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SCSL-03-01-T
(28892-28902)

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THE SPECIAL COURT FOR SIERRA LEONE

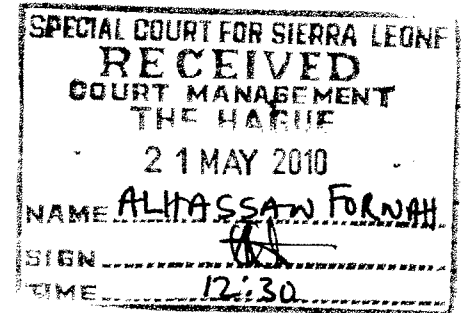
Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 21 May 2010

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX A

**DEFENCE APPLICATION FOR ADMISSION OF AFFIDAVIT
BY DCT-118 PURSUANT TO RULE 92bis**

Office of the Prosecutor

Ms. Brenda J. Hollis

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. Pursuant to Rule 92*bis*, the Defence seeks to submit a signed affidavit from witness DCT-118 in lieu of oral testimony. If the affidavit is admitted into evidence, the Defence does not intend to call DCT-118 to testify *viva voce*.¹
2. The signed affidavit of DCT-118 is attached confidentially as Annex A. Witness DCT-118 has protective measures that include the use of a pseudonym and non-disclosure to the public.² At this stage, however, the witness has affirmatively waived his right to protection, and therefore the Defence request that the protective measures for this witness be lifted to allow disclosure of his name to the public.³ If this request is granted by the Trial Chamber, the Defence request that it be allowed to file the attached affidavit publicly.

II. Applicable Legal Principles

3. The Appeals Chamber of the Special Court has confirmed that Rule 92*bis* exclusively controls the admission of documents submitted in lieu of oral testimony.⁴
4. Rule 92*bis* establishes specific protections for evidence submitted in the absence of a witness, to ensure that the interest of a fair hearing is safeguarded.⁵
5. Rule 92*bis*, regarding “Alternative Proof of Facts” states:

(A) In addition to the provisions of Rule 92*ter*, a Chamber may, *in lieu* of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.

(B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant for 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.

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-957, Defence Rule 73*ter* Filing of Witness Summaries – Version Five, 12 May 2010, Annex C (Updated Core Witness List).

² *Prosecutor v. Taylor*, SCSL-03-01-T-782, Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 27 May 2009.

³ Specifically, paras. (a), (b), and (c) of the above Protective Measures Decision should be rescinded.

⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-744, Decision on Prosecution Motion for Admission of Document Pursuant to Rules 89(C) and 92*bis*, 25 February 2009, pg. 2.

⁵ *Prosecutor v. Taylor*, SCSL-03-01-AR72-721, Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, 6 February 2009, para. 33 (“**Appeals Chamber Decision**”).

6. As the wording of the rule makes clear, the information to be admitted is not restricted to written statements or transcripts.⁶ The scope of Rule 92bis in the Special Court for Sierra Leone is deliberately more expansive than that of Rule 92bis in the ICTY, and thus is not restricted to documents prepared for the purposes of legal proceedings.⁷ Instead, the Special Court Appeals Chamber has determined that Rule 92bis permits “facts that are not beyond dispute to be presented to the court in a written or visual form that will require evaluation in due course”.⁸ Furthermore, the Appeals Chamber has defined “information” as: assertions of fact (but not opinion) made in documents or electronic communications, if such facts are relevant and their reliability is susceptible of confirmation.⁹

III. Submissions

Background

7. The scope of the evidence contained in the statement of DCT-118 is restricted to a point impacting on the credibility of the Accused, which was raised by the Prosecution during cross-examination of the Accused, Mr. Charles Ghankay Taylor. The Defence seeks to admit the statement in order to corroborate Mr. Taylor’s testimony and to contradict evidence brought by the Prosecution in an attempt to discredit Mr. Taylor, namely a Star Radio newscast¹⁰ and allegations of cannibalism.
8. On 2 December 2009, during cross-examination, Mr. Nick Koumjian for the Prosecution questioned Mr. Taylor about his role in traditional societies in Liberia.¹¹ The Prosecution questioned how Mr. Taylor acquired the title of “Dahkpannah” and suggested that he had usurped the title from the incumbent, DCT-118, whose statement is sought to be tendered.¹² The attached affidavit of DCT-118 seeks to explain the circumstances in which Mr. Taylor was appointed Dahkpannah.

