696) SCSL-03-01-T (23539-23548) 23539

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:	12 December 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 NEWSPAPER ARTICLES OBTAINED FROM THE CATHOLIC JUSTICE AND PEACE COMMISSION ARCHIVE IN MONROVIA, LIBERIA

Office of the Prosecutor:
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I. INTRODUCTION

1. The Prosecution files this Reply to the "Public Defence Response to Prosecution Motion for Admission of Newspaper Articles obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia."[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. As stated in previous similar replies, the ultimate 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 – Rules 89 and 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

General

4. Contrary to the Defence's assertions otherwise,[5] the Prosecution is aware that Rule 89(C) is a discretionary provision. However, the jurisprudence of this Court clearly establishes

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-687, "Public Defence Response to Prosecution Motion for Admission of Newspaper Articles obtained from the Catholic Justice and Peace Commission Archive in Monrovia, Liberia ," 8 December 2008 ("**Response**").
[2] Response, para. 6.
[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 92*quater* are not relevant and so are not discussed.
[5] Response, para. 7.

that: "[r]elevant evidence is not 'clearly inadmissible' [but] [b]y virtue of Rule 89(C), it is clearly admissible."[6] The Appeals Chamber has offered guidance on the standards to be applied regarding the admissibility of evidence emphasising the ability of professional judges to critically assess and accord weight to otherwise relevant evidence.[7] Therefore, when considering what discretionary issues a Chamber might wish to consider when assessing media information, it is also necessary to understand that it is publicly available information and that it is not only the content of the document which is relevant but the fact that such reports highlight that it was a matter of general knowledge and awareness that crimes were occurring in Sierra Leone.

Legibility & completeness of Documents

5. Paragraph 28 and the Annex to the Response erroneously identify certain documents as being either incomplete or illegible. The Prosecution advises as follows: Document 1 is complete, the second page being provided at CMS page 22503 – following filing of the motion the Prosecution also provided an electronic copy of this article to all parties (including Chambers) by email in order to deal with any issue of legibility; Documents 2, 3, 4 are complete with the relevant substance of the articles discernable; Document 5 is complete, page 6 of the article being provided on CMS page 22523 and the redacted sections relating to parts which the Prosecution does not seek to have admitted[8]. Further, the Prosecution highlights that copies of all the articles which are the subject of the filing have been disclosed to the Defence prior to the filing. Therefore, these are not new documents.

Relevance

6. The Defence argument that information which falls outside the temporal scope of the Indictment should not be admitted should be dismissed.[9] 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

[6] *Prosecutor v. Norman et al.*, SCSL 04-14-T, "Fofana – Appeal against Decision Refusing Bail", 11 March 2005 ("***Fofana* Bail Appeals Decision**"), para. 27.
[7] *Ibid*, para. 26.
[8] Although, the Prosecution highlights that a complete copy of the article is provided for completeness as part of the filing in order that the Parties have the full article, notwithstanding the fact that admission is only sought of part.
[9] Response, para. 9.

evidence. Further, Rule 93 permits evidence of a consistent pattern of conduct relevant to the charges in the Second Amended Indictment[10] provided such evidence is disclosed to the Defence. This Rule is also silent as to any jurisdictional limitations.

7. 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."[11] 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.[12] 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".[13]

The Articles do not contain opinion evidence

8. Contrary to the Defence arguments otherwise,[14] the articles do not contain opinion evidence. Indeed, it is noteworthy that despite this general observation no specific instance of opinion is identified in the Response. Rather, the submissions contained in the Annex to the Response related to this argument actually concern the fact that the source of the information is not identified. However, as repeatedly stressed in Prosecution filings, the SCSL's Rules are broad and there is no exclusion of hearsay evidence. Further, in so far as there is any dispute as to the facts which the articles report, the information can be challenged by comparison with other evidence adduced during the trial, including during the Defence phase.

9. Finally, the Prosecution notes the inherent contradiction between the Defence argument regarding opinion and hearsay with the argument regarding the fact that the evidence is cumulative. By the Defence's own admission, the information which the Prosecution

[10] *Prosecutor v. Taylor*, SCSL-03-01-T-263, "Prosecution's Second Amended Indictment", 29 May 2007.
[11] *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.*
[12] *Ibid.*
[13] *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.
[14] Response, paras. 10 - 11.

seeks to admit has been confirmed from other separate sources. The result of this is to minimize the very prejudice the Defence allege is manifest in such articles.

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

10. The Defence's arguments that the newspaper articles are "sensationalized", "half baked" and "highly prejudicial" are negated by their own argument that the information therein is cumulative and so confirmed by other sources.[15] Therefore, the Defence arguments that the probative value of the articles are outweighed by their prejudicial effect should be dismissed. It is important to note that the relevance and significance of the source in the instant case is that evidence currently on the court record was not only known by such sources in the case of witnesses but was also included in public media reports available in Liberia.

Admission under Rule 89(C)

11. As repeatedly noted in previous submissions, the exclusionary conditions set out in the *Kordić* and *Čerkez* case are legally and factually irrelevant to the matters at issue and should not be applied to the admission of the JPC Documents.[16] In relation to the application of this ICTY case to the current proceedings, the Prosecution refers the Chamber to its previous submissions.[17]

12. Further, the Defence's reliance on the *Milutinović* Decision[18] to justify application of the *Kordić* and *Čerkez* conditions,[19] is flawed. In this Decision one similar condition was applied and this was applied in order to exclude admission of several maps because of their cumulative nature.[20] These maps, however, were not simply cumulative but in fact nearly identical to, and in some cases less detailed than, previously admitted maps thus the maps were excluded as a matter of efficiency and economy.[21] The *Milutinović* Decision, therefore, does not establish that the conditions applied in the *Kordić* and

[15] See arguments at Response, paras. 18-20 and Annex.
[16] Response, paras. 22 - 28 and the Annex to the Response.
[17] See UN Documents Reply, para. 7.
[18] *Prosecutor v. Milutinovic et al.*, No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 (**"*Milutinović* Decision"**).
[19] Response, para 23.
[20] Response, para. 22.
[21] *Milutinović* Decision, paras. 23-24.

Čerkez Decision[22] should be applied in the instant case.

13. Related to the foregoing erroneous application by the Defence of the *Kordić* and *Čerkez* Decision to the current request, is the Defence's erroneous interpretation of this decision.[23] In this regard, the Prosecution has made submissions on this erroneous interpretation in a previous filing and so refers the Chamber to these previous submissions.[24] In addition, in response to the argument regarding the cumulative nature of the evidence,[25] exclusion of evidence is only considered where it is **unduly** cumulative and so risks prolonging the trial.[26] This is not a relevant consideration in this instance.

Admission under Rules 89(C) & 92bis

Indicia of reliability

14. In paragraph 12 of the Response, the Defence note Trial Chamber I's statement that "newspaper articles generally are not considered a reliable source of evidence and are often excluded for lack of probative value." However, the Prosecution notes that Rule 89 and Rule 92*bis* clearly stipulate the conditions for admissibility and, therefore, "... it is neither necessary nor desirable to add to [these provisions] a condition of admissibility [such as probativity] which is not expressly prescribed by [those] provision[s]."[27]

15. The Defence argument regarding the unreliability of media reports set out in paragraph 13 of the Response is again negated by their argument that the evidence is cumulative and so corroborated by different sources and the Prosecution refers to its submissions above on this point.

16. The Defence arguments at paragraphs 14 and 15 of the Response that a witness is required to speak to the contents and relevance of the newspaper articles is without merit for the following reasons. First, the Prosecution has identified the relevance of the

[22] *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**").
[23] Response, paras. 24 – 27.
[24] 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 regarding: (i) the purpose of the part of the *Kordić and Čerkez* Decision concerning the belated disclosure and tendering of material already produced in other proceedings (para. 19); (ii) the timing of seeking admission of documentary evidence (para. 20); the admissibility of hearsay evidence (para. 21). See also
[25] Response, para. 26.
[26] See *Prosecutor v. Blagojević and Jokic*, IT-02-60-T, "First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*", 12 June 2003, para. 20.
[27] *Prosecutor v. Delalić et al.*, IT-96-21-T, "Decision on the Motion of the Prosecutor for the Admissibility of Evidence", 19 January 1998, para. 20.

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.

Acts and conduct of the Accused

17. The Defence objection regarding "acts and conduct of the accused"[28] is based on an overly broad interpretation of this phrase. None of the documents contains such information as the phrase is defined and limited by the jurisprudence. The acts, conduct and opinion of others, notwithstanding the fact that it might concern or relate to the Accused, cannot be equated with the actual acts and conduct of the Accused.

Evidence going to a critical element of the Prosecution case

18. Finally, the Defence arguments at paragraph 17 of the Response should be dismissed as also being overly broad.

19. The "significance" of the evidence is overstated by the Defence. While it is important, it is not in and of itself critical. In this regard, the ICTR Appeals Chamber's dicta in *Karemera* regarding the type of facts which might properly be the subject of judicial notice 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."[29]

[28] Response, para. 16.
[29] *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", App. Ch., 16 June 2006, para. 50.

20. 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.

21. Should, *arguendo*, the Chamber decide that: (i) the Taylor Documents do contain evidence which goes to proof of the acts and conduct of the accused (as defined and limited by the jurisprudence) or evidence which goes to a critical element of the Prosecution case and is therefore proximate to the Accused; and (ii) such evidence may not be admitted, then such information may be redacted from the documents.[30]

III. CONCLUSION

22. For the reasons set out in the Motion and above, the Prosecution requests that the Trial Chamber admit into evidence the JPC Documents 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 UN Documents Motion[31]).

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

Filed in The Hague,
12 December 2008
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[30] This procedure conforms to the procedure adopted at the ICTR. At the ICTR statements tendered pursuant to Rule 92*bis* are reviewed. Where a statement is tendered that includes information that falls within Rule 92*bis* and information that falls outside the Rule, the statement is admitted but the paragraphs or information that fall outside the Rule are simply not admitted into evidence. See for example *Prosecutor v. Bagosora et al,* ICTR-98-41-T, "Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92bis," 9 March 2004. This procedure has now been adopted at the SCSL – see *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1049, "Decision on Defence Application for the Admission of the Witness Statement of DIS-192 under Rule 92*bis* or, in the alternative, under Rule 92*ter*", 12 March 2008.

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

LIST OF AUTHORITIES

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

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Prosecutor v. Taylor, SCSL-03-01-T-650, "Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies," 29 October 2008

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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

ICTR Cases

Prosecutor v Simba, ICTR-01-76-AR72.2 "Decision on Interlocutory Appeal Regarding Temporal Jurisdiction", 29 July 2004 http://69.94.11.53/ENGLISH/cases/Simba/decisions/290704.htm

Prosecutor v Ngeze et al, ICTR-99-52, Separate Opinion of Judge Shahabudeen, 5 September 2000 http://trim.unictr.org/webdrawer/rec/59312/view/NAHIMANA%20-%20NGEZE%20-%20SEPARATE%20OPINION%20OF%20JUDGE%20SHAHABUDDEEN.pdf

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