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SCSL-04-14-T  
(18413-18420)

18413

**SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER I**

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

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 12 June 2006

**THE PROSECUTOR**

**-against-**

**SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA**

**SCSL-2004-14-T**

**PUBLIC**

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First Accused Reply to Prosecution and Fofana Responses to 'Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session'

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**Office of the Prosecutor:**

Mr Christopher Staker  
Mr James Johnson  
Mr Joseph Kamara

**For Samuel Hinga Norman:**

Dr Bu-Buakei Jabbi  
Mr Alusine Sani Sesay

**For Moinina Fofana:**

Mr Victor Koppe  
Mr Arrow Bockerie  
Mr Michiel Pestman

**For Allieu Kondewa:**

Mr Charles Margai  
Mr Yada Williams  
Mr Ansu Lansana

SPECIAL COURT FOR SIERRA LEONE	
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## INTRODUCTION

1. Court Appointed Counsel for the First Accused, Mr Samuel Hinga Norman, (the “Defence”) hereby files its reply to the ‘Prosecution Response to Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session’<sup>1</sup> (the “Prosecution Response”) and to the ‘Fofana Response to Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session’<sup>2</sup> (the “Fofana Response”).
2. The Prosecution suggests that the Defence has not exercised due diligence in ensuring that all witnesses and evidence is available and on that basis the Motion<sup>3</sup> should be denied. The Prosecution further suggests that the Defence should be required to close its case in this session but that the Defence could always apply to reopen its case at a later stage.
3. The Defence submits that in bringing this Motion and in making every effort to obtain the necessary evidence on behalf of its client, it is acting with all due diligence. It is further submitted that the request for an addition of a few witnesses at this stage prior to closing the Defence case is a necessary and diligent step to pre-empt the need to make an application at a later stage to re-open its case.
4. Further, the Defence submits that in considering this Motion the interests of justice and the rights of the Accused to a fair trial must prevail. Accordingly, the Motion should be granted.

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<sup>1</sup> *Prosecutor v. Norman et al.*, SCSL-2004-14-T-615, Prosecution Response to ‘Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session’ 9 June 2006.

<sup>2</sup> *Prosecutor v. Norman et al.*, SCSL-2004-14-T-610, Fofana Response to ‘Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session’ 7 June 2006.

<sup>3</sup> *Prosecutor v. Norman et al.*, SCSL-2004-14-T-608, 6 June 2006 ‘Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session’ 6 June 2006.

## SUBMISSIONS

5. The Prosecution makes a number of submissions which it presents as representative of general principles. The Response merely asserts these without providing any basis for these principles.<sup>4</sup> The Defence submits that the overarching principles for the Trial Chamber in considering the Motion are the interests of justice and the rights of the accused to present a full defence.<sup>5</sup>
6. At Paragraph 5(a) of the Prosecution's Response, the Prosecution states that proceedings cannot be delayed indefinitely pending the calling of a witness or tendering of documents into evidence. The Defence, of course, agrees that a trial cannot be a never-ending exercise. However, the Defence has not requested an indefinite delay of the proceedings. The Defence has been quite clear in its Motion that it is requesting that the outstanding witnesses be called in the next trial session, the dates of which have already been fixed by the judicial calendar.<sup>6</sup> This is not delaying proceedings indefinitely.
7. Paragraph 5(b) sets out the Prosecution's conception of the due diligence requirements on the part of the Defence. The Prosecution states that due diligence includes ensuring witnesses and documents are ready for trial. The Defence submits that the concept of due diligence is not related to the procedural exercise of ensuring that each witness on the list is available to testify immediately after the previous witness. Rather due diligence requires that the Defence makes every effort to ensure that evidence on behalf of its client is presented. Further, the exercise of due diligence includes the appropriate use of all mechanisms of

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<sup>4</sup> For example, at ¶ 5c of the Prosecution Response, the Prosecution sets out 5 factors the Trial Chamber should consider in deciding whether an adjournment should be granted. However, the Response merely asserts these criteria without providing any basis for them and without reference to any sources.

<sup>5</sup> See, for example, Rule 89 (b) of the *Rules of Procedure and Evidence*: "...a Chamber shall apply rules of evidence which will best fair a fair determination of the matter before it and are consonant with the Spirit of the Statute and the general principles of law" and Article 17(2) of the *Statute of the Special Court*: "the accused shall be entitled to a fair and public hearing...".

<sup>6</sup> *Prosecutor v. Norman et al.*, SCSL-2004-14-T-595, Order detailing Judicial Calendar, 11 May 2006.

protection and compulsion available under the Statute and the Rules...to bring evidence on behalf of an accused before the Trial Chamber.<sup>7</sup>

8. This motion is brought in an effort to exercise due diligence. The Defence is making every effort to bring evidence on behalf of the Accused. The Defence has also taken appropriate use of the mechanisms available under the Rules and Statutes<sup>8</sup> and has attempted to keep the Trial Chamber advised of any difficulties and developments as they have arisen.
9. The Defence submits that the Chamber should adopt a liberal, rather than a restricted, approach in considering this Motion and should be slow to rule out any additional evidence which, if not admitted might create doubts as to whether a miscarriage of justice has occurred. Again, the Defence states that in considering this Motion the interests of justice and the rights of the accused to a fair trial prevail.
10. The Prosecution further suggests, at Paragraph 5(d), that where an adjournment is not granted by the Trial Chamber, the Defence could apply to reopen its case. It also states that to be able to reopen its case the Defence would need to satisfy the Trial Chamber that the evidence or the witness was genuinely not available despite the exercise of due diligence. The case law cited by the Prosecution<sup>9</sup> reinforces the view of the Defence that at this stage of the proceedings, the Defence should seek to have all the necessary evidence presented, to avoid the possibility at the appeal stage of an argument based on the unavailability of evidence or non-presentation of evidence at the trial stage. This is in satisfaction of the standard of due diligence.

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<sup>7</sup> *Prosecutor v. Tadic*, IT-94-1-A, Decision on Appellant's Motion for the Extension of a Time Limit and Admission of Additional Evidence, 15 Oct 1998, ¶ 47.

<sup>8</sup> For example, *Prosecutor v. Norman et al.*, SCSL-2004-14-T-523, Norman Motion for Issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, 15 December 2005.

<sup>9</sup> Prosecution Response, footnote 7.

11. Further, the Defence submits that it is making every effort to obtain all necessary to avoid the need to re-open its case at a later stage or that should that need arise, the Defence has satisfied the requirements for re-opening its case<sup>10</sup>.
12. The Prosecution submits that it would not be reasonable to grant the Defence request for a further postponement to call Maj-Gen Abdul One Mohamed in September on the basis that there is no certainty the witness will appear then and that the relevance and importance of the witness has not been explained fully to the Prosecution.<sup>11</sup> The Defence submits that it has complied with the Trial Chamber's order<sup>12</sup> to file detailed summaries and that there is no further need to set out in detail the importance of this witness.
13. To disclose fully the importance of this witness is to disclose a significant aspect of Defence strategy, and no such obligation exists for the Defence.<sup>13</sup> The Defence would again reiterate that it is entitled to resume a purely adversarial role vis-à-vis the Prosecution and is under no obligation to assist the Prosecution with disclosure beyond that contemplation by the Rules and as ordered by the Court.<sup>14</sup>
14. Further, accordingly to all available information the witness will be sufficiently healthy to appear and he has repeatedly stated that he will make every effort to attend. Of course, it is beyond the ability of the Defence to provide guarantees as to the condition of health of the witness nor can the witness himself state with any certainty that he will be healthy enough to appear. However, the mere possibility

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<sup>10</sup> See, for example, *Prosecutor v. Hadzihasanovic*, IT-01-47-T, Decision on the Prosecution's Application to Re-Open its Case, 1 June 2005 which states "In doing so, it [the Prosecution] recalls that the standard for admitting such evidence is that the material "by the exercise of reasonable diligence could not have been obtained before the close of its case-in-chief." ¶ 10.

<sup>11</sup> Prosecution Response, ¶ 10.

<sup>12</sup> See, *Prosecutor v. Norman et al.*, SCSL-2004-14-T-587, Norman Further Filing Following Consequential Order to the Status Conference of 22 March 2006 and the Status Conference of 5 April 2006, 7 April 2006.

<sup>13</sup> The Defence submits that the same holds true for the Mr Carpenter.

<sup>14</sup> See, for example, defence arguments made in *Prosecutor v. Norman et al.*, SCSL-2004-14-T-482, Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof, 17 November 2005, ¶ 7.

of his inability to attend is not sufficient reason to deny the Defence request to call this witness in September.

15. The Prosecution states that the First Accused has had considerable time to prepare his defence and obtain the necessary evidence.<sup>15</sup> The Defence has consistently stated that the scope of its witness list and the presentation of evidence is dependent on the Trial Chamber's judgment to the "Norman Motion for Issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah"<sup>16</sup> which was filed in December 2005 prior to the start of the First Accused's defence. The judgment has yet to be issued and the uncertainty in whether or not this key witness will be called has resulted in the Defence needing to adjust its witness list and defence strategy throughout this trial session. The Defence submits that given these circumstances, it is reasonable to grant the Defence a postponement of its case.
16. In reply to the Fofana Response, the Defence recognizes the importance of disclosing the names of the two proposed additional witnesses as soon as possible. Therefore, if the relief requested at paragraph 1(b) of the Motion is granted, the Defence will disclose those names as soon as the decision is taken to call them, or within the time frame set out by order of the Trial Chamber.

## CONCLUSION

17. The Defence submits that it has exercised due diligence in ensuring that all evidence on behalf of the first Accused is presented to the Court. Accordingly, its Motion should be granted.

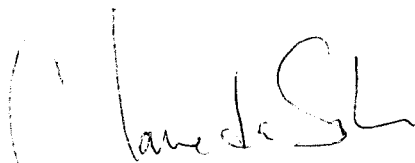
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<sup>15</sup> Response, ¶ 6.

<sup>16</sup> Ibid. Note 8.

Filed in Freetown,

12 June 2006

A handwritten signature in black ink, appearing to read "Bu-Buakei Jabbi". The signature is written in a cursive style with a large initial "B" and "J".

for Dr. Bu-Buakei Jabbi

## Index of Authorities

### A. Orders, Decisions and Judgments

1. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-615, Prosecution Response to 'Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session' 9 June 2006.
2. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-610, Fofana Response to 'Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session' 7 June 2006.
3. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-608, 6 June 2006 'Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session' 6 June 2006.
4. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-595, Order detailing Judicial Calendar, 11 May 2006.
5. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-523, Norman Motion for Issuance of a *Subpoena Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, 15 December 2005.
6. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-587, Norman Further Filing Following Consequential Order to the Status Conference of 22 March 2006 and the Status Conference of 5 April 2006, 7 April 2006.
7. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-482, Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof, 17 November 2005.

### ICTY

1. *Prosecutor v. Tadic*, IT-94-1-A, Decision on Appellant's Motion for the Extension of a Time Limit and Admission of Additional Evidence, App. Chamber, 15 October 1998. [<http://www.un.org/icty/tadic/appeal/decision-e/81015EV36286.htm>]
2. *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on the Prosecution's Application to Re-Open its Case, 1 June 2005, T. Ch. II, 1 June 2005 [<http://www.un.org/icty/hadzihas/trialc/decision-e/050601.htm>]

### B. Other

1. Special Court for Sierra Leone, Rules of Procedure and Evidence: Rule 89 (b)
2. Statute of the Special Court for Sierra Leone: Article 17(2)