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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Bankole Thompson, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Benjamin Mutanga Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date: 20th of July 2006

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

DECISION ON PROSECUTION NOTICE UNDER RULE 92*BIS* AND 89 TO ADMIT THE STATEMENT OF TF1-150

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TRIAL CHAMBER I ("Trial Chamber I") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet, and Hon. Justice Benjamin Mutanga Itoe;

SEISED of the *Prosecution Notice under Rules 92bis and 89 to Admit the Statement of TF1-150* filed by the Office of the Prosecutor ("Prosecution") on the 5th of June 2006 ("Application");

CONSIDERING that the Prosecution is seeking to have admitted in evidence pursuant to Rule 92*bis* of the Rules of Procedure and Evidence ("Rules") the statement of TF1-150 without direct examination or cross-examination of the witness;

NOTING the *Gbao Response to* Prosecution *Notice Under Rules 92bis and 89 to Admit the Statement of TF1-150* by Counsel for the Accused Augustine Gbao ("Gbao Response") and the *Sesay Defence Reply Prosecution Notice Under Rule 92bis and 89 to Admit the Statement of TF1-150* by Counsel for the Accused Issa Hassan Sesay ("Sesay Response"), both filed on the 12th of June 2006;

NOTING that Counsel for the Accused Morris Kallon have not objected to the Application;

PURSUANT to Rules 89 and 92*bis* of the Rules;

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. The Prosecution is seeking to admit in evidence the statement of Prosecution Witness TF1-150 dated the 18th of April 2005 which includes the report "Human Rights in Sierra Leone 1998-2000, Certain Aspects Relevant to the RUF-AFRC Indictments at the Sierra Leone Special Court" and its attachments ("Statement") pursuant to Rules 89 and 92*bis* of the Rules without direct examination or cross-examination of the Witness as he is not available during this trial session.

2. Witness TF1-150 was a UN human rights monitor in Sierra Leone from May 1998 to January 2000. This Witness testified in the case of *Prosecutor v. Norman, Fofana and Kondewa*[1] and was scheduled to testify as well in the case of *Prosecutor v. Brima, Kamara and Kanu.* In both cases, the Trial Chambers ordered that the Witness would be required to respond to the questions of Defence

Counsel in cross-examination regarding the identification of the sources of his information.[2] As a result of the preliminary ruling, the Prosecution chose not to call the Witness to testify in the proceedings of *Prosecutor v. Brima, Kamara and Kanu*.[3]

3. The Decisions were overturned by the Appeals Chamber which found that the Witness could not be compelled to answer questions on grounds of confidentiality pursuant to Rule 70(B) and (D) of the Rules.[4] The Appeals Chamber also noted, however, that given the Trial Chambers' obligation to ensure the fairness of the proceedings, the "probative value of the witness's remaining evidence may be affected by the invocation of Rule 70 protection" or the evidence may even be excluded where its admission would bring the administration of justice into disrepute.[5]

II. SUBMISSIONS

4. The Prosecution submits that the statement of Witness TF1-150 is background evidence of matters alleged in the Indictment including evidence demonstrating the occurrence of crimes in a certain location or the widespread or systematic nature of the alleged crime. It notes that the content of the Witness' report is similar to reports prepared by NGO and media.[6] The Prosecution states that it consents to the deletion of the first sentence of paragraph 61 of the statement which directly refers to one of the Accused.[7]

5. Based on a review of the jurisprudence of this Court and other international tribunals regarding the admission of evidence pursuant to Rules 89 and 92*bis*, the Prosecution submits that the

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[1] The Witness testified under the pseudonym of TF2-218 on the 7th and 8th of June 2005.
[2] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Confidential Decision on Defence Application Regarding Witness TF2-218, 8 June 2005 and Dissenting Opinion of Hon. Justice Itoe, 19 September 2005; and *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify Without Being Compelled to Answer any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality Pursuant to Rule 70(B) and (D) of the Rules, 16 September 2005.
[3] The Prosecution has since closed its case in *Prosecutor v. Brima, Kamara and Kanu* and thus the Witness will not testify as a part of the Prosecution case despite the recent ruling of the Appeals Chamber which held in favour of the Prosecution.
[4] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006; and *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73(B), Decision on Prosecution Appeal Against Confidential Decision on Defence Application Concerning Witness TF2-218, 26 May 2006.
[5] *Id.*, paras 34-35.
[6] Prosecution Notice, para. 2.
[7] *Id.*, para. 16.

statement of Witness TF1-150 is relevant, reliable, susceptible of confirmation and will aid this Trial Chamber in making a fair determination of the matters before it.[8]

6. The Prosecution also states that Witness TF1-150 could not testify until the release of the Decisions of the Appeals Chamber and is now not able to attend Freetown due to prior work commitments during the current trial session, at the end of which the Prosecution expects to be able to close its case.[9] As a result of this, the Prosecution seeks admission of the statement without direct or cross-examination of the Witness.

7. Counsel for Gbao opposes the admission of the statement of Witness TF1-150. They submit that the statement is written by a human rights activist and contains a large amount of second hand hearsay and statements of opinion.[10]

8. Defence submit that it is impermissible to apply Rule 92*bis* to a witness like Witness TF1-150 whose evidence goes directly to the commission of crimes and the legal elements of certain crimes set out in the Indictment since Article 17(3)(e)[11] of the Statute of the Special Court ("Statute") gives the Accused the right to examine witnesses "against" him.[12]

9. The Defence also assert that Rule 92*bis* does not allow a witness to testify in writing as this contravenes Rule 90(A) of the Rules which states that a witness may give evidence directly or by means of a deposition or via communications media.[13]

10. Lastly, the Defence submit that the nature of the evidence militates against its admission as it contains opinion evidence, admissible only through an expert, and information that was obtained through unidentified sources which should be tested through cross-examination.[14]

11. Counsel for Sesay also object to the admission of the Statement without the opportunity to cross-examine Witness TF1-150, submitting that while the Statement is admissible

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[8] *Id.*, para. 17.
[9] *Id.*, paras 5 and 15.
[10] Gbao Response, paras 3-4.
[11] Presumably, this reference should be to Article 17(4)(e) of the Statute.
[12] *Id.*, paras 6-14.
[13] *Id.*, para. 15.
[14] *Id.*, paras 16-20.

under the formal requirements of Rule 92*bis*, the Trial Chamber has a discretionary power to ensure that the trial is fair.[15]

12. Based on a review of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the Defence emphasise the importance of cross-examination in testing credibility and hearsay evidence where the evidence goes to the proof of a critical element. Defence further submit that the differences between Rules 92*bis* and 89 of the Special Court and the Rules of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") do not affect the discretionary power of the Court to order the attendance of a witness for cross-examination.[16]

13. Finally, according to the Defence, the Statement covers a large range of events between May 1998 and January 2000 which relate to Counts 1 to 14 of the Indictment, comments on the "widespread and systematic nature of the attacks" and contains hearsay and opinion evidence.[17] They submit that since the Prosecution is not seeking to have previous cross-examination of this Witness admitted, there will be no record of any challenges to the Witness' credibility, the reliability of the hearsay or methodology used, or to any of the issues central to the Prosecution case against the Accused, unless the Defence is allowed to cross-examine Witness TF1-150.[18]

III. APPLICABLE LAW

14. The relevant provisions of the Rules, Rules 89 and 92*bis*, read as follows:

> **Rule 89: General Provisions** *(amended 7 March 2003)*
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> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a 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.
>
> (C) A Chamber may admit any relevant evidence.
>
> **Rule 92*bis*: Alternative Proof of Facts** *(amended 14 March 2004)*
>
> (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.

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[15] Sesay Response, paras 3-5.
[16] *Id.*, paras 17-20.
[17] *Id.*, paras 21-24.
[18] *Id.*, paras 25-27.

(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.

