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SCSL-03-01-T
(30952-30976)

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SPECIAL COURT FOR SIERRA LEONE

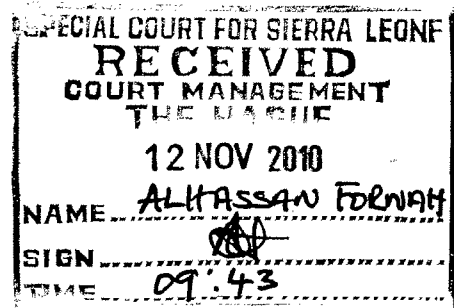
TRIAL CHAMBER II

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: 11 November 2010



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES A-D DEFENCE MOTION FOR
ADMISSION OF DOCUMENTS AND DRAWING OF AN ADVERSE INFERENCE
RELATING TO THE ALLEGED DEATH OF JOHNNY PAUL KOROMA

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 Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma”, filed on 27 October 2010 (“Motion”);¹

RECALLING the “Order for Expedited Filing”, dated 28 October 2010 wherein the Trial Chamber ordered expedited filing schedules for a response and a reply in relation to the Motion;²

NOTING the “Confidential Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma”, filed on 2 November 2010 (“Response”);³

NOTING ALSO the “Public with Confidential Annex One Defence Reply to Confidential Prosecution Response to Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma”, filed on 4 November 2010 (“Reply”);⁴

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 68, 73 and 92*bis* 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:

¹ SCSL-03-01-T-1108.

² SCSL-03-01-T-1111.

³ SCSL-03-01-T-1112.

⁴ SCSL-03-01-T-1114.

I. SUBMISSIONS

Background

1. In its “Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032”,⁵ issued on 20 October 2010, the Trial Chamber held that the Prosecution did not comply with Rule 68(B) and ordered it to disclose the following material to the Defence: (a) The details and results of an investigation that was conducted by the Prosecution into the alleged death of Johnny Paul Koroma including DNA tests on corpses that were exhumed during that investigation; (b) Records of all disbursements that were made to Defence witness DCT-032; and (c) an original duplicate copy of the letter of indemnity against prosecution before the Special Court for Sierra Leone written by Stephen Rapp to Defence witness DCT-032.⁶ The Trial Chamber however, declined the Defence’s request for it to draw adverse inferences from the Prosecution’s failure to comply with Rule 68(B), holding that since the potentially exculpatory material had not yet been disclosed such request was premature.⁷ On 21 October 2010, the Prosecution disclosed the material to the Defence.⁸⁹

Motion

2. The Defence requests that the recently disclosed exculpatory material, contained in Confidential Annexes A-C, and the affidavit of DCT-032 contained in Confidential Annex D, be admitted pursuant to Rule 92bis¹⁰ “and/or that based on these materials, the Trial Chamber draw an adverse inference from the disclosed material against Prosecution allegations and evidence that Charles Taylor, the Accused, was responsible in any way for the alleged death of Johnny Paul Koroma in Liberia.”¹¹

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010 (“Disclosure Decision”).

⁶ *Ibid.*, p. 15.

⁷ *Ibid.*, para. 33.

⁸ Disclosure to Defence, copied to Senior Legal Officer, 21 October 2010, Annexes A-C of Motion.

⁹ Motion, para 6.

¹⁰ Motion, paras 5, 28.

¹¹ Motion, paras 5, 28.



3. The Defence submits that it is in the interests of justice for the Trial Chamber to adjudicate on the present Motion notwithstanding its previous order that all Defence filings be made no later than 24 September 2010.¹²

4. The Defence further submits that the requirements of Rule 92bis have been met. It argues that the material is relevant and is submitted in lieu of oral testimony as the Defence does not intend to call DCT-032 to testify, since this is now impractical given that the closure of the defence case has been set for 12 November 2010.¹³ The Defence also argues, relying on Justice Sebutinde's dissenting opinion in the "Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92bis - Newspaper Article",¹⁴ and other jurisprudence interpreting the prohibition against the admission of "information that goes to the acts and conduct of the accused" under Rule 92bis, that this prohibition is not intended to preclude an accused from tendering exculpatory evidence into evidence as it is designed primarily to protect the fair trial rights of the accused.¹⁵ Therefore, to the extent that DCT-032 might be considered a subordinate of Mr. Taylor so that the affidavit may contain exculpatory material suggesting that Mr. Taylor's subordinates did not kill Johnny Paul Koroma, the Defence submits that such information does not go to proof of the acts and conduct of the accused upon which the prosecution relies to establish the guilt of the accused, and cannot be characterized as an "omission to act". It therefore submits that its admission should not be barred under Rule 92bis.¹⁶ Further, while the Defence accepts that the DNA and forensics reports are *strictu sensu* expert opinion evidence, and therefore are generally inadmissible under Rule 92bis, it submits that there is no dispute in this case between the parties as to the authenticity or veracity of these reports, and therefore neither party would be prejudiced if the reports were admitted under this rule.¹⁷

5. In relation to its request that the Trial Chamber draw an adverse inference, the Defence submits that in cases where the Trial Chamber has already established a Rule 68 violation, it is within

¹² Motion, para 5.

