

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

HAVING noted the absence of the First Accused, Sam Hinga Norman, the Second Accused, Moinina Fofana, and the Third Accused during the trial proceedings;

MINDFUL of the provisions of Rule 60 of the Rules of Procedure and Evidence of the Special Court ("Rules");

MINDFUL of the *Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court* delivered by the Trial Chamber on the 8th of June, 2004;

MINDFUL of the *Consequential Order on Assignment and Role of Standby Counsel*, delivered by the Trial Chamber on the 14th of June, 2004;

MINDFUL of the *Order for Assignment of Standby Counsel for Samuel Hinga Norman*, issued by the Registrar on the 15th of June, 2004;

ISSUES THE FOLLOWING RULING:

I. BACKGROUND

1. At the end of the morning session of trial on the 20th of September, 2004, the First Accused informed the Court that he would not attend trial in the future until the Trial Chamber made a determination on the issue he had raised, namely, that protective measures for Witness TF2-033 should be lifted given the witness' response to him during cross-examination that he did not fear his identity being made known to the public.

2. When the Court sitting resumed on the 20th of September, 2004 at 3.30 p.m. to continue the trial of the CDF case, none of the Accused were present in Court. Defence Counsel expressed their ignorance of the facts leading to the absence of the Accused and asked the Trial Chamber for an adjournment to confer with their clients. The Prosecution, quoting Rule 60 of the Rules that deals with trial in the absence of the Accused, did, however, not oppose an adjournment for a clarification of the reasons for the absence of the Accused. Consequently, the Trial Chamber ordered an adjournment for Counsel to liaise with their clients.

3. The trial session resumed at 5.10 p.m. on the 20th of September, 2004. The First and Second Accused were still absent from Court, the Third Accused appeared before the Court and explained that his absence was due to health problems and asked the Court's indulgence to be allowed to leave the Court to go and rest. This request was granted.

4. The Head of the Detention Facility, Mr. Barry Wallace, appeared in court and testified that the First and Second Accused were physically able to attend. However, pursuant to his testimony, the First Accused decided not to attend, because the witnesses did not testify in public and the Second Accused agrees with this position.

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2.

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5. During the trial session resuming at 5.10 p.m. on the 20th of September, 2004, one of the Stand-by Counsel for the First Accused, Mr. John Wesley Hall, Jr., presented a letter to the Court in which the First Accused expressed his decision not to appear for his trial until certain conditions he outlined were fulfilled. These conditions included the following:

- a.) The Joinder Indictment SERVED on the Accused pursuant to Rule 52 of the Rules.
- b.) Arraigned the Accused to enter a Plea, pursuant to Rule 61 (iii) of the Rules of Procedure.
- c.) Remove the Protective ORDER so that witnesses who are not sexually assaulted could TESTIFY in FULL VIEW OF THE PUBLIC in order to discourage the giving of lie TESTIMONIES that the Prosecution has been paying Prosecution Witnesses to give under hidden identity.
- d.) That the Single Indictment AGAINST me alone, Dated 7th March 2003 be quashed, so that it could not be used as a fall-back tactic in an eventuality by the Prosecutor."

This letter was admitted in evidence and marked as Exhibit 12. In Exhibit 12, the first Accused also instructed his Stand-by Counsel not to appear in Court on his behalf in his absence and stated that Counsel do not have his authority to participate in any ongoing proceedings in his absence until the legal pre-conditions he had stipulated are fully met.

6. On the 20th of September, 2004, Mr. Arrow Bockarie, one of the Counsel for the Second Accused Moinina Fofana, informed the Court that his client was apprehensive about witnesses testifying with their identity not disclosed to the public and about the fact that considerable sums of monies were paid to them. He stated that the Second Accused would not appear until these issues were addressed. The Second Accused failed to attend court in the afternoon of the 20th of September, 2004.

7. On the 21st of September, 2004, Mr. Arrow Bockarie informed the Court that the Second Accused had reconsidered his position and stated that he was willing to attend court, but that due to health reasons he could not attend court that day. This information was supported by a report from Doctor Harding, who examined the Accused's health.

8. On the 21st of September, 2004, the Trial Chamber ruled that Standby Counsel for the First Accused would represent him as Court Appointed Counsel. The Trial Chamber further appointed Court Appointed Counsel for the Second Accused.

9. On the 22nd of September, 2004, the Second Accused again appeared in Court and indicated that it was his intention to attend court in the future and to be represented by his Assigned Counsel. The Trial Chamber then ruled that Counsel for the Second Accused would represent him as his selected Counsel. On the 23rd of September, 2004, the Second Accused failed to attend court. Mr. Arrow Bockarie informed the Court that he had spoken to the Accused and he had expressed his intention not to attend court. Dr Harding appeared before the Court and stated that he had examined the Accused that morning and that he was physically and mentally healthy and could attend trial. Mr. Wallace, the Chief of Detention also appeared before the Court and stated that the Accused had expressed his wish not to attend Court. The Court then ruled that Counsel for the Second Accused would be Court Appointed Counsel.

10. The Trial Chamber consequently orally ordered the proceedings to resume and to proceed under Rule 60 of the Rules and stated that a detailed decision would follow in writing.

11. On the 27th of September, 2004, the Third Accused failed to attend Court without a reason, and the Trial Chamber ruled that Assigned Counsel for the Third Accused would act as Court Appointed Counsel.

II. THE APPLICABLE LAW

12. Article 17(4)(d) of the Statute provides that:

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:

To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it (emphasis added).

13. Rule 60 of the Rules, however, provides that a trial may be conducted in the absence of the Accused. In this event, Counsel appointed to represent him or her, in two circumstances, namely, where after having made his or her initial appearance and being afforded the right to appear at his own trial, he or she refuses to do so, or where he or she is at large and refuses to appear in court. Rule 60 states that:

- (A) An accused may not be tried in his absence, unless:
 - (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so; or
 - (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.
- (B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

14. In its recent *Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, rendered on the 13th of July, 2004, the Trial Chamber held that a trial may proceed in the absence of the Accused person in certain circumstances, and in this regard, had this to say:

“The Chamber therefore finds that though in essence trial in the absence of an accused person is an extraordinary mode of trial, yet it is clearly permissible and lawful in very limited circumstances. The Chamber opines that it is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification.¹”

15. Reviewing the principles adopted in national law systems on this issue, The Chamber further stated:

¹ Para. 8.

“Consistent with this reasoning, the Chamber also notes that in most national law systems, and especially in the common law jurisdiction, the general rule is that an accused person should be tried in his or her presence, but that exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances. For example, in Canada it is open to a court to continue to try an accused person in his or her absence where he or she was present at the start of the trial, a situation that is on all fours with the instant situation with which this Chamber is confronted as a result of the Third Accused’s refusal to appear for his trial. The Chamber further notes that in civil law systems, the practice is widespread for accused persons to be tried in their absence subject to certain procedural and due process safeguards.”²

16. Explaining the international approach to trial in absentia, the Chamber had this to say:

“From the Chamber’s perspective, it is particularly noteworthy that the international law practice is on two levels: (i) the practice at the European Court of Human Rights (“ECHR”) level and (ii) the practice at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) level. At the ECHR level, there is nothing in the jurisprudence of that Court to indicate that Articles 6(1) and 6(3)(c) of the European Convention on Human Rights providing basic legal guarantees for a person charged with crime have been construed in a manner suggesting the impermissibility of trial in absentia.³ At the level of the ICTY and ICTR, the Chamber finds that the statutory provisions of these tribunals on the subject are akin to those of this Court, and that in so far as ICTY is concerned, to date no trial in the absence of an accused has been conducted. However, the ICTR has conducted one trial in the absence of an accused in the case of *Prosecutor v. Jean Bosco Barayagizwa*.⁴ In that case, the Accused boycotted his trial on the grounds that he “challenged the ability of the ICTR to render and [sic] independent and impartial justice due, notably, to the fact that it is so dependent on the dictatorial anti-hutu regime of Kigali.”⁵

It is abundantly clear to the Chamber that the jurisprudence, evolving or past, points to the legal sustainability of trial in absentia in certain circumstances.”⁶

17. The Chamber, accordingly, emphasizes that it is settled law, nationally and internationally, that while an accused person has the right to be tried in his presence, there are circumstances under which a trial in the absence of the accused can be permitted. While due consideration must be given to ensure that all rights to a fair trial are respected, an Accused person charged with serious crimes who refuses to appear in court should not be permitted to obstruct the judicial machinery by preventing the commencement or a continuation of trials by deliberately being absent, after his initial appearance, or refusing to appear in Court after he has been afforded the right to do so, and particularly in circumstances as in this case, where no just cause, such as illness, has been advanced to justify the absence.

II. THE MERITS OF THE APPLICATION

18. In light of this background and the evidence presented, the Trial Chamber concludes that the First Accused has exhibited disruptive behaviour in court proceedings on a number of occasions, as can be inferred from his submission of a letter to the Trial Chamber on the 7th of September, 2004,

² Para. 9.

³ See *Ali Maleki v. Italy*, Communication No 699/1996 U.N. doc CCPR/C/667/669/1996 (27 July 1979) of the UN Human Rights Committee and *F. C. B. v. Italy*, European Court of Human Rights, 40/1990/231/297 (26th June 1991).

⁴ Decision on Defence Counsel Motion to Withdraw, Case No ICTR-97-19-T, 2nd November 2000.

⁵ Para. 10.

⁶ Para. 10.

where he threatened to be absent from court until a conclusion was reached on the arguments he raised in this letter. Further, in Court on the 20th of September, 2004, he submitted a letter addressed to the Principal Defender and copied to the Trial Chamber Judges, where he affirmed that until his listed conditions were met, he would not appear before the Trial Chamber. The First Accused in execution of his threat, failed to appear in Court in the afternoon of 20th of September, 2004 and has not attended Court since then.

19. Having received the First Accused's letter dated 7th of September, 2004, the Trial Chamber, on the 10th of September, 2004, informed the Accused that the established practice in this Court and in international law in respect of the issues raised by him is for arguments to be submitted by parties by oral or written motion to the Trial Chamber, after which the Trial Chamber will consider such submissions and issue a ruling thereafter. The Accused agreed to file the submissions contained in his letter of the 7th of September, 2004 in the form of a Motion before the Trial Chamber. On the 20th of September, 2004, no such filings had been made. Instead, the Accused, on this day in Court, presented another letter of "Judicial Protest". The Trial Chamber notes that on the 21st of September, 2004, a Motion for Service and Arraignment on second Indictment was filed by the Accused and Ms. Quincy Whitaker, his Standby Counsel.

20. The Trial Chamber wishes to emphasize that in the interests of justice, trial proceedings will not be interrupted by Accused persons who refuse to attend Court while submissions are being duly considered by the Trial Chamber, in accordance with legal procedures and due process. There is no authority for the position taken by the Accused and no lawful excuse for his deliberate absence from Court.

21. This Trial Chamber has granted the Accused a qualified right to self-representation. In its Decision of the 8th of June, 2004, it accorded the Accused the right of self-representation, with the additional assistance of Standby Counsel.⁷ Several adjournments were taken during the first session of the CDF trial to allow the Accused to participate in the selection of such Standby Counsel to assist him in his self-representation. Four Standby Counsel were duly assigned to him by the Registrar,⁸ and have assisted him so far in the proceedings. Additional resources and facilities have also been provided to him to further assist him in conducting his defence.⁹

22. It is our considered judgment, therefore, that in the absence of any lawful excuse, and we find that there exists no such excuse, it would not be in the interests of justice to allow the Accused's deliberate absence from the courtroom to interrupt the trial. The Trial Chamber considers that any deliberate absence from the trial proceedings will certainly undermine the integrity of the trial and will not be in the interests of justice.

23. The Trial Chamber considers that the exercise of the right to self-representation should not become an obstacle to the achievement of a fair trial. As stated by the Trial Chamber of the ICTY in the Milosevic¹⁰ case, "the right to represent oneself must therefore yield when it is necessary to ensure that the trial is fair". The Trial Chamber therefore concludes that on account of the Accused's deliberate absence from Court, his right to self-representation is revoked, and in accordance with

⁷ Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court" delivered by the Trial Chamber on 8 June 2004; See also Consequential Order on Assignment and Role of Standby Counsel, 14th June 2004.

⁸ Order for Assignment of Standby Counsel for Samuel Hinga Norman, issued by the Registrar, 15th June 2004.

⁹ Decision on Request by Norman for Additional Resources to Prepare his Defence, 23rd June 2004.

¹⁰ *Prosecutor v. Milosevic*, Reasons for Decision on Assignment of Defence Counsel, 22nd September 2004, para. 34.

Rule 60 of the Rules, the CDF trial will be continued in the absence of the First Accused and that he will be represented by Court Appointed Counsel.¹¹

24. The Trial Chamber also holds that the Second Accused and Third Accused have failed to attend court for no lawful reason, and on the basis of Rule 60 of the Rules, and in the interests of justice, the trial will proceed in their absence while ensuring that their interests are properly represented in Court by Court Appointed Counsel.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ORDERS AS FOLLOWS FOR THE FIRST ACCUSED:

REVOKES the First Accused's right to self-representation; and

ORDERS that the trial proceed in the absence of the First Accused pursuant to Rule 60(A)(i) of the Rules; and

APPOINTS the First Accused's Standby Counsel, namely, Dr. Bu-Buakei Jabbi, Mr. John Wesley Hall, Jr, Mr. Tim Owen, Q.C., and Ms. Quincy Whitaker, as Court Appointed Counsel to represent him in his trial proceedings; and

ORDERS that the duty of Court Appointed Counsel will be as set forth in the Consequential Order of the Trial Chamber delivered on 1st of October, 2004; and

ORDERS that the requirement for the resources granted by the Trial Chamber in its *Decision on Request by Sam Hinga Norman for Additional Resources to Prepare His Defence*, delivered on 23rd June 2004, for the purpose of assisting the First Accused to represent his case, that include a desktop computer and printer, and a stationary phone, be reviewed by the Registrar, who shall provide a report to the Chamber, with a view to assist the Chamber in determining whether these measures should be maintained, and that the further requests for additional resources made by the Accused at the Status Conference on 7th September 2004, are thereby dismissed on the basis that the Accused no longer represents himself, which is the basis upon which the resources were ordered;

ORDERS AS FOLLOWS FOR THE SECOND ACCUSED:

APPOINTS the Assigned Counsel for the Second Accused to represent him in the capacity of Court Appointed Counsel; and

ORDERS that the duty of Court Appointed Counsel will be as set forth in the Consequential Order of the Trial Chamber delivered on 1st of October, 2004;

ORDERS AS FOLLOWS FOR THE THIRD ACCUSED:

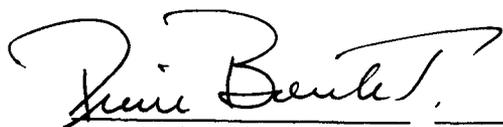
APPOINTS the Assigned Counsel for the Third Accused to represent him in the capacity of Court Appointed Counsel; and

¹¹ Rule 60, Rules of Procedure and Evidence of the Special Court for Sierra Leone.

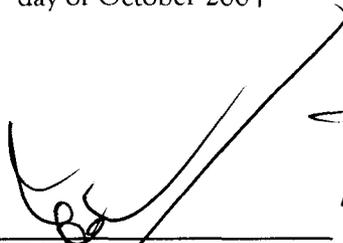
ORDERS that the duty of Court Appointed Counsel will be as set forth in the Consequential Order of the Trial Chamber delivered on 1st of October, 2004; and

ORDERS the Chief of the Detention Facility of the Special Court to maintain on a daily basis a record of the waiver of the Accused, Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, to appear in court, during each trial session of the CDF trial.

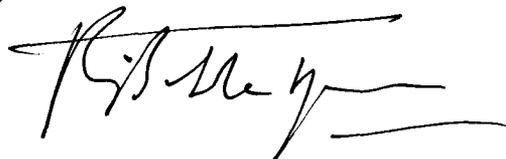
Done in Freetown, Sierra Leone, this 1st day of October 2004



Hon. Judge Pierre Boutet



Hon. Judge Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber



Hon. Judge Bankole Thompson

