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THE SPECIAL COURT FOR SIERRA LEONE

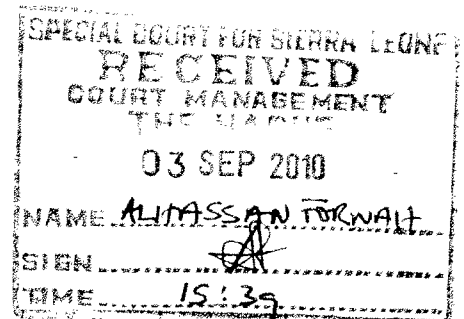
Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 3 September 2010

Case No.: SCSL-03-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE REPLY TO PROSECUTION OBJECTION TO DEFENCE MOTION ON
ADMISSION OF DOCUMENTS PURSUANT TO RULE 92bis --AUTOPSY REPORT**

Office of the Prosecutor:

Ms. Brenda J. Hollis

Ms. Leigh Lawrie

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.

Mr. Terry Munyard

Mr. Morris Anyah

Mr. Silas Chekera

Mr. James Supuwood

I. Introduction

1. This is the Defence Reply to the Prosecution's Objections to Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report (“Response”).¹ The Defence notes however that it has requested the Trial Chamber no longer consider Annex D.²
2. In its Response, the Prosecution opposes the admission of three documents, namely DCT-414, DCT-415 (being the translation of DCT-414) and DCT-416, on the grounds that the Defence has not satisfied the requirements of admission of evidence pursuant to Rule 92bis of the Rules of Procedure of the Special Court for Sierra Leone (“Rules”).
3. The Prosecution further requests that, should the Trial Chamber admit what they consider to be *expert* statements under Rule 92bis in light of Rule 94bis(C), the author of the documents should be made available for cross-examination on the final versions of the reports.
4. The Defence maintains its submissions set forth in Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report (“Motion”).³ The Defence submits that the Prosecution's objections misunderstood the application and legal requirements of Rule 92bis, and that it has met the requirements of Rule 92bis, *viz*:
 - i. The evidence is relevant;
 - ii. The evidence is “susceptible of confirmation”;
 - iii. The evidence does not consist of opinion information; and
 - iv. The evidence does not go to proof the acts and conduct of the Accused.
5. The Defence therefore requests the Trial Chamber to grant its Motion and to dismiss Prosecution's Response in its entirety.

II. Submissions

Documents have satisfied the requirements of Rule 92bis

6. The Prosecution argues that the three documents should not be admitted because their reliability is not “susceptible of confirmation” as they do not bear sufficient *indicia of*

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1066, Objections to Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report, 30 August 2010.

² *Prosecutor v. Taylor*, SCSL-03-01-T-1063, Corrigendum to Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report, 27 August 2010.

³ *Prosecutor v. Taylor*, SCSL-03-01-T-1061, Defence Motion for Admission of Documents Pursuant to Rule 92bis – Autopsy Report, 25 August 2010.

reliability. In its Response, the Prosecution avers that without any expert assistance it is not clear: (1) what the medical reports conclude or (2) how they were prepared and so whether they corroborate any witness.⁴ The Prosecution further argues that one of the documents is not conclusive (DCT-414 and DCT-415) and it is not convinced by the date written on the document since the reference was made to a website that was not available at that time.⁵ These are matters of weight and not admissibility.

7. The documents are indeed “susceptible of confirmation” as what the requirement of “susceptible of confirmation” is governed by the Special Court. The Appeals Chamber of the Special Court has ruled that “...[t]he phrasing of ‘susceptible of confirmation’ was chosen to make clear that 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.” Furthermore, it is for the Trial Chamber to decide whether the information comes in a form, or is of a kind, that is “susceptible to confirmation”.⁶
8. The Trial Chamber has found that the ‘capable of corroboration’ test does not require every point of evidence tendered under Rule 92*bis* to be corroborated by other evidence adduced at trial. The test is *susceptibility of or capability of* corroboration and not *actual* corroboration [emphasis added].⁷
9. The Rules favour the liberal admission of evidence where any questions to the reliability of specific points of evidence will go to the weight to be accorded to that evidence.⁸
10. The Trial Chamber is open to the possibility of determining the issue of reliability 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.⁹ In its Motion, the Defence submitted that the documents have been corroborated by other witnesses’ evidence in this proceeding,¹⁰ are in fact relevant,¹¹ and therefore have satisfied the requirements of Rule 92*bis*.

⁴ Response, para. 3.

⁵ Response, para. 4.

⁶ *Prosecutor v. Norman et al*, SCSL-04-14-AR73-398, “Fofana-Decision on Appeal Against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’”, 16 May 2005, para. 26.

⁷ *Prosecutor v. Taylor*, SCSL-03-01-T-739, “Decision on Prosecution motion for Admission of Documents of the United Nations and United Nations Bodies”, 20 February 2009, para. 37.

⁸ *Prosecutor v. Taylor*, SCSL-03-01-T-739, para. 37.

⁹ *Prosecutor v. Taylor*, SCSL-03-01-T-737, “Decision on Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone”, 19 February 2009, para. 30.

¹⁰ Motion, para.17.

The documents should be admitted through Rule 92bis alone

11. The Prosecution further argues that according to ICTY jurisprudence, the submission of ‘expert evidence’ under Rule 92bis should be considered in light of Rule 94bis. Additionally, the Prosecution want the opportunity to challenge the contents of the autopsy report in cross-examination.¹²
12. Rule 92bis of the Special Court is in several respects deliberately different from the comparable rule in the ICTY and ICTR.¹³ The Rule 92bis of the SCSL governs the admission of “...[a]ny information that does not go to proof of the acts and conduct of the Accused not tendered through a witness”.¹⁴
13. The Special Court is not bound by the decisions of other tribunals and have ruled on matters in relation to Rule 92bis. The Defence notes that there are some instances where this Trial Chamber has admitted Reports, which reflect specific knowledge and expertise of the authors, as evidence through Rule 92bis such as P-293, P-294, P-295, and P-296 (as part of the Sierra Leonean TRC Report)¹⁵, and P-297, P-300, P-303 and P-304 (as part of the Sierra Leone Humanitarian Situation Report of United Nations Department of Humanitarian Affairs).¹⁶
14. Most similar to the current request was the admission of through Rule 92bis of Exhibit P-309 which includes Medical Forms “CERTIFICAT MEDICAL DE CONSTATATION” (unofficially translated as Certificate for Medical Findings) signed by Medical Doctors providing assessment reports on the medical conditions of the asylum seekers on Guinean

¹¹ Motion, paras. 12-15.

¹² Response, p.3-6

¹³ *Prosecutor v. Taylor*, SCSL-03-01-T-721, “Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’”, 6 February 2009, paras.28-29: “The ICTY Rule 92bis is closer to the Special Court Rule 92ter than to its Rule 92bis.” See also: *Prosecutor v. Norman et al*, SCSL-04-14-AR73-398, “Fofana-Decision on Appeal Against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’”, 16 May 2005, para. 26: “SCSL Rules 92bis is different to the equivalent Rule in the ICTY and ICTR and deliberately so. 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 would be a short time-span in the country where the crimes had been committed [...] 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’”.

¹⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-721, para. 34.

¹⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-737, “Decision on Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone”, 19 February 2009.

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-739, “Decision on Prosecution motion for Admission of Documents of the United Nations and United Nations Bodies”, 20 February 2009.

territory.¹⁷ The conclusion in the reports consists of assessment and analysis of a situation based on the specific knowledge and experience of the authors, including Medical Doctors, which is exactly what the Prosecution argued against in its objection to the admission of the Autopsy Report. This is an example of an instance in which exhibits consisting of the opinion of professionals were admitted through Rule 92*bis* alone, without categorizing them as expert evidence.

The request for cross-examination of the authors is unfounded

15. The Defence disagrees with the Prosecution's assertion that the documents contain opinion and therefore require the authors to be available for cross-examination. Those documents mentioned above in paragraphs 13 and 14 are identical in nature to the annexed autopsy report, and therefore the same rules of admission should apply.
16. Furthermore, the Trial Chamber has previously admitted Exhibit P-297, which is a report that does not include any stated authorship, into evidence through Rule 92*bis*. The Trial Chamber was satisfied that the issue of lack of named authorship of a document is an issue of weight and is not a condition for admission under Rule 92*bis*.¹⁸ Notwithstanding the Defence's objection, the Prosecution was not compelled to reveal the author(s) of the document or to make them available for cross-examination. Exhibit P-297 was admitted with no witness to explain the content of the document or to contest the authenticity of the reports.¹⁹

Rule 94bis does not apply to this instance

17. The Prosecution argues that the documents contain "highly technical medical language" which requires "special knowledge in [the medical] field" and accuses the Defence of adding two expert witnesses via the back door by not submitting the documents through Rule 94*bis*.²⁰ Yet the Trial Chamber does not need to understand the technical language nor hear from an expert witness to understand the autopsy report's conclusion regarding the circumstances of Enoch Dogolea's death.

¹⁷ *Ibid.* See CMS pages 21487, 21491, 21496, 2150721510, 21515, 21518, 21535, and 21537.

¹⁸ *Ibid.*, para. 28.

¹⁹ *Ibid.*

²⁰ Response, para. 6.

18. As explained in the Motion, the documents were meant to be introduced through Defence Witness DCT-285 in order to indirectly impeach Prosecution Witness TF1-399's testimonies on an ancillary matter.²¹
19. The Appeals Chamber of the Special Court held that Rule 92*bis* deals with and applies to information admitted as evidence "in lieu of oral testimony", or "in the absence of a witness" as Rule 92*bis* ensures the Accused's right to an expeditious trial.²²
20. The Defence appreciates that there are other approaches in relation to the admission of evidence provided by the Rules. The Defence, however, wishes to submit these documents pursuant to Rule 92*bis*, thus "in the absence of a witness", and understands the distinction between the Rules and also the consequences of using different approach in admitting these documents into evidence. If the Defence had wished to admit these documents pursuant to Rule 94*bis*, the Defence would have done so.
21. Therefore, the Defence maintains that its submission of these documents through Rule 92*bis* was in fact appropriate according to the Rules governed by the Special Court.

III. Conclusion

22. For the foregoing reasons, and since the issue of Enoch Dogolea's cause of death is not a central issue of this case, the Defence respectfully requests the Trial Chamber admit through Rule 92*bis* Defence Exhibits DCT-414, DCT-415, and DCT-416 as annexed to the Motion.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 3rd Day of September 2010
The Hague, The Netherlands

²¹ Response, para. 10.

²² *Prosecutor v. Taylor*, SCSL-03-01-T-721, Footnote 10, paras. 29 and 33.

LIST OF AUTHORITIES

Taylor Case

Prosecutor v. Taylor, SCSL-03-01-T-1066, Objections to Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92*bis* – Autopsy Report, 30 August 2010

Prosecutor v. Taylor, SCSL-03-01-T-1063, Corrigendum to Defence Motion for Admission of Documents Pursuant to Rule 92*bis* – Autopsy Report, 27 August 2010

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CDF Case

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