⁶ Appeals Chamber Decision, para. 31.

⁷ Appeals Chamber Decision, para. 29.

⁸ *Prosecutor v. Norman, Fofana, and Kondewa*, SCSL-04-14-AR73-398, Fofana – Decision on Appeal Against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”, 16 May 2005, para. 27 (“**Fofana Appeals Chamber Decision**”).

⁹ Fofana Appeals Chamber Decision, para. 26.

¹⁰ See MFI-304, as discussed during *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 2 December 2009, p. 32960.

¹¹ See generally, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 2 December 2009, pgs. 32925-32930 and pgs. 32951-32954 (“**2 December 2009 Transcript**”).

¹² 2 December 2009 Transcript, pgs. 32953-4.

Discretionary Considerations: Time, Expense and Health Concerns

9. The power conferred on the Trial Chamber by Rule 92bis to admit written evidence is discretionary. The Defence submits that the Trial Chamber should use its discretion to admit the affidavit into evidence in order to minimize trial time and the costs related to the transportation of witnesses.
10. Additionally, the Defence requests that the Trial Chamber take into consideration that DCT-118 is approximately 100 years old and has very fragile health. If the witness is required to travel to The Hague to give evidence, this could be detrimental to his well-being.
11. Instead of bringing DCT-118 all the way to The Hague to testify *viva voce* on this limited albeit, relevant point and bearing in mind the time, expense, and personal effort that such a task would require, the Defence submits that it would be in the interests of a fair trial to admit DCT-118's evidence under Rule 92bis.

The Evidence in the Affidavit is Relevant and Susceptible of Confirmation

12. The Defence submits that this issue is relevant in that it impacts on the credibility of the Accused, which was brought into question by the Prosecution. As indicated above, the evidence sought to be admitted explains how Mr. Taylor was appointed to the position of Dahkpannah, contrary to the suggestion by the Prosecution that he usurped it.
13. It is for the Trial Chamber to decide whether the information contained in Annex A is in a form or is of a kind that is "susceptible to confirmation".¹³ The Defence submits that the evidence's reliability is susceptible of confirmation since it is a signed, notarized statement,¹⁴ and since the Prosecution is in a position to verify the truthfulness of the witness's statement by talking to other members of traditional societies in Liberia.
14. The statement of the witness explains how Mr. Taylor was appointed Dahkpannah, including other persons who were present and were part of the decision making process. The contents of the witness's statement can therefore be verified through any one or more of those persons.

¹³ Fofana Appeals Chamber Decision, para. 26.

¹⁴ For instance, Trial Chamber I admitted a solemn declaration under Rule 92bis in *Prosecutor v. Sesay, Kallon, and Gbao*, SCSL-04-15-T-534, Decision on Prosecution Request for Leave to Call an Additional Witness and Notice to Admit Witness' Solemn Declaration Pursuant to Rules 73bis(E) and 92bis, 5 April 2006, pg. 5.

The affidavit does not refer to acts and conduct of the accused

15. The Defence submits that the attached affidavit does not contain information that goes to the acts and conduct of the Accused as charged in the Indictment. Instead, the affidavit explains the process by which Mr. Taylor was appointed Dahkpannah and the circumstances in which such a title can be conferred. Only written statements that go to proof of the “acts and conduct of the accused as charged in the Indictment which establish his responsibility...” are excluded by Rule 92bis.¹⁵
16. Even if the affidavit did contain information about the acts and conduct of the accused more generally, the information should not be excluded for admission under Rule 92bis, as the information does not go to a critical issue in the case.¹⁶

The admission of the affidavit does not prejudice the Prosecution and cross-examination of DCT-118 is not necessary

17. It would not be prejudicial to the Prosecution for the affidavit to be admitted into evidence without a witness who could speak to or be cross-examined on its contents. This is true for two reasons, namely that the Accused himself has already been cross-examined on the contents and because of the peripheral nature of the issue in contention.
18. The purpose of the prohibition on the admission of evidence related to the acts and conduct of the accused is primarily to protect the rights of the accused.¹⁷ In this instance, the Defence is seeking admission of the evidence and submits that it is in the interests of justice to do so.
19. Additionally, the contents of the affidavit are not “so pivotal” or “going to a critical element” in either the Prosecution’s or the Defence’s case such that cross-examination of DCT-118 would be necessary.¹⁸

¹⁵ See, for example, *Prosecutor v. Taylor*, SCSL-03-01-T-556, Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pg. 4 (“**Taylor Rule 92bis Decision**”).

¹⁶ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-1049, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 Under Rule 92bis or, in the Alternative, Under Rule 92ter, 12 March 2008, pg. 3.

¹⁷ See, for example, *Prosecutor v. Taylor*, SCSL-03-01-T-623, Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kono District, 8 October 2008, pg. 3 (stating that where information is sufficiently proximate to the Accused that its admission in the absence of an opportunity to cross-examine the makers of the statements would unfairly prejudice the Accused and that it would be in the interests of justice to afford the Accused such an opportunity).

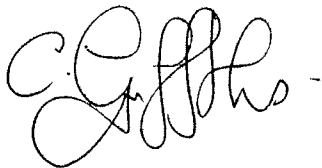
¹⁸ Taylor Rule 92bis Decision, pg. 4.

IV. Conclusion

20. In conclusion, the Defence requests that:

- A) the attached affidavit in Annex A be admitted into evidence pursuant to Rule 92*bis*;
and
- B) the protective measures for DCT-118 be modified such that Annex A can be filed
and/or tendered into evidence publicly.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 21st Day of May 2010
The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-556, Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice Under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008

Prosecutor v. Taylor, SCSL-03-01-T-623, Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kono District, 8 October 2008

Prosecutor v. Taylor, SCSL-03-01-AR72-721, Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, 6 February 2009

Prosecutor v. Taylor, SCSL-03-01-T-744, Decision on Prosecution Motion for Admission of Document Pursuant to Rules 89(C) and 92bis, 25 February 2009

Prosecutor v. Taylor, SCSL-03-01-T-782, Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials, 27 May 2009

Prosecutor v. Taylor, SCSL-03-01-T-957, Defence Rule 73ter Filing of Witness Summaries – Version Five, 12 May 2010, Annex C (Updated Core Witness List)

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 2 December 2009

Prosecutor v. Sesay, Kallon and Gbao

Prosecutor v. Sesay, Kallon, and Gbao, SCSL-04-15-T-534, Decision on Prosecution Request for Leave to Call an Additional Witness and Notice to Admit Witness' Solemn Declaration Pursuant to Rules 73bis(E) and 92bis, 5 April 2006

Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-T-1049, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 Under Rule 92bis or, in the Alternative, Under Rule 92ter, 12 March 2008



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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-03-01-T**

Document Index Number: **963**

Document Date: **21 May 2010**

Filing Date: **21 May 2010**

Document Type: - **Confidential Annex A**

Number of Pages **4** Numbers from: **28899- 28902**

- Application**
- Order
- Indictment
- Response
- Motion
- Correspondence

Document Title:

Public with confidential Annex A Defence Application for admission of affidavit by DCT-118 pursuant to Rule 92bis

Name of Officer:

Alhassan Fornah

Signed: