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SCSL-04-15-T
(24796-24800)

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SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER 1

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

Registrar: Herman von Hebel

Date: 12th March 2008

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

Public Document

**DECISION ON DEFENCE APPLICATION FOR THE ADMISSION OF THE WITNESS
STATEMENT OF DIS-129 UNDER RULE 92bis OR, IN THE ALTERNATIVE, UNDER RULE
92ter**

Office of the Prosecutor:

Mr Peter Harrison
Mr Reginald Fynn
Mr Vincent Wagana
Mr Charles Hardaway

Defence Counsel for Issa Hassan Sesay:

Mr Wayne Jondash
Ms Sarera Asl raph

Defence Counsel for Morris Kallon:

Mr Charles Taku
Mr Kennedy Ogeto
Mr Lansana Dumbuya
Ms Tanoo Mivaganam

Court Appointed Counsel for Augustine Gbao:

Mr John Cammegh
Mr Scott Martin

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
12 MAR 2008
NAME MAUREEN EDWARDS
SIGN. M. Edwards
TIME 11:02

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

SEIZED of the *Defence Application by Counsel for the First Accused, Issa Hassan Sesay ("Defendant")*, for the Admission of the Witness Statement of DIS-129 under Rule 92bis or, in the Alternative, under 92ter, in which the Defence requests the admission of the evidence of witness DIS-129 ("Witness") in the form of a written statement ("Application");

HAVING RECEIVED the *Confidential Prosecution Response to Sesay Defence Application for the Admission of the Witness Statements of DIS-129 Under Rule 92bis, or in the Alternative Under Rule 92ter* filed by the Office of the Prosecutor ("Prosecution") on the 10th March 2008;

HAVING RECEIVED the Response to the Application filed on behalf of the Second Accused, Morris Kallon, on 10th March 2008;

HAVING RECEIVED the Response to the Application made on behalf of the Third Accused, Augustine Gbao, on the 6th February 2008;

HAVING RECEIVED the *Sesay Defence Reply to Prosecution Application for Admission of Witness Statement of DIS-129 Under Rule 92bis or, in the Alternative Under Rule 92ter* filed on 10th March 2008 ("Reply");

NOTING that the Defence Counsel for the Second and Third Accused consent to the admission under Rule 92ter of the Witness' evidence in the form of a written statement;

CONSIDERING that the Prosecution refuses to consent to the admission of the evidence of the Witness under Rule 92ter;

CONSIDERING that the Prosecution objects to the admission under Rule 92bis of certain information contained in the statement as going to proof of the acts and conduct of the accused, and because this information is material to the command responsibility and joint criminal enterprise allegations in the Indictment;

CONSIDERING that the Prosecution requests to cross-examine the Witness under Rule 92bis on the remainder of her statement, on the basis that the evidence is contested by the Prosecution, ought to be heard orally and is of a nature so as to require cross-examination;

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NOTING that the Defence does not object to producing the Witness for cross-examination;

NOTING the *Decision on Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 and TF1-371 Pursuant to Rule 92ter* rendered by Trial Chamber II in the case of *Prosecutor v. Taylor* on the 25th of January 2008;

MINDFUL of this Chamber's recent *Decision on Defence Motion for Admission of Written Evidence pursuant to Rule 92ter* of 15th February 2008;

CONSIDERING that the consent of all of the parties is a condition precedent to the admission of evidence under Rule 92ter;

MINDFUL of this Chamber's *Decision on Prosecution Notice Under Rule 92bis and 89 to Admit the Statement of TF1-150* filed on the 20th of July 2006, its *Decision on the Prosecution Notice under 92bis to Admit the Transcripts of Testimony of TF1-256*, filed on the 23^d of May 2006 and its *Decision on the Prosecution Notice under Rule 92bis to Admit the Transcripts of Testimony of TF1-334* filed on the 23^d of May 2006 in this case, as well as this Chamber's *Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis*, filed on the 9th of October 2006, and its *Decision on Norman Request to Admit Documents in Lieu of the Testimony of Abdul-One Mohammed pursuant to Rules 89(C) and 92bis*, filed on the 15th of September 2006, in the case of *Prosecutor v. Norman, Fofana and Kondewa*;

RECALLING that the Chamber will determine whether documents sought to be admitted under Rule 92bis go to proof of the acts and conduct of the accused, whether the said documents are relevant, whether they possess sufficient indicia of reliability and whether their admission would not prejudice unfairly the opposing Party;¹

CONSIDERING the Defence submission in its Reply that to widen the definition of "acts and conduct of the accused" to evidence merely relating to command responsibility for subordinates or joint criminal enterprise "would render the efficacy of Rule 92bis illusory";²

RECALLING that "evidence regarding the acts and conduct of others who committed the crimes for which the Accused is alleged to be responsible" is to be distinguished from "evidence of the acts

¹ *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.

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and conduct of the Accused which establish his responsibility for the acts and conduct of those others";³

CONSIDERING that the phrase "acts and conduct of the accused" ought not to be expanded to include all information that goes to a critical issue in the case or is material to the Prosecution's theories of joint criminal enterprise or command responsibility;

RECALLING, however, that information "going to a critical element of the Prosecution's case" is proximate enough to the Accused so as to require cross-examination;⁴

CONSIDERING that Rule 92*bis* does not provide explicitly for cross-examination, but that it is within the inherent power of this Chamber under Rules 26*bis* and 54 of the Rules of Procedure and Evidence to order cross-examination;

CONSIDERING that the Witness' statement contains information "going to a critical element of the Prosecution's case" and, therefore, is proximate enough to the Accused so as to require cross-examination in the interests of fairness;⁵

³ *Sesay Defence Reply to Prosecution Application for Admission of Witness Statement of DIS-129 under Rule 92bis or, in the Alternative under Rule 92ter*, 10 March 2008, para 9.

⁴ *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, p. 4.

⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Notice Under Rule 92*bis* and 89 to Admit the Statement of TF1-150, 20 July 2006, para 30 ("*TF1-150 Decision*"). See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92*bis*", 9 March 2004, para 13 ("*Bagosora*"); *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 ("*Milosevic*"); *Prosecutor v. Galic*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)", 7 June 2002, para 13 ("*Galic*").

⁶ *TF1-150 Decision*, *ibid*, para 30. See also *Bagosora*, *ibid*, para 14; *Milosevic*, *ibid*; *Galic*, *ibid*.

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PURSUANT to Article 17 of the Statute and Rules 26*bis*, 54, 92*bis* and 92*ter* of the Rules:

HEREBY DENIES the Defence Application for the admission of the statement of Defence Witness DIS-129 under Rule 92*ter*.

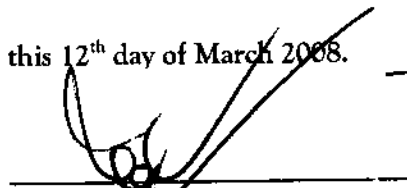
HEREBY GRANTS the Defence Application for the admission of the statement of the Witness under Rule 92*bis*, except that the fourth paragraph on p. 2-712 beginning with "I don't know..." shall be excised because it goes to proof of the acts or conduct of the First Accused, Issa Hassan Sesay.

HEREBY ORDERS the Witness to attend for cross-examination by the Prosecution and permissible re-examination by the Defence.

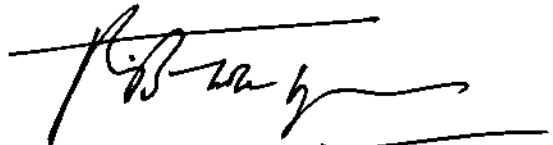
Done at Freetown, Sierra Leone, this 12th day of March 2008.



Hon. Justice Pierre Boutet



Hon. Justice Benjamin Mutanga
Itoe
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson

