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SCSL-04-15-T
(24427 - 24433)

SPECIAL COURT FOR SIERRA LEONE
FREETOWN - SIERRA LEONE

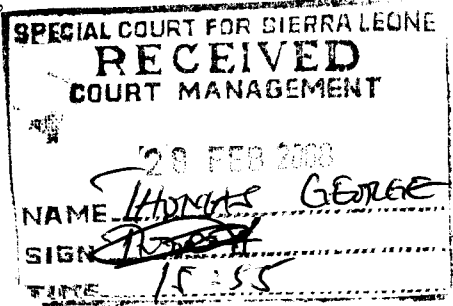
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TRIAL CHAMBER I

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

Registrar: Mr. Herman von Hebel

Date filed: 28th February 2008



THE PROSECUTOR
v.
Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

**SESAY DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE
MOTION FOR ADMISSION OF EVIDENCE PURSUANT TO RULE 92BIS**

Office of the Prosecutor
Mr. Peter Harrison
Mr. Reginald Fynn
Mr. Charles Hardaway
Mr. Vincent Wagana

Defence Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon
Mr. Charles Taku
Mr. Kennedy Ogetto
Mr. Lansana Dumbuya
Ms. Tanoo Mylvaganam

Defence Counsel for Augustine Gbao
Mr. John Cammegh
Mr. Scott Martin

1. On 22nd February 2008, the Defence for Issa Sesay (the 'Defence') filed its Application¹ for the admission of the statements of DIS-021, DIS-023, DIS-041, DIS-044, DIS-047, DIS-048, DIS-050, DIS-140, DIS-271 and DIS-283 under Rule 92*bis*.
2. On the 27th February 2008 the Prosecution filed its Response² in which it stated
 - (a) there was no objection to the statements of DIS-023 (save for a specified paragraph), DIS-044, and DIS-140 (save for the inclusion of an interpreter's declaration) being admitted pursuant to Rule 92*bis*; and
 - (b) that the remaining witness statements should have specified paragraphs deemed inadmissible before being admitted, with the Prosecution applying for cross-examination.
3. The Prosecution also submitted that an interpreter's declaration was necessary for the admission of DIS-021, DIS-047, DIS-048 and DIS-283.

Preliminary Issues

The need for signatures on statements

4. Rule 92*bis* reads as follows:

(A) In addition to the provisions of Rule 92*ter*, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to the proof of the acts and conduct of the accused.

(B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.

(C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted in 5 days.

5. There is no requirement for witness statements to be signed, or for interpreter's declarations to be attached to thumb-printed statements of illiterate witnesses. Indeed the Prosecution has not followed such a policy nor has the Trial Chamber requested that such a policy be put into place³.

¹ *Prosecutor v. Sesay et al*, Defence Motion for Admission of Written Evidence pursuant to Rule 92*bis*, SCSL-04-15-T-996.

² *Prosecutor v. Sesay et al*, Prosecution Response to Defence Motion for Admission of Written Evidence pursuant to Rule 92*bis*, SCSL-04-15-T-1006.

³ *Prosecutor v. Sesay et al*, Decision on the Joint Defence Motion Requesting Conformity of Procedural

6. The Defence considers that, as a matter of good practice, statements should be affirmed and signed/ thumb-printed by the statement-maker. As such we have no objection to our obtaining of interpreter's declarations for DIS-021, DIS-047, DIS-048, DIS-140 and DIS-283. We do, however, oppose the creation of a requirement of signed statements for the Defence where such a requirement has not existed previously.

Submissions

7. The Prosecution's objections to the specified paragraphs in the witness statements of DIS-021, DIS-023, DIS-041, DIS-047, DIS-048, DIS-050, DIS-271 and DIS-283 is based on the Indictment alleging joint criminal enterprise and command responsibility so that the facts set out in the above statements would go to the acts and conduct of the Accused, rendering specified paragraphs inadmissible. Furthermore, the Prosecution asserted that the facts were "proximate enough to the Accused so as to require cross-examination".
8. Rule 92*bis* does not permit the admission of evidence which goes to proof of acts and conduct of the Accused. Rule 92*bis* in essence mirrors that of the ICTR and ICTY. While the international jurisprudence appears to be posited on the assumption that it is the Prosecution making the application, it remains of use in this instance. It remains applicable in exactly the same way as at the behest of the Prosecution. Moreover it is applicable in exactly the same way as posited by the Prosecution in the RUF case on many different occasions in various applications (see below). The Prosecution ought not to be allowed to resile from these stated positions.

The Prosecution's previous interpretation of the applicable law

9. On 25th October 2005, the Prosecution stated in paragraph 17 of its Notice to Admit the Transcripts of Testimony of TF1-023, TF1-104 and TF1-069, that
- the evidence the Prosecution seeks to admit pursuant to Rule 92*bis* is evidence of the matters alleged in the Indictment as opposed to the evidence directly implicating any of the Accused persons in the perpetration of a crimes. Therefore, the evidence does not go to prove the acts of conduct of

Practice for Taking Witness Statements, 26th October 2005, SCSL-04-15-T-437.

the Accused. Examples of such 'background evidence' include evidence demonstrating the occurrence of crimes in a certain location, or in a widespread or systematic manner.⁴

10. TF1-023, TF1-104 and TF1-169 gave evidence of killings, physical violence (including amputations), sexual violence, child soldiers and the destruction of property in Freetown in January 1999.
11. Paragraph 17 of the Notice relating to TF1-023, TF1-104 and TF1-169 is identical to paragraph 12 of the 23rd March 2006 Notice relating to TF1-156 and TF1-179⁵ (evidence relating to killings, physical violence including amputations and destruction of property linked to rebels and junta forces in Northern districts in 1998), paragraph 16 of the 3rd May 2006 Notice relating to TF1-256⁶ (killing, acts of sexual and physical violence committed by SLAs with links to Superman in Port Loko) and paragraph 17 of the 3rd May 2006 Notice relating to TF1-369⁷ (expert evidence relating to sexual violence).
12. In summary, the Prosecution previously stated that this evidence, whilst relevant and probative of crimes pursuant to the joint criminal enterprise and command responsibility doctrine, was *not* evidence of acts and conduct of the accused.
13. The paragraphs, specified by the Prosecution, of DIS-041, DIS-047, DIS-048, DIS-050 and DIS-283 contain no mention of the Accused Sesay. They relate to what the witnesses saw and heard while living in the RUF controlled areas of Bombali, Tonkolili and Kono post December 1998. It is evidence which is relevant to the Indictment but is not evidence of specific acts and conduct of the accused.
14. The 2nd paragraph of p. 24254 of DIS-021 states that the witness would see Issa Sesay walking about town, greeting civilians. The Prosecution, in its cross-examination of

⁴ *Prosecutor v. Sesay et al* Prosecution Notice to Admit the Transcripts of Testimony of TF1-156 and TF1-179, SCSL-04-15-T-433 (Notice relating to TF1-023, TF-104 and TF1-169)

⁵ *Prosecutor v. Sesay et al* Prosecution Notice to Admit the Transcripts of Testimony of TF1-156 and TF1-179, SCSL-04-15-T-521 (Notice relating to TF1-156 and TF1-179)

⁶ *Prosecutor v. Sesay et al* Prosecution Notice to Admit the Transcripts of Testimony of TF1-256, SCSL-04-15-T-543 (Notice relating to TF1-256)

⁷ *Prosecutor v. Sesay et al* Prosecution Notice to Admit the Transcripts of Testimony of TF1-256, SCSL-04-15-T-544 (Notice relating to TF1-256)

various witnesses (including the Accused) has not challenged Issa Sesay's presence in that town during that period of time. The 3rd paragraph makes no reference to Mr. Sesay.

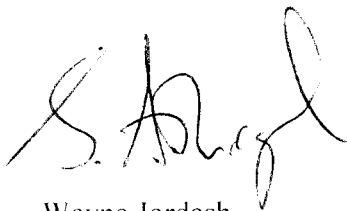
15. The last paragraph on p. 24311 in the statement of DIS-271 states that the witness did not see named crimes occurring when Issa Sesay was the commander in Kono. The Prosecution, in its cross-examination of various witnesses (including the Accused) has not challenged Issa Sesay's command in Kono during that period of time. The 3rd paragraph makes no reference to Mr. Sesay.
16. The 2nd and 3rd paragraphs on p. 24280 in the statement of DIS-047 state that Morris Kallon was the commander in Makali and that he asked the people of Makali to return from the bush to the town. The Prosecution have not cross-examined to the effect that the Accused Kallon is not in command of Makali in that period of time.
17. The witness statements filed in the Application are descriptions of civilian life under the RUF, based on what the witness saw or heard and are contextual in nature. They do not concern the acts and conduct of the accused, as defined by international jurisprudence or by the Prosecution in applications made during its case. To widen the definition of 'acts and conduct of the Accused' to including evidence relating to joint criminal enterprise and command responsibility for subordinates, immediate or otherwise, render the efficacy of Rule 92*bis* illusory. Mr. Sesay post- December 1998 is said to be a joint criminal enterprise with all members of the AFRC and RUF and to have effective command and control of all members of the RUF. Should Rule 92*bis* be widened to include evidence of joint criminal enterprise and command responsibility, the effect would be that no relevant evidence could be admitted under this Rule.
18. The Defence submit that the specified paragraphs do not provide evidence of acts and conduct of the Accused and ought to be admitted under Rule 92*bis*. Furthermore, the Defence submit that the evidence contained in the statements is not so proximate to the Accused so as to require cross-examination

24432

Relevance and susceptibility of confirmation

19. As has been noted on many occasions by the Trial Chamber, evidence which is probative is relevant under Rule 89(c). We submit that the evidence contained with the witness statements is relevant and ought to be admitted.
20. It is susceptible of confirmation through defence witnesses that have been called and will be called, all of whom come from the towns and villages mentioned by DIS-021, DIS-023, DIS-041, DIS-044, DIS-047, DIS-048, DIS-050, DIS-140, DIS-271 and DIS-283. Evidence given by the viva voce witnesses is the same or similar in content to the evidence given by the above witnesses in their statements. Evidence contained in the witness statements relates to life in town or villages about which viva voce witnesses have testified, or will testify.
21. The Defence notes that the Prosecution request appears contradictory in that it requests the exclusion of specified paragraphs from the witness statement but even with those paragraphs excised, requires the cross-examination of the witnesses.
22. In the event that the Trial Chamber wishes to have the witnesses cross-examined, we would be grateful for an indication at the earliest opportunity so we can make arrangements for the witnesses to return to Freetown.

Dated 28th February 2008



Wayne Jordash
Sareta Ashraph

BOOK OF AUTHORITIES

Prosecutor v. Sesay et al., Defence Motion for Admission of Written Evidence pursuant to Rule 92bis, 22nd February 2008, SCSL-04-15-T-996

Prosecutor v. Sesay et al., Prosecution Response to Defence Motion for Admission of Written Evidence pursuant to Rule 92bis, 27th February 2008, SCSL-04-15-T-1006

Prosecutor v. Sesay et al., Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, 26th October 2005, SCSL-04-15-T-437

Prosecutor v. Sesay et al., Prosecution Notice to Admit the Transcripts of Testimony of TF1-156 and TF1-179, 25th October 2005, SCSL-04-15-T-433

Prosecutor v. Sesay et al., Prosecution Notice to Admit the Transcripts of Testimony of TF1-156 and TF1-179, 23rd March 2006, SCSL-04-15-T-521

Prosecutor v. Sesay et al., Prosecution Notice to Admit the Transcripts of Testimony of TF1-256, 3rd May 2006, SCSL-04-15-T-543

Prosecutor v. Sesay et al., Prosecution Notice to Admit the Transcripts of Testimony of TF1-256, 3rd May 2006, SCSL-04-15-T-544