

THE APPEALS CHAMBER of the Special Court for Sierra Leone (“Special Court”)

BEING SEISED of the “Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma” filed on 10 December 2010 (“Appeal”);

CONSIDERING the “Prosecution Response to the Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma” filed confidentially on 17 December 2010 (“Response”);

NOTING the “Defence Reply to Prosecution Response to the Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma” filed on 10 January 2011 (“Reply”);

NOTING the “Decision on Urgent Prosecution Motion to Classify as ‘confidential’ the ‘Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma’ due to protective measures violations” issued by the Appeals Chamber on 10 January 2011;

NOTING the “Public with Redactions Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma” filed on 10 January 2011; and the Redacted Prosecution response thereto, filed on 12 January 2011;

CONSIDERING 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 (“Original Motion”);

CONSIDERING 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 (“Original Response”);

CONSIDERING the “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” rendered by Trial Chamber II on 11 November 2010 (“Impugned Decision”) and the Dissenting Opinion of Hon. Justice Julia Sebutinde filed on the same day;

CONSIDERING ALSO the “Decision on Defence Motion Seeking Leave to Appeal the ‘Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma’” rendered by Trial Chamber II on 2 December 2010 (“Decision Granting Leave to Appeal the Impugned Decision”);

NOW DETERMINES THE APPEAL ON THE BASIS OF THE WRITTEN SUBMISSIONS OF THE PARTIES:

I. PROCEDURAL HISTORY

1. On 10 December 2010, the Defence filed this Appeal against the Impugned Decision.¹ On 15 December 2010, the Prosecution filed a Motion² requesting that the Appeals Chamber re-classifies the Appeal as “confidential” and orders the Defence to file a public redacted version of the said Appeal.³ The Prosecution Motion was filed confidentially and alleged that certain portions of the Appeal breached the protective measures granted by Trial Chamber II in its 25 June 2008 Order,⁴ by revealing private session details of Witness TF1-375’s account of Johnny Paul Koroma’s alleged murder, allowing Witness TF1-375’s sources to identify him.⁵ On 16 December 2010, the Defence

¹ *Prosecutor v Taylor*, SCSL-03-01-T, Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma” 10 December 2010 (“Appeal”).

² *Prosecutor v Taylor*, SCSL-03-01-T, “Urgent Prosecution Motion to Classify as “Confidential” the ‘Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma’ Due to Protective Measures Violations”, with Confidential Annex A, 15 December 2010 (“Confidential Motion”).

³ Confidential Motion, paras 1, 2 6 & 7.

⁴ *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript (Private), 25 June 2008, pp. 12741-2: the Trial Chamber granted additional protective measures for Witness TF1-375 and ordered that all testimony relating to the death of Johnny Paul Koroma be adduced in private session.

⁵ See Confidential Motion, para. 5.

filed its Response wherein it partly objected to the Prosecution's re-classification Motion.⁶ On 17 December 2010, the Prosecution filed its confidential Response to the Defence Appeal.⁷

2. On 10 January 2011 the Appeals Chamber issued its Decision on the Prosecution's re-classification Motion.⁸ The Appeals Chamber found that the disputed portions of the Appeal fell outside the scope of Trial Chamber II's Order of 25 June 2008 and consequently, did not breach the protective measures granted by the Trial Chamber. The Appeals Chamber however granted the Prosecution's request in respect of the undisputed portions of the Appeal and ordered that (i) the Appeal be re-classified as 'confidential'; (ii) the Defence files a public version of its Appeal, with the undisputed portions redacted; and (iii) the Prosecution files a public redacted version of its confidential response to the Appeal.⁹ On 10 January 2011, the Defence filed both its reply¹⁰ and a public redacted version of its Appeal respectively.¹¹ A public redacted Prosecution response was filed on 12 January 2011.¹²

II. SUMMARY OF THE IMPUGNED DECISION

A. Relevant Background

3. On 20 October 2010, Trial Chamber II ordered the Prosecution to disclose the following materials to the Defence pursuant to its disclosure obligation under Rule 68(B): (a) details and results of an investigation that was conducted by the Prosecution into the

⁶ *Prosecutor v Taylor*, SCSL-03-01-T, Defence Response to 'Urgent Prosecution Motion to Classify as "Confidential" the 'Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma' Due to Protective Measures Violations" 16 December 2010.

⁷ Prosecution Response to Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma" 10 December 2010 ("Appeal").

⁸ *Prosecutor v Taylor*, SCSL-03-01-T, Confidential Decision on Urgent Prosecution Motion to Classify as "confidential" the 'Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma' due to protective measures violations, 10 January 2011 ("Confidentiality Decision").

⁹ See Confidential Decision, pp.2.

¹⁰ *Prosecutor v Taylor*, SCSL-03-01-T, Defence Reply to Prosecution Response to the Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma" 10 January 2011

¹¹ *Prosecutor v Taylor*, SCSL-03-01-T, Public with Redactions Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma" 10 December 2010 ("Redacted Appeal").

¹² *Prosecutor v Taylor*, SCSL-03-01-T, Public with Redactions Prosecution Response to Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma" 10 December 2010 ("Redacted Response").

