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SCSL-04-14-T
(20964-20977)

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: 16 March 2007

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC
PROSECUTION SUBMISSIONS PURSUANT TO ORDER FOR EXTENDED FILING

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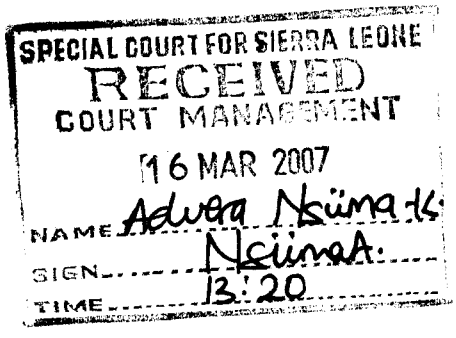

I. INTRODUCTION

1. On 23 February 2007, the Registrar filed with the Trial Chamber the Death Certificate for Samuel Hinga Norman."[1] Following that, the Registrar also filed a document entitled "Registrar's Submission Pursuant to Rule 33(B) Relating to the Death of Mr Sam Hinga Norman", on 6 March 2007 and asked the Trial Chamber to "take any measures that it may deem appropriate in relation to Mr Norman's demise.[2]
2. The Prosecution files this submission in response to the Trial Chamber's "Order for Extended Filing", dated 7 March 2007, wherein the Prosecution and each of the Defence teams were asked to make "submissions or any other initiatives" in order to "contribute to a resolution of the legal and factual issues and or consequences that have arisen or are likely to arise in the judicial determination of the case" against Norman.[3]

II. SUBMISSIONS

JURISDICTION

3. The death of an accused during criminal proceedings is not unprecedented. In the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") several accused have died at various stages of the proceedings. For example, General Mehmed Alagić, Đorde Djukic and Janko Bobetko died prior to the commencement of their trials[4] and Milan Kovačević passed away in the detention centre less than a month after his trial began.[5] Slavko Dokmanović committed suicide three days after his trial was completed.[6] Slobodan Milošević died during the course of the defence case.[7] In each of these cases, the Trial Chamber issued

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[1] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-761, "Transmission of the Death Certificate for Mr. Sam Hinga Norman", 23 February 2007.
[2] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-765, "Registrar's Submission Pursuant to Rule 33(B) Relating to the Death of Mr Sam Hinga Norman", 6 March 2007.
[3] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-766. "Order for Extended Filing", 7 March 2007.
[4] *Prosecutor v. Hadžihasnović*, IT-01-47, Trial Chamber, Transcript, 12 March 2003, p. 170-172; *Prosecutor v. Djukic*, IT-96-20, "Order Terminating Proceedings," Appeal Chamber, 29 May 1996; *Prosecutor v. Bobetko*, IT-02-62-I, "Order Terminating Proceedings Against Janko Bobetko", Trial Chamber, 24 June 2003.
[5] *Prosecutor v. Kovačević*, IT-97-24, "Order Terminating the Proceedings Against Milan Kovačević", Trial Chamber, 24 August 1998.
[6] *Prosecutor v. Mrkšić*, IT-95-13/1, "Order Terminating Proceedings Against Slavko Dokmanović", Trial Chamber, 15 July 1998.
[7] *Prosecutor v. Milošević*, IT-02-54-T, "Order Terminating the Proceedings", Trial Chamber, 14 March 2006. See also Talic, who was originally indicted with Brdjanin, who died shortly after the trials were separated: *Prosecutor v. Talic*, IT-99-36/1-T, "Order Terminating Proceedings Against Momir Talic", 12 June 2003; *Prosecutor v.*

an order terminating the proceedings. The usefulness of these precedents of the *ad hoc* tribunals is limited by the fact that there has been no instance at the ICTY or ICTR in which an accused in a joint multi-accused trial died after the closing of the case but prior to judgment.

4. In domestic courts, the ordinary rule in criminal proceedings is that where an accused dies before the verdict is given in the case, the proceedings are terminated or abated upon the death of the accused.
5. There has, however, been inconsistent practice in different national jurisdictions in cases where an accused dies after the verdict has been given in a case, but before an appeal in the case has been finally determined. Amongst the different systems in the various States of the United States of America, it is the rule in many States that the death of the accused pending appeal of a conviction abates not only the appeal but also all proceedings had in the prosecution since its inception. In other States, the defendant's death abates the appeal but does not abate the criminal proceedings from their inception. In a minority of States, an appeal can continue notwithstanding the death of the accused.[8]
6. Similar variations in practice are evident in other national systems. In England when an appellant dies prior to the final determination of an appeal, the appeal abates leaving the conviction and sentence intact.[9] However, in Canada, the rule that "the dead can not appeal", can be departed from if it is in the interests of justice to do so. For example in Canada (as in some courts in the United States), a substituted appellant may be able to continue the proceedings.[10] In Canada, it is settled law that appellate courts maintain jurisdiction to hear the appeal of an individual who died pending the hearing but this discretion should be exercised "only in exceptional circumstances where the death of the appellant is survived by a continuing controversy which, notwithstanding the death of the

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Musabyimana, ICTR-2001-62-I, "Order Terminating the Proceedings Against Samuel Musabyimana", Trial Chamber, 20 February 2003.

[8] *State v. Hoxsie*, 570 N.W. 2d 379 (1997), paras 8-10. In the Federal legal system of the United States, it is also the case that the appeal abates *ab initio* and the conviction is set aside without a hearing, see *Durham v. United States*, 91 S. Ct. 858 (1971) and *United States v. Moehlenkamp*, 557 F. 2d 126 (1977). Other State cases to the effect that the appeal abates on the death of the accused but the conviction survives include *State v. Makaila*, 897 P. 2d 967 (1995).

[9] *R. v. Kearley (No. 2)*, [1994] 3 All E.R. 246. Note, however, that Parliament established the Criminal Cases Review Commission with power to refer a conviction or sentence of a deceased for review even when an appeal had not been commenced: *Criminal Appeal Act* 1995 (U.K.), 1995.

[10] *State v. McGettrick*, 509 N.E. 2d 378 (Ohio 1987 (S.Ct.).

individual most directly affected by the appeal, requires resolution in the interests of justice."[11]

7. A court may decline to hear or decide a case where there is no longer a live controversy or an issue to be resolved, including the case where one of the parties has died. However, if a court maintains jurisdiction, a case rendered moot can still be heard if it is in the interests of justice to do so, for instance if the case raises an important legal issue whose determination may affect other parties.[12] An important legal issue may well exist beyond the deceased or the deceased party's interests and can include an issue that is of broad public importance.
8. In criticizing the rule of abatement of proceedings *ab initio* upon the death of the accused, JA. Fish, in the Canadian case *R. v. Jetté*, noted the following:

> "...this approach, however attractive, attaches inadequate importance to the collateral effects of the verdict. It disregards the potential pecuniary consequences of a conviction and it ignores the significant interests of those who must bear its emotional impact."[13]

9. The Supreme Court of Canada followed this line of thought in *R. v. Smith*, noting that there can be reasons existing beyond the deceased's interests to continue with the proceedings:

> "the existence of such collateral consequences for the administration of justice quite apart from the interest of the particular convicted individual or his family is an important consideration."[14]

10. In both cases the court held that it was in "the interests of justice" to hear the appeal even though the Appellants had died.
11. Similarly, the Prosecution submits that the Trial Chamber continues to maintain jurisdiction over the proceedings with respect to all three accused persons. The fact that the First Accused has, unfortunately, passed away, does not mean that the proceedings

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[11] *R. v. Smith*, 2004 SCC 14, ("***Smith***"), para 4.
[12] Ibid., paras 32-51.
[13] *R. v. Jetté*, [1999] R.J.Q 2603. The accused appealed his conviction of manslaughter but died before the appeal was heard. New evidence which tended to discredit the verdict arose and had the appeal been heard the accused would likely be acquitted.
[14] *Smith*, para. 49.

against him are automatically terminated and brought to an immediate end before the Trial Chamber has conducted a fact finding analysis. The Trial Chamber has the authority to decide how to best proceed in light of the death of the First Accused. This trial deals with issues of broad public importance, such as the question of who are the persons that bear the greatest responsibility for the atrocities that ravaged Sierra Leone, a country that witnessed some of the most egregious offenses under International Humanitarian Law. For this reason, and because this is a joint trial, the Prosecution submits that it is in the interests of justice that the Trial Chamber not automatically terminate the proceedings against Norman without first analyzing the evidence that has been adduced before the Trial Chamber.

EVIDENCE

12. It is the position of the Prosecution that the Trial Chamber consider all the evidence in the case, not for the purpose of issuing a verdict against Norman, but in order to issue a final determination against the two remaining accused. The Trial Chamber should consider all of the evidence in relation to all of the accused in this case, so far as it is relevant. As the Prosecution pointed out in its Final Trial Brief, all evidence that is admitted by the Trial Chamber is part of a single corpus of evidence before the Trial Chamber.[15] It has been repeatedly affirmed that

> "a witness, either for the Prosecution or Defence, once he or she has taken the Solemn Declaration pursuant to Rule 90(B) of the Rules of Procedure and Evidence, is a witness of truth before the International Tribunal and, inasmuch as he or she is required to contribute to the establishment of the truth, not strictly a witness for either Party."[16]

It is only by considering the evidence as a whole that the Trial Chamber will get to the truth of the allegations in relation to all of the accused.[17]

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[15] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-737, "Prosecution Final Trial Brief", ("**Prosecution Final Trial Brief**") 22 November 2006, para. 5.
[16] *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-PT, "Decision on Prosecutor's Motion on Trial Procedure", Trial Chamber, 19 March 1999; see also *Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Decision on Communications Between Parties and their Witnesses", Trial Chamber, 21 September 1998.
[17] See, for instance, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Request for Severance of Three Accused", Trial Chamber, 27 March 2006, para. 5 referring to earlier relevant case law of the ICTY and ICTR.

13. Throughout the trial and in its Final Trial Brief, the Prosecution argued that the three Accused shared a common plan, purpose or design, together with others in the CDF, to use any means necessary to defeat the opposing RUF and AFRC forces, to gain complete control over the population of Sierra Leone. Given the allegation of a joint criminal enterprise, there is inevitably overlap in the evidence relevant to each of the different counts and geographical locations, the evidence relevant to the individual criminal responsibility of each of the Accused, and the evidence relevant to each different mode of liability under Article 6 of the Statute.[18]
14. The Prosecution submits that in a joint trial, the evidence emanating from any witness, either orally or through documents, is evidence which can be considered in relation to any of the accused on trial. In *Delalić*, at the ICTY, the Trial Chamber held that:

> "in a joint trial, evidence at the trial concerns all the co-accused and evaluation of such evidence is not necessarily restricted to the evidence of the one accused whose evidence is in issue."[19]

The Prosecution has consistently taken the approach that "all of the evidence adduced throughout the trial can be applied in relation to each of the accused."[20] The unfortunate death of one of the accused does not change the situation. The evidence is still evidence that has been adduced and thoroughly tested before the Trial Chamber.

15. In *Brdjanin and Talic*, also a case where the Prosecution alleged a joint criminal enterprise, when deciding on a motion for separate trials, the Trial Chamber stated: "[N]or does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdjanin may give evidence which incriminates Talic"[21] The Trial Chamber noted that: "trials in this Tribunal are conducted by professional judges who are necessarily capable of determining the guilt of each accused individually".[22] In criminal cases like the ones that come before international tribunals, the Trial Chamber further

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[18] Prosecution Final Trial Brief, paras 13, 16.
[19] *Prosecutor v Delalić*, IT-96-21-T, "Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him", Trial Chamber, 1 July 1998, para. 46.
[20] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-570, "Prosecution Response to Third Accused's Request for Leave to Raise Evidentiary Objections During Prosecution's Cross Examination of Witnesses not Called by Him", 6 March 2006, paras 4-8 and Prosecution Final Trial Brief, paras 4-6.
[21] *Prosecutor v. Brdjanin and Talic*, IT-99-36-PT, "Decisions on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply," Trial Chamber, 9 March 2000, para. 29.
[22] *Ibid.*, para. 32.

held, the evaluation of evidence can be different from the approach in domestic courts. For example, circumstantial evidence is not considered to be less substantial than direct eye-witness testimony.[23] In determining the verdict, the Trial Chamber indicated that it:

> "... has taken into consideration the evidence given against the former co-accused Momir Talic, whose case was severed from that of the Accused and who subsequently passed away, as far as it is relevant to the case against the Accused.[24]

16. Clearly, the ICTY jurisprudence acknowledges and accepts that evidence emanating from one accused may be used as evidence against another accused. The Prosecution submits that this legal proposition remains unchanged simply because one of the accused has died.
17. At the ICTY, the transcripts of evidence given by witnesses who testified in Dokmanović's trial were admitted in Milošević's trial pursuant to Rule 92*bis*, thereby suggesting that the death of an accused does not mean that the admitted evidence, which was duly tested in cross-examination, itself is no longer of any use or value in the search for truth.[25]
18. Additionally, circumstances often arise during the course of international criminal trials when a key member of the joint criminal enterprise is either at large or has died. For instance, in *Stakić*, the trial proceeded as an individual trial because the two co-accused were dead.[26] Trial Chambers must continue to make decisions and findings they deem appropriate even when one of the accused has died.
19. The Prosecution submits that it is in the public interest to see a final determination of this trial.[27] The Prosecution invites the Trial Chamber to make findings of fact on the allegations as laid out in the Indictment against all three accused persons. The evidence submitted by both the Prosecution and the Defence relating to Norman should be

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[23] *Prosecutor v. Brdjanin*, IT-99-36-T, "Judgement", Trial Chamber, 1 September 2004, para. 35.
[24] *Ibid.*, para. 36.
[25] *Prosecutor v. Milošević*, IT-02-54-T, "Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92*bis*(D), Trial Chamber, 27 March 2003.
[26] *Prosecutor v. Stakić*, IT-97-24, Fourth Amended Indictment.
[27] Lans Gberie, Concord Times, 6 March 2007, "Hinga Norman - The Mysteries of a Special War Crimes Trial"; The Christian Monitor, 6 March 2007, "Penfold Decries British Government over Norman"; Awareness Times, 6 March 2007, "The Passing of Chief Hinga Norman"; The Exclusive, 6 March 2007, "Should the Special Court Become a Flop."

considered and evaluated within the context of the case as a whole. In any event, it is understood that the Prosecution is not asking for a judgment or sentence to be pronounced in the case against Norman.

20. The evidence presently before the Trial Chamber has been tested by defence counsel for Norman throughout the trial; therefore, the Prosecution submits, making findings of fact would not be unfair. It is imperative that the Trial Chamber make a determination for example, whether the three accused were participants as charged in a joint criminal enterprise.

21. A finding of fact on specific issues with regards to the case against Norman is an essential ingredient to a fair and impartial determination of the entire case against the other two accused persons. The failure to make findings of fact against Norman would be unfair to the two remaining co-accused as this is a joint trial in which a joint criminal enterprise is alleged.

22. For example, the question of whether Norman gave the order for the Kamajor attacks on Koribundo and whether burnings and unlawful killings resulted from those attacks is a factual finding that affects not just Norman, but Fofana and Kondewa as well. A finding of fact on this issue will either help to prove the Prosecution's case against Fofana and Kondewa, or in the alternative, help establish the defence for the Second and Third Accused. Similarly, a finding of fact from the evidence that Norman acknowledged responsibility for the actions of the Kamajors may assist the defence for the other two accused. A finding to the contrary; however, will go to prove the case against the Fofana and Kondewa.

23. Additionally, it would be extremely difficult to make a finding on the role of Fofana as Director of War and Operations of the CDF, without analysing the relationship between Fofana and the National Coordinator. In the Fofana Final Trial Brief, it is stated that Fofana was someone who held a degree of influence insufficient to give rise to Article 6(3) liability.[28] The degree of influence can only be measured against that of other roles and positions within the CDF which invariably includes that of Norman's. In addition, the Fofana Motion for Acquittal acknowledged the crucial role of Norman within the

[28] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-743, "Fofana Final Trial Brief", 24 November 2006, para 318(ii).

CDF and the support of 'trusted advisors, which presumably included Fofana'.[29]

24. Another factor that should be considered by the Trial Chamber is the opportunity for the two remaining accused to possibly advance a plea for mitigation at sentencing if they are convicted of any of the crimes in the Indictment. For instance, a finding of an authoritative role of Norman may to a certain extent diminish the role of Fofana and Kondewa. A failure to make a finding of any kind with regard to Norman's role, may deprive Fofana and Kondewa of an opportunity to plead a lesser role in an attempt to mitigate their sentence.

25. At paragraph 9 of its submissions, counsel for Fofana asks the Trial Chamber to "immediately order the severance and termination of the proceedings against Mr. Norman".[30] The Prosecution submits that at this stage of the trial, the proceedings against Norman may be terminated – to the extent that a verdict is not issued – but should not be severed. The time for severance in a joint trial, arises much earlier in the proceedings when there is concern that a joint trial will be unfair for one or all of the Accused.[31]

26. In light of the very late stage of these proceedings and the fact that there are two remaining accused on the Indictment, the Prosecution reiterates that it is necessary that the Trial Chamber make findings of fact with respect to the evidence presented against Norman and by Norman.

27. The Prosecution is not asking the Trial Chamber to issue a verdict against Norman, but to make findings of fact with respect to all the evidence adduced before the Trial Chamber, to the extent it is necessary to do so in order to issue verdicts against the two remaining accused.

III. CONCLUSION

28. The Prosecution submits that it would be very difficult, if not impossible, to separate the evidence in this joint trial and asks the Trial Chamber to issue findings of fact with

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[29] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-457, "Fofana Motion for Judgement of Acquittal", 4 August 2005, paras 36-37.

[30] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-768, "Fofana Submissions on the Death of the First Accused", 10 March 2007, para. 9.

[31] *Prosecutor* v. *Karemera,* ICTR-98-44-PT, "Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment. Articles 6, 11, 12 quarter, 18 and 20 of the Statute; Rules 47, 50 and 82(B) of the Rules of Procedure and Evidence", Trial Chamber, 14 February 2005, para. 7.

respect to the elements of the crime, the crime bases and the modes of liability with respect to Norman, without issuing a final verdict on either his guilt or innocence.

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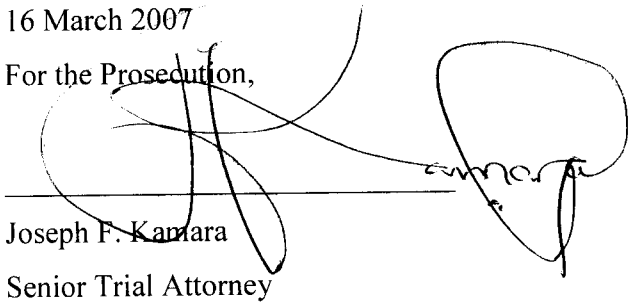
For the Prosecution,



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