

Case No. SCSL-2004-15-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

THURSDAY, 15 MAY 2008
9.43 A.M.
TRIAL

TRIAL CHAMBER I

Presiding

Before the Judges:	Benjamin Mutanga Itoe, Bankole Thompson Pierre Boutet
For Chambers:	Mr Felix Nkongho Ms Priyanka Chirimar
For the Registry:	Ms Advera Kamuzora
For the Prosecution:	Mr Peter Harrison Mr Vincent Wagona
For the accused Issa Sesay:	Mr Wayne Jordash Ms Sareta Ashraph
For the accused Morris Kallon:	Mr Charles Taku Mr Kennedy Ogeto Ms Tanoo Mylvaganam Ms Lois Mbafor
For the accused Augustine Gbao:	Mr John Cammegh Mr Scott Martin

1 [RUF15MAY08A-BP]

2 Thursday, 15 May 2008

3 [Open session]

4 [The accused present]

09:20:23 5 [Upon commencing at 9.43 a.m.]

6 [The witness entered Court]

7 PRESIDING JUDGE: Learned counsel, good morning, and
good

8 morning everyone. We are resuming the proceedings and the
agenda

9 of the Chamber this morning calls for the testimony of His
09:43:18 10 Excellency ex-president Ahmed Tejan Kabbah on a subpoena that
was

11 issued by this Court on him at the behest of the first
accused,

12 Issa Hassan Sesay. Is Mr Kabbah in Court.

13 MR JORDASH: Your Honour, he is not.

14 PRESIDING JUDGE: Who is this here now?

09:43:39 15 MR JORDASH: I think it's one of the Kallon Defence

16 witnesses.

17 PRESIDING JUDGE: Oh, can he be taken out of Court,
please.

18 Can the witness unit, you know, assist him out of Court,
please.

19 [Witness leaves courtroom]

09:44:40 20 PRESIDING JUDGE: And may we have the screen removed,

21 please. Let's have the screen removed, at least for purposes
of

gentlemen 22 the present exercise. Even the wooden screen, if some
23 can assist in removing the wooden screen itself, please.
24 MR JORDASH: Your Honour, perhaps I should indicate that
I
09:45:33 25 have an application to make in a closed session.
26 PRESIDING JUDGE: No, we are treating with preliminary
27 issues first. Oh, Mr Harrison, that's -- thank you, Mr
Harrison,
28 that was very generous of you. Thank you.
29 Yes, as we were saying, the agenda of the Court this

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president 1 morning calls for the appearance of His Excellency ex-
on 2 Ahmed Tejan Kabbah on a subpoena that was issued by this Court
of 3 the application of learned counsel, Mr Jordash, at the behest
4 course of his client -- of his client the first accused, Issa
09:47:04 5 Hassan Sesay -- and we remembered, you know, having adjourned
to
6 today in order that service can be effected on ex-President
7 Kabbah. We are reliably informed that ex-President Kabbah has
8 been served and we ordinarily, we were expecting to see him in
9 Court this morning as a witness. Is he here? Is he waiting

09:47:38 10 around the wings of the Court?

11 MR JORDASH: Well, as Your Honour rightly points out,
the
12 subpoena was served, and it now falls to me to apply for a
closed
13 session to make an application.

14 PRESIDING JUDGE: Why are you applying for a closed
09:48:03 15 session? For what reason?

16 MR JORDASH: Well, if I were to indicate in a public
17 session, I would remove the need for a closed session so I
would,
18 with Your Honours' leave, prefer to simply at this stage apply
19 for a closed session.

09:48:26 20 PRESIDING JUDGE: This is a matter of public interest.
It
21 is a matter of public interest. We would like to say this,
you
22 know, and you know that there were no protective measures that
23 were applied for President Kabbah. We didn't issue any
24 protective measures. And that is why we said that the screen
09:48:48 25 should be pushed away from here because we expected that, in
view
26 of the public interest, you know, of his testimony and in
respect
27 of which he was subpoenaed here, the public should not be
28 deprived of his testimony that was to be in open Court, which
is
29 the principle, you know, which you have always defended under

1 section -- Rule 78 of the Rules of Procedure and Evidence. So
we
2 do not know what the closed session is all about. I know if
an
3 application has to be made in closed session, you know, it has
to
4 be in closed session. But I say here now, you know, that this
is
09:49:33 5 a matter of public interest and we do not know -- because once
6 you, you know, that you are going into closed session, it
means
7 the audience, which is the public, you know, would be asked to
8 leave the Court and I don't think there is anything that we
9 should conceal in these proceedings at this stage. It is
09:49:59 10 important because the public is interested in knowing, you
know,
11 what happened. That is a thesis you have always defended,
12 Mr Jordash.

13 MR JORDASH: And I'm not attacking it at this moment.
I'm
14 simply indicating that I would like to make an application in
a
09:50:16 15 closed session but --

16 PRESIDING JUDGE: I find it very difficult as the
Chamber,
17 you know, to ask the audience, which is interested in this
18 particular issue of the ex-president, you know, to leave the
19 Court because we have to move in a closed session. This is my
09:50:28 20 problem.

Honours 21 MR JORDASH: I'm in Your Honours' hands. If Your
will 22 prefer that I make whatever application in open session, I
23 make it; if Your Honours would accede to an application in a
I'm 24 closed session, then I will make it in a closed session but
09:50:45 25 in Your Honours' hands.

26 JUDGE THOMPSON: Mr Jordash, I think the Bench does have
us 27 confidence in your ability to -- forensic ability to provide
28 by way of generalities as to exactly where you want to take us
idea 29 this morning in terms of the application, and if we get some

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in 1 from you without going into specifics at this point in time,
2 the interests of the public -- since, as you've already been
3 stoutest 4 reminded by the Presiding Judge, that you are one of the
09:53:22 5 advocates of public hearings and I've never seen you approbate
time 6 and reprobate on this issue, that perhaps at this point in
6 to persuade the Court to move to hear an application in closed

7 session, we should have some kind of general picture. In
other
8 words, don't be specific but just use your ingenuity which
you've
9 always used and see how you can persuade us to move into a
closed
10 session to hear the specifics. I apologise -- we apologise
09:53:51 for
11 putting this burden on you but I think we owe a duty to the
12 public in a matter of this nature to know why we're moving
away
13 from the norm.
14 MR JORDASH: I'm afraid my ingenuity fails me and even
if I
15 were to be as general as I'm able --
09:54:12
16 JUDGE THOMPSON: Yes.
17 MR JORDASH: -- the cat would be out of the bag, if I
can
18 put it that way. It's not possible, given the information
which
19 is in the public domain --
09:54:31
20 JUDGE THOMPSON: Yes.
21 MR JORDASH: -- at this point. It's not possible, in my
22 respectful submission, to say any more without -- all I can
say,
23 I suppose, is.
24 JUDGE THOMPSON: But you are familiar with the process.
In
09:54:58
25 other words, what we want to know in some general way, why is
a
26 closed session hearing preferable at this point in time as
27 against a public hearing? In other words, in some general
way,
28 not specifics.
29 MR JORDASH: All -- perhaps I can say this, that the

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as
1 subpoena was served. Matters then proceeded in the normal way
2 per the requirement in the subpoena order and consequent upon
3 those events, I now am required to make an application to go
into
4 a closed session to make a further application.

09:55:50 5 JUDGE BOUTET: But if you are making an application to
go
6 into a closed session, presumably you will attempt to satisfy
the
7 Chamber that the requirements under Rule 79 have been met or
one
8 of them. So as a minimum, you have to inform us at this time
9 what it is and which ground under 79 you are advocating to be
09:56:15 10 applicable to this scenario. I mean we know that this witness
that
11 was the former president of the Republic of Sierra Leone but
there
12 in itself is not a justification for a closed session, so
13 is more to it than just the mere fact that he was the former
14 president. So what -- what under these rubric of the closed
09:56:42 15 session and the requirement of the closed session is the one
at

direction

16 least that you'll be relying upon to seek the Court's

17 in this respect?

express

18 PRESIDING JUDGE: I have another concern and I'll

19 it very briefly. The subpoena has been served. Why is the

09:57:04 20 the

witness on whom the subpoena was served -- why is he not on

I

21 witness stand today? It is important, you know, for us to --

22 mean that should be the first reflex, you know, he is not in

23 Court, you know, today. I would imagine he is not and that is

24 why you want us to go into a closed session.

09:57:23 25 which

MR JORDASH: Well Your Honour is asking me a question

26 to answer it would require going into details which are best

27 done, I would submit, in a closed session. But Your Honour is

within

28 also asking the questions which relate to internal matters

publicly

29 the Sesay Defence team which I couldn't possibly answer

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applying

1 or in a closed session, but let me put it this way: I'm

the

2 under Rule 79 for Your Honours to order that the public and

to
the
09:58:11 - 3 press are excluded for the moment in order to protect pursuant
4 Rule 79(A)(ii) to the privacy, security or nondisclosure of
5 identity of either a victim or a witness as provided in Rule -

6 JUDGE BOUTET: [Overlapping speakers]

not
7 PRESIDING JUDGE: But the witness is not here. He is
8 here.

9 JUDGE BOUTET: But not only that, the identity of the
09:58:26 10 witness is well-known. This is of a public nature. I mean we
11 know the witness that you have asked this Court to assign by
12 subpoena is former President Kabbah, so I mean identity here
is
13 not an issue.

14 MR JORDASH: Well it is an issue. What's in issue is
what

09:58:43 15 happened following the service of the subpoena. And that's
the
16 issue. And strictly speaking you're right -- Your Honour is
17 right. The fact that the subpoena was served is a public
issue
18 and is in the public domain. What happened consequent upon
the
19 service of the subpoena and whether Mr Kabbah is a witness or
09:59:11 20 not, is not in the public domain. Simply serving a subpoena
on a
21 proposed witness doesn't make him a witness.

22 PRESIDING JUDGE: It makes -- respectfully I would say
it
23 makes him a witness, I mean in the public domain once the
Court
24 issues an order on your application, mark you. This is not a

09:59:33 25 Court witness. He was not subpoenaed hereby the Prosecution
26 either. He was subpoenaed by you and your Defence team. And
27 once the subpoena was served -- or rather was issued -- let me
28 put it this way: Once the Court acceded to your request that
29 Mr Kabbah be subpoenaed, it became obvious that he is a
witness,

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1 and you remember your application was predicated on the fact
that
2 you had made several efforts to get in touch with President
3 Kabbah to appear but that he -- he had refused to cooperate
with
4 you. That is why you came to the Court and the Court in the
10:00:18 5 interests of justice and to protect the rights, you know, of
your
6 client, who is the accused, decided under the law to issue
this
7 subpoena against the president. So I would with say that as
soon
8 as we issued the subpoena, President Kabbah assumed the
status,
9 you know, of a witness in this case. Mark you, you have
10:00:44 10 witnesses who have testified and others who have not
testified.
11 The fact that they have not testified does not mean that they

12 lose their status as witnesses.

13 MR JORDASH: But the fact that one simply speaks to a
14 proposed witness doesn't turn that proposed witness into a
10:00:59 15 witness either.

not 16 PRESIDING JUDGE: Are you not calling him? If you are
17 calling him you better indicate to the public, let the public
18 know that you are no longer calling him and we will close the
19 debate. We close the debate.

10:01:09 20 JUDGE BOUTET: Absolutely. This is you're call. This
is 21 your witness. This is a witness called on behalf of your
client.
22 Now if you've changed your mind and you don't want to proceed,
23 that's fine. I mean this is --

with 24 PRESIDING JUDGE: We close the debate and we go ahead
10:01:21 25 the Kallon case.

26 JUDGE BOUTET: Absolutely.

27 MR JORDASH: Well, Your Honours are clearly sending a
28 message that what happened between my --

you. 29 PRESIDING JUDGE: Yes, Mr Jordash, we are listening to

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79 1 MR JORDASH: Let me try again. I'm applying under Rule

2 at this stage for excluding the press and the public in the
3 interests of justice -- protecting the interests of justice.

If 4 Your Honour is not with me -- Your Honours understand --

10:02:17 5 PRESIDING JUDGE: Let me -- I don't want to -- let's not
6 drag this, you know, very far. But we, we as a Chamber, acted
7 under the guidance of the doctrine of fundamental fairness to
8 your client who insisted, through you, that Mr Kabbah must

come 9 to Court to testify on his behalf. We saw the fairness in it;
we

10:02:41 10 saw the justice in it and, as a judicial Chamber, we exercised
11 our discretion and issued the subpoena. So, for us, it's a
12 matter within the public domain and that is the way we
perceive 13 it because there was no application, you know, for him to be
14 accorded any protective measures or so.

10:03:03 15 So we would move briefly into a closed session to listen
to 16 your application, but the public which is here will go out,
but

17 they should please wait around the wings because they will be
18 prepared, you know, they should be free to come when, in if we
so 19 decide, you know, to know what the stand of the Chamber is on

10:03:30 20 this matter. So we will moved into the closed session and
21 please, may the gallery be emptied, and you may wait around
the 22 wings and if you are interested, you know, you may come in any
23 time for the decision of this Court which will be issued in

granted

24 public, as to whether the closed session application is

10:03:48 25

or not.

26 Are we already in a closed session?

27 MS KAMUZORA: My Lord, we will soon be ready.

28 PRESIDING JUDGE: Okay.

29 MS KAMUZORA: My Lords, we are set for closed session.

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session]

1 [At this point in the proceedings, a portion of the

2 transcript, pages 10 to 23, was extracted and sealed under

3 separate cover, as the proceeding was heard in a closed

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1 [Open session]

2 PRESIDING JUDGE: Learned counsel, we are resuming the

3 proceedings, and when we did resume a couple of minutes ago in

a

4 closed session, we did issue the ruling of the Chamber on the

12:10:55 5 application that was made in a closed session by learned
counsel

6 Mr Jordash, and our ruling was that the application was
7 dismissed; was denied and dismissed accordingly. And, in
8 conformity with the provisions of Rule 79(B) of the Rules of
9 Procedure and Evidence of that Court, we are supposed to
indicate

12:11:30 10 the reasons of our denial of this application in public.
11 So I will now read the decision of the Chamber in
public,
12 justifying the denial of Mr Jordash's application for
protective
13 measures to be granted to ex-President Kabbah, and this is the
14 ruling of the Chamber.

12:12:01 15 This Chamber adjourned the hearing of the testimony of
this
16 witness for the first accused, Issa Hassan Sesay, to today, 15
17 May 2008, in order to hear the testimony of ex-President Ahmed
18 Tejan Kabbah against who this Chamber, on the application of
the
19 first accused, Issa Hassan Sesay, issued a subpoena to appear
to
12:12:37 20 testify before it on his, Sesay's, behalf today, 15 May 2008.
21 Ex-President Kabbah has been served to appear before the
22 Chamber today. On inquiry as to why ex-President Kabbah was
not
23 in Court, learned counsel for the first accused applied to the
24 Court for a closed session to make an application in a closed
12:13:13 25 session; this application was granted.
26 During the closed session hearing, Mr Jordash applied
for
27 protective measures to be granted to the witness in question.
In

the

28 making this application, Mr Jordash relied upon Rule 75(A) of
29 Rules in order to safeguard the privacy and security of the

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the

1 witness. Mr Harrison, for the Prosecution, and counsel for
2 second accused, indicated that they were taking no position on
3 this matter. However, Mr Cammegh, learned counsel for the
4 accused, stated that his client had an interest that the
12:14:08 5 witness's testimony be given in public.

third

in

6 It is important to note that Mr Jordash, counsel for the
7 first accused, Issa Hassan Sesay, informed the Court that the
8 Court wishes to have the evidence of this witness to be heard

with

9 public. This is the ruling of the Chamber, having finished
12:14:40 10 the preliminaries.

guided

11 The Chamber, having considered the merits of this
12 application, based on the submissions of the parties, and
13 by the principles enunciated in the provisions of Article

17(2)

fair

14 of the Statute, to wit, that the accused is entitled to a

12:15:01 15 and public hearing, subject to the measures ordered by the
Court
78 16 for the protection of victims and witnesses, and also in Rule
17 of the Rules of Procedure and Evidence, which provides that
all 18 proceedings before a Trial Chamber, other than the
deliberations 19 of the Chamber, shall be held in public unless otherwise
12:15:29 20 provided, we find, considering that the matter is well-known
in 21 the public domain, that it would not be in the interests of
22 justice, nor will it be consistent with the rights of the
23 accused, to grant the protective measures to the witness in
24 question. We accordingly deny the application. This is the
12:15:58 25 ruling of the Chamber.

we 26 Mr Jordash, the Chamber is turning its looks at you and
27 would like to know how you proceed from here.

28 MR JORDASH: Well, as Your Honours are aware, we have a
29 witness statement from the former President, dated 12 May
2008,

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an 1 and given pursuant to the subpoena, and we would wish to make

92bis 2 application to have the statement tendered pursuant to Rule
3 in lieu of oral testimony.
4 The statement has been sent to the Prosecution and the
12:17:09 5 parties, and the Prosecution have indicated that they do not
6 object to the proposed course, that the statement be tendered
in 7 lieu of the oral testimony.
8 PRESIDING JUDGE: And you say you intend to tender it
under 9 what provisions of the law?
12:17:33 10 MR JORDASH: Rule 92bis.
11 PRESIDING JUDGE: Rule 92bis.
12 MR JORDASH: The Defence for Mr Kallon and Mr Gbao have
not 13 as yet indicated what their position is in relation to the
14 application. Can I request or seek clarification as to
whether 15 the Court are in possession of the statement which was sent to
16 your legal officer yesterday?
17 PRESIDING JUDGE: Even if we were, I think we are
18 interested in what you furnish to this Chamber because in
between 19 time why not -- you may have -- that statement may have been
12:18:41 20 modified, so we will rely on the one that you have.
21 MR JORDASH: I'll hand up the original signed by the
former 22 President.
23 PRESIDING JUDGE: Can Court Management show the
statement 24 to Mr Harrison, please. Yes, do you have -- Defence counsel -
-
12:19:30 25 MR JORDASH: It was sent to their e-mails yesterday.

26 PRESIDING JUDGE: I see.

27 MR JORDASH: So, my legal assistant is photocopying the
28 statement, so everyone can have a copy in Court, if they wish.
29 But it hasn't changed from yesterday.

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1 PRESIDING JUDGE: I see.

2 MS MYLVAGANAM: My Lord, we have no objection.

3 PRESIDING JUDGE: You have no objection. I see
everybody

4 is waiving his right to raise an objection within the context
of

12:20:13 5 the provisions of that Rule because certainly the timeframes,
you

6 know, have not been respected. Be it what it may, I think
it's

7 your call.

8 MS MYLVAGANAM: My Lord, having considered the
statement,

9 there's material there that will benefit us and it's not in
the

12:20:30 10 interests of Mr Kallon to object.

11 PRESIDING JUDGE: I see.

12 MS MYLVAGANAM: So one takes a pragmatic view of these
13 things as much as one would have welcomed an opportunity to
meet

14 with ex-President Kabbah in this courtroom.

12:20:43 15 PRESIDING JUDGE: Right; that's okay. Thank you, Ms
16 Mylvaganam. Mr Cammegh?

17 MR CAMMEGH: Again, I must emphasise that I'm instructed
18 that there may be questions that I should put to Mr Kabbah --
19 ex-President Kabbah. That aside, I would have no objection,
but

12:21:20 20 that is my instructed position. Once again, I find myself in
a
21 slightly hybrid position; I think Your Honours get my drift, I
22 hope.

23 PRESIDING JUDGE: Yes. Yes, Mr Harrison, yes.

24 MR HARRISON: The Prosecution will just put on the
record

12:22:04 25 that we too waive the notice provision that's contained in
26 92bis(C) which refers to the giving of ten days' notice.
We're
27 content to waive that.

28 PRESIDING JUDGE: You're content to waive that.

29 MR HARRISON: And as has already been indicated, the

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1 Prosecutor has advised and given instructions, and we take no
2 objection to the admission of the statement pursuant to 92bis.

3 PRESIDING JUDGE: Yes, Mr Jordash.

4 MR JORDASH: Well, I'm somewhat in Your Honours' hands.

I

12:23:07 5 can address Your Honours more fully on the law and the
contents

6 of the statement and how it, in our submission, can be applied
to

7 the law in favour of this application, or I can leave it at
this.

8 PRESIDING JUDGE: We want you to address us. This is,
you

9 can address us on this. I think we welcome your addresses and

12:23:36 10 particularly, particularly having in mind the position taken
by

11 learned counsel for the third accused, Mr Augustine Gbao, in

12 which he has indicated that his counsel or, rather, his client

13 would want him to put certain questions to ex-President Kabbah

14 for him to answer and this, notwithstanding the fact that he
has

12:24:04 15 no basic objection to the admissibility, to the admission of
that

16 document of Mr Kabbah's statement in evidence.

17 MR JORDASH: Well, the starting point obviously for the

18 application is the provisions -- or are the provisions of Rule

19 92bis. 92bis(a) state in addition to the provisions of Rule

12:24:32 20 92ter the Chamber may in lieu of oral testimony admit as
evidence

21 in whole or in part information including written statements
and

22 transcripts that do not go to the proof of the act and conduct
of

23 the accused. And (b), the information submitted may be
received

24 in evidence if, in the view of the Trial Chamber, it is
relevant

12:25:01 25 to the purpose for which it is submitted and if its
reliability
26 is susceptible of confirmation. As Your Honours are aware,
what
27 we are discussing is a written statement and it's our
submission
28 that the contents from a legal standpoint, and I emphasise
legal
29 standpoint, do not go to the proof of the acts and conduct of
the

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1 accused. Clearly, the statement is relevant to the
indictment,
2 but as Your Honours are aware, that is different to whether it
3 goes to proof of the acts and conduct of the accused, which
has a
4 specific and technical legal meaning. And in short, the
meaning
12:26:05 5 is that it is specific to the deeds and behaviour of the
accused.
6 In other words, 92bis is designed to deal with, in the context
of
7 statements, evidence which is not directly discussing the
deeds
8 and behaviour of the accused as relates to the indictment, but
9 can include such things as evidence relating to acts and
conduct

12:26:54 10 outside of the indictment period. It does or can include
11 evidence of acts and conduct by alleged co-perpetrators or
12 subordinates, and it is our submission that this statement,
13 whilst discussing such things as President Kabbah's view that
14 Mr Sesay was crucial to the disarmament process, that Mr Sesay
12:27:35 15 led the RUF through the disarmament process in an honest and
true
16 way. The statement also deals with Mr Sesay being elected by
17 ECOWAS to lead the RUF through disarmament in the place of
18 Foday Sankoh, who had been sidelined by ECOWAS having failed
in
19 his commitments to the Lome accord. And finally, it deals
with
12:28:19 20 Foday Sankoh's detention from 8 May and his being held
21 incommunicado insofar as he was unable to contact the RUF High
22 Commanders, including by implication Mr Sesay. And that's the
23 substance of the statement which relate to the character of
24 Mr Sesay and is relevant to the counts on the indictment
12:28:59 25 concerning the UNAMSIL abductions, insofar as the Prosecution
26 allege that Foday Sankoh was giving orders to Mr Sesay to
further
27 those abductions and this statement would appear to suggest
that,
28 in fact, Foday Sankoh was unable to give any instructions to
29 Mr Sesay during that period, since he was being held

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deeds
in
12:29:47
is
my

1 incommunicado. But it doesn't as such relate to the exact
2 and behaviour of the accused as defined pursuant to 92bis and
3 these circumstances, whilst the evidence is important and
4 relevant and we will in due course ask you to take it into
5 account when deliberating on Mr Sesay's guilt or innocence, it
6 suitable, we submit, for submission pursuant to 92bis. That's
7 application.

is
12:30:12
to
the
not
12:30:33
mean,
days'

8 JUDGE BOUTET: I have a few questions for you. First an
9 observation. You say that Sesay was elected by ECOWAS. This
10 not what your statement says. It says simply that he is aware
11 that ECOWAS -- that the RUF commanders were invited to attend,
12 there is no indication in that statement that he was elected
13 be RUF leader. So if that is the case, it's not contained in
14 statement you are producing. And my other comment, which is
15 to the statement per se, but given the position taken by the
16 third accused, how do we deal now with the notification, I
17 given their position I take it they are not waiving the ten
18 notification, so how are we to deal with that today.

question,
12:30:52
20

19 MR JORDASH: In relation to Your Honour's first
20 what I was dealing with was as much by implication that if

page 21 Your Honour looks at paragraph 2 of -- sorry, paragraph 2 of
22 2, Your Honour will see the reference to the general support
23 within the ECOWAS to replace Sankoh and then in paragraph 4, a
24 meeting involving the ECOWAS heads of state and the RUF
12:31:21 25 commanders where a discussion about finding a new leader from
observes 26 within the ranks of the RUF was held. President Kabbah
evidence 27 that he wasn't at the meeting, but in relation to other
Honours 28 which has been given in this trial, we will invite Your
29 to -- which effectively says that it was ECOWAS who selected

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ranks 1 Mr Sesay rather than that suggestion coming from within the
quite 2 of the RUF, we would say this supports that contention and
submit 3 directly so. In relation to the second question, we would
whether 4 the following: That the test obviously for Rule 92bis is
12:32:10 5 the statement goes to the acts and conduct of the accused. We
any 6 would say it doesn't, and therefore any cross-examination by

based

7 co-accused would be at best speculative because it would be

8 on assumptions made about how President Kabbah -- former

in

9 President Kabbah could assist that accused's case, especially

12:32:46 10

light of there being no indication, we would say, within the

and

11 statement that the former president can talk about the acts

And

12 conduct of that particular accused. That's my first point.

of

13 the second point is that: Of course it was always open to any

14 my learned friends to approach the former president if that

12:33:11 15
also

evidence was considered to be important to them. And it was

16 open to them to seek, as we did, a subpoena application. So

17 I'm -- of course I'm sympathetic to, not that my sympathy is

18 needed, but I'm making the point that I'm sympathetic to my

19 learned friend's stance and naturally the accused may well

12:33:37 20
conflict

consider in the context of the overall politics of the

21 and the aftermath of the conflict, they might wish to ask

22 President Kabbah -- former President Kabbah something. But

23 that's quite different to there being merit in calling him to

that

24 testify on issues which are important to their case. I make

12:34:04 25

distinction and it's a distinction which can be made and be

to

26 assumed if indeed a party -- an accused team has not attempted

27 approach President Kabbah themselves. There was no suggestion

28 until the end of the Sesay case that former President Kabbah

29 would be called to testify. So every co-accused in this case

has

1 had ample opportunity to approach President Kabbah if they
2 considered his evidence essential or even important to their
3 case.

4 JUDGE BOUTET: Yeah but that still does not deal with
the
12:34:45 5 issue of notification, so are you suggesting we should just
6 ignore the notification of ten days and five days? We haven't
7 heard, at least I haven't heard, that the third accused was
8 waiving the ten days provision of that 92bis rule, and if he
is
9 not, then how are we to deal with that? How are we to
entertain
12:35:10 10 your application now.

11 MR JORDASH: My first response to that would be to go
back
12 to the Rules, Rule 92bis which subsection (C): A party
wishing
13 to submit information as evidence shall give ten days notice
to
14 the opposing party, and so I would seek an interpretation of
the
12:35:36 15 opposing party to mean what it traditionally means, the party
16 which is opposing the defence or the -- in the other context,
17 opposing the Prosecution. But I would also submit this, that
the

18 party opposing, if that be a co-accused, should show why it is
19 they will not waive the ten days. What is it the party wishes
to
12:36:08 20 achieve in that ten days? I mean, it's a question, I would
21 submit, of prejudice because I could simply adjourn this
22 application and ask Your Honours to consider it in ten days,
23 which wouldn't exactly be, in my submission, sensible
practice.
24 Unless the party objecting can say how they would benefit from
12:36:30 25 that ten days. And so far we've heard that the party by
26 implication doesn't want the ten days to be waived but we
haven't
27 heard why. And I would submit given that: (1) the subpoena
28 application was public and there was nothing in the statement
29 which we've obtained from ex-President Kabbah that wasn't

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there
1 referred to fairly directly in the subpoena application, or
2 is nothing in the statement which has not been referred to by
3 implication or directly during the course of the trial through
4 other evidence. It's difficult to see what objection could be
12:37:14 5 properly raised as to why a party could not deal with either
an

6 application pursuant to 92bis today without ten days, or deal
7 with whatever arises from a reading of this evidence within
today
8 rather than waiting for ten days. I'm racking my brain but I
can
9 see absolutely no purpose to be served by the ten-day period.
12:37:36 10 The ten-day period is generally a good idea because obviously
it
11 gives a party who may be under pressure of resources and so on
or
12 may have been surprised by the evidence, to take cognisance of
13 it. But this is not the situation here.

14 JUDGE BOUTET: Thank you.

12:38:00 15 PRESIDING JUDGE: My worry is on the issue of relevance.
16 As you very well know, 92bis subjects the admission of that
17 document to its relevance to the proceedings, you know, as you
18 yourself have pointed out. We -- I would like to concede, you
19 know, that ex-President Kabbah has in that statement deposed
that

12:38:43 20 the first accused was very helpful, very instrumental to
securing
21 the disarmament and I will go further, maybe the restoration
of
22 peace in this country. He was elected under circumstances
which
23 we all know, because it is said in that statement that
24 Foday Sankoh was unreliable and the heads of states, you know,
12:39:15 25 preferred somebody who was more reliable to deal with in the
26 disarmament process. So Sankoh was sidetracked and Issa Sesay
27 was elected and you know from the globality of the evidence
even
28 before Issa Sesay accepted the election, he had to come back
to
29 his base and there was a debate and it was when he got the

designation
accepts
process.

1 confirmation from his base that he should accept that
2 that he went back to the heads of state and said well, he
3 it. Now, he assumed that role. He was helpful in the
4 But how relevant is his contribution to disarmament to the
5 indictment, you know, that he faces, particularly even if we
6 limiting ourselves to counts 15 to 17, which deals with the
7 taking of the UNAMSIL hostages, how helpful is his disarmament
8 role, the post-hostage-taking period relevant to the
indictment?

12:40:08
are

-

12:40:42 10

MR JORDASH: Well, if I can answer it in this way that -

PRESIDING JUDGE: Yes.

12:41:15 15

the

11 MR JORDASH: -- when we applied for a subpoena on 28
12 February 2008, and suggested in that application that the
13 evidence we could obtain from former President Kabbah was
14 essential evidence, we said that it was essential because it
15 would prove that, or disprove, an essential part of the
16 Prosecution case in relation to counts 15 to 18; namely, that

and 17 Prosecution allege that Foday Sankoh was giving instructions
18 orders to Mr Sesay as the battlefield commander.

suggestion 19 PRESIDING JUDGE: I hope there is -- there is no
12:41:41 20 anywhere, you know, that because we granted the subpoena, on
the 21 reasons you advanced, we necessarily were drawing, making a
22 finding that the facts you alleged were proved or that the
23 Prosecution's case, you know, was not founded.

24 MR JORDASH: But Your Honours did make a finding in this
12:42:05 25 way: Your Honours made a finding that the evidence, if
obtained, 26 would be important, and it has been obtained. Now, what
27 Your Honours make of it --

28 PRESIDING JUDGE: It has been obtained. That's the
29 evidence.

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1 MR JORDASH: Yes.

2 PRESIDING JUDGE: And that is where we are now.

3 MR JORDASH: Yes.

4 PRESIDING JUDGE: Now, the question is -- let me put it
12:42:27 5 more directly: How exculpatory is that evidence in relation
to

6 counts 15 and 17 which relates to the taking of the UNAMSIL
7 hostages? Because for this statement to be admitted it must
be
8 relevant for the purpose for which it is tendered and that is
to
9 show that he is innocent of a particular crime which is
proffered
10 against him in the indictment by the Prosecution. How
12:42:54 relevant
11 is that statement and his post-hostage-taking role to these
12 proceedings?

13 MR JORDASH: Well, it's --

14 JUDGE THOMPSON: Perhaps I should come in with something
12:43:21 15 related to that. In other words, and I would be certainly
16 interested in you addressing me extensively on that, whilst --
as
17 you grapple with the question from the learned Presiding
Judge.
18 I mean, is it your submission that the concepts of relevance
19 under Rule 92bis, and susceptibility of confirmation, are
12:43:56 20 synonymous with the concepts of legitimate forensic purpose
and
21 necessity under Rule 54? Is that your submission? In other
22 words, referring to our decision granting your request to
issue
23 the subpoena, we applied under Rule 54 the criteria of
legitimate
24 forensic purpose as one of those that the evidence must
satisfy
12:44:42 25 and also that the evidence must be necessary.

26 If I recall, that was how we reasoned things using Rule
54.
27 Are you suggesting also that by doing that, we were virtually

the

28 saying that the concept of legitimate forensic purpose, and
29 necessity under Rule 54, are synonymous with the concept of

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can

12:45:45
this

grant

1 relevance and susceptibility to confirmation under Rule 92bis?
2 In other words, are you saying that once we found that the
3 evidence satisfied the Rule 54 test, we cannot logically find
4 otherwise in respect of Rule 92bis criteria? So I think you
5 just join this to and answer us because I'm sure that's what
6 seems to be suggesting when you referred to the decision to
7 the subpoena.

8 MR JORDASH: Well, if I can answer the two questions in
9 this way, firstly addressing whether the test is synonymous.

12:46:09

10 JUDGE THOMPSON: Yes.

Rule

are

11 MR JORDASH: I would submit they are not synonymous.
12 54 is a much higher standard. In order to satisfy Rule 54 we
13 have to show that the evidence, if you like, is extremely
14 relevant, that it's necessary, whereas under Rule 92bis --

12:46:28

15 PRESIDING JUDGE: It's relevant on the face of your

16 application.

17 MR JORDASH: Yes.

18 PRESIDING JUDGE: On the face of your application.

19 MR JORDASH: Yes.

12:46:33 20 JUDGE THOMPSON: But remember that the formula is
21 legitimate forensic purpose, according to the decision, which
of
22 course I agree with you may well be a higher threshold. I
mean,
23 the decisions that have interpreted Rule 54, the Trial Chamber
24 decision in the CDF case, on the issue of a subpoena,
virtually
12:46:56 25 interpreted the concept of legitimate forensic purpose.

26 When that matter went on appeal, the Appeal Chamber
27 endorsed that as also the applicable test; it must be
necessary;
28 it must also serve a legitimate forensic purpose. Of course,
29 Their Lordships did not expound on the concept of legitimate

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1 forensic purpose. I am saying, bearing that in mind, if the
2 evidence passed the test for the purpose of Rule 54, does it
3 necessarily mean that the evidence does pass the test for the
4 purpose of Rule 92bis?

12:47:43 5 MR JORDASH: Well, I suppose the answer is it depends on
6 how closely the evidence obtained corresponds to the
description
7 given in the application for the subpoena.

8 JUDGE THOMPSON: And that's why I want you to enlighten
me
9 on that. In other words --

12:47:58 10 MR JORDASH: Sorry, Your Honour. If the application
11 outlines evidence that is sought, and the Trial Chamber finds
12 that that evidence would serve a legitimate forensic purpose,
13 then I -- then the subpoena is served and the evidence which
is

14 obtained doesn't correspond in the slightest with what was
12:48:24 15 outlined in the application, then obviously we -- the Trial
16 Chamber would have to ask whether that evidence had matched
the
17 application and whether, if it hadn't, how relevant it was.

18 JUDGE THOMPSON: Under both Rules which is the more
19 exacting criteria? Under both Rules.

12:48:49 20 MR JORDASH: Well, I think --

21 JUDGE THOMPSON: Because, I mean, 54 laid this down
clearly
22 and 54 has been interpreted to require that the evidence must
23 satisfy a legitimate forensic purpose test, and here,
relevance
24 and susceptibility to confirmation.

12:49:09 25 PRESIDING JUDGE: You see, we have granted the subpoena
26 under Rule 54. The statement is not being tendered under Rule
27 54, it is being tendered under Rule 92bis and, at this point
in
28 time, I think that it is an issue of the relevance of that
29 statement to the indictment, you know, that comes into issue
in

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the
the
see,
12:49:55

1 order to enable us to determine its admissibility following
2 application you made, and which has not been objected to by
3 Prosecution, and by counsel for the second accused. So, you
4 that's my problem, you know, and the question I'm asking, you
5 know, it's somehow related to the question --

pronged

6 JUDGE THOMPSON: And I would respectfully say not just
7 relevance but susceptibility to confirmation. It's a two-
8 test under 92bis.

12:50:15
be

9 MR JORDASH: Well, legitimate forensic purpose must
10 necessarily intrinsically include relevance. Evidence cannot
11 legitimately forensic if it's not relevant to the charges.

12 PRESIDING JUDGE: Can I be very direct in my question to
13 you, Mr Jordash. On that statement, is there anything on that
14 statement that would negate the allegations of the Prosecution
15 against your client under counts 15 and 17? That's the
12:50:46
question

16 which I'm asking.

17 MR JORDASH: And I can answer it quite simply.

18 PRESIDING JUDGE: Yes.

19 MR JORDASH: The indictment alleges that Foday Sankoh
12:51:11 20 effectively ordered the attack on the UNAMSIL peacekeepers and
21 these attacks took place between about April 2000 and 15
22 September 2000. I'm referring to paragraphs 28 and 83 of the
23 indictment.

24 PRESIDING JUDGE: A very wide time frame, looking at the
12:51:32 25 evidence. The time frame is very wide.

26 MR JORDASH: Very.

27 PRESIDING JUDGE: This is something that was limited in
--
28 limited in terms of the time and the space within which the
acts
29 are alleged to have been committed.

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1 MR JORDASH: Well --

2 JUDGE BOUTET: I would presume you are making reference
to
3 23; I have some concern about this one.

4 JUDGE THOMPSON: Is it 23?

12:52:01 5 MR JORDASH: Paragraph 23. Foday Saybana Sankoh and --

6 JUDGE BOUTET: From May 2000 until 10 March 2003.

7 MR JORDASH: Yes, by order of Foday -- yes. The
8 Prosecution allege that from May 2000 until about 10 March
2003,
9 by order of Foday Sankoh, Issa Sesay directed all RUF
activities
10 in the Republic off Sierra Leone. And the statement, at page
12:52:24 12, 2,
11 he
12 there.
13 was detained in Aberdeen; he was being held incommunicado
14 At that time, and I directly quote, "At that time the UN was
15 still being held in eastern Sierra Leone and arrangements were
12:52:59 15 being made to have the peacekeepers released through Liberia.
16 Sankoh was not able to give orders to other members of the RUF
17 after his arrest." Therein lies the forensic legitimate
purpose
18 and the relevance of the evidence to counts 15 to 18.

19 PRESIDING JUDGE: You are saying that even though
12:53:22 20 Foday Sankoh was reticent to the release of the hostage, your
21 client was for their release and he played a part in releasing
22 them?

23 MR JORDASH: That is what we do say. We say that what
24 happened was 8 May -- well, there's attacks on the UN, as
we've
12:53:46 25 heard in the courtroom -- early May. As you heard through
26 Mr Sesay's testimony, we say he made his way from Kono to try
to
27 sort out the mess and find out what was going on. By 8 May
28 Sankoh was arrested, and without warning arrested, thereafter
29 unable to communicate with any of his commanders, as confirmed
by

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find

1 former President Kabbah, therein leaving Mr Sesay to try to
2 out what to do with the hostages with no means of contacting
3 UNAMSIL because, as Your Honours heard from General Opande who
4 gave evidence here, there was no contact between UNAMSIL and

RUF

12:54:55
the

5 once Sankoh was arrested. As soon as Sesay is contacted by
6 ECOWAS, through Charles Taylor, he releases the hostages. So

why

7 were the hostages kept for three weeks by Mr Sesay in Kono?

One,

8 to secure their safety; and two, because he didn't have a

means

9 by which he could release them, all contact having been

12:55:27

10 intentionally cutoff by UNAMSIL, as per General Opande's
11 evidence, and with no means by which Mr Sesay could contact
12 Sankoh, as per former President Kabbah's evidence in the
13 statement. That's our defence to counts 15 to 18.

that

14 JUDGE BOUTET: So what you are suggesting, however, is

12:55:56

15 this evidence goes to acts and conduct of the accused.

16 MR JORDASH: No.

17 JUDGE BOUTET: This is what you are trying to convey

now.

I

18 MR JORDASH: Well, no, it doesn't. Because this is why

term:

19 started off the application by saying it's a very technical

12:56:09 20

Acts and conduct of the accused. It's not all evidence which

21 relates to the acts and conduct of the accused; it is evidence

22 which is acts and conduct of the accused and this does not

23 deal --

24 JUDGE THOMPSON: But we have jurisprudence on the

12:56:23 25

definition of that.

26 MR JORDASH: And I have some authority from --

acceptable

27 JUDGE THOMPSON: Right. And clearly we have an

28 meaning of acts and conduct of the accused in the context of

29 92bis.

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1 PRESIDING JUDGE: We have issued some decisions on this.

2 MR JORDASH: I've got decisions for Your Honours if

3 Your Honours wish to --

4 PRESIDING JUDGE: Yes, you can --

12:56:43 5

MR JORDASH: -- to peruse them. First is the Prosecutor

v

6 Galic at the ICTY, decision on interlocutory appeal concerning

7 92bis, which gives a useful definition --

8 JUDGE BOUTET: You provided this. Are these case law or
9 copies of?

12:57:05 10 MR JORDASH: I have copies for everyone.

11 JUDGE BOUTET: You do have copies for everyone?

12 MR JORDASH: Yes.

13 JUDGE BOUTET: Can we have them please?

14 JUDGE THOMPSON: And we recently approved that
definition

12:57:16 15 in one of our own decisions.

16 MR JORDASH: Absolutely. All the authorities which --
17 well, the two authorities we'll pass up have been approved by
18 Your Honours in Your Honours' decision. But I simply hand
them
19 to Your Honours so Your Honours can be refreshed.

12:58:17 20 Your Honours, I note the time. I don't know if -- we've
21 got another authority here which is the Prosecutor v Milosevic
at
22 the ICTY, decision on Prosecution's request to have witness
23 statements admitted under 92bis, and I don't know if it would
24 assist Your Honours to have the lunch adjournment to --

12:58:34 25 PRESIDING JUDGE: Why not?

26 JUDGE THOMPSON: Certainly.

27 PRESIDING JUDGE: Yes, that's fine.

28 JUDGE THOMPSON: I'm not in a preemptory mood at all.

29 PRESIDING JUDGE: After all -- when we talk of the

under
when
testify

1 legitimate forensic purpose and the necessity requirements
2 Rule 54 we were sufficiently conversed in the Milosevic case
3 Gerard Schroeder and Tony Blair were called to come and
4 before the ICTY.

12:59:03
very

5 JUDGE THOMPSON: And I thought that these had become
6 magical -- magical criteria.

--

7 MR JORDASH: Do Your Honours require the lunch break to
8 I notice it's 1 o'clock.

9 PRESIDING JUDGE: Yes. Did you have something to add to
12:59:26 10 what you've been saying or you wanted to continue in the
11 afternoon? Did you have some more edifying submissions in
12 addition to what you've said already and which you think, you
13 know, you can really complete in the afternoon or so? Because
14 this is a very important issue and we want to advise

ourselves,
12:59:48
very

15 you know, properly before we take a stand on this. It's a
16 important issue.

17 MR JORDASH: I would --

18 PRESIDING JUDGE: Yes, Mr Jordash, we are in your hands.

and

19 MR JORDASH: Well, I would suggest lunch and reflection
13:01:55 20 then I can finish addressing Your Honours in ten or fifteen

21 minutes after lunch.

22 PRESIDING JUDGE: All right. I think the Chamber is
minded

23 to grant your application, as usual.

24 MR JORDASH: No comment.

13:02:09 25 PRESIDING JUDGE: No comment. Well, learned counsel,
the

26 Chamber will recess for lunch. We will resume our proceedings
at

27 2.30. We will rise, please.

28 [Luncheon recess taken at 1.05 p.m.]

29 [RUF15MAY08C-BP]

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1 [Upon resuming at 2.49 p.m.]

2 PRESIDING JUDGE: Good afternoon, learned counsel. We
will

3 resume the proceedings and, Mr Jordash, you may continue.

4 MR CAMMEGH: Your Honour, I'm sorry to interrupt. I was
14:49:17 5 hoping for an opportune moment to interrupt the discourse
earlier

6 on. I want to make one thing clear: I am content for the
waiver

7 to be -- I'm content to waive the notice for the purposes of
this

for 8 argument. I didn't make that clear earlier on. I was hoping
one. 9 an appropriate moment to jump up earlier but I didn't find

14:49:44 10 PRESIDING JUDGE: Yes, you are not insisting on --

11 MR CAMMEGH: No, I want to make that clear first of all.

12 PRESIDING JUDGE: Yes, but you still insist on your
13 client's instructions that the witness be subjected to some
14 questioning.

14:50:04 15 MR CAMMEGH: I have five questions which I'm instructed
to 16 ask.

17 PRESIDING JUDGE: That is what I'm asking. I mean,
whether 18 there are ten or 100, I mean, there's no problem. You have
19 questions and your client says, you know, you must put those
14:50:40 20 questions to the witness.

21 MR CAMMEGH: Those are my instructions.

22 PRESIDING JUDGE: Those are your instructions. Right;
23 that's all I'm asking. I'm only asking for a confirmation.

24 JUDGE THOMPSON: From an abundance of caution, let me
get

14:50:40 25 it clear: You are waiving your right to object to the tender
26 requirements.

27 MR CAMMEGH: Absolutely.

28 JUDGE THOMPSON: But you are insisting on some right to
29 cross-examine?

1 MR CAMMEGH: I'm instructed to --

2 JUDGE THOMPSON: To ask for leave to cross-examine.

3 MR CAMMEGH: Indeed, yes, that's the way I should have
put
4 it.

14:50:54 5 JUDGE THOMPSON: I just wanted it in shorthand language
6 here. Thanks.

7 PRESIDING JUDGE: Right. Mr Jordash, you may --

8 MR JORDASH: I think I can be brief. I hope I can be
9 brief. This issue of the acts and conduct, and the definition
of

14:51:27 10 the same, which is relevant to the point that Mr Cammegh just
11 cleared up with the Court, and any insistent -- any insistence
of

12 a co-accused in wanting to cross-examine comes down to the
same

13 thing really. It's about proximity to the indictment, and
acts

14 and conduct is, under the jurisprudence, a description used to
15 reflect that evidence which is so proximate to the guilt or

16 innocence of an accused ought not to be adduced on paper and
so

17 I'll come back to Mr Gbao's insistence in a moment. But that
is

18 the issue we're concerned with, not simply because somebody
says:

19 I would like to ask some questions. It's about how those
14:52:39 20 questions relate to the evidence, and how proximate those

for 21 questions would be to guilt or innocence, how essential is it
22 that witness to have to attend to give evidence so that a
party 23 is not prejudiced by that lack of opportunity to cross-
examine.

24 And if I can take Your Honours to the case of Galic.

14:53:09 25 JUDGE BOUTET: Before you -- so there's no
26 misunderstanding, are you taking the position that by filing a
27 92bis and if we were to accept that proposition, there is no
28 cross-examination then.

29 MR JORDASH: No. What I'm suggesting is that there
could

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the 1 be cross-examination and Your Honours could say yes, despite
2 fact we have allowed this statement in pursuant to 92bis, we
3 still consider it important for cross-examination to take
place.

Honours 4 But Your Honours could only come to that decision if Your

14:53:52 5 decided that the evidence contained in that statement was such
6 that it was proximate enough to make it fair that a party
could

Gbao's 7 cross-examine on it. That's why I say, going back to Mr

that
subject.
8 position, it's not enough simply to say I would like to ask
9 witness some questions of my own about some unspecified

14:54:21 10 JUDGE THOMPSON: In other words you are saying that the
11 right to cross-examine becomes a conditional right.

12 MR JORDASH: [Overlapping speakers]

whether,
13 JUDGE THOMPSON: It's conditional contingent upon
14 in fact, the question relates to the issue of proximity in
14:54:31 15 respect of the acts and conduct of the accused.

16 MR JORDASH: Yes, conditional upon the proximity.

17 JUDGE THOMPSON: So it's not absolute.

18 MR JORDASH: No, conditional upon the proximity of the
19 evidence sought to be adduced on paper.

14:54:44 20 JUDGE THOMPSON: Yes.

21 MR JORDASH: To the guilt or innocence of an accused.

22 JUDGE THOMPSON: So it's not automatic.

23 MR JORDASH: It's a long way away from being automatic.
24 When you're putting in a statement pursuant to -- there's an
14:54:54 25 application pursuant to 92bis and it's recognised in the
26 jurisprudence that there is value in allowing statements to be
--
27 or evidence to be tendered in a statement because it saves on
28 time, it saves on resources; a particular issue is the saving
of
29 time. And if it is agreed between the Prosecution and the

issue

1 Defence, I would submit a Trial Chamber has to approach the
2 with extreme caution in saying well, despite the fact that
3 there's an agreement, despite the fact the parties have agreed
4 this is not so critical that one or the other has to
14:55:39 5 cross-examine.

the

6 JUDGE THOMPSON: So you are virtually saying that in, of
7 course the situation as we understand the law, is that 92bis
8 application and determination does not provide statutorily for
9 the right of cross-examination, but even if in the opinion of
14:56:00 10 Court it is in the interests of justice that cross-examination
11 should be allowed, it is a circumscribed right, it is not
12 automatic. In other words and this right -- this power or
13 discretion must not be exercised lightly.

and

14:56:25 15 from

14 MR JORDASH: Yes. Given the public interest in brevity
15 expeditiousness of proceedings and the saving of resources
16 the international public fund if you like.

position

17 JUDGE THOMPSON: I just wanted to understand your
18 as thoroughly as I could.

say

14:56:38 20 critical

19 MR JORDASH: And what we have here is the Prosecution
20 we don't require cross-examination, we don't see it as

21 to our case. We have --
22 PRESIDING JUDGE: That is the judgment of the
Prosecution.
23 MR JORDASH: And they are the ones --
24 PRESIDING JUDGE: I'm just reminding you, you know, that
it
14:56:51 25 is the judgment of the Prosecution which does not bind the
Court
26 anyway.
27 MR JORDASH: It doesn't but --
28 PRESIDING JUDGE: Yes.
29 MR JORDASH: -- the Prosecution are the guardians of
their

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1 case and if they say it's not critical to our case.
2 PRESIDING JUDGE: And we are the judges of their case.
3 They are guided by their case. We are the judges of their
case
4 and they may take a position which of course we don't even
need
14:57:16 5 to emphasise it. We are not bound by the positions taken by
the
6 parties albeit the Prosecution. So even if the Prosecution
did
7 not object, you know, it doesn't mean, you know, that there is

8 nothing in those statements, you know, that goes to prove the
9 acts and conducts, you know, of the accused person.

14:57:36 10 MR JORDASH: But.

11 PRESIDING JUDGE: The lack of an objection from the
12 Prosecution does not.

13 MR JORDASH: But it is.

14 PRESIDING JUDGE: Would you say it does.

14:57:42 15 MR JORDASH: Sorry.

16 PRESIDING JUDGE: Would you say that, you know, the
absence

17 of an objection from the Prosecution should be taken
18 automatically as meaning that the statement does not contain
19 instances of acts and conduct, you know, of the accused as far

as

14:58:04 20 his liability is concerned.

21 MR JORDASH: I think it's the critical factor. It's a
22 clear observation from the Prosecution that they do not regard
23 their case as being prejudiced such that they need to
24 cross-examine on it. And because they're ultimately the

judges

14:58:37 25 of their -- their case and what is or isn't critical,

26 Your Honours of course are the judges of the resolution of the
27 issues between the parties but they are the guardians of what

is

28 critical to their case and if they say no, it's not critical,

we

29 don't require cross-examination -- what you have in this

1 situation --

2 PRESIDING JUDGE: That would be a submission. What I'm
3 saying is that would be a submission. We may well agree with
4 them that it is not critical. We could as well disagree with
14:59:12 5 them, you know, that it is not critical.

6 MR JORDASH: I would submit.

7 PRESIDING JUDGE: We could take the view that it is
8 critical whilst they state their position the way they have
9 stated it.

14:59:22 10 MR JORDASH: But it would be, I would respectfully
submit,

11 difficult for the Trial Chamber to disagree without --

12 PRESIDING JUDGE: It will be difficult but not
impossible.

13 MR JORDASH: Nothing is impossible, Your Honour.

14 PRESIDING JUDGE: Right. Okay. That's all right.

14:59:38 15 MR JORDASH: But on the authorities --

16 PRESIDING JUDGE: That's okay. We agreed, we agreed on
17 this. That's all right.

18 MR JORDASH: But in light of the Prosecution's stand and
I

19 would submit in light of the authorities, it would be
difficult,

14:59:50 20 I would submit, the merits are clearly, I would submit, on --
in

21 favour of our application. And the Gbao situation doesn't --

situation 22 I'll come to the authorities in a moment but the Gbao
23 doesn't take the matter any further until and unless they say
to 24 this Court and explain why it is it is critical to them simply
15:00:12 25 saying we would like to ask some questions. They may simply
want 26 to ask about -- questions which Your Honours would rule are
not 27 permissible, so what we would be entering into is dragging a
28 witness into the courtroom to be asked questions which
eventually 29 are ruled inadmissible. So it is for them to say why it is
their

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to 1 questions are critical such that we abandon a short-cut route
2 get evidence into the Court. We use the Court's resources and
3 significant resources will be used of course in the context of
4 bringing the former president to the Court. Security issues
and 5 all sorts. So they must identify what is critical.
15:00:54 6 JUDGE THOMPSON: But on the question -- let me shift
7 grounds a bit. On the question of whether the information
sought

proof 8 to be admitted pursuant to 92bis goes to the issue of the
9 of the acts and conduct of the accused, who has the final say?
15:01:21 10 Suppose the Prosecution were of the view that the information
11 does not go to the proof of the acts and conduct of the
accused,
12 who has the final say as to whether the application is
13 meritorious or not. In other words, how critical if at all is
14 the Prosecution's position on that as to whether the
information
15:01:52 15 sought to be admitted does not go to the acts and conduct of
the
16 accused.
17 MR JORDASH: Well.
18 JUDGE THOMPSON: In other words how does that weigh with
19 the Tribunal.
15:02:06 20 MR JORDASH: Well, it must weigh heavily.
21 JUDGE THOMPSON: Should it.
22 MR JORDASH: Yes because.
23 JUDGE THOMPSON: Why.
24 MR JORDASH: Because it's the Prosecution who bring the
15:02:15 25 case and the Prosecution who must prove it, so it's them who
say
26 to Your Honours we regard this as critical. Now of course
27 Your Honours can disagree.
28 JUDGE THOMPSON: So in other words what you are saying,
if
29 I understand it, then of course we abdicate our role -- our

1 adjudicative role, we abdicate it completely.

is

2 MR JORDASH: Well, only if Your Honour's role is to --

3 to, of your own volition.

it

15:02:51

4 JUDGE THOMPSON: Because remember if you say the

5 Prosecution, and I'm taking this [indiscernible] point because

the

6 clearly is a question of where we draw the line. If you say

7 Prosecution is the guardian of what their interests and their

8 case is, the judges are the guardian of what.

9 MR JORDASH: The fairness of the proceedings.

15:03:03 10
reasoning,

JUDGE THOMPSON: Precisely. So by priority of

11 if they take a position that the information does not contain

12 matters that go to the proof of the acts and conduct of the

13 accused, why should this be a critical factor in the final

the

14 equation by the judges in making a determination one way or

15:03:25 15

other.

16 MR JORDASH: It's critical but not definitive. That's -

-

17 JUDGE THOMPSON: Right. I'm satisfied. I'll restrain

reasoning

18 myself, Mr Jordash. I apologise for interrupting your

19 and your thinking on this subject.

15:03:43 20

MR JORDASH: Not at all, Your Honour.

apologies 21 PRESIDING JUDGE: My Lord, Mr Jordash deserves no
22 for this. I think we are only doing our duty here just like
he 23 is doing his duty, so these exchanges and quizzes, you know,
are 24 necessary for the judicial process, and I think everybody is
15:03:57 25 fulfilling his role in this regard. Right, so. Yes, Mr
Jordash,
We 26 are you wrapping up or are you still on your feet, as usual.
27 are still listing to you.
28 MR JORDASH: I'm too busy -- I'm being deafened by Mr
29 Cammegh's chuckling. Let me wrap up, if I may. This is

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1 referring to Galic and Milosevic --
2 PRESIDING JUDGE: Yes.
3 MR JORDASH: Actually let me refer Your Honours to
4 Your Honours' decisions first. 12 March 2008 decision on
defence
15:04:42 5 application for the admission of the witness statement of DIS-
129
6 under Rule 92bis or in the alternative under Rule --
7 PRESIDING JUDGE: 12 March.
8 MR JORDASH: 12 March 2008 and we have copies for

9 Your Honour. I beg your pardon, we would have delivered them
15:04:55 10 earlier but we discover the judgment the last minute before
the
11 lunch break was over. Or I should say Mr Kneitel, our legal
12 assistance did, and this in essence will abbreviate the whole
13 matter because Your Honours laid out the law which reflects
the
14 law which is encapsulated by Galic and Milosevic. And I
believe
15:05:24 15 is what Your Honour Justice Thompson was referring to before
16 lunch: This was an application under 92bis in the alternative
17 Rule 92ter and Your Honour set out the law on page 2 and 3.
The
18 last paragraph of page 2: Recalling that evidence regarding
the
19 acts and conduct of others who committed the crimes for which
the
15:05:59 20 accused is alleged to be responsible is to be distinguished
from
21 evidence of the acts and conduct of the accused which
establish
22 his responsibility for the acts and conduct of others.
23 Considering that the phrase acts and conduct of the accused
ought
24 not to be expanded to include all information that goes to a
15:06:23 25 critical issue in the case or is material to the Prosecution's
26 theories of joint criminal enterprise or command
responsibility
27 and then finding in the circumstances that the information
sought
28 to be adduced in this or that instance was proximate enough to
29 the accused so to require cross-examination. That reflects
the

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--

Two

15:07:17

the

when

15:07:41

of

acts

15:08:12

of

offence

6.1

1 law in both Galic and Milosevic, I submit. And I would submit

2 one looks at the content from President Kabbah's statement.

3 types of evidence. One is the evidence which goes to the

4 accused's role post the indictment and two, the issue of the

5 UNAMSIL abductions and Foday Sankoh's inability to be able to

6 communicate with Sesay during the relevant period. Clearly

7 former, the information about his role post the indictment,

8 couldn't be said to be acts and conduct of the accused; not

9 the starting point is the indictment. But in relation to the

10 second, the evidence given by the former President is evidence

11 what Sankoh could or could not do at a critical time. That is

12 not acts and conduct of the accused. It's acts and conduct of

13 Sankoh. It's acts and conduct of the former President Kabbah.

14 It's act and conduct of Sankoh's prison guards. It is not

15 and conduct of the accused. And it doesn't go, in the terms

16 Galic, to the issues either that the accused committed an

17 himself or doesn't go to the issues which are encapsulated by

18 of the Statute. And it doesn't go to him as a superior under
19 command responsibility, and it doesn't go to his knowledge or
15:08:43 20 reasonable steps to prevent or punish acts. It goes to a
jigsaw,
21 a piece of the jigsaw of what we say happened during UNAMSIL,
but
22 whichever way you look at it, if Your Honours find that Sankoh
23 couldn't communicate with Sesay, it doesn't make Sesay
innocent.
24 If Your Honours find that he could communicate it doesn't make
15:09:12 25 Sesay guilty either. What it does is it provides a fact which
we
26 say in the overall facts which have been led by the
Prosecution,
27 and by the Defence, will enable you to conclude that the
28 Prosecution have failed to discharge their burden of proof.
But
29 it is not -- it's a long way away from critical because

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1 Your Honours could find one way or the other and it does not,
2 without those other factors which are much more critical,
enable
3 you to conclude one way or the other.

4 This is not, for example, an issue of Sesay turning up
on

15:09:49 5 the scene and the fact being critical as to what he did on the
6 scene. It's not critical as to what he did when the detained
--
7 when the UNAMSIL hostages were being held in Kono; it's none
of
8 that. It's simply whether Sankoh could communicate with Sesay
at
9 a given time. If he could or he couldn't it doesn't in and of
10 itself prove guilt or innocence, and those were my
15:10:12 10 submissions.

11 JUDGE THOMPSON: So then what's the -- in a nutshell
what's
12 the purport of information channelled through or siphoned
through
13 the 92bis mechanism?

14 MR JORDASH: It enables contextual evidence to be led
and
15:10:42 15 in an economic way saving the --

16 JUDGE THOMPSON: Time of the Court.

17 MR JORDASH: Saving the time and money which would
18 necessarily be spent bringing the witness to Court, and
19 Your Honours can see how important that is considered in the
case
20 of Milosevic which actually deals with --

21 JUDGE BOUTET: Yes, but the money here I don't think is
an
22 issue. I mean, the President, the ex-President lives right
here
23 in Freetown. I don't think the money is an issue here.

24 MR JORDASH: Well, it is in a sense because the security
15:11:12 25 situation will be, as I know, that the Court security
contacted
26 President Kabbah's security last night. This is a not
27 insignificant security task. Well, certainly not one --

28 JUDGE BOUTET: I can tell you, as far as I'm concerned,
29 this is not an issue. Not the security, I mean the money

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1 associated at this juncture.

can

2 MR JORDASH: Well, I suppose that is an argument which

Well,

3 always be raised in terms of 92bis. One can always say:

much

4 we have a particular witness, we're not going to save that

15:11:47
issue

5 money whether he comes or he doesn't come. It's more of an

try

6 with policy, that the policy of international tribunals is to

7 to expedite the proceedings and to save money and that

8 requires --

9 JUDGE BOUTET: As a general principle I agree with that.

15:12:00

10 On the facts of this case, this issue, no. But that's fine.

11 MR JORDASH: No, as a policy, as a policy, and this --

12 JUDGE BOUTET: But, on a different issue, I would like,

13 Mr Jordash, to be enlightened again, by the question I think I

14 asked this morning, and it relates to paragraph 23 of the

15:12:17

15 indictment, given what you are asking -- 23 of the indictment

16 relates to -- and it's one of the allegations made by the
17 Prosecution against all accused -- no, against Sesay in this
18 point. From about May 2000, until about 10 March 2003, by
order
19 of Sankoh, Issa Hassan Sesay directed all RUF activities in
the
15:12:44 20 Republic of Sierra Leone. So this evidence is obviously
evidence
21 that they are attempting to lead to offset this paragraph or
22 defeat this allegation.

23 MR JORDASH: Well, yes and no is the answer, I would
24 submit. In terms of the --

15:13:03 25 JUDGE BOUTET: If you say that you are leading this
26 evidence to show that Sankoh was incommunicado and therefore
27 could not, from 8 May I think from this evidence on,
communicate
28 with Sesay and therefore could not, according to what your
29 position is, direct and give orders to Sesay about these

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1 activities.
2 MR JORDASH: Well, it's, when I say yes or no, it's --
that
3 paragraph encapsulates the idea that Sankoh gave the order,
4 specific orders, specific orders, and the specific order we're

15:13:45 5 dealing with at the moment is Foday Sankoh giving Sesay
specific
6 orders to continue the attacks against UNAMSIL, so, in that
7 sense, this paragraph encapsulates that. But the paragraph
I'm
8 sure what the Prosecution will say is it matters -- and this
is
9 why I suspect they are happy to have the evidence pursuant to
10 92bis -- is that it doesn't answer this paragraph -- the
15:14:07 10 evidence
11 in President Kabbah's statement is not a full answer to this
12 paragraph because what they will say is: Well, Mr Sesay was
the
13 battlefield commander. He had implicit orders to continue in
the
14 absence of the leader the activities of the RUF. And that's
what
15:14:29 15 I suspect the Prosecution will say. So this evidence of
16 President Kabbah doesn't deal with this paragraph, in and of
17 itself.
18 JUDGE BOUTET: It does deal with it but you say not in
its
19 entirety?
15:14:44 20 MR JORDASH: Yes. Mr Sesay could still have been acting
at
21 all times subsequent to Sankoh's incarceration on implicit
22 orders. It doesn't deal with that.
23 JUDGE BOUTET: I have one last question, if I may,
24 Mr Jordash. One option open to this Court is to accept the
92bis
15:15:05 25 in part. We could sever the 92bis and accept, for example,
all
26 those parts of 92bis that goes in the post-disarmament or the
27 post-UNAMSIL scenario. That's something, a scenario that is

28 possible. I presume if we do that it doesn't serve your
29 purposes.

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1 MR JORDASH: Well --

2 JUDGE BOUTET: It is an option that is open and, as you
3 know, we've done that in the past because we've concluded that
4 the 92bis statement, as such, part of them would not be
15:15:44 5 acceptable for reasons that we felt were either acts, or
conducts
6 or too proximate to what it was, so the same could be
applicable
7 here. I'm not saying we will, but I'm just asking you about
8 this.

9 MR JORDASH: It's --

15:16:02 10 JUDGE BOUTET: Because you know, and you have stated,
that

11 the statement in question clearly contains two different
12 scenarios. One is vis-à-vis in respect of the UNAMSIL
capture,
13 the 14,15 or 15, 16, 17 counts, the other one has to do with
the
14 conduct of the accused post and is more in mitigation than
15:16:23 15 anything else than the other part.

16 MR JORDASH: I'm not sure I -- we would lose the
advantage
17 of being able to move on with the Kallon case. We would lose
the
18 benefit of a Rule 92bis and for the reasons I've outlined
would
19 be of very little benefit, I would submit.

15:16:51 20 President Kabbah can be brought to Court to deal with
the
21 single issue of his knowledge of Sankoh's incarceration, but
it
22 is a short and simple issue which is dealt with in totality, I
23 would submit, in the statement, that nothing, nothing will be
24 gained from simply asking him to repeat that evidence in the
15:17:16 25 witness box. That's, I suppose, the way I would look at it,
26 Your Honour.

27 JUDGE THOMPSON: Before you sit down, Mr Jordash, let me
28 put the question the other way: Just one question to satisfy
my
29 mind. What would be the disadvantage or disadvantages in
having

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1 a viva voce testimony from ex-President Kabbah? In a
nutshell.
2 Disadvantage, if there's one or disadvantages; just in a

3 nutshell. And you can see my mind. I just want to make sure
4 that I clear all my judicial doubts and reservations as my
mind

15:18:00 5 has been open all this time.

6 MR JORDASH: Disadvantage, disadvantages --

7 JUDGE THOMPSON: And don't feel pressured because it's a
8 very difficult question and I know you are thinking on your
feet.

9 Random thoughts would be accepted by me. Just one or two.

15:18:21 10 MR JORDASH: Loss of time; use of resources; the Kallon
11 team have witnesses waiting to go who are waiting, as I
12 understand it, to fly off home; inconvenience for former
13 President, who is a significant leader in this region.

14 Perhaps -- I don't know the answer to this -- but perhaps
15:18:50 15 increased security risk to the former President.

16 JUDGE THOMPSON: I don't want you to exhaust the field.
17 Thanks.

18 MR JORDASH: I think I might have. Those are my
19 submissions.

15:19:09 20 PRESIDING JUDGE: Thank you, Mr Jordash. Yes, Mr
Cammegh,
21 we would like to hear from you in the light of your indication
22 this morning about the stand you took on the instructions of
your
23 client.

24 MR CAMMEGH: Well, there's something that Mr Jordash --

15:19:34 25 PRESIDING JUDGE: And how you relate that to 92bis.

26 MR CAMMEGH: Well, my understanding that the
requirements
27 differ between counsel -- I forget the actual words of the
28 relevant line in the 92bis -- would Your Honours forgive me
for

29 one moment, because I wrote it down, and I just lost my note.

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and 1 PRESIDING JUDGE: Is it acts which relate to the proof
2 conduct?

3 MR CAMMEGH: Yes. Acts --

4 JUDGE THOMPSON: That do not go to the proof of acts and
15:20:17 5 conduct.

and 6 PRESIDING JUDGE: That do not go to the proof of acts
7 conduct of the accused.

8 JUDGE THOMPSON: That's A, section A.

9 MR CAMMEGH: That's it. Now, my understanding is that
15:20:31 10 counsel calling the witness -- well, put it a different way.
My
11 understanding is that if I were to cross-examine the witness,
12 would he go into the witness box, I would be allowed to
13 cross-examine him on issues that may go to proof of the acts
and
14 conduct of the accused.

15:21:05 15 Be that as it may, I think I'm probably at liberty to
16 inform the Court this: The questions that I have do not
17 necessarily go to the proof of the acts and conduct of the

to a 18 accused. Moreover, and this is with reference in particular
19 comment Mr Jordash made in his submission earlier on, which I
15:21:28 20 have to agree with, they may be questions which the Court may
21 require me to -- in relation to which the Court may require me
to 22 satisfy the Bench of their validity in these circumstances.
23 They may be questions which don't relate to the acts and
24 conduct of the accused; they may be questions that relate to a
15:21:59 25 more global issue concerning the termination of the conflict.
26 Now, I would be in Your Honours' hands. I think it's right
that 27 I should flag this up now, because it may be something that
28 Your Honours want to put into the scales when you consider
29 whether or not the witness should be called or not. Questions
I

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1 ask may not go directly to acts and conduct. I'm trying to be
2 as --
3 PRESIDING JUDGE: Of course, you know the --
4 MR CAMMEGH: -- careful as I can.
15:22:44 5 PRESIDING JUDGE: -- you know the other questions that
we

6 will not -- that we will rule out. We know those questions.

7 MR CAMMEGH: Well, I don't know if that's --

8 PRESIDING JUDGE: Which we would rule out, you know, if
9 they do come in at all.

15:22:57 10 MR CAMMEGH: I'm not sure if the questions that I would
be
11 instructed --

12 PRESIDING JUDGE: If the President were to be called, he
13 would be coming here to testify on behalf of the accused
person
14 who has called him, so, relating that to the evidence I think
of

15:23:16 15 the scenario of DMK-082 -- I'm just saying this in a
camouflaged
16 way -- I don't want to visit the details but you understand
what
17 I mean.

18 MR CAMMEGH: Well, I do. I'm not entirely sure that the
19 questions I'm instructed to ask would offend any particular
20 principle, but I just want to make it clear that I do not
intend
21 to ask the witness questions that go to the acts and conduct
of

22 the accused personally. I think it's right that I make that
23 point because Mr Jordash, I think quite properly, raised the
24 question or raised the concern that, following Defence counsel
15:24:05 25 may have to satisfy the Bench of the validity of their
questions,
26 and it may be that I will be required to do that. I'm sorry
to
27 sound so esoteric but I think it would be wrong for me to give
28 away at this stage what those questions are.

29 PRESIDING JUDGE: Yes. In fact, I was very -- I was
very

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you
them.
can
15:24:47

1 loathe myself, you know, for you to release your questions,
2 know, before you've even been given the opportunity to put
3 Normally the questions should come in for the tribunal to
4 determine at that material point in time as to whether they
5 be put or not.

to
15:25:18
inadmissible.

6 JUDGE THOMPSON: And I'm intrigued myself, and probably
7 help me out of my own judicial quandary here. It would seem
8 me, by some logical analysis, that if the proposed evidence
9 sought to be admitted under 92bis actually go to the acts and
10 conduct of the accused, then the evidence would be

11 MR CAMMEGH: That's my understanding of the Rule.

12 JUDGE THOMPSON: That's my understanding of the law.

13 MR CAMMEGH: Yes.

15:25:34
assurance

14 JUDGE THOMPSON: So, if that is the case, then it means
15 that if we have that scenario then the question of your
16 here would not even be necessary.

17 MR CAMMEGH: Well, Your Honour, I'm not entirely sure.

I'm 18 JUDGE THOMPSON: I know we're in a difficulty here but
19 just trying to understand your thinking.

15:25:51 20 MR CAMMEGH: I know that rule -- my understanding is
this:
21 That that rule would definitely apply with certainty and
finality
22 to the defendant calling the witness; what is unclear to me is
23 whether that same rule applies to counsel following.

15:26:08 24 JUDGE THOMPSON: Right. Well, I'm not going to -- yes,
25 quite.

26 MR CAMMEGH: I'm not sure it does.

27 JUDGE THOMPSON: I understand that position. It's just
28 that when I think of the rule in the context of its
legislative
29 history, under the old rule, information going to the acts and

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1 conduct of accused persons was admissible.

2 MR CAMMEGH: Of course, yes.

3 JUDGE THOMPSON: But under the new 92bis there is a
4 prohibition on such information passing the 92bis test.

15:26:40 5 MR CAMMEGH: Yes.

logical 6 JUDGE THOMPSON: So the difficulty I have here is a
that 7 one: That if, say, the Tribunal were to take the position
8 the information here is information that goes to the acts and
9 conduct of the accused, then the test is not fulfilled for the
15:27:00 10 application to be granted and then, of course, your situation
is 11 neutralised.

12 MR CAMMEGH: Well, of course. That would follow. I
agree 13 with Your Honour.

14 JUDGE THOMPSON: Yes. As a matter of logic.

15:27:14 15 MR CAMMEGH: Yes. My understanding is there is an
absolute 16 prohibition on counsel calling the witness to adduce evidence
17 that go to the acts and conduct of the --

18 JUDGE THOMPSON: Under the new rule.

19 PRESIDING JUDGE: [Microphone not activated].

15:27:25 20 JUDGE THOMPSON: As amended.

21 MR CAMMEGH: Yes. What I'm not clear about is whether
that 22 prohibition extends to counsel following for defendants two
and 23 three. That is what I'm not clear about.

24 JUDGE THOMPSON: I would say there is a lacuna in the
law 25 there.

15:27:43 26 MR CAMMEGH: Well, I would defer to Your Honours on the
27 point.

28 JUDGE THOMPSON: That's my random thought.

29 MR CAMMEGH: Your Honour correctly observes, however,

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--
1 that -- and I think this is what Your Honour was getting that
2 that lacuna, or whatever we want to call it, may not apply
3 to me because the questions which I'm instructed to ask do not
4 deal with the individual Augustine Gbao's acts and conduct --
15:28:06 5 JUDGE THOMPSON: Good point.
6 MR CAMMEGH: -- personally. They are a rather more
generic
7 nature, I think that's a proper way to --
8 JUDGE THOMPSON: I think we're now on the same radar
9 screen.
15:28:16 10 MR CAMMEGH: Yes. Now, in my submission, they would be
11 proper questions provided Your Honour felt -- Your Honours
felt
12 they were relevant.
13 JUDGE THOMPSON: Right.
14 MR CAMMEGH: Relevance is a question, of course, which
is
15:28:28 15 for Your Honours to decide. Your Honours may have an
objection
16 to the questions, in which case I shall be guided by the
Bench.
17 And there we have it.

18 JUDGE THOMPSON: That's okay.

19 MR CAMMEGH: I think I can assure my learned friend I'm
not

15:28:45 20 going to be asking questions about acts and conduct but, as he
21 correctly anticipated in his submission, the questions may be
of

22 such a nature where Your Honours might want to step in and
weigh

23 up the relevance. And I simply do that, or make this
declaration

24 now out of candour, to basically align myself with my learned

15:29:07 25 friend's reasoning, and also to alert the Chamber to the fact

26 that it may well be --

27 JUDGE THOMPSON: The clarification helps, yes.

28 MR CAMMEGH: Yes. I don't know if I can.

29 PRESIDING JUDGE: [Microphone not activated].

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1 MR CAMMEGH: I'm sorry, Your Honour, Your Honour's
2 microphone.

3 PRESIDING JUDGE: Sorry. I was saying that we are
4 sensitive to the fact that well, you're in cross-examination
and

15:29:32 5 at times you may start from a position of irrelevance, of what

6 may be considered irrelevance, before you get to the issue,
you
7 know, of relevance in your cross-examination. So the liberty,
8 you know, is more, you know, in the hands of a cross-examining
9 counsel in terms of relevance. How does he start his
10 cross-examination? You may start from an abstract concept and
11 progress to what you want to achieve as a result.

12 MR CAMMEGH: Sounds as if Your Honour is opening the
door
13 to giving me some sort of latitude in my cross-examination,
which
14 will be gratefully received, but I think --

15 JUDGE THOMPSON: And I hope faithfully applied.

16 MR CAMMEGH: I think everybody who was here at the
17 beginning of this trial in 2004 will remember that Augustine
Gbao
18 held a particular view which he wished to expound in this
19 courtroom, and those are views which he continues to hold.

20 It may well be -- and I say this out of candour and I
think
21 I'm at liberty to say this -- that there are questions which
may
22 mean that we revisit that particular scenario, and I put it no
23 more highly than that, I think I've dropped a broad hint, they
24 may find disfavour with the Bench; I don't know.

25 PRESIDING JUDGE: When they find disfavour with the
Bench,
26 we will let you know.

27 MR CAMMEGH: When the time comes, the time will come.
28 Exactly.

29 PRESIDING JUDGE: We will let you know.

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1 MR CAMMEGH: Thank you.

2 JUDGE BOUTET: We're not ruled out.

3 MR CAMMEGH: Thank you very much. I think that's all I
can
4 usefully add on this.

15:31:20 5 PRESIDING JUDGE: Good. Thank you.

6 Well, learned counsel, the Chamber will recess for a
7 deliberation, please. We will resume in the next couple of
8 minutes when we are through. We will rise, please.

9 [Break taken at 3.35 p.m.]

15:40:50 10 [RUF15MAY08D - BP]

11 [Upon resuming at 4.10 p.m.]

12 PRESIDING JUDGE: Learned counsel, we are resuming the
13 proceedings and this is the ruling of the Chamber on Mr
Jordash's
14 application on behalf of the first accused to have admitted in
15 evidence under Rule 92bis, the written statement of ex-
16 Ahmad Tejan Kabbah on behalf and in favour of the first
President
accused,
17 Issa Hassan Sesay. This is our ruling. In the course of the
18 proceedings this morning Mr Wayne Jordash, learned counsel for
19 the first accused Issa Hassan Sesay, in lieu of calling

16:10:52 20 ex-President Ahmad Tejan Kabbah to make a viva voce testimony
for
21 the first accused at whose behest he was subpoenaed, applied
to
22 tender under Rule 92bis a statement written and signed by
23 ex-President Kabbah. Having heard submissions of learned
counsel
24 Wayne Jordash on this application and having considered the
16:11:22 25 proposed statement of the witness alongside paragraph 23 of
the
26 indictment, the issue for determination by this Chamber is
27 whether the information contained in the said statement does
not
28 go to proof -- "proof of the acts and conduct of the first
29 accused Issa Hassan Sesay."

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1 In this regard the Chamber is of the opinion that the
2 contents of the said statement which is sought to be tendered
3 under Rule 92bis, do go to proof of the acts and conduct of
the
4 accused as charged in the indictment. Consequently, the
16:12:10 5 application to have the statement admitted in evidence under
Rule
6 92bis is devoid of merit. We accordingly dismiss it.

7 We order consequentially that ex-President Kabbah
appears

8 to testify before the Chamber tomorrow, Friday, 16 May 2008 at
9 9.30 a.m.. we are fixing this date, but we are flexible on
the

10 availability of this witness depending on what his calendar
16:12:47 is.

11 We are very conscious of the fact that you have a sick
witness.

12 Ms Mylvaganam, am I not --

13 MS MYLVAGANAM: My Lord.

14 PRESIDING JUDGE: Am I not -- I haven't anticipated you,
16:13:11 haven't I.

15

16 MS MYLVAGANAM: My Lord, you have.

17 PRESIDING JUDGE: Yes. Now, what we promise to do to
you

18 is to ensure that we take the evidence of your witness first
19 because we saw him. He is an old man. We will take -- but I
20 hope you will not be very long, would he.

16:13:36

21 MS MYLVAGANAM: My Lord, Mr Ogeto will lead the witness.

22 PRESIDING JUDGE: Mr Ogeto, may we have it first-hand
from

23 you.

24 MS MYLVAGANAM: He is likely, I anticipate, to be an
hour.

16:13:39

25 PRESIDING JUDGE: An hour.

26 MS MYLVAGANAM: At the very most.

27 PRESIDING JUDGE: I see him nodding his head. He is in
28 disapproval. Maybe more than one hour, Mr Ogeto.

29 MR OGETO: About two hours, two-and-a-half hours, My
Lords.

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1 PRESIDING JUDGE: Oh, for this witness.

2 MR OGETO: Yes, My Lords.

3 PRESIDING JUDGE: And you will not be bothered as to
4 whether he will be sick in the process or not.

16:14:00 5 MR OGETO: I will try and see how it goes, My Lords.

6 PRESIDING JUDGE: Well, two hours, two-and-a-half hours.

7 That's okay. I think we -- we can take -- but let us hear
8 Mr Jordash first, you know, on this. Mr Jordash.

9 MR JORDASH: Your Honour.

16:15:12 10 PRESIDING JUDGE: The Chamber is prepared to take on
your

11 witness -- Mr Sesay's witness tomorrow in the morning. What
will

12 be your reaction to this? Because -- well, they're competing

13 interests but I think we have to prioritise our interests on
this

14 and see whether -- because we know your witness is also a very

16:15:34 15 busy person. He has a busy calendar.

16 MR JORDASH: I don't know his availability but I would
17 always put a sick person above a busy person, if I can put it
18 that way. I know the Kallon team are keen to call their

witness

19 because of his illness and I would feel obliged to give that

due

16:15:59 20 prominence. It may be that former President Kabbah doesn't
want

21 to come tomorrow and would like the weekend to consider.

22 PRESIDING JUDGE: Then he can apply to the Chamber for
an

23 adjournment and ask for an adjournment to Monday or so.

24 MR JORDASH: The difficulty with that of course is that
the

16:16:26 25 Kallon.

26 PRESIDING JUDGE: By an ordinary correspondence anyway.

27 Not that we would come in open Court and ask for --

28 MR JORDASH: The only problem is, I can see, is that the
29 Kallon team would be left with the uncertainty of whether
their

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1 sick witness is or is not to give evidence tomorrow.

2 MS MYLVAGANAM: My Lord, I wonder whether I may -- I can
3 just assist the Court on another matter. I know that
[REDACTED]

4 kept this whole week free to be in Sierra Leone and indeed has
16:16:58 5 been here, if I'm not mistaken, for the whole week and was
hoping

6 to return to Nigeria over the weekend on Saturday or Sunday.

7 And.

8 PRESIDING JUDGE: May we hear from the spokesperson --
the

9 spokesperson --

16:17:34 10 MS MYLVAGANAM: I'm so sorry.

11 PRESIDING JUDGE: -- of the Kallon Defence team who for
the

12 time being is Ms Mylvaganam. We wouldn't want to interrupt
her,

13 Messrs Taku and Ogeto.

14 MS MYLVAGANAM: I didn't mean to breach any protective
16:17:55 15 measures and if I did so inadvertently, I hope appropriate
16 measures can be taken.

17 PRESIDING JUDGE: Well it's redacted. That mention is
18 redacted.

19 MS MYLVAGANAM: My Lord, I just got to my feet because
I'm

16:18:09 20 aware the witness is anxious to return to his home --

21 PRESIDING JUDGE: We have several competing interests.
22 There is the sick witness who you have; there is the one
23 hurrying, you know, to go back to his place of abode, and then
24 there is the Sesay witness.

16:18:34 25 MS MYLVAGANAM: It's the same witness I'm mentioning who
--

26 yes, well, the fact is there are these competing interests
with

27 the various witnesses.

28 PRESIDING JUDGE: Yes. So we have to live with it and
put

29 up with some inconveniences. I think there is nothing you can

1 appeal to depending on what we arrive at here as an agreement.
2 You can ask one of the other witness, you know, if he has had
to
3 wait for up to a week, I am sure he can wait for another extra
4 day. But it will all depend on how we sort it out.

16:19:24 5 MS MYLVAGANAM: Of course My Lord, being here over the
week
6 and waiting to testify and then having the weekend he may have
7 commitments one doesn't know. He may not be able to remain in
8 the jurisdiction. One just doesn't know what the position is.

9 PRESIDING JUDGE: Having come this far, you know, I'm
sure
16:19:41 10 he wouldn't like to go without fulfilling his obligations to
the
11 Court.

12 MS MYLVAGANAM: My Lord, I'm sure that's right but I am
13 very much aware of the fact that he --

14 PRESIDING JUDGE: And particularly too Mr Kallon, who
was
16:20:03 15 asked him to come and testify for him. I'm sure.

16 MS MYLVAGANAM: Yes. As I say, I'm aware My Lord, that
he
17 kept a week aside in order to fulfil this.

18 PRESIDING JUDGE: I know. I know. It's been quite
long.

19 JUDGE BOUTET: What's the timeline? In other words, can
we

16:20:17 20 tomorrow, as an example, hear these two witnesses, the one
that's
21 been postponed until tomorrow in the morning and this other
22 witness in the afternoon? Will this witness testify for a
long
23 time? I'm talking of the second witness that you intend to
call.

24 MS MYLVAGANAM: The witness -- I think in chief, as I
16:20:34 25 understand it, is likely to be two hours.

26 PRESIDING JUDGE: That's quite long for the day.

27 MS MYLVAGANAM: That's a long -- I have to say I would
have
28 thought perhaps not as long, but two hours is an absolute
29 maximum, I would have thought, of his testimony and then the

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1 Prosecution will have to --

2 PRESIDING JUDGE: Well, you never know.

3 MS MYLVAGANAM: I see Mr Harrison saying two hours so
it's
4 likely that he will be --

16:21:00 5 PRESIDING JUDGE: Mr Harrison, two hours in
6 cross-examination.

7 MR HARRISON: I just want to make sure there's no

one 8 misunderstanding on the part of Mr Justice Boutet. There is
9 witness for Kallon, not two.

16:21:14 10 PRESIDING JUDGE: Yes, it's one.

11 MR HARRISON: Only one witness.

12 PRESIDING JUDGE: Only one witness, yes.

13 JUDGE BOUTET: So the witness that was here this morning
14 we're talking of the same witness.

16:21:22 15 MR HARDAWAY: Exactly.

16 JUDGE BOUTET: Okay. That's fine. Thank you very much.
I

17 thought we were talking of two witnesses.

18 PRESIDING JUDGE: We have two witnesses really, the
19 examination-in-chief of the one who was here this morning will
16:21:29 20 take about two hours --

21 JUDGE BOUTET: It's the same witness.

22 PRESIDING JUDGE: -- and above. Yes I know. That's
what

23 Mr Ogeto was telling us. Then after that we have the other
24 protected witness who is suppose to be going back. Is he the
16:21:41 25 same.

26 JUDGE BOUTET: It's same person. Same. It's the same
27 person.

28 PRESIDING JUDGE: Is it the same person.

29 JUDGE BOUTET: Yes.

1 PRESIDING JUDGE: The man who was sitting here.

2 JUDGE BOUTET: Yes.

3 MR OGETO: My Lords, the position is that we have only
one

4 witness DMK --

16:21:55 5 JUDGE BOUTET: 444.

6 PRESIDING JUDGE: 444.

7 MR OGETO: 444 that is the man who was here in the
morning

8 and that is the man who is --

9 PRESIDING JUDGE: Who is sick.

16:22:03 10 MR OGETO: -- sickly, yes.

11 PRESIDING JUDGE: Oh well, I needed this clarification.
I

12 thought that since you spoke for one [indiscernible].

13 JUDGE THOMPSON: Too many cooks spoil the broth.

14 MR OGETO: They do at times.

16:22:19 15 PRESIDING JUDGE: So it's just that one.

16 MR OGETO: Just one witness.

17 PRESIDING JUDGE: I think the Chamber still stand by its
of

18 calendar, and I'm mindful too we would be taking the testimony

19 ex-President Kabbah at 9.30, but the other witness, DMK-444 --
is

16:26:38 20 it 0444?

21 MR OGETO: Yes, triple 4, My Lords.

22 PRESIDING JUDGE: DMK-444.

23 MR OGETO: Yes.

24 PRESIDING JUDGE: Should please stand by. If there is -

16:26:47 25 if need arises, you know, we would advise him subsequently on
26 what to do. Yes. So tomorrow, we are starting off with the
27 testimony of ex-President Ahmed Tejan Kabbah.

28 MR JORDASH: May I inquire as to -- I'm just referring
back
29 to Justice Boutet's remarks about accepting some of the
statement

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1 pursuant to 92bis or -- I'm just inquiring as to whether I
need
2 to lead the witness through the evidence which we have put
into
3 the statement or whether some of it will be allowed to be
adduced
4 through the 92bis?

16:27:40 5 PRESIDING JUDGE: No, all of it will be adduced, you
know,
6 viva voce. All of it, viva voce.

7 MR JORDASH: Certainly.

8 PRESIDING JUDGE: Learned counsel, I think in the
absence
9 of any other witness who we can take on for today, we will
call

16:27:58 10 this day a day here at 4.30, when we should be going on our
11 afternoon break, and we will resume the proceedings tomorrow
at
12 9.30. Mr Cammegh, did you -- you didn't want to address us,
did
13 you?

14 MR CAMMEGH: Nothing springs to mind, no.

16:28:15 15 PRESIDING JUDGE: All right. Okay. Because I saw you
16 posturing yourself, you know, to spring yourself on your feet.

17 MR CAMMEGH: No, thank you.

18 PRESIDING JUDGE: Right. The Chamber will rise and
resume
19 at 9.30 tomorrow.

16:28:25 20 [Whereupon the hearing adjourned at 4.30
p.m.,
21 to be reconvened on Friday, the 16th day of
May
22 2008 at 9.30 a.m.]
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