

996.)

SCSL - 04 - 15 - T

(24244 - 24325)

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SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER I

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

Registrar: Mr. Herman Von Hebel

Date filed: 21<sup>st</sup> February 2008

THE PROSECUTOR

against

ISSA HASSAN SESAY  
MORRIS KALLON  
AUGUSTINE GBAO

Case No. SCSL-04-15-T

Public with Confidential Annex

Defence Motion for Admission of Written Evidence pursuant to Rule 92bis

Office of the Prosecutor

Peter Harrison  
Reginald Fynn

Defence Counsel for Issa Sesay

Wayne Jordash  
Sareta Ashraph

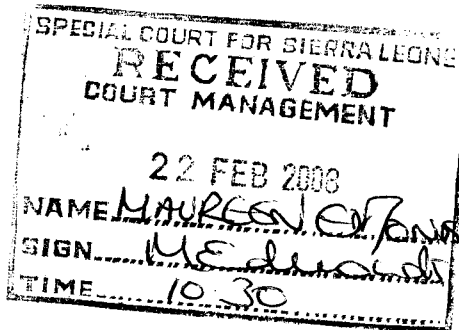
Defence Counsel for Morris Kallon

Charles Taku  
Orgetto Kennedy  
Lansana Dumbaya

Court-Appointed

Counsel for Augustine Gbao

John Cammegh  
Scott Martin



## INTRODUCTION

1. The Sesay Defence gives notice pursuant to Rules 92*bis* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules") of its intention to have admitted into evidence the confidential Statement (the "Statement") in Confidential Annex A without direct- or cross-examination of the witness.

## LEGAL STANDARD

2. Rule 92*bis* (A) provides that:
  - (A) In addition to the provisions of Rule 92*ter*, a Chamber may, in lieu of the oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
  - (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
  - (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.
3. Admitting evidence pursuant to Rule 92*bis* involves a four-step process. First, although not explicit in the text of Rule 92*bis*, evidence admitted must be relevant and have probative value, and its probative value must not be substantially outweighed by the need to ensure a fair trial (as under Rule 89(C) and (D)).
4. Second, a Trial Chamber must determine whether the statement or transcript goes to proof of a matter other than the acts and conduct of the accused. By its plain meaning, the phrase "acts and conduct of the accused" is specific to the "deeds and behaviour of the accused." "It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so."<sup>1</sup>
5. There is a "clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which

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<sup>1</sup> *Prosecutor v. Stanislav Galic*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)", 7 June 2002.

Rule 92bis(A) excludes from the procedure laid down in that Rule."<sup>2</sup>

- 6. Third, a Trial Chamber must satisfy itself that the admission of the statement or transcript is fair in the circumstances of the case. Rule 92bis favours admitting evidence in the form of statements or transcripts when that evidence is cumulative, relates to background, relates to statistical or general analysis, or relates to impact of crimes upon victims.
- 7. Fourth, a Trial Chamber must decide whether the witness should be called *viva voce* or for cross-examination. Relevant to this assessment are the following factors, *inter alia*: the right to a fair trial under Articles 20 and 21 of the Statute;<sup>3</sup> whether the evidence in question relates to a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue";<sup>4</sup> and the proximity of the accused to the acts and conduct described in the evidence.<sup>5</sup>

**ARGUMENTS**

- 8. The proffered evidence relates and is relevant to contextual information. The Sesay Defence submits that part of the evidence proffered contains facts regarding the everyday life conditions of the inhabitants of the respective areas, a factor that favours admission of the evidence under Rule 92bis.
- 9. The admission of this written evidence pursuant to Rule 92bis will reduce the length of trial and permit the Defence for Mr. Sesay to adhere to the Trial Chamber's imposed schedule to complete the trial by 13<sup>th</sup> March 2008. There is thus a strong public interest in favour of admitting this written evidence to reduce the length of trial.
- 10. A large part of the evidence contained in the Statement has been adduced by the Defence through Defence witnesses DIS-188, DIS-015 and DIS-046. It was in large part unchallenged

<sup>2</sup> *Id.*, at para. 11

<sup>3</sup> See *Prosecutor v. Sikirica et al.*, Case No. IT-95-08-T, "Decision on the Prosecution's Application's to Admit Transcripts under Rule 92bis", 23 May 2001, para. 4; *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, "Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis", 12 September 2006, para. 16.

<sup>4</sup> See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis", 21 March 2002, paras. 24-25; *Popovic*, para. 16

<sup>5</sup> See *Galic*, para. 13; *Milosevic*, para. 22; *Popovic*, para. 16.

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by the Prosecution during cross-examination.<sup>6</sup> It is burdensome to the Court to require all of the witnesses (see Annexes A-J) to attend and each to testify to facts covered by these live witnesses. In these circumstances the cumulative nature of the evidence proffered renders it appropriate for admission into evidence under Rule 9*bis*.

Dated 21<sup>st</sup> February 2008



Wayne Jordash  
Sareta Ashraph

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<sup>6</sup> See cross-examination of DIS-188, transcript, 2 November 2007, pages 83-109; cross-examination of DIS-015, transcript, 15 February 2008, pages 38-56; and cross-examination of DIS-046, transcript, 18 February 2008, pages 20-31.

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## LIST OF AUTHORITIES

### Decisions

*Prosecutor v. Milosevic*, Case No. IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis", 21 March 2002.

*Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, "Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis", 12 September 2006.

*Prosecutor v. Sikirica et al.*, Case No. IT-95-08-T, "Decision on the Prosecution's Application's to Admit Transcripts under Rule 92b:s", 23 May 2001.

*Prosecutor v. Stanislav Galic*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", 7 June 2002.

### Transcripts

*Prosecutor v. Sesay et al.*, 2 November 2007.

*Prosecutor v. Sesay et al.*, 15 February 2008.

*Prosecutor v. Sesay et al.*, 18 February 2008.

## ANNEXES

- A. Statement of DIS-021.
- B. Statement of DIS-023.
- C. Statement of DIS-041.
- D. Statement of DIS-044.
- E. Statement of DIS-047.
- F. Statement of DIS-048.
- G. Statement of DIS-050.
- H. Statement of DIS-140.
- I. Statement of DIS-271.
- J. Statement of DIS-283.



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Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao

Case Number: SCSL-2004-15-T

Document Index Number: 996

Document Date 21<sup>st</sup> February, 2008

Filing Date: 22nd February, 2008

Number of Pages: **24249-24325**

Document Type: - *Confidential Annexes*

- Affidavit
- Indictment
- Correspondence
- Order
- Motion
- Other

Document Title: **Confidential Annexes to document SCSL-04-15-T-996**

Name of Officer:

Maureen Edmonds.

Signed *Maureen Edmonds*