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SCSL

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding Judge
Justice Jon M. Kamanda
Justice George Gelaga King
Justice Emmanuel Ayoola

Registrar: Herman von Hebel

Date: 6 February 2009

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No.SCSL-2003-01-AR73)

DECISION ON "PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS CONCERNING THE DECISION REGARDING THE TENDER OF DOCUMENTS"

Office of the Prosecutor:
Ms. Brenda J. Hollis
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Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Renate Winter, Presiding Judge, Justice Jon M. Kamanda, Justice George Gelaga King and Justice Emmanuel Ayoola;

SEIZED of the "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", dated 5 January 2009 ("Appeal");

CONSIDERING the "Defence Response to Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", dated 12 January 2009 ("Response") and the "Prosecution Reply to Defence Response to Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", dated 16 January 2009 ("Reply");

NOTING the oral decision issued by Trial Chamber II ("Trial Chamber") on 21 August 2008 regarding the tender of documents[1] ("Impugned Decision") and the Trial Chamber's "Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents" ("Decision on Leave to Appeal"), dated 10 December 2008, wherein the Trial Chamber granted the Prosecution leave to make the Appeal;

HEREBY renders this Opinion on the Appeal based on the written submissions of the Parties.

I. BACKGROUND

1. On 21 August 2008, during its examination of Witness TF1-367, the Prosecution attempted to show the witness a document allegedly containing diamond mining records ("Document"). The Defence objected on the grounds that the witness was not in a position to speak on the Document and that the Prosecution had failed to lay a foundation for placing it before the witness. The Prosecution then applied to tender the Document under Rule 89(C) of the Rules.[2] The Defence objected on the ground that the Prosecution was seeking to circumvent Rule 92*bis* of the Rules and that absent some foundation the Document could not be admitted under Rule 89(C) of the Rules through the witness.[3]

2. The Trial Chamber consequently issued its Impugned Decision and held that:

> If the Prosecution wishes to tender a document under Rule 89(C) through a witness, they need to lay some foundation and in the instant case there is no sufficient foundation. If a

[1] *Taylor* Trial Transcript, 21 August 2008, page 14253.
[2] *Taylor* Trial Transcript, 21 August 2008, pages 14245-14246.
[3] *Taylor* Trial Transcript, 21 August 2008, page 14252.

document is to be tendered without a witness, then the application should be made under Rule 92bis of the Rules.[4]

II. SUBMISSIONS

A. Appeal

3. The Prosecution filed two grounds of appeal. The First Ground contends that the Trial Chamber erred in law by holding that if the Prosecution wishes to tender a document through a witness under Rule 89(C) of the Rules, it needs to lay a foundation and in the instant case there was no sufficient foundation; that if a document is to be tendered without a witness, the application should be made under Rule 92*bis* of the Rules.[5] The Second Ground states: To the extent that the Trial Chamber correctly determined that there must be sufficient foundation before a document may be tendered through a witness under Rule 89(C), the Trial Chamber erred in fact and law in determining that no sufficient foundation had been laid in the instant case.[6]

4. The relief sought is that:

(i) The Impugned Decision be set aside and that the Document in question be admitted in evidence; alternatively, that the Trial chamber be ordered to "evaluate the admissibility of the document based on its relevance alone";

(ii) "To the extent a foundation beyond relevance is required before a document can be admitted through or in conjunction with a witness pursuant to Rule 89(C), the Trial Chamber be ordered to admit the document . . . as a sufficient foundation had been established through witness TF1-367."[7]

5. In support of the first alleged error, the Prosecution submits that the only test for admissibility set out in Rule 89(C) is that the document be relevant.[8] It avers that this flexible approach has been found by the Appeals Chamber to be best suited to proceedings conducted by professional judges.[9] Since the Document's relevance was never in dispute, the Prosecution argues that the Trial Chamber erroneously added a condition for its admission by requiring a "sufficient

[4] *Taylor* Trial Transcript, 21 August 2008, page 14253.
[5] Appeal, p. 4 and paras 20, 38 and 39.
[6] Appeal, p. 4 and para. 20.
[7] Appeal, para. 46.
[8] Appeal, paras 24 and 25; Reply, para. 13.
[9] Appeal, para. 25, *citing Prosecution v. Norman et al.*, SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005 ("*Fofana* Bail Decision"), para. 26.