IV. DELIBERATIONS

15. This Chamber wishes to emphasise that it is now settled law that "the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence."[19]

16. Underscoring this approach, the Appeals Chamber of the Special Court has emphasised that Rule 92*bis* of the Special Court Rules is deliberately different from the corresponding Rule in the ICTY and the ICTR:

> The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92*bis* in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities. The effect of the SCSL Rule is to permit the reception of "information" – assertions of fact (but not opinion) made in documents or electronic communications – if such facts are relevant and their reliability is "susceptible of confirmation". [20]

17. It is important to recall that this Trial Chamber first addressed the application of Rule 92*bis* in the *Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)* in the case of *Prosecutor v. Norman, Fofana and Kondewa*. There, we held that at the stage of admission, the Chamber must determine whether documents admitted under Rule 92*bis* are relevant, whether they possess sufficient indicia of reliability and whether their admission would not prejudice unfairly the Defence.[21]

18. We have also noted that:

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[19] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para. 4. See also, *Prosecutor v. Norman, Kondewa and* Fofana, SCSL-04-14-AR65, Fofana - Appeal Against Decision Refusing Bail, 11 March 2005, paras 22-24 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on the Identification of Signatures by Witness TF1-360, 14 October 2005, para. 4.

[20] *Prosecutor v. Norman, Fofana and Kondewa*, 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.

[21] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C), 15 July 2005, p. 4.

> [The] requirement under this Rule of such information being capable of corroboration in due course leaves open the possibility for the Chamber to determine the reliability issue at the end of the trial in light of all evidence presented in the case and decide whether the information is indeed corroborated by other evidence presented at trial,[22] and what weight, if any, should the Chamber attach to it.[23] [all footnotes in original]

19. In the course of the trial of *Prosecutor v. Sesay, Kallon and Gbao*, this Chamber allowed, in lieu of oral testimony, the admission of transcripts of witnesses' testimony and the relevant exhibits from other trial proceedings on many occasions[24] and the admission of a solemn declaration.[25]

20. We reiterate that Rule 90(A) of the Rules does not affect the interpretation of Rule 92*bis*.[26]

21. Based on a careful examination of the statement of Witness TF1-150, the Chamber is satisfied that the evidence that the Prosecution is seeking to admit in lieu of the oral testimony of TF1-150 in this trial is relevant to the purpose for which its admission is sought and that its reliability is susceptible of confirmation. However, we must also determine whether the admission of this evidence under Rule 92*bis* without allowing for cross-examination would be unfair and prejudicial to the rights of the Accused.

22. In this regard, the Chamber has repeatedly stated that one example of a situation where the admission of evidence pursuant to Rule 92*bis* might prejudice unfairly the Defence is when documents pertaining to the acts and conduct of the Accused are admitted into evidence without giving the Defence the opportunity of cross-examination.[27]

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[22] For example, in the *Kovacevic* case, the ICTY Trial Chamber admitted the report from a member of the Commission of Experts, including analysis, but the Chamber explicitly stated that there was no question of the defendant being convicted on any count based on this evidence alone, *Prosecutor v. Kovacevic*, transcript 6 July 1998, p. 71.

[23] *Prosecutor v. Norman, Fofana and Kondewa, supra* note 21.

[24] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Prosecution Confidential Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-023, TF1-104 and TF1-169, 9 November 2005; Decision on the Prosecution Confidential Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-081, 21 February 2006; Decision on the Prosecution Confidential Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-156 and TF1-179, 3 April 2006; Confidential Decision on the Prosecution Confidential Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-369, 23 May 2006; Decision on the Prosecution Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-256, 23 May 2006; and Decision on the Prosecution Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-334, 24 May 2006.

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

[26] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Prosecution Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-256, 23 May 2006.

[27] See *Prosecutor v. Norman, Fofana and Kondewa, supra* note 21 and all of the decisions in *Prosecutor v. Sesay, Kallon and Gbao* listed at *supra* note 24.

23. In each of our previous Decisions made pursuant to Rule 92*bis*, the Prosecution indicated that it had no objection to the cross-examination of the witness by Defence Counsel for the three Accused. As a result, the Chamber ordered in all of these Decisions that the Defence was to be granted the opportunity to cross-examine the witnesses and that the Prosecution had the right to re-examine after cross-examination.

