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SCSL-03-01
(24052-24063)

24052



SPECIAL COURT FOR SIERRA LEONE

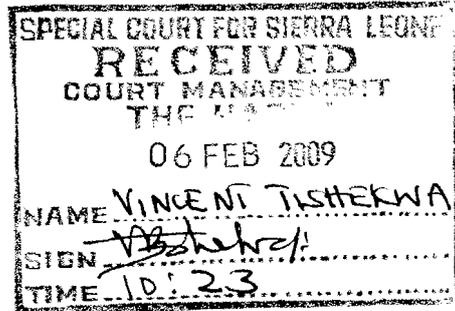
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL03-1-T

Date: 5 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES C TO E PROSECUTION MOTION FOR
ADMISSION OF THE PRIOR TRIAL TRANSCRIPTS OF WITNESSES TF1-021 AND TF1-083
PURSUANT TO RULE 92QUATER

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 C to E Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92*quater*”, filed on 1 September 2008 (“Motion”);¹

NOTING 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*””, filed on 11 September 2008 (“Response”);²

NOTING the “Prosecution Reply to “Defence Response to ‘Prosecution Motion for Admission of the Prior Trial Transcripts of Witness TF1-021 and TF1-083 Pursuant to Rule 92*quater*’””, filed on 17 September 2008 (“Reply”);³

MINDFUL of Article of 17(4) of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 73, 89, 92*bis*, 92*quater* and 95 of the Rules of Procedure and Evidence (“Rules”);

DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A).

I. SUBMISSIONS

Motion

1. Pursuant to Rules 89(C) and 92*quater*, the Prosecution seeks the admission of the prior transcripts and exhibits relating to the *viva voce* evidence of the now deceased Witnesses, TF1-021 and TF1-083, previously received in *Prosecutor v. Brima et al*⁴ and *Prosecutor v. Sesay et al*.⁵ The Prosecution submits that this is the first occasion on which recourse has been made to Rule 92*quater* at the Special Court and that the jurisprudence of the ICTY may be of guidance since the equivalent rule at the ICTY is in the same terms. The Prosecution submits that in order for evidence to be admitted pursuant to Rule 92*quater*, two cumulative conditions must be satisfied, namely, the unavailability of a person whose written statement or transcript is sought to be admitted and the reliability of the evidence therein.⁶ Indicia of reliability include the facts that the written statement or testimony of a witness was made under oath, that the witness was cross-examined in previous proceedings or that his/her evidence is corroborated by other evidence adduced at trial.⁷ The Prosecution submits further that the evidence admitted under Rule 92*quater* must be relevant to the current proceedings as required by Rule 89(C).⁸

¹ SCSL03-01-T-572.

² SCSL03-01-T-587.

³ SCSL03-01-T-596.

⁴ SCSL04-16-T (“AFRC Trial”); Motion, para. 2.

⁵ SCSL05-15-T (“RUF Trial”); Motion, para. 2.

⁶ Motion, para. 7.

⁷ Motion, para. 7, citing *Prosecutor v. Prlic et al*, IT-04-74-T (Trial Chamber), “Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92*bis* and *quater* of the Rules”, 27 October 2006, para. 10; and *Prosecutor v. Prlic et al*, 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, para.11.

⁸ Motion, paras 6, 12-14.

2. The Prosecution provides the background that Witness TF1-021, a protected witness, testified in the RUF Trial on 15 July 2004 and in the ARFC Trial on 15 April 2005 and was cross-examined on both occasions. The witness's prior trial transcripts are contained in Annex A to the Motion. In addition, two exhibits tendered through this witness during the AFRC trial, namely D-5A and D-5B, are contained in confidential Annex D to the Motion. The un-redacted prior transcripts and exhibits of this witness were disclosed to the Defence on 18 July 2008.⁹ Witness TF1-083, a protected witness, testified in the AFRC trial on 8 April 2005 and was cross-examined on that occasion. The un-redacted prior transcripts of this witness were disclosed to the Defence on 18 July 2008 and are contained in Annexes B and C to the Motion.¹⁰

3. With regard to Rule 89(C) the Prosecution submits that the evidence of both witnesses is relevant to the current proceedings, since Witness TF1-021 gave evidence concerning, *inter alia*, mass killings in Kissy and the burning of civilian houses during the Freetown invasion of January 1999¹¹ and Witness TF1-083 testified, *inter alia*, to crimes committed in Freetown during the indictment period, including the burning of civilian property, unlawful killings, sexual and physical violence and looting.¹² In addition, the evidence of both witnesses is relevant to the chapeau requirements of the crimes charged in the Second Amended Indictment.¹³

4. With respect to the first condition, the Prosecution states that Witnesses TF1-021 and TF1-083 are "unavailable" as they are both now deceased and exhibits their respective death certificates.¹⁴

5. With regard to the reliability of the evidence, the Prosecution states that the respective testimonies were (a) given under oath and in open session, albeit that the witnesses testified subject to protective measures, (b) subject to cross-examination¹⁵ and (c) are corroborated by other evidence adduced at this trial.¹⁶

6. The Prosecution points out that Rule 92*quater* does not preclude the admission of witness statements or transcripts which go to proof of the acts and conduct of the Accused, but that this may be a factor against the admission of such evidence or part of it.¹⁷ However, the Prosecution submits that in the present case this factor need not be considered as the transcripts of Witnesses TF1-021 and TF1-083 do not include evidence which goes to proof of the acts and conduct of the Accused.¹⁸

Response

7. The Defence contends that the Motion should be denied as the said testimony and related exhibits of Witnesses TF1-021 and TF1-083 fail to meet the threshold for admissibility pursuant to Rules 89(C) and 92*quater* in that:

- (i) the Prosecution has failed to establish that the said evidence is relevant;

⁹ Motion, para. 10.

¹⁰ Motion para. 11.

¹¹ Motion para. 12.

¹² Motion para. 13.

¹³ Motion, para. 14.

¹⁴ Motion, para. 15; Annex E.

¹⁵ Motion, para. 16.

¹⁶ Motion para. 17.

¹⁷ Motion, paras 8 and 19.

¹⁸ Motion para. 19.

- (ii) the *viva voce* testimony of the Witnesses does not bear sufficient *indicia* of reliability;
- (iii) the prejudicial effect of the evidence outweighs its probative value; and,
- (iv) the evidence will prejudice the rights of the Accused.¹⁹

8. On relevance of the proposed evidence, the Defence agrees with the Prosecution's articulation of the applicable legal standard on the admission of evidence under Rule 89 but emphasises that Rule 89(C) is also subject to Rule 95, in terms of which relevant evidence can be excluded if its admission would bring the administration of justice into serious disrepute, and argues that the Motion must fail if the Trial Chamber takes this into account.²⁰ The Defence contends that there are a number of specific points in each of the witnesses' evidence where relevance to the Indictment has not been established. In particular, the evidence of Witness TF1-083 is not *prima facie* relevant as it does not establish who the individuals committing the alleged crimes were.²¹

9. On reliability of the proposed evidence, the Defence accepts that guidance in the interpretation of Rule 92*quater* may be sought from the ICTY which has an equivalent provision, but submits that "this court is not limited to interpreting and applying Rule 92*quater* in the same manner".²² Also, the Defence agrees with the list of *indicia* of reliability that has evolved from the jurisprudence of the ICTY cited by the Prosecution, but submits that such list is not exhaustive.²³ The Defence notes the following additional *indicia*, namely, whether the statement or transcript was made through many levels of translation; whether the statement was signed and there was an accompanying acknowledgement that the statement was true to the witness's best recollection; and the absence of manifest or obvious inconsistencies.²⁴

10. The Defence submits that the Prosecution fails to establish reliability of the proposed evidence in that-

- (a) the issues dealt with in the AFRC and RUF trials are entirely different from the issues in this trial and as such, any cross-examination of the said witnesses in those trials would not have taken into account the lines of inquiry that are highly relevant and significant to the Defence in this trial;²⁵
- (b) the evidence of Witness TF1-021 was not at all tested in cross-examination in the RUF trial;²⁶
- (c) in cross-examining Witness TF1-083, Defence Counsel in the RUF trial did not fully explore the witness' apparent lack of comprehension of the Krio Language in which the witness was interviewed and his statement read back to him, nor was it ascertained if the witness

¹⁹ Response, para. 3.

²⁰ Motion, paras 4 & 8.

²¹ Reponse, paras 8-9.

²² Response, para. 5.

²³ Response, para 5.

²⁴ Citing *Prosecutor v. Milutinovic et al*, IT-05-87-T "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*", 16 February 2007, para. 7 and *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, 21 July 2000, para. 27.

²⁵ Response, paras 10, 12,14.

²⁶ Response, para.12 citing *Prosecutor v. Sesay et al*, Transcript, 15 July 2004, p.18732.

understood the language that was being used during that trial, resulting in a possible communication breakdown;²⁷

- (d) the evidence of each of the said witnesses is neither corroborated by the evidence of the other²⁸ nor by that of other witnesses in the current trial. On the contrary, what the Prosecution seeks to do is to use the proposed evidence to corroborate the “linkage evidence” of witnesses in the present trial;²⁹ and
- (e) the inconsistencies between the prior written statements of Witnesses TF1-021 and TF1-083 and their respective testimonies further cast doubt on the reliability of the proposed evidence and should be taken into account in excluding it;³⁰

11. The Defence invites the Trial Chamber to exclude the proposed evidence and further submits that the admission of the proposed evidence will prejudice the rights of the Accused in that-

- (a) the proposed evidence whilst *prima facie* crime-based, “eventually goes to proof of the acts and conduct of the Accused”, to the extent that the Prosecution seeks to use it to “establish *mens rea*- knowledge that his conduct fell into a pattern of widespread and systematic attacks”;³¹
- (b) Rule 92*quater* was adopted four years after the Accused was indicted, so that the application of the Rule to the Accused would therefore be retroactive thereby denying the Defence “the opportunity to modify and cross-examine” Prosecution witnesses who have already testified in order to compare their evidence with the proposed Rule 92*quater* evidence;³² and
- (c) the probative value of the proposed evidence is outweighed by its prejudicial effect on the Defence.³³

Reply

12. The Prosecution agrees with the Defence that the Chamber must weigh the *indicia* of reliability and the relevance of the evidence in determining its admission under Rule 92*quater* but submits that it is incorrect that the Chamber must weigh the probative value. All *indicia* are to be considered and an incomplete or ineffective prior cross-examination “goes to the weight to be attributed to the evidence rather than admissibility”.³⁴

13. The Prosecution reiterates its argument that the prior testimony of the two Witnesses is both relevant and reliable. It argues that corroboration is not a Rule 92*quater* requirement; it is simply a factor the court may consider in determining reliability.³⁵ It submits that corroborative evidence is not limited to that adduced at the instant trial nor is there any reason that these two testimonies cannot

²⁷ Response, para. 13.

²⁸ Response, paras 15-16.

²⁹ Response, paras 17-19.

³⁰ Response paras 21-23.

³¹ Response, para. 24.

³² Response, para. 25.

³³ Response, paras 4, 26.

³⁴ Reply, paras 2-3.

³⁵ Reply, para 4.

corroborate one another,³⁶ that the discrepancies in the prior statements and testimonies of Witnesses TF1-021 and TF1-083 are minor, and that the evidence of TF1-334 and TF1-021 and TF1-083 are easily reconciled.³⁷ The Prosecution submits that the Defence fails to show how the Accused will be unfairly prejudiced as he is not mentioned in the testimonies.³⁸ The Prosecution concludes that the probative value of admitting evidence would outweigh any prejudice to the Accused.³⁹

III. APPLICABLE LAW

14. Rule 89 provides:

General Provisions

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence.

15. Rule 92*quater* provides:

Unavailable Persons

- (A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92*bis*, if the Trial Chamber:
 - i. is satisfied of the person's unavailability as set out above; and
 - ii. finds from the circumstances in which the statement was made and recorded that it is reliable.
- (B) If the evidence goes to proof of acts and conduct of an Accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

16. Rule 95 provides:

Exclusion of Evidence

No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute.

³⁶ Reply, para. 12.

³⁷ Reply, para. 17.

³⁸ Reply, paras 22-25.

³⁹ Reply, para 25.

III. DELIBERATIONS

17. As noted by the parties the provisions of Rule 92~~quater~~ have not been previously considered by the Special Court. That Rule is subject to the provisions of Rule 89 and Rule 95. The Trial Chamber notes that Rule 92~~quater~~ requires that two cumulative conditions be satisfied, namely the unavailability of the author of the transcript of evidence and the reliability of the evidence contained therein.⁴⁰ In considering whether the evidence contained in the transcripts is reliable the Trial Chamber will consider the following *indicia* of reliability, namely, (i) the fact that the statement was made under oath, (ii) that it was subject to cross-examination and (iii) that it has been corroborated by other evidence.⁴¹ The Trial Chamber agrees that,

“the various factors of reliability will be considered collectively when determining the ultimate reliability of a statement. The absence of one or more of these factors does not automatically lead to the exclusion of this evidence as it may be compensated for by the existence of other factors. The Trial Chamber stresses that where such evidence is admitted, the absence of one or more *indicia* of reliability will be taken into consideration when attributing the ultimate weight to that evidence.”⁴²

18. We also note that Rule 92~~quater~~ does not preclude the admission of evidence which goes to the acts and conduct of an accused; however, this is a factor which can argue against admission in whole or in part,⁴³ and thus, will also be considered by the Trial Chamber.

First Threshold of Rule 94~~quater~~: Unavailability of Witness

19. The Defence does not contest the unavailability of Witnesses TF1-083 and TF1-021 and having viewed the copies of the death certificates provided by the Prosecution for each of these witnesses, the Trial Chamber is satisfied that the witnesses are, in fact, deceased, and are therefore “unavailable” within the meaning of Rule 92~~quater~~.

Second Threshold of Rule 92~~quater~~: Indicia of Reliability

Statements made on oath:

20. The Trial Chamber finds that Witness TF1-021 gave evidence under oath in open session in both the AFRC⁴⁴ and RUF⁴⁵ cases. Witness TF1-083 gave evidence under oath in open session in the AFRC case.⁴⁶

⁴⁰ *Prosecutor v Prlic et al*, ICTY Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92~~bis~~ and ~~quater~~ of the Rules, 27 Oct 2006, at para. 8.

⁴¹ *Ibid.*, para 10.

⁴² *Prosecutor v. Popovic*, IT-05-88-T, “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92~~quater~~, 21 April 2008, para. 41.

⁴³ Rule 92~~quater~~ (B). See also *Prosecutor v. Prlić et al*, ICTY-IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92~~bis~~ and ~~quater~~ of the Rules, 27 October 2006, para. 8.

⁴⁴ *Prosecutor v. Brima et al*, SCSL-2004-16-T, Transcript of 15 April 2005, p. 24, ln. 21-24 (see Annex A to the Motion).

⁴⁵ *Prosecutor v. Sesay et al*, SCSL-2004-15-T, transcript of 15 July 2004, p. 33, ln. 35 - p. 26, ln.3 (see Annex A to the Motion).

⁴⁶ *Prosecutor v. Brima et al*, SCSL-2004-16-T, Transcript of 8 April 2005, p. 44, ln. 27(see Annexes B and C to the Motion).

Statements subject to Cross-examination:

21. The various prior transcripts annexed to the Motion show that Witness TF1-021 was cross-examined during the AFRC trial,⁴⁷ while in the RUF trial Defence Counsel opted not to cross-examine the witness.⁴⁸ Witness TF1-083 was likewise cross-examined.⁴⁹ The Defence argues however, that the cross-examination of both witnesses TF1-021 and TF1-083 was inadequate and would not have taken into account several lines of inquiry that are highly relevant and significant to the Defence in this trial and accordingly falls short of the threshold of reliability required under Rule 92 *quater*.⁵⁰ The Prosecution argues in reply that “a general examination exploring credibility is sufficient to support a witness’ reliability. 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.”⁵¹

22. The Trial Chamber notes that the Defence relies, in support of its argument, on two ICTY Appeals Chamber Decisions, *Aleksovski* and *Kordic and Cerkez*, both of which were rendered prior to the adoption of Rule 92 *quater* by that court and by the Special Court.⁵² Further, the Defence, erroneously in our view, relies on the *Aleksovski* case to assert that cross-examination must be of a certain quality or standard before it should be considered an indicia of reliability. In fact, the ICTY Appeals Chamber in the *Kordic and Cerkez* Decision made reference to the earlier *Aleksovski* Decision to support its conclusion that cross-examination is a relevant indicia of reliability. The ICTY Appeals Chamber in the *Aleksovski* Decision upheld the Trial Chamber’s ruling that the opportunity to cross-examine the unavailable witness in a prior trial satisfied the need to cross-examine him in the *Aleksovski* trial and held that,

It is common ground that the alleged events out of which both men were charged took place in the same area, the Lasva Valley area, and that the two proceedings (which arose out of the same indictment) had much in common in both their legal and factual aspects. No attempt has been made to demonstrate any particular line of cross-examination which would have been both relevant and significant to the *Aleksovski* trial but which would not also have been both relevant and significant to the *Blaskic* trial.⁵³

The *Kordic and Cerkez* Appeals Chamber when adopting this criteria held,

⁴⁷ *Prosecutor v. Brima et al*, SCSL-2004-16-T, Transcript of 15 April 2005, p. 34, ln23 - p.46.

⁴⁸ *Prosecutor v. Sesay et al*, SCSL-2004-15-T, transcript of 15 July 2004, p. 40, ln.8-37.

⁴⁹ *Prosecutor v. Brima et al*, SCSL-2004-16-T, Transcript of 8 April 2005, p.71, ln. 10 - p.90, ln.19.

⁵⁰ Response, paras 10-11.

⁵¹ Reply, para. 11 citing *Prosecutor v. Popovic*, ICTY-IT-05-88-T, “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, para. 51.

⁵² Response, para. 6 citing *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, “Decision on Prosecutor’s Appeal on Admissibility of Evidence”, 16 February 1999, para 20 and *Prosecutor v Kordic and Cerkez*, IT-95-14/2 (Appeals Chamber), Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 at para. 20. Rule 92 *quater* was adopted into the ICTY RPE on 13 September 2006 and into the SCSL RPE on 14 May 2007.

⁵³ *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, “Decision on Prosecutor’s Appeal on Admissibility of Evidence”, 16 February 1999, para 20. Cited in part in *Kordic and Cerkez*, para. 26.

By contrast, the statement in this case contains none of these indicia of reliability. It lacks all of the factors present in *Aleksovski*. It was not given under oath. It was never subject to cross-examination by anyone. [...] ⁵⁴

23. The Trial Chamber considers in this context that the issue of primary concern is that opposing counsel in the prior proceedings, were given the opportunity to challenge the evidence and test the credibility of the witnesses and that the witnesses' responses to the challenges are on the record. In the circumstances, we find that the statements of witnesses TF1-021 and TF1-083 were subjected to cross-examination and that the quality and/or extent of the cross-examination are issues which go to the "weight to be attributed to the evidence rather than to its admissibility." ⁵⁵

24. Regarding the Defence allegation that there was a breakdown in communication during the testimony of Witness TF1-083, there is no indication in the transcripts that the Witness, who testified on oath with a sworn Temne interpreter, had any difficulty in communication during his testimony. On the contrary, the Witness' apparent lack of fluency in the Krio language in which his pre-trial statement was recorded and read back to him, was extensively explored in cross-examination and this Witness specifically opted to testify in Temne during the trial as his language of preference. ⁵⁶ The Trial Chamber therefore, finds no merit in this argument.

Corroboration of Witnesses' evidence:

25. The Defence asserts that the evidence of each of the said witnesses cannot be corroborated by the evidence of the other as neither transcript has yet been admitted in evidence and each testimony requires separate and independent corroboration. ⁵⁷ It argues that a deceased witness's statement or transcript should be corroborated by evidence already adduced at trial and not by evidence of another deceased witness sought to be introduced under Rule 92quater; however, it does not provide any authority in support of this assertion. ⁵⁸ The Defence also complains that there are "substantial differences" between the accounts of the deceased witnesses and that the evidence is inadequately corroborated by other witnesses whose evidence is already before the Chamber.

26. The Trial Chamber notes that similar to the other indicia of reliability, corroboration is a relevant factor to be considered in determining reliability, but not a necessary pre-requisite for the admission of evidence pursuant to Rule 92quater. ⁵⁹ The Trial Chamber is satisfied that the prior transcripts of Witnesses TF1-021 and TF1-083 are corroborated to the extent that they are generally

⁵⁴ *Kordic and Cerkez*, para. 27.

⁵⁵ *Prosecutor v. Popovic*, IT-05-88-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92quater, 21 April 2008, para. 51.

⁵⁶ *Prosecutor v. Brima et al*, SCSL-2004-16-T, Transcript of 8 April 2005, pp. 74, ln.1- pp.75, ln.1-2.

⁵⁷ Response, paras 15-16.

⁵⁸ Response, para. 6. The Defence make reference to paragraph 27 of the *Kordic and Cerkez* Decision the only part of which relevant to the issue of corroboration states, "In terms of the truth of the matter asserted - the presence of the accused on a particular evening in a particular place - it appears not to have been corroborated by any other evidence." See also, Response, paras 15-16.

⁵⁹ *Prosecutor v. Prlic et al*, ICTY-IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92bis and quater of the Rules, 27 October 2006, para. 10 which states "[...] the Chamber will take account in particular the following indicia of reliability: the fact that the statement was made under oath, that it was the subject of cross-examination or that it is corroborated by other evidence." [emphasis added]

consistent with reference to major events⁶⁰ and there is no valid reason in law or in fact why the evidence of Witness TF1-021 cannot corroborate that of Witness TF1-083 or *vice versa*. Any inconsistencies in the evidence do not preclude its admissibility but merely go to the weight to be accorded to it.⁶¹

Finding on reliability:

27. Taking all these indicia into consideration, the Trial Chamber finds that the prior transcripts of Witnesses TF1-021 and TF1-083 demonstrate the requisite indicia of reliability contemplated under Rule 92*quater*.

Whether the proposed evidence goes to the acts and conduct of the Accused:

28. The Prosecution argues that the prior transcripts of Witnesses TF1-021 and TF1-083 do not contain evidence which goes to proof of the acts and conduct of the Accused, including the acts and conduct of the Accused which would establish his responsibility for the acts and conduct of others.⁶² The Defence, while conceding that the proposed evidence is "*prima facie* crime-based," argues that "it eventually goes to proof of the acts and conduct of the Accused" to the extent that the Accused's *mens rea* could be inferred insofar as the evidence demonstrates the Accused's knowledge that his conduct fell into the pattern of widespread and systematic attacks.⁶³

29. The Trial Chamber is of the view that the Defence exaggerates the proximity of the crime-based evidence of the witnesses to the acts and conduct of the Accused, who is not mentioned in the testimony of either witness. The Trial Chamber finds no reason to exclude the testimonies of either Witness TF1-021 or TF1-083 on this basis. There is no piece of evidence contained in the prior testimonies of Witnesses TF1-021 and TF1-083 which is so proximate to the acts and conduct of the Accused or which is so pivotal to the Prosecution's case as to bar its admission under Rule 92*quater*.

Relevance under Rule 89(C):

30. The Defence argues that the Prosecution Motion should fail as there are "specific points" of the Witness's evidence where relevance to the Indictment has not been established as required by Rule 89(C).⁶⁴ Having reviewed the prior transcripts of Witnesses TF1-021 and TF1-083, the Trial Chamber is satisfied that the evidence is relevant to alleged crimes in Freetown as well as to the chapeau requirements of the crimes charged in the Indictment. Further, since evidence unrelated to the Indictment - such as a witness's background or evidence which establishes the context of events - may be adduced together with evidence which is more directly relevant to the Indictment, the Trial Chamber sees no reason to reject the evidence in its entirety on this basis. We find that the evidence of Witnesses TF1-021 and TF1-083 is relevant to the Indictment.

⁶⁰ *Prosecutor v. Milutinovic*, ICTY-IT-05-87-T (Trial Chamber), Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*quater*, 16 February 2007, para. 10.

⁶¹ *Prosecutor v. Milutinovic*, ICTY-IT-05-87-T (Trial Chamber), Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*quater*, 16 February 2007, para. 10; *Popovic*, para 61.

⁶² Motion, paras 19-20.

⁶³ Response, para. 24.

⁶⁴ Response, paras 8-9.

Retro-active effect of Rule 92^{quater}

30. We consider that there is no merit in the argument that the introduction of Rule 92^{quater} four years after the Accused was indicted will prejudice the Accused by denying the Defence “the opportunity to modify and cross-examine Prosecution witnesses who have already testified, for instance TF1-334, to compare their evidence with the proposed Rule 92^{quater} evidence”.⁶⁵ As already mentioned above, the evidence of the two witnesses is essentially crime-based, and in that regard the Defence has had adequate opportunity to cross-examine the many witnesses already called by the Prosecution. Moreover, the Prosecution could have sought to admit the transcripts pursuant to the provisions of Rule 92^{bis}, which was in force at the time the Accused was indicted.

31. The Trial Chamber holds that the prior transcripts of Witnesses TF1-021 and TF1-083, being sworn, cross-examined, open-court testimonies of deceased witnesses, submitted as partially corroborated proof of crimes relevant to the Indictment and which do not go to the acts and conduct of the Accused, wholly meet the criteria for admissibility under Rules 89(C) and 92^{quater}. Furthermore, the Trial Chamber finds that their admission would not prejudice the Accused or bring the administration of justice into serious dispute and that they may, therefore, be admitted in evidence pursuant to those Rules.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Prosecution Motion; and

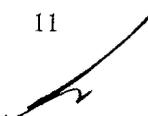
ORDERS that

1. The transcript of the testimony of Witness TF1-021 from the AFRC trial on 15 April 2005, as contained in Annex A to the Motion, is admitted into evidence as Exhibit P-287;
2. The prior witness statements of Witness TF1-021 contained in Confidential Annex D to the Motion, are admitted into evidence as Exhibits P-288a⁶⁶ and P-288b⁶⁷ respectively and marked as confidential;
3. The transcript of Witness TF1-021 from the RUF trial on 15 July 2004, as contained in Annex A to the Motion, is admitted into evidence as Exhibit P-289;
4. The transcript of Witness TF1-083 from the AFRC trial on 8 April 2005, as contained in Annex B, is admitted into evidence as Exhibit P-290a; and the portion of that testimony contained in Confidential Annex C is admitted into evidence as Exhibit P-290b and marked as confidential.

⁶⁵ Response, para. 25.

⁶⁶ AFRC Exhibit No. D.5A, Statement of Witness dated 25 February 2003.

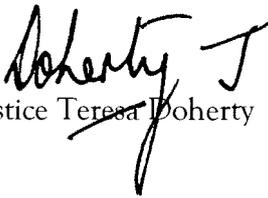
⁶⁷ AFRC Exhibit No. D.5B, Statement of Witness dated 10 December 2003.

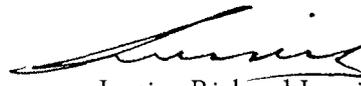




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Done at The Hague, The Netherlands, this 5th day of February 2009.


Justice Teresa Doherty


Justice Richard Lussick
Presiding Judge


Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

