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SCSL-03-01-T
(21152 - 21161)

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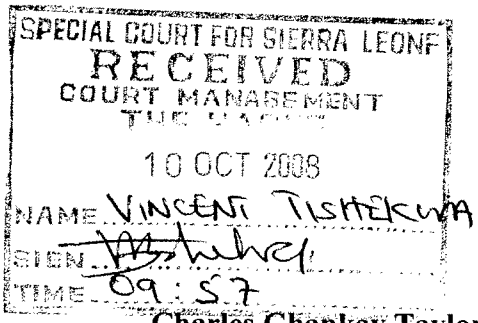
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 10 October 2008



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

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO "PUBLIC WITH CONFIDENTIAL ANNEX A DEFENCE OBJECTION TO 'PROSECUTION NOTICE UNDER RULE 92*BIS* 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 the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Reply to the "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081, and TF1-084".[1]
2. Contrary to the Defence assertions[2] and as noted by the Prosecution previously, Rule 92*bis* of the Rules of Procedure and Evidence ("**Rules**") does not preclude the Prosecution from filing a reply to any objections filed by the Defence under Rule 92*bis*(C).
3. In relation to the issues raised in the Objections, the Prosecution replies as set out below.

II. REPLY

Rule 92ter

4. The Defence continues to ignore the clear purpose of Rule 92*ter* and this Chamber's recent ruling on this point.[3] Indeed, this Chamber has held that notices such as that filed on 30 September 2008[4] are properly made under Rule 92*bis*[5] and has also failed to find the Defence claims regarding Rule 92*ter* as valid in relation to the admission of the prior evidence of TF1-072, TF1-074, TF1-076 and TF1-077.[6] Therefore, the Prosecution refers to the practice of this Chamber in support of the fact that Rule 92*bis* is the applicable Rule.

Admissibility under Rule 92bis

5. Objections to portions of the prior testimony sought to be introduced into evidence are without merit.[7] Contrary to the jurisprudence and its own apparent acceptance of that jurisprudence,[8] the Defence assertions continue to characterize evidence of the acts of

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[1] *Prosecutor v. Taylor*, SCSL-01-03-T-619, "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081, and TF1-084," 6 October 2008 ("**Objections**").
[2] Objections, para. 7.
[3] Objections, paras. 8 & 9.
[4] *Prosecutor v. Taylor*, SCSL-01-03-T-611, "Public with Confidential Annexes B to G Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081, and TF1-084," 30 September 2008 ("**Notice**").
[5] *Prosecutor v. Taylor*, SCSL-01-03-T-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 ("***Taylor* Rule 92*bis* Decision**"), p. 5.
[6] See *Prosecutor v. Taylor*, SCSL-01-03-T-623, "Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kono District", 8 October 2008 ("**Kono Rule 92*bis* Decision**"), which ordered that the prior trial transcripts and related exhibits of TF1-072, TF1-074, TF1-076 and TF1-077 be admitted under Rule 92*bis* and made no reference to Rule 92*ter*.
[7] Objections, para. 5.
[8] Objections, paras. 10 & 11.

others, in particular subordinates, as evidence of the acts and conduct of the Accused.[9] The Objections simply repeat the same arguments[10] previously rejected by this Court.[11]

"Linkage" information / information which goes to proof of the acts and conduct of the Accused

6. As stated in the Notice, the testimonies of TF1-024, TF1-081, and TF1-084 (**"Witnesses"**) do not contain evidence which goes to proof of the acts and conduct of the Accused. The link between the "Acts and Conduct of the Accused" "tick box" in the Defence Annex and the corresponding testimony does not withstand scrutiny nor is it supported by the recent findings of this Chamber in its two recent Rule 92*bis* decisions, which decisions the Defence appear to ignore.[12] In view of these recent findings of the Chamber, the Prosecution simply confirms that none of the 8 portions identified as being "Acts and Conduct of the Accused" are actually evidence of the acts and conduct of the Accused as defined by the jurisprudence and refers to its previous submissions on this point which the Chamber has accepted.[13]

