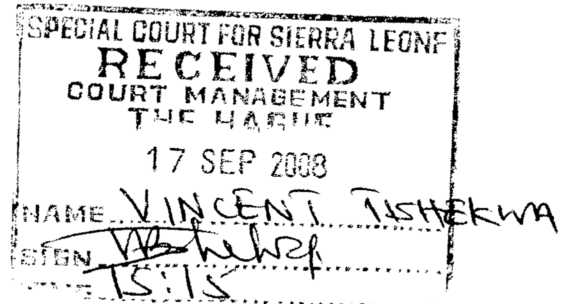
596) SCSL-03-01-T (19856-19865) 19856

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: 17 September 2008



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

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION REPLY TO "DEFENCE RESPONSE TO 'PROSECUTION MOTION FOR ADMISSION OF THE PRIOR TRIAL TRANSCRIPTS OF WITNESSES TF1-021 AND TF1-083 PURSUANT TO RULE 92*QUATER*'"

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian

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 Annexes Defence Response to 'Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92*quater*'".[1]

II. Reply

General standard under Rule 92*quater*

2. The Prosecution agrees with the Defence that the Chamber must weigh the indicia of reliability and relevance in determining the admission of evidence under Rule 92*quater*.[2] However, the Defence is incorrect in stating that the Chamber must weigh the probative value, as this Trial Chamber has previously pointed out that the rules of the Special Court "do not require that evidence be both relevant and probative."[3] The Prosecution stresses that all indicia considered in determining admissibility under Rule 92*quater* including, but not limited to, prior cross-examination, corroboration by other witnesses, and/or whether the evidence goes to prove the Accused's acts and conduct are merely factors to be considered and weighed by the Chamber and not preconditions for admissibility under Rule 92*quater*.[4]

3. The Defence erroneously states that the jurisprudence precludes consideration of prior cross-examination as an indication of reliability unless all lines of cross-examination are relevant to both the current proceedings and proceedings in which the deceased has previously testified.[5] Jurisprudence clearly establishes that consideration of prior cross-examination is appropriate when a witness's "credibility was generally questioned and tested and those challenges appear on the record."[6] An incomplete or ineffective prior cross-examination "goes to the weight to be attributed to the evidence rather than to its admissibility."[7]

4. The Defence also wrongly implies that a deceased witness's statement or transcript must be

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[1] *Prosecutor v. Taylor*, SCSL-01-03-T-587, "Public with Confidential Annexes Defence Response to 'Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92*quater*'", 11 September 2008 ("Response").

[2] *Prosecutor v. Prlic*, IT-04-74-T, "Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92*quater* of the Rules (Hasan Rizvic)," 14 January 2008, pg 4 para. 11-13.

[3] Prosecutor v. Brima et. Al., SCSL-04-16-T-280, "Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95", 24 May 2005, para. 13.

[4] *Prosecutor v. Popovic*, IT-05-88-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*quater*, 21 April 2008, para. 31 and 41.

[5] Response, para. 6.

[6] *Popovic*, para. 51.

[7] *Id.*

corroborated by "evidence adduced at trial."[8] Corroboration, however, is not a Rule 92*quater* requirement. Instead it is simply a factor which a court may consider in determining reliability.[9] Corroborative evidence is not limited to that adduced at the instant trial; rather the Chamber may take into account any "corroboration by some other evidence."[10] The corroboration and reliability itself is the factor, not the court in which the evidence was obtained.

5. Finally, the Defence misstates the legal test for evaluating any inconsistencies.[11] In order to find that pieces of evidence corroborate one another and/or that a testimony or statement is reliable, a Chamber need only find general consistencies as to major events.[12] Other minor inconsistencies, both those internal and those between corroborative pieces of evidence, "go to the weight to be attributed to the evidence, but do not preclude its admission."[13]

Admissibility of the testimonies of TF1-083 and TF1-021 under Rule 92*quater*

6. The Defence objections to the prior testimony sought to be introduced into evidence are without merit. In asserting lack of relevance, inconsistencies, non-corroboration, unreliability and evidence of the Accused's acts or conduct, the Defence fails to demonstrate why the scales, with all factors of reliability, admissibility and fairness, tip in favour of exclusion.[14] Instead, the Defence recites a few exaggerated factors, implying that any one of them alone could be grounds for exclusion.[15] Yet, these factors have been discounted as inconclusive in determining admissibility under Rule 92*quater*. Rather, many of the factors identified by the Defence should be applied in apportioning the weight to be given a certain piece of evidence, not in determining admissibility.[16]

Relevance of the evidence to the indictment

7. As stated in the Motion, the testimonies of TF1-083 and TF1-021 are relevant: they recount crimes committed in the Kissy Town area of Freetown in January 1999. These crimes are in

[8] Response, para. 6.
[9] *Prlic*, para. 22; *Popovic*, para. 52.
[10] *Prlic*, para. 11.
[11] Response, para. 6.
[12] *Prosecutor v. Milutinovic*, IT-05-87-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*quater*," 16 February 2007, para. 10; *Popovic*, para. 61.
[13] *Id.*
[14] Response, para. 8, 10-11, 15, 20, 24-26.
[15] Response, para. 27.
[16] *Milutinovic*, para. 10; *Popovic*, para. 61; *Prlic*, para 23.

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turn charged in the Indictment.[17] The Response incorrectly suggests that the word "rebels," referring to the perpetrators of killings, house-burnings and amputations, is never defined. From the context of the witness's testimony and the overall evidence adduced in the current trial, the identity of the "rebels" who invaded Freetown on 6 January 1999 is clear. TF1-083 states that the "rebels" were engaged in a cross-fire with ECOMOG and that they attacked the Rogbalan Mosque.[18] Additionally, corroborating evidence from the testimony of TF1-021 confirms that around 6 January 1999, AFRC and RUF rebels attacked the Rogbalan Mosque.[19] It follows that the "rebels" described by TF1-083 are the same AFRC and RUF rebels placed at the mosque on 6 January 1999 by TF1-021. As TF1-083's testimony relates to events applicable to several counts in the indictment, as well as events already discussed in other evidence, the evidence is relevant.[20]

<u>*The reliability of the evidence*</u>

a) Cross-examination

8. The Defence suggests that the testimonies of the deceased witnesses are not reliable as they were not adequately tested in cross-examination. The Defence also claims that several lines of cross-examination that are significant for the Taylor defence were not pursued in the witnesses' testimonies in the RUF and AFRC trials.[21]

9. According to the Response, the Defence in the current proceedings is not concerned with "The question of which group of the two (RUF or AFRC) committed the alleged crimes...as both groups link the Accused to the crimes as charged in the Indictment."[22] The Defence suggests several lines of cross-examination to be relevant and significant to the Accused. The Response, however, does not explain how any of the suggested lines of cross-examination could have benefited the Accused. The Defence claims that the number of people killed or amputated on the order of the commander was never mentioned. In fact, the witness testified in detail about what happened to all of those present when the commander gave his order: himself, Pa Sorie, Pa Musa and the other two victims who he did not

[17] *Prosecutor v. Taylor*, SCSL-01-03-T-587, "Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92*quater*", 1 September 2008 ("Motion").
[18] *Prosecutor v. Brima et al*, SCSL-04-16-T, 8 April 2005, pg. 18787.
[19] *Prosecutor v. Sesay et al*, SCSL-04-15-T, 15 July 2004, pg. 18726.
[20] *Prlic, para. 10-13.*
[21] Response, paras. 10 and 11.
[22] Response, para. 12

recognize.[23] The Response states that "most importantly, none of the modes of liability alleged against the Accused were put to the witness in cross-examination."[24] It is unclear, however, how one puts modes of liability to a witness, or how that could have benefited the present accused, particularly where the deceased witness never mentioned Charles Taylor in his testimony.

10. The Defence incorrectly claims that there was a communication breakdown that detracts from the reliability of TF1-083's evidence. There is no indication in the transcripts that the witness, who testified under oath before the Special Court with a sworn Temne interpreter, had any difficulty in communicating during his testimony. TF1-083 specifically testified that he chose to speak in Temne during the trial because he preferred and understood it.[25]

11. The Defence claims that the cross-examination of TF1-021 in the AFRC trial was immaterial to the instant proceedings as the AFRC defence counsel sought to implicate the RUF in the crime and absolve the AFRC.[26] The AFRC defence counsel also questioned the witness in an effort to undermine his credibility.[27] A general examination exploring credibility is sufficient to support a witness's reliability.[28] Even if a previous defence counsel conducted a cross-examination with different or hostile interests to the Accused, this factor is more appropriately considered in determining the weight to be assigned the testimony rather than precluding admission of the evidence.[29]

b) Corroboration

12. The Defence allege a material difference between the testimonies of TF1-021 and TF1-083 regarding the timing of the killings: TF1-021 stated the killings started at 12:30 and the TF1-083 stated he saw the bodies at 12:00. This half hour difference between accounts of such a traumatic experience years later is hardly a material inconsistency. There is no discrepancy and accordingly, no reason why TF1-021 and TF1-083 cannot corroborate one another.

13. The Defence alleges that the factual differences between TF1-021 and TF1-334 are so material as to render TF1-334 incapable of corroborating the evidence of TF1-021. Yet the

[23] AFRC transcript, page 18783 to 18785.
[24] Response, para. 14.
[25] *Prosecutor v. Brima et al,* SCSL-04-16-T, 8 April 2005, pg. 75 ln. 1-2.
[26] Response, para. 10.
[27] *Prosecutor v. Brima et al,* SCSL-04-16-T, 15 April 2005, pg. 42.
[28] *Popovic*, para. 51.
[29] *Popovic*, para. 60.

differences listed by the Defence in their Appendix A are inaccurate. For example, in row two of Appendix A, the Defence states that TF1-021 located the mosque on Ramsey and Windsor Streets while TF1-334 located the mosque on Old Shell Road.[30] The Defence fails to note in its chart, however, that TF1-021 referred to the Shell plant in identifying the location of the mosque.[31]

14. The defence also relies on an incomplete recounting of the facts in row five of Appendix A where TF1-334 states that there were ECOMOG troops hiding in the mosque.[32] The Defence failed to include a later statement by TF1-334 where the witness corroborates the evidence of TF1-021 stating that the civilians told him they went to the mosque to seek refuge.[33]

15. Row six of Appendix A of the Response misstates the facts regarding the accounts of the number of soldiers that attacked the mosque.[34] TF1-021 testified that he couldn't really count how many rebels there were because he was so afraid.[35] The witness then acknowledged that he only observed those that were coming over the wall, but admits that there were many more than the 15-20 he observed first hand.[36] Accordingly, the much higher estimate made by TF1-334 can be reconciled with the conservative estimate given by TF1-021.

16. In row three, the Defence points out that TF1-021, in his statement, said that the murders were part of Operation Kill People while TF1-334 testified that he was ordered to kill people by Gullit.[37] There is no indication that the order and the operation are at odds.

17. The material discrepancies claimed by the Defence are minor differences that are easily reconciled. Additionally, TF1-021 is testifying from the perspective of a victim and civilian, while TF1-334 is testifying from the position of a rebel soldier. Minor discrepancies, especially technical facts such as the origin of orders and names of operations, will exist when considering testimonies from a civilian on the one hand and a soldier on the other.

c) Alleged inconsistencies in the statements

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[30] Response, Appendix A, row 2.
[31] *Prosecutor v. Sesay et al,* SCSL-04-15-T, 15 July 2004, pg. 35.
[32] Response, Appendix A, row 5.
[33] *Prosecutor v. Taylor*, SCSL-03-01-T, 23 April 2008, pg. 8364 ln. 9-10.
[34] Response, Appendix A, row 6.
[35] *Prosecutor v. Sesay et al,* SCSL-04-15-T, 15 July 2004, pg. 25-26.
[36] *Prosecutor v. Brima et al,* SCSL-04-16-T, 15 April 2005, pg. 26 ln. 20-21.
[37] Response, Appendix A, row 3.

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18. The defence's exaggerated and misstated Appendix B purports to contain numerous inconsistencies between the statements and testimonies of TF1-021 and TF1-083, respectively. Yet, as indicated below, these are minor inconsistencies that often rely on whether certain testimony was elicited.[38] If a witness is generally consistent, minor inconsistencies should be considered in apportioning the weight of the evidence, not determining admissibility.[39]

19. The Defence claims inconsistencies and contradictions between the testimonies and statement of TF1-021 yet at least six facts upon which the witness allegedly was inconsistent are stated similarly or identically in Appendix B. For example, in row 13, the witness says the same thing in three different ways. TF1-021 never indicates a time when the people left the mosque.[40] In row 14, the wording between the testimony and the statement are nearly identical and yet it is cited as an inconsistency.[41]

20. Additionally, Defence cites to several alleged contradictions in the witnesses statements and testimony which, are in fact consistent if the testimony and statement are read fully and accurately. In row 19 of Appendix B, the Defence claims that the witness said in the RUF trail that he could not identify the rebels as RUF, and yet in both his AFRC testimony and written statement he did identify the rebels as RUF.[42] In his RUF testimony, however, he never said that he could not identify the rebels as part of a group, despite the Defence's assertions otherwise. Rather, the witness said that he could not identify them individually as they had chalk on their faces and bags over their heads.[43]

21. Finally, the Defence claims that TF1-083 was inconsistent when discussing language comprehension. The witness, however, was consistent when he said that he understood some Krio and that he understood his statement and the interview. TF1-083 merely testifies that he understands Temne better than Krio.[44]

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[38] Response, Appendix B, Rows 20-22, 24-25 (listing "not mentioned" as indicating an inconsistency).
[39] *Multinovic*, para. 10.
[40] *Prosecutor v. Sesay et al*, SCSL-04-15-T, 15 July 2004, pg. 28 (witness states that he did not record the time that the people left); *Prosecutor v. Brima et al*, SCSL-04-16-T, 15 April 2005, pg. 30 (witness explains that people were still there when he came to the mosque); *Prosecutor v. Brima et al*, SCSL-04-16-T, Witness Statement for TF1-021 (witness times the firing between 2pm and 5pm but never says when the people left the mosque).
[41] TF1-021 states in both that "the people took an additional 15,000 leones from his pocket."
[42] Response, Appendix B, row 19.
[43] *Prosecutor v. Sesay et al*, SCSL-04-15-T, 15 July 2004, pg. 35.
[44] *Prosecutor v. Brima et al*, SCSL-04-16-T, 8 April 2005, pg. 74 ln. 10 - 75 ln. 2.

