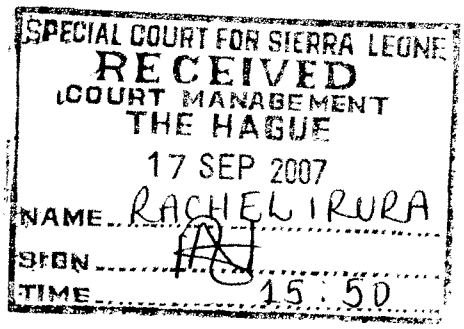
342) SCSL-03-01-T 12493
(12493 - 12501)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 17 September 2007



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO "DEFENCE RESPONSE TO 'PROSECUTION'S MOTION FOR JUDICIAL NOTICE'"

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nick Koumjian
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Defence Counsel for Charles Taylor:
Mr. Courtenay Griffiths Q.C.
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I. INTRODUCTION

1. Pursuant to Rule 7 of the Rules of Procedure and Evidence ("Rules"), the Prosecution files its reply to the "Defence Response to 'Prosecution's Motion for Judicial Notice'"[1].

2. In the "Prosecution's Motion for Judicial Notice"[2], the Prosecution requested that the Trial Chamber take judicial notice of 107 facts pursuant to Rule 94(A). In the Response, the Defence:

   (a) accepts that judicial notice should be taken of the following 12 proposed Facts: 1, 2, 3, 8, 19, 25, 27, 29, 30, 33, 101 and 102[3];

   (b) accepts that judicial notice should be taken of part of 6 proposed Facts, the relevant parts being: 93(d), 94(c), 98(a), 99(a), 99(c), 100(a), 107(d) and 107(f)[4];

   (c) accepts that judicial notice should be taken of the following 18 proposed Facts subject to the Defence's amendments: 4, 5, 13, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, 35, 36, 38, 39, and 49[5]; and

   (d) requests that the Trial Chamber refuse to take judicial notice of the remaining proposed Facts.[6]

3. The Defence argue that those proposed Facts (or parts thereof) not accepted in accordance with paragraph 2(a)-(c) above should be rejected on the basis that: (i) the Defence disagree with the Prosecution that they satisfy the criteria for facts of common knowledge or are beyond dispute;[7] or (ii) they "attest to the criminal responsibility of the accused"[8]. As to the first argument (i), the criteria for common knowledge, the Prosecution relies on the arguments set forth in its Motion. This reply will only address the arguments raised by the Defence in argument (ii).

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-338, Defence Response to "Prosecution's Motion for Judicial Notice", 10 September 2007 ("Response").
[2] *Prosecutor v. Taylor*, SCSL-03-01-PT-236, Prosecution's Motion for Judicial Notice, 14 May 2007 ("Motion").
[3] Response, para. 17 and Annex A.
[4] Response, para. 17 and Annex A.
[5] Response, para. 17 and Annex A.
[6] Response, para. 17 and Annex A.
[7] Response, paras. 12 and 15.
[8] Response, para. 14.

4. The Defence also argue that the Trial Chamber should reject the Prosecution's request that, in the alternative, the Trial Chamber admit into evidence the corresponding documentary extracts pursuant to Rules 89(C) and 92*bis*. The Defence base this argument on the erroneous assertion that the Prosecution has failed to indicate the relevant passages or parts of each document which it seeks to have admitted into evidence.[9] The Prosecution will not address this issue in the reply other than as set forth in footnote 9.

II. DEFENCE PROPOSALS

5. In reply to the Defence's proposals summarized in paragraph 2 above, the Prosecution:

(a) requests that the Trial Chamber take judicial notice of the facts listed in paragraph 2(a) above as the Defence do not oppose these facts as submitted in the Motion;

(b) does not accept the Defence position that judicial notice be taken of only part of the 6 proposed facts listed in paragraph 2(b) above, and requests that the Trial Chamber take judicial notice of facts 93, 94, 98, 99, 100 and 107 in their entirety; and

(c) accepts the amendments made in the Response to the facts listed in paragraph 2(c) above save in respect of Fact 5 and 13 and, therefore, requests that the Trial Chamber take judicial notice of Facts 4, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, 35, 36, 38, 39, and 49 as amended in the Response. However, the Prosecution reserves the right to offer evidence to prove the language omitted in these amended Facts.

The Prosecution requests that the Trial Chamber take judicial notice of the remaining contested Facts as submitted in the Motion.

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[9] Response, para. 16. See Annex A of the Motion, sources for each fact. For the convenience of the Trial Chamber and the Defence, the Prosecution has provided each document in its entirety. However, for each proposed Fact for which only a portion of a source document is relevant, the Prosecution has specified the relevant part(s) of each document. Where no such reference is made to a particular part of the document, the Prosecution relies on the entire document. It should also be understood that the Prosecution is requesting that the relevant extracts be admitted only if the Trial Chamber does not take judicial notice of the proposed Fact.

III. FACTS THAT "ATTEST TO CRIMINAL RESPONSIBILITY"

6. Both parties have acknowledged that facts judicially noticed under Rule 94(A) must not "attest to the criminal responsibility of the accused."[10] However, the interpretation given to this limitation in the Response is too broad.

7. As noted by the ICTR in the *Karemera* Appeals Decision, all facts in a criminal trial must be relevant to the issue of an accused's criminal responsibility in order to be admissible.[11] Therefore, the phrase "attests to the criminal responsibility of the accused" should be given a narrow interpretation such that only a fact which is *sufficient* of itself[12] or central[13] to establishing the criminal responsibility of the accused should not be judicially noticed. Whereas, all other facts that are relevant to the determination of criminal responsibility should not be subject to the exclusion. For example, facts which would be appropriate for judicial notice would be facts not sufficient of themselves or central to establishing the Accused's liability but which are: (a) related to the existence of a joint criminal enterprise and the conduct of its members other than the accused; and (b) facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability.

8. The Prosecution acknowledges that judicial notice must not adversely affect the right of the Accused to a fair trial and that it "must bring forth the necessary quantum of proof to sustain the allegations contained in the Indictment"[14]. However, in relation to the burden of proof, the Appeals Chamber in *Karemera* held that the Trial Chamber's refusal to take judicial notice of a widespread or systematic attack on a civilian population was an error:

> "...it is not relevant that these facts constitute elements of some of the crimes charged and that such elements must ordinarily be proven by the Prosecution... Of course, the Rule 94(A) mechanism sometimes will alleviate the Prosecution's burden to introduce evidence proving certain aspects of its case. As the Appeals Chamber explained in *Semanza*, however, it does not change the burden of proof, but simply provides another way for that burden to be met."[15]

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[10] Motion, para. 10 and Response, para 14.
[11] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, App. Ch., 16 June 2006 ("*Karemera* Appeals Decision"), para. 45.
[12] *Karemera* Appeals Decision, para. 47.
[13] *Karemera* Appeals Decision, para. 50.
[14] Response, para. 17.
[15] *Ibid*, para. 30.

IV. ADMISSION OF DOCUMENTS

9. If the Trial Chamber determines that any of the proposed Facts are not appropriate for judicial notice, the Prosecution has requested that the identified documents or extracts of the relevant document(s) be admitted into evidence under Rules 89(C) and 92*bis*. These extracts, i.e., the pertinent parts of the documents, are identified in Annex B of the Motion.

10. In the Response, the Defence request that the Trial Chamber rely on Rule 92*bis* as amended on 14 May 2007 when considering whether to admit any of the relevant extracts of the documents set out in Annex B of the Motion.[16] The Defence also state that "there are limitations to the information which can be admitted under Rule 92*bis* in order to ensure that the Accused's rights to a fair trial are respected."[17] From the arguments made in Annex A of the Response, such a limitation is evidence which relates to the acts and conduct of the accused.[18]

11. Rule 92*bis*(A) as amended states:

> (A) In addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony, admit in 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." (emphasis added)

It is clear from the conjugation of the verb "to do" that the limitation on proof of acts and conduct of the accused applies only to statements and transcripts and not to the other forms of information that are admissible. If the authors had intended to cover all information the verb would have been conjugated in the singular so that the phrase would have read "**does** not go to proof of the acts and conduct of the accused."

12. The extracts submitted in Annex B of the Motion are admissible under Rule 92*bis* for the following reasons. First, the clear intention of the amendment to Rule 92*bis* made on 14 May 2007 was to permit *in lieu of oral testimony* the admission of the *statements* and *transcripts* of witnesses which do not go to the acts and conduct of the accused. The amendment did not alter the fact that documents *other* than

[16] Response, para. 8.
[17] Response, para. 17.
[18] See for example, Response, Annex A, fact 18.

witness statements and transcripts[19] containing information that is relevant to the acts and conduct of the accused are admissible. The historical development of the equivalent rule at the *ad hoc* tribunals supports this view as the rule was developed to permit the admission of the written statements or transcripts of a previous testimony of a witness. If Rule 92*bis* were to be interpreted so as to exclude all documents rather than just statements and transcripts that are offered in lieu of a witness testifying, the effect would be to exclude such probative documents as minutes of meetings an accused attended where crimes were planned or even written orders to commit crimes. Clearly, that was not the intent of the amendment to Rule 92*bis*.

13. Moreover, even for those statements and transcripts for which the limitation on proof of the "acts and conduct of the accused" applies, the limitation is much narrower than the expansive reading given by the Defence. The limitation extends only to evidence *sufficient* of itself or central to establishing the criminal responsibility of the Accused.[20] In addition, the jurisprudence of the ICTY has found that there is a

> "clear distinction [to be] drawn ... between (a) the 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. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92*bis* (A) excludes from the procedure laid down in that Rule."[21]

As noted in the *Galić* Decision referred to *Karemera*, any other interpretation of this rule "would effectively denude it of any real utility."[22]

14. The jurisprudence also makes it clear that the term acts and conduct of the accused does not limit the admissibility of acts and conduct of persons other than the accused, including co-perpetrators, co-participants in a joint criminal enterprise, and subordinates.

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[19] In respect of many documents (i.e. UN reports) there is in reality no live witness alternative through which the evidence may be brought before the Court unless the party is expected to call members of the Security Council etc..
[20] See para. 7 above.
[21] *Karemera* Appeals Decision, *para. 52, citing Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 8-9 ("*Galić* Decision").
[22] *Ibid.*

15. Nor does the term limit the admissibility of documentary evidence which "relate[s] to the existence and activity of a joint criminal enterprise."[23] The *Karemera* Appeals Decision considered what type of facts might fall within the definition "acts and conduct of the accused". The Chamber stated that there is a distinction to be made between "facts related to the existence of a joint criminal enterprise and the conduct of its members other than the accused—and, more generally, facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability" and facts related to the acts and conduct of the accused.[24] While this discussion was held in the context of a consideration of Rule 94(B) (judicial notice of adjudicated facts), the Appeals Chamber refers to the *Galić* Decision concerning admissibility under Rule 92*bis*.[25]

16. Accordingly, on the basis of the above, Rule 92*bis*(A) exclusion applies only to witness statements and transcripts. Assuming, *arguendo*, the exclusion applies to the documents which are the subject of the Motion, only acts and conduct of the Accused which are sufficient of themselves or central to establishing the Accused's liability would be excluded. Acts and conduct of others are not excluded by Rule 92*bis*(A).

V. CONCLUSION

17. Noting that these are not contested by the Defence, the Prosecution requests that the Trial Chamber take judicial notice of the following Facts identified in the Motion as: 1, 2, 3, 8, 19, 25, 27, 29, 30, 33, 101 and 102.

18. The Prosecution requests that the Trial Chamber take judicial notice of the following Facts as amended in the Response: 4, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, 35, 36, 38, 39, and 49.

19. For the reasons stated above and in the Motion, the Prosecution requests that the Trial Chamber take judicial notice of the remaining contested Facts as proposed in the Motion.

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[23] *Karemera* Appeals Decision, para. 53
[24] *Karemera* Appeals Decision, para. 52.
[25] *Ibid.*

20. In the alternative, if the Trial Chamber declines to take judicial notice of some or all of the proposed Facts, the Prosecution requests that the Trial Chamber admit into evidence, pursuant to Rules 89(C) and 92*bis*, the corresponding extracts set out in Annex B of the Motion.

Filed in The Hague,
17 September 2007
For the Prosecution,

Brenda J. Hollis
Senior Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

***Prosecutor v. Brima et al.*, SCSL-04-16**

1. *Prosecutor v. Brima et al.*, SCSL-04-16-PT, Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence, 25 October 2005.

***Prosecutor v. Taylor*, SCSL-03-01**

2. *Prosecutor v. Taylor*, SCSL-03-01-PT-236, Prosecution's Motion for Judicial Notice, 14 May 2007.

3. *Prosecutor v. Taylor*, SCSL-03-01-T-338, Defence Response to "Prosecution's Motion for Judicial Notice", 10 September 2007.

ICTR Cases

4. *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, App. Ch., 16 June 2006.

   http://69.94.11.53/ENGLISH/cases/Karemera/decisions/160606.htm#_ftn89