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, written by Stephen Rapp to Defence Witness DCT-032.¹³ The Trial Chamber denied the Defence's request to draw adverse inferences from the Prosecution's failure to comply with its disclosure obligation under Rule 68(B) on the grounds that the request was "premature" (since the potentially exculpatory material had not yet been disclosed).¹⁴

4. On 21 October 2010, the Prosecution disclosed the materials to the Defence in compliance with the Court's Order.¹⁵ On 27 October 2010, the Defence filed a Motion requesting the Trial Chamber to admit into evidence, the recently disclosed materials contained in its Confidential Annexes A to C, and the affidavit of DCT-032 contained in its Confidential Annex D, pursuant to Rule 92bis.¹⁶ The Defence argued that the prohibition against the admission of "information that goes to the acts and conduct of the Accused" under Rule 92bis "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." Additionally, the Defence requested the Trial Chamber to draw an adverse inference from the disclosed materials against the Prosecution's allegations and evidence that the Accused was responsible in anyway for the alleged death of Johnny Paul Koroma in Liberia.¹⁷

B. The Majority Decision

5. The majority of the Trial Chamber disagreed with the Defence's interpretation of the meaning of the phrase "information ... that do not go to proof of the acts and conduct of the accused" pursuant to Rule 92bis. The majority of the Trial Chamber then considered whether each of the documents contained in the Defence's Confidential Annexes A to D, met the requirements for admission into evidence under Rule 92bis; and found that none

¹³ *Prosecutor v Taylor*, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010 ("Disclosure Decision"), pp.15

¹⁴ See Disclosure Decision, para. 33.

¹⁵ See *Prosecutor v Taylor*, SCSL-03-01-T, 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" 11 November 2010 ("Impugned Decision") footnote 8, Trial Chamber notes that Disclosure was made to the Defence and copied to the Senior Legal Officer on 21 October 2010.

¹⁶ *Prosecutor v Taylor*, SCSL - 03-01-T, 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" 27 October 2010 ("Admission Motion")

¹⁷ Admission Motion, paras 5 and 28.

of them satisfied those requirements.¹⁸ Specifically, the majority found that “the material in the affidavit relates to Witness DCT-032’s denial that he was involved in the killing of Johnny Paul Koroma pursuant to the orders of the Accused.”¹⁹

6. The majority of the Trial Chamber also found that the affidavit contradicted the evidence of Prosecution witnesses that Witness DCT-032 played a key role in the alleged killing of Johnny Paul Koroma.²⁰ The majority of the Trial Chamber held that the affidavit therefore constitutes exculpatory information which goes to proof of the acts and conducts of the Accused and is inadmissible under Rule 92bis.²¹ Regarding the other submitted materials, the majority held that if “the affidavit is not admissible, then the other documents sought to be admitted pursuant to Rule 92bis, including the DNA tests have no independent relevance” and are accordingly, also inadmissible.²²

7. Additionally, the majority of the Trial Chamber denied the Defence’s request that based on the disclosed materials, it should “draw an adverse inference against the Prosecution’s allegations and evidence that Charles Taylor was responsible in any way for the alleged death of Johnny Paul Koroma”; for the following reasons:

(i) The Defence 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;

(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.²³

8. On 2 December 2010, the Trial Chamber granted the Defence Motion seeking leave to appeal the Impugned Decision.²⁴

¹⁸ Disclosure Decision, pp. 15.

¹⁹ Impugned Decision, para. 23.

²⁰ Impugned Decision, para. 23.

²¹ Disclosure Decision, paras 23-27.

²² Disclosure Decision, paras 28-33.

²³ Disclosure Decision, para. 35.

²⁴ *Prosecutor v Taylor*, SCSL-03-01-T “Decision on Defence Motion Seeking Leave to to Appeal the ‘Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the

III. SUBMISSIONS OF THE PARTIES ON APPEAL

A. Defence Submissions

9. The Defence presents two grounds of appeal.

10. In its first ground of appeal, the Defence submits that the Trial Chamber committed errors of law and/or of drawing a patently incorrect conclusion of fact in deciding that exculpatory information contained in the affidavit of DCT-032, which contradicts the evidence of Prosecution witnesses relating to the alleged murder committed by subordinates of Charles Taylor on his orders, goes to proof of the acts and conducts of the Accused and thus is inadmissible ... under Rule 92bis.”²⁵ The Defence submits that the Trial Chamber “put undue focus on the acts and conduct of the Accused when the primary focus should have been on the credibility of Prosecution witnesses and the conduct [of the Prosecution].” The Defence advances four main arguments in support of its submissions.

11. First, the Defence submits that the Trial Chamber “misstates” the factual content of DCT-032’s affidavit by finding that “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.” The Defence submits that in fact, the affidavit merely describes DCT-032’s contact and interaction with the Prosecution and does not mention anything about the Accused and/or his alleged order to kill Johnny Paul Koroma or whether infact Johnny Paul was killed.²⁶

12. Second, the Defence submits that the Trial Chamber, in arriving at its conclusion, took “irrelevant factors into consideration, leading to an absurd application of Rule 92bis.”²⁷ The Defence contends that “the Trial Chamber should have confined its determination of whether the affidavit went to proof of the acts and conduct of the Accused to what was stated in the affidavit, rather than by comparison of the content of the affidavit to Prosecution evidence on record.”²⁸ The Defence posits that the Trial Chamber’s approach to Rule 92bis admission renders the rule obsolete because it prohibits crime base

Alleged Death of Johnny Paul Koroma” 2 December 2010 (“Decision Granting Leave to Appeal the Impugned Decision”);

²⁵ Defence Notice of Appeal, para. 12

²⁶ Defence Notice of Appeal, paras 19 and 23, citing para. 23 of the Impugned Decision.

²⁷ Defence Notice of Appeal, para. 24, citing paras 25 and 27 of the Impugned Decision.

²⁸ Defence Notice of Appeal, para. 24.

evidence which could later be linked to subordinates of the Accused in comparison to Prosecution evidence otherwise on the record.²⁹

13. Third, the Defence submits that the Trial Chamber committed an error of law in finding that the affidavit goes to proof of the acts and conduct of the Accused, including an omission to act, which is not related to a breach of duty alone.³⁰ The Defence gives the following reasons in support of its submission:

(a) the Trial Chamber erred in considering proof of the acts and conduct of the Accused, regarding his alleged orders to kill Johnny Paul Koroma which is outside the indictment period.³¹ Such evidence does not relate to the acts and conduct of the Accused as charged in the Indictment; but rather, is relevant to contradict allegations advanced by the Prosecution as Rule 93 evidence and therefore, should have been admitted pursuant to Rule 92bis.³²

(b) the evidence implicating DCT-032 in the killing of Johnny Paul Koroma is crime base evidence and does not implicate "linkage" evidence which ties the orders of the killing back to the Accused.³³

(c) the Trial Chamber erred in finding that "evidence in the affidavit which goes to proof of the acts and conduct of the Accused is inadmissible because it indicates that the accused did not do something."³⁴ The *Galic* Decision cited by the Trial Chamber in support of its finding describes an omission that leads to the commission of a crime as charged in the Indictment and not proof that an accused did not commit an act for which he is charged.³⁵

(d) Both the *Bagosora* and *Nsabimana* Decisions, which the Trial Chamber cited in support of its holding that a statement goes to proof of the acts and conduct of the accused if it tends to prove or disprove his acts and conduct and if it refutes allegations laid out against the accused; can be distinguished from the present

²⁹ Defence Notice of Appeal, para. 24

³⁰ Defence Notice of Appeal, para. 25.

³¹ Defence Notice of Appeal, para. 27: the Defence notes that the death of Johnny Paul Koroma occurred in 2003 which is outside the indictment period.

³² Defence Notice of Appeal, para. 27.

³³ Defence Notice of Appeal, para. 28.

³⁴ Defence Notice of Appeal, para. 29.

³⁵ Defence Notice of Appeal, para. 39, citing para. 17 of the Impugned Decision referencing *Prosecutor v. Galic*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", 7 June 2002, para. 11 ("*Galic* Decision").

case.³⁶ In *Bogosora*, statements going to proof of the acts and conduct of the accused which tended to prove or disprove his acts and conduct were only excluded because of the impact their admission might have had on a co-accused. In the present case, there is no co-accused. In *Nsabimana*, statements refuting the acts and conduct of the accused were only excluded because the evidence was so pivotal to the Prosecution case that, in fairness, admission would require cross-examination of the witness. In the instant case, the alleged death of Johnny Paul Koroma is outside the scope of the Indictment and therefore cannot be seen to be pivotal to the Prosecution case.

14. Fourth, the Defence submits that the Trial Chamber misconstrued the rationale of Rule 92bis.³⁷ The Defence contends that the exclusion of information directly implicating the acts and conduct of the accused under Rule 92bis is a safeguard intended to protect, rather than frustrate the fair trial rights of the Accused by ensuring that an accused has an opportunity to cross examine witnesses.³⁸ The Defence argues that the issue of admissibility pursuant to Rule 92bis arose from the Prosecution's failure to discharge its Rule 68(B) disclosure obligations³⁹ and has caused the Accused to suffer two prejudices - the failure to disclose and the failure to admit exculpatory information.⁴⁰ The Defence claims that the Trial Chamber erred by failing to give sufficient weight to the impact the late disclosure had on the Defence's ability to coordinate its case and schedule witnesses.⁴¹

15. In its second ground of appeal, the Defence submits that the Trial Chamber erred in finding that absent the affidavit of DCT-032, the other materials submitted, including the Prosecution's Index of Disbursements and indemnity letter to DCT-032 have no independent relevance and are therefore inadmissible pursuant to Rule 92bis.⁴² The Defence's primary contention is that the Index of disbursements and indemnity letter are relevant to the Defence's argument that the Prosecution made improper payments and inducements to witnesses, particularly Witnesses TF1-375 and DCT-032 to influence the substance of their testimony.⁴³ The Defence submits that the alleged improper payments

³⁶ Defence Notice of Appeal, para. 30, citing para. 17 of the Impugned Decision which references the *Bogosora Decision* and *Nsabimana Decision* respectively.

³⁷ Defence Notice of Appeal, paras 31-34.

³⁸ Defence Notice of Appeal, para. 32.

³⁹ Defence Notice of Appeal, para. 34.

⁴⁰ Defence Notice of Appeal, para. 34.

⁴¹ Defence Notice of Appeal, para. 34.

⁴² Defence Notice of Appeal, para. 35.

⁴³ Defence Notice of Appeal, paras 36, 42, 48, 51, 56, and 57.

and inducements made by the Prosecution to witnesses is “a live issue” in the trial⁴⁴ and that even absent the affidavit, the information contained in the Index of disbursements is sufficient to support its position that the Prosecution has improperly paid and induced witnesses.⁴⁵

16. The Defence further submits that the indemnity letters written by the Prosecution to numerous insider witnesses and DCT-032 is “relevant to show the Prosecution’s investigative *modus operandi* and how it recruited insider witnesses.”⁴⁶ The Defence contends that it should be able to rely on evidence of the indemnity letters to argue that the Prosecution offered them as an inducement for witnesses to testify about incriminating information that could implicate the Accused.⁴⁷ The Defence relies on Justice Sebutinde’s dissent in which she opined that the indemnity letter complied with the requirements for admission under Rule 92bis.⁴⁸

17. Additionally, the Defence submits that in its Final Brief, it should be allowed to draw inferences from the timing of the evidence of Prosecution witnesses and the payments made; and the indemnity letter written to DCT-032 by the Prosecution.⁴⁹ The Defence posits that “such an inference would cast doubt on the credibility of the Prosecution evidence at issue as well as on the integrity of the Prosecution case as a whole, given its contentions regarding the impact payments have on the truthfulness of testimony.”⁵⁰ The Defence cites the ICC case of *Prosecutor v Lubanga* in support of its submission.

18. The Defence requests the Appeals Chamber to “order the Trial Chamber” to admit into evidence the affidavit of DCT-032, Index of Disbursements to DCT-032 and letter of indemnity written by the Prosecution to DCT-032.⁵¹

B. Prosecution’s Response

19. The Prosecution opposes the appeal.

⁴⁴ Defence Notice of Appeal, para. 36 and 42.

⁴⁵ Defence Notice of Appeal, para. 38, citing Dissenting Opinion paras 14 and 16.

⁴⁶ Defence Notice of Appeal, para. 47.

⁴⁷ Defence Notice of Appeal, para. 47.

⁴⁸ Defence Notice of Appeal, para. 47.

⁴⁹ Defence Notice of Appeal, para. 57.

⁵⁰ Defence Notice of Appeal, para. 56.

⁵¹ Defence Notice of Appeal, para. 60.

20. The Prosecution submits that the Defence's interpretation of the Trial Chamber's finding that the affidavit goes to proof of the acts and conduct of the Accused is "unduly myopic" as it is clear that the Trial Chamber based its decision on the extension to the acts and conduct of the accused limitation outlined in the *Galic* Decision and supported by the jurisprudence of the Special Court.⁵² The Prosecution explains that the prohibition on admission of evidence which goes to proof of the acts and conduct of the accused has been extended and developed by the jurisprudence to include evidence that goes to the acts and conduct of a proximate subordinate of the accused.⁵³ The Prosecution posits that evidence of the killing of Johnny Paul Koroma is significant because it is "indicative of consciousness of the Accused's criminal responsibility for the crimes charged in the indictment";⁵⁴ and is therefore neither crime base nor peripheral.⁵⁵

21. The Prosecution refutes the Defence's arguments that the Trial Chamber misstated the factual contents of the affidavit by finding that it relates to DCT-032's denial that he was not involved in the killing of Johnny Paul Koroma.⁵⁶ The Prosecution argues that the Defence's submissions regarding the Trial Chamber's factual conclusion of the affidavit "is not borne out by a plain reading of the affidavit."⁵⁷ The Prosecution submits that the Defence has failed to show that no reasonable Trial Chamber could have reached the same conclusion based on the materials before it.⁵⁸

22. Additionally, the Prosecution submits that when assessing the admissibility of evidence concerning the acts and conduct of a proximate subordinate of an accused, the Trial Chamber is entitled to place the evidence in its wider context.⁵⁹ The Prosecution states that this approach to assessing evidence in its wider context was taken in the *Galic* Decision⁶⁰ and has also been taken on repeated occasions in the present proceedings at the request of the Defence in relation to admission of crime base evidence.⁶¹ The Prosecution submits that the Defence's argument that assessing crime base evidence in its

⁵² Prosecution Response, paras 9 and 10 citing *Galic* Decision.

⁵³ Prosecution Response, paras 9 and 10 citing *Galic* Decision, para. 13.

⁵⁴ Prosecution Response, para. 15 citing Disclosure Decision, para. 1.

⁵⁵ Prosecution Response, para. 15.

⁵⁶ Prosecution Response, paras 19-21, citing Defence Notice of Appeal, paras 19-23.

⁵⁷ Prosecution Response, para. 20.

⁵⁸ Prosecution Response, para. 20.

⁵⁹ Prosecution Response, para. 22.

⁶⁰ Prosecution Response, para. 22, citing *Galic* Decision, para. 18.

⁶¹ Prosecution Response, para. 23 citing *Prosecution 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, p. 5.

wider context will render Rule 92bis obsolete; is therefore without merit and contradicts the Defence's previous stance.⁶²

23. Regarding the Defence's submission that the Trial Chamber erred by finding that the affidavit goes to proof of the acts and conduct of the Accused including his omission to act; the Prosecution responds as follows:

(a) the Trial Chamber noted the significance of the evidence relating to the alleged killing of Johnny Paul Koroma, its pivotal nature and the fact that it was not presented for the purposes of crime base evidence. In any case, there is no temporal jurisdiction restriction on the type of evidence that can be admitted pursuant to Rule 92bis;⁶³

(b) the material in the affidavit relates to the acts and conduct of a proximate subordinate of the Accused. Jurisprudence establishes that this factor is relevant to the Trial Chamber's decision under Rule 92bis and that it may result in the exclusion of the evidence.⁶⁴

(c) the Defence has erroneously raised the issue of omission in the application of Rule 92bis. The Decision of the Trial Chamber was not premised on the affidavit being relevant to an omission of the Accused. Rather, the Trial Chamber assessed the affidavit in relation to the acts and conduct of a subordinate and also in relation to its intended use which is to refute the testimony of prosecution witnesses regarding the alleged killing of Johnny Paul Koroma. There is no issue of omission in the affidavit and therefore, no issue regarding the application of Rule 92bis to omissions in this appeal.⁶⁵

(d) the Trial Chamber correctly concluded that evidence which proves or disproves the acts and conduct of Accused falls within the scope of the acts and conduct restriction.⁶⁶

24. Furthermore, the Prosecution denies that the Trial Chamber misconstrued the rationale of Rule 92bis. According to the Prosecution, the provisions of Rule 92bis and the jurisprudence disclose that the prohibition of materials which goes to the acts and conduct

⁶² Prosecution Response, para. 23.

⁶³ Prosecution Response, para. 26, citing Defence Notice of Appeal, para. 27.

⁶⁴ Prosecution Response, para. 26, citing Defence Notice of Appeal, para. 27 and *Galic* Decision, para. 13.