Probative value outweighs any prejudice to the Accused

22. The Defence fails to show how the Accused would be unfairly prejudiced by admission of the testimonies, as all factors weigh in favor of reliability and relevance.[45]

23. In *Prlic*, the Trial Chamber admitted a statement under Rule 92*quater* that was never subject to cross-examination, was partially uncorroborated, went primarily to proving the acts and conduct of the accused, and contained minor inconsistencies.[46] Yet the Court noted that the statement was generally corroborated and was taken in the presence of a Presiding Officer appointed by the Registrar of the Tribunal: the statement was thus sufficiently reliable for admission.[47] The lack of cross-examination, non-corroboration and minor inconsistencies would be considered in weighing the evidence.[48]

24. The testimonies of TF1-021 and TF1-083 are much more consistent than that admitted in *Prlic*. Both testimonies were given under oath and within the safeguards of a courtroom setting.[49] Both testimonies were previously tested in cross-examination for general credibility. The testimonies corroborate each other and are generally corroborated by evidence already adduced in the instant trial.[50] TF1-021 and TF1-083 both discussed in their testimonies events which are central to the indictment in proving crime base thus their testimonies are prima facie relevant. All factors weigh in favor of admissibility.

25. The Response erroneously argues that the prior testimony of the deceased witnesses goes to the acts and conduct of the accused, Charles Taylor, who is not mentioned in the testimony. In support of this assertion, the Response misquotes *Galic*, citing the appeals decision for exactly the opposite of its holding.[51] In *Galic*, the ICTY Appeal Chamber noted that "a written statement which goes to the proof of any act or conduct *of the accused* upon which the prosecution relies" (emphasis in original) to establish the *mens rea* of the accused is not admissible under Rule 92*bis*.[52] In the same paragraph, the Appeals Chamber went to state:

> "In order to establish that state of mind, however, the prosecution may rely upon the acts and conduct of *others* which have been proved by Rule 92*bis* statements.

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[45] *Prlic*, para. 22.
[46] *Id.* at para. 21-23.
[47] *Id.* at para. 16-17.
[48] *Id.* at para. 23.
[49] Motion, para. 16.
[50] Motion, para. 17.
[51] Response, para. 11.
[52] *Galic*, para. 11.

> An easy example would be proof, in relation to Article 5 of the Tribunals Statute, of the knowledge by the accused that his acts fitted into a pattern of widespread or systematic attacks directed against a civilian population. Such knowledge may be inferred from evidence of such a pattern of attacks (proved by Rule 92*bis* statements) that he must have known that his own acts (proved by oral evidence) fitted into that pattern." (Emphasis in original.)

26. The testimonies of the deceased witnesses serve to provide further evidence of the horrific and infamous crimes that occurred in Freetown in January 1999 of which the Accused must have been aware. The Accused's own acts and conduct in planning, ordering, inciting, and supplying the ammunition and additional personnel used in the commission of the crimes have been proven by the oral evidence of other witnesses.

III. CONCLUSION

27. The Defence Response is without merit as the application by the Prosecution was properly made under Rule 92*quater*.

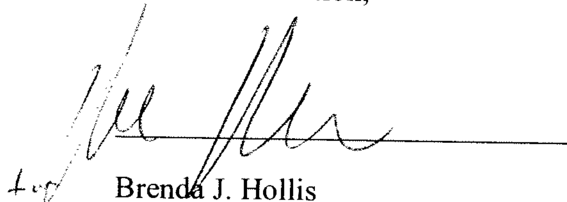
29. The Defence has not established any legal basis on which any of the evidence submitted for admission under Rule 92*quater* should be excluded as the evidence is relevant, its reliability is corroborated by other testimony and has been tested through prior cross-examination, it serves as crime base evidence, and does not prejudice the Accused.

30. Accordingly, the Prosecution requests that the prior testimony as submitted by the Prosecution TF1-021 and TF1-083 be admitted into evidence under Rule 92*quater* as requested by the Prosecution in its Notice.

Filed in The Hague,

17 September 2008

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

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TABLE OF AUTHORITIES

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