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SCSL-03-01-T
(30687-30699)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Julia Sebutinde, Presiding Judge Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Binta Mansaray
Case No.:	SCSL-03-1-T
Date:	5 October 2010

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH ANNEX A DEFENCE MOTION FOR ADMISSION OF DOCUMENTS PURSUANT TO RULE 92*BIS* – NEWSPAPER ARTICLE

Office of the Prosecutor:
Brenda J. Hollis
Leigh Lawrie

Counsel for the Accused:
Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

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

SEISED of the "Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92*bis* - Newspaper Article," filed on 24 September 2010 ("Motion"),[1] wherein the Defence requests the Trial Chamber to admit into evidence, pursuant to Rule 92*bis* of the Rules of Procedure and Evidence ("Rules"), the last three paragraphs of the Defence document DCT-463 ("Newspaper Extract"), Sunday Times Newspaper Article - "Taylor a Victim of 'Neo-Colonial' Conspiracy," dated 19 September 2010,[2] which read as follows:

> The National Conventional Arms Control Committee authorises arms by government and South African arms manufacturers. The committee has in the past been criticised by organisations like Ceasefire for selling weapons to countries with sketchy human rights records, and for failing to keep proper database of where South-African-made arms eventually end up.
>
> This week, Justice Minister Jeff Radebe, who heads the committee, denied the country or its arms manufacturers had ever done business with Taylor.
>
> Ministerial spokesperson Tlali Tlali said the committee's records reflected there were 'no applications for issuance of contracting or export permits' on behalf of either Taylor, government [sic], Liberia or the RUF.

on the grounds that the material sought to be admitted into evidence satisfies the requirements of Rule 92*bis* in that the evidence is relevant, susceptible of confirmation, and does not go to proof of the acts and conduct of the Accused;[3]

NOTING the "Prosecution Objections to Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92*bis* - Newspaper Article," filed on 27 September 2010 ("Objections"),[4] wherein the Prosecution opposes the admission of Newspaper Extract as the evidence contained therein does not satisfy the requirements of Rule 92*bis*[5] in that (i) it is irrelevant,[6] (ii) is not susceptible of confirmation,[7] and (iii) goes to proof of the acts and conduct of the Accused;[8]

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[1] SCSL-03-01-T-1087.
[2] Motion, paras 1-3, 14.
[3] Motion, paras 9-13.
[4] SCSL-03-01-T-1091.
[5] Objections, paras 2, 11.
[6] Objections, paras 3-6.
[7] Objections, para. 7.
[8] Objections, paras 8-10.

NOTING ALSO the "Defence Reply to Prosecution Objections to Defence Motion for Admission of Documents Pursuant to Rule 92*bis* – Newspaper Article," filed on 28 September 2010 ("Reply");[9]

COGNISANT of the provisions of Rule 92*bis* which states:

> **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 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.

NOTING that the effect of Rule 92*bis* is to permit in lieu of oral evidence, 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 ;[10]

RECALLING that the Special Court has adopted into its jurisprudence the ICTY Appeals Chamber's statement of law interpreting "acts and conduct of the accused" as meaning that Rule 92*bis*:

> excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –
> (a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes himself, or
> (b) that he planned, instigated, or ordered the crimes charged, or
> (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
> (d) that he was a superior to those who actually did commit the crimes, or
> (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
> (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.

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[9] SCSL-03-01-T-1092. The Trial Chamber notes that Rule 92*bis* does not contain a provision permitting the party applying for admission of documents pursuant to Rule 92*bis* to file a reply to an objection filed by the other party. However, the Trial Chamber finds that, in the circumstances, it is in the interests of justice to consider the Reply.

[10] *Prosecutor v. Norman, Fofana and Kondewa*, 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.

