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SCSL-03-01-T

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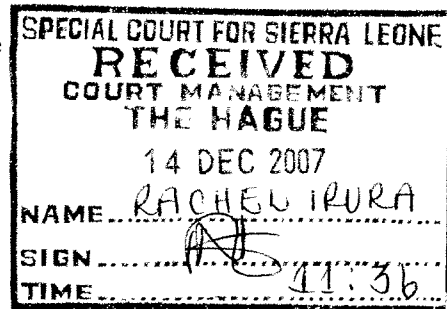
(13022-14202)

**SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone**

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

Registrar: Mr. Herman von Hebel

Date filed: 14 December 2007



**THE PROSECUTOR**

**Against**

**Charles Ghankay Taylor**

Case No. SCSL-03-01-T

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**PUBLIC WITH CONFIDENTIAL ANNEXES**

**PROSECUTION MOTION FOR ADMISSION OF PART OF THE PRIOR EVIDENCE OF TF1-362 & TF1-371 PURSUANT TO RULE 92ter**

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Office of the Prosecutor:  
Ms. Brenda J. Hollis  
Mr. Nicolas Koumjian  
Ms. Leigh Lawrie

Defence Counsel for the Accused:  
Mr. Courtenay Griffiths  
Mr. Andrew Cayley  
Mr. Terry Munyard

## I. INTRODUCTION

1. Pursuant to Rules 73, 89 and 92*ter* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“**Rules**”), the Prosecution requests that the Trial Chamber admit into evidence in the current proceedings parts of the prior trial transcripts and related exhibits identified in this motion and given by the witnesses, TF1-362 and TF1-371, in the *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T (“**RUF**”) trial before Trial Chamber I.
2. Should the relevant parts of the prior trial transcripts and related exhibits be so admitted, the Prosecution advises that it will seek to examine TF1-362 and TF1-371 in chief *viva voce* on:
  - (i) matters not considered in the transcripts to be admitted under Rule 92*ter*; and
  - (ii) points intended to clarify matters contained in the transcripts and related exhibits.
3. As required under Rule 92*ter*, each witness will:
  - (i) be present in court;
  - (ii) be available for cross-examination and any questioning by the Judges; and
  - (iii) is expected to attest that the relevant parts of the prior trial transcripts to be admitted hereunder accurately reflect what the witness would say if examined.

## II. BACKGROUND

4. On 4 April 2007, the Prosecution filed its Rule 73*bis* Pre-Trial Conference Materials.<sup>1</sup> As part of these materials the Prosecution filed a witness list (“**Witness List**”) and, in the introductory pages to the Witness List, advised the Court that it might seek leave to present the evidence of some witnesses through a combination of live testimony and the admission of prior testimony and/or statements in accordance with Rule 92*bis*<sup>2</sup> and Rule 90 of the Rules. TF1-362 and TF1-371 were both included on the Witness List and identified as being such witnesses.
5. TF1-362 testified in the RUF trial on 20, 22, 25 and 26 April 2005. The witness’

<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-218, “Public Rule 73*bis* Pre-Trial Conference Materials”, 4 April 2007 (“**Pre-Trial Conference Materials**”).

<sup>2</sup> Rule 92*bis* was the rule identified as the materials were filed prior to the amendment of the Rule at the ninth Plenary held on 14 May 2007. At the Plenary, which amended Rule 92*bis* was amended to exclude material being admitted relating to the acts and conduct of the Accused. As a result, the Prosecution now seeks to have the prior testimony and related exhibits of TF1-362 and TF1-371 admitted pursuant to Rule 92*ter* of the Rules rather than Rule 92*bis*.

testimony consisted of one and half days of examination-in-chief and two and half days of cross-examination. RUF Exhibit No. 25 was admitted as part of TF1-362's testimony. The prior trial transcripts of TF1-362 were disclosed in redacted format to the Defence on 17 May 2006 and in unredacted format on 4 June 2007. RUF Exhibit No. 25 was disclosed to the Defence on 11 August 2006. This exhibit was also included as Exhibit No. 1.038 on the Prosecution exhibit list filed with the court as part of its Pre-Trial Conference Materials on 4 April 2007.

6. TF1-371 testified in the RUF trial on 20, 21, 24, 28, 31 July and 1, 2 August 2006. The witness' testimony consisted of two and a half days of examination-in-chief and four and a half days of cross-examination. As part of the witness' testimony, 6 exhibits were admitted into evidence as RUF Exhibit Nos. 137, 185, 186, 187, 188 and 189. The prior trial transcripts of TF1-371 were disclosed in redacted format to the Defence on 27 October 2006 and in unredacted format on 10 December 2007. RUF Exhibit No. 137 was disclosed to the Defence on 11 August 2006. This exhibit was also included as Exhibit No. 1.039 on the exhibit list filed with the Pre-Trial Conference Materials. RUF Exhibit Nos. 185 to 189 are prior statements of the witness and were disclosed to the Defence on 17 May 2006 in redacted format and in unredacted format on 10 December 2007.

