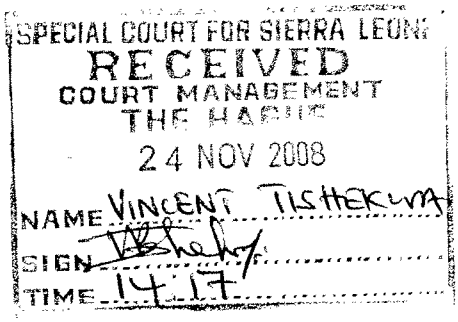
676) SCSL-03-01-T (22451 – 22462) 22451

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: 24 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 DOCUMENTS SEIZED FROM FODAY SANKOH'S HOUSE

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I. INTRODUCTION

1. The Prosecution files this reply to the "Public Defence Response to Prosecution Motion for Admission of Documents Seized from Foday Sankoh's House".[1]

II. REPLY

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 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.

3. However, the Prosecution underlines that, at base, the matter at issue is the ability of the Parties to bring relevant evidence before this Chamber. The Defence arguments contained in the Response are fundamentally flawed as they ignore the fact that two rules are used at the ICTY and ICTR for the introduction of evidence other than through live testimony – Rule 89 and Rule 92*bis*.[4] These rules are used in tandem. Nonetheless, the Defence seek to impose on the SCSL the interpretation and use made by the ICTY and ICTR of Rule 92*bis* without also extending to the SCSL these tribunals' interpretation and use of Rule 89(C).

General matters relevant to admission under Rule 89(C) alone or Rule 89(C) & Rule 92bis

Legibility of Documents

3. When scrutinised, the Defence complaint regarding legibility[5] concerns only one document[6], being the document provided at Tab 3 of Annex B of the Motion.[7] As noted

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-672, "Public Defence Response to Prosecution Motion for Admission of Documents Seized from Foday Sankoh's House", 17 November 2008 ("**Response**").
[2] Response, para. 3.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-670, "Public Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies", 17 November 2008 ("**UN Documents Reply**").
[4] In the context of the current issue, Rules 92*ter* and *quater* are not relevant and so are not discussed.
[5] Response, para. 18.
[6] First, the Defence claim that the document provided at tab 2 of Annex B is incomplete due to a reference to a previous message not detailed in the log is not a question of legibility but a matter which goes to weight. The

in the Motion, the Prosecution's copy of this document is a photocopy.[8] While the Prosecution would dispute that the scanned version served on the Defence is "impossible to read",[9] the Prosecution noted in the Annex to the Motion that the Prosecution's copy is available for inspection by the Defence.[10] However, no inspection has been made of the documents by the Defence. In relation to a separate concern regarding possible editing of the Radio Log Book provided at Tab 2 of Annex B to the Motion, the Prosecution advises that the Defence's concerns are speculative and a matter for final argument. In addition, this issue can also be addressed by inspection of the original document.[11]

Documents may be tendered absent a witness

4. The Defence argument that a witness is required to speak to the contents and relevance of the Sankoh Documents[12] is without merit for the following reasons. First, the Prosecution has identified the relevance of the documents in the Motion. The concerns raised by the Defence regarding the contents of these Documents are all matters going to the weight to be accorded to them when they are considered in light of all the evidence before the Trial Chamber at the conclusion of the trial. In reply to the example given by the Defence, it is clear that RUF Radio Log Books are relevant to these proceedings. The fact that the Defence finds them difficult to decipher and queries the Log as set out in paragraph 10 of the Response is not a ground for exclusion but a ground to challenge the weight the evidence is to be given. Equally, the questions raised in paragraph 11 of the Response are relevant to the weight to be given the document. The fact that a witness

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consecutive ERN numbers on each page of the document provided in the filing indicate that no page is missing. Second, the issue which the Defence have with the blank page between CMS pages 21990 and 21991 is not clear. It does not appear in the filed version served on the Prosecution and would appear to be a problem internal to the Defence. Electronic service of this filing was made in two parts, the last page of the first part being CMS page 21990 and the first page of the second part being CMS page 21991. Finally, the Defence concerns regarding possible editing of CMS page 22018 and the paperclip appearing on CMS page 21987 do not concern legibility but tampering. The Prosecution advises that the paper clip mark appearing on CMS page 21987 simply relates to an indentation on the original showing where a paperclip once was. The paperclip was not part of the document given to the Prosecution.

[7] *Prosecutor v. Taylor*, SCSL-03-01-T-659, "Public Prosecution Motion for Admission of Documents Seized from Foday Sankoh's House", 6 November 2008 ("**Motion**").

[8] See Motion, Annex A, Document 3, column headed "Original Available for Inspection".

[9] Response, footnote 25.

[10] Motion, Annex A, Document 3, column headed "Original Available for Inspection".

[11] See Motion, Annex A, Document 2, column headed "Original Available for Inspection" where it is indicated that the original is available for inspection.

[12] Response, paras. 8-12.

will not be called to answer them is not a ground for exclusion.

5. Second, the Defence request that the signatures on the Sankoh Documents be attested[13] is without legal merit. First, unlike the position at the *ad hoc* tribunals, issues of authenticity are not a condition of admission.[14] Rather, this is a matter which goes to the weight to be given the documents, in the context of all the evidence in the case. As regards the impact of such a consideration on the weight to be given the documents, there is no requirement that an expert be called to resolve such an issue. The Defence argument ignores the reality that the Prosecution has adduced evidence regarding those signatures from persons who have testified they are familiar with Sankoh's signatures, and may adduce additional evidence in this regard before the close of this case.

6. Finally, the Defence argument in paragraph 12 of the Response is without foundation and ignores the practice in other proceedings. The Prosecution has addressed this point in other similar submissions and, therefore, in order to avoid repetition respectfully refers the Chamber to those submissions.[15]

Chain of custody

7. The Sankoh Documents are relevant on their face and so admissible on their face. None of the Defence's arguments concerning chain of custody justify exclusion of the evidence.[16] Rather, they are also issues that relate, ultimately, to the weight to be given to this evidence. The SCSL jurisprudence is clear: "[r]elevant evidence is not 'clearly inadmissible' [but] [b]y virtue of Rule 89(C), it is clearly admissible."[17] Reliability can be proven on the face of the documents, with reference to other evidence, and through evidence relating to how the Prosecution obtained the documents. Contrary to the Defence's assertion otherwise,[18] this may be done at any time prior to the conclusion of the trial.

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[13] Response, para. 9.
[14] See, for example, Rule 89(E) of the ICTY Rules of Procedure and Evidence: "A Chamber may request verification of the authenticity of evidence obtained out of court."
[15] See *Prosecutor v. Taylor*, SCSL-03-01-T-669, "Prosecution Reply to Defence Response to Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone", 17 November 2008, para. 20.
[16] Response, paras. 13-17.
[17] *Prosecutor v. Norman et al.*, SCSL 04-14-T, "Fofana – Appeal against Decision Refusing Bail", 11 March 2005 ("***Fofana* Bail Appeals Decision**"), para. 27.
[18] Response, paras. 14 and 17.

8. Further, at present, the evidence of Mr Alfred Sesay given in the RUF Trial[19] referred to by the Defence in paragraphs 15 and 16 of the Response is not currently evidence in this trial. Notwithstanding this fact, in so far as the Defence attempt to make it so in order to justify exclusion, the Defence interpretation omits important details. The Defence fail to note that hearsay is admissible in this Court, as it is at the *ad hoc* tribunals. In addition, the Defence fail to note that the hearsay referred to is the hearsay of police officers in performance of their official duties related to the seizure and receipt of these documents, not hearsay from uninformed members of the general public with no explanation as to how they came into possession of the documents.[20] Further, the Defence fail to appreciate that the Documents are not fungible items which are not uniquely identifiable, and that Mr Sesay himself identified the documents as being those he received as documents taken from Sankoh's house.[21] Therefore, in this context, the admission of the Sankoh Documents would not bring the administration of justice into disrepute.

Probative value of the documents is not substantially outweighed by their prejudicial effect

9. The bases for exclusion identified by the Defence in paragraph 19 of the Response are those identified and considered in paragraphs 3 to 8 above. As stated above, these arguments are without merit. Further, in relation to the Defence's second ground, it is to be noted that evidence can be challenged by comparison with other evidence adduced during the trial. Furthermore, to take the Defence argument to its logical conclusion would be to invalidate the provisions of Rules 89(C) and 92*bis*, in that there would be no evidence that could be admitted without cross-examination. Such an interpretation is not consistent with the language or intent of those Rules. The Rules and the jurisprudence of the SCSL are clear and favour admission rather than exclusion, as the threshold for exclusion is set high.[22]

Admission under Rule 89(C)

10. As noted in previous submissions, the exclusionary conditions set out in the *Kordić and*

[19] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T ("**RUF Trial**").
[20] RUF Trial Transcript, 29 June 2006, p. 50, lines 6-12 and RUF Exhibit No. 110.
[21] RUF Exhibit No. 110.
[22] *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. 24.

Čerkez case are legally and factually irrelevant to the matter at issue and should not be applied to the admission of the Sankoh Documents.[23] In relation to the application of this ICTY case to the current proceedings, the Prosecution refers the Chamber to its previous submissions subject to the amendment that the Sankoh Documents are not publicly available documents but have been disclosed to the Defence for over two years.[24]

11. In addition to the above fundamental objection to the application of the *Kordić and Čerkez* Decision,[25] the Prosecution observes that the Defence interpretation of and reliance on this decision is further flawed for the following reasons.

12. First, in relation to the first limb of the *Kordić and Čerkez* Decision, the Defence at paragraph 23 of the Response are misinformed as to the effect of the Rule 92*bis* Decision on TF1-036.[26] No material related to this witness has been admitted into evidence under this decision, as admission is contingent on presenting the witness for cross-examination.[27] The Prosecution no longer seeks admission of the documents through this witness. Therefore, it is within its discretion to seek admission using the other mechanisms of evidence presentation available to it under the Rules.

13. Second, the Defence misinterpret the purpose of the second limb of the *Kordić and Čerkez* Decision concerning the belated disclosure and tendering of material already produced in other proceedings.[28] 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 ... and so [had] been available to the Prosecution for some time."[29] Therefore, the Defence arguments in these proceedings which focus on this

[23] Response, paras. 22-27 and Annex A.
[24] See UN Documents Reply, para. 7.
[25] *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**").
[26] *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.
[27] *Ibid*, p. 6 where the Chamber "ORDERS that the prior trial transcripts and related exhibits relating to the testimony of ... TF1-036 ... be admitted provided that the Prosecution shall make ... [TF1-036] ... available for cross-examination".
[28] Response, para. 23.
[29] *Kordić and Čerkez* Decision, para. 25.

point[30] 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.

14. Third, the Defence argument identifying crime base evidence as being not sufficiently significant to warrant admission at this stage is disingenuous in the face of the Defence's recent submissions equating all such evidence given by crime base witnesses to the acts and conduct of the accused, or identifying it as pivotal to the Prosecution case.[31] If the evidence is not sufficiently significant, then the basis on which crime base witnesses were brought to The Hague for cross-examination at the Defence's request is to be questioned. The Defence has made it clear by its actions that it disputes the crime base. However, notwithstanding this fact, absent stipulation, admitted facts or judicial notice, the Prosecution has the burden of proving each element of the crime base beyond reasonable doubt. Assuming, *arguendo*, the evidence is not individually significant, as noted by the Appeal Chamber in the *Fofana* Bail Appeals Decision, the fact that isolated items of evidence have "some relevance means that they must be available for counsel to weave into argument and for the Judge to have before him in deciding what to make of the overall factual matrix."[32]

15. Fourth, the Defence objection regarding the alleged cumulative nature of the evidence[33] is unfounded as the evidence is not unduly cumulative and so does not risk prolonging the trial.

16. Finally, the Defence objections concerning hearsay[34] are without merit as hearsay evidence is admissible before the SCSL.

17. Notwithstanding the foregoing, the *Kordić and Čerkez* case is illustrative of the point raised in paragraph 3 above as it demonstrates the use made of Rule 89 alone at the ICTY

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[30] Response, para. 23.
[31] See for example the following objections: *Prosecutor v. Taylor*, SCSL-01-03-T-589, "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," 12 September 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; and *Prosecutor v. Taylor*, SCSl-01-03-T-598, "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", 17 September 2008.
[32] *Fofana* Bail Appeals Decision, para. 23.
[33] Response, para. 25.
[34] *Ibid*, para. 26.

including its use to admit documentary evidence going to proof of the acts and conduct of the accused.[35] The *Kordić and Čerkez* Decision was concerned in part with the admission of a "War Diary" "said to reflect events in the immediate region from January to May 1993, including orders given by the accused, Dario Kordić".[36] The War Diary was admitted, the Chamber finding that is "under a duty to try to ascertain the truth and to deprive itself of this document would put that duty at risk."[37]

Admission under Rules 89(C) & 92bis

Acts and Conduct of the Accused

18. The Defence argument at paragraph 4 of the Response is flawed for two reasons. First, as noted in paragraph 3 above, the Defence advocate a selective application of the *ad hoc* tribunals' jurisprudence to the SCSL Rules which will result in the admission of evidence at the SCSL being narrower than that at the ICTY and the ICTR.[38] Second, and specific to the Sankoh Documents at issue, none of the Documents include evidence going to proof of the acts and conduct of the Accused (as such phrase is defined and limited by the jurisprudence). The first reference to "Liberians" highlighted by the Defence[39] refers to instructions that a "Liberian delegate" is not to be present. Such evidence relates to the acts and conduct of another (i.e. the person issuing the instructions) and has no bearing on those of the Accused. The second reference to "Liberians" is in actual fact to "Liberia"[40] and the word is used to describe a geographic position and can by no stretch be equated with the acts and conduct of the Accused. Finally, the reference to "President Taylor" concerns the acts and conduct of individuals who are to be picked up by helicopter in order to "join President Taylor", the term "President Taylor" being used in this context in a passive manner. Therefore, there is no evidence going to proof of the acts and conduct of the Accused in the Sankoh Documents.

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[35] In relation to the similar use made of Rule 89 at the ICTR see *Prosecutor v. Kalimanzira* ICTR-05-88-T, "Decision on Prosecution Motion for Admission of Certain Materials", 10 July 2008. As noted at paragraph 1 of this decision all the materials which were admitted either originated from the accused or were official documents involving the accused and/or relating to events set out in the Indictment.
[36] *Kordić and Čerkez* Decision, para. 26.
[37] *Ibid*, para. 44.
[38] The approach would result in the SCSL being denied access to items of evidence such as the War Diary (see the *Kordić and Čerkez* Decision) and the evidence available to the ICTR noted at footnote 35.
[39] Motion, Annex B, Tab 2, p. 21986.
[40] Motion, Annex B, Tab 2, p. 22014.

19. The Defence attempt to make the location of evidence seizure affect the evidence seized by bringing it within the Rule 92*bis* exclusion[41] is without merit and unsupported by any jurisprudence or practice.

Evidence going to a critical element of the Prosecution case

20. Finally, the Defence arguments at paragraphs 5 to 7 of the Response should be dismissed as being overly broad. In this regard, 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.[42]

21. On this basis, it is clear that the Documents are not central themselves to determining the liability of the Accused for the crimes set out in the Second Amended Indictment.

22. The Prosecution also notes in paragraph 6 of the Response the Defence reliance on dicta from the Kenema Decision which is itself based on jurisprudence from the ICTY.[43] However, as noted above, evidence which might be considered pivotal or proximate to the Accused and which is not contained in a witness statement or transcript is admitted at the ICTY under a different Rule.

III. CONCLUSION

23. For the reasons set out in the Motion and above, the Prosecution requests that the Trial Chamber admit into evidence the Sankoh Documents identified in **Annex A** and provided

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[41] Response, para. 4

[42] *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.

[43] This decision cites to *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), 7 June 2002.

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 UN Documents Motion[44]).

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

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

Brenda J. Hollis
Principal Trial Attorney

[44] *Prosecutor v. Taylor*, SCSL-01-03-T-650, "Public Prosecution Motion for Admission of Documents of the United Nations & United Nations Bodies", 29 October 2008 ("**UN Documents Motion**").

LIST OF AUTHORITIES

SCSL Cases

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

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-589, "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," 12 September 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

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Prosecutor v. Taylor, SCSL-03-01-T-669, "Prosecution Reply to Defence Response to Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone", 17 November 2008

Prosecutor v. Taylor, SCSL-03-01-T-670, "Public Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies", 17 November 2008.

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

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***Prosecutor v. Brima et al.* – Case No. SCSL-04-16**

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

ICTY Cases

Prosecutor v. Kordić and Čerkez, IT-95-14/2, "Decision on Prosecutor's Submissions concerning "Zagreb Exhibits" and Presidential Transcripts", 1 December 2000
http://www.un.org/icty/kordic/trialc/decision-e/01211AE514285.htm

Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), 7 June 2002
(Copy provided in previous filing - see Prosecutor v. Taylor, SCSL-03-01-T-510, "Public Prosecution Motion for Admission of Document Pursuant to Rule 89(C)", 19 May 2008)

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