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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Herman von Hebel
Date:	15th of May 2008

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

Public Document with Confidential Annexes

DECISION ON SESAY DEFENCE MOTION AND THREE SESAY DEFENCE APPLICATIONS TO ADMIT 23 WITNESS STATEMENTS UNDER RULE 92*BIS*

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Mr. Wayne Jordash
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Mr. Lansana Dumbuya
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Mr. John Cammegh
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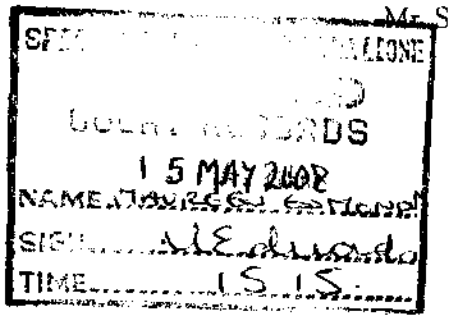

TRIAL CHAMBER I ("Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Pierre Boutet;

SEIZED of the Public with Confidential Annexes Defence Motion for Admission of Written Evidence pursuant to Rule 92bis filed by Counsel for the First Accused, Issa Hassan Sesay, ("Defence") on the 22nd February 2008 ("Motion");

CONSIDERING that Counsel for the First Accused, Issa Hassan Sesay, is seeking to have admitted the statements of Witnesses DIS-021, DIS-023, DIS-041, DIS-044, DIS-047, DIS-048, DIS-050, DIS-140, DIS-271 and DIS-283 in lieu of their examination-in-chief and without cross-examination;

NOTING the Confidential Prosecution Response to Defence Motion for Admission of Written Evidence Pursuant to Rule 92*bis* filed by the Office of the Prosecutor ("Prosecution") on the 27th of February 2008 ("Motion Response");

NOTING that Counsel for the Second Accused, Morris Kallon, and Counsel for the Third Accused, Augustine Gbao, did not file objections to the admission of the statements annexed to the First Motion;

NOTING the Sesay Defence Reply to Prosecution Response to Defence Motion for Admission of Evidence Pursuant to Rule 92*bis* file by the Defence on the 28th of February 2008 ("Motion Reply");

SEIZED of the Public with Confidential Annex Sesay Defence Application for the Admission of the statements of Witnesses DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-110, DIS-158, DIS-173, DIS-213 and DIS-285 under Rule 92*bis* filed by the Defence on the 29th of February 2008 ("First Application");

NOTING the Confidential Prosecution Response to Defence Motion for Admission of Written Evidence Pursuant to Rule 92bis of Witnesses DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-110, DIS-158, DIS-173, DIS-213 and DIS-285 filed by the Prosecution on the 10th of March 2008 ("First Application Response");

NOTING the Public Sesay Reply to Prosecution Response to Sesay Defence Application for the Admission of Written Evidence Pursuant to Rule 92bis of Witnesses DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-110, DIS-158, DIS-173, DIS-213 and DIS-285 filed on 12th of March 2008 ("First Application Reply");

SEIZED of the Public with Confidential Annex Sesay Defence Application for the Admission of the witness statement of DIS-150 under Rule 92*bis* filed by the Defence on the 29th of February 2008 ("Second Application");

NOTING the Confidential Prosecution Response to Defence Application for the Admission of the witness statement of DIS-150 under Rule 92*bis* filed by the Prosecution on the 10th of March 2008 ("Second Application Response");

NOTING the Sesay Reply to Prosecution Response to Sesay Defence Application for the Admission of the witness statement of DIS-150 under Rule 92bis filed by the Defence on the 12th of March 2008 ("Second Application Reply");

SEIZED of the Public with Confidential Annexes Sesay Defence Application for the Admission of the witness statements of DIS-067 and DIS-219 under Rule 92bis filed on the 5th of March 2008 ("Third Application");

CONSIDERING the Prosecution's Confidential Prosecution Response to Defence Application for the Admission of the witness statements of DIS-067 and DIS-219 under Rule 92bis, filed on 10th of March 2008 ("Third Application Response");

NOTING further that Counsel for the Second Accused, Morris Kallon, and Counsel for the Third Accused, Augustine Gbao, did not file any objections to the admission of the statements annexed to the First, Second or Third Applications;

NOTING the Defence Filings of Translator Affirmations for Statements of DIS-012, DIS-047, DIS-140, and DIS-283 filed on 12th of March 2008 ("Translator Affirmations");

PURSUANT to Rules 26*bis*, 73*ter*(D) 89(C), 90(F) and 92*bis* of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. The Defence filed one Motion and three Applications seeking to admit in evidence the statements of Defence Witnesses DIS-021, DIS-023, DIS-041, DIS-044, DIS-047, DIS-048, DIS-050, DIS-140, DIS-271, DIS-283, DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-110, DIS-158, DIS-173, DIS-213, DIS-285, DIS-150, DIS-067 and DIS-219 under Rule 92*bis* of the Rules of Procedure and Evidence in lieu of their examination-in-chief and without cross-examination of the Witnesses.

2. The witnesses statements sought to be admitted by the Defence generally fall into one of the following categories:

> Statements describing life in Makeni, Bombali District, for the most part after December 1998;
>
> Statements describing life in Makali, Masingbi and/or Matotoka, Tonkolili District, for the most part after December 1998;
>
> Statements describing life and/or mining conditions in the Kono District, for the most part between 1998 and 2000.

II. SUBMISSIONS

1. The Defence Request

3. The Defence proposes a four-part test for determining the admissibility of the witness statements under 92*bis*:

> Evidence must be relevant and have probative value which is not substantially outweighed by the need to ensure a fair trial under Rules 89(C) and (D);
>
> The evidence must not go to proof of the acts and conduct of the accused;

The admission of the evidence is fair in the circumstances of the case; and,

The Chamber must determine whether the witnesses should be called for cross-examination, having regard to the overall fairness of proceedings, whether the evidence in question relates to a live issue between the parties, and the proximity of the accused to the acts and conduct described in the evidence.[1]

4. The Defence argues that the prohibition in Rule 92*bis* on admitting written evidence going "to proof of the acts and conduct of the accused" should be construed narrowly. It is also submitted that the phrase should be interpreted as preventing the admission only of information about the actual "deeds and behaviour of the accused".[2] According to the Defence, the Chamber should distinguish between the acts and conduct of others for whom the indictment alleges the accused is responsible, which is admissible under Rule 92*bis*, and the acts and conduct of the accused that establish his responsibility for the acts and conduct of others, which is not admissible.

5. The Defence submits that the statements tendered offer relevant contextual information pertaining to the everyday life conditions of the inhabitants of the various areas. The Defence also argues that the public interest in having the trial proceed expeditiously favours admitting the evidence in documentary form. Furthermore, the Defence submits that the evidence is cumulative in nature and that most of it has not been challenged by the Prosecution in cross-examination, and that it would be onerous to require the witnesses to attend court in person.[3]

Public with Confidential Annexes Defence Motion for Admission of Written Evidence Pursuant to Rule 92*bis*, 21 February 2008, paras 2 – 7 "Motion"]; Public with Confidential Annexes Sesay Defence Application for the Admission of the Witness Statements of DIS-007, DIS-011, DIS-040, DIS-071, DIS110, DIS-158, DIS-173, DIS-213 and DIS-285, 29 February 2008, paras 2-7; Public with Confidential Annexes Sesay Defence Application for the Admission of the Witness Statement of DIS-150 under Rule 92*bis*, 29 February 2008, paras 2-7; Public with Confidential Annexes Sesay Defence Application for the Admission of the Witness Statements of DIS-067 and DIS-219 under Rule 92*bis*, 5 March 2008, paras 2-7 ["Third Application"].

[1] *Ibid*., paras 4-5.

[2] *Ibid*., paras 8-10.

2. The Prosecution's Objections

6. The Prosecution submits that the Chamber should proceed by considering whether to delete inadmissible paragraphs from each statement and then consider whether to allow cross-examination on the admissible portions of those statements.[4]

7. The Prosecution further submits that the addition of the clause that restricts the admissibility of evidence under 92*bis* to information which does "not go to proof of the acts and conduct of the accused" should be interpreted in line with the jurisprudence of the ICTR in *Bagasora* (and also in line with the jurisprudence of the ICTY). Specifically, the Prosecution submits that the new Rule 92*bis* excludes:

> any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish -
>
> (a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or
>
> (b) that he planned, instigated or ordered the crimes charged, or
>
> (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
>
> (d) that he was a superior to those who actually did commit the crimes, or
>
> (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
>
> (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.
>
> "Conduct" includes the Accused's state of mind and any statement going to proof of the Accused's act or conduct upon which the Prosecution seeks to establish state of mind is similarly excluded under Rule 92bis, although the Prosecution may rely on the acts or conduct of others to establish that Accused's state of mind.[5]

