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SCSL-03-01-T  
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## SPECIAL COURT FOR SIERRA LEONE

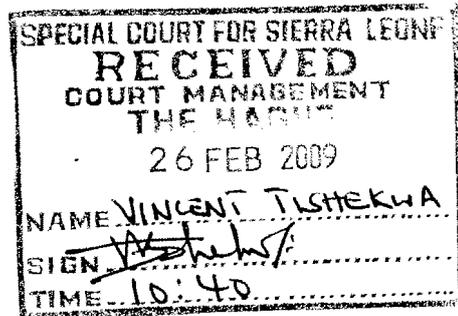
### TRIAL CHAMBER II

**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.:** SCSL-03-1-T

**Date:** 26 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

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### DECISION ON PROSECUTION MOTION FOR ADMISSION OF DOCUMENTS SEIZED FROM FODAY SANKOH'S HOUSE

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Office of the Prosecutor:  
Brenda J. Hollis

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 Prosecution Motion for Admission of Documents Seized from Foday Sankoh’s House, filed on 6 November 2008 (“Motion”);<sup>1</sup>

**NOTING** the Defence Response to Prosecution Motion for Admission of Documents Seized from Foday Sankoh’s House, filed on 17 November 2008 (“Response”);<sup>2</sup>

**NOTING ALSO** the Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents Seized from Foday Sankoh’s House, filed on 24 November 2008 (“Reply”);<sup>3</sup>

**NOTING** the Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, filed on 10 February 2009 (“Supplemental Request”);<sup>4</sup>

**RECALLING** the Trial Chamber’s Order for Expedited Filing, dated 10 February 2009;<sup>5</sup>

**NOTING** the Defence Response to Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, filed on 13 February 2009 (“Supplemental Response”);<sup>6</sup>

**NOTING** the Prosecution Reply to Defence Response to Prosecution Request for Leave to File Supplemental Argument in Light of the Appeals Chamber Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, filed on 17 February 2009 (“Supplemental Reply”);<sup>7</sup>

**COGNISANT** of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 26bis, 73(A), 89(C), 92bis and 95 of the Rules of Procedure and Evidence (“Rules”);

**HEREBY DECIDES AS FOLLOWS**, based solely on the written submissions of the parties, pursuant to Rule 73(A) of the Rules;

## I. SUBMISSIONS

### *Motion*

1. The Prosecution requests that the Trial Chamber admit into evidence documents seized from Foday Sankoh’s residence<sup>8</sup> as identified in Annex A and provided in Annex B (“Sankoh Documents”) pursuant to Rule 89(C) or, in the alternative, Rules 89(C) and 92bis.
2. The Prosecution submits that the documents should be admitted under Rule 89(C) alone,<sup>9</sup> and relies on and incorporates by reference its submissions at paragraphs 4-13 in its “Public

<sup>1</sup> SCSL-03-01-T-659.

<sup>2</sup> SCSL-03-01-T-672.

<sup>3</sup> SCSL-03-01-T-676.

<sup>4</sup> SCSL-03-01-T-726.

<sup>5</sup> SCSL-03-01-T-727.

<sup>6</sup> SCSL-03-01-T-730.

<sup>7</sup> SCSL-03-01-T-732.

<sup>8</sup> According to the Motion, para. 1, the said documents form part of a collection of documents allegedly seized from Sankoh’s residence on 8 May 2000. The Motion neither states the location of Sankoh’s residence nor does it specify the persons alleged to have seized the documents. The Motion does not explain how the Prosecution came into possession of the said documents.

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Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies”<sup>10</sup> (“UN Documents Motion”) *viz.*

- a. Because (i) Rule 89(C) is the general rule governing admission of evidence that has been used to tender documents absent a witness in other proceedings; (ii) Rule 92*bis* has been amended such that it now limited to witness statements and transcripts; and (iii) Rule 92*bis* as amended and limited does not apply to documents not prepared for legal proceedings.<sup>11</sup>
- b. Rule 89(C) allows experienced judges to receive into evidence relevant written material without compulsory resort to a witness subject to the necessary safeguards to prevent prejudice to the Defence. Further, that the jurisprudence of the Special Court “favour(s) a flexible approach to the issue of admissibility of evidence”.<sup>12</sup> Whilst admissibility under Rule 89(C) is subject to Rule 95 and to the Trial Chamber’s inherent jurisdiction to exclude evidence where its probative value is manifestly outweighed by its prejudicial effect a “very high standard must be met before relevant evidence is excluded.”<sup>13</sup> The Prosecution further submits that as the amendments to Rule 92*bis* narrow its scope making it more suited to the admission of witness statements and trial transcripts rather than the reception of information, it seeks admission directly under Rule 89(C).<sup>14</sup>

3. The Prosecution further submits that each of the Sankoh Documents relates to (i) the *chapeau* requirements of the crimes charged in the Second Amended Indictment; (ii) the several forms of liability alleged by the Prosecution in this case; and (iii) the crime base.<sup>15</sup> The Prosecution further submits that the material does not impact adversely and unfairly upon the integrity of the proceedings nor is it of such a nature that would bring the administration of justice into serious disrepute.<sup>16</sup> The Prosecution submits that the inability of the Defence to cross-examine witnesses is a matter that goes to the weight of the evidence, not its admissibility and that the “hearsay rule does not apply but the issue of weight to be given to this evidence is very much a matter for the Tribunal”.<sup>17</sup>

4. In the alternative, the Prosecution requests that the Trial Chamber admit into evidence the Sankoh Documents pursuant to Rules 89 (C) and 92*bis*, and relies on and incorporates its submissions in paragraphs 14-17 of its UN Documents Motion,<sup>18</sup> *viz.*

- a. “For evidence comprising public documents to be admitted pursuant to both Rules, the evidence must be relevant, its reliability must be susceptible to confirmation and its admission must not unfairly prejudice the Accused.”<sup>19</sup> The Prosecution states it is not required to prove that the evidence is in fact reliable at this stage, only that the reliability of the evidence is susceptible of confirmation meaning that the information should be capable of corroboration in due course.<sup>20</sup>

<sup>9</sup> Motion, para. 3.

<sup>10</sup> SCSL01-03-T-650.

<sup>11</sup> UN Documents Motion, paras 1, 3, 16.

<sup>12</sup> UN Documents Motion, paras 4-6.

<sup>13</sup> UN Documents Motion, para. 8.

<sup>14</sup> UN Documents Motion, paras 9-13.

<sup>15</sup> Motion, para. 7.

<sup>16</sup> Motion, para. 8.

<sup>17</sup> Motion, para. 9.

<sup>18</sup> SCSL01-03-T-650.

<sup>19</sup> UN Documents Motion, paras 14, 17.

<sup>20</sup> UN Documents Motion, para. 17.

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- b. The Prosecution further submits that the qualification in Rule 92bis that the evidence must “not go to proof of the acts and conduct of the accused” applies only to evidence contained in “witness statements and transcripts” and not to the Documents. However if the “acts and conduct qualification” also applies to non-testimonial documents then the term must be given its ordinary meaning and a distinction made between the acts and conduct of those who commit the crimes for which the Indictment alleges that the Accused is individually responsible and those of the Accused which establish his responsibility for the acts and conduct of others.<sup>21</sup>

5. The Prosecution restates its submission that the documents relate to (i) the *chapeau* requirements of the crimes charged in the Second Amended Indictment; (ii) the several forms of liability alleged by the Prosecution in this case; and (iii) the crime base;<sup>22</sup> and that (iv) the Prosecution is not required to prove that the evidence is in fact reliable at this stage, only that reliability of the evidence is susceptible of confirmation;<sup>23</sup> (v) the inability of the Defence to cross-examine witnesses is a matter that goes to the weight of the evidence, not its admissibility<sup>24</sup> and (vi) the hearsay rule does not apply but the issue of weight given to the evidence is a matter for the Tribunal.<sup>25</sup>

6. The Prosecution submits that the tendered documents do not go to the proof of the acts and conduct of the Accused. In relation to the acts and conduct of those who may be considered the Accused’s immediately proximate subordinates as referred to in the documents, the Prosecution restates its submissions at paragraph 4(b) above.<sup>26</sup>

#### *Supplemental Request*

7. In the light of the recent decision of the Appeals Chamber<sup>27</sup> dealing with the tender of documents under Rules 89(C) or 92bis, the Prosecution seeks leave to file a supplemental argument which it submits “focuses on the significance of the testimony of Mr. Tariq Malik<sup>28</sup> in relation to the admissibility” of (*inter alia*) the subject documents under Rule 89(C).

8. In the supplemental argument attached to the Supplemental Request, the Prosecution submits that although Mr. Malik did not give any evidence as to the contents of the documents, this is not a requirement for admission, and that evidence of investigative searches can establish that the documents are relevant “because they were found at a scene or obtained from a source related to the case.”<sup>29</sup> The Prosecution argues that the Appeals Chamber’s requirement for the admission of a document under Rule 89(C) – i.e. that the tendering party is required to lay a foundation of the witness’s competence to give evidence in relation to that document – has been met in that Tariq Malik established a relation to the documents as the Prosecution Evidence Custodian responsible for receiving documents and for collecting information regarding their seizure or possession prior to their arrival at the Office of the Prosecutor Evidence Unit.<sup>30</sup>

#### *Response*

9. In its Response to the Motion, the Defence opposes the Motion and submits that:

<sup>21</sup> UN Documents Motion, para. 15.

<sup>22</sup> Motion, para. 11 referring to para 7.

<sup>23</sup> Motion, para. 12.

<sup>24</sup> Motion, para. 9.

<sup>25</sup> Motion, para. 13 referring to paras 8-9 and 12.

<sup>26</sup> Motion, paras 13- 15.

<sup>27</sup> SCSL03-01-AR73-721, Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’, 6 February 2009 (“Appeals Chamber Decision”); Supplemental Request, para 3.

<sup>28</sup> *Prosecutor v. Taylor*, Transcript, 19-20 January 2009.

<sup>29</sup> Supplemental Request, Annex A, para. 2.

<sup>30</sup> Supplemental Request, Annex A, paras 3, 4.

- (i) Rule 89(C) cannot be used in isolation to admit the Documents included in the Motion.
- (ii) The documents “can only be admissible under Rule 89(C) in conjunction with Rule 92bis provided that any evidence that goes to the acts and conduct of the accused is inadmissible absent the opportunity for cross-examination”.<sup>31</sup>

10. In support of its submissions the Defence relies on and incorporates by reference its submissions at paragraphs 3-19 in its “Defence Response to Public Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies”<sup>32</sup> (“UN Documents Response”) viz:

- a. The Defence refutes the Prosecution submission that there is no specific rule for admission of documentary evidence and submits that the practice of the Special Court has been to admit documentary evidence under Rules 89(C) and 92bis.<sup>33</sup> The Defence further submits that Rule 89(C) is not absolute; it is subject to the provisions of Rule 95 and the Court’s inherent jurisdiction to exclude evidence where the probative value is outweighed by its prejudicial effect.<sup>34</sup>
- b. The Defence submits that the correct procedure for proper admission of the evidence is Rule 89(C) and Rule 92bis and that the Prosecution are mistaken in stating that Rule 92bis is exclusively limited to witness statements and transcripts as the Rule “encompasses information”.<sup>35</sup>
- c. The Defence further submits that, contrary to the Prosecution submissions, Rule 92bis was “deliberately amended to exclude information that goes to the acts and conduct of the accused in order to protect the Accused’s fair trial rights”<sup>36</sup> and there remains a distinction between acts and conduct of those who commit the crimes for which the indictment alleges the accused is individually responsible and the acts and conduct of the accused which establish his responsibility for the acts and conduct of those others. The first, the Defence submits, is admissible under Rule 92bis but the latter is not. The proximity of the acts and conduct of the alleged subordinate is relevant and documents pertaining to the acts and conduct of co-perpetrators should not be admitted unless a witness can be brought for cross-examination.<sup>37</sup>

11. The Defence further submits that the documents are purportedly taken from the house of Foday Sankoh who is an alleged co-perpetrator with the Accused and many of them refer to other alleged subordinates of the Accused such as Sam Bockarie, JP Koroma and Dennis Mingo. In its “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”<sup>38</sup> the Chamber held that where such documentary evidence is close to subordinates of the Accused, “it would not be fair to the

<sup>31</sup> Response, paras 2, 28.

<sup>32</sup> SCSL01-03-T-664.

<sup>33</sup> UN Documents Response, paras 3-6.

<sup>34</sup> UN Documents Response, paras 7-8.

<sup>35</sup> UN Documents Response, paras 10-13.

<sup>36</sup> UN Documents Response, para. 16.

<sup>37</sup> UN Documents Response, paras 14-19.

<sup>38</sup> *Prosecutor v. Taylor*, SCSL03-01-556, 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, 15 July 2008, p. 4. (“Kenema Decision”)

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Accused to give the evidence in written form”.<sup>39</sup> Further, the content of the documents goes to the joint criminal enterprise and superior responsibility modes of liability charged in the Indictment<sup>40</sup> and to the acts and conduct of the Accused or of his alleged subordinates and for these reasons and because their probative value is outweighed by their prejudicial effect they should not be admitted.<sup>41</sup>

12. The Defence submits that as a pre-condition to admission the Prosecution must produce a witness for cross-examination who is knowledgeable about the contents and who can decipher and explain the Documents. The fact that the documents are produced so late in the proceedings means that witnesses who have previously testified can no longer be challenged on them.<sup>42</sup>

13. The Defence also submits that the Prosecution should provide a clear chain of custody record showing these specific Documents were taken from Foday Sankoh’s house and how they found their way into the hands of the Prosecution. The Defence express a serious concern over “the careless manner in which the documents were kept” by a Prosecution employee and submit that the admission of the documents without showing a clear chain of custody would be contrary to Rule 95.<sup>43</sup> Furthermore, the Defence submit that the documents are inadmissible because some of the documents are illegible and others, such as those in Tab 2, have pages missing or are in incorrect sequence.<sup>44</sup>

#### *Supplemental Response*

14. The Defence opposes the request for leave to file a supplemental argument as well as the argument itself. The Defence submits that the Appeals Chamber Decision does not assist the Prosecution’s case because the Appeals Chamber ruled that “[t]he procedural scheme established by Rules 89(C) and 92bis does not allow a party to circumvent the stringency of the latter by simply tendering a document under the former.” The Defence says that this principle applies where a nominal witness such as Mr. Malik is brought forward simply as a conduit for the tendering of documents that go to the act and conduct of the Accused. The Defence further submits that a foundation of a witness’s competence to give evidence in relation to a document would form the basis for the witness’s cross-examination on the contents of the document. However, in the present case, Mr. Malik can only give evidence of the circumstances in which the documents were obtained and secured by the Prosecution. To then allow the documents to be admitted on such evidence would “clearly defeat the fundamental safeguard in Rule 89(C) or in the alternative Rule 92bis route.” The Defence contends that the Trial Chamber ought to exclude the evidence pursuant to Rule 95, since to admit documents that go to the acts and conduct of the Accused through a process that denies the Defence a chance to challenge the evidence would bring the administration of justice into serious disrepute.<sup>45</sup>

#### *Reply*

15. The Prosecution relies on and incorporates by reference its submissions at paragraphs 2-11 in its “Public Prosecution Reply to Defence Response to Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies” (“UN Documents Reply”)<sup>46</sup> to dispute the Defence interpretation of the jurisprudence relating to Rule 89(C) and Rule 92bis and

<sup>39</sup> Response, para. 6.

<sup>40</sup> Response, paras 4, 5.

<sup>41</sup> Response, para. 28.

<sup>42</sup> Response, paras 7-12.

<sup>43</sup> Response, paras 13-17.

<sup>44</sup> Response, para. 18.

<sup>45</sup> Supplemental Response, paras 8-13.

<sup>46</sup> SCSL-01-03-T-670.

recounts the background to the amendment to the latter rule and the jurisprudence of the ad hoc tribunals to support their previous submissions.<sup>47</sup>

16. In reply to the Defence objection that a witness is required to speak to the contents and relevance of the Sankoh Documents, the Prosecution submits that they have identified the relevance of the Sankoh Documents in the Motion and reiterates its requests for their admission.<sup>48</sup>

17. In reply to Defence objections concerning the Radio Log book at Tab 2 of Annex B of the motion, the Prosecution submits that these are matters for final argument. With regard to the Defence complaint that the document provided at Tab 3 is "impossible to read" the Prosecution notes that a photocopy of the original is available for inspection but the Defence has made no such inspection.<sup>49</sup>

18. Furthermore, in reply to the Defence's concerns regarding (i) the difficulty in deciphering the Radio Log Book at Tab 2 of Annex B; (ii) the contents of the Sankoh Documents; (iii) the request that signatures on Sankoh's documents be attested; (iv) the chain of custody of the Documents, including the manner in which the documents were kept; and (v) the probative value of the documents, the Prosecution submits that these are all matters that relate, ultimately, to the weight to be accorded to the said documents when they are considered in light of all the evidence before the Trial Chamber at the conclusion of the trial.<sup>50</sup>

19. The Prosecution submits that the Defence misinterpret or misapply the exclusionary conditions set out in *Kordic and Cerkez* to the instant case.<sup>51</sup> In reply to the Defence objections concerning joint criminal enterprise, the Prosecution states that none of the Sankoh Documents includes evidence going to proof of acts and conduct of the Accused. The Prosecution further submits that the "Defence attempt to make the location of evidence seizure" grounds for exclusion of the documents under Rule 92bis, is without merit.<sup>52</sup>

20. The Prosecution submits that the Defence arguments that the material implicates an alleged co-perpetrator and alleged subordinates of the Accused and, therefore, is so critical to the Prosecution case or proximate to the Accused, that it cannot be admitted without providing the Defence an opportunity to cross-examine a witness, should be dismissed as overly broad.<sup>53</sup>

#### *Supplemental Reply*

21. The Prosecution disputes the objections of the Defence to the Supplemental Request.<sup>54</sup> The Prosecution claims that during Mr. Malik's testimony a link was established between him and the documents, since he had personal knowledge of how each document came into possession of the Prosecution, and with such a foundation the documents should be admitted under Rule 89(C) in conjunction with his testimony.<sup>55</sup> The Prosecution submits that the Appeals Chamber Decision does not restrict admission of relevant documents to only those where the party offering the document produces a witness with personal knowledge of the document itself.<sup>56</sup> Further, the Prosecution points out that the Defence cites no jurisprudence and offers no arguments to

<sup>47</sup> UN Documents Reply, paras 2-11.

<sup>48</sup> Reply, paras 4, 23.

<sup>49</sup> Reply, para. 3.

<sup>50</sup> Reply, paras 4, 5, 7, 8, 9.

<sup>51</sup> Reply, paras 10-17.

<sup>52</sup> Reply, paras 18-19.

<sup>53</sup> Reply, paras 20-22.

<sup>54</sup> Supplemental Reply, paras 2-11.

<sup>55</sup> *Ibid.*, para. 5.

<sup>56</sup> *Ibid.*, para. 10.

support the claim that admitting documents which go to the acts and conduct of the Accused would violate Rule 95 in that it would bring the administration of justice into disrepute.<sup>57</sup>

## II. APPLICABLE LAW

22. The general rules of evidence are contained in Rule 89, which provides:

### Rule 89: 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.

23. Rule 92*bis* is the specific rule relating to alternative proof of facts, that is, proof of facts other than by oral evidence. Rule 92*bis* provides:

### Rule 92*bis*: Alternative Proof of Facts

(A) In addition to the provisions of Rule 92*ter*, 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 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.

24. The recent ruling of the Appeals Chamber, "Decision on 'Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents'" dated 6 February 2009<sup>58</sup> ("Appeals Chamber Decision"), wherein the Appeals Chamber upheld a decision of the Trial Chamber, confirms that:

By its express terms, Rule 92*bis* applies to information tendered "in lieu of oral testimony". These words must be given their ordinary meaning. Documentary evidence, by its very nature, is tendered in lieu of oral testimony.<sup>59</sup> [...]

[...]

The procedural scheme established by Rules 89(C) and 92*bis* does not allow a party to circumvent the stringency of the latter rule by simply tendering a document under the former.<sup>60</sup> [...]

[...]

The consequence of this is that any information that does not go to proof of the acts and conduct of the accused not tendered through a witness, should be submitted under Rule 92*bis* if it is sought to be admitted in lieu of oral testimony. For these reasons, we find that the Trial Chamber did not err in law in holding that Rule 92*bis* exclusively controls the admission of a

<sup>57</sup> *Ibid.*, para. 11.

<sup>58</sup> SCSL03-01-AR73-721, Decision on 'Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, 6 February 2009 ("Appeals Chamber Decision").

<sup>59</sup> Appeals Chamber Decision, para. 30 (original footnotes omitted).

<sup>60</sup> Appeals Chamber Decision, para. 33 (original footnotes omitted).

document submitted in lieu of oral testimony and that such document must be channelled through a witness in order to be admissible under Rule 89(C).<sup>61</sup> [...]

25. 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.<sup>62</sup> This leaves open the possibility for the Trial Chamber to determine the reliability issue at the end of the trial in light of the totality of the evidence by deciding whether the information is indeed corroborated by other evidence presented at trial,<sup>63</sup> and what weight, if any, should be attached to it.<sup>64</sup> Simply admitting a document into evidence does not amount to a finding that the evidence is credible.<sup>65</sup>

26. A distinction must be drawn 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.” Only written statements which go to proof of the latter acts and conduct are excluded by Rule 92bis.<sup>66</sup>

27. Thus, Rule 92bis excludes any written statement which goes to proof of any act or conduct of the Accused upon which the Prosecution relies to establish that the Accused planned, instigated, ordered, or committed any of the crimes charged, or aided and abetted in the planning, preparation or execution of such crimes, or that the Accused was a superior who actually committed the crimes, or knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or failed to take the necessary and reasonable measures to prevent such crimes or to punish the perpetrators thereof.<sup>67</sup> Where the Prosecution alleges that the Accused participated in a joint criminal enterprise, Rule 92bis excludes any written statement which goes to proof of any act or conduct of the accused upon which the Prosecution relies to establish that he had participated in that joint criminal enterprise.<sup>68</sup>

<sup>61</sup> Appeals Chamber Decision, para. 34.

<sup>62</sup> *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 (“Fofana Appeal Decision”), para. 26.

<sup>63</sup> *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-T, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis, 15 May 2008, para. 30.

<sup>64</sup> *Prosecutor v. Norman, Fofana & Kondewa*, SCSL-04-14-T, Decision on Prosecution’s Request to Admit Into Evidence Certain Documents Pursuant to Rules 92bis and 89(C), 15 July 2005, p. 4; see also *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-T, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis, 15 May 2008, para. 30.

<sup>65</sup> *Prosecutor v. Norman, Fofana & Kondewa*, SCSL-04-14-T, “Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis”, 9 October 2006, note 32, para. 18; see also *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-T, “Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis”, 15 May 2008, para. 31.

<sup>66</sup> *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-129 Under Rule 92bis or, in the Alternative, Under Rule 92ter, 12 March 2008, pp. 2-3; see also *Prosecutor v. Taylor*, SCSL-03-1-T, 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, 15 July 2008, p. 4.

<sup>67</sup> *Galic*, *ibid.*, para. 10; see also Prosecution’s Second Amended Indictment (“Indictment”), paras 33, 34.

<sup>68</sup> *Galic*, *ibid.*, para. 10; see also Indictment, para. 33.

28. The “conduct” of an accused person necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct of the Accused upon which the prosecution relies to establish that state of mind, is not admissible under Rule 92bis.<sup>69</sup>

29. Where the evidence is “so pivotal to the prosecution 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.”<sup>70</sup>

### III. DELIBERATIONS

30. Dealing first with the Prosecution application for the documents to be admitted under Rule 89(C), the Trial Chamber finds that the documents must be channelled through a witness competent to give evidence in relation to the documents in order to be admissible under Rule 89(C).<sup>71</sup> The said documents were tendered in lieu oral testimony and therefore should have been tendered under Rule 92bis.<sup>72</sup> Accordingly, the Prosecution application pursuant to Rule 89(C) must fail.

31. The Trial Chamber will now consider the merits of the Prosecution’s supplemental argument that the subject documents should be admitted under Rule 89(C) through the testimony of Tariq Malik. The Prosecution sought to admit the documents pursuant to Rule 89(C) through the *viva voce* evidence of Prosecution Witness Tariq Malik, the Chief of Evidence Unit on 19 and 20 January 2009.<sup>73</sup> It is common ground that Mr. Malik was unable to give any evidence relevant to the contents of the subject documents. His evidence was limited to what he had been told about the circumstances in which the documents had come into possession of Prosecution Evidence Unit and how they were organised and maintained within the Unit. That evidence was not objected to and is now a matter of record.

32. However, in the opinion of the Trial Chamber, the Prosecution failed to lay a satisfactory foundation for the documents themselves to be tendered through Mr. Malik under Rule 89(C). As the Appeals Chamber has pointed out,<sup>74</sup> “information can be admitted as part of the oral testimony of a witness, provided it is relevant, without the restraint of rules of evidence relating to admissibility of hearsay evidence and secondary evidence, subject to the power of the Court pursuant to Rule 95 to exclude evidence that would bring the administration of justice into disrepute”. What the Prosecution is seeking to tender is in effect the information contained in the documents, not the documents as objects of the processing structure of the Prosecution’s Evidence Unit. Mr. Malik, as has been said, could not give any relevant evidence of the contents of the documents, and so the documents cannot be admitted under Rule 89(C). In the absence of any oral testimony to prove the information contained in the documents, the only recourse open to the Prosecution if it wishes to tender the information contained in the documents, is to submit the documents under Rule 92bis. The Trial Chamber therefore dismisses the Prosecution’s supplemental argument.

33. In relation to the Defence objection that many of the documents, especially the Radio Logs in Tab 2, have numerous codes and codenames which are not decipherable on their own,<sup>75</sup> the Trial

<sup>69</sup> *Galic*, *ibid.*, para. 11.

<sup>70</sup> *Galic*, *ibid.*, para. 13. See also *Prosecutor v. Bradanin & Talic*, IT-99-36-T, Confidential Decision on the Admission of Rule 92bis Statements, 1 May 2002, at para. 14.

<sup>71</sup> Appeals Chamber Decision, para. 34.

<sup>72</sup> Appeals Chamber Decision, para. 34; see also *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Document Pursuant to Rule 89(C), 9 February 2009, p. 3.

<sup>73</sup> Transcript, p. 23113 ln.11- p. 21134.

<sup>74</sup> Appeals Chamber Decision, para. 33.

<sup>75</sup> Response, paras 8-12.

Chamber notes that a number of Prosecution witnesses who were radio operators including Witness Fornie Dauda Aruna,<sup>76</sup> have testified on codes and code names used in communications and that the information is therefore “capable of corroboration in due course” and should not be excluded on this ground alone.

34. Turning now to the Prosecution’s alternative application, the Trial Chamber will consider the admissibility of each of the documents under Rule 92bis.

**Tab 1: Letter/Memorandum to His Excellency Major J.P. Koroma, from the Military High Command and War Council, People’s Army of Sierra Leone (signed for Colonel Sam Bockarie), entitled “Proposal for the tentative integration of the People’s Army into the National Army and the Political Circle”, dated 13 August 1997**

35. The document that the Prosecution seeks to tender into evidence is a letter signed “for Sam Bockarie” proposing an integrated National Army and posts to be allocated to persons named therein. The Defence argue that the evidence is cumulative, and was already produced. The Trial Chamber finds that the information in Tab 1 is relevant, susceptible of confirmation and that it does not go to the acts and conduct of the Accused and admits it into evidence.

**Tab 2: Radio Log Book covering communications for the period of 28/04/1999- 11/09/1999**

36. The document that the Prosecution seeks to tender into evidence is a Radio Logbook covering communications within the RUF for the period 28 April 1999 to 11 September 1999. The Defence object to the admission of the information on the grounds that it is cumulative, has already been produced, is anonymous or hearsay based on alleged messages from sources that cannot be easily identified and goes to the acts and conduct of the Accused. The Trial Chamber finds the information in Tab 2 to be relevant and susceptible of confirmation. The Trial Chamber finds that the information does not go to the acts and conduct of the Accused with the exception of the communication dated 15-07-1999 headed “From: Smile To: Scorpion” on ERN page 21992. The Trial Chamber redacts this portion of ERN page 21992 and admits the remainder of Tab 2 into evidence.

**Tab 3: ‘Letter to leader RUF from Jackson Swaray, Blackguard Commander RUF/SL’ entitled “Suggestion and Advice”, dated 25 September 1999**

37. The document that the Prosecution seeks to tender into evidence is a letter concerning the loyalty of most combatants and civilians in RUF controlled areas. The Defence object to the admission of the information on the grounds that it is not relevant, it is cumulative and it is illegible. The Trial Chamber finds that the photocopy provided by the Prosecution in Tab 3 is partly illegible but since the Prosecution’s copy was available for inspection and the Defence did not avail of the opportunity to inspect the Trial Chamber does not refuse admission on this ground. The Trial Chamber finds that the information in Tab 3 is relevant, susceptible of confirmation and that it does not go to the acts and conduct of the Accused. The Chamber admits it into evidence on condition that a legible copy is provided to Court Management Services.

**Tab 4: Letter to the Leader of the Revolution from the Black Guard (signed by Mr. Jackson Swarray) on “Information received from Lt Col. George Steven”, dated 14 January 2000**

38. The document that the Prosecution seeks to tender into evidence is a letter concerning United Nations peacekeeping forces (UNAMSIL) in the Gbungbuna area. The Defence object to the admission of the information on the grounds that it has already been produced and is

<sup>76</sup> Witness TF1-275, Transcript, 21 February 2008, p. 4446; Witness TF1-584, Transcript, 18 June 2008, p. 12112; Witness TF1-274, Transcript, 3 December 2008, pp. 21619-21620.

cumulative. The Trial Chamber finds that the information in Tab 4 is relevant, susceptible of confirmation and that it does not go to the acts and conduct of the Accused and admits it into evidence.

**Tab 5: Nominal Rolls of Trained RUF/SL Personnel**

39. The document that the Prosecution seeks to tender into evidence contains a list of RUF personnel classified as prisoners of war by ECOMOG and includes name, rank, time, and location of capture. The Defence object to the admission of the information on the grounds that it is crime based evidence, is not sufficiently significant and is cumulative. The Trial Chamber finds that the information is relevant, susceptible of confirmation and does not go to proof of acts and conduct of the Accused, and admits it into evidence.

**IV. DISPOSITION**

FOR THE ABOVE REASONS, the Trial Chamber:

**DISMISSES** the Prosecution application for admission of the documents under Rule 89(C);

**GRANTS** the Prosecution's alternative application in part and

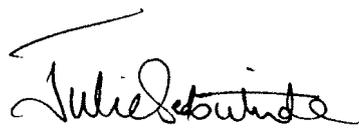
**ORDERS** that:

- i) Tab 1 is admitted into evidence and marked as Prosecution Exhibit P-360;
- ii) Tab 2, excluding the communication dated 15-07-99 headed From: Smile To Scorpion on ERN page 21992, which is redacted, is admitted into evidence and marked as Prosecution Exhibit P-361;
- iii) Tab 3 is admitted into evidence and marked as Prosecution Exhibit P-362;
- iv) Tab 4 is admitted into evidence and marked as Prosecution Exhibit P-363;
- v) Tab 5 is admitted into evidence and marked as Prosecution Exhibit P-364;

Done at The Hague, The Netherlands, this 26<sup>th</sup> day of February 2009.

  
Justice Teresa Doherty

  
Justice Richard Lussick

  
Justice Julia Sebutinde

Presiding Judge