7. The Defence erroneously argues that the Witnesses' testimonies contain evidence which is sufficiently proximate to the Accused to warrant cross-examination and that the evidence should be excluded if such cross-examination is not ordered.[14] First, the evidence at issue of TF1-081 and TF1-084 is not sufficiently proximate to the Accused. Neither of these witnesses refer to the acts of high ranking rebel commanders taking direct orders from the Accused. Instead, all the Defence "Acts and Conduct of Accused" objections relating to

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[9] At para. 15, the Objections acknowledge that "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. The first is admissible under Rule 92*bis*, the latter is not."

[10] See *Prosecutor v. Taylor*, SCSL-03-01-T-449, "Public with Confidential Annex A Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 31 March 2008, paras. 9 to 17; *Prosecutor v. Taylor*, SCSL-01-03-T-456, "Public with Confidential Annex Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Kenema District", 4 April 2008, paras. 11 to 19; and *Prosecutor v. Taylor*, SCSL-01-03-T-579, "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 – TF1-218 & TF1-304'", 9 September 2008, paras. 10 to 24.

[11] The submissions made by the Defence in the above listed objections that certain evidence should not be admitted under Rule 92*bis* were not accepted in the *Taylor* Rule 92*bis* Decision or the recent Kono Rule 92*bis* Decision.

[12] See Taylor Rule 92*bis* Decision, p. 5 and the Kono Rule 92*bis* Decision, p. 3.

[13] See the Prosecution's submissions regarding this same point in the following filings: (i) *Prosecutor v. Taylor*, SCSL-01-03-T-588, "Public Prosecution Reply to Defence Objection to Prosecution Notice under Rule 92bis for the Admission of Evidence Related to inter alia Kono District – TF1-218 & TF1-304", 12 September 2008, para. 6; and (ii) *Prosecutor v. Taylor*, SCSL-01-03-T-601, "Public Prosecution Reply to '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' and Other Ancillary Relief", 22 September 2008, para. 6.

[14] Objections, paras. 14-17.

TF1-081 and TF1-084 simply dispute crime base evidence.[15] The Prosecution acknowledges that all legal elements relating to the crime base are critical to the Prosecution's case in the sense that, absent stipulation or judicial notice, the Prosecution must prove all these elements beyond a reasonable doubt. The critical nature of evidence alone, however, cannot be the measure of admissibility under Rule 92*bis*. A bar to critical evidence will prove a bar to all evidence thus negating the rule's very purpose or effectiveness. Given the ordinary, non-legal meaning of the term, the Prosecution highlights that the evidence of TF1-081 and TF1-084 being offered pursuant to Rule 92*bis* is not, of itself, evidence which is critical to proof of the Accused's guilt.

8. Secondly, in so far as any of the testimonies might be considered to contain evidence proximate to the Accused, cross-examination or exclusion are not the only options. Rule 92*bis* does not expressly allow cross-examination and it has been described as a "back-up arrangement".[16] Instead, a more detailed consideration and assessment of the evidence is required - such as whether it has been sufficiently tested[17] and whether the opposing party has made a showing of good cause as to why further cross-examination is required in the interests of justice.[18]

Relevant evidence

9. The Defence suggest in Annex A of the Objections that AFRC Prosecution Exhibit No. 25 and AFRC Defence Exhibit No. 3 are not relevant. However, both exhibits are *per se* relevant as they were tendered and referred to during the testimonies of TF1-081 and TF1-084.[19] Indeed, AFRC Prosecution Exhibit No. 25 was prepared by TF1-081 and is discussed in detail both before and after tender.[20] Also, there is no rationale advanced that

[15] The portions of evidence identified in the Annex to the Objections as "Acts and Conduct of Accused" concern the killing of civilians, the burning of State House, AFRC/RUF military operations, the abduction of hospital patients, looting and housing burning in Kissy.

[16] As described by Judge Shahabuddeen at para. 6 of his Separate Opinion Appended to the Appeals Chamber Decision in *Prosecutor v. Milosović*, IT-02-54-AR73.5, "Admissibility of Evidence-In-Chief in the Form of Written Statements", 31 October 2003.

[17] For example, by the cross-examination of witnesses giving similar evidence in these proceedings or by the cross-examination of the witnesses at issue in other proceedings.

[18] See *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. 40 on this issue.

[19] It is apparent from reading the testimony of TF1-081 that AFRC Prosecution Exhibit No. 25 is first referred to at page 11 of the AFRC Trial Transcript dated 4 July 2005 and then admitted into evidence on page 19. During the testimony of TF1-084, AFRC Defence Exhibit No. 3 is first mentioned at page 47 of the AFRC Trial Transcript dated 6 April 2005 and is admitted into evidence on page 49.

[20] AFRC Trial Transcript, 4 July 2005, p. 6-21.

any single portion of the five page exhibit is more or less relevant nor is there any requirement that the Prosecution so indicate: the relevance of the exhibit as a whole being explained within TF1-081's testimony.

10. As for the second relevance objection contained in the Annex, it was Defence Counsel who tendered AFRC Defence Exhibit No. 3. As the exhibit might be viewed as evidence undermining the credibility of the witness, the Prosecution included it less there be a claim that it was trying to remove exculpatory material. Therefore, if the Trial Chamber finds AFRC Defence Exhibit No. 3 irrelevant, then the Prosecution has no objection to its being redacted or disregarded.

Opinion or conclusion evidence

11. In paragraph 5(b) of the Objections, the Defence states without argument that some of the evidence can be considered the Witnesses' own opinions or conclusions. To the extent this is correct, not all opinion or conclusory evidence given by a fact witness is inadmissible. In the Annex, the Defence identifies only one portion of evidence as being "Opinion or Conclusion" evidence[21]: the supplemental statement of TF1-084 that a commander named Akim had child soldiers.[22] TF1-084 observed Akim's soldiers first-hand and even interacted with them.[23] From his observations and interactions with the soldiers, TF1-084 reasonably formed the opinion or conclusion that these soldiers were under the age of 15 years. Where, as in TF1-084's case, the opinion is rationally based on a witness' perception, (i.e. the witness perceived with his senses the matters on which his opinion is based and there is a rational connection between the opinion and his perceptions), such evidence is admissible. This evidence is based on first hand knowledge and is an opinion or conclusion which a normal person would form from observed facts; it is not such that can only be based on scientific, technical or other specialized knowledge.

12. There is, therefore, no legal basis on which the portion of evidence identified as being opinion evidence which should be excluded from admission under Rule 92*bis*.

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[21] Annex to Objections, page 2 – Supplemental Statements Re TF1-084 Dated 23 May 2008 Pg 20643-4, para 7 and Pg 20645, para 9.
[22] Supplemental Witness Statement, TF1-084, 23 May 2008, paras. 7 & 9.
[23] Supplemental Witness Statement, TF1-084, 14 February 2005, pg. 2-3.

Request to cross-examine

13. The Objections regarding cross-examination are erroneous.[24]

14. First, as noted at paragraph 8 above, cross-examination has been described as a "back-up arrangement". Second, the Defence argument that "[t]he right of cross examination is the Defence's absolute prerogative in each case"[25] overstates the right invoked. When granted, the right to cross-examine is not without limits. The jurisprudence establishing conditions which would allow for cross-examination under Rule 92*bis* are proof of those limits, contrary to what the Defence appears to argue at paragraph 19. Nor does the Defence have the right to cross-examine on irrelevant matters, nor to conduct an unduly cumulative examination of a witness. The ICTY imposes limits on the time allowed and the subject matter of cross-examination where witnesses are being called for such under Rule 92*bis*.[26] It is in this context and alongside the qualification noted by the Prosecution previously[27], that one must consider the continued reliance by the Defence on this Chamber's dismissal of similar arguments on the basis that "the Accused would be prejudiced if judicial economy were allowed to take precedence over his fair trial rights."[28] Furthermore, fairness and expediency are not contrary principles. The Prosecution relies on its submissions made on this point in previous submissions.[29]

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[24] Objections, paras. 18-20.
[25] *Ibid*, para. 19.
[26] See *Prosecution v. Milošević*, IT-02-54-T, "Decision on Confidential Prosecution Motion for Admission of a Transcript and Statement Pursuant to Rules 92bis(D) and 89(F) for Witness B-1805", 12 January 2004, p. 3 order 2 where cross-examination by the accused and the *Amici Curiae* was limited to two hours in total; and *Prosecutor v. Delic*, IT-04-83-T, "Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court", 24 July 2007, Annex, para. 17 which states *inter alia* that cross-examination might be limited to "matters which the Trial Chamber has decided to allow the witness to be called for cross-examination". In *Delić*, the approach taken by the Trial Chamber in *Prosecutor v. Milan Martić*, IT-95-11-T, "Decision on Prosecution's Motion for the Admission of Written Evidence Pursuant to Rule 92*bis* of the Rules", 16 January 2006 was referred to with approval. In *Martić*, the Chamber ordered that the areas of cross-examination be limited as follows: "Witness MM-06, appear for cross-examination on matters going to the existence of a joint criminal enterprise in which the Accused allegedly participated, to the alleged goal of the joint criminal enterprise, and to the effective control the Accused allegedly had over units committing crimes; that Witness MM-07 appear for cross-examination on matters concerning the Arkan's Tigers, the alleged effective control of the Accused over units committing crimes, and a "policy" in "the area of responsibility in the Kordun area" "to get as many Croats as possible out of the territory"; that Witness MM08 appear for cross-examination on matters concerning the existence of a joint criminal enterprise in which the Accused allegedly participated, to the relationship of the Accused with other members of this alleged joint criminal enterprise, and to the "Red Berets"; that Witness MM-037 and Witness MM-044 appear for cross-examination on matters concerning "Martic's Police" (see para. 37).
[27] *Prosecutor v. Taylor*, SCSL-01-03-T-588, "Public Prosecution Reply to Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Kono District – TF1-218 & TF1-304", 12 September 2008, para 19.
[28] Objections, para. 18.
[29] *Supra*, footnote 27.

15. Thirdly, as stated above, there is no basis to the Defence claim that "the information sought to be tendered goes to the acts and conduct of the accused ..., [such that] cross-examination must be allowed."[30] Therefore, the Defence explanation of their prior statements concerning their approach to the crime base evidence must be viewed in this light.[31] Nor is the evidence so proximate as to require cross-examination. Even if portions of evidence are considered sufficiently proximate, as also stated above, this does not automatically require that the evidence be made subject to cross-examination.

16. Finally, the Defence argument that it must be shown that the line of defence in previous proceedings coincides with that of the Defence in the current proceedings does not sit squarely with its previous submissions regarding the similarity of other SCSL proceedings to the current proceedings.[32] In the Defence motion filed in December 2007, the Defence argued that the nexus between the RUF case and the Taylor case was such that it should be allowed access to closed session defence witness testimony from the RUF trial and limited disclosure of RUF defence witness names and related potentially exculpatory material.[33] Yet it now seeks to distance itself from any similarities with the RUF case for purposes of the Objections.

