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SCSL-04-14-T
(19323-19327)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 02 October 2006

THE PROSECUTOR**Against**

Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PROSECUTION RESPONSE TO FOFANA REQUEST TO ADMIT EVIDENCE PURSUANT TO RULE 92BIS

Office of the Prosecutor:

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Court Appointed Defence Counsel for Kondewa

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Mr. Ansu Lansana

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
02 OCT 2006	
NAME	<i>Adura Nsiima -K</i>
SIGN	<i>Nsiima</i>
TIME	<i>10.40 a.m</i>

I. INTRODUCTION:

1. The Prosecution files this Response to the Second Accused's ("**Defence**") request of 27 September 2006 ("**Motion**") to admit the original signed statement of Ambassador Foday Seisay, ("**Seisay Statement**") and a copy of an email communication from Mr. Alfred SamForay, ("**SamForay Email**") into evidence pursuant to Rule 92*bis* of the Rules of Procedure and Evidence ("**Rules**").¹
2. The Prosecution, via email communication, notified counsel for the Defence of its intention to oppose the admissibility of both statements.
3. Subsequently, the Prosecution further reviewed the statements and now indicate that it has no objection to the admission of the SamForay Email attached to the Motion as Appendix B.
4. The Prosecution, however, does oppose the admission of Appendix A, the Seisay Statement, on the following grounds: (i) it is inadmissible as it contains not merely factual observations, but the author's opinions; (ii) it contains assertions that are highly disputable and go to prove the acts and conduct of the accused; (iii) it lacks sufficient indicia of admissibility; and (iv) the Defence has offered no explanation for Ambassador Seisay's inability to appear before this Trial Chamber.

II. SUBMISSIONS

5. Information in lieu of oral testimony may be received in evidence, pursuant to Rule 92*bis*(B), if: "it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation."² The burden rests entirely on the party seeking to admit the evidence. The Prosecution submits that the Defence has failed to meet this burden .
6. In the Appeal Chamber's view the Special Court's Rule 92*bis* was deliberately construed "to permit the reception of 'information' – assertions of fact (but not opinion) made in documents or electronic communications – if such facts are

¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-701, "Fofana Request to Admit Evidence Pursuant to Rule 92*bis*", 27 September 2006 ("Motion").

² Rule 92*bis* of the Rules of Procedure and Evidence.

relevant and their reliability is ‘susceptible of confirmation’”.³ Rule 92*bis* permits facts that are not in dispute to be presented to the court in a written or visual form and entered into evidence without the need for *viva voce* evidence.

7. The Prosecution submits that the evidence the Defence seeks to admit pursuant to Rule 92*bis*, the Seisay Statement, contains the author’s opinion on matters alleged in the Indictment.
8. In paragraphs six, eight and nine of the Seisay Statement, Ambassador Seisay does not only provide factual information, but offers opinion evidence on various issues. For example, Ambassador Seisay states in paragraph six that according to his own assessment “a lot of the positions within the CDF were just big names.”⁴ Additionally, at paragraph eight, Ambassador Seisay describes the Second Accused “as the very docile and very cooperative individual I believe him to be.”⁵ Ambassador Seisay goes on to offer his opinion on the Second Accused’s capabilities, stating that: “Based on my own personal and professional observations, Mr. Fofana was not capable of directing a war.”⁶
9. Whether or not the Second Accused was capable of directing a war is a contentious issue in this trial. Issues relevant to the charges in the Indictment that are contentious or in dispute are matters of proof before the Court and must be tested under cross-examination. Rule 92*bis* cannot be used as an instrument to deprive the Court of an opportunity to hear both sides on issues relevant to the Indictment. Denial of this opportunity would circumvent the Court’s ultimate function – to ascertain the truth.
10. It is the view of the Prosecution that Ambassador Seisay’s opinions, opinions which the Prosecution is unable to challenge, do nothing to assist the Trial Chamber in its quest to ascertain the guilt or innocence of the Second Accused and therefore are not admissible pursuant to Rule 92*bis*.
11. The Prosecution submits that the Seisay Statement is inadmissible as it contains

³ *Prosecutor v. Norman et al*, SCSL-04-14-T, Appeals Chamber, “Fofana-Decision on Appeal Against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”, 16 May 2004, (majority decision) para. 26 (“Fofana Appeal Decision”). See also Separate Opinion of Justice Robertson, para. 13, 14.

⁴ Motion, Appendix A: The Seisay Statement, para. 6.

⁵ *Ibid.*, para. 8.

⁶ *Ibid.*, para. 9.

statements on issues that are in dispute as opposed to providing background evidence or assertions of facts that are not in dispute. Ambassador Seisay makes concluding statements on issues which, ultimately, only this Trial Chamber can decide.

12. Additionally, the Prosecution opposes the admission of the Seisay Statement on the grounds that it lacks sufficient indicia of reliability.
13. In the Fofana Appeal Decision, the requirement under Rule 92*bis* that the reliability of the evidence be susceptible to confirmation was interpreted to mean that “the information should be capable of confirmation in due course.”⁷ This should be interpreted as allowing only evidence that contains some indicia of reliability, automatically excluding opinion evidence offered by a non-expert.
14. Finally, this Trial Chamber has continually stressed the importance of the principle of orality. Learned counsel for the Defence recently agreed with the Court’s view on this noting that: “the principle of orality is the guiding principle of this court.”⁸ Given this agreement, it is noteworthy that the Defence has not offered a detailed explanation for Ambassador Seisay’s inability to give *viva voce* evidence before the Trial Chamber, except to simply say that he is not able to attend the trial proceedings.⁹

III. CONCLUSION:

15. Considering the strong opinions expressed in various paragraphs of the Seisay Statement, plus the lack of any indicia of reliability, the Prosecution objects to the admission of the Seisay Statement.
16. Should the Trial Chamber decide to admit the Seisay Statement, the Prosecution would request that paragraphs six, eight and nine be removed, crossed out or accorded no weight at all by the Trial Chamber. In the alternative, if the Seisay Statement is admitted in whole, the Prosecution requests leave of the Trial Chamber to allow it to cross-examine Ambassador Seisay on the contents of his statement.

⁷ Fofana Appeal Decision, para. 26.

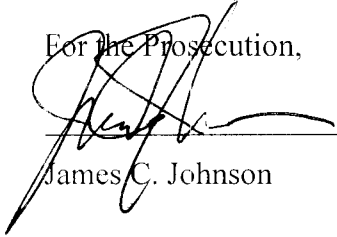
⁸ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-2004-14-T, Trial Transcript, 27 September 2006, p. 85.

⁹ Motion, para. 2.

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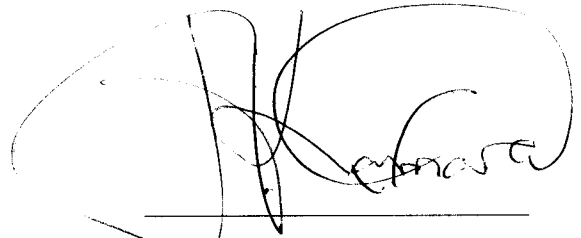
02 October 2006

For the Prosecution,



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