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SCSL-04-15-T
(18949 - 18954)

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SPECIAL COURT FOR SIERRA LEONE

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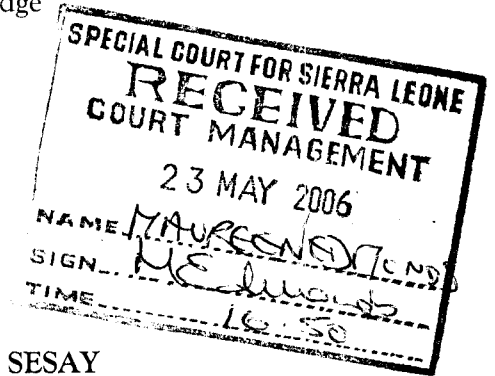
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TRIAL CHAMBER I

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

Interim Registrar: Mr. Lovemore G. Munlo SC

Date: 23rd of May 2006



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

Public Document

**DECISION ON THE PROSECUTION NOTICE UNDER 92bis
TO ADMIT THE TRANSCRIPTS OF TESTIMONY OF TF1-256**

Office of the Prosecutor:

James C. Johnson
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Charles Taku
Melron Nicol-Wilson

Court Appointed Counsel for Augustine Gbao:

Andreas O'Shea
John Cammegh

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

SEIZED OF the *Prosecution Notice Under Rule 92bis to Admit the Transcripts of Testimony of TF1-256* filed by the Office of the Prosecutor (“Prosecution”) on the 3rd of May 2006 (“Notice”);

CONSIDERING that the Prosecution is seeking to have admitted in evidence the testimony of Prosecution Witnesses TF1-256 which was recorded in the course of his testimony in Trial Chamber II during the trial proceedings in *Prosecutor v. Brima, Kamara and Kanu* (“AFRC trial”) in lieu of his examination-in-chief in the proceedings in *Prosecutor v. Sesay, Kallon and Gbao* before Trial Chamber I pursuant to Rule 92bis of the Rules of Procedure and Evidence (“Rules”);

NOTING the *Sesay Reply to Prosecution Notice Under Rule 92bis to Admit the Transcripts of Testimony of TF1-256* filed by Counsel for the Accused Issa Hassan Sesay on the 8th of May 2006 in which Counsel stated that they do not object to the admission of the relevant transcripts in this specific instance since the evidence is background evidence which does not go to prove the acts and conduct of the accused;

NOTING that Counsel for the Second Accused Morris Kallon have not objected to the admission of this evidence pursuant to Rule 92bis;

CONSIDERING the *Gbao Response to Prosecution Notice Under Rule 92bis to Admit the Transcripts of Testimony of TF1-256* filed by Counsel for the Accused Augustine Gbao on the 8th of May 2006 in which Counsel oppose the admission of the transcripts on the following grounds:

- The judicial discretion under Rule 92bis of the Rules must be understood in light of Article 17(4)(e) of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 90(A) of the Rules;
- The evidence is probative to issues of acts and omissions of the accused under the doctrines of joint criminal enterprise and command responsibility;

- In light of the Chamber's Decision on joinder¹, the Chamber must not grant a 92bis application if the rights of the accused to a fair trial could be jeopardised through a possibility of conflict in defence strategy or mutual recriminations;
- There is a conflict in defence strategy between Counsel for Gbao and Counsel for the Accused Brima of the AFRC trial;
- During his cross-examination in the AFRC trial, Counsel for Brima unwittingly introduced evidence which "might indirectly arguably have some probative value to implicating the accused into such a framework of responsibility for crimes committed by the AFRC";

MINDFUL of Rule 92bis of the Rules of Procedure and Evidence ("Rules");

CONSIDERING that the Appeals Chamber has emphasised that this Rule is deliberately different from the corresponding Rule in the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda;²

MINDFUL of this Chamber's *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 which it held that at the stage of admission, the Chamber must determine whether documents admitted under Rule 92bis are relevant, whether they possess sufficient indicia of reliability and whether their admission would not prejudice unfairly the Defence, like in situations where documents pertaining to the acts and conduct of the Accused are admitted into evidence without giving the Defence the opportunity of cross-examination;³

MINDFUL that this Chamber has admitted the transcripts of witness testimony from the AFRC trial and the exhibits admitted in the course of their testimony pursuant to Rule 92bis in place of their examination-in-chief in this trial for six prior witnesses;⁴

¹ *Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara and Kanu*, SCSL-03-05, 06, 07, 09, 10 and 13-PT, Decision and Order the Prosecution's Motion for Joinder, 28 January 2004 and the Corrigendum to this Decision, 29 January 2004.

² *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.

³ *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.

⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of TF1-023, TF1-104 and TF1-169, 9 November 2005; Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of TF1-081, 21 February 2006; and Decision on

CONSIDERING that neither Article 17(4)(e) of the Statute nor Rule 90(A) of the Rules is directly relevant to the interpretation of Rule 92bis of the Rules and that the test for the admission of evidence under this Rule is that outlined above and not only where the defence does not object or where it is justified by exceptional circumstances;

CONSIDERING that it is in the interests of justice and in accordance with the rights of the Accused set forth in Article 17 of the Statute of the Special Court that the trial proceeds fairly and expeditiously;

MINDFUL of the fact that the evidence that the Prosecution is seeking to tender in lieu of the oral testimony of TF1-256 is relevant as background evidence of matters alleged in the Amended Consolidated Indictment by revealing that crimes were committed generally;

CONSIDERING that, contrary the assertions of Counsel for Gbao, the Witness' testimony that he was released from custody by soldiers after they received a letter from Superman ordering the soldiers to stop killing is evidence regarding **the acts and conduct of others** who committed the crimes for which the Accused is alleged to be responsible and **not evidence of the acts and conduct of the Accused** which establish his responsibility for the acts and conduct of those others;⁵

MINDFUL of the fact that the broad nature of Rule 92bis, in contrast to its counterpart in the Rules of the ICTY and the ICTR, does not limit the type of evidence admissible under this Rule to mere background evidence that does not go to proving the acts and conduct of the Accused;

CONSIDERING that the evidence that the Prosecution is seeking to admit in lieu of the oral testimony of TF1-256 in this trial is relevant to the purpose for which it is sought to be admitted and that its reliability is susceptible of confirmation;

REITERATING that the Chamber must also consider, however, whether the admission of this evidence under Rule 92bis would unfairly prejudice the Defence;

the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of TF1-156 and TF1-179, 3 April 2006.

⁵ *Prosecutor v. Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras 9-10. See also *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis, 21 March 2002, para. 22.

NOTING that the Defence Counsel for Gbao have argued that the Defence may be prejudiced by a conflict in Defence strategies between themselves and Counsel for Brima which resulted in possibly prejudicial evidence being elicited during cross-examination;

CONSIDERING, after a careful review of the transcripts in question, that the evidence that Witness TF1-256 was released from the custody of the soldiers after they received a message by Superman sent from Lunsar that the soldiers should stop killing the people of Masimera was elicited during examination-in-chief by the Prosecution⁶ and that the Defence cross-examination by Counsel for Brima merely confirms this;⁷

MINDFUL of the fact that the Defence has not demonstrated that they will be unfairly prejudiced by the admission of this evidence;

CONSIDERING that the Prosecution has indicated that it has no objection to the cross-examination of Witness TF1-256 by Defence Counsel for the three Accused and that it wishes to reserve its right to re-examine the witness if they are cross-examined;

PURSUANT to Rule 92bis of the Rules:

HEREBY GRANTS the Prosecution's Application for the admission of the transcripts from the AFRC trial for Prosecution Witnesses TF1-256; and

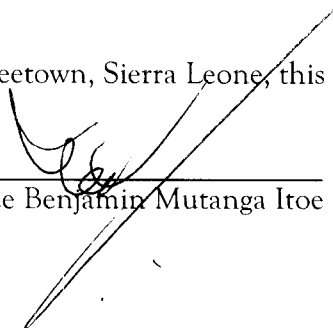
ORDERS that the Prosecution file in this trial the transcripts of the AFRC trial of the 14th of April 2005 from pages 46 to 109, inclusive, and of the 15th of April from pages 1 to 21, inclusive.

⁶ *Prosecutor v. Brima, Kamara and Kanu*, SCSL04-16-T, Transcripts of 14 April 2005, p. 103, Annexed to Prosecution's Notice, p. 18640.

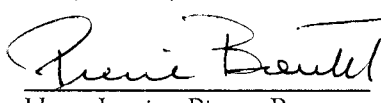
⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL04-16-T, Transcripts of 15 April 2005, pp. 5-6, Annexed to Prosecution's Notice, p. 18651-18652. The Witness confirms that they were released after the instruction was received from Superman. While he states that he understood that the letter said they should be released, it is apparent that the Witness never read the letter and does not know the details. He also states that he did not understand that Superman was in charge of the people in the guard room who had detained the Witness.

AND FURTHER ORDERS that the Defence Counsel may cross-examine Witnesses TF1-256 and that the Prosecution may re-examine the Witness relating to matters raised in any cross-examination by Defence Counsel.

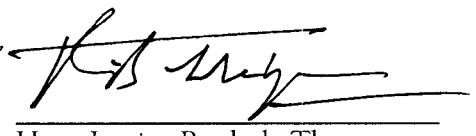
Done at Freetown, Sierra Leone, this 23rd day of May 2006



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

