

SPECIAL COURT FOR SIERRA LEONEOFFICE OF THE PROSECUTOR
Freetown – Sierra LeoneBefore: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

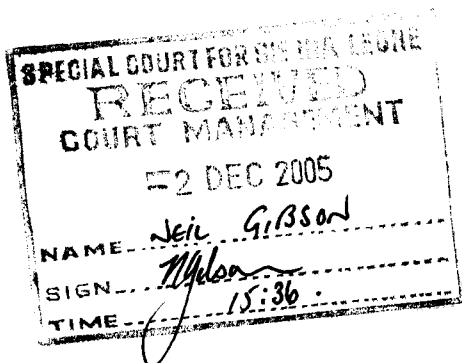
Interim Registrar: Mr. Lovemore Munlo

Date filed: 2 December 2005

THE PROSECUTOR**Against****Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

**PROSECUTION RESPONSE TO URGENT FOFANA MOTION FOR RECONSIDERATION
OF THE 25 NOVEMBER 2005 ORAL RULING AND THE 28 NOVEMBER 2005
CONSEQUENTIAL ORDER OF TRIAL CHAMBER I**

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I. INTRODUCTION

1. On 21 October 2005, Trial Chamber I filed an Order Concerning the Preparation and Presentation of the Defence Case (“Order”)¹ ordering a Status Conference to be held on 27 October 2005, the Defence to file specific Materials no later than the 17 November 2005, a Pre-Defence Conference to be held on 11 January 2006 and the commencement of the Defence Case on 17 January 2006. Accordingly, a Status Conference was held on 27 October 2005.² The Defence filed its Joint Defence Materials and Request for Partial Modification on 17 November 2005 (“Defence Materials”).³
2. Thereafter, the Trial Chamber ordered a further Status Conference to be held on 25 November and further ordered the Prosecution to file any submissions pertaining to the Defence Materials not later than 24 November 2005.⁴ The Prosecution filed its Submissions on 23 November 2005 (“Prosecution Submissions”).⁵
3. At the Status Conference on 25 November 2005 (“November Status Conference”) the Trial Chamber stated that there was “a lack of compliance with [its] order.”⁶ Fofana’s Legal Assistant requested on behalf of all defence teams that the Defence Materials be deemed a motion and the Prosecution submissions a response and that the Defence be allowed to reply. The Chamber adjourned to deliberate upon this request and rejected it (“Oral Ruling”).⁷
4. As a consequence of the fact that “each of the Defence Teams have failed to comply with the Order of the 21st of October, 2005”, a “Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case” was issued by

¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-474, “Order Concerning the Preparation and Presentation of the Defence Case”, (“**Order**”), 21 October 2005.

² *Prosecutor v. Norman, Fofana, Kondewa*, Transcript (“**October Status Conference**”), 27. October 2005.

³ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-482, “Joint Defence Materials Filed pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification thereof”, 17 November 2005 (“**Defence Materials**”).

⁴ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-484, “Scheduling Order for Status Conference”, 18 November 2005; *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-485, “Order Re-Scheduling Status Conference and order for submissions by the Prosecution”, 21 November 2005.

⁵ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-486, “Prosecution Submissions on the Joint Defence Materials filed pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof”, (“**Prosecution Submissions**”), 23 November 2005.

⁶ *Prosecutor v. Norman, Fofana, Kondewa*, Transcript (“**November Status Conference**”), 25. November 2005, p. 11.

⁷ November Status Conference, p. 18.

the Trial Chamber on 28 November 2005 (“Consequential Order”).⁸

5. On 29 November 2005, the Defence Team for the Second Accused filed an “Urgent Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber I or, Alternatively, Request for Leave to Appeal Both.”⁹ That same afternoon, Trial Chamber I rejected the Motion on the ground that it was not properly before the Chamber and reminded the Defence of its obligations to fully comply with the Consequential Order.¹⁰
6. The Defence then filed its “Urgent Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber I” on 1 December 2005 (“Fofana Motion”).¹¹ On the same day, the Trial Chamber ordered the Prosecution to file any response to the Fofana Motion by 2 December.¹²
7. The Prosecution hereby files this Response to the Fofana Motion.

II. CONTENT OF THE CONSEQUENTIAL ORDER AND ORDER

8. In its Order, as reinforced and adjusted in its Consequential Order, Trial Chamber I ordered the Defence Teams to file the following Materials, *inter alia*, by no later than the 5 of December 2005:
 - a.) A list of witnesses that each Defence Team intends to call, including:
 - (i) the name of each witness;
 - (ii) a summary of their respective testimony;
 - (...)
 - d.) A chart which indicates, for each paragraph in the Indictment, the testimonial evidence and documentary evidence upon which the Defence will rely to defend the Accused against the allegations contained therein;”

⁸ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-489, “Consequential Order for Compliance with the Order concerning the Preparation and Presentation of the Defence Case”, (“**Consequential Order**”), 28 November 2005.

⁹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-490, “Urgent Fofana Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber I or, Alternatively, Request for Leave to Appeal both”, 29 November 2005.

¹⁰ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-491, “Order on Urgent Motion for Reconsideration, or in the Alternative, for Leave to Appeal the Orders for Compliance with the Order concerning the Preparation and Presentation of the Defence Case”, 29 November 2005, the Motion was rejected “due to the particular nature of the applications made, two separate and distinct motions should have been filed.”

¹¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-493, “Urgent Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber”, 1 December 2005.

¹² *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-495, “Order for Expedited Filing”, 1 December 2005.

III. ARGUMENTS

A. ALTERNATIVE PLEADING

9. The Prosecution submits that while requesting alternative relief in a single motion does not violate the Rules, the Chamber was justified in finding that the submissions were not properly before it. The Chamber may issue such orders as are necessary for the conduct of the trial (Rule 54) and shall ensure that a trial is fair and expeditious (Rule 26*bis*). The Chamber did not speak of a violation of the Rules *per se*, but found that the particular nature of the applications – one being a motion for reconsideration and the other being an application for leave to appeal – meant that two distinct filings, invoking two distinct procedural tools, should have been made in order to enable the Chamber to deal with them appropriately.

B. COMPLIANCE WITH THE CONSEQUENTIAL ORDER AND ORDER

(i) Reasoned Objections as a Form of Compliance

10. The Defence claims that the filing of reasoned objections is a form of compliance and submits that “where the Defence found certain portions of the Original Order objectionable, it advanced reasoned arguments in support of their reconsideration; otherwise, compliance was complete.”¹³ However, the Prosecution submits that the Defence did not respect the Trial Chamber’s original Order and appeared deliberately to disregard it in many ways. Moreover, it is disingenuous to argue that filing objections is a form of compliance when those objections were filed on the date by which full compliance was mandatory. Counsel are duty bound to comply with an order of a Chamber. If a counsel believes that there is some reason why an order cannot or should not be complied with, the counsel should raise that reason in a motion at the earliest opportunity, to give the Chamber time before the deadline for compliance to decide whether or not to vary or rescind the original order. Unless or until the Chamber rescinds or varies its original order, the counsel remains under an obligation to comply with it, even if a motion to challenge it is pending at the time of the deadline for compliance. Quite apart from anything else, proceedings before the Special Court would potentially be thrown into disorder if counsel could file objections to orders of the Chamber at the last minute, and then rely on the filing of those objections to excuse non-compliance with the

¹³ Fofana Motion, para. 16.

order.

11. The Prosecution notes that the Defence did not contest the original Order when it was filed on 21 October 2005 or during the Status Conference on 27 October 2005, the purpose of which was “to consider the preparation and presentation of the defence case in this CDF trial.”¹⁴ The Defence did not raise any objections concerning fair trial issues or ask the Trial Chamber to review or amend its Order at the appropriate time. The Prosecution submits that the Defence should not be given an extended opportunity to raise its objections and that the failure to raise objections at the appropriate time, and consequent risk that proceedings will be delayed, should be taken into account in assessing the strength of the Defence’s arguments.
12. Furthermore, the need to protect the rights of the accused fully cannot justify continued failure to comply with Court orders until the Defence objections are upheld. It may be true, as the Fofana Motion states, that the Defence is “duty-bound to raise objections it feels are based on legitimate legal grounds”.¹⁵ However, it is equally true that the Defence, having raised such any such objection, is duty bound to accept the Trial Chamber’s ruling on the matter, subject to any available appeals procedures. Counsel cannot rely on their own understanding of their ethical obligations as a reason for persistently refusing to comply with an order of a Chamber.
13. Indeed, it is the Prosecutions view that the Defence is seeking to re-litigate issues which have been ruled upon by the Trial Chamber. The repeated resurrection of these matters is impermissible and has no basis in the Statute or the Rules of the Special Court.¹⁶ The Defence was already ordered by the Trial Chamber twice to comply with its Order and the issues raised by the Defence in the Fofana Motion were already raised in the Defence Materials and during the November Status Conference. The Defence itself concedes that it raised several of the issues both by written request and upon subsequent oral motion.¹⁷ The Prosecution submits that there is no right, even by appealing to the need to protect the rights of the accused, constantly and repetitively to raise matters that have already been

¹⁴ Status Conference, p. 2.

¹⁵ Fofana Motion, para. 17.

¹⁶ See in this regard *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-406, “Decision on Request by first Accused for Leave to Appeal against the Trial Chamber’s Decision on First Accused’s Motion on Abuse of Process”, 24 May 2005.

¹⁷ Fofana Motion, para. 24, where the Defence concedes that it “adopts, by reference, the arguments advanced in the Joint Materials and Request and only briefly reiterates them below.”

settled. The rights of the accused form an integral aspect of the Chamber's decision-making process and there is nothing to suggest that they have been treated peripherally simply because the Trial Chamber has reiterated its order in its original terms. Indeed, the Trial Chamber has offered latitude in terms of extensions of time for compliance and encouragement to file motions for protective measures for witnesses if the Defence has supported grounds for not wishing to disclose the names of witnesses immediately.

(ii) Legal and Statutory Bases for a Request for Modification

14. The Defence argues, making reference to Rule 73, that it is not "only appropriate, but imperative, to seek modification of orders it finds contrary to law."¹⁸ The Defence then sets out ICTY and ICTR jurisprudence according to which, the Defence argues, a Trial Chamber "possesses the inherent discretionary power to reconsider its own decision."¹⁹
15. The Prosecution submits that the Defence confuses the concepts of "modification" and "reconsideration". In effect, the Defence is seeking more than a modification of an aspect of the Order and Consequential Order and is asking the Trial Chamber to reconsider, for the second time, the validity of and legal justifications for its orders.
16. The Rules do not explicitly provide for reconsideration.²⁰ Nevertheless, according to the jurisprudence of the ad hoc international criminal tribunals, a Chamber does possess an inherent power to reconsider its own decisions.²¹ In *Prosecutor v Semanza*, the Trial Chamber held that in light of the principle of finality, which mandates that the parties should be able to rely and act on the binding decisions of the Tribunal without fear that the decisions will be lightly overturned, the inherent discretion to reconsider a decision should be sparingly exercised. The Trial Chamber noted that frequent motions to the Trial Chamber for review or reconsideration of its decisions were not desirable. Thus, reconsideration of a previous decision may be appropriate only in exceptional circumstances, "where, through no fault of a party, he or she has been subjected to an

¹⁸ Fofana Motion, para. 18.

¹⁹ Fofana Motion, para. 19.

²⁰ See *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, "Decision on the Appeal against the Oral Decision of 7 February 2002 Dismissing the Motion for Review of the Decision of 29 January 2002 relating to the Appearance of the French Expert Witness Dominique Lecomte and the Acceptance of his Report", 16 April 2002, where the Appeals Chamber considered that "even if there is no right of review, there was a right of reconsideration."

²¹ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision denying Leave to Call Rejoinder Witnesses, 9 May 2002, ("**Semanza Decision**"), para. 9; *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Appeals Chamber, "Interlocutory Appeal From Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of Lack of Jurisdiction", 2 May 2002 ("**Bagosora Decision**")

unfair procedure.”²² According to the Trial Chamber, in deciding whether to exercise its discretion in a given case, it could consider, *inter alia*, any new facts or legal arguments brought to the attention of the Chamber, and the possibility and gravity of prejudice to a party. Notably, reconsideration could not be used to circumvent the inadmissibility of an appeal or a review of an interlocutory decision.²³

17. The *Bagosora* case does not support the arguments of the Defence. Although recognizing an inherent discretionary power to reconsider its decision, the ICTR Appeals Chamber “did not consider it to be an appropriate case in which to do so. [...] An appellant cannot seek to challenge a decision of a Trial Chamber after the time for filing an appeal from that decision has expired by the simple expedient of seeking to have that decision reconsidered. Whether or not a Trial Chamber reconsiders a prior decision is itself a discretionary decision.”²⁴
18. Similarly, in the cited case of *Hadzihasanovic et al.*, the ICTY Trial Chamber noted that the Defence was “fully aware of and agreed to the existing system of allocation of funds to assigned counsel during the pre-trial phase before they accepted being assigned” and considered that the Defence “now again addresses the Trial Chamber on the issue of allocation of resources and presents so-called new facts that form either a repetition of earlier submissions or are nothing but self-created new facts, notwithstanding the fact that this Trial Chamber has already made it clear that the issue is inadmissible”. The Chamber held that it may “consider any future submissions of a similar character as the present Oral Motion as frivolous” and therefore dismissed the Motion.²⁵
19. The Prosecution submits that the Defence has not adduced any new or convincing argument as to why the Trial Chamber should reconsider its original Order, its oral ruling at the November Status Conference, or its Consequential Order, all of which were, in the Prosecution’s view, validly issued. This is not a case where the Chamber’s limited power to review should be exercised and to do so would erode the doctrine of finality. A party

²² Semanza Decision., para. 8.

²³ Ibid, in that case, the Trial Chamber stated that “[t]he Motion does not present any new legal arguments in favour of the Defence position that rejoinder is admissible as a matter of right where there has been evidence in rebuttal (...)The Defence has not adduced any new fact or convincing argument why the Chamber should reconsider this assessment.”

²⁴ Bagosora Decision, para. 10.

²⁵ *Hadzihasanovic et al.*, Case No. IT-01-47-PT, “Decision on Joint Defence Oral Motion for Reconsideration of ‘Decision on Urgent Motion for Ex Parte Oral hearing On Allocation of Ressources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial’”, 18 July 2003.

cannot be permitted to avoid complying with an order of a Chamber by simply requesting the Chamber continuously to reconsider the order.

C. ESTOPPEL

20. The Defence argues that according to the Oral Ruling of the Trial Chamber it is unclear if “the Chamber is simply reiterating its belief that parties may never object to its orders or, rather, relying on a theory of estoppel by laches or implied waiver as articulated by the Prosecution.”²⁶
21. First, the Prosecution submits that there was no indication from the Trial Chamber that “parties may never object to its orders.” This seems to be a misconception of the Trial Chambers deliberation, which held that the Defence, “having failed to comply with the Court’s order, cannot now seek to benefit from such non-compliance.”²⁷
22. Secondly, the Prosecution notes that neither the Order nor the Consequential Order are at odds with any statutory rights of the Accused or fair trial principles. In this context it must be reiterated that the Defence raised all of these issues in the Defence Materials and at the November Status Conference, so ample opportunity was given to the Defence in this regard.

D. PRINCIPLE OF EQUALITY OF ARMS

23. The Defence argues and reiterates that paragraph 2(a)(ii) of the Order and Consequential Order, according to which the Defence is compelled to disclose the name of each witness is at odds with the principle of equality of arms.²⁸
24. The ICTY Appeals Chamber has found that the principle of equality of arms should be interpreted in favour of both parties and not only in favour of the accused.²⁹ Reference may be made to the European Court of Human Rights case of *Dombo Beheer BV v. The Netherlands*³⁰ where the court described the requirement of equality of arms as providing a “fair balance” between the parties and as implying that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that

²⁶ Fofana Motion, para. 20.

²⁷ November Status Conference, p. 18.

²⁸ Defence Motion, para. 24.

²⁹ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, “Decision on Prosecutor’s Appeal on Admissibility of Evidence”, 16 February 1999, para. 25.

³⁰ *Ibid.*, para. 24, citing *Dombo Beheer BV v. The Netherlands*, (1993) 18 EHRR 213 at para. 33. This was a civil case but the court was considering whether the requirement of equality of arms recognised in criminal cases should apply to civil cases also.

do not place him at a substantial disadvantage vis-à-vis his opponent.³¹ The ICTY Appeals Chamber noted that the principle of equality does not affect the fundamental protections given by the general law or Statute to the accused and that the trial proceeds against the background of those fundamental protections. “Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.”³²

25. The Prosecution re-emphasizes that if protective measures are sought for any Defence witnesses, including the use of pseudonyms and delayed disclosure of identities to the Prosecution, then the Trial Chamber has provided ample opportunity to the Defence to take advantage of these procedures. Contrary to the suggestion of the Defence, the purpose of protective measures is not to ensure a “procedural advantage”; rather, it is to protect the respective witnesses. There is no inequality of arms, as both the Prosecution and the Defence are entitled to apply for protective measures on an equal basis. If Defence witnesses do not require protection, there is no unfairness in requiring the immediate disclosure of their names.
26. The Prosecution notes that despite the protective measures in place in respect of the majority of its witnesses, a rough internal calculation shows that in fact for one third of the witnesses, the Defence had disclosure of identifying information more than 42 days before testimony and for many of the witnesses the time period was much longer – well over the 21 days required by the order relating to protective measures. While these figures resulted from the way the trial panned out in practice, the Prosecution wishes to emphasize that it did not gain any “collateral procedural benefit”³³ as a result of being granted protective measures.

