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SCSL-03-01-T
(19884 - 19901)

19884

THE SPECIAL COURT FOR SIERRA LEONE

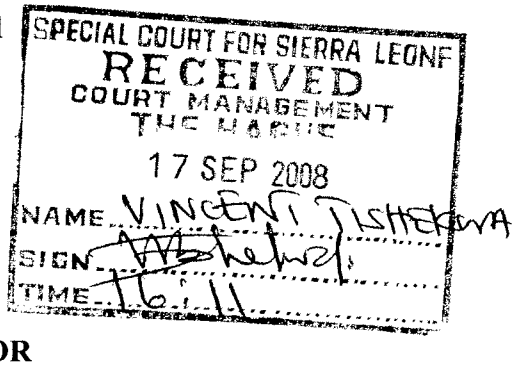
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 17 September 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX A

DEFENCE OBJECTION TO "PROSECUTION NOTICE UNDER RULE 92*bis* FOR THE ADMISSION OF EVIDENCE RELATED TO *INTER ALIA* KONO DISTRICT – TF1-195, TF1-197, TF1-198 & TF1-206 AND OTHER ANCILLARY RELIEF

Office of the Prosecutor
Ms. Brenda J. Hollis
Ms. Leigh Lawrie

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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* Kono District. The Defence submits that the Notice is defective in several respects and is therefore objectionable.

2. On 11 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 TF1-195, TF1-197, TF1-198 and TF1-206 in other proceedings before the Special Court for Sierra Leone, including additional statements of TF1-198 and TF1-206 (the "Witnesses").

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 the Kono District 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 Prosecution's case, it is proximate enough to the accused as to require cross-examination, which a Chamber may, in its discretion, order.[5] In the present case, the witnesses would not be available for cross-examination.

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-585, "Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Freetown & Western Area – TF1-023 & TF1-029", 28 August 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.
[5] See Notice, para. 22, and cases cited therein.

5. The Defence files this Objection to the admission of the prior testimony and related exhibits of witnesses TF1-195, TF1-197, TF1-198 and TF1-206, and the additional statements of TF1-198 and TF1-206, under Rule 92*bis*, on the grounds that:
   a) Some of the evidence is not relevant as it falls outside the Indictment period;
   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 and related exhibits of the witnesses must be denied.
   b) Alternatively, if the Trial Chamber does not deny the admission of the prior transcripts and related exhibits under Rule 92*bis* completely, then only those portions of the witnesses' prior testimony and related exhibits 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 and related exhibits 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.

7. Further, subject to the present proceedings, whether the witnesses' respective evidence is tendered under Rule 92*bis* (A) with cross-examination or Rule 92*ter* with cross-examination, the Defence hereby makes a timely application[6] to rescind

[6] The Defence recognizes that typically an application to modify or rescind protective measures will be done in a separate Motion. However, for purposes of efficiency and so that all trial-related issues related to this witness can be resolved comprehensively, the Defence includes this application in its Objection. The Prosecution is not disadvantaged in this regard – whether in it's Reply to this Objection, or in a Response to a separate Defence motion, the Prosecution would only have one opportunity to comment on the application. If the Prosecution deems it necessary, the Defence would not oppose an oral request for a full ten days to file its Reply and/or a reasonable extension of the filing page limit in order to fully consider this application.

the protective measures granted in the RUF case on the grounds that the underlying basis upon which the measures were granted no longer obtains. There has been a substantial change of circumstances. The Defence observes that under Rule 75(F), these measures continue to apply to the current proceedings, *mutatis mutandis*, until they are rescinded by this Chamber, in consultation with Trial Chamber I.[7]

II. Legal Basis and Submissions

Page Limit for the present filing

8. In terms of Article 6(C) of the Practice Direction of Dealing with Documents in The Hague – Sub-Office, adopted on 16 January 2008, "[p]reliminary motions, motions, responses to such motions and replies to such shall not exceed 10 pages or 3000 words, whichever is greater."

9. In this case, as the Defence combines otherwise two separate filings – its Objection to the Prosecution's Rule 92bis Notice and an Application for the Rescission of Protective Measures – this rule should not strictly apply. If at, the page limit should double. Alternatively, should it be held to the page limit in Article 6(C), the Defence seeks the court's indulgence should the filing exceed the prescribed page limit.

Prosecution's right of Reply

10. 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.

Application Should Have Been Made Under Rule 92*ter*

11. As the Prosecution's Notice includes information directly related to proof of the acts and conduct of the accused,[8] it should have been brought under Rule 92*ter*,

[7] Rule 75(H) of the Rules of the Court.
[8] See Annex A.

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.

12. 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.

Objection Under Rule 92*bis*

13. Rule 92*bis*(A) states that, "[i]n 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". In terms of Rule 92*bis* (B), the information submitted must be reliable and susceptible of confirmation.

14. 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.[9] In *Prosecutor v. Galic,* the ICTY Appeals Chamber sets

[9] *Prosecutor v. Milosevic,* ICTY-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002, para. 22.

out various examples of what should be considered acts and conduct of the accused. These include:[10]

- 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).

15. Annex A hereto 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 92*bis*.

16. 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.

17. This Court has also decided that another consideration under Rule 92*bis* is whether the admission of certain information would unfairly prejudice the opposing party,

[10] *Prosecutor v. Galic*, ICTY-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, paras. 10 and 11 ("Galic 92*bis* Appeals Decision").
[11] *Prosecutor v. Martic*, 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.

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]

18. Trial Chamber 1 has also determined that acts of co-perpetrators or subordinates of the accused[13] is relevant in determining if cross-examination should be allowed, but not in determining if a document should be admitted under Rule 92*bis*.[14] Thus, 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]

19. More specifically, the Special Court has held that where a witness statement contains information "material to the command responsibility and joint criminal

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

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

[16] Galic 92*bis* Appeals Decision, para. 13; *Prosecutor v. Martic*, 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

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]

20. The Defence submits that through the admission of the prior testimony and related exhibits of witnesses TF1-195, TF1-197, TF1-198 and TF1-206, and the additional statements of TF1-198 and TF1-206, without the opportunity for cross-examination, the Prosecution is improperly attempting to introduce into evidence of the acts and 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. Taylor[20] cannot be equated with the acts and conduct of Mr. Taylor himself, and therefore may be admissible. The Defence however the defence 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.

The Evidence is Not Entirely Relevant

21. It is trite law that all information tendered into evidence must be relevant.[22] In the Notice the Prosecution highlights the evidence of TF1-195, TF1-197, TF1-198 and

[18] Sesay 92*bis* Decision, pgs. 1, 3.
[19] Galic 92*bis* Appeals Decision, para. 15; *Prosecutor v. Martic*, 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.
[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, Zig Zag Marzah, and Savage.
[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] Rule 89(C) of the Rules.

TF1-206 relevant to the charges in the Prosecution's Second Amended Indictment.[23] These include charges for crimes allegedly committed in Kono District, during limited time frames: Terrorizing civilian population between about 01 February 1998 and about 31 December 1998;[24] Unlawful Killings between about 01 February 1998 and about 31 January 2000;[25] Sexual Violence between about 01 February 1998 and about 31 December 1998;[26] Physical Violence between about 01 February 1998 and about 31 December 1998;[27] Abduction and Forced Labour between about 01 February 1998 and about 18 January 2002; and Looting between about 01 February 1998 and about 31 December 1998.[28] Therefore any evidence that falls outside these respective temporal jurisdictions must be excluded under Rule 92*bis*,[29] except where such evidence is shown to be relevant under Rule 93(A), and only to that limited extent.

The Evidence is Not Susceptible of Corroboration

22. The Defence submits that all portions of the Witnesses' respective transcripts which refer to hearsay evidence from people who are no longer alive and thus cannot be corroborated or confirmed should also not be admitted.

Cross Examination

23. 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.[30] 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

[23] Notice, para.16.
[24] Second Amended Indictment, para.7.
[25] Second Amended Indictment, para.11.
[26] Second Amended Indictment, para.15.
[27] Second Amended Indictment, para.19.
[28] Second Amended Indictment, para.29.
[29] See specific examples in Annex A.
[30] Notice para. 26.

economy were allowed to take precedence over his fair trial rights.[31] The Prosecution's submission should therefore fail on the same basis.

24. 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, which the Defence would not seek to challenge.[32] Further, that the evidence has already been tested in cross-examination by defence counsel in *other* proceedings anyway [emphasize added].[33] 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.[34] 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 92*bis* cannot be considered to be so critical to an important issues between the parties in the present proceedings.[35] 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.

25. 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 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 additional statements

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[31] *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.
[32] Notice, para. 25.
[33] Notice, para. 26.
[34] The Defence submits that the statements by its Lead 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.
[35] *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 92*bis*, 15 May 2008, para. 42.

of TF1-198 and TF1-206 has not been challenged at all. The Prosecution's argument therefore simply cannot stand.

Request for Previously Granted Protective Measures To Be Rescinded

26. Witnesses TF1-195, TF1-197, TF1-198 and TF1-206 were granted protective measures in RUF proceedings on the 5th of July 2004.[36] The comprehensive measures in place include the use of a screen and voice distortions for witnesses TF1-195 and TF1-198. In the present application, the Defence requests that those specific measures be rescinded.

27. The Defence submits that there has been a substantial change in circumstances which justifies reconsidering the protective measures. These witnesses no longer need such protection as the context in which they would, subject to the decision of the court on the Prosecution's Notice, testify in this case is no longer the same as when they testified in the previously proceedings.

28. In this instance, the Defence notes that the decision granting protective measures issued fours years ago was based on the "paramount and compelling factor" of the "location of the Special Court in the very country where the crimes were allegedly committed combined with the fragility of the security situation that still exist[ed].[37] The same rationale no longer applies to the present trial four years down the line.

29. As the protective measures were primarily motivated by a consideration of the security situation that was prevailing in Sierra Leone at that time, the measures should be rescinded as those security considerations no longer apply to the present proceedings in that: a) there has been a dramatic improvement in security in Sierra Leone since the decision was made. Since the decision in 2004, security, public order and the rule of law has been restored in the country with international

[36] *Prosecutor v Sesay et al.*, SCSL-05-15-T-180, "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses", 5 July 2004.
[37] Op.Cit., *Prosecutor v Sesay et al.*, SCSL-04-15-180, para.27

assistance. Even the Special Court is part of that legacy. The Security of the Witnesses generally and individually is therefore now more guaranteed than before; b) most importantly, if the primary consideration in granting the protective measures in the previous proceedings was the location of the court in the theater of the alleged crimes, the decision should then cease to apply to the Taylor trial which was specifically relocated away from that fragile environment to The Hague.

30. The Defence therefore submits that, on a balance of probabilities, the protective measures must be rescinded with respect to each of the witnesses, given the relocation of the Taylor trial to The Hague and/or the improved security situation in Sierra Leone.

31. The Defence recognises the need to balance the rights of the Accused and the protection of witnesses and submits that in this instance, the rights of the Accused should prevail. The Defence reiterates the Accused's right to a fair and public hearing and submits that the prevailing protective measures for the witnesses and in particular the use of a screen and of voice distortion, would effectively translate to "in camera" justice for the Accused. [38] In those circumstances, given the changes in the security circumstances of the Witnesses as argued above, the protective measures should be rescinded.

III. Conclusion

32. The Defence requests the Trial Chamber to:

(A) Dismiss the Prosecution Notice entirely as it should have been filed under Rule 92*bis;* or

(B) Admit into evidence only those portions of the witnesses' prior testimony and related exhibits that are not objected to in Annex A.

[38] See *Prosecutor v Tadic*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 , para. 32 – 35.

(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:

i) Order the Prosecution to make witnesses TF1-195, TF1-197, TF1-198 and TF1-206 available for cross-examination; and

ii) Vary or rescind the protective measures previously granted to those witnesses in the RUF Trial.

Respectfully Submitted,

Courtenay Griffiths Q.C.

Lead Counsel for Charles G. Taylor

Dated this 17th Day of September 2008

The Hague, The Netherlands.

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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

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☐ Correspondence

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Name of Officer:

Vincent Tishekwa

Signed: