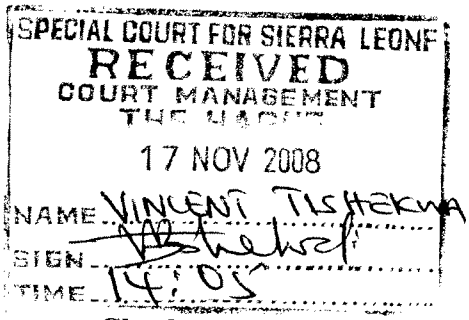
669) SCSL-03-01-T (22381-22391) 22381

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 November 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 EXTRACTS OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE

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 Defence Response to Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone".[1]

II. APPLICABLE LEGAL PRINCIPLES

2. In the Response, the Defence incorporate by reference arguments contained in a separate filing regarding the legal principles to be applied to the admission of documents.[2] The Prosecution has today filed a reply to that separate filing addressing those arguments.[3] Accordingly, the Prosecution relies on and incorporates by reference its submissions made therein at paragraphs 2 to 11 in reply to those submissions incorporated by reference in the Response and also to the argument in paragraph 4 of the Response.

The report is not expert evidence

3. The Defence erroneously attempt to classify the extracts of the TRC Report which the Prosecution seek to admit as expert evidence.[4] As set out below, such an attempt is flawed.

4. First, the information contained in the extracts of the TRC Report is not information which is outside the experience and knowledge of the Chamber. The TRC Report extracts contain analyses of the statements taken by the TRC from victims, witnesses and perpetrators of human rights violations committed during the Sierra Leonean conflict in order to "study what the statements can mean in the aggregate".[5] This overlap with crime base evidence is acknowledged by the Defence in paragraph 9 of the Response. Accordingly, the extracts are not expert evidence but are analyses of crime base evidence which will assist the Chamber by providing an overview of such evidence in the most efficient manner.

5. Second, the prior practice of this Court determines that Judges do not need expert assistance in assessing statistical evidence. In the AFRC Trial, evidence similar to that

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-663, "Public Defence Response to Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone", 10 November 2008 ("**Response**").
[2] Response, para. 3.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T, "Public Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies", 17 November 2008.
[4] Response, paras. 5 - 8 and 20 – 21.
[5] *Prosecutor v. Taylor*, SCSL-03-01-T-652, "Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone", 31 October 2008 ("**Motion**"), Annex B, p.1, paras. 1-2.

set out in the TRC Report extracts was admitted without recourse to expert testimony. In that Trial, the findings of surveys focusing on sexual violence carried out by Physicians for Human Rights were admitted in the report "War related Sexual Violence in Sierra Leone" which became Prosecution Exhibit P.58.

6. Finally, the Defence arguments that the TRC Report extracts cannot be admitted as they make determinations on the ultimate issue before the Court should be dismissed as being based on an overly broad interpretation of the ultimate issue. The ICTR Appeals Chamber's dicta in *Karemera* regarding the type of facts which might properly be taken judicial notice of is helpful in considering this type of objection and which facts properly fall within its scope:

> "The Appeals Chamber ... has never gone so far as to suggest that judicial notice under Rule 94(B) cannot extend to facts that "go directly or indirectly" to the criminal responsibility of the accused (or that "bear" or "touch" thereupon). With due respect to the Trial Chambers that have so concluded, the Appeals Chamber cannot agree with this proposition, as its logic, if consistently applied, would render Rule 94(B) a dead letter. The purpose of a criminal trial is to adjudicate the criminal responsibility of the accused. Facts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial, and, as noted above, thus may neither be established by evidence nor through judicial notice. So judicial notice under Rule 94(B) is in fact available *only* for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused.[6]

On this basis, it is clear that the facts in the TRC Report extracts are not central to establishing the Accused's criminal responsibility for the crimes set out in the Second Amended Indictment. On this basis, there is no usurping of the trier of fact.

III. ARGUMENTS

No requirement in international criminal law to produce documents through a witness

7. The Defence's preliminary observations regarding live witness alternatives to the TRC Report[7] are without merit and should be dismissed. Provided the evidence otherwise satisfies the Rules of Procedure and Evidence ("**Rules**"), then the method of evidence presentation is a matter within the Prosecution's discretion. To find that documents can only be introduced into evidence either through a witness or on condition that a witness

[6] *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73(C), "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", App. Ch., 16 June 2006, para. 50.
[7] Response, para. 9.

be made available for cross-examination on it, is not supported by the Rules and ignores the practice of this court in terms of its application of Rule 89(C) and Rule 92*bis* in relation to documentary evidence. Further, as noted above, the extracts are similar to documentary evidence which has been admitted in previous trials without recourse to a witness.

*If both Rules 89(C) and 92*bis *are applied*

8. The Defence argument that information which falls outside the temporal and geographical scope of the Indictment should not be admitted should be dismissed.[8] It is clear that the Rules do not exclude the admission of such information if it is relevant to the case. Rule 89 is silent as to any jurisdictional limitation, stating simply that a Chamber may admit *any* relevant evidence. Further, Rule 93 permits evidence of a consistent pattern of conduct relevant to the charges in the Second Amended Indictment[9] providing such evidence is disclosed to the Defence. This Rule is also silent as to any jurisdictional limitations.

9. As held by the ICTY Appeals Chamber, evidence can be admitted "concerning events not charged in the indictment as corroborating evidence establishing acts charged in the indictment."[10] Where the evidence is used to prove an issue relevant to the charges such as motive, opportunity, intent, preparation, plan or knowledge, it may be admitted as relevant under Rule 89 notwithstanding the fact that it covers acts of the accused other than those charged in the Indictment.[11] Further, evidence outside the temporal limits of the Indictment can also provide the basis from which to draw inferences, "in the sense that from one fact a reasonable inference may sometimes be made that another fact also existed".[12]

10. Further, the Defence argument ignores that evidence relevant to contextual elements, such as the existence of a widespread or systematic attack against a civilian population, is

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[8] Response, para. 11.
[9] *Prosecutor v. Taylor*, SCSL-03-01-T-263, "Prosecution's Second Amended Indictment", 29 May 2007.
[10] *Prosecutor v Strugar*, Case No. IT-01-42-T, "Decision on the Defence Objection to the Prosecution's Opening Statement concerning Admissibility of Evidence" 22 January 2004, citing with approval the Appeals Chamber Judgement in *Kupreskic et al.*
[11] *Ibid.*
[12] *Prosecutor v Ngeze et al*, ICTR-99-52, Separate Opinion of Judge Shahabudeen, 5 September 2000. para. 10. This opinion has been widely used in other cases, see for instance *Prosecutor v Simba*, ICTR-01-76-AR72.2 "Decision on Interlocutory Appeal Regarding Temporal Jurisdiction", 29 July 2004 and *Prosecutor v Bagosora*, ICTR-98-14-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003.

admissible whether it occurs within or outside the temporal or geographical limits alleged for specific crimes. This is also true for evidence which is, of itself or cumulatively with other evidence in the case, relevant to prove intent, awareness, knowledge, or reasonable foreseeability. Such evidence is admissible whether or not it is considered Rule 93(A) evidence.

11. As regards perpetrators not covered by the Indictment such as ECOMOG, GAF, CDF, ULIMO, police and miscellaneous, the statistics relating to these groups were included as a point of completeness. However, the Prosecution does not object to the redaction of this information.

12. The Defence arguments regarding susceptibility of confirmation are without legal merit and should be dismissed. They are premature as they ignore the clear jurisprudence that information may be "corroborated by other evidence presented at trial".[13] Therefore, the information may be corroborated by evidence led during both the Prosecution and Defence phases of the trial. However, at this stage, susceptibility of confirmation does not need to be proven and is not a condition of admission.

13. The Defence interpretation of the phrase acts and conduct of the accused and proximate subordinates of the accused is overly broad, unsupported by jurisprudence and, on this basis, should be dismissed. None of the information contained in the TRC Report extracts falls within these categories as such is defined and limited by the jurisprudence. Instead, the extracts refer to groups broadly and contain no information regarding the leadership, composition or individuals involved in such groups. Further, as is plain from the reference pages noted in Annex A of the Motion and from the annotated copies of the extracts provided in Annex B of the Motion, the Prosecution does not seek admission of the section entitled "Patterns of documented violations attributed to Liberian perpetrators." On this basis, the Defence's comments on this section[14] are irrelevant and the reference to the RUF-NPFL Study on CMS page 21848 of Annex B can be redacted.

Probative value is not manifestly outweighed by its prejudicial effect

14. The Defence arguments regarding prejudice are without merit and should be dismissed.[15] The margins of error and other issues which might affect the Chamber's assessment of

[13] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1125, "Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92*bis*", 15 May 2009, para. 30.
[14] Response, para. 13.
[15] *Ibid*, paras. 15-19.

the evidence if admitted are clearly identified and will assist the Chamber in determining the weight to be accorded it at the conclusion of the case. Indeed, the margins identified are not such that they indicate any manifest prejudice to the Accused should the evidence be admitted. First, the general limitation noted in Annex B of the Motion at CMS p. 21849, paragraph 1, that the data on certain violations was not sufficient to analyse the patterns, relates to violations not charged in the Second Amended Indictment. Second the limitations noted on the same page at paragraph 4 are similar to those that would be expected in any survey. Finally, the sections which identify a specific margin of error (such as the figure of 22% identified by the Defence),[16] relate to sections in respect of which the Prosecution does not seek admission. In this regard, the Defence's attempts to link the issue of information allegedly going to proof of acts and conduct of the accused with the margin of error in order to lend weight to their prejudice argument, are based on information contained in parts of the Report the Prosecution is not seeking to admit.[17] The Defence's submissions on this point are, therefore, irrelevant.

15. The Defence arguments at paragraph 17 of the Response are based on the erroneous assertion that the extracts of the TRC Report amount to expert evidence. As stated above, the extracts are not expert evidence and any issues regarding the absence of cross-examination goes to weight.[18]

If only Rule 89(C) is applied

16. The Defence arguments are also fundamentally flawed in that they ignore the fact that two rules are used at the ICTY for the introduction of evidence other than through live testimony – Rule 89 and Rule 92bis[19] - which rules must be considered in tandem. Nonetheless, the Defence seek to impose on the SCSL the ICTY's interpretation and use of Rule 92*bis* without also extending to the SCSL the ICTY's interpretation and use of Rule 89(C).

17. The Defence's submissions regarding the *Kordić and Čerkez* case are legally and factually irrelevant to the matter at issue and should be dismissed.[20] The exclusionary

[16] *Ibid*, para. 16.
[17] *Ibid*, para. 16.
[18] *Prosecutor v. Taylor*, SCSL-03-01-T-543, "Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka, or in the alternative, to Limit its Scope And on Urgent Prosecution Request for Decision", 19 June 2008, para. 25.
[19] In the context of the current issue, Rules 92*ter* and *quater* are not relevant and so are not discussed.
[20] Response, paras. 22-24 and Annex A.

conditions from *Kordić and Čerkez* which the Defence now seeks to apply to this case are specific to the facts of that case and have no role to play in the current proceedings. In *Kordić and Čerkez* the conditions were imposed in relation to the admission of a considerable amount of documentary evidence disclosed after the conclusion of both the Prosecution and Defence cases.[21] It is clear that these strict conditions were imposed by the ICTY Trial Chamber in view of the exceptional circumstances with which all parties were faced and at a time when such material could not be put to and so challenged by Defence witnesses.[22] The Defence attempt to apply the ruling in *Kordić and Čerkez* with the current situation is without merit, particularly when the material at issue relates to a publicly available document which it has itself used in proceedings.

18. Notwithstanding the inapplicability of *Kordić and Čerkez*, the Prosecution makes the following additional observations in order to correct the record.

19. First, the Defence are misinformed as to the purpose of the second part of the *Kordić and Čerkez* Decision concerning the belated disclosure and tendering of material already produced in other proceedings.[23] In *Kordić and Čerkez*, part of the justification for the late disclosure and tendering of the Zagreb materials was that the Prosecution had only received these materials after the close of both the Prosecution and the Defence cases. However, as is highlighted in the *Kordić and Čerkez* Decision, this was not the case in respect of one of the Zagreb materials "exhibit 673.4 [as it] was introduced during the trial of Colonel Blaskić before the International Tribunal and so [had] been available to the Prosecution for some time."[24] Therefore, the Defence arguments in these proceedings which focus on this point are irrelevant as none of the materials are being disclosed after the conclusion of the Prosecution or Defence cases or on the basis that they were not previously in the hands of the Prosecution.

20. The Prosecution also notes that, in relation to timing,[25] there is no requirement in the Rules that it be required to seek the admission of documentary evidence at any particular

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[21] For a narration of the facts against which the decision was made see paras. 1 – 11 of *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, "Decision on Prosecutor's Submissions concerning "Zagreb Exhibits" and Presidential Transcripts", 1 December 2000 ("***Kordić and Čerkez* Decision**").

[22] See in particular the comments of Judge May referred to at para. 36 and the arguments of the Defence referred to at para. 23 of the above referenced decision.

[23] Response, para. 23.

[24] *Kordić and Čerkez* Decision, para. 25.

[25] Response, para. 24.

stage in proceedings. Indeed, in the AFRC Trial, admission of such evidence was sought near the close of the Prosecution case.[26] Further, in view of the filings pending before this court pertinent to the issue of the basis on which documents might be admitted, the Prosecution had thought it prudent to delay pending resolution of these issues. However, it remains the case that no prejudice is suffered seeking admission at this stage as the document at issue is publically available, known to the Defence and can be challenged during the Defence phase of proceedings.

21. Finally, the Defence arguments regarding the admission of hearsay material[27] should be dismissed as it is a well established principle in international law that such evidence is admissible before international tribunals including the SCSL.

No bar to admission of the TRC Report

22. Contrary to the Defence's statements otherwise, the Prosecution is not barred from seeking to admit extracts of the TRC Report.[28] In 2002 and 2003, the SCSL and the TRC were operating side by side and assurances were made by the Prosecutor that those testifying before the TRC could do so without fear of having their statements subpoenaed. In 2004, the TRC Report was published. In conformity with this position, the Prosecution has not sought to use any individual statement provided to the TRC. Rather, it now seeks to use these statements in their aggregate. This use of data in the aggregate deals with the public policy concerns raised by the Defence.[29]

23. Even assuming, *arguendo*, the Chamber finds that the Prosecution position has changed, the Prosecution should not be prevented from seeking admission of the extracts. First, the Prosecution statements at issue were made in 2002 and 2003 at a time when testimony was still being heard before both organs and the TRC Report had not been published. It is now some 4 years since these statements and the TRC Report has been published. In the face of these facts, the Prosecution cannot find itself in the current proceedings fettered by non-binding statements made several years ago.

24. Finally, the practice and jurisprudence of this court, supports the Prosecution's request to admit the extracts. The Appeals Chamber has, on two occasions, made reference to the

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[26] *Prosecutor v. Brima et al.*, SCSL-04-16-T, "Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92*bis*", 18 November 2005.
[27] Response. para. 24.
[28] *Ibid*, para. 10.
[29] *Ibid.*

use which may be made of the TRC Report in proceedings. It has recommended that judicial notice be taken of the TRC Report[30] and also that it be admitted under Rule 92*bis*, as that Rule was originally drafted and before the amendments.[31] Further, the Defence arguments are disingenuous in light of the considerable use it has made of the TRC Report during these proceedings.[32] In view of the Appeals Chamber's recommendations and the Defence's own use of the Report, it would place the Prosecution at a disadvantage if it were prevented from making its own use of the Report.

IV. CONCLUSION

25. For the reasons set out in the Motion and above, the Prosecution requests that the Trial Chamber admit into evidence the portions of the TRC Report identified in **Annex A** and provided in **Annex B** of the Motion pursuant to: (i) Rule 89(C); or, in the alternative, (ii) Rules 89(C) and 92*bis* (Rule 92*bis* being interpreted as set out in paragraphs 15-16 of the Motion).

26. The Prosecution further requests that the arguments contained in the Response be dismissed.

Filed in The Hague,
17 November 2008
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[30] *Prosecutor v. Norman*, SCSL-03-08-PT-122, "Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone ("TRC" or "The Commission") and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson delivered on 30 October 2003 to deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP", 28 November 2003, para. 7.
[31] *Prosecutor v. Norman et al.*, SCSL-04-14-AR73-398, "Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005, para. 26.
[32] See Defence Exhibits 6, 12, 17, 26, 30, 31, 32.

LIST OF AUTHORITIES

SCSL Cases

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

Prosecutor v. Taylor, SCSL-03-01-T-263, "Prosecution's Second Amended Indictment", 29 May 2007

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Prosecutor v Strugar, Case No. IT-01-42-T, "Decision on the Defence Objection to the Prosecution's Opening Statement concerning Admissibility of Evidence" 22 January 2004 http://www.un.org/icty/strugar/trialc1/decision-e/040122.htm

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Prosecutor v Bagosora, ICTR-98-14-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003 http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/180903.htm

Prosecutor v. Karemera, Case No. 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