foundation."[10] The foundation which according to the Defence is necessary - where the Document came from, who wrote it and the location and availability of the original[11] - confuses, the Prosecution submits, the sole requirement for admissibility under Rule 89(C) (*i.e.*, relevance) with the assessment of the Document's reliability at the end of the trial.[12]

6. Insofar as a foundation beyond relevance is required where a document is tendered in conjunction with witness testimony, the Prosecution submits that the Trial Chamber did not set out what that additional foundation must be.[13] In the Prosecution's view, the witness' personal knowledge of the document is not required; it suffices that his or her testimony is relevant to understanding or evaluating the document, or that the document is relevant and related to the testimony.[14] In the present case, it argues, the Document is related and relevant to the testimony of Witness TF1-367 regarding the AFRC/RUF practice as to records of diamond mining.[15]

7. Under the second alleged error, the Prosecution reiterates firstly that as the Document's relevance was neither disputed by the Defence nor questioned by the Trial Chamber the requirement of relevance under Rule 89(C) is met.[16] It concedes that the document "was created after the witness had left the position of mining commander," but argues that it consistently pointed out the document's relevance to the testimony of Witness TF1-367.[17] Secondly, it contends that no reasonable trier of fact could have concluded that a "sufficient foundation" had not been laid for the Document's admission, given, *inter alia*, Witness TF1-367's familiarity with similar documents, knowledge of AFRC/RUF diamond mining activities,, the recordkeeping associated therewith and the names and locations mentioned in the document.[18]

8. Turning to the Trial Chamber's statement that applications to tender doeuments without a witness must bc madc under Rule 92*bis*, the Prosecution contends that the Trial Chamber ruled, in effect, that the only mode of admission of a document under Rulc 89(C) is through or in conjunction with a witness.[19] The Prosecution submits that that ruling is erroneous because the language of Rule 89(C) does not set out such a requirement and documents have previously been

[10] Appeal, paras 24 and 27. *See* also Reply, paras 4 and 15.
[11] *Taylor* Trial Transcript, 21 August 2008, page 14246-14247.
[12] Appeal, para. 26.
[13] Appeal, para. 31.
[14] Appeal, paras 28 and 31.
[15] Appeal, paras 29-30.
[16] Appeal, para. 40.
[17] Appeal, para. 41.
[18] Appeal, paras 41-44.
[19] Appeal, para. 21.

admitted by the Special Court under that rule in the absence of a witness.[20] Relying on Special Court and ICTY case-law, it adds that there is no requirement in international criminal law to produce documents through a witness.[21]

9. The Prosecution further disputes the argument that if it could not link the Document to the testimony of Witness TF1-367, then it was seeking to prove facts by documentary and not oral evidence, and, therefore the provisions of Rule 92*bis* apply as *lex specialis* for information in documents and cannot be circumvented simply by trying to admit the Document under the general Rule 89(C).[22] It argues that documents may be and have been admitted in the absence of a witness under Rule 89(C) solely and that Rule 92*bis* only applies where, unlike this instance, a document is offered *in lieu* of oral evidence.[23] It avers that the Document falls outside the purview of Rule 92*bis* because that rule, which has some similarity to the comparable rules in the ICTY and ICTR, is more suited to the admission of witness statements and transcripts, as opposed to other types of documentary evidence which have not been prepared for legal proceedings and are not offered as a substitute for live testimony. It contends that Rule 89(C) controls the admission of such other documents.[24]

10. The Prosecution submits that the Impugned Decision will cause it immediate and future prejudice,[25] and requests the Appeals Chamber to set the Impugned Decision aside and order the Trial Chamber to admit the Document, or, in the alternative, to order the Trial Chamber to evaluate the Document's admissibility based on its relevanee alone.[26]

B. Response

11. The Defence opposes the Appeal[27] and disputes the prejudice alleged.[28] It submits that Rule 89(C) gives the Trial Chamber discretion as to which relevant evidence it deems appropriate to admit.[29] Further, it submits that some foundation is necessary to establish relevance, or alternatively, that the Trial Chamber appropriately exercised its discretion in requesting a