### **III. APPLICABLE LAW**

7. Rule 89 sets out the basic principles to be applied by the Court in relation to the admission of evidence. Rule 89(B) provides that the Chamber: "... shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". Further, Rule 89(C) provides the Chamber with the discretion to admit relevant evidence.
8. Rule 92*ter* provides that:

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 witness statement or 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 the witness' declaration and what the witness would say if examined.
9. Rule 89 constitutes the basic rule regulating the admission of evidence which applies in addition to the more specific provisions contained in Rule 92*ter*.<sup>3</sup> The procedural requirements of Rule 92*ter* must be met by the party seeking admission of a transcript or statement, in addition to the requirements of Rule 89. Accordingly, for evidence to be admitted pursuant to Rules 89(C) and 92*ter*, the evidence must be relevant, the parties must agree to its admission and the three conditions listed in sub-clauses (i) to (iii) of Rule 92*ter* must be satisfied. Rule 92*ter* does not otherwise limit the evidence which might be admitted under it.<sup>4</sup>

#### IV. SUBMISSIONS

10. The jurisprudence of the Special Court for Sierra Leone ("SCSL") supports the view that expedient and fair trials are promoted where sworn testimony before the Court, which includes prior cross-examination, is admitted in a subsequent trial in lieu of the Prosecution carrying out a second examination-in-chief over several days.<sup>5</sup> The fact that the witness would be available for cross-examination was considered relevant when reaching such decisions. This jurisprudence applies the principles enshrined in Article 17 of the SCSL's Statute regarding the Accused's right to a fair and expeditious trial, and the principles underlining Rule 26*bis* which require that trial proceedings be conducted in a fair and expeditious manner.

#### The evidence is relevant

11. The prior evidence of Witness TF1-362 in the RUF trial is relevant to the current proceedings as it concerns *inter alia* the: the abduction and forced military training of

<sup>3</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, "Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements", 30 September 2003, paras 9-10.

<sup>4</sup> For example, there is no restriction similar to that in Rule 92*bis* that the evidence must be limited to background evidence and should not go to proof of the acts and conduct of the accused.

<sup>5</sup> See: *Prosecutor v. Sesay et al.*, SCSL-04-15-T-448, "Decision on the Prosecution Confidential Notice under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-026, TF1-104 and TF1-169", 9 November 2005; *Prosecutor v. Sesay et al.*, SCSL-04-15-T-557, "Decision on the Prosecution Notice under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-256", 23 May 2006; and *Prosecutor v. Sesay et al.*, SCSL-04-15-T-559, "Decision on the Prosecution Notice under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-334", 23 May 2006.

civilians at various locations in Sierra Leone between 1995 and 1998; use of forced labor by the RUF, AFRC/RUF; the abduction of women and their use as sex slaves by RUF commanders; the retreat from Freetown by the Junta in 1998 including the associated atrocities and crimes committed; the use and/or training of children for military purposes by organized armed groups in Sierra Leone; RUF, AFRC/RUF diamond mining in Sierra Leone, and the significance of Kono District to the AFRC/RUF.

12. The evidence of Witness TF1-371 is relevant to the current proceedings as it concerns *inter alia* “inside” knowledge as to: organizational, functional, command structure of the RUF, AFRC/RUF Junta and AFRC/RUF alliance, including commanders, communications, reporting and areas of control, composition and meetings of the Junta Supreme Council, the operation of the Supreme Council and the Junta generally; events during and after the Intervention in 1998 including the continued relationship between the AFRC and the RUF; the retreat from Freetown to Kono via Masiaka and Makeni in 1998 including the resulting atrocities; the operation of the AFRC/RUF high command in Buedu in the post-Intervention period; forced labour in Kaliahun District during the Indictment period; the planning and execution of the 1999 attack on Freetown; the use of child soldiers and “bush wives” by the RUF; RUF, AFRC/RUF diamond mining in Sierra Leone; use of forced labour by the AFRC/RUF; and the inhumane treatment of civilian diamond miners in Kono and Kenema during the Indictment period.