¹³ Motion, paras 21-22.

¹⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-1099, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92bis - Newspaper Article, 5 October 2010 ("Newspaper Decision"), Separate Dissenting Opinion of the Honourable Justice Sebutinde.

¹⁵ Motion, paras 9-11.

¹⁶ Motion, para. 23.

¹⁷ Motion, para. 24.

its discretion to order an appropriate remedy.¹⁸ The Defence argues that the late stage of the proceedings makes it impractical, if not impossible, for it to recall the three relevant Prosecution witnesses for cross-examination, and/or to call DCT-032 and/or an expert witness to testify on the attached material, and that therefore the most reasonable remedy is for the Trial Chamber to draw an adverse inference relating to the Prosecution evidence and the credibility of Prosecution witnesses from the Prosecution's breach of its Rule 68 obligation.¹⁹

Response

6. The Prosecution opposes the admission of the four documents on the basis that they do not satisfy the requirements of Rule 92bis.²⁰ First, the Prosecution submits that separate from the affidavit, the documents included in Confidential Annexes A-C have no independent relevance.²¹ The Prosecution also argues that the documents should not be admitted as their reliability is not susceptible to confirmation, as there is no evidence on the record which is capable of corroborating any of these documents, and, in the closing stages of the trial, it will not be capable of corroboration in due course.²² In particular, the Prosecution submits that the affidavit does not bear sufficient *indicia* of reliability, as in the affidavit, DCT-032 repeatedly admits that he lied and it contradicts previous evidence he gave to the Prosecution.²³

7. Further, the Prosecution submits that there is no basis for the Defence's interpretation of the law in relation to evidence going to the acts and conduct of the accused, as both the plain language of the rule and the jurisprudence of this and other tribunals establish that "information that goes to the proof of the acts and conduct of the accused" encompasses exculpatory as well as incriminatory evidence.²⁴ The Prosecution submits that the jurisprudence also establishes that where the proposed evidence concerns a material allegation in the trial and the acts and conduct of subordinates who are

¹⁸ Motion, paras 14-15

¹⁹ Motion, paras 26-27.

²⁰ Response, para. 4.

²¹ Response, para. 4.

²² Response, paras 5-7.

²³ Response, para. 8.

²⁴ Response, paras 9-10, referring to *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92bis - Newspaper Article, 5 October 2010, p. 4, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-16-T-1125, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Statements under Rule 92bis, 15 May 2008; *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 ("*Nsabimana* Decision").

proximate to the accused, it should not be admitted in written form.²⁵ In the Prosecution's submission, the evidence at issue in the present case relates to the acts and conduct of the accused's direct subordinates in the killing of Johnny Paul Koroma.

8. The Prosecution argues that the Trial Chamber should refuse to exercise its discretion to admit this evidence in order to ensure a fair trial as (i) the credibility of the witness is clearly at issue as the author of the affidavit is an admitted liar; (ii) the affidavit is an incomplete version of this witness' story, even though the Defence has been provided with the version the witness gave to the Prosecution.²⁶ The Prosecution therefore submits that to admit only the Defence version would be permitting the Defence to "cherry-pick" its evidence to the detriment of the truth-seeking function of the court, in particular as there is no reason why DCT-032 could not have been called in a timely fashion to give oral testimony subject to proper cross-examination.²⁷

9. If the Trial Chamber does decide to admit the proposed evidence, the Prosecution submits that such evidence should only be admitted conditional upon the complete version of DCT-032's story being admitted and DCT-032 being made available for cross-examination.²⁸

10. The Prosecution also argues that the recent disclosure of the materials set out in Confidential Annexes A-C of the Motion has not resulted in any prejudice to the Defence such that any remedy is warranted, as such materials could not have been used in a meaningful way in the cross-examination of any of the Prosecution witnesses who gave evidence regarding the death of Johnny Paul Koroma.²⁹ Further, the Prosecution submits that the drawing of inferences is a severe form of remedy that should only be invoked in exceptional circumstances, which are not present in this case, particularly as there is no reason why DCT-032 could not have been called to testify earlier or indeed now.³⁰ Moreover, it is not clear what adverse inferences could even be drawn based on the affidavit of an admitted liar, who has already given two versions of events.³¹

²⁵ Response, paras 11-13, referring to *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002 ("Galić Decision"), para. 14 and *Prosecutor v. Taylor*, SCSL03-01-T-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.

²⁶ Response, para. 16.

²⁷ Response, paras 3, 16.

²⁸ Response, paras 17-19.

²⁹ Response, paras 14, 20-22.

³⁰ Response, para. 22.

³¹ Response, para. 23.