17. Notwithstanding the foregoing, should the Chamber order cross-examination, then, as argued previously, such cross-examination should be limited to relevant areas of inquiry not previously examined. Such limits are justified as all of the witnesses' cross-examination in the prior proceedings was full, rigorous and effective and carried out by defence counsel for an accused with a similar interest to the Accused in the present proceedings.[34] Further, limits on cross-examination, particularly in relation to witnesses

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[30] Objections, para. 19.
[31] *Ibid*, footnote 26.
[32] Objections, para. 20.
[33] *Prosecutor v. Taylor*, SCSl-03-01-T-377, "Public Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", 14 December 2007. A similar motion is also currently pending in respect of Kallon and Gbao defence witnesses – see *Prosecutor v. Taylor,* SCSL-03-01-T-506, "Public with Annexes A and B Defence Motion Pursuant to Rule 75(G) to Modify Kallon & Gbao Defence Protective Measures Decisions of 19 March 2007 and 1 March 2007 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", 15 May 2008.
[34] The nexus between the RUF case and the Taylor case was recently argued by the Defence in their motion seeking access to closed session defence witness testimony from the RUF trial and limited disclosure of RUF defence witness names and related potentially exculpatory material in *Prosecutor v. Taylor*, SCSL-03-01-T-377, "Public Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", 14 December 2007.

whose testimony in chief is admitted under Rule 92*bis*, are not contrary to the fair trial rights of the Accused but, rather in balance with these rights, have ensured the promotion of one of the central purposes of the rule which is an expeditious trial.

18. The Prosecution is cognisant of the logistical arrangements and advance planning which must be undertaken for witnesses to travel from Sierra Leone to the Hague. The Prosecution, therefore, advises that, should the Chamber order that these witnesses be made available for cross-examination, then the Prosecution shall endeavour that they be available from end of October/early November 2008.

III. CONCLUSION

19. The Defence Objections are without merit.

20. The application by the Prosecution was properly made under Rule 92*bis*.

21. The Defence has not established any legal basis on which any of the evidence submitted for admission under Rule 92*bis* should be excluded as the evidence is relevant, does not go to the proof of the acts and conduct of the Accused (giving such phrase its plain and ordinary meaning as is required by the jurisprudence), its reliability is susceptible of confirmation and it does not relate to opinion evidence, or in the alternative, the opinions were properly elicited.

22. The Prosecution requests that the prior testimony as submitted by the Prosecution, the related exhibits and statements of the Witnesses be admitted into evidence under Rule 92*bis*.

Filed in The Hague,
10 October 2008
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

Prosecutor v. Taylor, Case No. SCSL-03-01-T

Prosecutor v. Taylor, SCSL-03-01-T-377, "Public Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", 14 December 2007

Prosecutor v. Taylor, SCSL-01-03-T-449, "Public with Confidential Annex A Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 31 March 2008

Prosecutor v. Taylor, SCSL-01-03-T-456, "Public with Confidential Annex Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Kenema District", 4 April 2008

Prosecutor v. Taylor, SCSL-03-01-T-506, "Public with Annexes A and B Defence Motion Pursuant to Rule 75(G) to Modify Kallon & Gbao Defence Protective Measures Decisions of 19 March 2007 and 1 March 2007 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", 15 May 2008

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

Prosecutor v. Taylor, SCSL-01-03-T-579, "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 – TF1-218 & TF1-304'", 9 September 2008

Prosecutor v. Taylor, SCSL-01-03-T-588, "Public Prosecution Reply to Defence Objection to Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Kono District – TF1-218 & TF1-304", 12 September 2008

Prosecutor v. Taylor, SCSL-01-03-T-601, "Public Prosecution Reply to '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' and Other Ancillary Relief", 22 September 2008

Prosecutor v. Taylor, SCSL-01-03-T-611, "Public with Confidential Annexes B to G Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081, and TF1-084," 30 September 2008

Prosecutor v. Taylor, SCSL-01-03-T-619, "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081 and TF1-084," 6 October 2008

Prosecutor v. Taylor, SCSL-01-03-T-623, "Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kono District", 8 October 2008

***Prosecutor v Sesay et al*, SCSL-04-15-T**

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

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http://www.un.org/icty/milosevic/appeal/decision-e/031031so.htm

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