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SCSL-04-14-T
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**SPECIAL COURT FOR SIERRA LEONE
Trial Chamber 1**

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

Registrar: Mr. Lovemore G. Munlo, SC

Date: 10th July, 2006

PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

Public

**NORMAN REPLY TO PROSECUTION RESPONSE TO APPLICATION BY
FIRST ACCUSED FOR LEAVE TO APPEAL AGAINST THE DECISION ON
EXTENSION OF TIME TO SUBMIT DOCUMENTS.**

Office of the Prosecutor:

Mr Christopher Staker
James Johnson
Joseph Kamara

For Samuel Hinga Norman

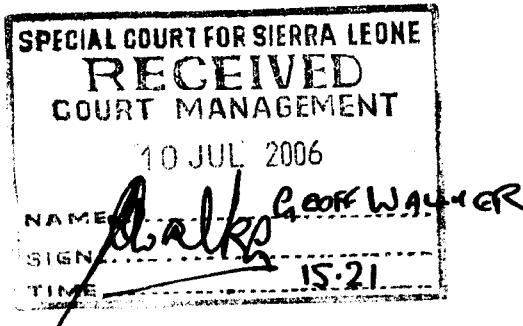
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For Moinina Fofana:

Michiel Pestman
Arrow J. Bockarie
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For Allieu Kondewa:

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I. INTRODUCTION.

1. Counsel for Norman hereby reply (“**the Reply**”) to the Prosecution Response to Application by the First Accused for Leave to Appeal Against the Decision on Extension of Time to Submit Documents (“**the Prosecution Response**”) ¹ filed on 7 July 2006, the said “**Leave Application**”² having been filed on 3 July 2006 for leave to appeal against Trial Chamber I’s (“**the Chamber’s**”) *interlocutory* Decision on First Accused Urgent Motion for Extension of Time to Submit Documents Pursuant to Rule 96 *bis* (“**the Decision on Extension of Time**”) ³ as filed on 29 June 2006. The previous applications and the decision that had set the foregoing processes in motion were, respectively, the Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session (“**the Deferment Motion**”) ⁴ filed on 6 June 2006, the Chamber’s Decision thereon (“**the Deferment Decision**”) ⁵ filed on 15 June 2006 and the First Accused’s **Motion for Extension of Compliance Time**⁶ (as filed on 15 June 2006) to comply with an order in the said Deferment Decision in respect of the submission of documents pursuant to Rule 92 *bis*.
2. It would be helpful here to begin by setting out in pertinent parts the applications made in the said Deferment Motion and the orders made thereon or related thereto by the Chamber in its Deferment Decision.

(1) Applications in Deferment Motion.

The pertinent orders sought by the First Accused were as follows:

“(a). to defer the calling of (witness J.A. Carpenter) in his defence to the September-December 2006 Trial Session ...

(...)

“(c). to file any and all Rule 92 *bis* information or evidence in respect of his case not later than 21 days after his cross-examination, if

¹ SCSL-04-14-T-652.

² SCSL-04-14-T-646.

³ SCSL-04-14-T-642.

⁴ SCSL-04-14-T-608.

⁵ SCSL-04-14-T-619, “Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session”, 14 June 2006.

⁶ Ibid. 622, “First Accused Urgent Motion for Extension of Time to Comply with Order Contained in Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session”, 15 June 2006.

any, of all witnesses to be called on behalf of the other co-accused persons herein.”⁷

(2) Orders Granted or Made in the Deferment Decision.

The pertinent orders granted or made in the Deferment Decision were:

“(a).

(v). Counsel for Norman shall submit documents, which they initially intended to tender through witness J.A. Carpenter, pursuant to Rule 92 bis 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.

“(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 92 bis 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 orders that the Defence case for the First Accused be closed in September 2006.”⁸ (Emphases added)

The orders in subparagraphs (a) (v) and (c) above may, for analytical purposes, be dubbed the specific and the general respectively. The “imposing” of the 24-hour “deadline”⁹ in paragraph 17 (a) (v) and (c) of the Deferment Decision, as filed and electronically served on the First Accused on 15 June 2006 and as selectively set out above in subparagraph 2 (2) hereof, were the compliance times that Counsel for Norman sought to have extended to at least 14 July 2006 by the Motion for Extension of Compliance Time. And it is The Chamber’s dismissal of that motion by its *interlocutory* Decision on Extension of Time that Counsel for Norman are seeking leave to appeal in the current

⁷ SCSL-04-14-T- 608 at paras. 1 (a) & (c) and 14 (a) & (c).

⁸ SCSL-04-14-T-619 at para. 17.

⁹ SCSL-04-14-T-642, “Decision on First Accused Urgent Motion for Extension of Time to Submit Documents Pursuant to Rule 92 Bis”, 29 June 2006, at preambular para. 12, where The Chamber refers to its “imposing the deadline of the 16th of June 2006 for Counsel for Norman to submit the documents pursuant to Rule 92 bis” (Emphasis added).

proceedings. They accordingly hereby file this Reply to the Prosecution Response to the said Leave Application. The granting of the order in paragraph 17 (d) of the Deferment Decision, as selectively set out in the said subparagraph 2 (2) hereof, is cited here to indicate the extension by the Chamber of the closing of the evidence of the First Accused to some time on or after 13 September 2006 in the Eighth Trial Session, rather than on 16 June 2006 as had earlier been contemplated or expected.

II. SUBMISSIONS.

3. The First Accused reasons for seeking leave, as canvassed generally in paragraphs 6 to 11 inclusive of the Leave Application, are, briefly, as follows:
 - (i). that as Rule 92 *bis* contains no express specific time stipulation as to when applications thereunder may be made, other than the notice and objection stipulations therein, the imposition of such a specified time limit or deadline therefor by The Chamber is entirely unwarranted and at the same time a violation of the First Accused's fair trial rights under the substantive statutory provisions in Article 17 (4) (b) and (e) of the Statute annexed to the Agreement of the Special Court for Sierra Leone, and that to that extent the said deadline is both an "exceptional circumstance" and an "irreparable prejudice" to the First Accused;
 - (ii). that the Chamber's interpretations and/or applications of Rules 26 *bis* and 90 (F) and Article 17 (4) (c) of the Statute to the Special Court Agreement in seeking to reinforce or endorse the imposition of the aforesaid time limit or deadline is clearly erroneous and tantamount to a denial of both the "minimum guarantees, in full equality" to which the Accused person is "entitled" under Article 17 (4) of the said Statute and its own obligation under Rule 26 *bis* to "ensure that a trial is fair ... (and) conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused", and that in that respect and to that extent the said interpretations constitute at one and the same time both an

“exceptional circumstance” and an “irreparable prejudice” to the First Accused;

- (iii). that the orders being upheld by The Chamber’s Decision on Extension of Time, as are set out above in subparagraph 2 (2) hereof, are in effect oppressive and internally inconsistent or self-contradictory even as they deprive the First Accused of the right and the opportunity to present evidence in his defence through the Rule 92 *bis* procedure, thereby obstructing or undermining one of the main values or principles of international criminal adjudication, to wit, in the words of Justice Thompson, “the overriding need to ascertain in matters of such grave humanitarian law dimensions the absolute truth,”¹⁰ and that in that way and to that extent the said orders constitute an “exceptional circumstance” and an “irreparable prejudice” to the First Accused;
- (iv) that the whole issue of the timing, and indeed the possible frequency or potential recurrence, of applications by any one party under Rule 92 *bis* raises crucial and important questions of fact, law, procedure and evidence, with scarce jurisprudence thereon in the international criminal tribunals and certainly of a novel analytical nature in the Special Court for Sierra Leone, and therefore constitutes an “exceptional circumstance” within Rule 73(B) which would be in the interest of justice for the Appeals Chamber to consider and determine.

4. The most relevant part of the Prosecution Response to the Leave Application is in paragraph 9 thereof, which reads thus:

“The Prosecution submits that notwithstanding the Rules being silent as to the timing of an application under Rule 92 *bis*, the Chamber is empowered under Rule 54 to issue such orders, summonses, subpoenas, warrants and transit orders as may be necessary for the purposes of an investigation, preparation or conduct of the trial. Also under Rule 89 the Chamber is to apply rules of evidence which will best favour fair determination of the

¹⁰ SCSL-04-14-T- 617, “Dissenting Opinion of Hon. Justice Bankole Thompson ...”, 13 June 2006, para. 22 at p.9

matter before it and are consonant with the Statute and general principles of law.”

The Chamber, on its own part, considered that Rule 26 *bis* is an adequate answer to the timing situation or the apparent lack thereof in Rule 92 *bis*. As it puts it in preambular paragraph 11 of the Decision on Extension of Time,

“**NOTING** that, although Rule 92 *bis* of the Rules does not explicitly provide for a time limit to file the documents intended to be admitted through this rule, The Chamber has power to impose such time restrictions bearing in mind the provision of Rule 26 *bis* that a trial must be fair and expeditious and (in) the overall interests of justice”.

4. In reply, it should be noted that, strictly speaking and in accordance with the golden rule of interpretation, it is not true that Rule 92 *bis* (C) (to be precise) has no stipulation at all as to when applications may be made by a party under the Rule. Rather, Counsel for Norman submit, the truth is that by expressly providing only for a notice period of 10 days for the applicant and 5 days for any objections thereto, Rule 92 *bis* (C) indirectly and impliedly stipulates that the timing for making any application thereunder is necessarily subject primarily to the notice and objection time scales expressly stipulated therein and that *a fortiori* such applications may be made at any time and for any number of times by a party so long as there is enough time before the closing of that party’s evidence to accommodate the combined notice and objection time scales. Such a reading is entirely consistent and compatible with both sets of the fair trial rights of an accused person “to have adequate time and facilities for the preparation of his or her defence” and “to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her” that are enshrined in the substantive provisions in Article 17 (4) (b) and (c) of the Statute of the Special Court. Hence the submissions that the contrary interpretation underpinning the impugned orders in the Deferment Decision and their endorsement in the Decision on Extension of Time are violations of the fair trial rights of the First Accused and also thereby constitute “exceptional circumstances” for the purposes of the Leave Application.
5. Counsel for Norman also submit that, even without awareness of the implied stipulation as to the timing for making application under Rule 92 *bis*, each of

the specific and general orders in subparagraphs (a) (v) and (c) respectively above is radically inconsistent and self-contradictory in itself and thus impracticable or impossible to implement or comply with correctly. For if indeed one were to “ensure compliance with” either the notice or objection time scale expressly prescribed in the Rule, then it can only be within 10 and 15 days respectively with effect from 15 June 2006 when the said orders were filed and served rather than within the 1 day or 24 hours indicated by “not later than Friday, the 16th of June 2006 at 4:00 p.m.” This is both an impossibility and an absurdity that renders the said orders and their endorsement in the Decision on Extension of Time an “exceptional circumstance” warranting leave to appeal against the latter Decision.

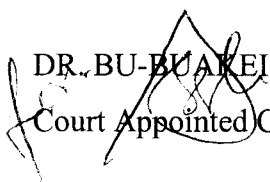
6. It is also submitted that, if the flexible interpretation of the timing for applications under Rule 92 *bis* (C) proffered in paragraph 4 above is plausible, then both the specific and general orders in subparagraphs (a) (v) and (c) above are undeniable violations of the fair trial rights of the First Accused as “guaranteed” under Article 17 (4) (b) and (e) of the Statute of the Special Court, which again renders them as both “exceptional circumstances” and an “irreparable prejudice” to the First Accused.
7. Counsel submit furthermore that, in view of the above proffered flexible interpretation of the timing for applications under Rule 92 *bis* (C), by which a non-rigid stipulation as to that timing is realised as impliedly made, the impugned orders were and are accordingly premature and even uncalled for and irrelevant for the purpose of being in the service of expeditiousness or the avoidance of “undue delay” in terms of either Article 17 (4) (c) of the Statute of the Special Court or of Rule 26 *bis*, or in that of either “effectiveness for the ascertainment of the truth” or “avoiding the wasting of time” in terms of Rule 90 (F), or for any evidentiary stipulation in that regard under Rule 89 (B) (“General Provisions”) that is “not otherwise provided for” under “Section 3: Rules of Evidence” of the Rules of Evidence and Procedure; and that this wide range of irrelevance for the said orders made by The Chamber is tantamount to an unwarranted and illegitimate amendment of Rule 92 *bis* in breach of the amendment provisions in Rule 6 and especially of even the permissive Rule 6 (C) thereof.

III. CONCLUSION.

8. In view of the foregoing analysis and submissions, Counsel for Norman submit that the Leave Application has met and satisfied the threshold and criteria for seeking leave to appeal under Rule 73 (B); and that The Chamber, on considering the said analysis and submissions, will be satisfied to grant the said leave as it did in the recent Subpoena Decision with the following words:

“The Chamber considers that the novel nature of this issue and the likelihood that it will be raised again in this case and in other cases before the Special Court, together with the diverse legal perspectives from which it can be viewed ... amount to exceptional circumstances. In addition, it would be in the interests of justice to have this matter determined by the Appeals Chamber.”¹¹

Since almost all the instances of “exceptional circumstances” identified above have also been shown to be instances of “irreparable prejudice”, The Chamber is accordingly hereby urged to grant the leave to appeal being sought herein not only in the overall interests of justice but also in that of a well-developed jurisprudence for the Special Court for Sierra Leone, i.e. the “principle recognizing the need for the constructive development of one’s own jurisprudence.”¹²


DR. BU-BUAREI JABBI
Court Appointed Counsel for Norman.

¹¹ SCSL-04-14-T- 643, “Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber’s Decision on Their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone”, 29 June 2006, para. 12.

¹² SCSL-04-14-T- 617, “Dissenting Opinion of Hon. Justice Bankole Thompson”, 13 June 2006, para. 12 at p.5

SPECIAL COURT LIST OF AUTHORITIES

1. SCSL-04-14-T-652, Prosecution Response to Application by the First Accused for Leave to Appeal Against the Decision for Extension of Time to submit Documents.
2. SCSL-04-14-T-646, Application by First Accused for Leave to File interlocutory Appeal Against the Decision on First Urgent Motion for Extension of Time to submit Documents pursuant to Rule 92bis
3. SCSL-04-14-T-642, Decision on First Accused Urgent for Extension of Time to submit Documents Pursuant to Rule 92bis
4. SCSL-04-14-T-608, Norman Motion to Defer Further Evidence and closing of His Case to September-December 2006 Trial Session
5. SCSL-04-14-T-619, Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Session, 14 June 2006.
6. SCSL-04-14-T-622, First Accused Urgent Motion for Extension of Time to Comply with Order Contained in “Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session”.
7. SCSL-04-14-T-617, Dissenting Opinion of Hon. Justice Bankole Thompson.
8. SCSL-04-14-T-643; Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber’s Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, dated 29 June 2006.