449) SCSL-03-01-T (16472-16487) 16472

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 31 March 2008

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX A

DEFENCE OBJECTION TO PROSECUTION NOTICE UNDER RULE 92*bis* FOR THE ADMISSION OF THE PRIOR TESTIMONY OF TF1-036 INTO EVIDENCE

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. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. On 14 March 2008, the Prosecution filed a Notice[1] under Rule 92*bis* of its intention to seek admission, on a confidential basis, of the prior trial transcripts and related exhibits of witness TF1-036 from the RUF trial proceedings before the Special Court for Sierra Leone.
2. Prosecution, in its Amended Witness List filed on 7 February 2008,[2] characterizes Witness TF1-036 as a "Core Predominately Linkage Witnesses". It submits that the evidence of this witness will include "relevant historical information regarding the Accused's training in Libya, plans to launch the war in Liberia, the role of the Vanguards in the conflict in Sierra Leone, and information concerning the Abidjan Peace Accord (1996) and the Lome Peace Agreement (1999)".[3] Further, that the witness will provide evidence of the RUF command structure and the relationship between the RUF/AFRC, which is relevant to the several forms of liability alleged against Mr. Taylor by the Prosecution in this case.[4]
3. Rule 92*bis*(A) specifically prohibits the admission of evidence that goes to proof of the acts and conduct of the accused. Further it has been determined in jurisprudence that where information goes to a critical element of the Prosecution's case, it is proximate enough to the Accused to warrant cross-examination, which a Chamber may, in its discretion, order.[5] Notably, the Prosecution has not offered to make witness TF1-036 available for cross-examination.
4. Pursuant to the five day time limit under Rule 92*bis*(C), and taking into account the intervening Judicial Recess, the Defence files its Objection to the admission of the prior testimony and related exhibits of witness TF1-036 under Rule 92*bis*. The defence objects on the basis that some of the information is not relevant as it falls outside the Indictment period, and that some of the information is "linkage" in nature and/or goes to proof of the acts and conduct of the accused, and to that extent, absent the opportunity for cross-examination, is inadmissible under Rule 92*bis*. The Defence aver that the Prosecution

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-438, Prosecution Notice Under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 14 March 2008, paras. 1, 2 ("Notice").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-410, Prosecution's Amended Witness List, 7 February 2008 ("Amended Witness List").
[3] Notice, para. 11.
[4] Notice, para. 14.
[5] See Notice, para. 15, and cases cited therein.

should have made its application under Rule 92*ter*, which allows for the admission of written statements that go to the proof of acts and conduct of the accused and/or his alleged subordinates while ensuring that the witness is present for cross-examination.

5. Therefore, if the Trial Chamber does not deny the admission of the prior transcripts and related exhibits of witness TF1-036 under Rule 92*bis* completely, the Defence request, in the alternative, that only those portions of the witness' prior testimony or related exhibits that are not objected to in Annex A be admitted. Alternatively, that the Court, for purposes of a fair trial, order the Prosecution to ensure that witness TF1-036 is made available for cross-examination.

6. Further, regardless whether the witness' evidence is tendered through Rule 92*bis*(A) with cross-examination; through Rule 92*ter* with cross-examination; or completely live, the Defence hereby includes in this Objection a timely[6] application[7] to rescind the closed session protective measures orally granted to witness TF1-036 in the RUF case, on the basis that there is no indication that they are still necessary.[8] The Defence observes that under Rule 75(F), these measures continue to apply to the current proceedings, *mutatis mutandis*, until they are rescinded by this Chamber, in consultation with Trial Chamber I, per Rule 75(H).

II. Legal Basis and Submissions

*Application Should Have Been Made Under Rule 92*ter

[6] The Presiding Judge recently commented that the testimony of TF1-362 would have to proceed in closed session because the Defence had not made a "timely application" to vary or rescind orders previously made by Trial Chamber I in regard of that witness's testimony. Thus the Presiding Judge was "reluctantly" bound to proceed in closed session. See Taylor Trial Transcript, 27 February 2008, pg. 4797, lns. 6-10.

[7] The Defence recognize that typically an application to modify or rescind protective measures will be done in a separate Motion. However, for purposes of efficiency and so that all trial-related issues related to this witness can be resolved comprehensively, the Defence include this application in its Objection. The Prosecution is not disadvantaged in this regard – whether in its Reply to this Objection, or in a Response to a separate Defence motion, the Prosecution would only have one opportunity to comment on the application. If the Prosecution deem it necessary, the Defence would not oppose an oral request for a full ten days to file its Reply and/or a reasonable extention of the filing page limit in order to fully consider this application.

[8] See Notice, para. 18 and Notice, Confidential Annex A. Witness TF1-036 was orally granted closed session protective measures by Trial Chamber I on 27 July 2005, at pages 19-20 of the Trial Transcript. Also see the protective measures previously granted to witness TF1-036 as in "insider witness" in *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004.

7. As the Prosecution's application includes information directly related to proof of the acts and conduct of the accused,[9] it should have been brought under Rule 92*ter*, which requires the agreement of the parties and that the witness is present for cross-examination. Rule 92*ter* states:

> With the agreement of the parties, a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:
> (i) the witness is present in court;
> (ii) the witness is available for cross-examination and any questioning by the Judges; and
> (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

8. On the basis of the legal principle that any statute must be read as a whole, an application under Rule 92*bis* may therefore only be made if there is no agreement between the parties or if there is genuinely no information that goes to proof of the acts or conduct of the accused.

*Objection Under Rule 92*bis

9. Rule 92*bis*(A) states, "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". Rule 92*bis*(B) adds the further requirements that the information submitted must be reliable and susceptible of confirmation.

10. The prohibition on admission of information going to proof of the acts and conduct of the accused has been clearly expounded in the jurisprudence of international criminal tribunals as well as that of the Special Court. As a general rule, the phrase, "acts and conduct of the accused" must be given its ordinary meaning; that is, deeds and behaviour of the accused.[10] In *Galic,* the ICTY Appeals Chamber set out various examples of what amounts to acts and conduct of an accused.[11] This includes:

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[9] See Annex A.
[10] *Prosecutor v. Milosevic,* ICTY-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002, para. 22.
[11] *Prosecutor v. Galic,* ICTY-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, paras. 10 and 11 ("Galic 92*bis* Appeals Decision") (emphasis added) (copy provided with Prosecution Notice).

- That the accused **committed** (that is, that he personally physically perpetrated) any of the crimes charged himself, or
- That he **planned, instigated or ordered** the crimes charged, or
- That he otherwise **aided and abetted** those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
- That he was a **superior** to those who actually did commit the crimes, or
- That he **knew or had reason to know** that those crimes were about to be or had been committed by his subordinates [relevant state of mind], or
- That he **failed to take reasonable steps to prevent** such acts or to punish those who carried out those acts [omission to act], or
- That he **participated in a joint criminal enterprise**, or
- That he shared with the person who actually did commit the crimes charged the **requisite intent** for those crimes (as part of a Joint Criminal Enterprise).

11. In the attached Annex, the Defence highlights portions of the transcript of the prior testimony of witness TF1-036 which contain information that, on the basis of any one or more of the above criteria, goes to proof of the acts and conduct of the accused, which therefore must not be admitted under Rule 92*bis*.

12. Jurisprudence from this court also specifically recognizes that a separate consideration for the admission of evidence under Rule 92*bis* is whether admission of certain information would unfairly prejudice the opposing party,[12] because it is too closely linked to the acts and conduct of the accused to be admitted without the opportunity for cross-examination.

13. While the Defence agree that the acts and conduct of an alleged subordinate of Mr. Taylor[13] cannot be equated to the acts and conduct of Mr. Taylor himself, and therefore may be admissible – such evidence must only be admitted if the witness is available for cross-examination.[14] The Special Court has previously determined that acts of co-

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[12] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1049, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 Under Rule 92*bis*, or in the Alternative, Under Rule 92*ter*, 12 March 2008, pg. 2 ("Sesay 92*bis* Decision"), citing *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-447, Decision on Prosecutor's Request to Admit into Evidence Certain Documents Pursuant to Rules 92*bis* and 89(C), 14 July 2005, pg. 4 ("CDF 92*bis* Decision"). See also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-559, Decision on Prosecutor's Notice Under Rule 92 *bis* to Admit the Transcripts of Witness TF1-334, 23 May 2006, pg. 3 ("RUF 92*bis* Decision").

[13] For purposes of this Objection, and based generally on Prosecution allegations, the following non-exhaustive list of personalities should be considered "subordinates" of Mr. Taylor: Foday Sankoh, Sam Bockarie, Issa Sesay, Morris Kallon, Augustine Gbao, Johnny Paul Koroma, Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Benjamin Yeaten, Ibrahim Bah, Daniel Tamba Jungle, and Zig Zag Marzah.

[14] For instance, TCI has determined that a witness' testimony that he was released from custody by soldiers after they received a letter from Superman ordering the soldiers to stop the killing is evidence **regarding the acts and conduct of others** who committed the crimes for which the Accused [Gbao] is alleged to be responsible and **not evidence of the acts and conduct of the accused** which establish his responsibility for the acts and conduct of

perpetrators or subordinates of the accused is relevant in determining whether cross-examination should be allowed, but not in determining if a document should be admitted under Rule 92*bis*.[15] Thus, there remains a distinction between (a) acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others.[16] The first is admissible under Rule 92*bis*, the latter is not. Significantly, the **proximity** of the acts and conduct of the alleged subordinate to the accused, as described in the evidence sought to be admitted, is relevant to this determination.[17]

14. Specifically, the Special Court has held that where a witness statement contains "material to the command responsibility and joint criminal enterprise allegations in the Indictment", that information goes to a "critical element of the Prosecution's case" and is therefore "proximate enough to the Accused so as to require cross-examination", which the Trial Chamber's may to order at its discretion under Rules 26*bis* and 54.[18] This is simply, but crucially, a matter of fairness.[19] The ICTY has also noted that there is only a "short step" from a finding that the acts constituting the crimes charged were committed by a subordinate to finding that the accused knew or had reason to know that those crimes were being committed by them.[20]

15. The Defence therefore submit that by seeking to admit into evidence of the acts and conducts of alleged subordinates of Mr. Taylor[21] through witness TF1-036's prior testimony and related exhibits, the Prosecution is in fact leading evidence on the acts and conduct of the accused without affording him the opportunity to challenge the evidence through cross examination. On the basis of the accused's statutory right to a fair trial, this

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others. However, this testimony was only admitted because the witness was available for cross-examination. RUF 92*bis* Decision.

[15] CDF 92*bis* Decision, pg. 4.

[16] See Galic 92*bis* Appeals Decision, para. 9.

[17] Galic 92*bis* Appeals Decision, para. 13.

[18] Sesay 92*bis* Decision, pgs. 1, 3.

[19] Galic 92*bis* Appeals Decision, para. 15; *Prosecutor v. Martic*, ICTY-95-11-T, Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules, 16 January 2006, paras. 29, 33.

[20] Galic 92*bis* Appeals Decision, para. 14.

[21] For instance, the witness makes lengthy allegations that Sam Bockarie traveled from Sierra Leone to Liberia with diamonds, had discussions there with Benjamin Yeaten, and then returned to Sierra Leone with arms and ammunition. See Annex A.

can not be allowed. If the witness is not available for cross-examination, then the portions objected to in Annex A should not be admitted into evidence.

The Evidence is Not Entirely Relevant or Susceptible of Corroboration

16. It is common cause that all information tendered into evidence must be relevant under Rule 89(C). Evidence that falls outside the Indictment period is only relevant in limited situations, such as that provided by Rule 93(A), which states that "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice". Therefore, portions of the transcript of TF1-036 that discuss the Accused's training in Libya or the plans to create conflict in Liberia, all of which took place before 1996, should not be admitted.[22]

17. Further, portions of the witness' transcript which refer to people who are no longer alive and thus cannot be corroborated or confirmed should also not be admitted.

Request for Previously Granted Closed Session Protective Measures To Be Rescinded

18. Witness TF1-036 was orally granted closed session Protective Measures in the RUF trial in July 2005. Since then the Prosecution has not indicated whether the witness would still require such measures if required to appear for cross-examination.

19. It is established that closed session is an extreme security measure that is resorted to only when it is absolutely necessary to do so. In *Tadic*, the ICTY determined that:

> "...**[A]ny measures taken should be strictly necessary**. If a less restrictive measure can secure the required protection, that measure should be applied. The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable".[23] (emphasis added)

20. This Chamber recently reaffirmed this principle and set forth a clear three-prong test, stating:

> "...[I]n granting protective measures to witnesses and victims, the Trial Chamber has a duty to balance the protection of those victims and witnesses with the rights of the Accused to a fair and public trial and that the **extraordinary measure** of closed session testimony will only be granted where it is clearly demonstrated (a) that there is a real and specific risk to the witness and/or his family, (b) that the right of the

[22] Specific objections to portions of TF1-036's transcript and exhibits on the basis of relevance are indicated in Annex A.

[23] *Prosecutor v. Tadic,* IT-94-1, Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 66. See also, *Prosecutor v. Bagosora,* No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19.

Accused to a fair and public trial is not violated, and (c) that no less restrictive measures can adequately deal with the witness's legitimate concerns".[24]

The Prosecution Has Not Shown that There Still Exists a Real and Specific Risk to Witness TF1-036

21. The burden of justifying the protection of witnesses lies on the party seeking such protection.[25] Additionally, the subjective fear of a witness is insufficient to justify special protective measures without any objective considerations.[26]

22. In this instance, the Defence aver that the order for closed session testimony for this witness, which was granted more than two and a half years ago, has in essence expired, unless the Prosecution can show otherwise. Even if it were accepted that witness TF1-036 once faced threats that were real and specific, the Prosecution has not submitted any recent material to prove that currently there are any real or specific risks to the witness and/or his family. The Defence note that the operation of protective measures prevents it from thoroughly investigating the current circumstances of this witness to ascertain whether the prevailing order for protective measures is still warranted. Only the Prosecution is in a position to do so. Absent that information from the Prosecution, the order for protective measures must therefore be rescinded.

Closed Session Testimony Infringes on the Accused's Right to a Fair and Public Trial

23. According to Rule 78, the preference at the Special Court is for public hearings and open session testimony. This preference is also clear from the rights granted to the Accused in Article 17(2) of the Statute. The right to a public hearing may be only be infringed by the "need to guarantee the utmost protection and respect for victims and witnesses".[27]

24. One of the essential components of a fair trial is the Defence's ability to investigate allegations against the Accused in an effective manner. Article 17(4)(e) of the Statute

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[24] *Prosecutor v. Taylor,* SCSL-03-01-T-427, Decision on Confidential Prosecution Motions SCSL-03-01-T-372 and SCSL-03-01-T-385 for the Testimonies of Witnesses to be Held in Closed Session, 26 February 2008, pg. 6 ("Closed Session Decision").

[25] *Prosecutor v. Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2February 2005, para. 13.

[26] *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, para. 26.

[27] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, paras. 33-34.

affords the Accused the right to "examine, or have examined, the witnesses against him". The practical realities of hearing witness testimony in closed session however is that the Defence's ability to effectively investigate the witness as well as the content of the witness' testimony is severely restricted. Thus, counsel are not able to comprehensively obtain information with which to cross-examine the witnesses called to testify against Mr. Taylor.[28]

25. Because of the impact on the Accused's rights to a fair and public hearing, which includes the right to conduct thorough investigations, the use of closed session should remain an "extraordinary measure",[29] and should only be granted if less restrictive measures are not sufficient.

Prosecution Has Recourse to Other Less Restrictive Measures that Could Adequately Deal with the Witnesses' Legitimate Concerns, If Any

26. The Defence further avers that, especially considering the time that has lapsed since the current order for closed session for Witness TF1-036 was granted, this order can now be rescinded without material prejudice to the witness as the Prosecution has recourse to other less restrictive measures. Absent an indication from the Prosecution that it has given "full and exhaustive consideration" to less restrictive witness protection measures available under Rule 75(B)(i)(c),[30] the order must therefore be rescinded.

27. The Defence submit that if necessary, it is possible to alleviate whatever real or perceived safety concerns witnesses TF1-036 may still have by relying on the pre-existing protective measures granted to him for trial purposes by Trial Chamber I. If additional protective measures are still needed for the Taylor trial, the Defence invites the Prosecution to make a fresh application, or to propose an alternative arrangement, taking into consideration the

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[28] See *Prosecutor v. Taylor,* SCSL-03-01-T-413, Defence Response to the Public Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, and 390, 8 February 2008, paras. 13-17. Also, contrary to what the Prosecution insinuates, the Accused himself does not know nor have knowledge of the majority of the linkage and crime base witnesses the Prosecution is calling against him. Thus, his ability to contribute investigative leads to the Defence team is limited. See *Prosecution v. Taylor,* SCSL-03-01-T-418, Reply to Defence Response to Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388 and 390, 14 February 2008, para. 12.

[29] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-577, Decision on Prosecution Motion for the Testimony of Witnesses TF1-367, TF1-369, TF1-371 to be held in Closed Session and for other Relief of Witness TF1-369, 14 June 2006, pg. 5.

[30] Closed Session Decision, pg. 6.

intervening two and a half years since the initial application was granted and the current mindset and circumstances of the witness.

IV. Conclusion

28. The Defence request that the Trial Chamber:

    (A) Dismiss the Prosecution Notification in its entirety, since it should have been filed under Rule 92*bis;* or

    (B) Alternatively, only admit into evidence those portions of witness TF1-036's prior testimony or related exhibits that are not objected to in Annex A.

29. However, if the Trial Chamber admits the objectionable portions of witness TF1-036's testimony and related exhibits, the Defence request that the Trial Chamber:

    (A) Orders the Prosecution to make witness TF1-036 available for cross-examination; and

    (B) Rescind the closed session protective measures previously granted to Witness TF1-036 in the RUF Trial.

Respectfully Submitted,

Silas Chekera

for Courtenay Griffiths Q.C.
Lead Counsel for Charles G. Taylor
Dated this 31st Day of March 2008
The Hague, The Netherlands.

Table of Authorities

Prosecutor v. Taylor, SCSL-03-01-T-410, Prosecution's Amended Witness List, 7 February 2008

Prosecutor v. Taylor, SCSL-03-01-T-413, Defence Response to the Public Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, and 390, 8 February 2008

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Prosecutor v. Taylor, SCSL-03-01-T-427, Decision on Confidential Prosecution Motions SCSL-03-01-T-372 and SCSL-03-01-T-385 for the Testimonies of Witnesses to be Held in Closed Session, 26 February 2008

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Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-577, Decision on Prosecution Motion for the Testimony of Witnesses TF1-367, TF1-369, TF1-371 to be held in Closed Session and for other Relief of Witness TF1-369, 14 June 2006

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Prosecutor v. Tadic, IT-94-1, Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995

Prosecutor v. Bagosora, No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005

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Prosecutor v. Nyiramasuhuko et al, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005

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PUBLIC WITH CONFIDENTIAL ANNEX A – DEFENCE OBJECTION TO PROSECUTION NOTICE UNDER RULE 92BIS FOR THE ADMISSION OF THE PRIOR TESTIMONY OF TF1-036 INTO EVIDENCE

Name of Officer:

Vincent Tishekwa

Signed: