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EIS21.9



SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Registrar: Mr. Lovemore G. Munlo, SC

Date: 15th of September 2006

PROSECUTOR

Against

SAM HINGA NORMAN
 MOININA FOFANA
 ALLIEU KONDEWA
 (Case No.SCSL-04-14-T)

Public Document

DECISION ON NORMAN REQUEST TO ADMIT DOCUMENTS IN LIEU OF THE
 TESTIMONY OF ABDUL-ONE MOHAMMED PURSUANT TO RULES 89(C) AND 92 *BIS*

Office of the Prosecutor:

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 James Johnson
 Joseph Kamara

Court Appointed Counsel for Sam Hinga Norman:

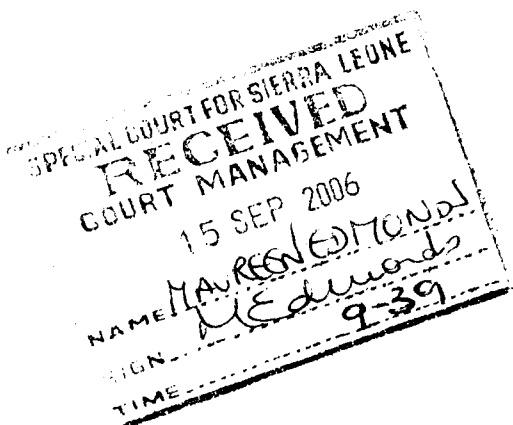
Dr. Bu-Buakei Jabbi
 John Wesley Hall, Jr.
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Court Appointed Counsel for Moinina Fofana:

Victor Koppe
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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;

SEISED OF the "First Accused Request to Admit Certain Documents in Lieu of the Oral Testimony of Major-General Abdul-One Mohammed Pursuant to Rules 89(C) and 92bis and Request for Clarification on Procedure for Closing", filed by Court Appointed Counsel for the First Accused ("Counsel for Norman") on the 8th of September 2006 ("Motion");¹

CONSIDERING that Counsel for Norman seek to have admitted in evidence pursuant to Rules 89(C) and 92bis of the Rules of Procedure and Evidence ("Rules") two Exhibits, namely, "Periodic Report Civil Defence Force 'Kamajors' dated 1 August 1997" and "Letter from President Ahmed Tejan Kabbah to CSO Mustapha with an Action Plan captioned Operation Athens dated 13 August 1997", and a two-pages document, entitled "The Sierra Leonian² Crises ECOMOG and the Civil Defence Forces (Kamajors)" with the signature of Major-General Abdu One Mohammed³ and dated the 2nd of March 2006 (collectively "Documents"), in lieu of the oral testimony of witness Major-General Abdul-One Mohammed;⁴

NOTING the "Fofana Response to Norman Request to Admit Documents Pursuant to Rule 92bis", filed by Court Appointed Counsel for the Second Accused ("Counsel for Fofana") on the 11th of September 2006 ("Fofana Response")⁵ and "Kondewa Response to First Accused Request to Admit Certain Documents Pursuant to Rule 89(C)", filed by Court Appointed Counsel for the Third Accused ("Counsel for Kondewa") on the 13th of September 2006 ("Kondewa Response");⁶

NOTING that Counsel for Fofana and Counsel for Kondewa have no objection to the admission of the Documents in evidence;⁷

NOTING the "Prosecution Response to First Accused Request to Admit Documents Pursuant to Rules 89(C) and 92bis", filed by the Office of the Prosecutor ("Prosecution") on the 13th of September 2006 ("Prosecution Response");⁸

CONSIDERING that the Prosecution have no objection to the admission of the Documents, although, they do not concede as to their authenticity and to the relevance of the two-pages document, entitled "The Sierra Leonian Crises ECOMOG and the Civil Defence Forces (Kamajors)" with the signature of Major-General Abdu One Mohammed and dated the 2nd of March 2006, as submitted by Counsel for Norman in Annex A of the Motion to be considered as the statement of witness Major-General Abdul-One Mohammed;⁹

¹ SCSL-04-14-686.

² Sic!

³ Sic! The name of the witness is spelt differently in various documents: Abdul-One Mohammed Cf. Abdu One Mohammed.

⁴ Motion, paras 1, 6-8.

⁵ SCSL-04-14-687.

⁶ SCSL-04-14-690.

⁷ Fofana Response, para. 1; Kondewa Response, para. 1.

⁸ SCSL-04-14-691.

⁹ Prosecution Response, para. 4. Annex A of the Motion states: "[t]his document [...] is relevant in the sense that it lays down how ECOMOG was in command and control of the CDF during the conflict" and the Prosecution submit that "the [witness]

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NOTING further the Prosecution's submission that "Major-General Abdul-One Mohammed is also a witness for the Second Accused and may be called to testify during the case for the Second Accused" and that "[t]he Prosecution seeks to reserve its right to cross-examine [this witness] in relation to the [Documents] should it become necessary during the course of the evidence";¹⁰

NOTING the "Reply of the First Accused to the Prosecution Response, Second and Third Accused Responses to the First Accused Request to Admit Documents Pursuant to Rules 89(C) and 92bis", filed by Counsel for Norman on the 14th of September 2006;¹¹

NOTING that Rule 92bis of the Rules provides that:

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.
- (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.

NOTING that Rule 89(C) vests The Chamber with discretionary power to admit any relevant evidence;¹²

RECALLING that 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";¹³

NOTING that in the application of Rule 92bis of the Rules The Chamber has taken guidance from the Appeals Chamber's interpretation of this Rule where it said that:

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".

statement in its entirety "does not mention, nor can it be inferred, that ECOMOG was in command and control of the CDF during the conflict. The operative word used by Major-General Mohammed is 'collaboration'."

¹⁰ Prosecution Response, para. 5.

¹¹ SCSL-04-14-692.

¹² *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-447, "Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", the 14th of July 2005, p. 3 ("Decision of the 14th of July 2005") citing *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker", the 23rd of May 2005, para. 6.

¹³ 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.

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This phraseology was chosen to make clear 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.¹⁴

RECALLING that The Chamber 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,¹⁵ and what weight, if any, should the Chamber attach to it; [footnotes in original]¹⁶

CONSIDERING, therefore, that The Chamber will take into account the nature and source of the information when it assesses the probative value and weight to be given to the evidence in light of the totality of the evidence before it;

RECALLING further that at the stage of the 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 opposing Party;¹⁷

CONSIDERING that the Documents sought to be admitted are relevant and their reliability is susceptible of confirmation;

NOTING that there is no objection by Counsel for Fofana, Counsel for Kondewa and Prosecution to the admission of the Documents in evidence;

CONSIDERING that the admission of the Documents in evidence would not prejudice unfairly any of the Parties;

NOTING that in their Motion Counsel for Norman further request the guidance of The Chamber as to the procedure for closure of the Defence case for the First Accused, in light of the Appeals Chamber Decision concerning the issuance of a subpoena to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone;¹⁸

NOTING the "Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone", delivered by the Appeals Chamber of the Special Court on the 11th of September 2006, wherein the Appeals Chamber dismissed the appeal lodged by the First Accused and the Second Accused for the issuance of a subpoena to H.E. Alhaji Dr. Ahmad Tejan Kabbah to attend a pre-testimony interview and to testify on their behalf before the Special Court;¹⁹

¹⁴ *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.

¹⁵ 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.

¹⁶ Decision of the 14th of July 2005, p. 4.

¹⁷ *Ibid.*

¹⁸ Motion, paras 2, 18.

¹⁹ SCSL-04-14-688.

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MINDFUL OF the "Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session" of the 14th of June 2006, wherein The Chamber ordered that "the Defence case for the First Accused shall be closed, upon the completion of the testimony of witness No 21, Major-General Abdul One Mohammed, in September 2006";²⁰

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

THE CHAMBER GRANTS the Motion by admitting in evidence two Exhibits, namely, "Periodic Report Civil Defence Force 'Kamajors' dated 1 August 1997" and "Letter from President Ahmed Tejan Kabbah to CSO Mustapha with an Action Plan captioned Operation Athens dated 13 August 1997", and the two-pages document, entitled "The Sierra Leonian Crises ECOMOG and the Civil Defence Forces (Kamajors)" with the signature of Major-General Abdu One Mohammed and dated the 2nd of March 2006; and

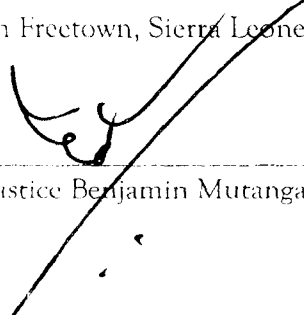
ORDERS AS FOLLOWS:

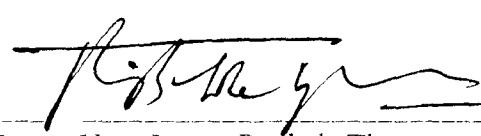
- 1) Counsel for Norman shall file with the Court the original documents, namely, "Periodic Report Civil Defence Force 'Kamajors' dated 1 August 1997", "Letter from President Ahmed Tejan Kabbah to CSO Mustapha with an Action Plan captioned Operation Athens dated 13 August 1997", and the two-pages document, entitled "The Sierra Leonian Crises ECOMOG and the Civil Defence Forces (Kamajors)" with the signature of Major-General Abdu One Mohammed and dated the 2nd of March 2006, as soon as possible but no later than Monday, the 18th of September 2006, by 10 a.m.;
- 2) The Registry shall assign Exhibit numbers to the aforesaid admitted documents;

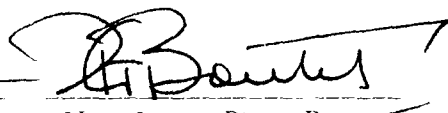
Counsel for Norman shall now exercise their option to close the Defence Case for the First Accused on Friday, the 15th of September 2006; and

FURTHER ORDERS that should witness Major-General Abdul-One Mohammed be called to testify on behalf of the Second Accused, the Prosecution, in accordance with the prescribed procedure, could then cross-examine this witness in relation to the aforesaid admitted documents, should it become necessary during the course of his evidence.

Done in Freetown, Sierra Leone, this 15th of September 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]

²⁰ SCSL-04-14-619, Disposition, para. 17(d)