24. In addition to the other differences outlined above, this Chamber notes that Rule 92*bis* of the Special Court Rules does not specifically provide for the Trial Chamber's authority to require a witness to appear for cross-examination like its counterpart in the ICTY and ICTR Rules.[28] The Chamber finds, however, that it may still order the cross-examination of a witness whose evidence is admitted pursuant to Rule 92*bis* if the interests of justice so dictate consistent with the rights of the Accused to a fair trial set forth in Article 17 of the Statute.

25. Instructively, the Trial Chamber of the ICTY in *Milosevic* held that cross-examination should be allowed when the evidence that the Prosecution sought to admit pursuant to Rule 92*bis* was put into issue by the Accused. The Chamber had this to say::

> The accused has put this evidence into issue and vigorously put forward a contrary case. There is, therefore, an important issue for the Trial Chamber to try. The evidence relates to a 'critical element of the Prosecution's case' or, put another way, to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.
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> In these circumstances, in the view of the Trial Chamber the requirements of a fair trial demand that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case. This course will also address any concerns about the reliability of the evidence and any hearsay.[29]

26. Further, in *Galic*, the Appeals Chamber of the ICTY approved this reasoning and held that, after the decision has been made to admit a statement pursuant to Rule 92*bis*, the "proximity to the accused of the acts and conduct which are described in the written statement is relevant" to the determination of whether cross-examination should be ordered.[30]

27. We note that the statement of TF1-150 contains an introductory section which sets out information about the author, the organisation for which he worked while in Sierra Leone, the

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[28] See Rule 92*bis*(E) of the ICTY and ICTR Rules.
[29] *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002, paras 24-25.
[30] *Prosecutor v. Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 13.

information gathering methodology of the organisation and the sources of the information contained in the report. We note further that thereafter, the report describes findings of the organisation regarding events from May 1998 to January 2000.

28. As Counsel for Sesay points out, the events described in this chronology are generally relevant to Counts 1 to 14 of the Amended Consolidated Indictment.[31] The records further reveal that with the exception of the first sentence of paragraph 61 which makes direct reference to the First Accused,[32] the Accused are not directly implicated or named in the Statement. Rather, the material generally constitutes background evidence which reveals that crimes were committed but does not directly prove the acts and conduct of the Accused.

29. The Defence submit that much of the information contained in the Statement is based on hearsay. The Chamber finds that it is generally clear from the report whether the information regarding specific events was obtained via first hand observation or through reports of sources of information, but this may be a relevant area of cross-examination. As noted earlier, the Appeals Chamber has already stated with regard to this Witness that he may testify "without being compelled to answer questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to Rule 70 (B) and (D)" and thus would not be required to identify his sources.[33]

30. Upon careful review and reflection, this Chamber finds that the evidence contained in the Statement of TF1-150 and its attachments, while it does not go directly to the acts and the conduct of the Accused, may be seen as going to a critical element of the Prosecution's case and is proximate enough to the Accused so as to require cross-examination.

31. We also agree with the Defence that the Statement also contains certain conclusions drawn by TF1-150 with regard to the widespread or systematic nature of the attacks and the responsibility of the RUF.[34] We therefore emphasise that these findings will be made by the Chamber itself at the end of the trial in light of the applicable law and the totality of the evidence adduced before it.

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[31] Sesay Response, para. 21.
[32] As already noted, the Prosecution has consented to the deletion of this sentence from the Statement if it is admitted into evidence.
[33] *Prosecutor v. Brima, Kamara and Kanu, supra* note 4.
[34] Sesay Response, para. 22.

V. DISPOSITION

TRIAL CHAMBER I HEREBY DENIES the Prosecution's Application for the admission of the statement of Prosecution Witness TF1-150 without direct or cross-examination.

Done at Freetown, Sierra Leone, this 20th day of July 2006

Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Bankole Thompson, Presiding Judge, Trial Chamber I | Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]