Agreement of both parties

13. The Prosecution contacted the Defence on 30 November 2007 seeking its consent to the Prosecution proposal to submit part of the evidence of TF1-362 and TF1-371 under Rule 92ter. On that date the Prosecution provided the defence with a list of the portions of the transcripts which the Prosecution would not offer pursuant to Rule 92ter,<sup>6</sup> and provided an updated list on 7 December 2007. The Prosecution requested a response by 13 December 2007 in order that this motion could be filed before the judicial recess. To date no response has been received.
14. The requirement that both parties agree to the admission of evidence under Rule 92ter should be read in light of the apparent purpose of this Rule, which appears to be similar

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<sup>6</sup> See paras. 16 and 17 which explain the redacted portions of the transcripts.

to the apparent purpose of Rule 92bis to facilitate a fair, efficient and expeditious trial.<sup>7</sup> Therefore, the language should not be read to allow a party to prevent the admission of prior testimony or statements without good cause. To interpret the language of the Rule otherwise would be to give one party the power to obstruct the orderly progression of the case. Such an interpretation would also usurp the Trial Chamber's authority and responsibility to control the proceedings and to ensure the trial proceeds in an efficient, timely manner. In order to achieve the purpose of the Rule, the party opposing the admission of such evidence should be required to show good cause as to why the evidence should not be admitted in the form allowed by the Rule. Imposing such a requirement on the party opposing admission of the evidence would not deprive that party of the ability to confront the evidence. The witness may be cross examined on the prior testimony or statement, although, to achieve the purpose of the Rule, such cross examination should be limited to relevant questions which are not unduly cumulative to the prior cross examination. Finally, if a showing of good cause was held not to be a requirement, such an interpretation would lead to an illogical result. A witness's prior testimony or prior statements, not given under oath or subject to cross examination, could be admitted under Rule 92bis without the consent of the opposing party, but prior sworn testimony given by a witness who is in the courtroom and available for cross examination could be precluded by a party without a showing of good cause to object. To require the objecting party to show good cause for their objection would be consistent with the other provisions of Rule 92ter, would achieve the purpose of the Rule and would not deprive either party of any rights.

Rule 92ter (i)-(iii) conditions met

15. In relation to the conditions listed in (i) to (iii) of Rule 92ter, as stated above, the Prosecution does intend to call both TF1-362 and TF1-371 to give evidence *viva voce* and so the witnesses will be present in court, available for full cross-examination<sup>8</sup> and able to make the required attestations.

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<sup>7</sup> Re. the interpretation of Rule 92bis see *Prosecutor v. Norman et al*, SCSL-04-14-T-398, "Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", 16 May 2005, para. 26; Separate Opinion of Justice Robertson, paras. 13 and 14.

<sup>8</sup> Subject to the aforementioned condition that cross-examination should not be unduly cumulative to the questions put to the witness during the prior testimony.

**V. APPLICATION**TF1-362

16. In relation to TF1-362, the parts of the prior trial transcripts given in the fourth RUF trial session on 20, 22, 25 and 26 April 2005 and related RUF Exhibit No. 25 which the Prosecution seeks to admit under Rule 92ter are set out in Annexes A and B of this motion. As permitted by the Rule, the Prosecution seeks to admit *parts* only of TF1-362's prior testimony into evidence under Rule 92ter and wishes to exclude those sections which concern: (i) legal argument which had no impact on the evidence of the witness; (ii) RUF trial administrative matters; and (iii) evidence of the acts and conduct of the Accused which the Prosecution intends to lead the witness on *viva voce* in the current proceedings. Accordingly, portions of TF1-362's prior testimony set out in Annex A have been redacted.

TF1-371

17. The parts of TF1-371's prior RUF trial testimony given on 20, 21, 24, 28, 31 July and 1, 2 August 2006 and related RUF Exhibit Nos. 137 and 185 to 189 which the Prosecution seeks to admit under Rule 92ter are set out in Annexes C and D of this motion. The Prosecution also seeks to admit those exhibits from the RUF trial which were referred to during but were not tendered through the witness' testimony.<sup>9</sup> As with TF1-362, the Prosecution seeks to admit *parts* only of TF1-371's prior testimony under Rule 92ter and wishes to exclude those sections which concern: (i) legal argument which had no impact on the evidence of the witness; (ii) RUF trial administrative matters; (iii) information regarding the witness' whereabouts; and (vi) evidence of the acts and conduct of the Accused which the Prosecution intends to lead the witness on *viva voce* in the current proceedings. Accordingly, portions of TF1-371's prior testimony set out in Annex C have been redacted.

Confidential Annexes

18. Annexes A to D of this motion are filed on a confidential basis because:
- (i) TF1-362 and TF1-371 are subject to protective measures orders<sup>10</sup> which:

<sup>9</sup> These exhibits are RUF Exhibits: 6, 9, 32 (in part), 33 (in part), 36 (in part), 39, 40, 81, 82, 83, 84b and 144.