> Where the prosecution alleges that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92*bis*(A) excludes also any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –
> (g) that he had participated in that joint criminal enterprise., or
> (h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[11]

CONSIDERING that the above statement of law applies equally to evidence introduced by the Defence,[12] since Rule 92*bis* applies to any application for the admission of "information" into evidence, whether made by the prosecution or the defence. The "conduct" of an accused person may also include his omission to act.[13] A statement goes to proof of the acts and conduct of the accused if it tends to prove or disprove his acts or conduct.[14] Similarly, a statement which refutes allegations laid against the accused goes to proof of the acts and conduct of the accused;[15]

CONSIDERING ALSO that the Defence concedes that the Newspaper Extract corroborates evidence given by the Accused himself concerning his own acts and conduct ("Mr. Taylor himself during cross-examination stated that he did not procure weapons from South Africans such as Nico Shefer while in South Africa in September 1997. He further stated that Victor Malu never raised the issue of importing weapons from South Africa with him and that he (Mr. Taylor) in fact never brought back

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[11] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 10; see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements Under Rule 92*bis*, 15 May 2008, paras 33- 35; *Prosecutor v. Taylor*, SCSL-03-01-T-748, Decision on Prosecution Motion for Admission of Documents of Certain Intergovernmental Organisations & of Certain Governments, 26 February 2009, para. 17; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies, 20 February 2009, para. 23; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Liberia Search Documents, 18 February 2009, para. 20; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Documents of Certain Non-Governmental Organisations and Associated Press Releases, 23 February 2009, para. 15; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of BBC Radio Broadcasts, 25 February 2009, para. 14; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Documents of Certain Intergovernmental Organisations & of Certain Governments, 26 February 2009, para. 17; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Documents Seized From Foday Sankoh's House, 26 February 2009, para. 27; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Newspaper Articles Obtained From the Catholic Justice and Peace Commission Archive in Monrovia, Liberia, 27 February 2009, para. 29; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion for Admission of Documents Seized From RUF Kono Office, Kono District, 27 February 2009, para. 29.

[12] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements Under Rule 92*bis*, 15 May 2008, paras 34, 35.

[13] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 11.

[14] *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. 16.

[15] *Prosecutor v. Nsabimana et al.*, ICTR-97-29-T, Decision on Nsabimana's Motion to Admit the Written Statements of Witness Jami in Lieu of Oral Testimony Pursuant to Rule 92*bis*, 15 September 2006, para. 34.

weapons from South Africa. Thus the Newspaper Extract corroborates Mr. Taylor's testimony and vice-versa");[16]

FINDING therefore that the material sought to be admitted into evidence, which in essence goes to prove that the Accused has never done business with the South African Government or South African arms manufacturers and has never applied for a "contracting" or export permit in respect of South African arms, is a statement that goes to proof of the acts and conduct of the accused and is thus not admissible under Rule 92*bis*;

PURSUANT to Rule 26*bis*, 54, 73(A), 89(A) & (C), and 92*bis* of the Rules;

DISMISSES the Motion.

Justice Sebutinde appends a separate dissenting opinion.

Done at The Hague, The Netherlands, this 5th day of October 2010.

Justice Richard Lussick

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

[16] Reply, paras 7, 8.

SEPARATE DISSENTING OPINION OF THE HON. JUSTICE JULIA SEBUTINDE ON THE DEFENCE MOTION FOR ADMISSION OF DOCUMENTS PURSUANT TO RULE 92BIS - NEWSPAPER ARTICLE

Introduction

1. In this Separate Opinion, I respectfully dissent from the approach of the Majority in the Trial Chamber's Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92bis- Newspaper Article, to which this Opinion is appended. I am of the view that the information contained in the last three paragraphs of the Newspaper Extract tendered by the Defence for admission into evidence is relevant to the purpose for which it is submitted and that its reliability is susceptible of confirmation as required by Rule 92*bis*(B) of the rules of Procedure and Evidence. I do, however, disagree that the Newspaper Extract "*goes to proof of the acts and conduct of the Accused*" and that it should not be admitted into evidence on this ground.

2. In my view, the safeguard in Rule 92*bis*(A) excluding information that "goes to proof of the acts and conduct of the accused" from admission into evidence, is primarily intended to protect the fair trial rights of an accused as guaranteed by Article 17 of the Statute, by ensuring that he has an opportunity to confront live testimony on matters pertaining directly to his guilt and to cross-examine witnesses against him, which opportunity he would not have if the incriminating evidence were to be admitted in a form other than oral testimony, such as statements or transcripts. While evidence implicating an accused is normally tendered by the Prosecution, in a trial involving multiple co-accused, evidence implicating one accused or affecting his defence may also come from a co-accused[1]. In either case, such incriminating evidence will not be admitted under Rule 92*bis* without the Court giving the accused(s) whose acts and conduct are implicated an opportunity to cross-examine the witness or witnesses against him. In my view, the information in the Newspaper Extract does not fall in either of the above categories and should accordingly be admitted.

3. Furthermore, I do not subscribe to the view that the safeguard in Rule 92*bis* was intended to preclude an accused who is standing trial alone from tendering into evidence, exculpatory information, *i.e.* information including statements and transcripts that in any way tends to suggest his innocence or mitigate his guilt or that affects the credibility of the prosecution evidence, such as is the present case. Such an interpretation would not only be contrary to the purpose of Rule 92*bis* but it would be highly prejudicial to the fair trial rights of the Accused. Likewise, I do not subscribe to the

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[1] See *Prosecutor v. Nsabimana et al.*, ICTR-97-29-T, Decision on Nsabimana's Motion to Admit the Written statement of Witness JAMI in lieu of Oral testimony Pursuant to Rule 92bis, 15 September 2006; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-1125, Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements under Rule 92bis, 15 May 2008.

view that the safeguard in Rule 92*bis equally* or indiscriminately extends to the Prosecution. In a few exceptional cases, the International Criminal Tribunals have permitted cross-examination by the Prosecution only where the information admitted pursuant to Rule 92*bis* goes to a critical allegation in the Indictment. The Prosecution has not been accorded this opportunity where the information concerns an issue that is peripheral to the Indictment, such as is the Newspaper Extract in question. This Opinion is instructed by the jurisprudence of the various International Criminal Tribunals which is considered in more detail below.

The Rationale of Rule 92*bis*:

4. Rule 92*bis* was adopted from the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and later amended by the Plenary of the Judges of the Special Court to suit the unique situation of the Court.[2] As the Motion turns upon the construction of Rule 92*bis*, it is useful to consider the jurisprudence of the International Criminal Tribunals relating to similar provisions, such as the Appeals Chamber of the ICTY,[3] the ICTR,[4] Trial Chamber I of the Special Court,[5] as well as that of this very Trial Chamber.[6]

5. While Rule 89(C) generally empowers a Chamber to admit "any relevant evidence," Rule 92*bis* gives a Chamber the discretion to admit relevant "information" in lieu of oral evidence, provided that information does not "go to proof of the acts and conduct of the accused." Rule 92*bis* was primarily intended for "crime-base" evidence and was intended to promote the efficiency of the trial by enabling the parties to tender information into evidence, in documentary or electronic form, thereby avoiding/minimising the cost of calling live witnesses, whilst at the same time safeguarding the rights of the accused to cross-examine witnesses on matters that "go to proof of his acts and conduct" as charged in the indictment.

6. The Appeals Chamber of the Special Court explained the rationale or effect of Rule 92*bis* when they held:

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[2] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73, Decision on Appeal Against "Decision on Prosecution Motion for Judicial Notice and Admission of Evidence", 16 May 2005, para. 26.

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

[4] *Prosecutor v. Nsabimana et al.* ICTR-97-29-T, Decision on Nsabimana's Motion to Admit the Written statement of Witness JAMI in lieu of Oral testimony Pursuant to Rule 92bis, 15 September 2006.

[5] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T-447, Decision on Prosecution's request to Admit into Evidence Certain Documents Pursuant to Rule 92*bis* and 89(C), 14 July 2005.

[6] *Prosecutor v. Taylor*, SCSL-03-01-T-736, Decision on Prosecution Motion for Admission of Liberia Search Documents, 18 February 2009.

> The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92bis in order to simplify this provision for a court operating in what was hoped to be a short time-span in the country where the crimes had been committed and where a truth and reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities. The effect of the SCSL Rule is to permit the reception of "information"- assertions of fact (but not opinion) made in documents or electronic communications- if such facts are relevant and their reliability is "susceptible of confirmation" [...][7]

7. Trial Chamber I of the Special Court explained the safeguard in Rule 92*bis* thus,

> CONSIDERING that the Accused will be unfairly prejudiced if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity of cross-examination and noting in this regard the view of *May and Wierda* that:
>
> > As a matter of practice, Trial Chambers still prefer to hear evidence on the acts and conduct of the accused from live witnesses who can be cross-examined. [...] the trend which may, therefore, be discerned is for a preference for live testimony on matters pertaining directly to the guilt or innocence of the accused. This practice allows the accused to examine witnesses against him [...][8]

Meaning of the phrase "acts and conduct of the accused:"

8. While the Statute and Rules of the Special Court do not define the phrase "the acts and conduct of the accused," the interpretation of similar provisions by international tribunals is instructive. The ICTY Rule 92*bis* specifically prohibits the admission of evidence going to proof of the acts and conduct of the Accused as charged in the Indictment, which establish his responsibility for the acts and conduct of others, but does not exclude from admission into evidence the acts and conduct of his co-perpetrators or subordinates. The ICTY Appeals Chamber in interpreting Rule 92*bis*(A) of the ICTY Rules of Procedure and Evidence[9] has held:

> Rule 92*bis* (A) excludes any written statement which goes to proof of any act or conduct of the accused (including his omission to act) ***upon which the prosecution relies to establish to establish***-
>
> (a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or
>
> (b) that he planned, instigated or ordered the crimes charged, or
>
> (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
>
> (d) that he was a superior to those who actually did commit the crimes, or

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[7] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73, Decision on Appeal Against 'Decision on Prosecution Motion for Judicial Notice and Admission of Evidence', 16 May 2005, para. 26.

[8] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T-447, Decision on Prosecution's request to Admit into Evidence Certain Documents Pursuant to Rule 92*bis* and 89 (C), 14 July 2005 where Trial Chamber I quoted from May and Wierda, International Criminal Evidence, 2002, para. 10.54, pp. 343-344.

[9] The ICTY Rule 92(A) empowers a Trial Chamber to "admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."

(e) that he know or had reason to know that those crimes were about to be or had been committed by his subordinates, or

(f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts

Where the prosecution case is that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92*bis* (A) excludes also any written statement which goes to proof of any act or conduct of the accused ***upon which the prosecution relies to establish***

(g) that he had participated in that joint criminal enterprise, or

(h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.

Those are the "acts and conduct of the accused as charged in the indictment," not the acts and conduct of others for which the accused is charged in the indictment with responsibility.[10] [Emphasis added]

9. This Trial Chamber, adopting the above holding of the ICTY Appeals Chamber, held in this trial:

> Thus, Rule 92*bis* 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. 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. 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 92*bis*. 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."[11] [Emphasis added]

10. The above jurisprudence demonstrates instances where the International Criminal Tribunals have construed the phrase "information that goes to proof of the acts and conduct of the accused" under Rule 92*bis* to mean *information upon which the prosecution relies to establish the guilt of the accused*, in other words, incriminating, rather than exculpatory evidence.

Other Considerations affecting the Trial Chamber's Discretionary Powers under Rule 92*bis*:

11. An appropriate analysis of the application of Rule 92*bis* would involve firstly, an inquiry as to whether the information sought to be admitted satisfies both Rule 89(C) in that it is relevant, and

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[10] *Prosecutor v. Galić*, Case IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), 7 June 2002, paras 10-11.

[11] *Prosecutor v. Taylor*, SCSL-03-01-T-736, Decision on Prosecution Motion for Admission of Liberia Search Documents, 18 February 2009, paras 20-22, where the Trial Chamber adopts the interpretation in *Galić*, *ibid.*, para 13; and in *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Confidential Decision on the Admission of Rule 92bis Statements, 1 May 2002, para 14.

