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

In Trial Chamber I

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

Registrar: Mr Lovemore Munlo, SC

Date: 12 July 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

REPLY TO PROSECUTION RESPONSE TO FOFANA APPLICATION FOR LEAVE TO CALL ADDITIONAL WITNESSES

For the Office of the Prosecutor:
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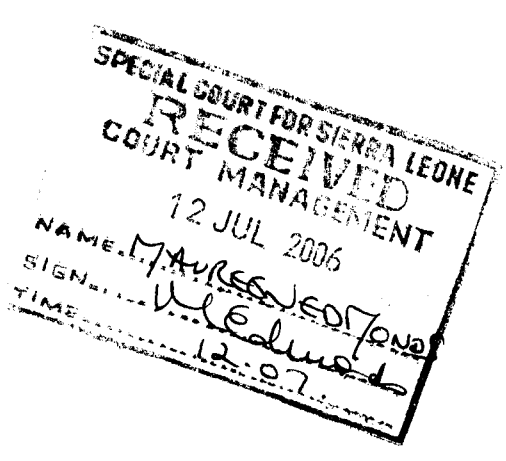
Mr James C. Johnson
Mr Joseph Kamara



For Moinina Fofana:
Mr Victor Koppe
Mr Michiel Pestman
Mr Arrow Bockarie

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr John Wesley Hall
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For Allieu Kondewa:
Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana

INTRODUCTION

1. Counsel for the Second Accused, Mr Moinina Fofana, (the "Defence") hereby submits its reply to the 'Prosecution Response to Fofana Application for Leave to Call Additional Witnesses'[1] (the "Response").

2. Contrary to the submissions of the Office of the Prosecutor (the "Prosecution"), the Defence has provided the Chamber with sufficient information to make a determination as to whether good cause has been demonstrated by the 'Fofana Application for Leave to Call Additional Witnesses'[2] (the "Application"). Each of the proposed witnesses referred to therein will provide relevant, material, and unique evidence. Furthermore, the proposed expert witness will provide relevant evidence and will not encroach on the Chamber's fact-finding domain. Objections and submissions as to the weight of his proposed evidence can be addressed in due course. Finally, no party will be prejudiced by the proposed additions.

3. For these reasons as well as those previously advanced in the Application, the Defence respectfully urges the Chamber to grant the requested relief without delay.

SUBMISSIONS

The Defence Has Made a Sufficient Showing of Good Cause

4. The Prosecution submits that the Defence has not established good cause to call the proposed additional witnesses[3], specifically arguing that the Application lacks sufficient detail for a proper determination of the good-cause issue[4]. As a general matter, the Defence does not dispute the factors listed by the Prosecution to be taken into account by the Chamber when making an assessment as to good cause[5]. However, it is submitted that such factors need not be conclusively demonstrated to the extent suggested by the

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-651, 7 July 2006.
[2] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-640, 27 June 2006.
[3] *See* Response, ¶ 2.
[4] *See* Response, ¶¶ 8–11.
[5] *See* Response, ¶ 7.

Prosecution, whose proposed test is unduly burdensome[6] and inconsistent with the practice of the Chamber to date[7].

5. The Defence has already provided sufficient information in this regard. Specifically, the Application advanced three explanations for the delay in confirming the proposed witnesses: (i) the reluctance of individuals to readily agree to testify due to certain subjective fears[8]; (ii) the difficulty of physically locating certain targets residing in remote areas[9]; and (iii) the discovery of new witnesses as the result of ongoing investigations[10]. It is submitted that each of these justifications—without further detail or explication—amounts to a showing of good cause as that concept has been developed to date by the Chamber. It has simply not been the practice in these CDF proceedings to require "evidence" in support of procedural submissions of this nature, and the jurisprudence cited by the Prosecution in this regard is inapposite[11]. Counsel's signature appended to the Application should be taken as an implicit affirmation of the accuracy of the information contained therein, and it is submitted that no further "proof" is necessary in the context of such a motion.

6. Nor is a specific showing as to each and every one of the above-referenced factors[12] required for granting an application to call additional witnesses[13]. Some of the enumerated factors may be given more weight than others depending on the circumstances of the particular application. Specifically, as noted in the Application, this Chamber has placed particular emphasis on the relevance of the proposed evidence as well as the danger of prejudice to the other parties[14]. In any event, the Defence submits that the proposed additional evidence is both relevant and material to determining the issues at stake, such that its inclusion will serve the overall interests of justice. Further, as explained in the Application, the proposed additions are largely the result of ongoing

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[6] *See, e.g.*, Response, ¶ 8 (requesting "details of the dates and nature of the previous steps taken by the Defence to secure the attendance of these witnesses"). The Defence submits that such information is not necessary for a determination of the Application.
[7] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-585, Trial Chamber I, 'Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists', 6 April 2006.
[8] *See* Application, ¶ 6. This explanation applies to three of the proposed witnesses. *See* Application, Appendix B.
[9] *See* Application, ¶ 7. This explanation applies to two of the proposed witnesses. *See* Application, Appendix B.
[10] *See* Application, ¶ 8. This explanation applies to one of the proposed witnesses. *See* Application, Appendix B.
[11] *See* Response, ¶ 8.
[12] *See* n 5 *supra*.
[13] *See, e.g.*, n 7 *supra*.
[14] *See* Application, ¶ 3.

defence investigations, and the material now sought to be added either could not have been discovered or could not have been made available at an earlier point in time despite the exercise of due diligence on the part of the Defence. Finally, allowing the proposed additions will in no way prejudice the Prosecution or the other parties.

7. The Prosecution claims that the "brevity of the summaries in Annex B to the Motion makes it difficult to assess the materiality and relevance of the proposed testimony, or to determine whether the testimony" is duplicative of evidence already before the Chamber[15]. However, the Defence submits that a *prima facie* showing of materiality and relevance—such as has been made in the Application—is sufficient for the purposes of the instant motion. Each of the proposed factual witnesses has been identified by name as an individual in possession of material information relevant to contested issues in Mr Fofana's case[16]. Furthermore, an undertaking was made to disclose more detailed summaries should the Application be granted[17]. The Prosecution seems to equate brevity with lack of specificity. However, that a description or explanation is brief does not make it, *ipso facto*, inadequate or unhelpful. The Defence contends the relevance and materiality of the proposed evidence has been sufficiently stated in the Application[18].

8. Further, the Prosecution would have the Chamber apply the jurisprudence of sister tribunals in an artificially restrictive manner to the present Application[19]. Yet, the cited jurisprudence does not establish an exclusionary preference for direct evidence or evidence of so-called "insiders"[20] as suggested by the Prosecution. Such would be inconsistent with the flexible approach to admissibility applied so far in these proceedings. With the exception of the examination of a few common witnesses, the Defence has yet to begin its case in earnest. Unlike the factual scenarios presented by the cited case law, Mr Fofana is not so much seeking to call *additional* witnesses as he is to

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[15] Response, ¶ 8.
[16] Issues of materiality, relevance, and uniqueness were canvassed generally at ¶ 10 of the Application and then more specifically at Annex B.
[17] *See* Response, ¶ 10.
[18] The Defence submits that it is self-evident that the following issues—clearly identified at Annex B of the Application—are both relevant and material to contested issues before the Chamber: the credit of prosecution witnesses; Kamajor activity at SS Camp; Mr Fofana's activity at Base Zero and as Director of War; Kamajor activity at alleged command locations other than Base Zero; and the role of other non-Kamajor combatants in operations allegedly credited to the Kamajors.
[19] *See* Response, ¶ 9.
[20] *See* Response, ¶ 9.

call *different* ones[21]. However, the Prosecution would have Mr Fofana's substantive right to call the witnesses of his choice[22] curtailed—as a procedural matter—simply because, for example, the Defence exercised its right to cross-examine Mr Norman's witnesses[23]. The Defence has very carefully chosen its witnesses to either present its own version of Mr Fofana's role as Director of War or to counter specific pieces of Prosecution evidence. At this relatively early stage of Mr Fofana's defence, these options should remain viable ones without undue restriction. While some of the proposed additional evidence may be incidentally corroborative or repetitive in nature, it is not primarily or "merely"[24] so, and therefore should not be excluded on the basis of such grounds.

9. The Prosecution further complains that "the brevity of the explanations given in the Motion and its Annex B as to the reasons why these witnesses were not listed earlier also makes it impossible to evaluate whether the new evidence could have been discovered or made available at an earlier point in time with the exercise of due diligence"[25]. Yet contrary to the Prosecution's insinuation[26], the Defence is not required to provide a dossier for each of its investigative targets with details of particular meetings and the results thereof. Defence investigations are ongoing, and counsel are officers of the Court. Accordingly, the representations made in the Application as to Defence efforts to secure the attendance of the proposed witnesses should be sufficient. Why the Prosecution now seeks to impose additional "burdens"[27] on the Defence, where no prejudice has been alleged, is perplexing to say the least[28].

10. Notwithstanding these stated positions, the Defence provides the following additional information in order to assuage any potential concerns the Chamber may have in this regard:

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[21] *N.B.* The Defence has already significantly reduced its witness list with a view to streamlining the proceedings.
[22] See Statute, Article 17(4)(e).
[23] *See* Response, ¶ 14.
[24] Response, ¶ 9.
[25] Response, ¶ 8.
[26] *See* Response, ¶ 10.
[27] *See* Response, ¶ 11.
[28] N.B. The Prosecution itself was required at times to vary its case strategy, despite the fact that it had at its disposal a team of international investigators, a fleet of vehicles, a virtually unlimited budget by comparison to the Defence, and all the coercive machinery of the Republic of Sierra Leone at its disposal, including the ability to relocate witnesses and provide guarantees of immunity. No doubt the Prosecution appreciates that the Defence—not a party to such advantages—may have encountered some minor investigative difficulties in the presentation of its own case.

Billoh Conteh and Momoh Pemba

11. These individuals—both of whom reside in remote areas of the Bonthe District—were both named by prosecution witness Albert Nallo as having been assigned to him by Mr Fofana for an allegedly illegal operation[29]. The Defence submits that, contrary to the Prosecution's submission[30], there is nothing duplicative or otherwise improper about calling each of them to give his own reaction to Mr Nallo's testimony.

Tejan Sankoh

12. The fact that Tejan Sankoh was at one point in time "only a *backup* witness"[31] is of no consequence to the Application. Initially contacted by a defence investigator in 2004, Mr Sankoh provisionally agreed to cooperate with the Defence, and his name was subsequently listed as a back-up witness pending further consultation. At some point after the filing of its original witness list, the Defence lost touch with Mr Sankoh and was unable to then confirm his cooperation and attendance. In candour to the Court, his name was removed from the backup list. Recently, as part of ongoing investigations into the activities of certain members of parliament, the Defence was able to re-establish contact with Mr Sankoh and renew his commitment to cooperate as a witness. Accordingly, he is now properly one of the subjects of the instant motion.

Steven Lahai Fassay

13. The fact that three Prosecution witnesses and four witnesses for Mr Norman have each testified with respect to alleged incidents at SS Camp[32] should not preclude Mr Fassay from testifying on the same subject. As the putative leader of the camp, he will supplement as well as corroborate the existing testimony.

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[29] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript of 29 November 2004 at 117–123 and Trial Transcript of 30 November 2004 at 1–12.
[30] *See* Response, ¶ 12.
[31] Response, ¶ 13 (emphasis in original).
[32] *See* Response, ¶ 14.

14. The Prosecution claims the proposed evidence of these individuals "covers the same terrain as the testimony of five witnesses who testified on behalf of the First Accused, including the First Accused himself"[33] and argues for denying the Application on this basis alone[34]. However, this assertion is inaccurate with respect to Mr Tucker and irrelevant as to Mr Zorokong. As indicated, Mr Tucker will testify largely about CDF activity at Monrovia, Liberia; Bo Waterside and Gendema, Sierra Leone, during the junta period, a topic the Defence submits has yet to be exhaustively canvassed as it relates to the issues relevant to Mr Fofana's alleged culpability. Further, Mr Zorokong will provide evidence with regard to Mr Fofana's role as Director of War as well as his own interactions with Mr Fofana at Base Zero during the junta period. Such information is crucial to Mr Fofana's defence. That witnesses for the Prosecution or for Mr Norman have already "covered the same terrain" should not preclude the Defence from conducting its own survey of the evidentiary landscape with a view to adding to or detracting from its current depiction.

Proposed Additional Expert Witness

15. The Defence does not dispute the Prosecution's general position with respect to the testimony of expert witnesses[35]. However, the distinction articulated between logical relevance and legal relevance[36] is a consequence of the rather complicated rules that govern expert testimony in most municipal legal systems, rules designed to protect lay juries from unnecessarily prejudicial information[37]. Accordingly, the Defence submits that the arguments advanced in this regard are inapposite to the instant situation where the professional judges of the Chamber are capable of assessing scientific evidence with the same degree of scepticism that sustains the scientific method itself. The rationale behind the exclusionary rules of national jurisdictions does not apply with equal force to proceedings before international criminal tribunals. There is simply no danger of undue

[33] Response, ¶ 15.
[34] Response, ¶ 15.
[35] *See* Response, ¶ 17.
[36] *See* Response, ¶18.
[37] The question of legal relevance as presented by the Prosecution at ¶ 18 is clearly related to a situation where a jury needs to be protected from any potential "prejudicial effect" of the proposed evidence. The "impact on the trial process" discussed in the cited case relates to the impact on the jury.

prejudice resulting from the proposed evidence, as the Chamber is, of course, free to discount the evidence as having little or no weight.

16. The question of Dr Yarmey's expertise—as that concept is defined by the relevant jurisprudence—seems clear. Contrary to the Prosecution's assertion[38], the Defence submits that forensic voice recognition amounts to a technical domain not necessarily within the purview of the Chamber's legal expertise, nor is it a matter of common sense within the ordinary comprehension of the layman. The Defence agrees that the reliability of memory is generally a matter that does not require the aid of expert testimony. However, the contours and nuances of forensic voice identification—like those of eyewitness identification—are better viewed through the prism of expertise. While it has yet to occur at the Special Court, it is by no means "unusual"[39] for a trier of fact to hear evidence of this nature[40].

17. The fact that Dr Yarmey has not been qualified as an expert in a significant number of cases reflects not the substantive merit of his expertise, but rather the highly technical rules regarding expert witnesses that have evolved in the United States in order to protect juries from potentially prejudicial information—the fear that juries will be unduly persuaded by science over common sense. As noted above, this is not a significant concern at this Tribunal. Notwithstanding the fact that courts of national jurisdictions may differ as to the degree of its utility, forensic voice recognition is a recognized academic discipline with proven applications to the legal domain. While indeed, as the Prosecution indicates, Dr Yarmey's proposed evidence has been rejected in twenty-nine separate cases[41], on twice that many occasions his expert evaluations were found to be appropriate to the determination of facts in issue[42].

18. Taking up the Prosecution's terminology as to the relevance of the proposed evidence, certainly it is logically so, relating as it does to "a fact in issue"[43]. Further, Dr Yarmey's

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[38] *See* Response, ¶ 20.
[39] Response, ¶ 20.
[40] *E.g.*, as shown by Dr Yarmey's extensive experience in this regard.
[41] No doubt the "expert" testimony of Drs Haglund and Hoffman as well as Colonel Iron would garner similar odds before the various courts of the United States with their infinitely more comprehensive and complex jurisprudence on the issue. Of course, this should not alter the analysis applied by this Court one way or another.
[42] *See* Application, Appendix C.
[43] Response, ¶ 18.

testimony would take only a few hours so there is little concern that an "inordinate amount of time" would be spent. The proposed evidence is clearly not intended to mislead the Chamber, but rather to assist it with its evaluation of the testimony of witness TF2-057[44], who claims to have heard Mr Fofana calling for two men to be removed from a cell, two men whom the witness claims were later murdered by Mr Fofana's alleged associates. This evidence goes to Mr Fofana's potential liability under Article 6.1 of the Statute ("ordering") with respect to Counts One and Two of the Indictment. As noted in the Application, Dr Yarmey will not attempt to draw expert conclusions as to the alleged criminal liability of Mr Fofana nor will he seek to evaluate the witness's general recollection of the incident. Rather, his proposed opinions will be limited to a factual, scientific assessment of the disputed evidence[45].

19. Given these considerations, as well as the Chamber's generally liberal approach to admissibility of evidence, the Defence submits that the prudent course would be to admit the expert evidence as relevant, leaving the legitimate (though not necessarily meritorious) arguments raised by the Prosecution[46] for a more appropriate juncture. This has been the practice followed to date[47], and the Defence fails to see how any party could be prejudiced by such arrangement.

CONCLUSION

20. For the reasons outlined above and for those contained in the Application, the Defence respectfully urges the Chamber to allow the proposed additions.

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[44] Contrary to the Prosecution's claim at ¶19. The purpose of his report is to provide scientific information that *may* assist the Chamber in its interpretation of voice recognition factors.

[45] Dr Yarmey will decidedly not attempt to speak to the credibility of witness TF2-057. That witness, of course, may be correct or mistaken in his voice identification of Mr. Fofana, and that determination is the Chamber's alone. Instead, Dr Yarmey will endeavour to provide a context or framework of general conclusions from voice identification research as a means of helping the Chamber in determining the likely accuracy of identification in this case.

[46] *See* Response, ¶¶ 21–22.

[47] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-650, Trial Chamber I, 'Decision on Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PhD', 7 July 2006.

COUNSEL FOR MOININA FOFANA

pp Victor Koppe

APPENDIX A

Defence List of Authorities

Constitutive Documents of the Special Court

1. Statute of the Special Court, Article 17(4)(e)

Jurisprudence of the Special Court

2. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-585, Trial Chamber I, 'Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists', 6 April 2006

3. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-650, Trial Chamber I, 'Decision on Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PhD', 7 July 2006