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SCSL-04-14-T  
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**SPECIAL COURT FOR SIERRA LEONE**

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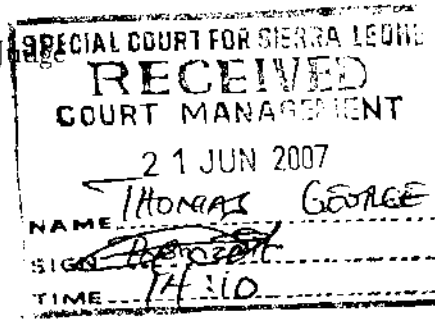
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**TRIAL CHAMBER I**

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

**Registrar:** Herman von Hebel, Acting Registrar

**Date:** 22<sup>nd</sup> of June 2007



**PROSECUTOR** Against **MOININA FOFANA**  
**ALLIEU KONDEWA**  
 (Case No.SCSL-04-14-T)

**Public Document**

**ORDER ON NEW APPLICATION FOR THE APPOINTMENT OF CO-COUNSEL FOR THE TAYLOR DEFENCE TEAM**

**Office of the Prosecutor:**

Stephen Rapp  
James C. Johnson  
Joseph Kamara

**Court Appointed Counsel for Moinina Fofana:**

Victor Koppe  
Arrow Bockarie  
Michiel Pestman  
Steven Powles

**Court Appointed Counsel for Allieu Kondewa:**

Charles Margai  
Yada Williams  
Ansu Lansana  
Susan Wright

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

**SEIZED** of a Memorandum and its appendices to Trial Chamber I from Vincent Nmehielle, Principal Defender, dated the 1<sup>st</sup> of June 2007, entitled "Notice of Intention to Appoint Mr. Steven Powles, Court Appointed Counsel for Moinina Fofana as Co-Counsel to Charles Taylor" ("Memo"), in which the Principal Defender submits a fresh application requesting that the Chamber approve Mr. Powles' appointment as Co-Counsel for the Taylor Defence Team;

**MINDFUL** of Article 14(C) of the Directive on Assignment of Counsel ("Directive"), which provides that:

No Counsel shall be assigned to more than one Suspect or Accused unless the concerned Suspects or Accused have received independent legal advice and have waived their right to be represented by separate Counsel. Any application by Counsel to be assigned to more than one Suspect or Accused must be made, through the Principal Defender, to the Presiding Judge of the appropriate Chamber.

**MINDFUL** of this Chamber's Order Regarding the Appointment of Co-Counsel for the Taylor Defence Team filed on the 28<sup>th</sup> of May 2007 ("Order"), in which the Chamber denied an application from the Principal Defender to approve the appointment of Mr. Powles as Co-Counsel to the Taylor Defence Team on the basis that the waiver signed by Mr. Fofana on the 16<sup>th</sup> of May 2007 was not an unconditional waiver of his right to be represented by separate counsel, and that there was therefore no compliance with Article 14(C) of the Directive;

**NOTING** that the Memo contains a new waiver from Mr. Fofana, signed on the 31<sup>st</sup> of May 2007, stating that:

I, Moinina Fofana, accused before the Special Court of Sierra Leone, hereby give my unequivocal consent for my assigned counsel, Mr. Steven Powles, to act in proceedings before the Special Court of Sierra Leone on behalf of the accused Mr. Charles Taylor.<sup>1</sup>

I give this consent on the understanding that, should there be an appeal (against either conviction/sentence or acquittal) in my case, and in the event that I would like Mr. Steven Powles

<sup>1</sup> Emphasis in original.



to continue representing me, Mr. Steven Powles will do his utmost to fulfil his professional obligations to me.<sup>2</sup>

**CONSIDERING** that the Chamber is of the view that this waiver, still being conditional on a certain eventuality, does not constitute a proper waiver of Mr. Fofana's right to be represented by separate counsel;

**CONSIDERING** that the Chamber is therefore of the opinion that there still has not been compliance with the requirements as envisaged in Article 14(C) of the Directive;

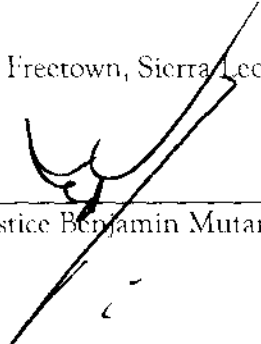
**MINDFUL** of Article 17 of the Statute of the Special Court for Sierra Leone and Rules 54 and 26bis of the Rules of Procedure and Evidence;

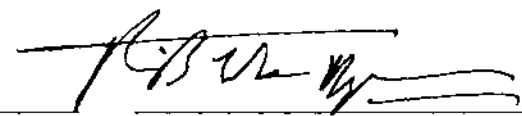
**THE TRIAL CHAMBER**


**DENIES** the application.

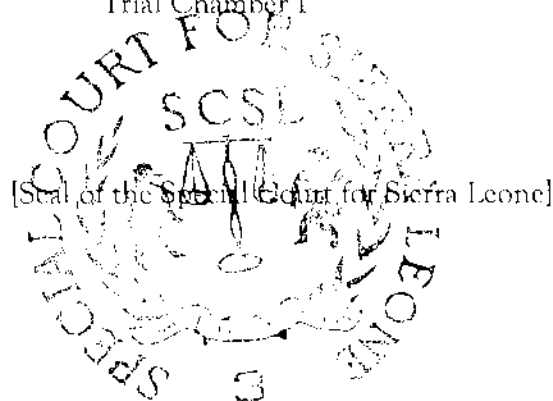
Justice Benjamin Mutanga Itoe entirely agrees with this Decision but has issued a Dissenting Opinion only on the issue of the exclusion of the name of the deceased First Accused, Samuel Hinga Norman from the cover page of this Decision.

Done at Freetown, Sierra Leone, this 22<sup>nd</sup> day of June 2007.

  
\_\_\_\_\_  
Hon. Justice Benjamin Mutanga Itoe

  
\_\_\_\_\_  
Hon. Justice Bankole Thompson  
Presiding Judge  
Trial Chamber I

  
\_\_\_\_\_  
Hon. Justice Pierre Bourret



<sup>2</sup> Memo, Annex III.



1. I would like to indicate here before I proceed any further, that I am totally in agreement with and fully endorse the conclusion and Decision of the Trial Chamber on the substantive issue relating to the waiver that Mr. Moinina Fofana, the Second Accused, is alleged to have given to Mr. Steven Powles so as to make the latter's designation as Co-Counsel for the Charles Taylor Defence Team, possible.

2. Let me state here however, that our unanimity on this substantive issue was not built on, nor did it concern the issue of deleting Late Norman's name from the cover sheet of that decision. Indeed, it could not have been and was not the case because this issue was neither canvassed by the Parties nor did we deliberate on it in the course of examining the substantive Moinina Fofana / Powles waiver issue during which the question of deleting the Late Norman's name did not arise at all.

3. My decision to take this dissenting position on an issue such as this would appear, and indeed, on the face of it, appears trivial. Should it even be characterised as a dissenting opinion in its empirical sense? I ask this question because the decision I am in disagreement with is not reduced to writing, nor was it arrived at in the usual conventional and traditional manner. In fact, there are issues and standards of procedural and legal tidiness in it which, to my mind, were not respected in the process of arriving at this Majority Decision.

4. In the decision that we were all about to unanimously sign, but for my detection of the omission of the name of the First Accused, the Late Samuel Hinga Norman on the cover page, for which I took an objection, My Learned Brothers and Colleagues, on the contrary, took the view that his name should, because of his death, be deleted. The logical and legal consequences and effects of this Majority stand is that the deceased's name should not and will no longer feature on the records of the Chamber, particularly on the cover sheets of our decisions and other processes relating to what has hitherto been, and is still being popularly referred to as the 'Hinga Norman Case'.

5. This mention on the cover sheet, we all know, is consecrated principally to clearly feature and identify the Parties to the case on the record and on the decision. The argument My Learned Colleagues confronted me with verbally is that we could rightfully delete his name because his death has had the effect of terminating the proceedings against him. In response, I took, and still take the

view, that this is not only procedurally improper but also amounts to interfering with the judicial and historical records as well as it violates the due process principles that govern judicial proceedings.

### JUSTIFICATION FOR THIS ARGUMENT

6. In this regard and to buttress this argument, it is my view that a decision to delete the name of an Accused Person from the records cannot, in circumstances such as those in this case, be taken by the Chamber exclusively on its own motion. It is my considered opinion that to so act, the Chamber must be seized of an application to this effect by either the Prosecution or by the Defence Team of the Accused Person concerned, and that a decision on it can only be taken by the Chamber after hearing or considering the submissions of the Parties.

7. The reason for taking this stand, I would like to indicate, is that decisions of this nature are potentially appealable and only on proper records which in this case, do not exist on this issue, particularly so because there are, to my mind, exceptional circumstances that surround it and that an irreparable prejudice might be occasioned to an aggrieved party should an application for leave, if any, is made in this regard under the provision of Rule 73(B) of the Rules of Procedure and Evidence, be refused.

8. In our unanimous decision dated the 21<sup>st</sup> of May 2007, on the Registrar's Application seeking a directive on what action he had to take following the First Accused Norman's death, we unanimously held that "*the trial proceedings against the Accused Samuel Hinga Norman are hereby terminated by reason of his death.*"<sup>1</sup> We did not go further to order that his name should no longer appear in Chamber records or in the Court's documented processes.

9. My Honourable and Learned Colleagues however, took the view that we can, from now henceforth, merely on the strength of this unanimous decision and without more, proceed, as they have already done in their Majority Decision as opposed to mine, to delete the name of the deceased, the First Accused Samuel Hinga Norman, from the cover sheet of this decision and certainly, from other processes that are yet to be published by the Chamber in relation to this case, and to conserve only the names of the two surviving co-Accused, Moinina Fofana and Allieu Kondewa, respectively the Second and the Third Accused.

10. I very respectfully and with all due deference, do not share their reasoning in this regard and am accordingly constrained, in the circumstances, to enter this Dissenting Opinion against what really is a unilaterally conceived and unwritten Chamber Majority Decision which, it should be noted, has been arrived at, off the records, and without calling for a hearing or considering submissions from the Parties on this particular issue before taking this very far reaching stand that they have adopted.

**BACKGROUND OF THE CHAMBER'S UNANIMOUS DECISION OF  
THE 21<sup>ST</sup> OF MAY 2007**

11. The First Accused, Samuel Hinga Norman, died on the 22<sup>nd</sup> of February 2007. After this sad event, there were no initiatives taken by any of the Parties before the Chamber to address issues relating to the direction the case should take. We did not as a Chamber either, want to proceed to pre-emptively issue a directive on it without having been seized of the issues related thereto by any of the Parties to this case.

12. It was in the course of this protracted period of uncertainty and expectation that the Registrar of the Court finally, on the 6<sup>th</sup> of March 2007, pursuant to the provisions of Rule 33(B) of the Rules, filed an application, according to him, "*for this Chamber to take any measures that it may deem appropriate in relation to Mr Norman's demise.*"<sup>2</sup>

13. Rather than act only on the Registrar's submissions which did not address the core issues that were of concern to us, the Chamber, on the 7<sup>th</sup> of March 2007, with a view to hearing all the Parties to this case on the crucial issues involved, made an Order for Extended Filing to the said Parties, in which we called on them, *inter alia*, to make their submissions since this was, as we indicated in that Order, and I quote:

"in the interests of justice that submissions or any other initiatives by the Prosecution and each of the Defence Teams are necessary 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

<sup>1</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, 21 May 2007, Order No. 1, p. 8 ["Norman Decision"].

<sup>2</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Registrar's Submissions Pursuant to Rule 33(B) Relating to the Death of Mr. Sam Hinga Norman, 6 March 2007, para 5.

against the Accused Person as a result of the death of the First Accused Sam Hinga Norman.”<sup>3</sup>

14. In the submissions that were filed following this Extended Filing Order, the Defence Team of the First Accused Samuel Hinga Norman, now deceased, argued and canvassed that “a verdict should be delivered in respect of him one way or another without any special consideration for his having passed away.”<sup>4</sup> They submitted and urged this Chamber to hold that “it would be in the interests of justice to deliver a free and unfettered verdict or judgement for all the three accused persons including Norman as soon as possible”.<sup>5</sup> They base this argument and submission on the fact that the deceased Accused had after all, “stood his full trial.”<sup>6</sup> It should be noted in this regard, that in the course of the trial of these three Accused Persons, the Late Accused testified on his own behalf as a witness and only died after the closure of the defence case and while waiting for the substantive judgement which is yet to be delivered.

15. In their further submissions filed on the 29<sup>th</sup> of March 2007, the Defence Team for the Second Accused, Moinina Fofana, submitted that “it has no objection to the delivery of a judgement with respect to the First Accused provided that such delivery does not negatively impact upon Mr Fofana’s right to be tried without undue delay.”<sup>7</sup>

16. The submissions by the Defence Team of the Third Accused filed on the 16<sup>th</sup> of March 2007, were silent on this issue.

17. In their submissions filed on the 16<sup>th</sup> of March 2007, the Prosecution submitted that it 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.”<sup>8</sup> In conclusion, the Prosecution submitted that “it would be very difficult if not impossible, to separate evidence in this joint trial and ask the Trial Chamber to issue findings of fact with

<sup>3</sup> Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, Order for Extended Filing, 7 March 2007, p. 2.

<sup>4</sup> Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, Norman Defence Team Submissions on his Death, 22 March 2007, para 28.

<sup>5</sup> Ibid., para 29.

<sup>6</sup> Ibid.

<sup>7</sup> Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, Further Fofana Submissions on the Death of the First Accused, 29 March 2007, para 1.

<sup>8</sup> Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, Prosecution Submissions Pursuant to Order for Extended Filing, 16 March 2007, para 27.



respect to the elements of the crime, the crime bases and modes of liability with respect to Norman, without issuing a final verdict on either his guilt or innocence.”<sup>9</sup>

18. These, in a nutshell, are the submissions that were made before us and to which we addressed our minds and considered before we unanimously arrived at the decision under reference.

19. In our examination of the submissions of the Parties and in arriving at that unanimous decision, the issue of deleting Late Norman’s name from the records, least still, from the Indictment, was never considered because it was neither canvassed by the Prosecution or by any of the Defence Teams in their submissions, nor was it a subject matter on which the decision was articulated or based. It in fact did not constitute one of the findings or directives made by the Chamber in the unanimous decision. Indeed, this issue has only been raised *ex improviso* at this stage by this Chamber with an informal Majority Decision taken by analogy on the strength of our unanimous decision of the 21<sup>st</sup> of May 2007.

#### DELIBERATION

20. One of the cardinal benchmarks in law which underlies judicial traditions and practices is that a Court makes decisions and articulates them only on those issues which it is seized of and which have been canvassed by the Parties before it in their submissions.

21. It is of course conceded that a Court of law, in the exercise of its inherent jurisdiction, may make a decision on either substantive, tangential or collateral issues raised on its own motion. In this regard however, it is trite law that this can only be done on condition that the Parties have been afforded the opportunity of being heard on those issues raised by the Court of its own motion, particularly where the said issues really do impact, or have the potential of impacting negatively on the legal rights of the Parties or on the dictates of ensuring the integrity of the proceedings or of procedural tidiness. A departure from this universally and legally accepted principle, in my opinion, not only amounts to a violation of the legal rights of either or all the Parties to the case, but also, to an abuse of the judicial process.



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<sup>9</sup> *Ibid.*, para 28.

22. On the issue relating to deleting or in seeking to delete the name of Samuel Hinga Norman from the records of the Chamber and of the Court on the grounds of his death, it is necessary to point out, as I have indicated earlier, that this Chamber was not seized of such a request by any of the Parties, nor did we call on them to make submissions on this issue as we did in our Order for Extended Filing of the 7<sup>th</sup> of March 2007, following the Registrar's application of the 6<sup>th</sup> of March 2007. In fact, not even the Prosecution made an application to this effect under the provisions of Rule 51(C) of the Rules of Procedure and Evidence as it did with the indictment, not only against the Late Accused, Foday Saybana Sankoh<sup>10</sup> but also that against the Late Accused, Sam Bockarie<sup>11</sup>.

23. The Defence Team of the deceased First Accused did not raise the issue of the withdrawal either, after his death. We now know, from their submissions, what the Norman Defence Team's opinion is following our Order for Extended Filing. It is in fact calling for a clear finding and verdict of guilt or of innocence in respect of him, notwithstanding his death. As a Chamber, we have unanimously rejected and overruled this submission and option. We stand by it and only leave ourselves open to the exercise by the Appeals Chamber, of its prerogatives in this regard should this eventuality arise.

**MAJORITY DECISION TO DELETE NORMAN'S NAME  
NOT REDUCED TO WRITING**

24. A feature that is particular to this case is that the Majority Decision which has triggered my dissent is not written. It is a short-circuited conceptually conceived decision that has neither been judicially crafted nor motivated in the traditional manner for the records and for scrutiny, as well as for the purpose of eventually putting it into effect. If, as I now understand, it was to be conceived, understood, or was to be treated as a decision that can logically flow or be inferred from our 21<sup>st</sup> May 2007 unanimous decision, as My Learned Brothers now inform me, it could only have been consequential to that decision, and therefore, ought to have been reduced into writing for our signature in the form of a Consequential Order to that unanimous Decision.



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<sup>10</sup> *Prosecutor v. Foday Saybana Sankoh*, SCSL-03-02-I, Prosecution Request for Appearance before the Trial Chamber to Withdraw the Indictment, Pursuant to Rule 51(B), 14 November 2003.

<sup>11</sup> *Prosecutor v. Sam Bockarie*, SCSL-03-04-I, Prosecution Request for Appearance before the Trial Chamber to Withdraw the Indictment, Pursuant to Rule 51(B), 14 November 2003.

25. There is no such Order in the Chamber or in Court records. The decision is only made by inference from our unanimous decision of the 21<sup>st</sup> of May 2007, where we held the “*the trial proceedings against Accused Samuel Hinga Norman are terminated by reason of his death.*” We ended there. We did not go further to order that the indictment against him, like we did with those of Late Sankoh<sup>12</sup> and Late Bockarie<sup>13</sup> on the initiative and application of the Prosecution, be withdrawn. This is because it was for the Prosecution to initiate this course of action like they did in the Sankoh and Bockarie cases. In this one, it did not. Not even in the entirety of its submissions following our Order for Extended Filing, did the Prosecution canvass or suggest this course of action.

26. The legal situation that is a reality therefore, is that this deleted Norman’s name still remains intact in the Indictment as there is neither an application nor is there an order issued to this effect as yet by the Chamber. Why then should this same Chamber without more, proceed to delete his name from the Cover Sheet that has given rise to this dissent?

#### THE NAME OF SAMUEL HINGA NORMAN ON THE RECORDS

27. As a matter of law therefore, the name of Samuel Hinga Norman, even though he is no more, should continue to feature in the indictment with his former co-Accused Persons and by analogy, in the Records of the Chamber and in those of Court Management right up to the stage of our Judgement. This, I humbly consider, is the logical and legal solution to this issue because his name in any event, will, following our Decision of the 21<sup>st</sup> May 2007, continue to feature largely and quite predominantly in one episode or the other in whatever decisions that will be taken by this Chamber.

28. This course of action, as I have indicated, is even more imperative in the light of Our findings in paragraphs 20 and 21 and of Our Order No. 3 of Our unanimous decision dated the 21<sup>st</sup> of May 2007, which read as follows:

“Paragraph 20. As already noted, the entirety of the trial proceedings against the three Accused were completed before the death of the Accused Norman. The trial proceedings were conducted in full respect of the right to a fair trial of each of the Accused.

Paragraph 21. On the issue of the legal effect of the death of Norman on the case against the other two Accused, the Chamber finds that it is neither

<sup>12</sup> *Prosecutor v. Foday Saybana Sankoh*, SCSL-03-02-1, Withdrawal of Indictment, 8 December 2003.

<sup>13</sup> *Prosecutor v. Sam Bockarie*, SCSL-03-04-1, Withdrawal of Indictment, 8 December 2003.

possible nor desirable to separate the evidence presented at the trial against the Accused Norman from the entire evidentiary record.

Order No. 3. The Judgement of the Chamber in relation to the two remaining Accused persons will be based on the evidence that was adduced on the record by all the Parties up to when the entire case for the Defence was closed;<sup>14</sup>

29. In the light of these findings and within the context of our Order No. 3, the name of the First Accused, Samuel Hinga Norman, even though deceased, is, and still remains, for purposes of our evidential, factual and legal analysis and findings *vis-a-vis* his surviving Co-Accused Persons, excepting of course a finding of his guilt or of his innocence, a permanent feature that cannot be easily nor should it be deleted from any processes related to this case.

30. In fact, a deletion of the name of the deceased First Accused, Samuel Hinga Norman, from the cover page of documents relating to a case in which he is the undisputed legend, occasions a disconnect in terms of the traditional appellation of this case in the Records of the Court which are supposed to be kept intact. Furthermore, it eclipses the real judicial history and jurisprudence we have created and continue to create in this case which will certainly have to take its rightful place, featuring the Parties with all their names, in the archival policy and programming of the records of the Special Court.

31. As was and would widely have been expected, given the trend and tone of their submissions, the Defence Team of the deceased, First Accused, on the 24<sup>th</sup> of May 2007, which was the third and last day when they were supposed to file their application for leave to appeal, filed a Motion for extension of time within which to file an application for leave to appeal against our unanimous decision of the 21<sup>st</sup> of May 2007, which, as I had mentioned earlier, could eventually be forwarded to the Appeals Chamber for a further and final determination of this issue.<sup>15</sup>

### OUR UNANIMOUS DECISION OF THE 21<sup>ST</sup> OF MAY, 2007 IS NOT YET FINAL

32. In view of the fact that our unanimous decision has so far, not hit the bar of finality because of the pending status of this still-unresolved and intriguing Motion by the Defence Team for extension of time, it could, and should be concluded in law, that the Majority unwritten Decision on

<sup>14</sup> Norman Decision, paras 20, 21, Order No. 3.

this issue cannot, and should not, in addition to the preceding arguments, stand in view of the apparent and obvious prematurity in making that unwritten Order to delete the Late Accused Person's name from the cover sheet of the said decision and a *fortiori*, from the records of the Court on the grounds of his death.

33. I would like to reiterate here, that the deletion of a deceased Accused Person's name from the records is, and remains a judicial act that should be preceded by a judicial process. Even if, as I have already mentioned, it is conceded that a Tribunal, in the exercise of its inherent jurisdiction, can, of its own motion, take such a decision, it is my opinion that this one is taken illegally because it cannot stand the legal test on which the Court's jurisdiction in this regard can lawfully be invoked.

34. I say this because this particular silently taken and mute decision by my Distinguished Colleagues is, in my opinion, in violation of the basic principles of due process which require that the parties to a case should be heard on the issue or issues at stake before a decision is taken on it and that such a decision should be reduced to writing for the attention of the Parties and for the records of the process before it is enforced.

### CONCLUSION

35. In this regard, I would like to observe that a purported legal Order of such judicial magnitude and importance such as this one, that is made by a Tribunal on a mere inference and off the records, clearly lacks any legal validity, is null and void, and consequently, unenforceable because it is made in violation of the best judicial and Court Management processes and practices. In fact, making it effective would amount to executing a legally mute extra judicial decision that has neither been regularly taken nor does it exist on any Chamber or Court record.

36. It is accordingly my view and opinion, in light of the foregoing analysis, that this decision to delete Late Samuel Hinga Norman's name from the records should be disregarded and set aside. In fact, in order to remain in harmony with our current practices and the records kept by Court Management, the name of Samuel Hinga Norman, even though he is now deceased, should continue to feature on the cover page of Our Chamber processes, decisions and in Court records because his

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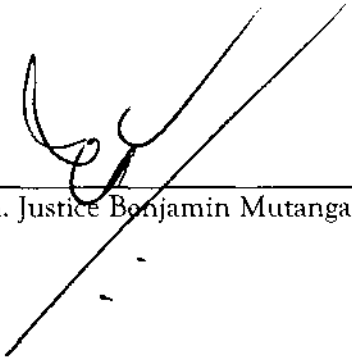
<sup>15</sup> Norman, unlike Milosevic (*Prosecutor v. Milosevic*, IT-02-54) was only one of 3 Accused persons on the same Indictment who died after the Defence case had closed and before Judgement was delivered.

current status as a deceased Accused will of course be acknowledged and commented on in the Judgement that will be rendered by this Chamber in due course in the case concerning the two surviving Co-Accused Persons in this matter.

37. I accordingly so decide in the light of the above, and ORDER AS FOLLOWS:

1. THAT THE NAME OF THE DECEASED FIRST ACCUSED, SAMUEL HINGA NORMAN, BE REINSERTED IN THE SAME POSITION THAT IT HAS ALWAYS OCCUPIED WITH THE OTHER ACCUSED PERSONS ON THE COVER SHEET OF OUR DECISIONS BEFORE IT WAS DELETED IN EXECUTION OF THE UNWRITTEN MAJORITY DECISION.
2. THAT THIS ORDER BE CARRIED OUT.

Done at Freetown this 22<sup>nd</sup> day of June, 2007

  
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Hon. Justice Benjamin Mutanga Itoe

