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SCSL-2004-14-T

(8767-8773)

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SPECIAL COURT FOR SIERRA LEONE

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet
Registrar: Robin Vincent
Date: 26 July 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

RESPONSE OF FIRST ACCUSED TO PROSECUTION'S REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES

Office of the Prosecutor:
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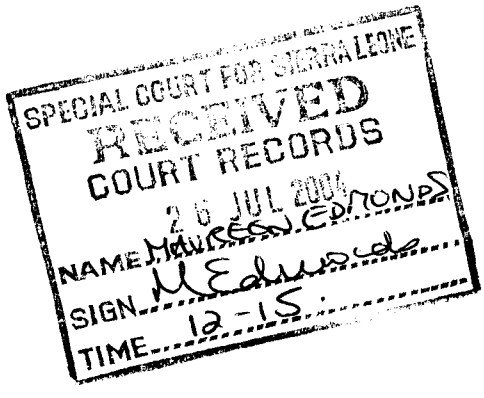

Introduction

1. Standby Counsel for Mr. Samuel Hinga Norman (the "**Accused**") hereby file this response (the "**Response**") to the "Prosecution's Request for Leave to Call Additional Witnesses" ("**Request**"), filed on 16 July 2004, pursuant to Rule 73*bis* of the Rules of Evidence and Procedure of the Special Court for Sierra Leone, (the "**Rules**").

2. Rule 73*bis* provides in relevant part that should the Prosecution seek to add any witnesses or exhibits to the lists submitted on 26 April 2004, "*it shall be permitted to do so only upon good cause being shown.*" Rule 73*bis*(E) goes on to say that "*After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.*"

3. Rule 66A(ii) clarifies that the Prosecutor must show "*good cause*" before the Trial Chamber may permit the addition of prosecution witnesses.

4. The Prosecutor maintains that each of the proposed witnesses meets the "good cause" standard set forth in Rule 66A(ii), and that therefore the Court should grant the Prosecution's Request for leave to modify the witness list.

5. The Accused submits that the Prosecution Request does not meet the standard of "good cause" for the grant for leave to call additional witnesses under Rules 66A(ii) and 73*bis* of the Rules of Procedure and Evidence (the "**Rules**"). The Accused submits, *firstly*, that the Request fails to exhibit those indicia of a "good cause" request which have been described in the jurisprudence of the *ad hoc* international criminal tribunals. Namely, the Prosecution has failed to demonstrate the materiality of the evidence to be presented by the additional witnesses; it has not shown that the Accused will not be prejudiced by the adding witnesses to the witness list; the disclosure of the evidence to the Accused was not timely and the Prosecution has failed to justify the lateness of the Request. The Accused submits, *secondly*, that the Trial Chamber is not bound by the

jurisprudence of the *ad hoc* international criminal tribunals, and in assessing whether "good cause" has been shown is entitled to consider other factors, such as the specific circumstances of the Accused, and the imprecision of the Request.

Submissions

6. The Accused submits that the Trial Chamber should be guided – but is not bound by – the jurisprudence of the *ad hoc* international criminal tribunals.

7. The Accused acknowledges that this jurisprudence indicates that in assessing "good cause" in this context, those tribunals have looked to those indicia described by the Prosecution in paras 5 *et seq.* of the Request. However, the Accused submits both that:
   a. the instant Request fails to exhibit these indicia; and
   b. the Trial Chamber is entitled, in determining whether good cause has been shown, to consider other factors.

A. <u>Failure to Exhibit the Settled Indicia of a "Good Cause" Request to Add Witnesses</u>

a. Materiality of the proposed additional witnesses' evidence

8. The Accused adopts paragraphs 5 and 6 of the Joint Response of Second and Third Accused to Prosecution's Request for Leave to Call Additional Witnesses (the "**Joint Response**").

9. The Accused additionally submits that the proposed additional witnesses' evidence does not meet the requisite test of materiality because:
   a. the proposed testimony of witness TF2-221 will unnecessarily repeat the testimony of witnesses TF2-194 (specifically relating to the Accused's presence and actions at Base Zero, and the handing over of prisoners to ECOMOG), TF2-013 (the capture of Tongo) and TF2-014 (instruction at Base Zero relating to the killing of collaborators);

b. the proposed testimony of witness TF2-222 will unnecessarily repeat the testimony of witnesses TF2-005, TF2-026, TF2-029, TF2-035, TF2-047, TF2-052 and TF2-053 (in relation to Tongo); and

c. the proposed testimony of witness TF2-223 will unnecessarily repeat the testimony of witnesses TF2-002 (in relation to Njendema and Zimmi), TF2-004 (in relation to Zimmi), and TF2-005 (in relation to the Accused's alleged instructions relating to collaborators).

10. The Accused notes further that the Prosecution Request indicates that *each* of these three witnesses will testify to paragraphs 20, 23, 24, 25, 26 and 28 of the Indictment. In and of itself, this makes clear that the three proposed witnesses will repeat each other.

b. Prejudice to the Accused

11. The Accused adopts paragraphs 7 to 9 and 11 and 12 of the Joint Response.

12. The Accused additionally notes that, in contrast to the situation represented in some of the cases cited by the Prosecution in support of its Request, such as *Prosecutor v. Nahimana*,[1] the effect of granting the Request will not be to *reduce* the overall number of Prosecution witnesses, but to *increase* that number.

13. The Accused notes with alarm that only 4 of the agreed 154 witnesses have been heard to date. The Accused notes that, even allowing for the delay caused by the appointment of Standby Counsel, these witnesses were heard over a period of 8 sitting days in June, which indicates that the average time for hearing each witness is 2 sitting days. At this rate, the Accused can anticipate a further 300 sitting days even before the Prosecution case is closed. Allowing for 20 sitting days per month, and the judicial recess and the alternation of CDF and RUF trials before this Trial Chamber, this means that at the current rate the Prosecution case may last for a further 30 months, or until the end of 2006 or longer, a year or more

[1] *Prosecutor v. Nahimana*, ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses, 26 June 2001.

beyond the Court's mandate. In that context, there is no good cause for the addition of any more witnesses, further prolonging the detention of the Accused.

c. Untimely disclosure of evidence and lateness of the Request

14. The Accused adopts paragraph 10 of the Joint Response.

15. The Accused reiterates that the Prosecution has been in possession of the witness statements of TF2-221, TF2-222 and TF2-223 for over two weeks *before* the first day of trial (TF2-221, TF2-222, and TF2-223 obtained on 19, 18, and 20 May 2004, respectively). By failing to disclose this evidence in a timely fashion the Prosecution has not met the requirements necessary to show "good cause."

16. The Accused submits that in order to demonstrate "good cause", the Prosecution must not only justify the lateness of newly obtained potential evidence, but also any tardiness in disclosing that evidence. The Accused notes that the very jurisprudence cited by the Prosecution in its Request makes clear that the Prosecution was obliged to reveal the names of additional witnesses "*as soon as it formed the intent to call these additional witnesses in proof of the guilt of the accused persons*".[2]

17. The Prosecution has offered no explanation for this additional delay, and cannot excuse the additional prejudice it has caused the Accused.

B. <u>Other Relevant Factors in Determining "Good Cause"</u>

18. The Accused additionally submits that the Trial Chamber is not bound by the jurisprudence of the *ad hoc* international criminal tribunals, and is accordingly entitled to consider any other factors it considers relevant in determining whether the Prosecution has shown "good cause".

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[2] *Prosecutor v. Delalic*, ICTY-96-21-T, Decision on the Confidential Motion to Seek Leave to Call Additional Witnesses, 4 September 1997.

19. The Accused submits that the Prosecution has failed to advert to two specific factors which both militate against the addition of the three proposed witnesses, and that by failing to so advert, the Prosecution has failed to discharge its obligation to show good cause.

20. First, the Prosecution has failed to advert to the specific circumstances of the Accused. The jurisprudence cited by the Request clearly states that purpose of pre-trial disclosure of witness lists, *"is to give the Defence sufficient notice and adequate time"*[3] within which to prepare their case. In this case, the Accused represents himself. He confronts the Prosecution's armies of attorneys and teams of investigators alone, assisted only by four Standby Counsel, three of whom are located overseas.

21. Every additional Prosecution witness places a significant burden on the Accused, requiring him to read the new witness statements, make arrangements for investigations relevant to the allegations raised by those witnesses, negotiate for the payment of those investigators with the Court, negotiate access to the additional resources necessitated by the resulting expansion of the defence, prepare cross-examination and consider how the new witnesses alter the content of evidence which has already been presented in Court or which the Prosecution has previously indicated it will present in Court. The Accused must do all of this while in detention and undergoing trial.

22. Accordingly, the addition of even a single Prosecution witness causes irreparable damage to the prospects of this Accused receiving a fair and expeditious trial far beyond the damage it causes to the Second and Third Accused, since they are not defending themselves.

23. The Prosecution has failed to address this matter, and has, consequently failed to discharge the onus, incumbent upon it as a matter of law under the Rules, to show good cause.

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[3] *Prosecutor v. Bagilishema*, ICTR-96-1-T, 2 December 1999.

24. Second, the Prosecution has failed to justify the imprecision of the information provided in its Request. It provides one bare paragraph outlining the content of each proposed witness' testimony. Each outline speaks in vague and imprecise terms of the "unique evidence", "direct evidence" and "significant value" of the witness' testimony. This imprecision makes it impossible for not only the Accused, but also the Trial Chamber, adequately to assess the probable repetitive nature of the proposed testimony.

25. By failing to provide a sufficiently detailed explanation of the nature of the proposed testimony, and how it varies from already-proposed testimony, the Prosecution has failed to equip the Trial Chamber with adequate information upon which safely to reach a determination that the Prosecution has discharged their onus to show "good cause".

Conclusion

26. For all the above reasons, Standby Counsel for the Accused, Sam Hinga Norman, respectfully submits that the Prosecution has failed to show "good cause" for the addition of the proposed witnesses, and their Request for leave should be denied.

26 JULY 2004

Dr. Bu-Buakei Jabbi