

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

SEIZED OF the “Fofana Request to Admit Evidence Pursuant to Rule 92bis”, filed by Court Appointed Counsel for the Second Accused (“Counsel for Fofana”) on the 27th of September 2006 (“the Motion”);¹

CONSIDERING that Counsel for Fofana seek to have admitted in evidence pursuant to Rule 92bis of the Rules of Procedure and Evidence (“Rules”) two documents, namely, (i) a statement of Ambassador Foday Seisay; and (ii) a copy of an email communication by Mr. Alfred SamForay, in lieu of their oral testimony;²

MINDFUL OF the “Order for Expedited Filing”, filed by The Chamber on the 28th of September 2006, which ordered that any objections to the Motion should be filed no later than Monday, the 2nd of October 2006, at 1.00 p.m.;³

NOTING the “Prosecution Response to Fofana Request to Admit Evidence Pursuant to Rule 92bis” (“Response”), filed by the Office of the Prosecutor (“Prosecution”) on the 2nd of October 2006;⁴

NOTING that neither Counsel for Norman nor Counsel for Kondewa have filed any objections to the Motion within the prescribed time limit;

PURSUANT TO Rules 54, 89(C) and 92bis of the Rules;

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. Counsel for Fofana seek the admission in evidence of two written statements. The statements have been given by two individuals who are unable to attend the trial in person and who are therefore unavailable for cross-examination.⁵

2. The first document that Counsel for Fofana seek to submit for admission in evidence is a statement by Foday Mohammed Duramani Seisay, the Sierra Leonean Ambassador to Germany, Austria, Italy, and Switzerland (“the Seisay Statement”). The statement was signed on the 29th of August 2006 and is witnessed by one Maru Josephine Ballada. At the time of the coup, Mr. Seisay was the Deputy Minister of Sanitation and Health in the SLPP government. In July 1997 he fled to Conakry, where he states he was not involved in the activities of the CDF. After his return to Sierra Leone, Mr. Seisay was appointed Minister of State for the Southern Region and moved to Bo to take up those duties.⁶

¹ SCSL04-14-701.

² Motion, paras 1, 6-8.

³ SCSL04-14-702.

⁴ SCSL04-14-704.

⁵ Motion, para. 2.

⁶ Motion, Appendix A, pp. 1-2.

3. The second document that Counsel for Fofana seek to submit for admission in evidence is a printed copy of an email, dated the 2nd of May 2006, sent by Rev. Alfred SamForay to Counsel for Fofana (“the SamForay Document”). Rev. SamForay is the Spokesman and Coordinator of the Hinga Norman-CDF Defence Fund, and is now resident in Indiana, USA. The SamForay Document consists of a series of questions and answers relating to the preparation of the CDF Calendar, which was admitted in evidence in this trial as Exhibit 112.⁷

II. SUBMISSIONS

4. Counsel for Fofana submit that The Chamber has “adopted and consistently applied a simple, three-pronged test for the admission of information in lieu of oral testimony, namely: (i) Is the tendered information relevant? (ii) Does it possess sufficient indicia of reliability (that is, is it susceptible of corroboration in due course)? and [sic] (iii) Would no party be unfairly prejudiced by its admission?”⁸ Counsel for Fofana further submit that where the answer to all three of these questions is positive, the document should be admitted into evidence despite any objections relating to probative value or weight.⁹ Counsel for Fofana state that such objections are properly deferred until The Chamber can consider the information “in light of the totality of the evidence before it.”¹⁰

5. With respect to the Seisay Statement, Counsel for Fofana submit that Ambassador Seisay’s factual observations, relating to the period when Mr. Seisay acted as Minister of State in Bo, are relevant to a material question before The Chamber, namely, “Mr. Fofana’s alleged activities in Bo following the reinstatement of the Kabbah government in 1998.”¹¹ Portions of the testimony of Prosecution Witnesses TF2-008 and TF2-014 are cited to support Counsel for Fofana’s claim that the information in the Seisay Statement is susceptible of corroboration.¹² It is suggested that The Chamber will be in a position to evaluate the Seisay Statement in light of the totality of the evidence before it at the close of the CDF proceedings.¹³

6. With respect to the SamForay Document, Counsel for Fofana submit that the Prosecution have made an issue of “Mr. Fofana’s alleged leadership role within the CDF” and that “the factual assertions contained in the SamForay Document with respect to the creation, purpose, and accuracy of the [CDF] calendar are [therefore] relevant to a material issue before this Chamber.”¹⁴ Counsel for Fofana submit that the information contained in the SamForay Document may be corroborated by the evidence of the Accused Norman and by that of Mr. Lumeh.¹⁵

⁷ Motion, Appendix B, p. 2.

⁸ Motion, para. 6.

⁹ *Ibid.*

¹⁰ *Ibid.* citing *Prosecutor v. Norman et al.*, SCSL-2004-14-T-447, “Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(C)”, 14 July 2005, p. 4 (“Decision of the 14th of July 2005”).

¹¹ Motion, para. 8.

¹² *Ibid.*, para. 9.

¹³ *Ibid.*, para. 9.

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*, para. 12.

7. On the question of prejudice, Counsel for Fofana submit that no party will be adversely affected by the “mere admission” of either document, as all Parties may make submissions relating to the probative value and weight of the statements in their final trial briefs.¹⁶

8. Finally, Counsel for Fofana submit that an interpretation of Rule 92*bis* requiring the Party seeking admission of statements to produce the individual in court for cross-examination would “defeat the purpose of Rule 92*bis*”.¹⁷

9. The Prosecution object to the admission of 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 [The] Chamber.¹⁸

10. The Prosecution submit that the burden of proving the reliability and relevance of information submitted pursuant to Rule 92*bis* rests entirely on the Party seeking to admit the evidence, and that Counsel for Fofana have failed to meet this burden.¹⁹

11. The Prosecution emphasise that “the principle of orality is the guiding principle of [The] Court” and question the absence of any explanation as to why Ambassador Seisay cannot provide *viva voce* evidence.²⁰

12. The Prosecution object to the admission of the entire Seisay Statement, however they request, should The Chamber admit the statement, that “paragraphs six, eight and nine be removed, crossed out or accorded no weight at all by the Trial Chamber.”²¹ Alternately, if the Seisay Statement is admitted in its entirety, the Prosecution request leave to cross-examine Ambassador Seisay on the contents of the statement.

13. The Prosecution do not oppose the admission of the SamForay Document.²²

III. APPLICABLE LAW

Although Counsel for Fofana submit the Motion pursuant to Rule 92*bis*, Rule 89 is also applicable. The relevant provisions of Rules 89 and 92*bis* read as follows:

Rule 89: General Provisions

¹⁶ *Ibid.*, paras. 10, 13 - 14.

¹⁷ *Ibid.*, para. 7.

¹⁸ Response, para. 4.

¹⁹ *Ibid.*, para. 5.

²⁰ *Ibid.*, para. 14.

²¹ *Ibid.*, para. 15.

²² *Ibid.*, para. 3.

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence.

Rule 92bis: Alternative Proof of Facts

- (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.
- (D) 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.

IV. DELIBERATIONS

14. The Chamber notes that the present Motion differs from the Decision on Norman Request to Admit Documents, in that the admission of documents in that instance was not opposed by the Prosecution. The present Motion is also distinguishable on the basis that the Prosecution did not seek cross-examination in the earlier case.²³

15. Rule 89(C) vests The Chamber with broad discretionary power to admit any relevant evidence.²⁴ The Chamber has repeatedly held that “the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined at the end of the trial when assessing probative value of the totality of the evidence.”²⁵

16. Previously, The Chamber has adopted the following passage of Appeals Chamber, on the interpretation of Rule 92bis:

²³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-694, “Decision on Norman Request to Admit Documents in Lieu of the Testimony of Abdul-One Mohammed Pursuant to Rules 89(C) and 92bis”, the 15th of September 2006, p. 2 (“Decision on Norman Request to Admit Documents”). Although the Prosecution did not oppose the admission of documents in that instance, it did not concede the authenticity or relevance of the documents in question.

²⁴ Decision of the 14th of July 2005, *supra* note 10, p. 3, citing *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-391, “Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker”, the 23rd of May 2005, para. 6 (“Ruling on Gbao Application”).

²⁵ See e.g. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-AR65, “Fofana – Appeal Against Decision Refusing Bail”, the 11th of March 2005, paras. 22-24.

SCSL Rule 92bis is different to the equivalent Rule in the ICTY and ICTR and deliberately so. The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92bis in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities. The effect of the SCSL Rule is to permit the reception of "information" - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation".²⁶

17. The Chamber has previously held that:

[P]roof of reliability is not a condition for admitting "information" under Rule 92bis and that a requirement under this Rule of such information being capable of corroboration in due course leaves open the possibility for the Chamber to determine the reliability issue at the end of the trial in light of all evidence presented in the case and decide whether the information is indeed corroborated by other evidence presented at trial,²⁷ and what weight, if any, should the Chamber attach to it. [Footnotes in the original.]²⁸

18. The Chamber therefore reiterates that simply admitting a document into evidence does not amount to a finding that the evidence is credible.²⁹

19. The Chamber recalls that in the context of applications by the Prosecution to admit evidence pursuant to Rule 92bis, The Chamber found:

[T]hat the Accused will be unfairly prejudiced if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity of cross-examination and noting in this regard view of *May and Wierda* that:

[...] [A]s a matter of practice, Trial Chambers still prefer to hear evidence on the acts and conduct of the accused from live witnesses who can be cross-examined. [...] The trend which may, therefore, be discerned is for a preference for live testimony on matters

²⁶ *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'", the 16th of May 2005, para. 26 ("Fofana Appeal Decision on Admission of Evidence"). See also Decision on Norman Request to Admit Documents, *supra* note 23, p. 3; *Prosecutor v. Sesay, Kallon, and Gbao*, SCSL-2004-04-15-605, "Decision on Prosecution Notice Under Rule 92bis and 89 to Admit the Statement of TF1-150", the 20th of July 2006, p. 6 ("Sesay Decision on Notice"); *Prosecutor v. Norman, Fofana and Kondewa*, Decision of the 14th of July 2005, *supra* note 10, p. 3.

²⁷ For example, in the *Kovacevic* case, the ICTY Trial Chamber admitted the report from a member of the Commission of Experts, including analysis, but the Chamber explicitly stated that there was no question of the defendant being convicted on any count based on this evidence alone, *Prosecutor v. Kovacevic*, Transcript 6 July 1998, p. 71.

²⁸ Decision of the 14th of July 2005, *supra* note 10, p. 4.

²⁹ Decision of the 14th of July 2005, *ibid.* Accord *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, the 27th of January 2000, para. 57: "[T]he determination of admissibility does not go to the issue of *credibility*, but merely *reliability*." [Emphasis in the original.] See also *Prosecutor v. Delalic et al*, Case No. ICTY-96-21, "Decision on the Motion of the Prosecution for the Admissibility of Evidence", the 19th of January 1998, para. 20: "[T]he mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts."

pertaining directly to the guilt or innocence of the accused. This practice allows the accused to examine witnesses *against him* [...].³⁰ [Footnotes in original.]³¹

20. By parity of reasoning, The Chamber concludes that unfair prejudice may be caused to the Prosecution by the admission of documents relating to the acts and conduct of the Accused, if such documents purport to address the alleged criminal responsibility of the accused as charged in the Indictment, and the Prosecution are not afforded the opportunity of cross-examination on these issues.

21. Furthermore, as in the case where the Defence seek cross-examination following the admission of a statement pursuant to Rule 92bis, "the 'proximity to the accused of the acts and conduct which are described in the written statement is relevant' to the determination of whether cross-examination should be ordered."³²

22. Upon careful review and consideration of the Seisay Statement, in light of the above comments, The Chamber finds that certain portions, as set out below, are not admissible due to the fact that they express the author's opinion. Similarly, other portions of the Seisay Statement are not admissible because they relate to acts and conduct of the Accused which may purport to prove or disprove pivotal issues in the Prosecution case, such as the Accused Fofana's alleged criminal responsibility.

23. As stated repeatedly by this Chamber, Rule 92bis allows the reception of assertions of fact, not opinion.³³ The Chamber accepts the Prosecution's submission that the following sentences of the Seisay Statement contain the opinions of the author, rather than assertions of fact, and are therefore not admissible:

1. *Paragraph six, eighth through tenth sentence:* "Colonel Ekenbossi and I would later come to wonder why a man with such a title appeared to be so uninvolved in CDF affairs. We both had heard of the position, but neither one of us had any official dealings with him in 1998 or any sense of his official duties. According to my own assessment, a lot of the positions within the CDF were just big names."
2. *Paragraph eight, final sentence:* "At one point, a gentleman called Simon Arthy, who worked for the European Commission, later inquired as to Mr. Fofana's personality in connection with a grant, and I described him as the very docile and very cooperative individual I believe him to be."
3. *Paragraph nine, first two sentences:* "Based on my own personal and professional observations, Mr. Fofana was not capable of effectively directing a war. To me, he was a sort of personal assistant to Mr. Norman, who took care of chores unrelated to war or fighting."

³⁰ Judge Richard May and Marieke Wierda, *International Criminal Evidence* (Ardsey, NY: Transnational Publishers, Inc., 2002), § 10.54.

³¹ Decision of the 14th of July 2005, *supra* note 10, p. 4. See also *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis", the 21st of March 2002, paras. 24-25; and *Prosecutor v. Galic*, IT-98-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", the 7th of June 2002, para. 13 ("Galic Decision Concerning Rule 92bis(C)").

³² Sesay Decision on Notice, *supra* note 26, para. 26, citing Galic Decision Concerning Rule 92bis(C), *ibid.*, para. 13.

³³ Fofana Appeal Decision on Admission of Evidence, *supra* note 26, para. 26. See also Decision on Norman Request to Admit Documents, *supra* note 23, p. 3; Sesay Decision on Notice, *supra* note 26, p. 6; Decision of the 14th of July 2005, *supra* note 10, p. 3.

24. Additionally, The Chamber finds, given the Defence submission that Ambassador Seisay will not be available for cross-examination,³⁴ that the following portions of the Seisay Statement relate to acts and conduct of the Accused which may purport to prove or disprove matters that may be in issue in the Prosecution case, such as the Accused Fofana's alleged criminal responsibility, and that their admission could prejudice the Prosecution in the absence of an opportunity to cross-examine Mr. Seisay:

1. *Paragraph five, last sentence:* "Moinina Fofana was not."
2. *Paragraph six, fifth sentence:* "Again, Mr. Fofana was not present at this meeting nor was his name mentioned at that time."
3. *Paragraph six, second half of seventh sentence:* "while the official location and activities of Mr. Fofana were unknown to me, if they existed at all in fact."

25. With respect to the balance of the Seisay Statement, the Chamber is satisfied that the tendered information is relevant, that it is susceptible of corroboration in due course, and that it will not prejudice any Party by its admission.

26. Similarly, The Chamber finds that the factual assertions contained in the SamForay Document are relevant, susceptible of corroboration in due course, and will not prejudice any Party by its admission.

27. The Chamber will determine what weight, if any, to attach to the factual assertions contained in both statements at the end of the trial, in light of the totality of evidence.

V. DISPOSITION

THE CHAMBER HEREBY GRANTS the Motion and admits the SamForay Document;

THE CHAMBER HEREBY PARTIALLY GRANTS the Motion and admits the Seisay Statement with the exception of those portions identified as inadmissible in paragraphs twenty-three and twenty-four of this Decision;

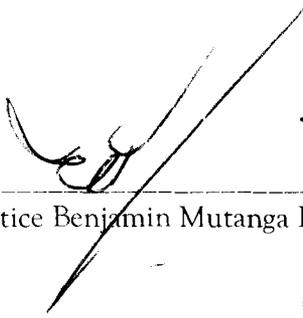
ORDERS Counsel for Fofana to file with the Court a copy of the email communication from Mr. Alfred SamFoday, with the final paragraph redacted as in Annex B;

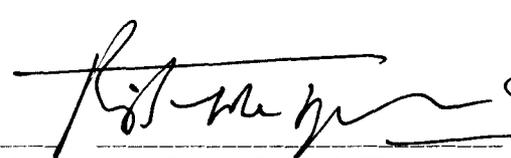
ORDERS Counsel for Fofana to file with the Court the original, signed statement of Ambassador Foday Seisay;

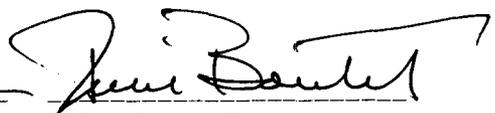
FURTHER ORDERS the Registry to redact the Seisay Statement according to the findings of The Chamber as stated in paragraphs twenty-three and twenty-four of this Decision, and to allocate Exhibit numbers to these statements;

³⁴ Motion, para. 2.

Done in Freetown, Sierra Leone, this 9th of October 2006.


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I


Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

