

511

SCSL-04-14-T
(14397-14405)

14397

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
ALLIEU KONDEWA**

SCSL-2004-14-T

**RESPONSE BY THE FIRST ACCUSED TO THE PROSECUTION REQUEST
FOR ORDER TO DEFENCE PURSUANT TO RULE
73TER TO DISCLOSE WRITTEN WITNESS STATEMENTS**

Office of the Prosecutor:
Christopher Staker
James C. Johnson

Court Appointed Counsel for Hinga Norman

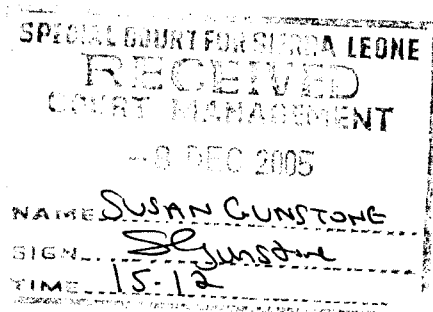
Dr Bu-Buakei Jabbi
Mr John Wesley Hall

Court Appointed counsel for Moinina Fofana:

Mr Victor Koppe
Mr Arrow Bockarie
Mr Michiel Pestman

Court Appointed Counsel for Allieu Kondewa:

Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Ms Susan Wright



SCSL-2004-14-T

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 Hinga Norman (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

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.

Moyamba District. It should contain *a little more* detail than that kind of summary description⁴.

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 Norman’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 summaries⁸ 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, Norman summaries , as

⁴ *Norman et al.*, Transcript of 27 October 2005 Status Conference at 18:2-6 (emphasis added).

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).

currently filed, includes what each witness intends to testify as well as factual summaries of the intended testimony.

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 2005¹¹. The Defence immediately filed an urgent request for modification, in accordance with Rule 7(C), of the Order for Expedited Filing¹². 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

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

10. Disclosure of defence witness statements pursuant to Rule 73ter(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 defence witness statements should be ordered only in extraordinary circumstances and only with specific reference to the evidentiary justification for such order.
11. Orders for blanket disclosure of defence witness statements are simply not, as the Prosecution asserts, “commonplace”¹⁴, 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 case¹⁵ stands

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, ¶ 7.

¹⁵ *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.

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 case¹⁶.

12. 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 hand¹⁷.

13. 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”¹⁸, 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 Prosecution¹⁹.

14. 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

¹⁶ 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 data of the witnesses).

¹⁷ *Prosecutor v. Tadic*, IT-91-1-A, Appeals Chamber, ‘Judgement’, Majority Decision, 15 July 1999, ¶ 319.

¹⁸ *Ibid.*, ¶ 320.

¹⁹ *Ibid.*, ¶ 326.

approach of that tribunal is a “restrictive”²⁰ 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 73ter(B), marks a significant and unnecessary departure from the actual practice of international criminal tribunals²¹. 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 disclosure²².

15. The Norman defence has organised the preparation of its case on assumptions based upon the adversarial process whereby statements of witnesses for the defence taken by the defence in contemplation of litigation are privileged and therefore not subject to disclosure and had it been intimated in advance that prior statements of our witnesses would have to be disclosed, we would have taken into consideration in deciding who to call. Furthermore, if any witness had been told that his statement would be supplied to the Prosecution, the defence has grave doubt as to whether any witness would have spoken to the Norman Defence Team at all. Given the adversarial nature of the proceedings, the Defence would be bound to suffer prejudice if any intended witness for the Norman Defence were to refuse to testify because of the possibility that statements they might give or had given under the assurance of confidentiality would be disclosed.

16. The Statute of the Special Court gives the court powers to seek for guidance as appropriate from the Criminal Procedure Act, 1965, of Sierra Leone. Sierra Leone being a typical common law country, the procedure applicable here is essentially adversarial and as stated by Sopinka J. speaking for the Supreme Court of Canada in *R. v. Stinchcombe* and cited with approval in the separate and concurring opinion of Judge Stephen in *Tadic*, discussing the fundamental difference in adversarial systems of the respective roles of the prosecution and the defence, he says: “the fruits of the investigation which are in the possession of counsel for the Crown are not the

²⁰ Request, ¶ 13.

²¹ 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 73ter(B) was adopted and give the parties an opportunity to be heard on that point.

²² *Prosecutor v. Tadic*, IT-91-1-A, Appeals Chamber, ‘Judgement’, Separate Opinion of Judge Shahabuddeen, 15 July 1999, ¶ 41.

property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence, has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role”.

17. Furthermore, and contrary to the Prosecution’s assertion²³, 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 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*²⁴.

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

17. 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”²⁵ to see Defence witness statements, yet offers no reasons as to why the summaries offered by the Norman Defence Team, in their current incarnation, are in any way deficient with respect to these two goals. The Defence submits that, as intimated by

²³ Request, ¶ 15.

²⁴ *Prosecutor v. Tadic*, IT-91-I-A, Appeals Chamber, ‘Judgement’, Separate Opinion of Judge Shahabuddeen, 15 July 1999, ¶ 47 (internal citations omitted) (emphasis added).

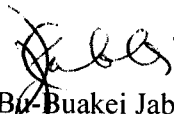
²⁵ Request, ¶ 12.

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.

18. 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”²⁶, Rule 73ter simply marks the limits of the Chamber’s discretion. It is submitted that such discretion should be exercised judiciously and not without sufficient justification. Surely the Prosecution must substantiate its claim that the summaries, as currently filed, lack sufficient “precision and detail”²⁷. Otherwise, Rule 73ter would have been couched in mandatory, rather than discretionary, terms.

CONCLUSION

19. Accordingly, the Defence opposes the Request and urges the Chamber not to order the disclosure of Norman defence witness statements.


Dr. Bu-Buakei Jabbi
Court Appointed Counsel

²⁶ *Ibid.*, ¶ 15.

²⁷ *Ibid.*

DEFENCE LIST OF AUTHORITIES

1. Prosecutor v. Nahimana, ICTR-99-52-T, Trial Chamber 1, “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 on the Prosecutor’s Motion to compel the Defence’s Compliance with Rules 73ter, 67(c), 3 October 2002
2. Prosecutor v. Ntakirutimana, ICTR-96-10-T, Trial Chamber 1, “Decision on the Defence Application for Extension of Time for submission of witness Statements’, 17 January 2002
3. Prosecutor v. Bagosora, ICTR-98-41-T, Trial Chamber 1, “Decision on Sufficiency of Defence Witness Summaries’ 20 October 2005-12-08
4. Prosecutor v. Muvunyi, ICTR-2000-55A, Trial Chamber II, “Decision on Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses”, 20 October 2005-12-08
5. Prosecutor v. Tadic, IT-91-1-A, Appeal Chamber, “Judgement”, Majority Decision and Separate Opinion of Judge Shahabuddeen, 15 July 1999,
6. Prosecutor v. Tadic, Trial Chamber, Separate Opinions of Judge Ninian Stephens and Judge Vohrah, on the Prosecution Motion for Production of Defence Witness Statements.