SCSL-04-14-T
(14386-14394)

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SCA

SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

Before:	Justice Pierre Boutet, Presiding Justice Bankole Thompson Justice Benjamin Mutanga Itoe
Interim Registrar:	Mr Lovemore Munlo
Date:	8 December 2005

THE PROSECUTOR

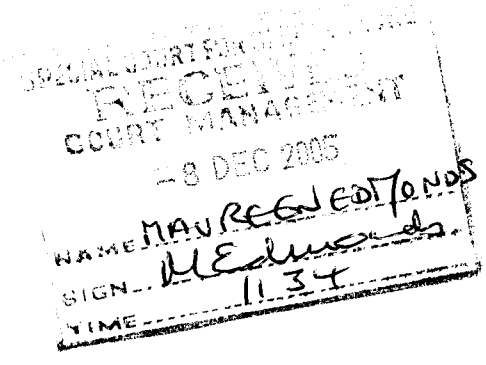
-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

FOFANA RESPONSE TO THE PROSECUTION REQUEST FOR ORDER TO DEFENCE PURSUANT TO RULE 73*TER* TO DISCLOSE WIRTTEN WITNESS STATEMENTS

For the Office of the Prosecutor:
Mr Luc Côté
Mr James C. Johnson
Ms Nina Jørgensen
Mr Marco Bundi



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

For Samuel Hinga Norman:
Mr John Wesley Hall
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For Allieu Kondewa:
Mr Charles Margai
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Mr Martin Michael

INTRODUCTION

1. Considering the Trial Chamber's 'Decision on Extremely Urgent Defence Motion for Modification of the Order for Expedited Filing'[1] (the "Filing Decision"), counsel for Moinina Fofana (the "Defence") hereby submits its response to the 'Request for Order to Defence Pursuant to Rule 73*ter* to Disclose Written Witness Statements'[2] (the "Request") filed yesterday, 7 December 2005, by the Office of the Prosecutor (the "Prosecution").

2. The Defence opposes the Request on the grounds that disclosure of defence witness statements should be ordered only in extraordinary circumstances and the Prosecution has failed to show why such disclosure is necessary in this case. The Defence submits that its witness summaries are sufficient for the purposes of facilitating both the Prosecution's intended cross-examination and the Chamber's management of the trial.

3. Accordingly, the Defence urges the Chamber to deny the Request in its entirety.

BACKGROUND

4. On 21 October 2005, the Chamber issued its 'Order Concerning the Preparation and Presentation of the Defence Case'[3] (the "Original Order") directing the Defence to submit, *inter alia*, a list of its intended witnesses including summaries of their respective testimony.

5. A status conference was held pursuant to the Original Order on 27 October 2005, at which the Presiding Judge made the following indication with respect to defence witness summaries:

> I indicate here that a summary should be descriptive enough so that the Chamber understands the nature of the evidence of that particular witness, not only that the witness will talk about Moyamba District. It should contain *a little more* detail than that kind of summary description[4].

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-506, 7 December 2005.
[2] *Norman et al.*, SCSL-2004-14-T-501.
[3] *Norman et al.*, SCSL-2004-14-T-474.
[4] *Norman et al.*, Transcript of 27 October 2005 Status Conference at 18:2-6 (emphasis added).

6. On 17 November 2005, the deadline for compliance with the Original Order, counsel for the three accused submitted their 'Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof'[5] (the "Joint Materials and Request"). Among other things, that document contained summaries of the expected testimony of Mr Fofana's intended witnesses—summaries which had been prepared using the above-cited directive of the Presiding Judge as a guide.

7. Nonetheless, at a subsequent status conference, held on 25 November 2005, the Chamber informed the Defence that its witness summaries were, in its view, inadequate, noting: "What has been provided is not sufficient for the purpose that this is to be provided for"[6].

8. Pursuant to the Chamber's 'Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case'[7] (the "Consequential Order"), filed on 28 November 2005, the Defence filed on 5 December 2005, *inter alia*, its updated witness summaries[8] in accordance with the Chamber's directive that such summaries "should be sufficiently descriptive to allow the Chamber to appreciate and understand the nature of the proposed testimony"[9]. When preparing the updated summaries, the Defence took as a guide, upon recommendation of the Chamber, language from a decision of Trial Chamber I of the International Criminal Tribunal for Rwanda (the "ICTR") admonishing defence counsel to provide, with respect to its witness summaries, "a factual summary and *not merely the subject matter* on which each witness will testify"[10]. In accordance with this directive, the Fofana summaries, as currently filed, include *both* an indication of the subject matter on which each witness intends to testify as well as factual summaries of the intended testimony.

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[5] *Norman et al.*, 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] *Norman et al.*, Transcript of 25 November 2005 Status Conference at 26:15-17.
[7] *Norman et al.*, SCSL-2004-14-T-489, 28 November 2005.
[8] *See Norman et al.*, SCSL-2004-14-T-500, 'Fofana Materials Filed Pursuant to the Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case', 5 December 2005.
[9] Consequential Order at p.3, ¶ (a)(ii).
[10] *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Trial Chamber I, 'Decision on the Prosecutor's Motion to Compel the Defence's Compliance with Rules 73ter, 67(C) and 69(C)', 3 October 2002, ¶ 1 (emphasis in original).

9. The Prosecution filed the instant Request on 7 December 2005, and the Chamber ordered the Defence to file its response, if any, by 8 December 2005[11]. The Defence immediately filed an urgent request for modification, in accordance with Rule 7(C), of the Order for Expedited Filing[12]. However, the Chamber dismissed the request, noting that it was "satisfied that the Order for Expedited Filing provides for sufficient time for the Defence, in the present circumstances, to properly respond, if it intends to do so, to the Prosecution Request"[13].

SUBMISSIONS

The Defence Takes Exception to the Filing Decision

10. The Defence reasserts the arguments advanced in its Urgent Request and hereby notes, for the record, its exception to the Chamber's denial of same.

Availability of Defence Witness Statements

11. The Defence, at this time, makes no submission as to the availability of witness statements. Such silence, however, should not be seen as indicating agreement with the Prosecution's submission that "such statements are almost certainly available"[14] or any other submission contained in paragraphs 8 and 9 of the Request.

Disclosure of Defence Witness Statements Should be Ordered Only in Extraordinary Circumstances

12. Disclosure of defence witness statements pursuant to Rule 73*ter*(B) is discretionary. The Rule provides that the Chamber *may* order such disclosure but fails to elucidate the circumstances under which such disclosure would be appropriate. The Defence submits that the optional nature of the rule militates in favour of a cautious approach, rather than the indiscriminate scheme advanced by the Prosecution. The disclosure of

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[11] *Norman et al.*, SCSL-2004-14-T-503, Trial Chamber I, 'Order for Expedited Filing', 7 December 2005.
[12] *Norman et al.*, SCSL-2004-14-T-504 'Extremely Urgent Defence Request for Modification of the 7 December 2005 Order for Expedited Filing of Trial Chamber I' (the "Urgent Request"), 7 December 2005.
[13] Filing Decision at p.2.
[14] Request, ¶ 9.

defence witness statements should be ordered only in extraordinary circumstances and only with specific reference to the evidentiary justification for such order.

13. Orders for blanket disclosure of defence witness statements are simply not, as the Prosecution asserts, "commonplace"[15], neither at the ICTR nor at any other international criminal tribunal. It is worth noting that the Prosecution's assertion in this regard is unsupported by its cited authorities, among which only one case[16] stands for the proposition that a trial chamber of the ICTR should order disclosure of defence witness statements in advance of defence witness testimony. However, the decision in that case does not provide any reasoning or insight into *why* the trial chamber ordered the production of defence witness statements in addition to the production of detailed factual summaries. The Defence submits that such unreasoned authority is unhelpful and unpersuasive in the present circumstances as it is impossible to analogize the factors that motivated the *Nahimana* court with the facts and circumstances of the instant case[17].

14. The Defence submits that the better rule is the one advanced by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in the *Tadic* case:

> There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand[18].

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[15] Request, ¶ 7.

[16] *Prosecutor v. Nahimana*, ICTR-99-52-T, Trial Chamber I, 'Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules', 17 January 2003; Trial Chamber I, 'Decision on the Prosecutor's Motion to Compel the Defence's Compliance with Rules 73ter, 67(C) and 69(C)', 3 October 2002.

[17] The remaining cited authorities are inapposite. *See Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Trial Chamber I, 'Decision on the Defence Application for Extension of Time for Submission of Witness Statements', 17 January 2002 (wherein the trial chamber granted a defence request for an extension of time in which to disclose defence witness statements, which disclosure had been previously pledged *voluntarily by the defence pursuant to an informal agreement among the parties*); *Prosecutor v. Bagosora*, ICTR-98-41-T, Trial Chamber I, 'Decision on Sufficiency of Defence Witness Summaries', 5 July 2005 (wherein the trial chamber did not order the disclosure of defence witness statements, but rather only detailed factual summaries); and *Prosecutor v. Muvunyi*, ICTR-2000-55A, Trial Chamber II, 'Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses', 20 October 2005 (wherein the trial chamber did not order the disclosure of defence witness statements, but rather only certain identifying date of the witnesses).

[18] *Prosecutor v. Tadic*, IT-91-1-A, Appeals Chamber, 'Judgement', Majority Decision, 15 July 1999, ¶ 319.

15. This is because, as explained by the *Tadic* court, "[t]he power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question"[19], namely, the Prosecution's ability to test the credibility of defence witnesses. It should be left to the discretion of the Chamber, "depending on the circumstances of the case at hand", to order disclosure only after the examination-in-chief of a particular defence witness upon a showing of necessity by the Prosecution[20].

16. At the same time that it proclaims a commonplace practice of defence witness statement disclosure at the ICTR, the Prosecution acknowledges that, in reality, the approach of that tribunal is a "restrictive"[21] one. The Defence submits that the Prosecution's attempt to impose a regime of wholesale disclosure of defence witness statements as a matter of course upon the Special Court—based solely on the addition of certain discretionary language to Rule 73*ter*(B)—marks a significant and unnecessary departure from the actual practice of international criminal tribunals[22]. As noted by Judge Shahabuddeen in the *Tadic* decision, "the sparsity of the provisions relating to evidence counsels caution in adopting" new approaches to defence disclosure[23].

17. Furthermore, and contrary to the Prosecution's assertion[24], blanket disclosure of defence witness statements is inconsistent with the rights of the accused. Defence disclosure obligations are not equivalent to those of the Prosecution, and deliberately so:

> [T]hat the defence has a unilateral right to receive copies of prosecution witness statements ... is the transmuted equivalent of the right of an accused person, under many legal systems, to be apprised beforehand, in one way or another, of the evidence for the prosecution. Also, it has to be remembered that, altogether apart from the question whether he is guilty or not guilty, a man has a right not to be charged without just cause. *Fairness requires this kind of unilateralism.* A man who has been indicted, with the

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[19] *Ibid.*, ¶ 320.
[20] *Ibid.*, ¶ 326.
[21] Request, ¶ 13.
[22] Further, if the Chamber were somehow inclined to accept this argument, the Defence submits that it should not do so without first examining the minutes of the Plenary at which the addition to Rule 73*ter*(B) was adopted and give the parties an opportunity to be heard on that point.
[23] *Prosecutor v. Tadic*, IT-91-1-A, Appeals Chamber, 'Judgement', Separate Opinion of Judge Shahabuddeen, 15 July 1999, ¶ 41.
[24] Request, ¶ 15.

> prospect of loss of liberty, has a right to know what is the evidence on the basis of which he is being put through the judicial process. *The prosecution does not stand on that ground and has no similar basis for demanding access to the evidence of the defence*[25].

Requiring the Defence to routinely disclose witness statements would be contrary to this very basic principle of fairness.

The Prosecution Has Failed to Show That Disclosure is Necessary

18. At this stage, the Prosecution has failed to show how the Fofana summaries are in any way deficient. As an evidentiary matter, the summaries as provided by the Defence are sufficiently detailed to advance both of the intended goals of pre-defence-case disclosure: (i) assisting the Prosecution with its preparation for cross-examination and testing of defence evidence and (ii) aiding the Chamber with its management of the trial. The Prosecution admits that it has no "blanket right"[26] to see Defence witness statements, yet offers no reasons as to why the Fofana summaries, in their current incarnation, are in any way deficient with respect to these two goals. The Defence submits that, as intimated by the *Tadic* decision, such condition precedent should be satisfied before seeking the issuance of an order as broad as the one the Prosecution now desires. With respect to Mr Fofana's intended witnesses, the Defence submits that the Prosecution is already in possession of "sufficient disclosure as to enable it to prepare fully and effectively for cross examination"[27].

19. Rather than setting out "in express terms the extent of the obligations that were intended to be imposed upon the Defence vis-à-vis the Prosecution"[28], Rule 73*ter* simply marks the limits of the Chamber's discretion. It is submitted that such discretion should not be exercised without sufficient justification. Surely the Prosecution must substantiate its claim that the summaries, as currently filed, lack sufficient "precision and detail"[29]. Otherwise, Rule 73*ter* would have been couched in mandatory, rather than discretionary, terms.

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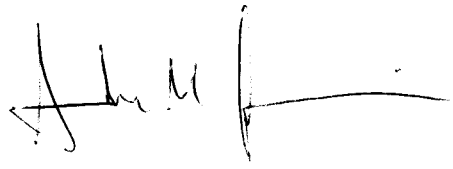
[25] *Prosecutor v. Tadic*, IT-91-1-A, Appeals Chamber, 'Judgement', Separate Opinion of Judge Shahabuddeen, 15 July 1999, ¶ 47 (internal citations omitted) (emphasis added).
[26] Request, ¶ 12.
[27] *Ibid.*
[28] *Ibid.*, ¶ 15.
[29] *Ibid.*

CONCLUSION

20. Accordingly, the Defence opposes the Request and urges the Chamber not to order the disclosure of witness statements at this time.

COUNSEL FOR MOININA FOFANA



Victor Koppe

DEFENCE LIST OF AUTHORITIES

Statutes & Rules

1. SCSL Rules of Procedure and Evidence: Rule 73*ter*

Jurisprudence

2. *Prosecutor v. Nahimana*, ICTR-99-52-T, Trial Chamber I, 'Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules', 17 January 2003; Trial Chamber I, 'Decision on the Prosecutor's Motion to Compel the Defence's Compliance with Rules 73ter, 67(C) and 69(C)', 3 October 2002

3. *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Trial Chamber I, 'Decision on the Defence Application for Extension of Time for Submission of Witness Statements', 17 January 2002

4. *Prosecutor v. Bagosora*, ICTR-98-41-T, Trial Chamber I, 'Decision on Sufficiency of Defence Witness Summaries', 5 July 2005

5. *Prosecutor v. Muvunyi*, ICTR-2000-55A, Trial Chamber II, 'Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses', 20 October 2005

6. *Prosecutor v. Tadic*, IT-91-1-A, Appeals Chamber, 'Judgement', Majority Decision and Separate Opinion of Judge Shahabuddeen, 15 July 1999, ¶ 319