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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Registrar: Mr. Lovemore G. Munlo SC

Date: 23rd of May 2006

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

**DECISION ON THE PROSECUTION NOTICE UNDER RULE 92 *bis*
TO ADMIT THE TRANSCRIPTS OF TESTIMONY OF TF1-334**

Office of the Prosecutor:

Desmond de Silva QC
James Johnson
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

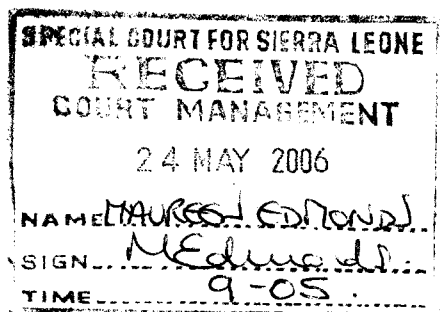
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Charles Taku
Melron Nicol-Wilson

Court Appointed Counsel for Augustine Gbao:

Andreas O'Shea
John Cammegh



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

SEIZED OF the *Confidential Prosecution Notice Under Rule 92bis to Admit the Transcript of Testimony of TF1-334* filed by the Office of the Prosecutor ("Prosecution") on the 2nd of March 2006 ("Notice");¹

CONSIDERING that the Prosecution is seeking to have admitted in evidence the transcripts of the testimony of Prosecution Witness TF1-334 which was given over a period of 16 days and the 16 exhibits that were admitted in the course of his testimony before Trial Chamber II during the trial proceedings in *Prosecutor v. Brima, Kamara and Kanu* ("AFRC trial") in lieu of his examination-in-chief in the proceedings in *Prosecutor v. Sesay, Kallon and Gbao* before Trial Chamber I;

NOTING the *Confidential Gbao Response to Confidential Prosecution Notice Under Rule 92bis to Admit the Transcript of Testimony of TF1-334* filed by Counsel for the Accused Augustine Gbao on the 7th of March 2006;

CONSIDERING that Counsel for Gbao does not object to the admission of the transcripts of the testimony of Witness TF1-334 in this specific instance but that the Defence seeks leave to reserve its position regarding the exhibits until the witness testifies in the RUF trial as the Defence has not yet sufficiently reviewed his testimony to assess the exhibits;

NOTING the *Confidential Defence Reply Prosecution Notice Under Rule 92bis to Admit the Transcript of Testimony of TF1-334* filed by Counsel for the Accused Issa Hassan Sesay on the 7th of March 2006;

CONSIDERING that Counsel for Sesay objects to the admission of the transcripts and related exhibits of TF1-334 on two grounds:

- that Rule 92bis was intended to admit information from non-partisan sources and not the transcripts of a witness which go to the acts and conduct of the Accused; and
- that judicial discretion should be exercised against their admission given that the Defence will be prejudiced since it will not have the opportunity to cross-examine the witness on inconsistencies between the testimonies in the two trials and given that the

Accused's right to a public hearing requires that the witness relate the allegations against Mr. Sesay within his sight and hearing;

MINDFUL of the provisions of that Rule 92bis of the Rules of Procedure and Evidence ("Rules") which read as follows:

- (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
- (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.

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

CONSIDERING that the Appeals Chamber further held that "proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course";³

MINDFUL of this Chamber's *Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)* in the case of *Prosecutor v. Norman, Fofana and Kondewa*, in which it held that at the stage of admission, the Chamber must determine whether documents admitted under Rule 92bis are relevant, whether they possess sufficient indicia of reliability and whether their admission would not prejudice unfairly the Defence, like in situations where documents pertaining to the acts and conduct of the Accused are admitted into evidence without giving the Defence the opportunity of cross-examination;⁴

¹ The Trial Chamber notes that while this Notice was filed confidentially due to the fact that TF1-344 testified partially in closed session and that some of the exhibits were sealed, the Chamber is satisfied that it is in the interests of justice that this Decision be filed publicly.

² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, "Fofana - Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", 16 May 2005, para. 26.

³ *Id.*

⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, "Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", 15 July 2005, p. 4.

MINDFUL of this Chamber's *Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of TF1-023, TF1-104 and TF1-169* in this case filed on the 9th of November 2005, the *Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of TF1-081* filed on the 21st of February 2006 and the *Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of TF1-156 and TF1-179* filed on the 3rd of April 2006;

CONSIDERING that the Prosecution has indicated that it has no objection to the cross-examination of Witness TF1-334 by Defence Counsel for the three Accused and that it wishes to reserve its right to re-examine the witness if he is cross-examined;

NOTING that Counsel for the Second and Third Accused have not objected to the admission of the transcripts of the testimony pursuant to Rule 92bis even though Counsel for the Third Accused seeks to reserve their position regarding the exhibits until the witness testifies in the RUF trial;

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

NOTING that the broad nature of Rule 92bis, in contrast to its counterpart in the Rules of the ICTY and the ICTR, does not limit the type of evidence admissible under this Rule to mere background evidence;

MINDFUL nevertheless that in all of the above Decisions in which the Trial Chamber admitted the transcripts of witness testimonies and exhibits pursuant to Rule 92bis, the Chamber found that the testimonies were relevant as background evidence of matters alleged in the Amended Consolidated Indictment and that while the evidence revealed that crimes were committed generally, it did not directly prove the acts and conduct of any of the Accused;

HAVING conducted a careful examination of the transcripts of the testimony of TF1-334 and the exhibits admitted during his testimony in Trial Chamber II;

NOTING that the Prosecution Witness TF1-334 was an insider in the AFRC who testified over 16 days in the AFRC trial and that while the majority of his evidence related to the AFRC and the Accused in that trial, he also testified about the relationship between the AFRC and the RUF and provided direct evidence of acts and communications of the Accused Sesay and the Accused Kallon and their positions within the RUF;

NOTING FURTHER that the Prosecution's allegation is that there was a joint criminal enterprise between the AFRC and the RUF;

SATISFIED that the evidence that the Prosecution is seeking to admit in lieu of the oral testimony of TF1-334 in this trial is relevant to the purpose for which its admission is sought and that its reliability is susceptible of confirmation;

REITERATING that the Chamber must also consider, however, whether the admission of this evidence under Rule 92bis would be unfair and prejudicial to the rights of the Accused;

OBSERVING that the Defence is not prejudiced merely because they will not have the opportunity to cross-examine Witness TF1-334 on any inconsistencies which may arise if he were required to testify orally in this trial;

MINDFUL of the fact that while the majority of the testimony and exhibits of TF1-334 that the Prosecution is seeking to tender in lieu of the oral testimony of TF1-334 is relevant as background evidence of matters alleged in the Amended Consolidated Indictment, a portion of his evidence does directly relate to the acts and conduct of the Accused;

NOTING that the Defence has had disclosure of Prosecution interviews with Witness TF1-334 recorded over five days in November 2003, two days in May 2004, two days in February 2005, three days in March 2005, five days in April 2005 and four days in May 2005 and of the 11 days of examination-in-chief testimony and five days of cross-examination in the AFRC trial in order to prepare for cross-examination and assess any inconsistencies in the Witness' evidence;

MINDFUL of the fact that the Defence will be given the opportunity to fully cross-examine Prosecution Witness TF1-334;

ACKNOWLEDGING that the Accused have the right to a public hearing under Article 17(2) of the Statute, but noting that this right must be understood in the light of the other rights of the Accused contained in this Article, including that of their being tried without undue delay;

SATISFIED in the existing circumstances that the admission of the transcripts of the testimony and the exhibits of Prosecution Witness TF1-334 is in the interests of justice and will not unfairly prejudice the Defence;



NOTING that the exhibits that were tendered during the testimony of Witness TF1-334 consist of official documents of Sierra Leone, most of which have already been taken judicially noticed by the Chamber as to their existence and authenticity⁵, papers on which the Witness wrote the names of persons in order to protect their identity during open session testimony, and a Prosecution disbursement record for TF1-334;

MINDFUL of the fact that the Defence for the Accused Gbao has not sufficiently justified why it is necessary to wait until the appearance of Witness TF1-334 in order to take a position as to admission of the exhibits and noting that Defence will be permitted to cross-examine Witness TF1-334 regarding the exhibits;

PURSUANT to Rules 54 and 92bis of the Rules of Procedure and Evidence;

HEREBY GRANTS the Prosecution's Application for the admission of the transcripts and exhibits from the AFRC trial for Prosecution Witness TF1-334; and

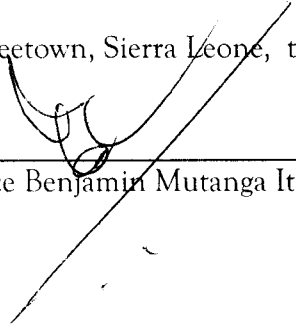
ORDERS that the Prosecution file in this trial, the transcripts of the AFRC trial proceedings and the exhibits that were tendered and admitted in the course of the testimony of TF1-334, as outlined in Appendix B of the Prosecution's Notice.

AND ORDERS that the transcripts of closed session testimony, namely pages 4 to 25 inclusive of the 16th of May 2005, pages 63 to 73 inclusive of the 15th of June 2005, pages 4 to 26 inclusive of the 17th of June 2005 and pages 27-76, inclusive of the 20th of June 2005 and the portions of the transcripts that were placed under seal on the 16th of June 2005 and the 21st of June 2005 shall be sealed and that the Exhibits P12, P13, P15, P16, P20, P21 and D6 which were admitted under seal shall be sealed;

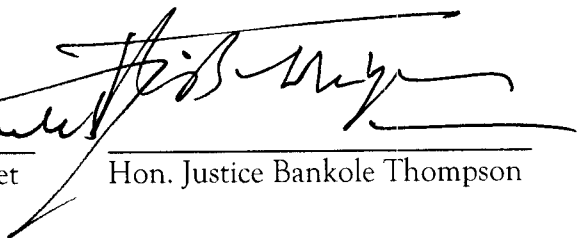
⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 24 May 2005. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 24 June 2004.

AND FURTHER ORDERS that the Defence Counsel may cross-examine Witness TF1-334 and that the Prosecution may re-examine the Witness relating to matters raised in the course of cross-examination, if any, by Defence Counsel.

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


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I


Hon. Justice Bankole Thompson