<sup>10</sup> In relation to TF1-362, see *Prosecutor v. Sesay et al.*, SCSL-04-01-T-286, "Order on Protective Measures for Additional Witnesses", 24 November 2004 and, in respect of TF1-371, see *Prosecutor v. Sesay et al.*, SCSL-04-15-T-537, "Decision On Prosecution Request For Leave To Call Additional Witness TF1-371 And For Order For Protective Measures", 6 April 2006.

- (a) prevent the disclosure to the public or the media of the witnesses' names and any other identifying data or information which could reveal their identities; and
  - (b) prevent the inclusion of the witnesses' names and any other identifying information concerning the witnesses in any existing or future records of the Court; and
- (ii) the testimony of TF1-362 and TF1-371 was heard entirely in closed session.<sup>11</sup>

## VI. CONCLUSION

19. For the reasons set out above, the Prosecution requests that, pursuant to Rule 92*ter*, the Trial Chamber:

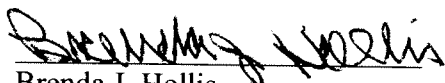
- (i) admit into evidence in the current proceedings:
  - (a) those parts of TF1-362's prior RUF trial testimony given on 20, 22, 25 and 26 April 2005 and related RUF Exhibit No. 25 as are identified in Annexes A and B; and
  - (b) those parts of TF1-371's prior RUF trial testimony given on 20, 21, 24, 28, 31 July and 1, 2 August 2006 and related RUF Exhibit Nos. 6, 9, 32 (in part), 33 (in part), 36 (in part), 39, 40, 81, 82, 83, 84b, 137, 144 and 185 to 189 as are identified in Annexes C and D,

under seal, which is consistent with the protective measures decisions relating to these witnesses; and

- (ii) order that the examination by the Prosecution and the cross examination of TF1-362 and TF1-371 by the Defence in the current proceedings be limited to relevant questions which are not unduly cumulative to the testimony in the trial transcripts admitted by this Trial Chamber under Rule 92*ter*.

Filed in The Hague, 14 December 2007

For the Prosecution,



Brenda J. Hollis  
Senior Trial Attorney

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<sup>11</sup> See: (i) ruling of the Trial Chamber on the Prosecution's application to hear the whole of the testimony of TF1-362 in closed session in *Prosecutor v. Sesay et al.*, Trial Transcript, 19 April 2005 at page 107; and (ii) *Prosecutor v. Sesay et al.*, SCSL-04-15-T-577, "Decision On Prosecution Motion For The Testimony Of Witnesses TF1-367, TF1-369 And TF1-371 To Be Held In Closed Session And For Other Relief For Witness TF1-369", 14 June 2006.



## LIST OF AUTHORITIES

**SCSL*****Prosecutor v. Taylor, SCSL-2003-01-T***

*Prosecutor v. Taylor*, SCSL-03-01-PT-218, Public Rule 73bis Pre-Trial Conference Materials, 4 April 2007

***Prosecutor v. Norman et al, SCSL-2004-14-T***

*Prosecutor v. Norman et al*, SCSL-04-14-T-398, Fofana – Decision on Appeal Against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, 16 May 2005

***Prosecutor v Sesay, Kallon & Gbao, SCSL-2004-15-T***

*Prosecutor v. Sesay et al.*, SCSL-04-01-T-286, Order on Protective Measures for Additional Witnesses, 24 November 2004

*Prosecutor v. Sesay et al.*, Trial Transcript, 19 April 2005

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-448, Decision on the Prosecution Confidential Notice under Rule 92bis to Admit the Transcripts of Testimony of TF1-026, TF1-104 and TF1-169, 9 November 2005

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-537, “Decision On Prosecution Request For Leave To Call Additional Witness TF1-371 And For Order For Protective Measures”, 6 April 2006

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-557, Decision on the Prosecution Notice under Rule 92bis to Admit the Transcripts of Testimony of TF1-256, 23 May 2006

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-559, Decision on the Prosecution Notice under Rule 92bis to Admit the Transcripts of Testimony of TF1-334, 23 May 2006

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-577, “Decision On Prosecution Motion For The Testimony Of Witnesses TF1-367, TF1-369 And TF1-371 To Be Held In Closed Session And For Other Relief For Witness TF1-369”, 14 June 2006

**ICTY**

*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, “Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements”, 30 September 2003

<http://www.un.org/icty/milosevic/appeal/decision-e/030930.htm>



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Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: **The Prosecutor v Charles Ghankay Taylor**  
Case Number: **SCSL-2003-01-T**  
Document Index Number: **375**  
Document Date: **14 December 2007**  
Filing Date: **14 December 2007**

Number of Pages: **1080**

Page Numbers from: **13022 - 14202**

- Application
- Order
- Indictment
- Motion**
- Correspondence
- Other

Document Title: **Public with Confidential Annexes Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92ter**

Name of Officer:

Rachel Irura

Signed: