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SCSL-03-01-T
(18298-18303)

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SPECIAL COURT FOR SIERRA LEONE

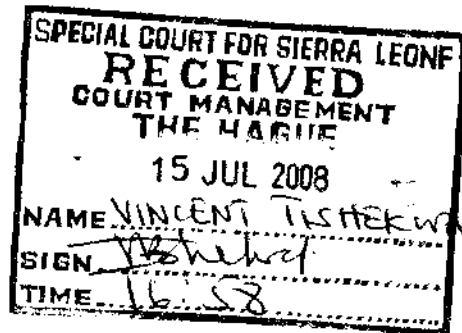
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 15 July 2008



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PROSECUTION NOTICE UNDER RULE 92BIS
FOR THE ADMISSION OF EVIDENCE RELATED TO *INTER ALIA* KENEMA DISTRICT
AND
ON PROSECUTION NOTICE UNDER RULE 92BIS
FOR THE ADMISSION OF THE PRIOR TESTIMONY OF TF1-036 INTO EVIDENCE

Office of the Prosecutor:

Brenda J. Hollis
Leigh Lawrie

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

SEISED of the “Public with Confidential Annexes Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *inter alia* Kenema District”, filed on 29 February 2008 (“First Notice”),¹ wherein the Prosecution gives notice under Rule 92bis of its intention to seek admission into evidence of the prior trial transcripts and related exhibits which relate to the testimony of TF1-060, TF1-062, TF1-122 and TF1-125 in other proceedings before the Special Court of Sierra Leone (“SCSL”),²

RECALLING the extension of time granted to the Defence to file a Response by 4 April 2008;³

NOTING the “Public, with Confidential Annex Defence Objection to Prosecution Notice under Rule 92bis for the Admission [of] Evidence Related to *inter alia* Kenema District”, filed on 4 April 2008 (“Objection to First Notice”),⁴ wherein the Defence objects to the admission of such evidence on the grounds that: (i) some of the information is not relevant as it falls outside the Indictment period; (ii) some of the information is “linkage” in nature and/or goes to proof of the acts and conduct of the Accused; (iii) therefore the Prosecution should have applied under Rule 92ter which, with the consent of the parties, would allow for the admission of written statements that go to the acts and conduct of the Accused and would also ensure that the witness is present for cross-examination;⁵ and that alternatively, the Defence requests that, if the Trial Chamber admits the prior transcripts and related exhibits under Rule 92bis, it exercises its discretion to order the witnesses concerned to appear for cross-examination;⁶ further, the Defence applies for the closed session protective measures orally granted to witnesses TF1-060 and TF1-125 in the RUF Trial to be rescinded “because there is no indication that they are still necessary”;⁷

NOTING the Confidential Prosecution Reply to “Defence Objection to Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *inter alia* Kenema District”, filed on 14 April 2008 (“First Reply”);⁸

SEISED FURTHER of the “Public with Confidential Annexes A & B Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence”, filed on 14 March 2008 (“Second Notice”),⁹ wherein the Prosecution gives notice under Rule 92bis of its intention to seek admission into evidence of the prior trial transcripts and related exhibits of witness TF1-036’s testimony in the trial of *Prosecution v. Sesay, Kallon and Gbao* (“RUF Trial”)¹⁰ before the Special Court of Sierra Leone;

NOTING the “Public, with Confidential Annex A Defence Objection to Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence”, filed on 31 March

¹ SCSL03-01-T-429 (“First Notice”).

² TF1-060, TF1-122 and TF1-125 all testified in *Prosecutor v. Sesay et al.* (“RUF Trial”), TF1-062 and TF1-122 testified in *Prosecutor v. Brima et al.* (SCSL04-16-T) (“AFRC Trial”).

³ Transcript 6 March 2008, pp. 5385-5389.

⁴ SCSL03-01-T-456 (“Objection to First Notice”).

⁵ Objection to First Notice, para 5.

⁶ Objection to First Notice, para 6.

⁷ Objection to First Notice, para 7.

⁸ SCSL03-01-T-467 (“First Reply”).

⁹ SCSL03-01-T-438 (“Second Notice”).

¹⁰ SCSL04-15-T (“RUF Trial”).

2008 ("Objection to Second Notice"),¹¹ wherein the Defence objects to the admission of the prior testimony of witness TF1-036 without the opportunity to cross-examine, submitting that some passages of the written statement go to proof of the acts and conduct of the accused, which would disqualify the statement under Rule 92bis;¹² further, the Defence applies for the closed session protective measures orally granted to Witness TF1-036 in the RUF Trial to be rescinded "on the basis that there is no indication that they are still necessary";¹³

NOTING the "Confidential Prosecution Reply to "Defence Objection to Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence", filed on 7 April 2008 ("Second Reply");¹⁴

NOTING that the Prosecution gives notice under Rule 92bis of its intention to seek admission of the prior trial transcripts and related exhibits of Prosecution Witnesses, TF1-060, TF1-062, TF1-122, TF1-125¹⁵ and TF1-036¹⁶ relating to testimony given in other proceedings before the Special Court for Sierra Leone¹⁷ and that the Prosecution seeks to admit parts only of the prior testimonies into evidence so as to exclude those parts which concern: (i) legal argument; (ii) trial administrative matters; and (iii) evidence of the acts and conduct of the Accused;¹⁸

MINDFUL of the provisions of Rule 92bis of the Rules of Procedure and Evidence ("Rules") which state

Rule 92bis: Alternative Proof of Facts (amended 14 March 2004 and amended 14 May 2007)

- (A) In addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
- (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
- (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

MINDFUL FURTHER of the provisions of Rule 92ter of the Rules which state

Rule 92ter: Other Admission of Written Statements and Transcripts (adopted 24 November 2006)

With the agreement of the parties, a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

¹¹ SCSL-03-01-T-449 ("Objection to Second Notice").

¹² Objection to Second Notice, paras 4, 5.

¹³ Objection to Second Notice, para 6.

¹⁴ SCSL-03-01-T-458 ("Second Reply").

¹⁵ First Notice, para. 2.

¹⁶ Second Notice, para. 2.

¹⁷ TF1-060 (29 April 2005), TF1-122(7, 8 July 2005) and TF1-125 (12, 13 and 16 May 2005) all testified in the RUF Trial, and TF1-062 (27 June 2005) and TF1-122 (24 June 2005) testified in the AFRC Trial; TF1-036 testified in the RUF Trial on 27, 28, 29 July and 1, 3 August 2005.

¹⁸ First Notice, para. 22; Second Notice, para. 17.

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges;
and
- (iii) the witness attests that the written statement or transcript accurately reflects that the witness' declaration and what the witness would say if examined.

CONSIDERING that the effect of Rule 92bis is to permit the reception of information, - assertions of fact (but not opinion) including, but not limited to, written statements and transcripts that do not go to proof of the acts and conduct of the accused - if such facts are relevant and their reliability is "susceptible of confirmation"; proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course;¹⁹

NOTING that there must be a distinction made between "the acts and conduct of those others who commit the crimes for which the Indictment alleges that the accused is individually responsible" and "the acts and conduct of the accused as charged in the Indictment which establish his responsibility for the acts and conduct of others;"²⁰ and that only written statements which go to proof of the latter are excluded by Rule 92bis;²¹

NOTING that where evidence is "so pivotal to the Prosecution's case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form";²²

CONSIDERING that Rule 92bis does not provide explicitly for cross-examination, but that it is within the inherent power of this Chamber under Rules 26bis and 54 to order cross-examination and that information "going to a critical element of the Prosecution's case" is proximate enough to the Accused so as to require cross-examination.²³

NOTING that the jurisprudence supports the view that where subordinates who are close in proximity to the Accused are referred to in the transcripts, two options are available: the transcripts may be declared inadmissible or, in the alternative, the transcripts may be admitted provided that an opportunity to cross-examine is granted;²⁴

¹⁹ *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-AR73, Fofana - Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005, para. 26.

²⁰ *Prosecutor v. Galic*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", 7 June 2002, para. 9. See also *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 92bis or, in the alternative, Under Rule 92ter", 12 March 2008, p. 2-3.

²¹ *Galic, id.*, para. 9.

²² *Galic, id.*, para. 13. Also see *Prosecutor v. Brdanin & Talic*, IT-99-36-T, "Confidential Decision on the Admission of Rule 92bis Statements", 1 May 2002, at para. 14.

²³ *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 92bis or, in the alternative, Under Rule 92ter", 12 March 2008, p. 3; see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Notice Under Rule 92bis and 89 to Admit the Statement of TF1-150, 20 July 2006, para. 30; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92, 9 March 2004, para. 13; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Request to Have a Written Statement Admitted Under Rule 92bis, 21 March 2002, paras.24-25; *Prosecutor v. Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 13.

²⁴ *Galic, id.*, para. 15, Reply, para. 6.

HAVING conducted a careful examination of the transcripts of the testimony of TF1-036, TF1-060, TF1-062, TF1-122 and TF1-125 and the exhibits²⁵ admitted during their testimony in the RUF and/or AFRC trials;

SATISFIED that the information the Prosecution is seeking to tender in lieu of the oral testimony of TF1-036, TF1-060, TF1-062, TF1-122 and TF1-125 does not go to proof of the acts and conduct of the Accused, is relevant to the purpose for which it is submitted and that its reliability is susceptible of confirmation;

SATISFIED ALSO, that the agreement of the parties is a condition precedent for the admission of evidence under Rule 92^{ter}²⁶ and that since no such agreement has been reached in the present case, both Notices are properly filed pursuant to Rule 92^{bis};

SATISFIED FURTHER that the nature of the information contained in the transcripts sought to be tendered in evidence by the Prosecution is sufficiently proximate to the Accused that its admission in the absence of an opportunity to cross-examine the makers of the statements would unfairly prejudice the Accused and that it is therefore in the interests of justice to afford the Accused such an opportunity;

RECALLING that Witnesses TF1-036,²⁷ TF1-060,²⁸ and TF1-125²⁹ were each previously granted the protective measure of testifying in closed session in the RUF Trial;

NOTING that the Appeals Chamber has held that

Where a party wishes to rescind protective measures previously granted to a witness, it should present supporting evidence capable of establishing on a preponderance of probabilities, that the witness is no longer in need of such protection. The Trial Chamber must thus be satisfied that there is a change in the security situation facing the witness such as a diminution in the threat level faced by the witness that justifies a variation of protective measures orders.³⁰

FINDING with respect to the Defence applications³¹ to rescind the closed session protective measures previously granted to Witnesses TF1-036, TF1-060 and TF1-125, that the Defence has not established on a balance of probabilities that each of the said witnesses is no longer in need of such protection;

²⁵ Set out in Annexes B and C of First Notice and Annexes B and C of Second Notice.

²⁶ *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92^{ter}, 25 January 2008, page 3.

²⁷ Oral Decision of Trial Chamber 1 in the *Prosecutor v. Sesay et al.*, transcript of 25 July 2005, page 4, line 18 - page 6, line 11.

²⁸ Oral Decision of Trial Chamber 1 in the *Prosecutor v. Sesay et al.*, transcript of 29 April 2005, page 61, lines 1 - 18.

²⁹ Oral Decision of Trial Chamber 1 in the *Prosecutor v. Sesay et al.*, transcript of 16 May 2005, page 35, line 20 - page 43, line 10.

³⁰ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 23 May 2008, para 37.

³¹ Objection to Second Notice, paras 18 - 27, 29 and Objection to First Notice, paras 20 - 29, 31.

FOR THE ABOVE REASONS

PURSUANT TO Rules 26bis, 54, 75, 89(C), and 92bis of the Rules of Procedure and Evidence;

GRANTS the Prosecution applications in the First Notice and Second Notice; and


ORDERS that

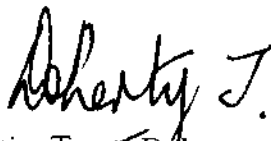
the prior trial transcripts and related exhibits relating to the testimony of Witnesses TF1-036, TF1-060, TF1-062, TF1-122 and TF1-125 shall be admitted into evidence pursuant to Rule 92bis provided that the Prosecution shall make the said Witnesses available for cross-examination by the Defence;

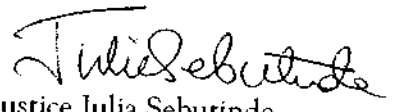
AND

DISMISSES the Defence application for rescission of protective measures in respect of witnesses TF1-036, TF1-060 and TF1-125.

Done at The Hague, The Netherlands, this 15th day of July 2008.


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