⁶⁵ Prosecution Response, para. 27, citing Defence Notice of Appeal, para. 29.

of the Accused applies to evidence introduced by both the Prosecution and the Defence.⁶⁷ The Prosecution argues that the Defence's submission that it was prejudiced by the Prosecution's failure to meet its disclosure obligation under Rule 68 is outside the scope of the appeal and does not concern the interpretation of Rule 92bis.⁶⁸ The Prosecution submits that in any event, the Defence had the opportunity to present the evidence to DCT-032 and that it has failed to show that the disclosure of the DNA tests, index of disbursements and indemnity letter resulted in any prejudice to the Accused.⁶⁹

25. The Prosecution submits that the Defence's second ground of appeal falls outside the scope of the Appeal. Alternatively, the Prosecution submits that the Defence's arguments under its second ground of appeal should be dismissed for the following reasons. First, the Defence's allegations that the Prosecution made improper payments and inducement to witnesses does not constitute a "live issue" in the present proceeding.⁷⁰ Second, the only issue to which the index of disbursements and indemnity letter are relevant, is the witness's credibility; and as DCT-032 has not testified viva voce or via Rule 92bis, the information in those documents are effectively "disembodied" and "irrelevant".⁷¹ Third, unlike the *Lubanga* case which the Defence cites in support of its argument that documents containing evidence of improper conduct by the Prosecution should be admitted, there is no live issue before the Trial Chamber regarding improper payments and inducements to witnesses; and in any event, DCT-032 is not a Prosecution intermediary.⁷²

C. Defence Reply

26. The Defence reiterates its arguments in its Appeal.

IV. APPLICABLE LAW

27. Pursuant to Rule 89(C), a Chamber may admit any relevant evidence.

28. Rule 92bis states:

Alternative Proof of Facts

⁶⁶ Prosecution Response, para. 28, citing Defence Notice of Appeal, para. 30.

⁶⁷ Prosecution Response, para. 30.

⁶⁸ Prosecution Response, para. 32, citing Defence Notice of Appeal, para. 34.

⁶⁹ Prosecution Response, para. 32, citing Defence Notice of Appeal, para. 34.

⁷⁰ Prosecution Response, paras 35 and 39.

⁷¹ Prosecution Response, paras 36 and 39 citing *Karemera case*, para. 7.

⁷² Prosecution Response, paras 38 and 39.

(A) 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.

V. DELIBERATIONS

29. Trial Chambers have a wide discretion in the conduct of the proceedings before them including, in deciding on issues of admissibility of evidence.⁷³ The Trial Chamber is afforded deference in such decisions based on the circumstances of the case before it.⁷⁴ The Appeals Chamber will only intervene on appeal where the Trial Chamber's exercise of discretion was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.⁷⁵

30. Pursuant to Rule 92bis, the Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.⁷⁶ The purpose of Rule 92bis is to expedite proceedings within the parameters of the right of the accused to a fair trial.⁷⁷ A fair trial under the Rules of the Special Court, calls for the bringing forth and testing of testimonial evidence,⁷⁸ with very few exceptions. One of those few exceptions to live testimony is documentary evidence which the Trial Chamber has discretion to admit under Rule 92bis provided that the proffered evidence (i) does not go to proof of the acts and conduct of the

⁷³ Rule 89(C) of the SCSL Rules.

⁷⁴ *RUF Appeal Judgment*, para. 229, citing *Prosecutor v Delalic et al.*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 533.

⁷⁵ *Prosecutor v. Milan Milutinovi} et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006, para. 6.

⁷⁶ Rule 92bis (A) of the Rules.

⁷⁷ *RUF Appeal Judgment*, para. 229, citing *Prosecutor v Prlic et al*, IT-04-74-AR73.6, Decision on Appeal against Decision admitting transcript of Jadranko Prlic's questioning into evidence, 23 November 2007, para. 43, *Prosecutor v. Stanislav Galic*, Case No IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C) ("*Galic* Decision"), 7 June 2002, paras 28-30.

⁷⁸ See Rule 90 which deals with the testimony of Witnesses.

(A) Witnesses may give evidence directly, or as described in Rules 71 and 85 (D).

accused, (ii) is relevant for the purpose for which its admission is sought and (iii) its reliability is susceptible of confirmation.⁷⁹

31. The prohibition against evidence which goes to the proof of the acts and conduct of the Accused applies to evidence introduced by both the Prosecution and the Defence.⁸⁰ Evidence goes to proof of the acts and conduct of the accused if it tends to prove or disprove the accused's acts or conduct as charged.⁸¹ Rule 92bis is by its plain reading completely neutral. It excludes incriminatory as well as exculpatory evidence that goes to proof of the acts and conduct of the accused, tendered by either the Prosecution or Defence. It is intended to expedite, where appropriate, a fair trial. It is not designed to give an unfair advantage to either the Defence or the Prosecution.

32. The Defence's argument that evidence tendered by the Accused, which goes to proof of the acts and conduct of the Accused on peripheral issues should be admissible provided it meets the other requirements of Rule 92bis, is rejected.⁸²

33. The Appeals Chamber will now address the merits of the appeal.

34. The primary issue for consideration in this appeal is whether the Trial Chamber correctly exercised its discretion in deciding (a) that the affidavit of DCT-032 goes to proof of the acts and conduct of the Accused and is inadmissible pursuant to Rule 92bis; and (b) that absent the affidavit, the other documents sought to be admitted into evidence have no independent relevance and are also inadmissible pursuant to Rule 92bis. The Appeals Chamber will consider each of these issues consecutively.

a) The affidavit of DCT-032

35. We agree with the proposition: "the purpose of Rule 92bis is to expedite proceedings within the parameters of the right of the accused to a fair trial."⁸³ A fair trial

⁷⁹ *Prosecutor v Norman et al.*, 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 ("Norman Rule 92bis Decision"); see also, Decision on Sesay Rule 92bis Motion, para. 25.