Reply

11. The Defence submits in reply that the Motion flows directly from the Prosecution's dereliction of its disclosure obligation, and that all of the documents are independently and collectively admissible under Rule 92bis.³² It argues that the DNA and forensic test results are admissible under Rule 92bis independently of the affidavit as it is relevant to the issue of whether Johnny Paul Koroma is alive or dead,³³ that the index of Prosecution payments is independently relevant as it is an example of improper Prosecution payments,³⁴ and that the indemnity letter is independently relevant to show the Prosecution's investigative *modus operandi* and how it recruited insider witnesses.³⁵

12. The Defence submits that the Prosecution has misconstrued the "capable of corroboration" requirement of Rule 92bis, and argues that the purpose of this requirement is to ensure that admitted information is sufficiently reliable.³⁶ The Defence submits that the reliability of the requested evidence in Annexes A-C of the Motion is not in dispute, and has been confirmed already by the Prosecution.³⁷ Further, it contends that the affidavit is susceptible of confirmation in relation to these documents, as the core components of the information provided by DCT-032 to the Defence in September 2010 were never contested by the Prosecution, and because the information contained in the affidavit is in large part corroborated by the Prosecution's disclosure.³⁸

13. The Defence argues that the Prosecution request that the Proffer of DCT-032 should be admitted pursuant to Rule 92bis should be disregarded, as the Prosecution has not even attempted to demonstrate how the Proffer satisfies any of the criteria of Rule 92bis.³⁹ Finally, the Defence submits that there is little need for the Prosecution to cross-examine DCT-032 on his statement regarding the disclosure violation because this has already been substantiated, thus the Prosecution cannot be prejudiced.⁴⁰

³² Reply, paras 3-5.

³³ Reply, para. 7.

³⁴ Reply, paras 8-9.

³⁵ Reply, para. 10.

³⁶ Reply, para. 12.

³⁷ Reply, para. 13.

³⁸ Reply, para. 14.

³⁹ Reply, paras 6, 15.

⁴⁰ Reply, para. 16.



II. APPLICABLE LAW

14. Rule 92bis provides as follows:

Rule 92bis: Alternative Proof of Facts

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

15. The effect of Rule 92bis 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.⁴¹

16. The Trial Chamber recalls 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 92bis:

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

⁴¹ *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. See also Newspaper Decision, p. 4.

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

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 92bis(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.⁴²

17. The Trial Chamber has previously held that the above statement of law applies equally to evidence introduced by the Defence,⁴³ since Rule 92bis 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.⁴⁴ A statement goes to proof of the acts and conduct of the accused if it tends to prove or disprove his acts or conduct.⁴⁵ Similarly, a statement which refutes allegations laid against the accused goes to proof of the acts and conduct of the accused.⁴⁶

18. Furthermore, where evidence “is so pivotal to the Prosecution’s case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial

⁴² *Galić* Decision, 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 92bis, 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; Newspaper Decision, pp. 3-4.

⁴³ Newspaper Decision, p. 4 citing *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 92bis, 15 May 2008, paras 34, 35.

⁴⁴ Newspaper Decision, p. 4, citing *Galić* Decision, para. 11.

⁴⁵ Newspaper Decision, p. 4, citing *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.

⁴⁶ Newspaper Decision, p. 4, citing *Nsabimana* Decision, para. 34.

Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form".⁴⁷

III. DELIBERATIONS

A) Preliminary Issues

1) Timing

19. The Trial Chamber recalls that on 13 September 2010, it ordered the Defence to file all remaining motions by 24 September 2010.⁴⁸ The Defence filed its "Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032"⁴⁹ on the last day of the deadline, i.e. 24 September 2010. The Prosecution filed its response⁵⁰ on 1 October 2010 and the pleadings closed with the filing of a reply⁵¹ from the Defence on 5 October 2010. The Disclosure Decision was delivered on the 20 October 2010 and the disclosure of the material was made by the Prosecution on 21 October 2010. Clearly, it would not have been possible for the Defence to have filed the present Motion in accordance with the deadline set by the Trial Chamber. Accordingly, the Trial Chamber finds that it would be in the interests of justice for it to consider the Motion, notwithstanding that it was filed after the deadline of 24 September 2010.

2) Confidentiality of Prosecution Response

20. The Trial Chamber observes that the Prosecution has filed its response confidentially. However, it notes that the Prosecution has not provided any justification for doing so. The Trial Chamber recalls that a document should be filed on a confidential basis only in exceptional circumstances, when it contains information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness, or where the very fact of filing might have the same result.⁵² The Trial Chamber finds that there is nothing in the Response that uniquely

⁴⁷ *Galić* Decision, para. 13, cited in *Prosecutor v. Taylor*, SCSL-03-01-T-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 ("Disclosure Decision of 15 July 2008"), p. 4.

⁴⁸ *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 13 September 2010, p. 48323.

⁴⁹ SCSL-03-01-T-1088.

⁵⁰ SCSL-03-01-T-1096.

⁵¹ SCSL-03-01-T-1098.

⁵² *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for Reclassification of Filings, 10 March 2010, p. 2. See also *Prosecutor v. Stakić*, IT-92-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 6; *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Decision on Lahi Brahimaj Application for Provisional Release, 25 May 2009,

identifies DCT-032, and that the Prosecution has therefore not demonstrated exceptional circumstances that justify the filing of its Response on a confidential basis. The Trial Chamber accordingly finds that the Response should be reclassified as a public document with confidential annexes.

B) Merits

21. The Trial Chamber agrees with the Prosecution's submission that there is no basis for the Defence's interpretation of the law in relation to evidence going to the acts and conduct of the accused. Such an interpretation is not supported by the trite law that the words of a statute must be given their ordinary meaning, nor by any persuasive case law.

1) Admission of Documents pursuant to Rule 92bis

22. The Trial Chamber will consider in turn whether each document contained in Annexes A-D meets the requirements for admission.

a) Affidavit of Witness DCT-032

23. The material in the affidavit relates to DCT-032's denial that he was involved in the killing of Johnny Paul Koroma pursuant to the orders of the Accused.

24. In its Disclosure Decision the Trial Chamber recalled that:

[. . .] a number of Prosecution witnesses including Moses Blah, a former Vice President of Liberia, Joseph 'Zig-Zag' Marzah (TF1-399) and a protected witness TF1-275, testified regarding the circumstances of Johnny Paul Koroma's alleged murder. While none of the witnesses actually witnessed the alleged murder or saw the body of Johnny Paul Koroma, they gave evidence implicating a number of alleged subordinates of the Accused in the murder of Johnny Paul Koroma and in particular, the individual referred to in this Motion as Witness DCT-032 as the person or one of the persons that actually carried out the killing in Foya, Liberia in 2003, on orders of the Accused. According to these witnesses, DCT-032 played a key role in the alleged murder of Johnny Paul Koroma [. . .]⁵³

25. In essence, the material in the affidavit contradicts the evidence of these Prosecution witnesses and is thus exculpatory information relating to an alleged murder committed by subordinates of Charles Taylor on his orders. The affidavit therefore, in the opinion of the Trial Chamber, goes to proof of the acts and conduct of the Accused.

para. 5; *Prosecutor v. Blagojević et al*, IT-02-60-A, Decision on Prosecution Motion to Lift Confidential and Ex Parte Status of Appeals Chamber's Decision of 2 December 2005, 11 July 2007.

26. The Defence argues that the ICTR has held that where there has been a breach of Rule 68, the requirements of Rule 92bis should be relaxed such that statements going to the acts and conduct of the accused are admissible.⁵⁴ However, the Trial Chamber notes that in the *Ndindiliyimana* case cited by the Defence in support of this proposition, the ICTR Trial Chamber had originally permitted the Defence to recall a Prosecution witness and to call an additional witness in relation to the disclosed material, and it was only because the witnesses were unavailable or could not be located that the Trial Chamber subsequently allowed the statement of one of these witnesses to be admitted pursuant to Rule 92bis.⁵⁵ Further, in that case, the evidence hearing phase of the trial had closed.⁵⁶ It is clear from the *Ndindiliyimana* case that it was due to those exceptional circumstances that a more relaxed standard of Rule 92bis was applied.

27. These exceptional circumstances are not present in the instant case, since DCT-032's location is known to the Defence, he is available, and the Defence is still in evidence. In fact, DCT-032 had been scheduled to testify, even though he was not called.⁵⁷ The Trial Chamber therefore sees no reason to relax the standard for the admission of documents pursuant to Rule 92bis, and holds that documents which do not satisfy the requirements of this Rule should not be admitted. The Trial Chamber accordingly finds that the affidavit, which goes to the acts and conduct of the accused, is inadmissible pursuant to Rule 92bis.

b) *Results of the Prosecution investigation into the alleged death of Johnny Paul Koroma*

28. The Trial Chamber agrees with the Prosecution submission that, if the affidavit is not admissible, then the other materials submitted, including the DNA tests, have no independent relevance. The Defence itself concedes that “[t]he primary purpose of requesting the admission of the

⁵³ Disclosure Decision, para. 24 [footnotes omitted].

⁵⁴ Motion, para. 13.

⁵⁵ *Prosecutor v. Ndindiliyimana et al.*, Decision on Nzuwonemeye's Urgent Motion for Admission of CN's Statement into Evidence, 20 March 2009.

⁵⁶ *Ibid.*, para. 11.

⁵⁷ See Letter from the Defence to Prosecution “re Disclosure of Protected Defence Witnesses' Name” dated 12 April 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-951, Public with Annex A Defence Witness Order for the Week 17 - 21 May 2010, 3 May 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-957, Public with Annex A, C and Confidential Annex B Defence Rule 73ter Filing of Witness Summaries - Version Five, 12 May 2010; *Prosecutor v. Taylor*, SCSL-03-01-966, Public with Annex A and Confidential Annex B Defence Witness Order for the Week 7 June - 11 June 2010, 25 May 2010.

Affidavit of DCT-032 is to provide context to the other three Prosecution documents, such that an adverse inference can be drawn on the evidence relating to the Prosecution's disclosure violation."⁵⁸

29. Contrary to the Defence submission, the Trial Chamber finds that the DNA tests are irrelevant to the issue of whether Johnny Paul Koroma is alive or dead, but only confirm that DCT-032 intentionally directed investigators to a site he knew did not contain the remains of Johnny Paul Koroma.

30. Moreover, the "information" that the Trial Chamber is permitted to admit as evidence pursuant to Rule 92bis is confined to assertions of fact, not opinion.⁵⁹ The Trial Chamber notes that the DNA and forensics reports are purportedly the opinions of experts qualified in those fields. It also notes that Rule 94bis provides a specific procedure regarding the admission of a statement of an expert witness.⁶⁰ As these reports constitute "opinion" evidence rather than assertions of fact, the Trial Chamber finds that they cannot be admitted pursuant to Rule 92bis.

c) Records of all the disbursements made to Defence Witness DCT-032

31. The Trial Chamber, as stated earlier, agrees with the Prosecution submission that, if the affidavit is not admissible, then the other materials sought to be admitted pursuant to Rule 92bis have no independent relevance. The Trial Chamber finds that, absent the testimony of this witness or the admission of his affidavit, the payments in and of themselves are not relevant to any of the issues in the case, as their sole relevance would have been to corroborate DCT-032's account of the Prosecution's conduct in relation to his role in the investigation of the death of Johnny Paul Koroma or to impugn his credibility. The Trial Chamber therefore finds that the records of disbursements are not admissible pursuant to Rule 92bis.

d) "Original duplicate copy" of the indemnity letter to DCT-032

32. The Trial Chamber reiterates that it agrees with the Prosecution submission that, if the affidavit is not admissible, then the other documents sought to be admitted pursuant to Rule 92bis have no

⁵⁸ Reply, para 16.

⁵⁹ *Prosecutor v. Taylor*, SCSL-03-01T-1070, Decision on Public with Confidential Annexes A, B, C and D Defence Motion for Admission of Documents Pursuant to Rule 92bis - Autopsy Report, 9 September 2010 ("Autopsy Decision"). See also *Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for Admission of Liberia Search Documents, 18 February 2009, para. 18; *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.

independent relevance. The Trial Chamber finds that, absent the testimony of this witness or the admission of his affidavit, the indemnity letter in and of itself is not relevant to any of the issues in the case, as its sole relevance would have been to corroborate DCT-032's account of the Prosecution's conduct in relation to his role in the investigation of the death of Johnny Paul Koroma or to impugn his credibility. The Trial Chamber therefore finds that the letter of indemnity is not admissible pursuant to Rule 92bis.

e) Proffer of DCT-032

33. The Prosecution has submitted that if the Trial Chamber were to allow the admission of the evidence proposed by the Defence, it should only be admitted conditional upon the complete version of DCT-032's story being admitted.⁶¹ The Defence has interpreted this to be a Prosecution request to have the Proffer of DCT-032 admitted pursuant to Rule 92bis.⁶² As the Trial Chamber has determined that the Defence's proposed evidence is inadmissible pursuant to Rule 92bis, it is unnecessary to consider whether the Proffer meets the requirements of Rule 92bis.

2) Defence Invitation to the Trial Chamber to draw adverse inferences.

34. In light of the Prosecution's failure to comply with Rule 68(B), the Defence invites the Trial Chamber to draw adverse inferences against the Prosecution's allegations and evidence that the Accused was responsible in any way for the alleged death of Johnny Paul Koroma in Liberia.

35. The Trial Chamber finds that this particular application must fail for several reasons:

- (i) the Defence has failed to demonstrate that any material prejudice has flowed from the Prosecution's failure to observe Rule 68(B);
- (ii) the Prosecution's failure to comply with Rule 68(B) was not done in bad faith but in accordance with its interpretation of that Rule, which, while not unreasonable, was subsequently held by the Trial Chamber to be incorrect;

⁶⁰ Autopsy Decision, p. 4.

⁶¹ Response, para. 17.

⁶² Reply, paras 6, 15.




- (iii) the adverse inference sought by the Defence is not available on the material relied upon, which does not go so far as to establish that the evidence of the Prosecution witnesses relating to the death of Johnny Paul Koroma cannot be believed.

FOR THE ABOVE REASONS,

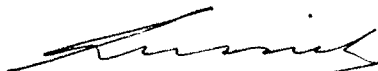
THE TRIAL CHAMBER

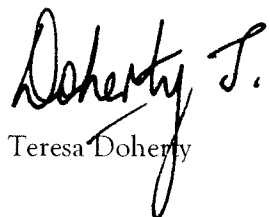
DISMISSES THE MOTION in its entirety; and

ORDERS the Court Management Section to reclassify the Response as a public document with confidential annexes.

Justice Julia Sebutinde appends a Dissenting Opinion hereto.

Done at The Hague, The Netherlands, this 11th day of November 2010.


Justice Richard Lussick


Justice Teresa Doherty



DISSENTING OPINION OF JUDGE JULIA SEBUTINDE

Introduction

1. In this Separate Opinion, whilst I agree with the Majority's views on the preliminary issues of the timing of this Motion and confidentiality of the Response, I respectfully dissent from the reasoning and conclusions of the Majority on the merits, in the Trial Chamber's Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, to which this Opinion is appended.

Admissibility of the affidavit of Witness DCT-032 (Confidential Annex D)

2. The Majority does not dispute that the affidavit of Witness DCT-032 is "relevant for the purpose for which it is tendered" or that "its reliability is susceptible of confirmation" as required by Rule 92bis and neither do I. However, the Majority rejected the said affidavit on the grounds that it "goes to the acts and conduct of the Accused." I disagree with that conclusion and hold that the affidavit does not go to the acts and conduct of the Accused within the meaning of Rule 92bis.

3. My first point of departure from the Majority is in relation to the definition or meaning attached to the phrase "*goes to the acts and conduct of the accused*" as found in Rule 92bis. In my view, the safeguard in Rule 92bis(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 effectively affecting his defence may also come from a co-accused.¹ In either case, such incriminating evidence will not be admitted under Rule 92bis without the Court giving the accused(s) whose acts and conduct are implicated, an opportunity to cross-examine the witness or witnesses

¹ See *Prosecutor v. Sylvain Nsabimana et al.* Case No. 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 et al.* 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.

against him. In my view, the information in the said affidavit does not fall in either of the above categories and should accordingly be admitted.

4. Furthermore, as stated in my earlier Dissenting Opinion on a similar finding,² I do not subscribe to the view that the safeguard in Rule 92bis 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 92bis but it would be highly prejudicial to the fair trial rights of the Accused. Likewise, I do not subscribe to the view that the safeguard in Rule 92bis is equally or indiscriminately enjoyed by 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 92bis 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 affidavit in question. This Opinion is instructed by the jurisprudence of the various International Criminal Tribunals considered in more detail below.

The Rationale of Rule 92bis

5. Rule 92bis was adopted from the Rules of Procedure and Evidence of the ICTY and ICTR and later amended by the Plenary of the Judges of the Special Court to suit the unique situation of the Court.³ In this regard, it is useful to consider the jurisprudence of the International Criminal Tribunals relating to similar provisions, such as the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY),⁴ the International Criminal Tribunal for Rwanda (ICTR),⁵ Trial Chamber I of the Special Court,⁶ as well as that of this very Trial Chamber.⁷

² See *Prosecutor v. Taylor*, SCSL-03-01-T-1099, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92bis-Newspaper Article, 5 October 2010, Separate Dissenting Opinion of the Hon. Justice Julia Sebutinde on the Defence Motion for Admission of Documents Pursuant to Rule 92bis - Newspaper Article ("Dissenting Opinion Newspaper Article").

³ *Prosecutor v. Fofana*, SCSL-04-14-AR73, Decision on Appeal Against "Decision on Prosecution Motion for Judicial Notice and Admission of Evidence", 16 May 2005, para. 26

⁴ *Prosecutor v. Stanislav Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002

⁵ *Prosecutor v. Sylvain 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.

6. While Rule 89 (C) generally empowers a Chamber to admit “any relevant evidence,” Rule 92bis 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 92bis was primarily intended for “crime-base” evidence and was intended to promote the efficiency of the trial by enabling the parties to tender into evidence, information 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.

7. The Appeals Chamber of the Special Court explained the rationale or effect of Rule 92bis when they held,

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” [...]⁸

8. Trial Chamber I of the Special Court explained the safeguard in Rule 92bis 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 [...].⁹

⁶ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-447, Decision on Prosecution’s request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89 (C), 14 July 2005

⁷ *Prosecutor v. Taylor*, SCSL-03-01-T-736, Decision on Prosecution Motion for Admission of Liberia Search Documents, 18 February 2009

⁸ *Prosecutor v. Fofana*, Case No. SCSL-04-14-AR73, Decision on Appeal Against “Decision on Prosecution Motion for Judicial Notice and Admission of Evidence”, 16 May 2005, para. 26

Meaning of the phrase “acts and conduct of the accused”

9. While the Statute and Rules of the SCSL 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 92bis 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, evidence of the acts and conduct of his co-perpetrators or subordinates. [emphasis added] The ICTY Appeals Chamber interpreting Rule 92bis(A) of the ICTY Rules of Procedure and Evidence¹⁰ held,

Rule 92bis (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 -

- (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
- (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 92bis(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.¹¹ [Emphasis added]

⁹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-447, Decision on Prosecution’s request to Admit into Evidence Certain Documents Pursuant to Rule 92bis 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

¹⁰ 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.”

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

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

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. 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 92bis. 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.”¹² [Emphasis added]

11. 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 92bis to mean information upon which the prosecution relies to establish the guilt of the accused, in other words, incriminating, rather than exculpatory evidence.

Exceptions:

12. There is jurisprudence demonstrating that International Criminal Tribunals will exercise their discretion under Rule 92bis 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;¹³ or where the evidence is so pivotal to the Prosecution case that in all fairness, it would require cross-examination.¹⁴ In my view the said affidavit does not fall in any of the above exceptions and should be admitted.

¹² *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 *Galic*, *ibid.*, para. 13. and in *Prosecutor v. Brdanin & Talic*, IT-99-36-T, “Confidential Decision on the Admission of Rule 92bis Statements”, 1 May 2002, at para. 14.

¹³ *Prosecutor v. Théoneste Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor’s Motion for the Admission of Written Statements Under Rule 92bis, 9 March 2004.

¹⁴ *Prosecutor v. Sylwain 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 et al.*, SCSL-04-

13. The Prosecution argues wrongly, in my opinion, that according to Galic¹⁵ ‘conduct’ of the accused includes an “omission to act which is not restricted to a breach of duty alone”¹⁶ and that by that definition, the affidavit “goes to the acts and conduct of the Accused” in so far as it seeks to prove that DCT-032 did not kill Johnny Paul Koroma on orders of the Accused.¹⁷ Such a fanciful interpretation would, in my view, not only lead to absurd conclusions not intended under Rule 92bis, 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. 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 affidavit is in effect exculpatory in that tends to contradict Prosecution witnesses alleging that DCT told them that he was involved in the killing of Johnny Paul Koroma on orders of the Accused. The affidavit is not, by any stretch of the imagination, evidence of an “omission” within the meaning in *Galic*. For all the above reasons I would admit the affidavit into evidence pursuant to Rule 92bis and to be fair to the Prosecution, I would order the Defence to produce DCT-032 for cross-examination.

Admissibility of the other Documents (Annexes A-C)

14. My second point of departure from the Majority is with the finding that “if the affidavit is not admissible, then the other materials submitted, including DNA tests, have no independent relevance”. While I agree that the affidavit does provide context to the other three documents, it is not altogether true that the other documents cannot stand on their own. This is because each of the three documents (Annexes A-C) is comprehensive and speaks for itself and can be used by the parties in their final briefs or closing arguments without reference to the affidavit. In my view, the Trial Chamber should have gone ahead to separately consider the admissibility of each of these documents

15-T-1125, Decision on Sesay Defence Motion and Three Defence Applications to Admit 23 Witness Statements under Rule 92bis, 15 May 2008

¹⁵ *Galic* Decision, para. 11

¹⁶ Response, para. 10

¹⁷ Response, paras 9-10.

under Rule 92bis. In view of my finding that the affidavit is in fact admissible under Rule 92bis, I will proceed to consider the admissibility of each of the other documents.

Admissibility of the Prosecution's Cover letter and results of the DNA and forensic tests (Annex A)

15. The Defence accepts that "the DNA and forensic reports disclosed by the Prosecution are *stricto sensu* expert opinion evidence and are generally inadmissible under Rule 92bis."¹⁸ As earlier pointed out, the Appeals Chamber has stated that the admission of evidence under Rule 92bis is limited to "assertions of fact and not opinion" and made no exceptions to that rule.¹⁹ On the contrary, the procedure for introducing expert opinion into evidence is prescribed under Rule 94bis. This Trial Chamber recently rejected on similar grounds another expert report that was filed pursuant to Rule 92bis instead of Rule 94bis.²⁰ In the present case, I am of the view that the results of the DNA and forensic tests are expert opinion that is inadmissible under Rule 92bis. I disagree with the Defence submission that because "there is no dispute between the parties as to the authenticity and veracity of the DNA results" the documents should be admitted pursuant to Rule 92bis contrary to the Appeals Chamber jurisprudence. The proper procedure for tendering into evidence an expert report that is not disputed by the other party is prescribed under Rule 94bis, in particular sub-rule (C). I therefore would not admit this category of documents into evidence under Rule 92bis.

Admissibility of the record of disbursements made to DCT-032 (Annex B)

16. The Trial Chamber in an earlier Decision found that "the payments made by the Prosecution to DCT-032 went beyond that which is reasonably required for the management of a witness and assumed a potentially exculpatory character."²¹ In my view the record of proceedings contained in Confidential Annex B is relevant, does not go to the acts and conduct of the Accused and is susceptible of confirmation. It should therefore be admitted into evidence pursuant to Rule 92bis.

Admissibility of the Prosecutor's letter of indemnity to DCT-032 (Annex C)

17. The Trial Chamber having previously held that "prior to his listing as a defence witness, DCT-032 was a potential Prosecution witness and that consequently the said letter of indemnity was

¹⁸ Motion, para.24

¹⁹ *Prosecutor v. Fofana*, Case No. SCSL-04-14-AR73, Decision on Appeal Against Decision on Prosecution Motion for Judicial Notice and Admission of Evidence, 16 May 2005, para. 26

²⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-1070, Decision on Public With Confidential Annexes A, B, C, and D Defence Motion for Admission of Documents Pursuant to Rule 92bis - Autopsy Report, 9 September 2010.

²¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010, para. 31.

potentially exculpatory”²², I find that this letter complies with the requirements of Rule 92bis and should be admitted in evidence pursuant to Rule 92bis.

Admissibility of Proffer of DCT-032

18. The Prosecution submits that the affidavit of DCT-032 is an incomplete version of his story and should only be admitted on condition that the Trial Chamber also admits into evidence, the document in Annex 1 to the Response (“Proffer”) as well as call DCT-032 to be cross-examined.²³ The Prosecution, unlike the Defence, closed its case months ago and before it cannot simply introduce fresh evidence without showing “exceptional circumstances”. The Trial Chamber has laid down specific criteria that the Prosecution must fulfil before tendering fresh evidence at this late stage.²⁴ In particular, the Trial Chamber held that-

[...]a document containing fresh evidence probative of the guilt of the Accused is subject to disclosure and its use will not be permitted during cross-examination unless (a) it is in the interest of justice and (b) it does not violate the fair trial rights of the Accused. Furthermore, such a document will not be admitted into evidence unless the Prosecution can establish “exceptional circumstances”. In considering whether such exceptional circumstances have been established, the Trial Chamber will take into consideration (i) when and by which means the Prosecution obtained the document (ii) when it disclosed it to the Defence and (iii) why it is being offered only after the conclusion of the Prosecution case.²⁵

19. Firstly, I must observe that the status of the so called “Proffer” is not clear as it is not a witness statement. It appears to be some sort of witness summary. Be that as it may, the Proffer does contain material that “goes to proof of the guilt of the Accused” in as far as it alludes to subordinates of the Accused carrying out the murder of Johnny Paul Koroma. As such the Prosecution has not complied with the required standards set out above in relation to their application to admit the Proffer in evidence. I would reject the Prosecution application on this ground.

Defence Invitation to the Trial Chamber to draw adverse inferences

20. The Defence requests that based on the materials referred to in the Motion, the Trial Chamber should “draw an adverse inference against the Prosecution allegations (in its Opening Statement) and

²² *Ibid.*, para. 32

²³ Response, paras 16-19.

²⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-865, Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination, 30 November 2009, paras 26-27.

²⁵ *Ibid.*

evidence (of Prosecution witnesses Moses Blah, Joseph Zig-Zag Marzah and TFI-375) that Charles Taylor the Accused was responsible in any way for the alleged death of Johnny Paul Koroma".²⁶ The Defence submits that this is an appropriate remedy in light of the Prosecution's breach of Rule 68 obligations.²⁷ I did in my earlier Dissenting Opinion²⁸ set out the circumstances surrounding the late disclosure by the Prosecution of the materials referred to in the Motion. I further pointed out that-

In these circumstances, the Prosecution not only failed in its duty to assist in the administration of justice, but also clearly violated the fair trial rights of the Accused, by denying him the right to use the said exculpatory information in cross-examining the Prosecution witnesses referred to in this Decision. Considering that the disclosures ordered by the Trial Chamber in this Decision come at a very late stage in the proceedings, such a violation should not go without a remedy. [...] Taking into account the seriousness of Prosecution allegations implicating the Accused in the alleged murder of Johnny Paul Koroma; the impracticability of recalling the said Prosecution witnesses for cross-examination at this late stage of the proceedings, as well as the right of the Accused to be tried without undue delay, I am of the view that the Trial Chamber not only has the discretion but also the responsibility at this stage, to secure justice and ensure a fair trial for the Accused by determining a suitable remedy following the late disclosures ordered. The Chamber must consider a remedy that is appropriate in the circumstances; that preserves the integrity of the judicial process; and that assists the Trial Chamber in ascertaining the events surrounding the alleged murder of Johnny Paul Koroma.²⁹ That said, I do however, agree that at this stage of the proceedings when the potentially exculpatory material has not yet been disclosed, it may not be practicable for the Trial Chamber to "draw adverse inferences" from the Prosecution's non-disclosure of the same without knowing the full content of this material. Rather, it is more realistic to consider the appropriate remedy at the stage of evaluation of the evidence and Judgement writing, having taken into account the nature and effect of the exculpatory material disclosed.

21. I hold the same view expressed above regarding the Defence's present request to draw adverse inferences as a remedy and emphasise that it is more realistic to consider the appropriate remedy at the stage of evaluation of the evidence and Judgement writing, having taken into account the nature and effect of the exculpatory material disclosed.

22. For all the above reasons I would partially grant the Motion and admit the Defence Documents except for the results of the DNA and forensic testing.

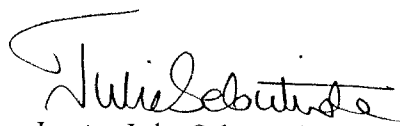
²⁶ Motion, para. 5.

²⁷ Motion, paras 14-16.

²⁸ See paras 2-3, Dissenting Opinion attached to *Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010

²⁹ See *Ndindiliyimana Case.*, para. 61.

Done at The Hague, The Netherlands, this 11th day of November 2010.



Justice Julia Sebutinde

Presiding Judge

