

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;

SEIZED OF the "Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session", filed by Court Appointed Counsel for the First Accused ("Counsel for Norman") on the 7th of June 2006 ("Motion");

NOTING The Chamber's "Order for Expedited Filing", delivered on the 7th of June 2006;

NOTING the "Fofana Response to Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session", filed by Court Appointed Counsel for the Second Accused on the 7th of June 2006 ("Fofana Response");

NOTING the "Report About Prospective Defence Witness Major General Abdu-One Mohammed¹ of Nigeria", filed by Court Appointed Counsel for the First Accused on the 8th of June 2006 ("Norman Report on Witness Abdul One Mohammed");

NOTING the "Prosecution Response to Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session", filed by the Prosecution on the 9th of June 2006 ("Prosecution Response");

NOTING the "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'", filed Court Appointed Counsel for the First Accused on the 12th of June 2006 ("Reply");

NOTING the "Urgent Fofana Submissions with Respect to Common Witness Abdul-One Mohammed", filed confidentially by Court Appointed Counsel for the Second Accused on the 2nd of June 2006 ("Fofana Report on Witness Abdul One Mohammed");

PURSUANT to Rules 26bis, 54, 73ter(E), 82(A), 85(A), 86(A), 89(B), 92bis of the Rules of Procedure and Evidence of the Special Court (the "Rules"),

HEREBY ISSUES THE FOLLOWING DECISION:

I. PARTIES' SUBMISSIONS

1. By this Motion Counsel for Norman request The Chamber to grant the following relief, which they deem to be appropriate and necessary for the Defence of the First Accused:

¹ [sic!] the name of the witness is spelled differently in various filings: "Major-General Abdul One Mohammed" in the Motion, "Major General Abdu-One Mohammed" in the Norman Report on Witness Abdul One Mohammed and in the witness list of the First Accused of the 7th of April 2006 and "Abdul-One Mohammed" in the Fofana Report on Witness Abdul One Mohammed.

14th of June 2006

a) "to defer the calling of further witnesses in his defence to the September-December 2006 Trial Session, especially witnesses Nos. 1, 21 and 26", on the "core" witness list, filed on the 7th of April 2006,² namely H.E. President Alhaji Dr. Ahmad Tejan Kabbah ("President Kabbah), Major-General Abdul One Mohammed and Mr. J.A. Carpenter, and to file their identifying information and detailed summaries not later than 14 days prior to each of these witnesses giving their testimony;

b) "to call two more witnesses in the said next trial session, one in respect of the so-called Moyamba Crime Base and another in respect of the activities in exile of [President Kabbah] concerning the conduct and control of Kamajors and ECOMOG between May 1997 and March 1998", either from the "core" or "back-up" witness list of the 7th of April, 2006 or from "elsewhere outside of them, if need be" and to file their identifying information and detailed summaries not later than 21 days following the granting of this Motion;

c) "to file any and all Rule 92bis information or evidence in respect of his case not later than 21 days after his cross-examination, if any, of all witnesses to be called on behalf of the other co-accused persons herein";

d) "to close his case after presentation of all the evidence in his defence, including any cross-examination on his behalf of any witnesses to be called on behalf of the other co-accused persons herein, any rejoinder evidence by or in respect of all co-accused persons herein, and any evidence ordered by the Court itself".³

2. The Prosecution oppose the Motion in its entirety but note that the position regarding witness President Kabbah will be determined by The Chamber.⁴

II. APPLICABLE LAW

3. The relevant provisions applicable to the Motion are those contained in Article 17(4) and Rules 26bis, 54, 73ter(E), 82(A), 85(A), 86(A)(B), 89(B), 92bis of the Rules, which provide as follows:

Article 17: Rights of the accused

[...]

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

[...]

b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

c. To be tried without undue delay;

[...]

² SCSL-04-14-587, "Norman Further Filing Following Consequential Order to the Status Conference of 22 March 2006 and the Status Conference of 5 April 2006".

³ Motion, paras 1-2.

⁴ Prosecution Response, para. 4.

Rule 26bis: The Chambers

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Rule 54: General Provision

At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 73ter: Pre-Defence Conference

[...] (E) After the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

Rule 82: Joint and Separate Trials

(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately. [...]

Rule 85: Presentation of Evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
- (iv) Evidence ordered by the Trial Chamber.

[...]

Rule 86: Closing Arguments

(A) After the presentation of all the evidence, the Prosecutor shall and the defence may present a closing argument.

(B) A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument.

[...]

Rule 89: General Provisions

[...]

(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.

[...]

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.

III. DELIBERATIONS

4. Before The Chamber proceeds to consider the relief sought by Counsel for Norman, The Chamber deems it appropriate to highlight the following relevant procedural developments which have taken place in this trial up to this time and which may have application for the determination of this Motion:

- i) On the 5th of February 2004 the Consolidated Indictment was confirmed.
- ii) On the 2nd of March 2004 the Prosecution filed their pre-trial brief⁵ and on the 31st of May 2004 the Defence for the First Accused filed their pre-trial brief.⁶
- iii) On the 3rd of June 2004 the trial commenced with the opening of the Prosecution case.
- iv) On the 20th of June 2005 The Chamber heard the evidence of the last Prosecution expert witness.⁷
- v) On the 14th of July 2005 the Prosecution closed their case.⁸
- vi) On the 21st of October 2005, following the rendering of the "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98",⁹ The Chamber issued its "Order Concerning the Preparation and Presentation of the Defence case",¹⁰ by which it ordered Court Appointed Counsel for all three Accused persons to file their Defence materials, *inter alia*, witness lists, exhibits lists, witness summaries, as required by Rule 73^{ter} of the Rules, by the 17th of November 2005 and further ordered the Defence case to commence on the 17th of January 2006.

5. Since then The Chamber has issued a number of Orders to, particularly, Court Appointed Counsel for the First Accused noting their non-compliance with some parts of The Chamber's Orders and requesting them to comply with The Chamber's Orders in order to start at the prescribed time and to proceed expeditiously with the presentation of the Defence case for the First Accused. These Orders included: "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", filed on the 28th of November, 2005; "Consequential Order to the Status Conference of 18 January 2006", filed on the 18th of January, 2006; "Order to the First Accused to

⁵ SCSL-04-14-24, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73 bis) of 13 February 2004". On the 22nd of April 2004 the Prosecution filed the "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", SCSL-04-14-63.

⁶ SCSL-04-14-111, "Defence Pre-Trial Brief Pursuant to Revised Order for the Filing of Defence Pre-Trial Briefs (Under Rules 54 and 73 bis) of 22nd March 2004".

⁷ Transcript of the 20th of June 2005, p. 60.

⁸ Transcript of the 14th of July 2005, p. 9; *see also* 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.

⁹ SCSL-04-14-473, the 21st of October 2005.

¹⁰ SCSL-04-14-474.

Re-File Summaries of Witness Testimonies”, filed on the 2nd of March, 2006; “Order for Extension of Time and Consequential Order to the First Accused to Re-File Summaries of Witness Testimonies”, filed on the 3rd of March, 2006; “Consequential Order to the Status Conference of 22 March 2006”, filed on the 23rd of March, 2006. Subsequent to the rendering of the “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98”, The Chamber held seven Status Conferences, namely on the 27th of October 2005, on the 25th of November 2005, on the 11th of January 2006, on the 18th of January 2006, on the 22nd of March 2006, on the 5th of April 2006 and on the 2nd of May 2006.

6. Court Appointed Counsel for the Second and Third Accused made their respective opening statements on the 19th of January 2006 and the Defence case for the First Accused began on the 24th of January 2006 with the commencement of the testimony by the First Accused himself. The sixth trial session finished on the 23rd of February 2006 with eight witnesses having been heard on behalf of the First Accused. During the current seventh trial session, which started on the 3rd of May 2006, up to the time of the filing of this Motion, The Chamber has heard evidence of 20 witnesses, bringing the total number of witnesses heard on behalf of the First Accused to 28 witnesses. The seventh trial session was scheduled to run until the 16th of June 2006.

7. On the 24th of May 2006, The Chamber made its first inquiry about the remaining witnesses for the First Accused and asked Counsel for Norman to report the next day on their decision to call, *inter alia*, witness No 21. Counsel for Norman then reported that they were not able to establish a contact with witness No 21 and that they would send their legal assistant to Nigeria. Since then, The Chamber granted several adjournments to Counsel for Norman, in order to accommodate their efforts of “witness tracing” as no more witnesses were available to be called to testify on behalf of the First Accused. The court had to adjourn earlier on Friday, the 26th of May 2006,¹¹ on Monday, the 29th of May 2006¹² until Wednesday, the 31st of May, 2006 with granting extension of time to Counsel for Norman to prepare the three remaining witnesses and to finalize witness-related issues and on Friday, the 2nd of June 2006¹³ with granting extension of time to Counsel for Norman until Wednesday, the 7th of June 2006. Since the 7th of June 2006 the Court was adjourned throughout the week until the 14th of June 2006. This Motion was brought on the 7th of June 2006.

8. Based on this detailed description of procedural developments in this case, The Chamber concludes that Counsel for Norman have had sufficient time to properly conduct their investigations, collect evidence, prepare their witnesses and obtain their attendance in a timely manner to avoid unnecessary delays and adjournments. The Chamber also recalls here that it has stressed on numerous occasions the importance of providing the order of witnesses to be called to testify at trial¹⁴ and of having at all times at least two stand-by witnesses available.¹⁵

9. Before proceeding with the disposition of the relief sought, The Chamber notes, as a preliminary issue, that in their submissions in respect of the relief sought under (c) and (d), Counsel for Norman seem to confuse the notions of “closing the case” and “presenting closing arguments”, which are clearly

¹¹ Adjournment at 1:33 p.m. as opposed to 5:30 p.m.

¹² Adjournment at 11:39 a.m. as opposed to 5:30 p.m.

¹³ Adjournment at 4:44 p.m. as opposed to 5:30 p.m.

¹⁴ Transcript of the 22nd of February 2006, p. 8; Transcript of the 22nd of March 2006, pp. 36-37; Transcript of the 5th of April 2006, pp. 16-18.

¹⁵ Transcript of the 18th of January 2006, p. 27, Transcript of the 5th of April 2006, p. 41; Transcript of the 2nd of May 2006, p. 22; Transcript of the 26th of May 2006, p. 61.

two distinct notions. The notion of “closing the case”, especially in multi-accused trials, such as this one, simply underlines the order of the presentation of one’s evidence, as prescribed by Rule 85(A) of the Rules. In accordance with such procedure, The Prosecution present their evidence first. Once they close their case, it is then followed by the presentation of the evidence by the First Accused. After that the First Accused closes his case and once it is closed, the Second Accused presents his case. Once the case for the Second Accused is closed, the Third Accused proceeds with presenting and subsequently closing his case. This approach has been consistently applied in the conduct of trials at the other international criminal tribunals.¹⁶ It can be said to be the accepted practice, which we have followed and are still following in this trial.

10. Rule 86(A) of the Rules provides that “[a]fter the presentation of all the evidence, the Prosecutor shall and the defence may present a closing argument”. Therefore, it goes without saying that closing arguments of both the Prosecution and the Defence come at the end of the presentation of all the evidence before The Chamber, including evidence in rebuttal and evidence ordered by The Chamber, if any, before The Chamber’s deliberations, and certainly after the filing of the final trial briefs, as stated in Rule 86(B) of the Rules.

11. If such distinction between these two different notions did not exist, then following the procedure suggested by Counsel for Norman, the Prosecution would have been allowed to continue calling their witnesses until this point in time, as long as they could show that such witnesses are “necessary” and “crucial”, or would have been required to make their closing argument at the time of the closing of their case, which is contrary to Rule 86(A) of the Rules. The Chamber does not dispute that Counsel for Norman may try to elicit evidence in support of the case of the First Accused, should they wish to do so, through cross-examination of witnesses called on behalf of the Second and Third Accused, even though their case may be closed. The case law cited by Counsel for Norman in this respect is not applicable in this case.¹⁷

12. Therefore, The Chamber cannot entertain the Counsel for Norman’s relief sought under (c) and (d) and accordingly denies these requests. Having so stated, Counsel for Norman may, should they still intend to submit any documents pursuant to Rule 92bis of the Rules, to do so as soon as possible, but not later than Friday, the 16th of June 2006. In this respect, The Chamber recalls that it indicated to Counsel for Norman already on the 25th of May 2006, that if Counsel for Norman intend to submit any documents pursuant to Rule 92bis of the Rules, they have to indicate their intention to The Chamber, the latest by the 30th of May 2006,¹⁸ which Counsel for Norman failed to do.¹⁹

¹⁶ See e.g., *Prosecutor v. Hadzihasanovic and Kubura*, ICTY Case No IT-01-47. The trial started on 2 December 2003. The Prosecution presented its case from 3 December 2003 until 23 July 2004. In total, there were 100 Prosecution witnesses, who testified during the case presentation. The Trial Chamber issued its decision on motion for acquittal pursuant to Rule 98bis on 27 September 2004. The Defence case for Enver Hadzihasanovic commenced on 18 October 2004 and finished on 31 March 2005. In total, there were 62 witnesses for the Defence of Enver Hadzihasanovic who gave their testimony before the court. The Defence case for Amir Kubura lasted from 11 April 2005 until 17 May 2005. There were 13 witnesses for the Defence of Amir Kubura who gave their testimony before the court. The Prosecutor presented its closing argument on 11 and 12 July 2005; the Defence for Enver Hadzihasanovic presented its closing argument on 12 and 13 July 2005 and the Defence of Amir Kubura on 14 July 2005.

¹⁷ Motion, para. 11 citing *Prosecutor v. Delalic et al.*, “Decision on the Motion by the Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him”, 1 July 1998, paras 39-42.

¹⁸ Transcript of the 25th of May 2006, pp. 60-61.

13. As to the relief sought under (a) and (b), The Chamber rules as follows. Considering that The Chamber dismissed the application brought by Court Appointed Counsel for the First and Second Accused for the issuance of a subpoena to President Kabbah to testify at trial,²⁰ this part of the relief sought in respect of witness No 1, President Kabbah, is now moot.

14. In respect of witness No 21, Major-General Abdul One Mohammed, The Chamber notes that this witness is willing to testify before this Chamber but, due to his health, is unable to attend the court before September 2006. He would reportedly return to Nigeria from medical treatment in Germany only by the end of July 2006.²¹ The Chamber further notes that this witness is a common witness to the First and Second Accused and therefore also, takes into account the submissions of Court Appointed Counsel for the Second Accused in relation to this witness.²² The Chamber also notes that the Second Accused was ordered to start the presentation of his case in the next trial session, which is scheduled to start on the 13th of September 2006²³ and that such presentation would reportedly take not more than three to four weeks.²⁴ Therefore, in the specific circumstances of this case and in the exercise of its discretion, The Chamber grants the request of Counsel for Norman to allow them to defer the calling of witness No 21, Major-General Abdul One Mohammed, until the 13th of September 2006 as the first witness in the eighth trial session in this case. The expanded and detailed summary of this witness shall be filed with the Court as soon as possible but not later than Friday, the 14th of July 2006.

15. In relation to the Counsel for Norman's request to defer the calling of witness No 26, J.A. Carpenter, Clerk at the Parliament of Sierra Leone, until September-December session, The Chamber finds as follows. The Chamber recalls that on the 6th of April 2006 it granted leave to Counsel for Norman to add this witness on their witness list.²⁵ On the 5th of April 2006, prior to making this decision, The Chamber had made certain inquiries from Counsel for Norman on the relevance and necessity of adding this witness to the witness list. Counsel for Norman had then responded that they were aware of the possibility of submitting the necessary documents which they intended to tender through this witness in lieu of his oral testimony or even as part of the judicial notice and that they would take appropriate steps at the time.²⁶ On the 29th of May 2006, for the first time Counsel for Norman informed the Court that they were to tender the documents in lieu of his oral testimony and were, therefore, considering not calling him.²⁷ Counsel for Norman also assured The Chamber that they would get a positive answer in relation to the availability of these documents within two days, *i.e.* the 31st of May 2006,²⁸ and they failed to provide such an answer. Therefore, The Chamber considers that Counsel for Norman have not provided any reasonable explanation as to why they failed to obtain either the timely attendance of J.A. Carpenter as a witness in this trial or the documents to be tendered

¹⁹ Note also that at the Pre-Defence Conference, The Chamber indicated to all Court Appointed Counsel the availability of Rule 92bis procedure as a possible mechanism for reducing the number of *viva voce* witnesses, Transcript of the 11th of January 2006, p. 33.

²⁰ SCSL-04-14-617, "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", the 13th of June 2006.

²¹ Norman Report on Witness Abdul One Mohammed, Annex A, para. 3.

²² Fofana Report on Witness Abdul One Mohammed, paras 2, 4.

²³ SCSL-04-14-595, "Order Detailing Judicial Calendar", the 11th of May 2006.

²⁴ Transcript of the 25th of May 2006, p. 62.

²⁵ SCSL-04-14-585, "Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists", the 6th of April 2006.

²⁶ Transcript of the 5th of April 2006, pp. 21-23.

²⁷ Transcript of the 29th of May 2006, pp. 16-17.

²⁸ *Ibid.*, p. 16, lines 25-27.

through him or under Rule 92bis of the Rules and therefore denies the Counsel for Norman's request to defer the calling of this witness to the September-December trial session.

16. Finally, The Chamber cannot entertain the Counsel for Norman's relief requested under (b), as it is not properly before The Chamber. If the Counsel for Norman's request to "call two more witnesses" in the September-December trial session indeed means substituting two "core" witnesses with two "back-up" witnesses, then Counsel for Norman are perfectly aware of the procedure to follow in such instances. The Chamber ruled on numerous occasions that a "back-up" witness "is designed to make up lists for the deficiency in the 'core' list", and that Counsel may, therefore, call a witness from the "back-up" list only "if some of the 'core' witnesses are not available to testify".²⁹ Such requests must be specific and reasons for witnesses' unavailability on the "core" list must be clearly articulated. Only then The Chamber may exercise its discretion to grant such requests. Should such a request be intended to add two witnesses on the "core" list, such request must be made pursuant to Rule 73ter(E) of the Rules and could be granted "in the interests of justice" and "only upon good cause being shown".³⁰ Considering the above stated comments, The Chamber concludes that the relief sought by Counsel for Norman under (b) is not properly before The Chamber and cannot, therefore, be entertained.

IV. DISPOSITION

17. For the reasons stated above, The Chamber **RULES** as follows:

a) In respect of the relief sought by Counsel for Norman under (a):

(i) The Chamber finds that, considering that the application brought by Court Appointed Counsel for the First and Second Accused for the issuance of a subpoena to President Kabbah to testify at trial has been dismissed, this part of the relief sought in respect of witness No 1 is now moot.

(ii) The Chamber grants the Counsel for Norman's request to defer calling witness No 21, Major-General Abdul One Mohammed, a common witness for the First and Second Accused, until the September-December trial session. The Chamber orders Counsel for Norman to call this witness as the first witness in that session, which is scheduled to start on Wednesday, the 13th of September 2006 at 9:30 a.m. in Courtroom I.

(iv) The Chamber orders Counsel for Norman to file with the Court the expanded and detailed summary of witness Major-General Abdul One Mohammed as soon as possible but not later than Friday, the 14th of July 2006 at 4:00 p.m.

(v) The Chamber denies the Counsel for Norman's request to defer calling of witness No 26, J.A. Carpenter, until the September-December trial session. However, The Chamber orders Counsel for Norman, if they so intend, to call witness J.A. Carpenter to give a *viva voce* evidence during this week bearing in mind that he should conclude his evidence before the 16th of June 2006; alternatively, Counsel for Norman shall submit documents, which they

²⁹ See, *inter alia*, Transcript of the 11th of January, 2006, pp. 24-25; *supra* note 25.

³⁰ SCSL-04-14-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", the 28th of November 2005; *see also supra* note 25, pp. 3-4.

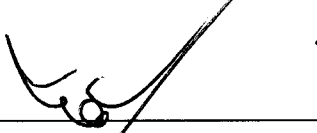
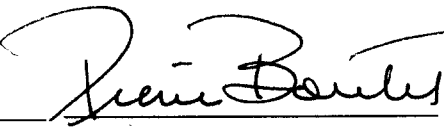
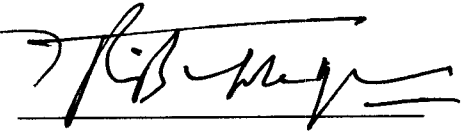
initially intended to tender through witness J.A. Carpenter, pursuant to Rule 92bis of the Rules, whilst ensuring compliance with the time limits prescribed in this Rule, and not later than Friday, the 16th of June 2006 at 4:00 p.m.

b) In respect of the relief sought by Counsel for Norman under (b), the said application is not properly before The Chamber and cannot be entertained.

c) The Chamber denies the relief sought by Counsel for Norman under (c). However, The Chamber orders Counsel for Norman, if they so wish, to submit documents pursuant to Rule 92bis of the Rules, whilst ensuring compliance with the time limits prescribed in this Rule and not later than Friday, the 16th of June 2006 at 4:00 p.m.

d) The Chamber denies the relief sought by Counsel for Norman under (d) and orders 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.

Done in Freetown, Sierra Leone, this 14th day of June 2006.

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet

Hon. Justice Bankole Thompson

Presiding Judge,
Trial Chamber I

[Seal of the Special Court for Sierra Leone]