⁸⁰ *Prosecutor v Sesay et al.*, SCSL-04-15-T 'Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92bis' 15 May 2008

⁸¹ *Prosecutor v Bagosora et al.* ICTR-98-41-T, Decision on Prosecution's Motion for the Admission of Written Witness Statements under Rule 92bis, 9 March 2004, para. 16; *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, pp. 4 citing, *Prosecutor v Nsabimana et al.* ICTR-97-29-T Decision on Nsabimana Motion to Admit the Written Statements of Witness Jami in Lieu of Oral Testimony pursuant to Rule 92bis, 15 September 2006, para. 34.

⁸² Defence Notice of Appeal, para. 33.

under our Rules calls for the bringing forth and testing of testimonial evidence⁸⁴ with very few exceptions. One of those few exceptions to live testimony is documentary evidence which the Trial Chamber has discretion to admit under Rule 92bis provided that the proffered evidence:

- 1) does not go to proof of the acts and conduct of the accused;
- 2) is relevant to the purpose for which it is submitted; and
- 3) its reliability is susceptible of confirmation.

36. A document offered under Rule 92bis may be relevant to more than one purpose. However, if the fact finder determines that the document goes to proof of the acts and conduct of the Accused, even if that is not the purpose for which it is offered, then the Rule precludes its admission in lieu of live testimony. The majority of the Trial Chamber found that a relevant purpose, for which the affidavit of DCT-032 was submitted, went to proof of the acts and conduct of the Accused.⁸⁵ We agree.

37. The Prosecution was permitted to offer testimony from at least three witnesses regarding the Accused's involvement in ordering the death of several potential witnesses against him, one of whom was Johnny Paul Koroma.⁸⁶ It argued, and the Trial Chamber apparently agreed, that this evidence was relevant to the Prosecution because, if believed, it would support the existence of an attempted cover-up by the Accused.⁸⁷ Cover-up evidence goes to proof of "consciousness of criminal responsibility" for the crimes charged in the indictment.

38. Prosecution witnesses testified that DCT-032 told them that he (DCT-032) was involved in the killing of Johnny Paul Koroma on orders from the Accused.⁸⁸

⁸³ *RUF Appeal Judgment*, para. 229, citing *Prosecutor v Prlic et al*, IT-04-74-AR73.6, Decision on Appeal against Decision admitting transcript of Jadranko Prlic's questioning into evidence, 23 November 2007, para. 43, *Prosecutor v. Stanislav Galic*, Case No IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C) ("Galic Decision"), 7 June 2002, paras 28-30.

⁸⁴ Rule 90: Testimony of Witnesses (*amended 7 March 2003 and amended 14 May 2007*)
(A) Witnesses may give evidence directly, or as described in Rules 71 and 85 (D).

⁸⁵ *Impugned Decision*, para. 25.

⁸⁶ *Prosecutor v Taylor*, SCSL-03-01-T, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information relating to DCT-032, 20 October 2010, para. 1 ("Disclosure Decision").

⁸⁷ See Disclosure Decision, para. 1; see also Prosecution Response, para. 15.

⁸⁸ See *Impugned Decision*, para. 24 citing Disclosure Decision, para. 24. See also, Disclosure Decision, para. 1.

39. DCT-032, in his affidavit which the Defence is seeking to admit, denies any knowledge of Johnny Paul Koroma's death and any involvement in it. The affidavit does not mention Mr Taylor.

40. The Trial Chamber considered that one relevant purpose for which the affidavit was being submitted was to challenge the evidence of the Prosecution that the Accused had used DCT-032 to kill Johnny Paul Koroma.⁸⁹

41. Rule 92bis not only excludes evidence of the acts and conduct of the accused; it excludes evidence *that goes to proof* of the acts and conduct of the accused.

42. The Prosecution witnesses were called to give evidence that went to proof of the Accused's consciousness of guilt for the crimes charged, based on his involvement in an alleged subsequent cover-up. That evidence includes testimony that DCT-032 told Prosecution witnesses that he killed Johnny Paul Koroma on the orders of the Accused. DCT-032's affidavit denying any knowledge or involvement in the death of Johnny Paul Koroma, likewise goes to that same proof - by challenging the veracity and reliability of the Prosecution witnesses' assertions, as well as their general credibility.

43. In its original Motion to the Trial Chamber, the reason given by the Defence for seeking admission of the affidavit under Rule 92bis was expressly for the purpose of rebutting Prosecution "allegations and evidence" that the Accused had ordered the death of Johnny Paul Koroma. In that Motion, the Defence requests:

That the recently disclosed exculpatory material in Confidential Annexes A-C, as well as the affidavit of DCT-032 in Confidential Annex D, be admitted pursuant to Rule 92bis, and/or that based on these materials, the Trial Chamber draws an adverse inference 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.⁹⁰ (Emphases added)

44. The Defence further argues in its original Motion to the Trial Chamber that the relevance standard required by Rule 92bis has already been met and cites with approval, the Trial Chamber on this point:

The Trial Chamber has already determined that the material is relevant in that it affects the credibility of Prosecution allegations that Johnny Paul Koroma was

⁸⁹ Impugned Decision, para. 25.

