

1086)

SCSL-03-01-T  
( 30292 - 30303 )

30292



**THE SPECIAL COURT FOR SIERRA LEONE**

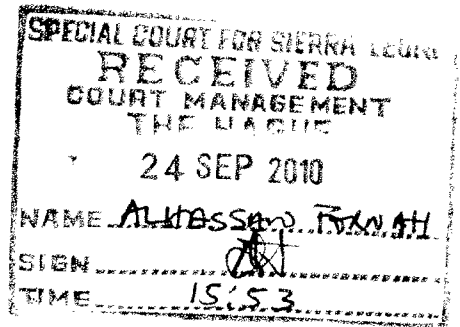
**Trial Chamber II**

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

**Registrar:** Ms. Binta Mansaray

**Date:** 24 September 2010

**Case No.:** SCSL-03-01-T



**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

---

**PUBLIC**

**DEFENCE MOTION TO EXCLUDE EVIDENCE FALLING OUTSIDE THE  
SCOPE OF THE INDICTMENT AND/ OR THE JURISDICTION OF THE  
SPECIAL COURT FOR SIERRA LEONE**

---

**Office of the Prosecutor:**

Ms. Brenda J. Hollis  
Mr. Nicholas Koumjian

**Counsel for Charles G. Taylor:**

Mr. Courtenay Griffiths, Q.C.  
Mr. Terry Munyard  
Mr. Morris Anyah  
Mr. Silas Chekera  
Mr. James Supuwood

## I. INTRODUCTION

1. This is the Defence motion to exclude evidence falling outside the scope of the Indictment and/ or the jurisdiction of the Special Court for Sierra Leone.<sup>1</sup>
2. The Defence submits that the Motion is timely and appropriate at this stage of the proceedings because it implicates evidentiary matters that arose on a recurring basis during the trial proceedings.<sup>2</sup>
3. During its case, the Prosecution has adduced a great deal of evidence which falls outside the temporal and geographical jurisdiction of the Special Court (“ex-temporal evidence” and “ex-territorial evidence”). The Defence has previously objected to such evidence, including in its Pre-trial Brief filed on 26 April 2007.<sup>3</sup> For example, on 18 April 2008 during the course of the oral testimony of TF1-334, defence counsel objected to evidence of crimes perpetrated on civilians in Koinadugu District on the basis that such crimes are not alleged in the Indictment.<sup>4</sup> The Defence has never waived its objection on this issue, and files the Motion in continuance of its objection.
4. The Defence submits that much of the ex-temporal and ex-territorial evidence adduced in the case is irrelevant to the Indictment, falls outside the jurisdiction of the Special Court and should be excluded from the Trial Chamber’s consideration of the evidence in the case when it retires to consider judgment.

## II. PRELIMINARY MATTERS

5. The Special Court has held that where the Defence objects to the admissibility of evidence on the basis that it falls outside the scope of the Indictment, the Defence is expected to make a specific objection at the time the evidence is sought to be

<sup>1</sup> Hereinafter “the Motion”. Any references to Indictment in the Motion are to *Prosecutor v. Taylor*, SCSL-03-01-PT-263, “Prosecution’s Second Amended Indictment”, 29 May 2007.

<sup>2</sup> Rule 72(B) contemplates the filing of preliminary motions based on lack of jurisdiction and Rule 72(A) mandates that such motions be brought by either party within 21 days following disclosure by the Prosecution to the Defence of all the material envisaged by Rule 66(A)(i).<sup>2</sup>

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 April 2008, p. 8054; Trial Transcript, 21 April 2008, p. 8077; Trial Transcript, 7 May 2008, p. 9148; Trial Transcript, 5 November 2008, p. 19798. *Prosecutor v. Taylor*, SCSL-03-01-PT-229, “Rule 73bis Taylor Defence Pre-trial Brief”, 26 April 2007, paras. 9-23 (Hereinafter “Defence Pre-trial Brief”).

<sup>4</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 April 2008, p. 8054.

introduced.<sup>5</sup> However, failure to do so “is not... an absolute bar to raising such a challenge on appeal”.<sup>6</sup> Indeed, at the ICTR, the Trial Chamber in *Bizimungu* confirmed that it may deal with such matters even after the testimony has finished where the interests of justice so require.<sup>7</sup>

6. In the present case, the Defence did raise specific objections at the time in certain instances.<sup>8</sup> However, the use of ex-temporal and ex-territorial evidence by the Prosecution has been so widespread that it proved impractical for the Defence to raise the same objection at every turn. Nevertheless, the Defence’s objection to the overarching inclusion of ex-temporal and ex-territorial evidence has been well-noted. Indeed, the Defence’s Pre-trial Brief contained a specific section urging “the Trial Chamber to be vigilant in ensuring there is no expansion of the territorial or temporal jurisdiction of the Court via the back door”.<sup>9</sup> There is no reason, therefore, why the Defence should be barred from raising this matter now or later on appeal.
7. In addition, it is in the interests of justice to decide on this matter even after testimony has finished, given the centrality of the ex-temporal and ex-territorial evidence to the case, as will be further outlined below.
8. It should also be noted that the Defence’s objection is not solely to the form of the Indictment, since much of the ex-temporal and ex-territorial evidence adduced in this case falls outside the scope of the Indictment and the jurisdiction of the Special Court and could not have been charged in the Indictment in any event. To this end, the Defence also objects to the use of Rule 89(C) and Rule 93 by the Prosecution to incorporate evidence which falls outside of the remit of the Special Court into its case as if it were one with the evidence adduced to prove the crimes alleged in the Indictment. Under this head, in particular, the Defence has in mind the evidence relating to alleged crimes in Liberia, in the geographical sense, and to crimes which pre-date 1996, in the temporal sense. This is set out in more detail below.

<sup>5</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Trial Judgment”, 2 March 2009, para. 337 (Hereinafter “RUF Trial Judgment”).

<sup>6</sup> *Prosecutor v. Brima et al.*, SCSL-04-16-A, “Appeal Judgment”, 22 February 2008, paras. 42-43.

<sup>7</sup> *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, “Decision on Motion from Casimir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA”, 23 January 2004, para. 18.

<sup>8</sup> Motion, para. 3, fn. 3.

<sup>9</sup> Defence Pre-trial Brief, para. 9.

### III. APPLICABLE LAW

9. The temporal jurisdiction of the Special Court is limited to crimes which occurred within the period extending from 30 November 1996 to January 2002. The geographical jurisdiction of the Special Court is limited to crimes which occurred within the territory of the Republic of Sierra Leone.<sup>10</sup> In assessing the admissibility of evidence which falls outside these boundaries, the following rules are significant:
- a) Rule 89(C) provides that “A Chamber may admit any relevant evidence”.<sup>11</sup>
  - b) Rule 93 provides 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”.<sup>12</sup>
  - c) Rule 95 provides that “No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute”.<sup>13</sup>
10. In addition, case-law has clarified the need to take into account the probative value and prejudicial effect of the evidence in question. In the ICTR, in the case of *Bagosora et al.*, the Appeals Chamber held that:
- “Rule 93 does not create an exception to Rule 89(C), but rather is illustrative of a specific type of evidence which may be admitted by a Trial Chamber. Rule 93 must be read in conjunction with Rule 89(C), which permits a Trial Chamber to admit any relevant evidence which it deems to have probative value. Even where pattern evidence is relevant and deemed probative, the Trial Chamber may still decide to exclude the evidence in the interests of justice when its admission could lead to unfairness in the trial proceedings, such as when the probative value of the proposed evidence is outweighed by its prejudicial effect”.<sup>14</sup>

While the Special Court’s Rule 89(C) differs from that of the ICTR and ICTY, in that the Special Court’s Rule 89(C) does not explicitly provide for the probative value and prejudicial effect of the evidence in question to be considered, there is still the

<sup>10</sup> Special Court for Sierra Leone, Statute, Article 1 (Hereinafter “the Statute”).

<sup>11</sup> Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 89(C) (Hereinafter “the Rules”).

<sup>12</sup> Rules, Rule 93(A).

<sup>13</sup> Rules, Rule 95.

<sup>14</sup> *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93.2, “Decision on Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence”, 19 December 2003, para. 13 (Hereinafter “Bagosora Appeal Decision”).

requirement to do so where the effect of the evidence would infringe Rule 95.<sup>15</sup> One must also, of course, consider the fair trial rights of the Accused guaranteed under Article 17 of the Statute, as well as the requirement under Article 20(3) to follow, where necessary, the guidance provided by the ICTR and ICTY.

#### IV. ARGUMENT

11. Evidence must be relevant and not adversely prejudicial to be admissible.<sup>16</sup> Such relevant evidence may include evidence which falls outside the scope of the Indictment.<sup>17</sup> Indeed, the present Trial Chamber, in its Rule 98 Decision, took into account evidence which pre-dated the Indictment period.<sup>18</sup> As to what qualifies as “relevant”, there is no exhaustive list, but case-law offers some guidance; for example, the Trial Chamber in the RUF case held that:

“evidence is admissible if it bears on facts in issue, such as the role of the Accused in the RUF, the existence of a joint criminal enterprise, the RUF command structure, or the existence of *de facto* authority or control over subordinates. Evidence which provides the Chamber with background and context in which to understand the conflict or the testimony of a Witness is also admissible.”<sup>19</sup>

12. In its oral submissions on the topic, the Prosecution has argued that evidence falling outside the scope of the Indictment is relevant on the following grounds: (a) to prove there was a widespread and systematic attack on the civilian population of Sierra Leone; (b) to show there was a coordinated campaign of terror within Sierra Leone; (c) under Rule 93 as evidence of a consistent pattern of conduct; and (d) to illustrate the Accused’s *mens rea*, namely his knowledge of, awareness of and/ or intent to cause the crimes which took place in Sierra Leone.<sup>20</sup>

<sup>15</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr Koker”, 23 May 2005, para. 6.

<sup>16</sup> *Prosecutor v. Ngeze and Nahimana*, ICTR-99-52-A, “Decision on the Interlocutory Appeals – Separate Opinion of Judge Shahabuddeen”, 5 September 2000, para. 19 (Hereinafter “Shahabuddeen Opinion”); *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on Admissibility of Proposed Testimony of Witness DBY”, 18 September 2003.

<sup>17</sup> RUF Trial Judgment, para. 482.

<sup>18</sup> For example, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 4 May 2009, p. 24207 (Hereinafter “Rule 98 Decision”).

<sup>19</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment”, 26 June 2008, para. 11.

<sup>20</sup> For example, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 21 April 2008, pp. 8077-8079; Trial Transcript, 7 May 2008, pp. 9148-9149.

13. Such submissions have been accepted by the Trial Chamber as providing context of one type or another, *without being evidence on which guilt is determined*. This, of course, accords with the fundamental principle that an accused can only be convicted of crimes for which he is indicted as is illustrated in the Trial Chamber's reasoning in the AFRC case:

“While such evidence may support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes may be made in respect of such locations not mentioned in the indictment.”<sup>21</sup>

14. However, there is a fine line between relevance for context and the danger that the evidence serves as the basis for a conviction, especially when one is faced with a mass of “contextual” evidence as in this case. Indeed, the Trial Chamber has already based its findings on the Rule 98 Decision in part on such “contextual” evidence.<sup>22</sup>

15. The Defence submits that there is so much evidence outside the scope of the Indictment at bar, that it amounts to prejudice of such a nature which far outweighs any probative value of such evidence. In that sense it contravenes both Rule 95 and Article 17.<sup>23</sup> In what follows, for ease of reference, the evidence has been divided into evidence which falls outside the temporal scope of the Indictment and evidence which falls outside of the geographical scope of the Indictment.

A. Evidence falling outside of the temporal scope of the Indictment

*(i) Joint Criminal Enterprise*

16. The Defence particularly draws attention to the problems associated with the charge of joint criminal enterprise (JCE). In its Amended Case Summary, the Prosecution made reference to a common plan between the Accused and Foday Sankoh which originated in the late 1980s, which is not merely contextual, but is a crucial element of the alleged JCE.<sup>24</sup> The Trial Chamber will have to determine guilt based on events which occurred up to ten years before the commencement of the Indictment period. The Defence submits that this is not within the Special Court's jurisdiction to decide.

<sup>21</sup> *Prosecutor v. Brima et al.*, SCSL-04-16-T, “Trial Judgment”, 20 June 2007, para. 37.

<sup>22</sup> Rule 98 Decision, pp. 24209-24210.

<sup>23</sup> Rules, Rule 95; Statute, Article 17(2).

<sup>24</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-327, “Case Summary Accompanying the Second Amended Indictment”, 3 August 2007, paras. 1-3, 42 and 44.

17. Indeed, even were the Trial Chamber merely to consider and not rule on such evidence, the Defence submits that there must be a limit to the extent to which evidence which falls outside the scope of the Indictment and/ or jurisdiction of the Special Court can be taken into consideration by the Trial Chamber in assessing the guilt of the Accused.<sup>25</sup> Otherwise, there is a real danger that such a sheer mass of evidence will have an impact on the Trial Chamber's findings. Indeed, it becomes so prejudicial to the Accused, that such evidence violates Rule 95, and infringes the Accused's own fair trial rights guaranteed under Article 17.

*(ii) Evidence of atrocities in Liberia*

18. The evidence adduced by the Prosecution concerning the Accused's alleged involvement in atrocities in Liberia has little relevance or probative force other than to blacken the Accused's reputation with the Trial Chamber; indeed, it clearly has nothing to do with the charges the Accused faces in respect of Sierra Leone.<sup>26</sup> Throughout the trial, the Accused has had to face such evidence being admitted via the back door that is Rule 93, despite the warning given by the Trial Chamber in *Kupreškić* that Rule 93 cannot be used to simply show the bad character of an accused.<sup>27</sup> The Defence submits such evidence is contrary to Rule 95, Article 17, and the jurisprudence of the international tribunals.<sup>28</sup>

B. Evidence falling outside of the geographical scope of the Indictment

*(i) Evidence which could fall inside the scope of the Indictment but which does not*

19. The Prosecution has led evidence on the commission of crimes in certain districts of Sierra Leone which does not fall within the crimes charged in the Indictment, but which nevertheless could have been pleaded within the Indictment. For example, witness TF1-334 testified to the crimes which occurred in Koinadugu District.<sup>29</sup>

<sup>25</sup> Indeed, the Trial Chamber seems to have recognised there is a limit to the Prosecution's ability to adduce ex-temporal evidence; for instance, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 22 January 2008, pp. 1842-1845.

<sup>26</sup> For instance, the evidence of TF1-399: *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 12 March 2008, pp. 5913-5919.

<sup>27</sup> *Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Decision on Evidence of Good Character of the Accused and the Defence of Tu Quoque", 17 February 1999, para. 31.

<sup>28</sup> Bagosora Appeal Decision; Shahabuddeen Opinion; *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", 18 September 2006.

<sup>29</sup> See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 18 April 2008, p. 8054.

Likewise, witness TF1-028 testified to crimes which occurred in Bombali District.<sup>30</sup> Neither district of Sierra Leone, nor the alleged crimes occurring therein were pleaded in the Indictment.

20. The Defence submits these locations should have been pleaded in the Indictment. The evidence is not merely background information: there is nothing to differentiate this evidence from evidence adduced to prove crimes occurring within districts that were expressly pleaded in the Indictment; its prejudicial effect is the same.
21. The Prosecution has argued that this additional evidence is necessary to prove: (a) there was a widespread and systematic attack on the civilian population of Sierra Leone; (b) there was a coordinated campaign of terror within Sierra Leone; and (c) the Accused's knowledge of, awareness of and/ or intent to cause the crimes which were taking place in Sierra Leone.<sup>31</sup> However, such elements can easily be adduced from the crimes and locations already charged in the Indictment. The Indictment is the main charging instrument against the Accused and the means by which the Accused is notified of the charges he must face at trial. It is axiomatic that the Prosecution cannot circumvent the requirements of the Indictment by adding layer upon layer of alternative locations in which crimes were committed, without formally charging the Accused with those crimes; evidence of such ex-territorial crimes provide so little probative value and are so prejudicial to the Accused, such that they contravene both Rule 95 and Article 17.
22. To view such evidence in any other way would result in the serious danger that, uniquely among international courts, the Special Court would be seen as having permitted a Prosecutor to charge an accused with as few particulars as possible, while having held back the particulars into which the bulk of the evidence falls for admission via the back door at trial under the guise of "relevant" evidence. This may be strategic for a Prosecutor, but should not be countenanced by any reasonable tribunal.

---

<sup>30</sup> See, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 7 May 2008, p. 9148.

<sup>31</sup> See above, para. 12, fn. 20.



23. For the foregoing reasons, the Defence submits that evidence of crimes committed in locations of Sierra Leone not pleaded in the Indictment should be excluded from the Trial Chamber's deliberations.
- (ii) Evidence potentially falling outside the jurisdiction of the Special Court*
24. The Prosecution has led evidence on the commission of crimes in territories over which the Special Court does not have the jurisdiction to rule. This particularly concerns crimes allegedly involving the Accused in Liberia, but at times expands to incorporate the Accused's alleged role in conflicts, arms-dealing and diamond-dealing throughout the African continent.
25. This evidence has been brought into the proceedings under the ambit of Rule 93. However, Rule 93 does not provide an unregulated or unrestricted route for the admission of evidence demonstrating a consistent pattern of conduct; rather, such evidence may only be admitted where it is in the interests of justice to do so. This point was raised by defence counsel on 21 April 2008.<sup>32</sup> Nevertheless, the Trial Chamber has on at least one occasion refused to assess the probative value of the evidence in question, despite the fact that an assessment of the interests of justice must invariably include an assessment of the probative value of the evidence against its prejudicial effect.<sup>33</sup>
26. The Defence submits that this ex-territorial evidence is irrelevant, contrary to the interests of justice and, in any event, adversely prejudicial to the Accused such that it contravenes both Rule 95 and Article 17. As such it should be excluded from the Trial Chamber's deliberations.

## V. CONCLUSION

27. This Motion is directed squarely at ex-temporal and ex-territorial evidence led by the Prosecution during its case-in-chief. While the Defence may also have led such evidence during the Defence's case, the necessity for doing so often was directly related to rebutting Prosecution evidence. Bearing in mind that the Defence has no burden of proof and never has an obligation to put forth a case, whether or not the

---

<sup>32</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 21 April 2008, pp. 8079-8080.

<sup>33</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 5 November 2008, p. 19800.

Defence has led such evidence is immaterial and of no consequence to the relief being sought herein vis-à-vis Prosecution evidence.

28. For all of the foregoing reasons, the Defence respectfully requests that the Trial Chamber grant the following relief:

- (a) Exclude Prosecution evidence which falls outside the temporal scope of the Indictment, OR impose limits on the scope to which such evidence may be taken into consideration;
- (b) Exclude Prosecution evidence of crimes committed in locations within Sierra Leone not pleaded in the Indictment, OR impose limits on the scope to which such evidence may be taken into consideration; and
- (c) Exclude Prosecution evidence of crimes committed outside of Sierra Leone and impermissibly admitted pursuant to Rule 93 or other Rules.

Respectfully Submitted,



---

**Courtenay Griffiths, Q.C.**  
**Lead Counsel for Charles G. Taylor**  
Dated this 24th Day of September 2010,  
The Hague, The Netherlands

## LIST OF AUTHORITIES

### *Prosecutor v. Taylor*

*Prosecutor v. Taylor*, SCSL-03-01-PT-229, “Rule 73bis Taylor Defence Pre-trial Brief”, 26 April 2007

*Prosecutor v. Taylor*, SCSL-03-01-PT-263, “Prosecution’s Second Amended Indictment”, 29 May 2007

*Prosecutor v. Taylor*, SCSL-03-01-T-327, “Case Summary Accompanying the Second Amended Indictment”, 3 August 2007

*Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcripts: 18 April 2008; 21 April 2008; 7 May 2008; 5 November 2008; 4 May 2009

### *Prosecutor v. Sesay et al.*

*Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker”, 23 May 2005

*Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment”, 26 June 2008

*Prosecutor v. Sesay et al.*, SCSL-04-15-T, “Trial Judgment”, 2 March 2009

### *Prosecutor v. Brima et al.*

*Prosecutor v. Brima et al.*, SCSL-04-16-T, “Trial Judgment”, 20 June 2007

*Prosecutor v. Brima et al.*, SCSL-04-16-A, “Appeal Judgment”, 22 February 2008

## ICTR

*Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on Admissibility of Proposed Testimony of Witness DBY”, 18 September 2003  
<http://www.ictrcaselaw.org/docs/doc39146.PDF>

*Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93.2, “Decision on Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence”, 19 December 2003  
<http://www.ictrcaselaw.org/docs/doc40737.pdf>

*Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, “Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence”, 18 September 2006

<http://www.unictr.org/Portals/0/Case%5CEnglish%5CBagosora%5CTrail%20and%20Appeal%5C180906.pdf>

*Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, “Decision on Motion from Casimir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA”, 23 January 2004

<http://www.ictrcaselaw.org/docs/doc41186.PDF>

*Prosecutor v. Ngeze and Nahimana*, ICTR-99-52-A, “Decision on the Interlocutory Appeals – Separate Opinion of Judge Shahabuddeen”, 5 September 2000

<http://www.ictrcaselaw.org/docs/doc59310.pdf>

### ICTY

*Prosecutor v. Kupreškić et al.*, IT-95-16-T, “Decision on Evidence of Good Character of the Accused and the Defence of Tu Quoque”, 17 February 1999

<http://www.icty.org/x/cases/kupreskic/tdec/en/90217MS25407.htm>