. Conclusion

21. The Defence requests the Trial Chamber to:

- (A) Dismiss the Prosecution Notice entirely as it should have been filed under Rule 92*ter*; or
- (B) Admit into evidence only those portions of the witnesses' prior testimony and related exhibits that are not objected to in Annex A.
- (C) In the event that the Trial Chamber admits the objectionable portions witnesses' testimony and related exhibits, the Defence further requests the Trial Chamber to order the Prosecution to make witnesses TF1-024, TF1-081, and TF1-084 available for cross-examination.

Respectfully Submitted,



SILAS OMEREM

 Courtenay Griffiths Q.C.

Lead Counsel for Charles G. Taylor

Dated this 06 Day of October 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

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

Prosecutor v Taylor, SCSL-01-556, 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

Prosecutor v. Taylor, SCSL-03-01-T-611, "Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Freetown & Western Area – TF1-024, TF1-081, and TF1-084", 30 September 2008

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 92bis, or in the Alternative, Under Rule 92ter, 12 March 2008

ICTY

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

Prosecutor v. Galic, ICTY-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002

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



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TF1-024, TF1-081 AND TF1-084”**

Name of Officer:

Vincent Tishekwa

Signed: 