Rule 92*bis*, in that it goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment. Secondly, even if the information fulfils both these requirements, the Trial Chamber must decide each case on its own merits bearing in mind the overarching necessity of ensuring the fair trial rights of the Accused as enshrined in Article 17 of the Statute. In this regard, there is jurisprudence demonstrating that International Criminal Tribunals will exercise their discretion under Rule 92*bis* in favour of oral testimony rather than admitting into evidence "information," where the information although tendered by an accused in his defence, is prejudicial to or goes to the acts and conduct of a co-accused in the same trial;[12] or where the evidence is so pivotal to the Prosecution case that in all fairness, it would require cross-examination.[13] Be that as it may, the cases cited by the Majority in support of their decision to exclude the Newspaper Extract are, in my view, distinguishable from the present case.

12. In the *Prosecutor v. Sesay, Kallon and Gbao* case,[14] the applicant Sesay was one of three co-accused jointly indicted by the Prosecution. The Sesay Defence filed a Motion seeking the admission of 32 witness statements in lieu of oral testimony pursuant to Rule 92*bis* which Motion was opposed by the Prosecution, but not by *Kallon* or *Gbao*, two of the other co-accused. Although the Sesay Defence argued that the Motion was not prejudicial to the other co-accused, Trial Chamber I held that "the absence of any objections from the parties to the admission of a statement under Rule 92*bis* is not a *sine qua non* of admissibility, and that the Chamber must ensure that each tendered statement is properly admissible under Rule 92*bis*."[15] Applying the *Galić* standard the Chamber drew a distinction between information going to proof of the acts and conduct of the accused on the one hand, and information going to proof of a critical element of the case, on the other, holding that while the former was inadmissible under Rule 92*bis*, the latter was admissible.[16] The Chamber further held that "the phrase "*acts and conduct of the accused*" should not be expanded to include all information that goes to a critical issue in the case or that is material to the Prosecution's theories of joint criminal enterprise or command responsibility. Rule 92bis provides no judicial warrant for such

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[12] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Statements Under Rule 92*bis*, 9 March 2004.

[13] *Prosecutor v. Nsabimana et al.*, ICTR-97-29-T, Decision on Nsabimana's Motion to Admit the Written statement of Witness JAMI in lieu of Oral testimony Pursuant to Rule 92bis, 15 September 2006; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-1125, Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements under Rule 92bis, 15 May 2008.

[14] *Prosecutor v. Sesay Kallon and Gbao*, SCSL-04-15-T-1125, Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements under Rule 92bis, 15 May 2008.

[15] *Ibid.*, para 26.

[16] *Ibid.*, para 38.

an expansion."[17] In conclusion, while the Chamber excluded certain portions of the statements on the grounds that they either went to proof of the acts and conduct of Sesay and the co-accused Morris Kallon,[18] or that they was unduly repetitive[19], it admitted the rest into evidence, holding that "while the information touched on issues that are material to the indictment, the information could not be considered to be so critical to an important issue between the parties that fairness requires that the Prosecution be allowed to cross-examine upon it."[20]

13. In the *Prosecutor v. Nsabimana et al.*,[21] the applicant Nsabimana was one of several co-accused jointly indicted by the Prosecution. The Nsabimana Defence sought to tender the witness statement of one JAMI in lieu of oral testimony, claiming that the witness could not testify for religious reasons. Ntahobali, a co-accused, opposed the application on the grounds that the witness statement was prejudicial to him and affected his defence strategy. The Prosecution also objected to the application claiming that it directly contradicted paragraph 6.6 of the Indictment which alleged that the Accused knew of the massacres and yet took no steps to assist the refugees. The ICTR Trial Chamber denied the application on the grounds that the statement concerned the conduct of not only the applicant but also that of his co-accused who had a right to confront the evidence against them in cross-examination. The Chamber also held that the witness statement "went to the acts and conduct of the accused" in that contained evidence directly contradicting paragraph 6.6 of the Indictment which essentially alleges that the Accused knew of the massacres and yet took no steps to assist the refugees.[22]

14. In the *Prosecutor v. Bagosora et al.*,[23] the Prosecution sought to tender into evidence several witness statements in lieu of oral evidence pursuant to Rule 92bis. The four co-accused jointly opposed the Prosecution application on the grounds that the statements were prejudicial to the Defence, and that they should be allowed to cross-examine the witnesses. The ICTR Trial Chamber excluded three of the statements on the grounds that they went to proof of the acts and conduct of the accused as charged in the indictment. In relation to four of the statements, the Trial Chamber held that although these did not go to proof of the acts and conduct of the accused, they were

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[17] *Ibid.*, para 39.
[18] *Ibid.*, Disposition, Order 2D.
[19] *Ibid.*, paras 46-49.
[20] *Ibid.*, paras 42-43.
[21] *Prosecutor v. Nsabimana et al.*, ICTR-97-29-T, Decision on Nsabimana's Motion to Admit the Written statement of Witness JAMI in lieu of Oral testimony Pursuant to Rule 92bis, 15 September 2006.
[22] *Ibid.*, paras 34, 39.
[23] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Statements Under Rule 92*bis*, 9 March 2004.

prejudicial in that they contained evidence going to specific aspects of the Indictment. As such they were admitted subject to cross-examination of the witnesses.[24]

15. The above decisions can be distinguished from the present case, firstly, in that Mr. Taylor is the only accused in this trial and considerations for the fair-trial rights of a co-accused would not arise. Secondly, although the information in the Newspaper Extract touches on an important issue that is material to the Prosecution case, namely whether or not Mr. Taylor purchased a consignment of arms and ammunition from South Africa in late 1997,[25] it is not so critical or pivotal to the Indictment[26] as to require in the interests of fairness, that the Prosecution be allowed to cross-examine upon it. It should accordingly be admitted under Rule 92*bis*.

16. Thirdly, the Prosecution argues wrongly, in my opinion, that according to *Galić*[27] 'conduct' of the accused includes an "omission to act"[28] and that by that definition, the Newspaper Extract "goes to the acts and conduct of the Accused" in so far as it seeks to prove that he *did not* purchase arms or ammunition from the Government of South Africa.[29] I disagree with the Prosecution's understanding or interpretation of the Decision in *Galić*. Such a fanciful interpretation would, in my view, not only lead to absurd conclusions not intended under Rule 92*bis*, but would be highly prejudicial to the fair-trial rights of the Accused. Clearly, the ICTY Appeals Chamber was speaking of an "omission" (*i.e.* a breach of duty) *upon which the Prosecution relies to establish the guilt of the accused under the indictment.* An example of such omission would be that the accused knew or had reason to know that crimes were about to be or had been committed by his subordinates and that *he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.* [Emphasis added] Clearly the ICTY Appeals Chamber was not referring to exculpatory evidence, i.e. evidence showing that the accused *did not* commit the alleged crimes or evidence that in any way tends to suggest his innocence or mitigate his guilt. The information in the Newspaper Excerpt is in effect exculpatory in that tends to suggest that neither Mr. Taylor's Government, nor Liberia, nor the RUF applied for the issuance of contracting or export permits for arms and ammunition from the Government of South Africa. The Excerpt is not, by any stretch of the imagination, evidence of an "omission" within the meaning in *Galić*.

17. For all the above reasons I would grant the Motion and admit the Newspaper Extract into evidence pursuant to Rule 92*bis*.

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[24] *Ibid.*, paras 19-41.
[25] Prosecution Exhibit 461D; see also Mr. Taylor's testimony of 14 January 2010 at pp. 33360-33361, 33349.
[26] Both parties rightly submit that the purchase of arms from South Africa is not a critical issue in the Indictment.
[27] *Galić* Decision, para. 11.
[28] Objections, para. 9.
[29] Objections, paras 9-10.

Done at The Hague, The Netherlands, this 5th day of October 2010.

Justice Julia Sebutinde

Presiding Judge

[Seal of the Special Court for Sierra Leone]