⁹⁰ Defence Original Motion filed October 27, 2010, para. 5 footnotes omitted.

killed in Liberia in 2003 at the behest of or by people subordinate to Charles Taylor.⁹¹

45. The Defence now avers in this Appeal, that the Trial Chamber erred in accepting the purpose which the Defence itself proffered for the use and relevancy of the evidence. The Trial Chamber's conclusion that the affidavit goes to rebut Prosecution allegations that DCT-032 "was involved in the killing of Johnny Paul Koroma pursuant to the orders of the Accused;"⁹² and that such rebuttal goes to proof of the acts and conduct of the Accused,⁹³ was reasonable and a proper application of the law.

The decision to exclude the affidavit is affirmed.

b) The other documents

46. The Defence also seeks the admission into evidence of two other documents; namely, the index/record of disbursements made by the Prosecution to DCT-032 and the letter of indemnity written by the Prosecution to DCT-032.⁹⁴ The Trial Chamber declined the Defence's request to admit these documents pursuant to Rule 92*bis* on the basis that they have no "independent relevance" without the affidavit. The Appeals Chamber disagrees.

47. The Defence has put forward several independent grounds for admitting the index/record of disbursement and indemnity letter including improper payments to witnesses and inducement of witnesses.⁹⁵ The Defence has consistently made the issue of improper payments and inducements to witnesses or potential witnesses and sources, a live issue in this trial and has stated the relevance of these documents to their case.⁹⁶ As Justice Julia Sebutinde points out in her Dissent:

It is not altogether true that the other documents cannot stand on their own. This is because ... each 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.⁹⁷

48. The Appeals Chamber is satisfied that the documents meet the requirements for admission into evidence pursuant to Rule 92*bis* in that they are independently relevant, do

⁹¹ Defence Original Motion filed October 27, 2010, para. 21.

⁹² Impugned Decision, para. 25.

⁹³ Impugned Decision, para. 25.

⁹⁴ Defence Notice of Appeal, para. 60, see also Reply, para. 20.

⁹⁵ Defence Notice of Appeal, paras. 40-57.

⁹⁶ Defence Reply to Admission, paras. 8-9; Defence Notice of Appeal, paras. 40-57.

⁹⁷ Admission Decision, Sebutinde Dissent, paras 14 and 16.

not go to proof of the acts and conduct of the Accused and their reliability is susceptible of confirmation. Rule 92bis does not preclude their admission.

49. Having determined that Rule 92bis does not bar admission of the two documents, it would normally be for the Trial Chamber to determine their ultimate admissibility. We have said before that "it is not the Appeals Chamber's function to immerse itself in the detail of ongoing trials" ⁹⁸ However the Trial Chamber has given leave to this Chamber to review its evidentiary decision in this instance. Given that the trial is in its final stage and closing arguments have been scheduled, "we shall, exceptionally, exercise our appellate power to revise the Trial Chamber's decision" ⁹⁹ and admit the two documents.

VI. DISPOSITION

50. Accordingly, pursuant to Rule 106 of the Rules, the Appeals Chamber hereby:
- (i) **GRANTS** the Motion **IN PART** and **ORDERS** that the index/record of disbursements to DCT-032 and the indemnity letter written by the Prosecution to DCT-032 are admitted into evidence pursuant to Rule 92bis;
 - (ii) **DIRECTS** the Defence to file the index/record of disbursements and indemnity letter with the Registry;
 - (iii) **DENIES** the Motion in all other respects.

Justice George Gelaga King appends a Separate and Partially Dissenting Opinion hereto.

Done this 25th day of January 2011 at Freetown, Sierra Leone.

⁹⁸ *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 87.

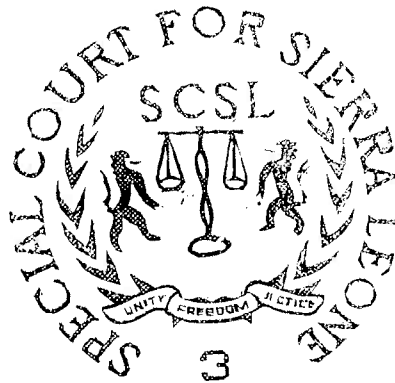
Justice Jon M. Kamanda
President

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]



⁹⁹ Rule 106(B): "The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber."

**SEPARATE AND PARTIALLY DISSENTING OPINION OF JUSTICE GEORGE
GELAGA KING**

1. I agree with the Appeals Chamber’s decision to admit the index/record of disbursements and indemnity letter into evidence under Rule 92bis. As these documents do not refer to the Accused’s alleged role as a superior or to any acts or conduct which go to establish that the Accused participated in a JCE as charged in the Indictment, or shared with the persons who committed the crimes charged in the Indictment - the requisite intent for those crimes - then no obstacle exists to prevent their admission into evidence under Rule 92bis.
2. However, for reasons hereinafter appearing, I dissent from my learned colleagues who have affirmed the Trial Chamber’s decision excluding the affidavit of DCT-032 pursuant to Rule 92bis.
3. My colleagues hold that “the majority of the Trial Chamber considered that one relevant purpose for which the affidavit was being submitted was to challenge the evidence of the Prosecution that the Accused had used DCT-032 to kill Johnny Paul Koroma.”¹ With respect, the Trial Chamber made no such consideration in paragraph 25 of the Impugned Decision as my colleagues assert. On the contrary, the majority of the Trial Chamber stated in the preceding paragraph 24, that in its Disclosure Decision, it recalled that:

“[...] a number of Prosecution witnesses ... 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 refereed to ... as witness DCT-032 as the person or one of the persons that actually carried out

¹ See para. 37 of the majority Appeals Chamber Decision, *citing* para. 25 of the Impugned Decision.

