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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

Interim Registrar: Mr. Lovemore Munlo SC

Date: 16th of February, 2006

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

Public Document

# DECISION ON APPLICATION BY COURT APPOINTED COUNSEL FOR THE FIRST ACCUSED FOR LEAVE TO LEAD EVIDENCE ON ALTERNATE DAYS AND FOR RIGHT TO COMMUNICATE

Office of the Prosecutor:

Luc Côté
James Johnson
Kevin Tavener



Court Appointed Counsel for Sam Hinga Norman:

Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana:

Victor Koppe
Arrow Bockarie
Michiel Pestman

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana

**TRIAL CHAMBER I** ("The Chamber") 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;

**MINDFUL OF** the Oral Application made by Court Appointed Counsel for the First Accused in the course of the proceedings of the 24th of January, 2006 ("Motion"), moving The Chamber to grant leave to the First Accused to give his testimony before this Court on alternate days and that the intervening time be used to afford the Defence of the First Accused complete freedom of interaction and communication between him, Counsel, and the First Accused during the duration of the testimony of the First Accused;

**NOTING** the Prosecution's Oral Response given on the same day;

**NOTING** Counsel's Reply to the said Prosecution Response;

**MINDFUL OF** The Chamber's Oral Decision on the Motion delivered in Court on the 24th of January, 2006;[1]

**NOTING** that the Case for the Prosecution against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa was opened on the 3rd of June, 2004;

**CONSIDERING** that during the court proceedings of the 8th of June, 2004, The Chamber made an oral ruling on the First Accused's right to self-representation and that in the interest of justice, it can only be exercised with the assistance of Counsel to be assigned to the trial in whatever capacity (standby or otherwise) and with clear respect for the Accused's rights under Article 17 of the Statute;

**NOTING** that the First Accused, from the 21st of September, 2004, decided not to be present in the court room anymore;

**NOTING** that the Prosecution closed its case on the 14th of July, 2005;

**CONSIDERING** that following the issuance of the "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98" on the 21st of October, 2005, The Chamber issued its "Order Concerning the Preparation and Presentation of the Defence Case", which ordered that a Status Conference be held on the 27th of October, 2005, and that The Chamber at that session require the Defence to present the particulars for their preparation of the Defence Case and indicate, *inter alia*, "whether the Accused will testify at trial";

**MINDFUL OF** the fact that this Order of the 21st of October, 2005, ordered each Defence team to file, *inter alia*, a list of witnesses with an indication of whether the witness will testify in person or pursuant to Rule 92*bis* and further ordered that a Pre-Defence conference be held on the 11th of January, 2006 and that the Defence case to commence on the 17th of January, 2006;

**CONSIDERING** that at the Status Conference of the 27th of October, 2005, The Chamber reminded the Parties of Rule 85(C) which provides that the "Accused may, if he so desires, appear as a witness in his own defence. If he chooses to do so, he shall give his evidence under oath or affirmation and, as the case may be, thereafter call his witnesses" and specified that if the Accused elected to testify, he should testify first and call his witnesses at that close of his testimony;

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[1] Transcript of the 24th of January, 2006, pp. 41-42.

**MINDFUL OF** the fact that following the Status Conference of the 25th of November, 2005, The Chamber issued its "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case" on the 28th of November, 2005, where The Chamber noted the failure of the Defence to comply with its Order of the 21st of October, 2005 and re-iterated its order for the Defence to give an "indication of whether each of the Accused intends to testify in his own Defence and this, pursuant to Rule 85(C) of the Rules", by the 5th of December, 2005;

**NOTING** that on the 5th of December, 2005, Counsel for Norman filed their witness list indicating that "the First Accused intends to testify in his own Defence pursuant to Rule 85(C) of the Rules";

**CONSIDERING** that at the Pre-Defence Conference of the 11th of January, 2006, Counsel for Norman indicated certain difficulties in securing Norman's testimony, but promised to give a definite reply to the Prosecution on whether Norman was coming or not after the conference;[2]

**MINDFUL OF** the fact that at the Status Conference of the 18th of January, 2006, Counsel for Norman confirmed Norman's intention to testify as a witness in his own defence and also confirmed that he would comply with the order to testify first before other witnesses and The Chamber ordered Counsel that the First Accused shall take a stand on the 20th of January, 2006;

**MINDFUL OF** the fact that at the same Status Conference of the 18th of January, 2006, The Chamber delivered its ruling on the mode of examination and on trial procedure when the First Accused comes to testify, as follows:

> Given that the First Accused is to appear as the first witness in his own case, we would like to emphasise that the proper order of examination would be for Counsel for Norman to examine him first; that will be then followed by cross-examination by Counsel for the Second Accused; cross-examination by Counsel for the Third Accused; then cross-examination by the Prosecution. The scope of the cross-examination again should, as much as possible, [...] be limited to issues raised during examination-in-chief [... that it be] a focused cross-examination if at all possible and feasible. [...] [C]ounsel for the First Accused may re-examine the First Accused once this is completed, but again, as the rule prescribes, only on new issues that may have been raised during cross-examination. [...]
> [O]nce the accused has taken an oath or affirmation and commenced testifying he has then become the witness of the Court and the Prosecution and the Defence must not communicate with the witness on the content of the witness testimony because he is a witness in the Court, except with leave of the Court at that particular moment. If the Defence wishes to communicate with the witness at that particular moment, they shall inform the other Parties of their intent and what is the matter that they wish to raise and this matter may be raised with the Chamber if need be. [...]

**CONSIDERING** that following this order, Counsel for Norman clarified the particulars of the order in respect of the communication between himself and Accused Norman after which the Chamber ruled that Counsel shall not be allowed to communicate with Norman in the course of his evidence;

[2] Transcript of the 11th of January, 2006, pp. 55-56.

**CONSIDERING** that Counsel for Norman did not then seek any further clarification nor raise an objection regarding The Chamber's ruling either in respect of the date of commencement of the First Accused's testimony or the mode of his testimony;

**NOTING** therefore that on the 18th of January, 2006, The Chamber adjourned with the clear understanding that the First Accused would commence his testimony on the 20th of January, 2006 at 9:30 a.m.;

**NOTING** that at the court proceeding of the 19th of January, 2006, Counsel for Norman brought an application before The Chamber requesting that additional seven days be granted to his team to allow proper preparation of the examination of the First Accused;

**RECALLING** that in making this application, Counsel argued that his inability and unpreparedness to lead Norman's examination was due to the absence of the First Accused from Court proceedings and his lack of cooperation, which ended only recently;

**CONSIDERING** that The Chamber granted an application and allowed Counsel an additional five days to prepare Norman's evidence and fixed the 24th of January, 2006 as the date for the commencement of Norman's testimony before the Court;

**MINDFUL OF** the fact that the Prosecution objected to the present Motion for the reasons of having had no warning of this application, and essentially for the following reasons: a) that the application is without merit; b) that it is highly damaging to the interests of the First Accused; c) that the Accused wants to be in a position of privilege and wants to be above the law; d) that when a witness takes the oath and goes into the witness stand to tell the whole truth, he or she is not allowed to do it with the assistance, advice and counselling of others; e) that the Prosecution wants to protect the First Accused from the suggestions that are being made that could seriously damage his credibility;

**CONSIDERING** that the present application is made out of time, as Counsel for Norman has had extensive amount of time and latitude to prepare for his testimony and to bring an application of this nature since the date for the commencement of the defence case was set on the 21st of October, 2005;

**CONSIDERING** that The Chamber has already granted an extension of five additional days to Counsel for Norman to enable him to prepare the testimony of his client;

**MINDFUL OF** the fact that granting this Motion might occasion a breach respectively of Article 17(4)(C) of the Statute of the Special Court and of Rule 26*bis* of the Rules of Procedure and Evidence of the Special Court ("Rules") on the right of the Accused to be tried without undue delay and on ensuring the fairness and expeditiousness of the proceedings against him;

**MINDFUL OF** the fact that the ICTY *Kupreskic* Decision emphasised the following principle:

> [P]ermitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence or affect the witness's further testimony in ways

> which are not consonant with the spirit of the Statute and Rules of the International Tribunal[...][3]

**MINDFUL OF** the fact that the ICTY *Kupreskic* Decision was endorsed and followed in the ICTY *Kordic* Decision in this regard;

**CONSIDERING** that once a witness has taken an oath or made an affirmation and commenced testifying, the Prosecution and Defence must not communicate with the witness on the content of the witness's testimony except with leave of the Chamber and that this Rule applies to the testimony of the Accused;

**PURSUANT TO** Rule 90(F) of the Rules, which states that:

> The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:
>
> (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
>
> (ii) Avoid the wasting of time.

**THE CHAMBER DISMISSES** the Motion as being meretricious and **REITERATES** its Oral Decision of the 24th of January, 2006.

Done in Freetown, Sierra Leone, this 16th day of February, 2006

| Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Pierre Boutet<br>Presiding Judge,<br>Trial Chamber I | Hon. Justice Bankole Thompson |
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[Seal of the Special Court for Sierra Leone]

[3] *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. ICTY Case No. IT-95-14/2, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999; see also *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic*, ICTY Case No. IT-96-16, Decision on Communications Between the Parties and Their Witnesses, 21 September 1998.