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[20] Appeal, para. 22, *citing Fofana* Bail Decision; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 2 August 2006 ("*Sesay* Decision"); Reply, paras 8-12.
[21] Appeal, para. 23, *citing inter alia Prosecutor v. Blaškić*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgment, 3 March 2000, para. 35; *Sesay* Decision, pp. 3-4.
[22] *Taylor* Trial Transcript, 21 August 2008, page 14249. *See also* Appeal, para. 13.
[23] Appeal, paras 32, 33 and 37, *referencing Sesay* Decision, p. 4; *Fofana* Bail Decision, paras 4-6.
[24] Appeal, paras 34-36.
[25] Appeal, para. 45.
[26] Appeal, paras 7 and 46.
[27] Response, paras 2, 30 and 31.
[28] Response, paras 27-29.
[29] Response, para. 12.

foundation before admitting the evidence.[30] The Defence argues that while relevance might be the only express legal requirement, the Rule is not couched in exclusive terms. It was, therefore, permissible for the Trial Chamber to determine that a foundation must be established before determining whether or not a document is relevant or admissible.[31] If the witness had no knowledge of the document or of its contents, then it was not relevant to that witness's testimony and it ought not to be admitted through that witness.[32]

12. Next, the Defence disputes the Prosecution's assertion that the Impugned Decision is inconsistent with the practice of the Special Court, and contends that in both of the decisions cited by the Prosecution the documents at issue were not admitted without a witness.[33] The Defence denies that the Trial Chamber's interpretation of Rule 89(C) is inconsistent with the practice of the Court and submits that the Prosecution's contention that Rule 89(C) has been used to admit documents without a witness is based on a flawed understanding of the relevant cases. It argues that the Appeals Chamber in the Fofana Bail Appeal Decision, while noting that the document in issue should have been admitted under Rule 89(C), also noted that witnesses would then have to be made available for the purposes of cross-examination in relation to the documents. In both cases, the respective documents *per se* were not admitted without a witness.[34]

13. The Defence further avers that a careful approach to the admission of documents does not disrespect the Judges' professionalism; rather, it safeguards the integrity and efficieney of the proceedings. In this regard, it argues, proof of the acts and conduct of the accused by way of documentary evidenee *in lieu* of oral testimony without the opportunity for cross-examination should be excluded.[35] Allowing evidence of an accused's acts and conducts to be admitted under Rule 89(C), without the possibility to cross-examine a witness on the material, would circumvent the safeguards of Rule 92*bis* and also prejudice the aeeused's confrontation rights under Article 17 of the Statute.[36]

14. Moreover, the Defence submits that as the Document was not linked to the evidence of Witness TF1-367, it is clear that the Prosecution attempted to tender it *in lieu* of oral evidenee, which can only be done through the *lex specialis* rule for documents tendered without a witness,

[30] Response, para. 12.
[31] Response, para. 12.
[32] Response, para. 13.
[33] Response, para. 15, citing *Sesay* Decision; *Fofana* Bail Decision, paras 28-30.
[34] Response, para. 15.
[35] Response, paras 16 and 19.
[36] Response, paras 19 and 20.

i.e., Rule 92*bis*.[37] It argues that Rule 89(C) does not contain a requirement similar to that in Rule 92*bis* that the document must bear some indicia of reliability precisely because the former Rule contemplates testimony of a witness and the opportunity for cross-examination, which would minimise the risk that unreliable evidence would be admitted.[38]

15. The Defence argues that in May 2007 amendments to Rule 92*bis* only narrowed the scope as to what may be admissible by explicitly prohibiting information which goes to proof of the acts of the accused. The amendments did not narrow the definition of what may be considered and admitted as "information". They do not, as the Proseeution argues, make Rule 92*bis* only suitable for the admission of statements and transcripts.[39]. The Defence points out that the Prosecution has previously filed a motion under Rule 92*bis* applying for the admission of a sizeable number of documents other than written statements or transcripts (ineluding video footage, maps, information downloaded from the internet, etc.) *in lieu* of oral testimony.[40]

16. The Defence submits that Rule 92*bis* is broader than the comparable Rules at the ICTY and ICTR in that it allows thc admission of "information" and not, as argued by the Prosecution, only statements or transcripts from other trials.[41] It argues that the phrase "*in lieu* of oral testimony" in Rule 92*bis* should be given its ordinary meaning and should not be restricted to written statements or transcripts that are tendered *in lieu* of oral testimony. The Defenee goes on to state that, since "documents do not themselves speak, the contents of any doeumentary evidence is essentially tendered *in lieu* of oral testimony".[42] In this regard it submits:

> This is not a novel or inventive definition of the phrase. In this instance, the Prosecution was attempting to admit alleged RUF mining records in a documentary and written format *in lieu* of oral testimony: i.e., instead of calling a witness to testify as to the quantity, classification, etc., of mined diamonds. As such, the document falls squarely within the provisions and safeguards of Rule 92*bis*, as does all documentary evidence tendered in the absence of a witness.[43]

C. Reply

17. The Prosecution replies that the Defence incorrectly stated that the Prosecution "could not demonstrate how the witness was qualified to answer questions about the doeument" beeause it had pointed out that (i) the locations mentioned in the mining records were locations directly tied to the

[37] Response, para. 17. *See* also Response, para. 23.
[38] Response, para. 18.
[39] Response, para. 22.
[40] Response, para. 22.
[41] Response, paras 21 and 22.
[42] Response, para. 23.
[43] citation

witness's testimony; (ii) some of the names of commanders mentioned therein were persons the witness had mentioned as having been involved in mining; (iii) the witness had testified that he was the mining commander in the period immediately preceding that covered by the document in question; and (iv) the witness explained RUF mining operations and how they were recorded.[44] Therefore, the Prosecution asserts, the witness had already testified to matters that were relevant to understanding the subject matter of the document.[45]

18. The Prosecution also asserts that the Defence only raised questions related to authenticity and reliability and not relevance as the grounds of its objection in the Trial Chamber.[46] It submits that the Defence appears to equate the requirement for "foundation" with the rule against leading questions when it suggested that "a foundation in this instance was necessary to ensure that the Prosecution did not lead the witness in regard to the content of the document."[47] The Prosecution argues that by proposing to proceed without showing the document to the witness, it vitiated any issue of leading, and in any event any objection of leading would have been premature since no question had been asked of the witness concerning the document.[48]

19. Regarding the *Sesay* Decision, the Prosecution submits that the Trial Chamber did not admit the document "through" a witness, and in fact the defence in that case objected to the admission of the document on the basis that the Prosecution "should have sought to introduce the [document] through a witness." The Prosecution argues that the Trial Chamber in the *Sesay* Decision rightly considered that "there is no requirement in international criminal law to produce documents through a witness," and therefore approached the issue of admissibility of the document solely on the basis of its relevance.[49]

20. As regards the *Fofana* Bail Appeals Decision, the Prosecution argues that the Defence misrepresents this decision by suggesting that "the Appeals Chamber noted that witnesses *would then have to be* made available for the purposes of further clarification and cross-examination in relation to the documents" because, in fact, the Appeals Chamber merely noted that "it was *open to the judge to invite* [a witness] to present the State's submission in person."[50] The Prosecution argues that when the Appeals Chamber held in the *Fofana* Bail Appeals Decision that the Trial

[44] *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Prosecution Reply to Defence Response to the Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, 16 January 2009 ("Reply"), para. 3.
[45] Reply, para. 3.
[46] Reply, para. 4.
[47] Reply, para. 7.
[48] Reply, para. 7.
[49] Reply, para. 8.
[50] Reply, para. 9.

Chamber the Trial Chamber correctly admitted a document under Rule 89(C) it "did not qualify this aspect of its [d]ecision by requiring that [a witness] *would have to be* made available for the purpose of cross-examination," rather the objections noted by the Appeals Chamber went to weight and therefore the Appeals Chamber commented that "it was *open to the defence to ask* [a witness] *to be called* and to cross-examine him or controvert his evidence [with their own witnesses] in order to undermine its weight."[51] According to the Prosecution, the Appeals Chamber made no precondition for admissibility of a document that the witnesses *would have to be* made available for that purpose.[52]

21. The Prosecution argues that the Defence's reference to previous Prosecution submissions requesting the admission of documents other than witness statements and transcripts under Rule 92*bis* is inapplicable because those submissions were made prior to the publication of the amendment to Rule 92*bis*.[53]

22. The Prosecution also submits that the "foundation" requested by the Defence counsel would not have assisted the Trial Chamber in determining the relevance of the document because the Defence had not objected on the basis of relevance.[54]

III. APPLICABLE LAW

23. In adjudicating on the issues raised in this Appeal it is first necessary to examine, and interpret, principally Rules 89 and 92*bis* of the Rules, and the interaction between them having regard to the Grounds of Appeal The respective Rules provide as follows:

> **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.
>
> **Rule 92*bis*: Alternative Proof of Facts**

[51] Reply, para. 10.
[52] Reply, para. 10.
[53] Response, para. 14.
[54] Reply, para. 15.

> (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 as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

IV. DELIBERATIONS

24. The issues raised in this Appeal involve two principal questions of law: First, whether the Trial Chamber has discretion under Rule 89(C), which provides for the admission of relevant evidence; and second, how does the Court determine that the proposed evidence is relevant? In resolving the issues, it will also be necessary to determine whether Rule 92*bis* of the Rules exclusively controls the admission of a document *in lieu* of oral testimony, or whether such document can, under Rule 89(C), also be admitted through a witness (who had never before seen it) during that witness' oral testimony. Furthermore, whether the party seeking to have such document admitted into evidence under Rule 89(C) of the Rules through a witness giving oral testimony must establish a "sufficient foundation" for admission.

A. Admission of a document *in lieu* of oral testimony

25. The Prosecution challenges the ruling in the Impugned Decision that:

> If a document is to be tendered without a witness, then the application should be made under [Rule] 92bis of the Rules.[55]

26. We opine that what the Trial Chamber meant by the phrase, "without a witness", is, in the very words of Rule 92*bis*(A), "*in lieu* of oral testimony". This ruling, in effect, excludes the admission, under Rule 89(C), of the document which is sought to be put in evidence, *in lieu* of oral testimony, by a witness who had never before seen the document. In such a situation and having regard to the provisions of Rules 89 and 92*bis*, the proper course is for the Prosecution to apply for the admission of the document under Rule 92*bis*. Of course, it will then be incumbent on the Prosecution to comply with the mandatory terms of Rule 92*bis*(C), to wit: "shall give 10 days notice to the opposing party".

[55] *Taylor* Trial Transcript, 21 August 2008, page 14253.

27. Rule 92*bis* deals with and applies to information to be admitted as evidence "*in lieu* of oral testimony."[56] Although this information is not restricted to material in the form of written statements or transcripts,[57] it must, nonetheless. be proffered as a substitute for the *viva voce* evidence of a witness. Determining the scope of the requirement that Rule 92*bis* evidence is "*in lieu* of oral testimony" involves a communal reading of Rules 92*bis*, 92*ter* and 92*quater* and reeognising one signal distinction between Rule 92*bis* on the one hand and Rules 92*ter* and 92*quater* on the other. The distinction is that while the latter Rules deal with an alternative manner of presentation of "the evidence of a witness" or "the evidence of a person", the former does not deal with such presentation, but deals with the admission of evidence *in lieu* of oral testimony. Both Rules 89(C)[58] and 92*bis*[59], no doubt, facilitate the administration of justice, thereby ensuring the accused's right to an expeditious trial. Rule 89(C) makes it possible for evidenee ro be admitted that would probably have been rendered inadmissible by application of strict rules of evidence. Thus, Rule 89(C) makes the distinction between primary and secondary evidence less eonsequential in regard to admissibility of evidence. It makes seeond hand evidence admissible in so far as it is relevant and makes the question of admissibility of seeondary evidenee less contentious.

28. The Appeals Chamber of the ICTY has eonsistently struck a balanee so that its comparable Rule 92*bis* only applies to documents "prepared for the purposes of legal proeeedings."[60] Other doeuments, made in the ordinary course of events by a person with no interest other than to record as accurately as possible the matters described therein, are not governed by the ICTY's Rule 92*bis*.

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[56] 92bisRule 92bis (A).

[57] *See Prosecutor v. Norman et al.*, 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* Judicial Notice Decision"), para. 26.

[58] *See Fofana* Bail Decision, para. 26.

[59] *See Fofana* Judicial Notice Decision, para. 26.

[60] *Prosecutor v. Galić*, IT-98-29-AR73.2, International Criminal Tribunal for the former Yugoslavia, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C) ("*Galić* Decision"), 7 June 2002, para. 28, which reads:

> Rules 92*bis*(A) and Rule 92*bis*(C) are directed to written statements prepared for the purposes of legal proceedings. This is clear not only from the fact that Rule 92*bis* was introduced as a result of the *Kordić and Čerkez* Decision but also from its description of the written statement as being admitted "*in lieu* of oral testimony" in Rule 92*bis*(A), as well as the nature of the factors identified in Rule 92*bis*(A) in favour and against "admitting evidence in the form of a written statement".

See also *Prosecutor v. Limaj et al.*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 14 (*citing Galić* Decision, para. 28):

> 92bisRule 92*bis* is designed to expedite the proceedings on matters that are not pivotal to the case, by avoiding the need to call and examine the witness and admitting his or her written statements as substantive evidence *in lieu* of his or her oral evidence.

See further *Prosecutor v. S. Milošević*, IT-02-54-AR73.4, International Criminal Tribunal for the former Yugoslavia, Decision on Admission of Prosecution Investigator's Evidence, 30 September 2002, para. 18 (*citing Galić* Decision, para. 28):

> 92bisRule 92*bis* as a whole is concerned with one very special type of hearsay evidence which would previously have been admissible under Rule 89(C), written statements given by prospective witnesses for the purposes of legal proceedings.

but may be admissible under its equivalent Rule 89(C).[61] This jurisprudence has been adopted by the Appeals Chamber of the ICTR.[62]

29. However, we recall that Rule 92*bis* of the Rules of the Special Court is in several respects deliberately different from the comparable Rule in the ICTY and the ICTR[63], even though, the two Rules are identical insofar as they are both limited to doeuments offered "*in lieu* of oral testimony".[64] It is true that the Appeals Chamber of the ICTY has interpreted its Rule 92*bis* as applying to documents "prepared for the purposes of legal proceedings."[65] Other documents, made in the ordinary course of events by a person with no interest other than to record as accurately as possible the matters described therein, are not governed by the ICTY's Rule 92*bis*, but may be admissible under its equivalent Rule 89(C).[66] However, as has been noted above, Rule 92*bis* of the Rules of the Special Court is in several respects deliberately different from the comparable Rule in the ICTY, in particular with the latter's limitation to evidence of a witness in the form of a written statement or a transcript of evidence *in lieu* of oral testimony.[67] The ICTY Rule 92*bis* is closer to the Special Court Rule 92*ter* than to its Rule 92*bis*. Accordingly, the aforementioned jurisprudence of the ICTY is not instruetive in the present instance where the issue is the scope of Rule 92*bis* of the Special Court Rules.[68]

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[61] *See Galić* Decision, para. 28; *Prosecutor v. S. Milošević*, IT-02-54-AR73.4, International Criminal Tribunal for the former Yugoslavia, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, 30 September 2003, paras 11 and 13; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgment"), paras 223 and 226; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 9 May 2007, fn. 860.

[62] *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, International Criminal Tribunal for Rwanda, Judgement, 28 November 2007, fn. 1230.

[63] *See Fofana* Judicial Notice Decision, para. 26.

[64] 92bisRule 92bis (A) of the ICTY Rules of Procedure and Evidence (IT/32/Rev. 42, 4 November 2008) reads:

> A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidenee, which was given by a witness in proceedings before the Tribunal, *in lieu* of oral testimony which goes to proof of a matter other than the acts and conduet of the accused as charged in the indictment.

[65] *Prosecutor v. Galić*, IT-98-29-AR73.2, International Criminal Tribunal for the former Yugoslavia, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C) ("*Galić* Decision"), 7 June 2002, para. 28; *Prosecutor v. Limaj et al.*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 14 (*citing Galić* Decision, para. 28); *Prosecutor v. S. Milošević*, IT-02-54-AR73.4, International Criminal Tribunal for the former Yugoslavia, Decision on Admission of Prosecution Investigator's Evidence, 30 September 2002, para. 18 (*citing Galić* Deeision, para. 28).

[66] *See Galić* Decision, para. 28; *Prosecutor v S. Milošević*, IT-02-54-AR73.4, International Criminal Tribunal for the former Yugoslavia, Deeision on Interlocutory Appeal on the Admissibility of Evidenee-In-Chief in the Form of Written Statements, 30 September 2003, paras 11 and 13; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgment"), paras 223 and 226; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, International Criminal Tribunal for the former Yugoslavia, Judgement, 9 May 2007, fn. 860.

[67] *See also Fofana* Judicial Notiee Deeision, para. 26.

[68] *See* Article 20(3) of the Statute.

30. By its express terms, Rule 92*bis* applies to information tendered "*in lieu* of oral testimony."[69] These words must be given their ordinary meaning. Doeumentary evidenee, by its very nature, is tendered *in lieu* of oral testimony. It is not apt to deseribe Rule 92*bis* as the *lex specialis* to the *lex generalis* of Rule 89(C) beeause both do not apply to exactly the same situation. Sueh deseription may be apt in regard to the ICTY Rules which do not have eomparative provision as in our Rule 92*bis*.

31. The question then arises, whether all forms of doeumentary evidence tendered without a witness fall within Rule 92*bis* or, rather, whether some such forms fall within Rule 89(C), as contended by the Proseeution. The answer to this question appears in Rule 92*bis* itself. As that Rule makes elear, through the use of the word "including",[70] the information to be admitted is not restricted to written statements or transcripts.[71] No express limitation on the form of the information appears in the text of the Rule itself; there is no reason to imply any limitation.

32. We also notc that in one or two eases the Special Court admitted documentary evidence not tendered directly through witness testimony Rule 89(C).[72]

33. The procedural scheme established by Rules 89(C) and 92*bis* does not allow a party to circumvent the stringency of the latter rule by simply tendering a document under the former.[73] Rule 92*bis* establishes specific protections for evidence submitted in the absenee of a witness. First, Rule 92*bis* only applies to the admissibility of a special type of information, namely, information that does not go to proof of the acts and conduct of the accused. Second. by virtue of Rule 92*bis* (C) a party willing to submit information as evidence *in lieu* of oral testimony shall give 10 days noticc to thc opposing party who shall be at liberty to submit an objection within 5 days. The interest of fair hearing is thus safeguarded by the special procedure enacted in Rule 92*bis* itself. Rule 89(C), on the other hand, does not enact any special procedure as does Rule 92*bis*, understandably, because undcr that Rule information can be admitted *as part,* (not *in lieu*) of oral

[69] 92bisRule 92bis (A).
[70] Rule 92*bis* refers to 'information *including* written statements and transcripts' (emphasis added).
[71] *See Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Fofana – Decision on Appeal Against "Decision on Proseeution's Motion for Judicial Notiec and Admission of Evidence", 16 May 2005 ("*Fofana* Judicial Notice Deeision"), para. 26.
[72] *Sesay* Deeision, pp. 3-4. The Appeals Chamber notes that, even though the document at issue in the *Sesay* Decisiou was deemed relevant to fully understand the context of the testimony of a witness (*Sesay* Decision. p. 4), it was nonetheless admitted in the absenee of a witness under Rule 89(C) over the objection that it should be introduced through a witness (*Sesay* Decision, pp. 2 and 4). Indeed, the Trial Chamber specifically considered that "there is no requirement in intemational criminal law to produce documents through a witness" (*Sesay* Deeision. p. 3). The *Fofana* Bail Deeision on the other hand, contrary to the arguments of the parties, did not concern the issue in the instant case, namely, whether a document can legally be admitted under Rule 89(C) in the absenee of a witness. As such, the Appeals Chamber does not consider it instructive for present purposes.
[73] As argued by the Defence. Response, paras 19 and 20.

testimony of a witness, provided it is relevant, as has been noted, 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 serious disrepute.

34. 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 92*bis* 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 92*bis* 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). This part of the Appeal is not granted.

B. Requirements for admission of documents under Rule 89(C) through a witness

35. Under this part of the Appeal, the Prosecution challenges the Trial Chamber's holding that:

> If the Prosecution wishes to tender a document under Rule 89(C) through a witness, they need to lay foundation [...].[74]

36. We note that a trial before a court such as the Special Court is, in many respects, distinct from a domestic criminal trial, not least because the Judges sit without a jury. The Rules are designed to reflect this particular compositional feature. As the Appeals Chamber has previously had occasion to observe:

> Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards.[75]

37. At the admissibility stage, the only test is that of relevance. This is particularly true in the Special Court, where the applicable Rule 89(C) provides without more that, "A Chamber may admit any relevant evidence."[76] In the *Fofana* Bail Decision, the Appeals Chamber put it thus:

> Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission.[77]

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[74] *Taylor* Trial Transcript, 21 August 2008, page 14253.
[75] *Fofana* Bail Decision, para. 26.
[76] Rule 89(C) of the Rules.
[77] *Fofana* Bail Decision, para. 24.

It is at a later stage – when the evidence is being considered by the Trial Chamber in order to reach its judgment – that it becomes incumbent upon the Trial Chamber to inquire as to matters such as the reliability and probity of the relevant evidence.[78]

38. This is not to say that the Trial Chamber is to remain passive in the assessment of the admission of a document. Insofar as the Trial Chamber is ascertaining the relevance of a particular document, it is within its discretion to make further inquiries of the party wishing to tender the document.[79] It will wish to satisfy itself as to the relevance of the document to the case before it, and – as part of the relevance test – the document's relation to the witness at hand, where applicable.

39. Turning to the present case, at all salient points, adopting the language of the Defence, the Trial Chamber spoke of the need for the Prosecution to lay a "foundation" if it wished to have the Document admitted under Rule 89(C).[80] In granting leave to appeal, the Trial Chamber similarly spoke of laying "sufficient foundation".[81] The Defence used the language of "foundation" to cover a range of issues from "the origins" of the document and its authenticity and authorship,[82] through to the relationship between the witness and the document.[83]

40. Undoubtedly, the Trial Chamber in exercising its unfettered discretion under Rule 89(C) ("*may* admit any relevant evidence") as to whether or not the proposed evidence is relevant, cannot properly do so in thin air. When determining the relevance of a document, the Trial Chamber must require the tendering party to lay a foundation of the witness's competence to give evidence in relation to that document.

41. In the instant case, another document had earlier been shown to the witness and had been tendered as Defence exhibit D-54.[84] The witness had personal knowledge of that document.[85] With regard to the Document at issue in this Appeal, the Trial Chamber held that the witness had no personal knowledge of it. He, therefore, had no connection or link with the Document, and

[78] *See*, along similar lines, *Prosecutor v. Brđanin and Talić*, IT-99-36-T, International Criminal Tribunal for the former Yugoslavia, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 13.
[79] *Cf. supra*, para. 28.
[80] *Taylor* Trial Transcript, 21 August 2008, page 14253.
[81] Decision on Leave to Appeal, p.3.
[82] *Taylor* Trial Transcript, 21 August 2008, page 14246.
[83] *Taylor* Trial Transcript, 21 August 2008, page 14252.
[84] *See Taylor* Trial Transcript, 21 August 2008, pages 14212-3.
[85] *Taylor* Trial Transcript, 21 August 2008, p. 14216.

consequently, no foundation had been laid. Without a connection to the document, the witness is only capable of offering opinion evidence.

42. It is imperative on the Prosecution to lay sufficient foundation to enable the Trial Chamber, in properly exercising its discretion, to come to a conclusion that, *prima facie*, the proposed evidence is relevant. However, at the stage in which the Impugned Decision was given the Trial Chamber was concerned with the question whether the proposed evidence could be introduced through the witness and not whether the evidence, if properly introduced through the witness, would be relevant or not. The Trial Chamber was, therefore, correct in law in ordering the Prosecution to lay sufficient foundation for that purpose. Otherwise, the Prosecution should proceed under Rule 92*bis* and observe the safeguards under (B) and (C) of that Rule.

C. Conclusion

43. For the reasons given, the Appeal must fail in its entirety and we so order.

V. DISPOSITION

BASED ON THE FOREGOING REASONS, WE

FIND that the Trial Chamber did not err in law by holding that if a document is to be tendered *in lieu* of oral testimony, the application should be made under Rule 92*bis* of the Rules;

FIND that the Trial Chamber did not err in law or in fact in ordering the Prosecution to lay sufficient foundation to enable it to decide whether the proposed evidence could be introduced through the witness.

DISMISS the Appeal in its entirety.

Done this 6th day of February 2009 at Freetown, Sierra Leone.

Justice Renate Winter,
Presiding

Justice Jon M. Kamanda

Justice George Gelaga King

Justice Emmanuel Ayoola

[Seal of the Special Court for Sierra Leone]