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 [...]”²

4. The majority of the Trial Chamber looked at the affidavit and found that it relates to a denial by DCT-032 that he was involved in the killing of Johnny Paul Koroma on the orders of the Accused.³ It then considered the testimony of Prosecution witnesses regarding the alleged incident and concluded:

“In essence, the material in the affidavit contradicts the evidence of [those] Prosecution witnesses and is thus exculpatory information relating to an alleged murder committed by subordinates of Charles Taylor on his orders. The affidavit therefore ... goes to proof of the acts and conduct of the Accused.”⁴

This conclusion does not in any way translate into a finding regarding the “relevant purpose” for submitting the affidavit under Rule 92*bis*, as my learned colleagues assert.

5. While I agree with the Trial Chamber’s conclusion that the affidavit of DCT-032 tends to contradict the testimony of Prosecution witnesses implicating DCT-032 in the alleged killing of Johnny Paul Koroma on the Accused’s orders, I however disagree that any such contradictory evidence goes to proof of the acts and conduct of the Accused.
6. In the affidavit, DCT-032 discusses the circumstances leading to his contact or meeting with members of the Prosecution. DCT-032 explains that when he was initially contacted by a member of the Prosecution and asked to provide information on the killing of Johnny Paul Koroma, he “denied any knowledge of Johnny Paul Koroma or his death.” DCT-032 states that he maintained this position until he was eventually persuaded by a ‘friend’ to “make-up a story to get ... money [from the Prosecution].” DCT-032 describes his interaction with the Prosecution: he states that the Prosecution gave him various sums of money and even discussed the possibility of

² See para. 24 of the Impugned Decision, *citing* paragraph 24 of the Disclosure Decision.

³ Para. 23 of the Impugned Decision.

⁴ Para. 25 of the Impugned Decision.

relocating him and his family abroad if he provides information about the alleged killing of Johnny Paul Koroma. In addition, the Prosecution offered DCT-032 and his 'friend' \$500 each to locate Johnny Paul Koroma's grave; and an additional \$5000 upon confirmation that the grave infact contains the remains of Johnny Paul Koroma. Finally, DCT-032 gives a detailed account of his misrepresentation to the Prosecution. He explains that "when the DNA tests [on the remains] came out negative, [the Prosecution approached him again] to query his information." DCT-032 further explains:

"I have never met Johnny Paul Koroma. My descriptions of him to the Prosecution were entirely based on what they were suggesting to me. I just confirmed whatever they told me."

7. The affidavit contains information about DCT-032's interaction with the Prosecution and his lack of personal knowledge of Johnny Paul Koroma's alleged death. DCT-032 basically explains that he misled the Prosecution and makes no relevant mention of the Accused or his alleged orders to kill Johnny Paul Koroma. The assertion by DCT-032 that he has never met Johnny Paul Koroma is exculpatory because it is relevant to the credibility of Prosecution witnesses who testified that DCT-032 played a key role in the killing of Johnny Paul Koroma on the orders of the Accused.
8. I opine that the Affidavit in and of itself only goes to DCT-032's denial that he was involved in the killing of Johnny Paul Koroma. It is not a denial that DCT-032 did or did not do anything pursuant to the Accused's orders and therefore does not in any way tend to prove or disprove that DCT-032 is the Accused' subordinate or that the Accused did infact order DCT-032 to kill Johnny Paul Koroma. DCT-032's denial that he was involved in the killing of Johnny Paul Koroma is relevant because Prosecution witnesses implicated DCT-032 as having "played a key role in the alleged murder of Johnny Paul Koroma;"⁵ and such contradiction, if believed, could impact on the credibility of those Prosecution witnesses who gave evidence to that effect. As the Trial Chamber held in its Disclosure Decision:

⁵ Para. 25 of the Impugned Decision.

The Prosecution evidence on record specifically **implicates DCT-032** as the person or one of the persons that actually carried out the alleged killing on orders of the Accused. The fact that the Prosecution interviewed this alleged murderer and that he led them to a grave site or grave sites that later turned out not to be that of Johnny Paul Koroma is relevant to the issue of whether Johnny Paul Koroma is dead or alive, and may affect the credibility of the Prosecution evidence.⁶ [Emphasis included]

I agree.

9. The information in the affidavit is exculpatory in that it may affect the credibility of the Prosecution hereinbefore referred to. *A fortiori*, the exculpatory information does not go to proof of the acts and conduct of the Accused.

Rule 92bis, **Alternative Proof of Facts** provides:

(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.** [Emphasis included]

10. The phrase “that do not go to proof of the acts and conduct of the accused” must, I opine, be construed as acts and conduct of the accused as charged in the indictment. I therefore, agree with Judge Julia Sebutinde that “the affidavit does not go to the acts and conduct of the Accused within the meaning of Rule 92bis.”⁷
11. The Prosecution evidence on record is that the alleged killing of Johnny Paul Koroma occurred in 2003 in Foya, Liberia.⁸ The Indictment charges the Accused with crimes alleged to have been committed in various locations throughout Sierra Leone between

⁶ Disclosure Decision, para. 28.

⁷ Dissenting Opinion of Judge Julia Sebutinde, para 2

⁸ See para. 24 of the Impugned Decision, *citing* paragraph 24 of the Disclosure Decision

30 November 1996 and 18 January 2002.⁹ The evidence on record is that the alleged killing of Johnny Paul Koroma occurred in 2003, which is outside the Indictment period, and in a location not pleaded in the Indictment. Accordingly, any such evidence regarding Johnny Paul Koroma's murder cannot be said to go to proof of the acts and conduct of the Accused *as charged in the Indictment*.

For the foregoing reasons, I will admit the affidavit pursuant to Rule 92bis, *in lieu* of oral testimony.

Done this 25th day of January 2011 at Freetown, Sierra Leone


Justice George Velaga King

[Seal of the Special Court for Sierra Leone]



⁹ *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Prosecution's Second Amended Indictment, 29 May 2007.