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[4] Prosecution Response to Defence Motion for Admission of Written Evidence Pursuant to Rule 92*bis*, 27 February 2008, para. 7 ["Motion Response"]; Confidential Prosecution Response to Defence Motion for Admission of Written Evidence Pursuant to Rule 92*bis* of Witnesses DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-110, DIS-158, DIS-173, DIS-213 and DIS-285, 10 March 2008, para 7 ["First Application Response"]; Confidential Prosecution Response to Defence Application for the Admission of the Witness Statement of DIS-150 under Rule 92*bis*, 10 March 2008, para 7 ["Second Application Response"]; Prosecution Response to Defence Application for the Admission of the Witness Statements of DIS-067 and DIS-219 under Rule 92*bis*, 10 March 2008, para 8 ["Third Application Response"].

[5] Motion Response, *supra* note 4, para 7, citing *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on the Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92*bis*", 9 March 2004, para 13 ["*Bagosora*"]. *Bagosora* in turn relies upon the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Decision in

8. Based on their review of the jurisprudence, the Prosecution argues that where the information contained in the witness statements goes to critical elements of the case and raises important issues for the Chamber to try, the information is proximate enough to the accused so as to require cross-examination in the interests of fairness.[6]

9. The Prosecution also argues that the application of Rule 92*bis* is more difficult in a case where joint criminal enterprise is alleged as a form of committing an offence, or where the information may go to proof of command responsibility. In such cases, according to the Prosecution, the cross-examination of witnesses ought to be permitted where it is sought.[7]

10. The Prosecution objects to the admission of portions of the statements of Witnesses DIS-021, DIS-041, DIS-047, DIS-048, DIS-050, DIS-271[8], DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-285,[9] DIS-067 and DIS-219[10] on the grounds that the paragraphs go to proving the acts and conduct of the accused, since the information contained in the statements is material to the accused's alleged command responsibility and his participation in a joint criminal enterprise, or because the information is irrelevant.

11. The Prosecution also objects to the admission of the statements of Witnesses DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, and DIS-285,[11] DIS-150,[12] DIS-067 and DIS-219[13] based on the repetitive nature of the proffered evidence. Further, the Prosecution submits that since Witness DIS-067 appears to have been dropped from the Defence core list of witnesses, the Witness cannot be the subject of a 92*bis* application.[14] In addition, the Prosecution argues that the Third Application was filed less than 10 days prior to the scheduled close of the Defence case; therefore, the statements of Witnesses DIS-067 and DIS-219 should be held to be inadmissible.

Prosecutor v. Galic, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92*bis*", 7 June 2002, para 10 ["*Galic*"].

[6] Motion Response, *supra* note 4, paras 3-10.

[7] Motion Response, *supra* note 4, para 9.

[8] Motion Response, *supra* note 4, paras 12-13, 15-17, 20-22, 24-25, 26-27, 30-32, 34-35.

[9] First Application Response, *supra* note 4, paras 13-15, 16-17, 18-19, 21-22, 23-24, 29-30.

[10] Third Application Response, *supra* note 4, paras 14-15, 16-17.

[11] First Application Response, *supra* note 4, paras 11, 31.

[12] Second Application Response, *supra* note 4, para 11.

[13] Third Application Response, *supra* note 4, para 18.

[14] *Ibid.*, para 13.

12. The Prosecution objects to the admission of the statements of Witnesses DIS-021, DIS-047, DIS-048, DIS-140 and DIS-283,[15] DIS-040,[16] DIS-067 and DIS-219[17] on the grounds that they do not meet the reliability requirement under Rule 92*bis*, unless an interpreter's declaration is supplied.

13. The Prosecution also seeks to cross-examine Witnesses DIS-021, DIS-041, DIS-047, DIS-048, DIS-050, DIS-271, DIS-283,[18] DIS-007, DIS-011, DIS-012, DIS-040, DIS-071, DIS-285,[19] DIS, DIS-067 and DIS-219[20] on any admissible portions of their statements.

14. The Prosecution does not object to the admission of the statements of Witnesses DIS-044 and DIS-140 without cross-examination; while it objects to the final paragraph of the statement of Witness DIS-023, it does not seek to cross-examine this Witness.[21] Should the statements of DIS-110, DIS-158, DIS-173, DIS-213,[22] and DIS-150[23] be found to be admissible, the Prosecution does not seek to cross-examine these Witnesses.

3. The Defence Reply

15. The Defence filed Reply submissions with respect to the Motion Response and the First and Second Application Responses. In its submissions, the Defence argues that evidence that should not be considered to go to proof of the acts and conduct of the accused simply because it is relevant and probative of the accused's criminal responsibility or lack thereof under the doctrines of joint criminal enterprise and command responsibility. The Defence argues that such a broad interpretation would mean that no relevant evidence could be admitted under Rule 92*bis*.[24]

16. The Defence contends that witnesses may move back and forth between their core and back-up witness lists, provided that there has been no enlargement of the core list.[25] In addition, the Defence objects to the creation of a requirement to provide interpreter's declarations where no such

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[15] Motion Response, *supra* note 4, paras 11, 19, 23, 28.
[16] First Application Response, *supra* note 4, para 20.
[17] Third Application Response, *supra* note 4, para 12.
[18] Motion Response, *supra* note 4, paras 13, 17, 22, 25, 27, 32, 35.
[19] First Application Response, *supra* note 4, paras 15, 17, 19, 22, 24, 30.
[20] Third Application Response, *supra* note 4, para 18.
[21] Motion Response, *supra* note 4, paras 14, 18, 29.
First Application Response *supra* note 4, para 31.
[22] Second Application Response, *supra* note 4, para 12.
[23] Sesay Defence Reply to Prosecution Response to Defence Motion for Admission of Evidence Pursuant to Rule 92*bis*, 28 February 2008, para 17 ["Motion Reply"].
[24] Sesay Reply to Prosecution Response to Sesay Defence Application for the Admission of Written Evidence Pursuant to Rule 92*bis* of Witnesses DIS-007, DIS-001, DIS-012, DIS-040, DIS-071, DIS-110, DIS-158, DIS-173, DIS-213 and DIS-285, 12 March 2008, paras 2-3 ["First Application Reply"].

requirement applied to the Prosecution during the presentation of its case.[26] As a matter of good practice, however, the Defence did file interpreter's declarations with respect to the statements of DIS-021, DIS-047, DIS-140 and DIS-283.[27]

17. The Defence submits, for the first time in reply, that the evidence contained in the statement is probative of a consistent pattern of conduct that is relevant and probative of the Accused's innocence.[28] The Defence argues that repetitiveness is not an element of admissibility under Rule 92*bis* or 89(C).[29]

4. Submissions of the Other Parties

18. Counsel for the Second Accused, Morris Kallon, and Counsel for the Third Accused, Augustine Gbao, did not file any objections to the admission of the statements annexed to the Motion or to the First, Second or Third Applications.

III. APPLICABLE LAW

19. The Chamber notes that Article 17 of the Statute of the Special Court of Sierra Leone provides, *inter alia*, that:

> Rights of the accused
>
> 2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
>
> ...
>
> 4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

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[26] Motion Reply, *supra* note 24, paras 5-6; Sesay Reply to Prosecution Response to Sesay Defence Application for the Admission of the Witness Statement of DIS-150 under Rule 92*bis*, 11 March 2008, para 4 ["Second Application Reply"].

[27] Public with Confidential Annexes Defence Filings of Translator Affirmations for Statements of DIS-021, DIS-047, DIS-140, DIS-283, 11 March 2008.

[28] Second Application Reply, *supra* note 26, para. 3

[29] Second Application Reply, *ibid.*, para 4.

c. To be tried without undue delay;

d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

...

20. The Chamber further notes that Rules 26*bis*, 73*ter*(D), 89, and 90(F), 92*bis* stipulate as follows:

Rule 26bis: The Chambers (adopted 29 May 2004)

The Trial chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Rule 73ter: Pre-Defence Conferences (amended 13 May 2006)

The Trial Chamber or a Judge designated from among its members may order the defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

Rule 89: General Provisions (amended 7 March 2003)

(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 90: Testimony of witnesses (amended 14 May 2007)

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

Make the interrogation and presentation effective for the ascertainment of the truth; and

Avoid the wasting of time.

Rule 92bis: Alternative Proof of Facts (amended 19 November 2007)

(A) In addition to the provisions of Rule 92ter, 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 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

21. In light of the commonality of facts, purpose and location of the witness statements tendered for admission in the Motion and the First, Second and Third Applications, this Chamber deems it most expedient to dispose of the Motion and the three Applications in a single Decision.

22. As a preliminary matter, the Chamber notes that the procedure laid down in Rule 92*bis* requires the party applying to submit information as evidence to give ten days notice to the opposing Party, and that the opposing Party is at liberty to object to the admission of the information within five days. The Rule makes no provision for a right of reply.

23. The Chamber observes that the records show that the Third Application was filed less than ten days prior to the scheduled close of the Defence case, and that the Prosecution objections to the First and Second Applications were filed outside the prescribed five day limit. Whist emphasising the need to proceed in an organised and timely manner to ensure expedition and efficiency, the Chamber, nevertheless, will exercise its discretion under Rule 26*bis* to consider the merits of Motion, the First, Second and Third Applications, all of the Prosecution Responses and the Defence Replies.

24. The Chamber is mindful of the fact that "the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing the probative value of the totality of the evidence."[30]

25. The Chamber recalls that it first considered an application under 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. In that Decision, we held that when considering whether a document is admissible under Rule 92*bis*, it should be determined whether the document was relevant, whether it possessed sufficient *indicia* of reliability and whether its admission would not prejudice unfairly the opposing Party.[31] Since that Decision, Rule 92*bis* has been amended, requiring the Chamber now also to determine whether the document contains information that goes to proof of the acts or conduct of the accused. Consistent with the amended 92*bis*(A), such information is now inadmissible under this provision.

26. It is evident that the absence of any objections from the Parties to the admission of a statement under Rule 92*bis* is not a *sina qua non* of admissibility, and that the Chamber must ensure that each rendered statement is properly admissible under Rule 92*bis*.

27. We opine that it is settled law that Rule 92*bis* allows for the alternative proof of facts, not of opinions.[32]

28. It is also our considered view that evidence admitted under Rule 92*bis* must be relevant to the purpose for which its admission is sought. It is noteworthy that the Defence seeks to admit the 23 witness statements on the basis that they provide social and economic background information on the everyday life conditions of the inhabitants of the respective areas.[33] Upon careful consideration of

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[30] *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.

[31] *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 ["*Norman et al.* 92*bis* and 89(C) Decision"]; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92*bis*, 9 October 2006, p. 4.

[32] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92*bis*, 9 October 2006, paras 22-23 ["*Fofana* 92*bis* Decision"]; *Norman et al.* 92*bis* and 89(C) Decision, *supra* note 31, p. 5.

[33] Motion, *supra* note 1, para 8; Sesay Defence Application for the Admission of the witness Statement of DIS-150 under Rule 92*bis*, 29 February 2008, para 8; Third Application, *supra* note 1, para 8.

the statements, the Chamber finds that at least some of the statements are relevant to this stated purpose.

1. Reliability and the Need for Interpreter's Declarations

29. On the issue of reliability and the need for interpreters' declarations, it is the Prosecution's submission that a number of the witness statements are inadmissible because they fail to meet the necessary threshold of reliability. Although the Defence opposes the creation of a requirement for interpreter's declarations, the Defence has submitted these declarations in relation to four of the six witness statements to which the Prosecution has objected.

30. As a matter of law, the Chamber notes that the Appeals Chamber has held that "proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course".[34] This Trial Chamber has also held that:

> [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,[35] and what weight, if any, should the Chamber attach to it.[36] [all footnotes in original]

31. It is settled law that simply admitting a document into evidence does not amount to a finding that the evidence is credible.[37] This Chamber has never required the inclusion of an interpreter's declaration as a condition precedent to the admissibility of a written witness statement, even where the witness is illiterate. We therefore decline to create such a requirement at this late stage of the trial. The Chamber will take into account the nature and source of the information when it assesses the probative value of any evidence.[38]

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[34] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73, Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005, para 26; See also *Norman et al.* 92*bis* and 89(C) Decision, *supra* note 31, p. 4.

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.

[35] *Norman et al.* 92*bis* and 89(C) Decision, *supra* note 31, p. 4.

[36] *Fofana* 92*bis* Decision, *supra* note 32, para 18.

[37] *Norman et al.* 92*bis* and 89(C) Decision, *supra* note 31, p. 5.

2. Acts and Conduct of the Accused

32. As regards the issue of the acts and the conduct of the accused as part of the Rule 92*bis* equation, the Chamber recalls that following the November 2006 Plenary Session, which took place after the close of the Prosecution case, Rule 92*bis* was amended to exclude the admission of information that goes to proof of the acts and conduct of the accused. In its Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C), this Chamber took guidance from the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), where it was held that "the phrase, 'acts and conduct of the accused' is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused".[39]

33. We recall that the definition of the phrase "acts and conduct of the accused" used in the Trial Chamber's Decision in *Milosevic* was elaborated upon by the ICTY Appeals Chamber in the case of *Prosecutor v. Stanislav Galic* in these terms:

> Rule 92bis(A) excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –
>
> (a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or
>
> (b) that he planned, instigated or ordered the crimes charged, or
>
> (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or
>
> (d) that he was a superior to those who actually did commit the crimes, or
>
> (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
>
> (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.
>
> Where the prosecution case is that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92bis(A) excludes also any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish –
>
> (g) that he had participated in that joint criminal enterprise, or that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes

[39] Fn. p. 4, citing *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002, para 22 ["*Milosevic*"].

(b) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[40] [emphasis in original, footnotes omitted]

34. The ICTY Appeals Chamber held that the phrase "acts and conduct of the accused" also includes the relevant state of mind of the accused. Therefore, "a written statement which goes to proof of any act or conduct *of the accused* upon which the Prosecution relies to establish that state of mind is not admissible."[41] [emphasis in original] However, the acts and conduct of other individuals proven by statements admitted under Rule 92*bis* may be relied upon to establish the state of mind of the accused.[42] The Chamber considers that this statement of law would apply equally to evidence introduced by the Accused.

35. The Chamber accordingly finds the above interpretation of the phrase "acts and conduct of the accused" to be instructive, and has considered whether the information that the Defence seeks to have admitted falls within this definition.

3. Cross-examination under Rule 92*bis*

36. As to the issue of cross-examination, the Chamber also recalls that under the former Rule 92*bis*, information going to proof of the acts and conduct of the accused was admissible. It was, however, for the Chamber to determine whether information went to proof of the acts and conduct of the accused in order to determine whether fairness required that the witness be produced for cross-examination by the opposing party. From the plain and literal interpretation of the amended Rule 92*bis*, information going to prove the acts and conduct of the accused is inadmissible. The Chamber will consider whether cross-examination should be permitted in relation to any admissible information.[43]

37. This Chamber has held that "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."[44] Information has been held to be proximate enough to the accused so as to

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[40] *Galić*, *supra* note 5, para. 10. A similar definition was adopted by the ICTR Trial Chamber in *Bagosora*, para. 13 ["*Bagosora*"].

[41] *Galić*, *ibid.*, para. 11. See also *Bagosora*, *ibid.*, para. 13.

[42] *Galić*, *ibid.*

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

[44] *Galić*, *ibid.*, para. 13; *Norman et al.* 92*bis* and 89(C) Decision, *supra* note 31, para. 21.

require cross-examination where it goes to prove a critical element of the Prosecution's case, including the acts and conduct of others for whom the accused is said to be responsible.[45]

38. In our previous jurisprudence under the old Rule 92*bis* we distinguished "evidence regarding the acts and conduct of others who committed the crimes for which the Accused is alleged to be responsible" from "evidence of the acts and conduct of the Accused which establish his responsibility for the acts and conduct of those others."[46] Under the amended Rule 92*bis* only the latter is admissible. Similarly, pursuant to the old Rule 92*bis*, the Chamber distinguished the acts and conduct of the accused from information going to a critical element of the case.[47] Under the amended Rule 92*bis*, only the latter is admissible.

39. We note that many of the Prosecution's objections to the admissibility of the witness statements in question fail to appreciate the distinction made in this Chamber's previous jurisprudence between "acts and conduct of the accused", which is now inadmissible, and information that is proximate enough to the accused so as to require cross-examination. It is the Chamber's view that the phrase "acts and conduct of the accused" should not be expanded to include all information that goes to a critical issue in the case or that is material to the Prosecution's theories of joint criminal enterprise or command responsibility.[48] Rule 92*bis* provides no judicial warrant for such an expansion.

40. Applying the foregoing principles, the Chamber finds that the vast majority of the information contained in the witness statements annexed to the Motion and the three Applications has already been testified to by *viva voce* witnesses who have been cross-examined by the Prosecution. This is an important consideration for the Chamber in determining whether to order cross-examination on any of the otherwise admissible witness statements.

41. The statements of Witnesses DIS-021, DIS-023, DIS-041, DIS044, DIS-047, DIS-048, DIS-050, DIS-140, DIS-283, DIS-007, DIS-011, DIS-012, DIS-040, DIS-110, DIS-158, DIS-173, DIS-213,

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[45] *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"]; *Norman et al.* 92*bis* and 89(C) Decision, *supra* note 31, p. 4; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Prosecution Notice Under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-334, 23 May 2006; DIS-129 Decision, *supra* note 43, p. 3. See also *Bagosora*, *supra* note 5; *Milosevic*, *supra* note 39, paras 24-25; *Galic*, *supra* note 5, para 13.

[46] *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.

[47] TF1-150 Decision, *supra* note 45, para 30.

[48] DIS-129 Decision, *supra* note 43, p. 3.

DIS150 deal with events in Bombali and Tonkolili Districts and relate to times or locations falling outside the Indictment. After careful consideration of these statements, the Chamber is of the opinion that they primarily concern the general conditions of life for the Witnesses.

42. On the other hand, the Chamber finds that the statements of Witnesses DIS-271, DIS-071, DIS-285, DIS-067 and DIS-219 relate to the Kono District are material to the allegations of kidnapping and forced labour made in Count 13 of the Indictment. The Chamber further finds that the statements of Witnesses DIS-271, DIS-285 and DIS-219 are sufficiently proximate to the accused so as to require cross-examination. The statement of Witness DIS-067, in contrast, relates primarily to conditions of life in a single town; and, while it touches on issues that are material to the indictment, the information contained in that statement cannot be considered to be so critical to an important issue between the Parties that fairness requires that the Prosecution be allowed to cross-examine the Witness.[49]

43. In all the circumstances, the Chamber concludes that the information contained in the statements of Witnesses DIS-021, DIS-023, DIS-041, DIS044, DIS-047, DIS-048, DIS-050, DIS-140, DIS-283, DIS-007, DIS-011, DIS-012, DIS-040, DIS-110, DIS-158, DIS-173, DIS-213, DIS150 and DIS-067 is primarily in the nature of background information and is not so proximate to the accused that fairness dictates that the Prosecution be given a chance to cross-examine upon it.

Repetitiveness

44. As regards repetitious testimony, the Chamber has consistently directed all Parties in this case to reduce to a strict minimum the number of witnesses necessary to establish their case or to challenge the allegations in the Indictment and the testimony of the Prosecution witnesses.[50] The unnecessary repetitiveness of many proposed Defence witnesses has been canvassed by this Chamber in its recent Decision on Sesay Defence Application for a Week's Adjournment – Insufficient Resources in Violation of Article 17(4)(b) of the Statute of the Special Court filed on the 5th of March 2008, and its Decision on the Sesay Defence Team's Application for Judicial Review of the Registrar's

[49] The Chamber notes that the passages cited in the Prosecution's objections to the admission of DIS-067's statement do not correspond to actual passages in that statement: Third Application Response, *supra* note 4, para 14.

[50] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-14-T, Decision on Sesay Defence Application for a Week's Adjournment – Insufficient Resources in Violation of Article 17(4)(b) of the Statute of the Special Court, 5 March 2008, para 44 ["*Sesay* Adjournment Decision"]. See also, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Sesay Defence Team's Application for Judicial Review of the Registrar's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 26th of April 2007, 12 February 2008, paras 23-24.

Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 26th of April 2007 filed on the 12th of February 2008.

45. Guided by the aforesaid Decision, the Chamber stresses once again that corroboration is not required before the evidence of a single witness may be accepted as proof of a particular fact. While recognising that corroboration may enhance the probative value of a piece of evidence when evaluating the credibility of all witnesses who have testified to particular facts,[51] the Chamber reiterates that:

> this cardinal and well established principle should not provide a platform or a justification for parties to adduce evidence that is unnecessarily long or repetitive even if it were conceded that these repeated facts which rebut or contradict the core allegations that have been made by the Prosecution in the Indictment as well as in the testimony of their witnesses, were relevant.[52]

46. We opine again that the practice of leading evidence which is largely repetitive results "in an unnecessary consumption of valuable Court time" and can render "inefficacious, the application of the notion of judicial economy".[53] It is still the Chamber's view that although the cumulative nature of evidence sought to be admitted under Rule 92*bis* may be a factor favouring admission in some situations, "this is not an invitation to tender unnecessarily cumulative or repetitive evidence, which would affect the expeditious nature of the proceedings."[54]

47 We find significantly that the majority of the witness statements submitted in the Motion, the First, Second and Third Applications are repetitive of each other and of the *viva voce* testimony already heard by this Chamber. Of the 23 witness statements concerned in this Decision, nine of them describe the conditions of daily life in a single town in Bombali District during the same time period; a further five relate information regarding conditions in Kono District, largely within the same time period; and, the remaining nine statements relate primarily to a small number of towns in the Tonkolili District, and describe the same events during the same time period.

48. It is also our considered view that the admission of 23 repetitive statements would result in duplicating evidence and hence delaying the proceedings by unnecessarily increasing the size of the

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[51] Sesay Adjournment Decision, *ibid.*, paras 52-53. See also, Judge Richard May and Marieke Wierda, *International and Comparative Criminal Law Series – International Criminal Evidence*, (New York: Transnational Publishers, 2002), p. 120; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement (TC), 2 September 1998, para 135; *Prosecutor v. Aleksovski*, IT-95-14-1/A, Judgement (AC), 24 March 2000, para 62.

[52] Sesay Adjournment Decision, *ibid.*, para 54.

[53] *Ibid.*, para 43.

[54] Rwamakuba, *supra* note 5, para 15. See also *Milosevic*, *supra* note 39, para 27.

case. This is all the more true in the case of statements that contain information sufficiently proximate to the accused so as to require cross-examination, but which are unduly duplicative of testimony already heard by this Chamber.

49. The Chamber, however, is of the view that certain of the witness statements contain admissible information which the Chamber does not consider to be unduly repetitive. The Chamber considers that the witness statements listed below provide the Chamber with some new information and are otherwise admissible under Rule 92*bis*.

V. DISPOSITION

PURSUANT to Rules 26*bis*, 73*ter*(D) 89(C), 90(F) and 92*bis* of the Rules of Procedure and Evidence;

ORDERS AS FOLLOWS:

1. That the Motion and the three Applications relating to all the witnesses referred to therein are consolidated and will be ruled upon in a single Consolidated Decision by the Chamber;

2. That the Defence requests contained in the three Applications and the one Motion for the admission of witness statements without cross-examination under Rule 92*bis*, are partially granted in respect of the following witness statements, except that the portions of the statements indicated herein and reproduced in the Annex to this Decision shall be excised where they are inadmissible under Rule 92*bis* for the reasons indicated below:

   A. The statement of DIS-050 is admissible, with the following exceptions: the penultimate paragraph of the statement shall be excised because it consists of inadmissible opinion evidence, with the exception of the fourth sentence. The final sentence of the statement shall also be excised because it goes to proving the acts or conduct of the accused.

   B. The statement of DIS-140 is admissible, with the following exceptions: the final paragraph on p. 24301, which continues as the first paragraph on p. 24302, along with the second and penultimate paragraphs on p. 24302, shall be excised as they go to prove the acts and conduct of the First Accused, Issa Hassan Sesay. Similarly, the final paragraph on p. 24302, which continues onto p. 24303, the second paragraph

on p. 24304, the final sentence of the penultimate paragraph on p. 24306 and the final paragraph on that page shall be excised for the same reason.

C. The statement of DIS-213 is admissible in its entirety.

D. The Defence may choose to tender the statement of either DIS-040 or DIS-150, but not both. If the Defence chooses to tender the statement of DIS-040, the final two sentences of the third paragraph on p. 24480 shall be excised since they go to proof of the acts and conduct of the First Accused, Issa Hassan Sesay, and the Second Accused, Morris Kallon.

E. The statement of DIS-067 is admissible in its entirety.

3. That the Defence Motion and three Applications in respect of the statements of Witnesses DIS-021, DIS-023, DIS-041, DIS-044, DIS-047, DIS-048, DIS-271, DIS-283, DIS-007, DIS-011, DIS-012, DIS-071, DIS-110, DIS-158, DIS-173, DIS-285 and DIS-219 are denied in their entirety.

Done at Freetown, Sierra Leone, this 15th day of May 2008

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

[Seal of the Special Court for Sierra Leone]

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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- Sesay, Kallon & Gbao
Case Number: SCSL-2004-15-T
Document Index Number: 1125
Document Date 15 May, 2008
Filing Date 15 May, 2008 at 15:15
Number of confidential pages: 40
Page Number: **25948-25987**

Document Type: -
☐ Affidavit
☐ Indictment
☐ Motion
☐ Order
☐ Other
☒ **Decision**
☐ Response
☐ Application

Document Title: **Confidential Annexes to Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92 bis**

Name of Officer:

Maureen Edmonds

Signed: MEdmonds