E. PRESUMPTION OF INNOCENCE

27. The Defence reiterates its submissions in the Defence Materials and during the Status Conference in relation to the order to create a chart outlining the Defence case.³⁴
28. The Prosecution submits that the presumption of innocence is not affected by providing a

³¹ Ibid, para. 24.

³² Ibid., para. 25.

³³ Defence Motion, para. 25.

³⁴ Defence Motion, para. 26-27.

chart which indicates, for each paragraph in the Indictment, the testimonial evidence and documentary evidence upon which the Defence will rely to defend the Accused against the allegations contained therein. The Defence is merely required to *indicate* the relevant paragraphs of the indictment to which the items of its evidence relate. Rule 89(C) provides that the Trial Chamber may admit any *relevant* evidence. It is open to the Trial Chamber at any time to ask either the Prosecution or Defence to indicate the relevance of any particular evidence sought to be adduced by that party. Such an enquiry by the Chamber does not shift the burden of proof in any way. It merely asks the party to indicate the issues to which the evidence they seek to introduce is relevant. The chart that the Trial Chamber ordered the Defence to produce would not place the burden on the Defence of proving anything at all. It would merely give the Trial Chamber and the Prosecution advance notice of the relevance of proposed Defence witnesses, thereby permitting the Trial Chamber to better control and steer the proceedings, and the Prosecution to better prepare for cross-examination. The Prosecution was ordered to produce a similar chart before the commencement of the Prosecution case.

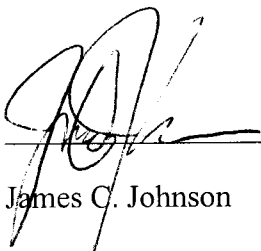
V. CONCLUSION

29. For these reasons, the Prosecution submits that the Defence motion should be dismissed in its entirety and that the Defence should comply fully with the Order and Consequential Order of the Court so as to avoid any delay to the proceedings.

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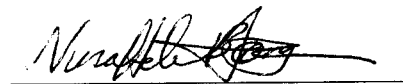
2 December 2005

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INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGMENTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-495, “Order for Expedited Filing”, 1 December 2005.
2. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-493, “Urgent Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber”, 1 December 2005.
3. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-491, “Order on Urgent Motion for Reconsideration, or in the Alternative, for Leave to Appeal the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case”, 29 November 2005.
4. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-485, “Order Re-Scheduling Status Conference and Order for Submissions by the Prosecution”, 21 November 2005.
5. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-482, “Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof”, 17 November 2005.
6. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-484, “Scheduling Order for Status Conference”, 18 November 2005.
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9. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-490, “Urgent Fofana Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber I or, Alternatively, Request for Leave to Appeal Both”, 29 November 2005.
10. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-406, “Decision on Request by first Accused for Leave to Appeal against the Trial Chamber’s Decision on First Accused’s Motion on Abuse of Process”, 24 May 2005.
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<http://www.un.org/icty/mrksic/trialc/decision-e/050309.htm>

12. *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, “Decision on the Appeal Against the Oral Decision of 7 February 2002 Dismissing the Motion for Review of the Decision of 29 January 2002 Relating to the Appearance of the French Expert Witness Dominique Lecomte and the Acceptance of his Report”, 16 April 2002.
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15. *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-PT, “Decision on Joint Defence Oral Motion for Reconsideration of ‘Decision on Urgent Motion for Ex Parte Oral Hearing On Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial’”, 18 July 2003.
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16. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, “Decision on Prosecutor’s Appeal on Admissibility of Evidence”, 16 February 1999.
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17. *Dombo Beheer BV v. The Netherlands*, (1993) 18 EHRR 213 (cited in *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, “Decision on Prosecutor’s Appeal on Admissibility of Evidence”, 16 February 1999.
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B. TRANSCRIPTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, Transcript, 27 October 2005.
2. *Prosecutor v. Norman, Fofana, Kondewa*, Transcript, 25 November 2005.