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SCSL-2004-~~14~~¹⁴-PT
(6535-6551)

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet
Registrar: Mr. Robin Vincent
Date: 13 May 2004

THE PROSECUTOR

Against

**SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA**

CASE NO. SCSL-2004-14-PT

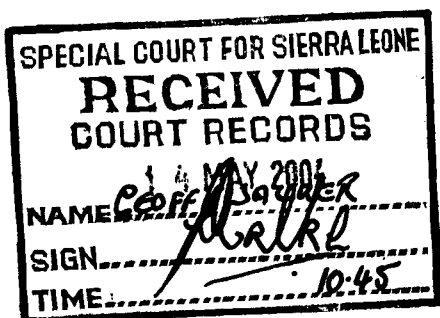
MOININA FOFANA

**RESPONSE TO PROSECUTION MOTION FOR MODIFICATION OF
PROTECTIVE MEASURES AND REQUEST FOR PERMISSION TO CONTACT
PROTECTED WITNESSES**

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Mr. James Johnson
Mr. Charles Caruso

Defence Office:
Mr. Ibrahim Yillah

Defence Counsel:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie



1. In response to the “Prosecution Motion for Modification of Protective Measures for Witnesses” dated 4 May 2004 (the “Motion”), the Defence for Mr. Fofana hereby objects to the request to reduce by half the length of time in which the Defence will be in possession of unredacted protected witness statements. In addition, the Defence objects to all protective measures requested for witnesses not falling within category A, B or C, as defined by the Prosecution in its Motion.¹
2. As well as responding to the Motion, the Defence would take this opportunity to request permission to contact some of the witnesses the Prosecution wishes to protect. This request is based on order (k) of the “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, dated 16 October 2003 (the “Trial Chamber Decision”).

Modification of deadline for disclosure to 21 days

3. As a preliminary point, the Defence notes that the Prosecution divides its witnesses into two principal categories, I and II, category I (“witnesses of fact”) comprising witnesses for whom the Prosecution is seeking protective measures, and category II (expert witnesses and those who have “waived their right to protection”)² comprising those for whom no protection is sought.³ The Prosecution then refers to three sub-groups of category I: A (sexual assault witnesses); B (children); and C (insiders). There is presumably a fourth sub-group or sub-category – witnesses for whom the Prosecution is seeking protection but who are neither sexual assault witnesses, children nor insiders. The Defence will refer to these witnesses as sub-group D. In spite of the fact that this seems to be the largest sub-category of witnesses the Prosecution is seeking to protect with special measures, sub-category D is conspicuously absent in the Motion and not defined by the Prosecution.

¹ Motion, paras. 24-35.

² Neither the Statute nor the Rules provided for a “right” to protective measures. Witnesses can not “waive” a right they do not have. Of course, witnesses can choose whether or not to come forward, but having chosen to do so, they have no “right” to be protected against danger or risk which may possibly result from their testimony in trial. Protective measures are ordered at the discretion of the Trial Chamber.

³ Motion, para. 20.

Category I	Category II
A	expert witnesses
B	
C	witnesses who have waived their “right” to protection
(D)	

category I: “witnesses of fact”

category II “expert witnesses and witnesses who have waived their right to protection”

sub-category A: “Sexual Assault Witnesses and Victims”

sub-category B: “Witnesses – Children”

sub-category C: “Witnesses – insiders”

sub-category D: other witnesses for whom the Prosecution is seeking protection

4. Order (a) of the Trial Chamber Decision provides:

“The Prosecution may withhold identifying data of the persons [for whom] the Prosecution is seeking protection as set forth in paragraph 25 of the Motion and any other information which could lead to the identity of such a person to the Defence, until 42 (forty-two) days before the witness is to testify at trial; and may not disclose any materials provided to the Defence in a redacted form until 42 (forty-two) days before the witness is to testify at trial, unless otherwise ordered.”

The Defence notes that the order applies to “the persons [for whom] the Prosecution is seeking protection”, i.e. witnesses in category I. There is thus no basis to withhold identifying data for witnesses in category II, and the Defence should therefore have received unredacted statements from all witnesses in this category. However, to date that has not been the case. The Defence would therefore ask the Trial Chamber to order that unredacted statements of category II witnesses be disclosed immediately.

5. In the Motion, the Prosecution asks the Trial Chamber to reduce the period of 42 days in order (a) of the Trial Chamber Decision to 21 days. The Defence strenuously objects to this request.
6. The Prosecution suggest that disclosure of unredacted statements is necessary merely “to allow the Defence to conduct any inquiries relating to remaining issues such as credibility of the identified witness”.⁴ As the Defence has previously explained, however, for example at the status conference of 5 March 2004, the statements so far received are so heavily redacted as to be almost impenetrable. Disclosure of the unredacted statements is necessary for the Defence to carry out all but the most general of investigations into the strength of the Prosecution case. It would be a significant encroachment on the right of the accused to adequate time and facilities to prepare his defence if these investigations were not possible until three weeks before the testimony of each protected witness. It should be remembered that the Defence has only received two unredacted (protected) witness statements so far. Virtually the entire case against Mr. Fofana has been presented in heavily redacted form of little use to the Defence. In these circumstances and with respect to the Trial Chamber, the Defence considers the period of 42 days to be at the very limits of the acceptable.
7. The Defence would also point out that pursuant to order (f) of the Trial Chamber Decision it is under an obligation not to disclose any protected identity at any stage. It is therefore unclear to the Defence how a witness will be put at risk by the disclosure of unredacted statements to the Defence.
8. The Defence will not comment on the Prosecution’s claim that the security situation in Sierra Leone has deteriorated over recent months, but it was unpleasantly surprised by the following quotation from the Trial Chamber decision on protective measures in the case of Mr. Kondewa:

“[...] the particularly bloody, hostile and vicious environment in which these gruesome offences were cruelly perpetrated and the necessity to fulfil the

⁴ Motion, para. 9.

procedural imperatives of an adversarial system of justice governing the courts by providing witnesses to sustain the charges [...].”⁵

This passage in the Kondewa decision suggests judicial bias. Judge Itoe appears not only to have already decided that the crimes charged by the Prosecutor were indeed committed, but also that they were “cruelly perpetrated”. The Defence hopes that the Trial Chamber will not demonstrate similar prejudice in judging the current Motion, in particular the request to reduce the deadline for disclosure to 21 days.

9. As an aside, the Defence strongly objects to the *ex parte* submission of statements in support of its proposition that the potential security risk to witnesses has increased dramatically in recent months.⁶ The Trial Chamber should not consider any evidence which is unknown to the Defence. To do so would seriously violate the accused’s right to a fair and adversarial trial in which each party has the opportunity to challenge the evidence presented to the Court by the other party. It is for this reason that neither the Statute nor the Rules allow for *ex parte* presentation of evidence.

Protective measures should be restricted to sub-categories A, B and C

10. As mentioned above, the Prosecution seeks protective measures, albeit to a varying degree, for all witnesses falling within category I. One can safely assume that category II, i.e. experts witnesses and witnesses who have “waived their right” to protection, is limited and that, therefore, sub-category D will be the most substantial group of witnesses.
11. The Defence is concerned that the Prosecution has not even attempted to define, other than in the negative, this principal sub-category of witnesses. More importantly, the Prosecution has failed to explain why the circumstances for this group are so exceptional, and the danger or risk so real, that the far-reaching protective measures

⁵ Prosecutor against Kondewa, SCSL-2003-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Measures are in Place, 10 October 2003, para. 25, as cited in the Motion, para. 7.

⁶ Motion, para. 11 (I), Declarations 1-7.

are justified. The Prosecution here has failed to meet the requirements of Rule 69 (A) of the Rules of Procedure and Evidence.

12. If the Trial Chamber were to allow the requested protective measures for all witnesses the Prosecution is seeking to protect, including vast and ill-defined sub-category D, it would encourage the blanket use of these measures by the Prosecution, contrary to Rule 69. Experience in this case shows that the Prosecution tends to use the powers delegated to it by the Trial Chamber to determine which witness deserves protection without discrimination.
13. In sum, the Defence for Mr. Fofana opposes the suggested deadline of 21 days for the disclosure of unredacted witness statements. The Defence does not object to the protective measures requested for sub-category A, B and C witnesses, but in the absence of further information it strongly opposes the request for protective measures for any other witness. It further requests, therefore, the immediate disclosure of unredacted statements of all witnesses not belonging to one of the three sub-categories mentioned above.

Request for permission to contact protected witnesses

14. Pursuant to order (k) of the Trial Chamber Decision, the Defence for Mr. Fofana also requests the Court's permission to contact all category C witnesses before their testimony at trial.
15. Permission to interview a wider group of witnesses was requested from the Prosecution by letter of 19 January 2004.⁷ This request was refused by letter of 5 February 2004.⁸ The Defence brought the matter to the Trial Chamber's attention at the status conference of 5 March 2004, where it was instructed to attempt to reach agreement with the Prosecution, and in particular to suggest a *modus operandi* for the interviews which would safeguard the identities of the interviewees. This was done by

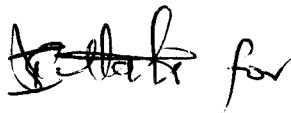
⁷ Letter from Mr. Michiel Pestman to Mr. David Crane, 19 January 2004, **Annex 1**.

⁸ Letter from Mr. James C. Johnson to Mr. Michiel Pestman, 5 February 2004, **Annex 2**.

letter of 11 March 2004.⁹ No reply to this last letter has been received, and the Defence suspects that no progress will be made on this issue without an order from the Trial Chamber.

16. With a view to the above, the Defence, now, asks the Trial Chamber to order the Prosecution to facilitate Defence interviews with all category C witnesses as soon as their identity is revealed to the Defence. This new proposal should overcome the objections raised by the Prosecutor, which related to protecting the witnesses' identities from the Defence during the pre-trial phase.
17. If the Trial Chamber decides that the witness may refuse to be interviewed by the Defence, the Defence would ask that the request to interview be referred by the Victims and Witnesses Unit, as a neutral intermediary.

COUNSEL FOR THE ACCUSED

A handwritten signature in black ink, appearing to read "Michiel Pestman" followed by "for". The signature is written in a cursive, somewhat stylized script.

Mr. Michiel Pestman

⁹ Letter from Mr. Michiel Pestman to Mr. James C. Johnson, 11 March 2004, **Annex 3**.

Annexes

1. Letter from Mr. Michiel Pestman to Mr. David Crane, 19 January 2004.
2. Letter from Mr. James C. Johnson to Mr. Michiel Pestman, 5 February 2004.
3. Letter from Mr. Michiel Pestman to Mr. James C. Johnson, 11 March 2004.

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Mr. David Crane
 Prosecutor
 Special Court for
 Sierra Leone

Amsterdam, 19 January 2004
 Our ref. 20030855.MP/hw

Telephone +31 20 3446200
 Fax +31 20 3446201

Re: Prosecutor v. Fofana / SCSL-2003-11-PT

Dear Mr. Crane,

I have been assigned as Defence Counsel to Mr. Moinina Fofana in the above-mentioned case.

The legal team engaged by my client is currently preparing for trial. On the basis of the limited and seriously censored material the Prosecution has disclosed to the Defence, pursuant to Rule 66 (A), it has proved almost impossible to do so properly. The witness statements which we have received are simply not detailed or specific enough, mainly because of the many deletions in the text. This problem is compounded by the fact that more than twenty seemingly crucial statements were only disclosed as summaries.

In addition to the general preparation of my client's defence, I am about to file an application for bail, pursuant to Rule 65.

In order to effectively prepare for trial and to be able to challenge the continuing detention of my client effectively, I have four requests.

Firstly, would you please provide us with full statements from all witnesses for whom a summary statement only has been disclosed.

19 January 2004, page 2

In this regard, I would draw your attention to the case of Lietzow v. Germany before the European Court of Human Rights (ECHR, Lietzow v. Germany, 13 February 2001, no. 24479/94). In that judgment the Court found that the provision of summaries rather than full witness statements to the defence rendered the defence unable properly to challenge the reliability of the prosecution case. The defendant's right to a fair trial and to an adversarial process (in this case during a preliminary challenge to this detention) were found to have been violated.

Secondly, I should like to interview the following protected witnesses: numbers 12, 49, 68, 70, 72, 79, 83, 87, 96, 97, 103, 117, 118, 124, 141, and 143.

Pursuant to Order (K) of the "Orders for Immediate Protective Measures for Witnesses and Victims and for Non Public Disclosure", issued by Judge Thompson on 16 October 2003, I shall be making a written request to interview the mentioned witnesses to the Trial Chamber, unless you consider that an arrangement can be made between ourselves.

Thirdly, pursuant to Rule 66 (A) (ii), I request inspection of books, documents or other evidence in your custody or control which the Prosecution intends using or is considering to use as evidence at trial.

In addition, I request inspection of all other books, documents, or other objects, which are material for the preparation of the defence. I am particularly, but not solely, interested in inspecting those documents, books and other objects which mention or are in any other way related to my client, to the (organisation of the) CDF, and to the crimes listed in the indictment.

With regard to this request, I would refer you to the case of Schöps v. Germany at the European Court of Human Rights (ECHR, 13 February 2001, no. 25116/94). In that case, the Court held that the right to a fair trial – again, even at the preliminary stage – required that:

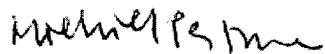
"the accused be given a sufficient opportunity to take cognisance of statements and other pieces of evidence underlying them, such as the results of the police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence which he seeks to be given access to" (*ibidem*, para. 50).

Lastly, I should point out some apparent oversights in the material disclosed which are also hindering the preparation of my client's defence. Some of the statements omit to specify the date of the incidents they describe. These include statements from witnesses numbered 18, 19, 54, 67, 84, and 101. In other statements, such as those from witnesses numbered 7, 38, 57, 58, 59, 62, 63, 81, 84, and 119, the location of events recounted remains unclear. It would also appear that statements with numbers 75, 82, 102, and 104 have been omitted entirely.

19 January 2004, page 3

Please, forward any missing statements and provide clarification of dates and locations as specified at your earliest convenience.

Kind regards,



Michiel Pestman



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III
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05 February 2004

Mr. Michiel Pestman
Bohler Franken Koppe Wijngaarden
Keizersgracht 560-562
1017 EM Amsterdam

Re: Prosecutor v. Fofana / SCSL-2003-11-PT

Dear Mr. Pestman:

In response to your letter dated 19 January, I herein endeavor to address the requests you have made therein.

① As to providing you "... with full statements from all witnesses for whom a summary statement only has been disclosed," I draw your attention to paragraphs 5, 8 and 21 of the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure. Specifically, in paragraph 8 we identify our intent to disclose summaries "where redaction would effectively render a witness statement or interview report useless." We will certainly make full disclosure of witness statements when required in accordance with applicable witness protection orders.

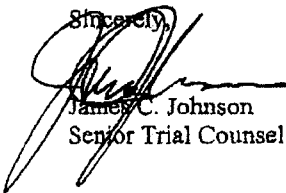
② Relying upon the same authority, we decline to disclose the identity of the witnesses identified by your letter as individuals you wish to interview. At such time, as required by applicable witness protection orders, we will disclose the identities of such witnesses and assist in facilitating any such interviews in accordance with the desires of the witness or orders of the Trial Chamber.

③ Pursuant to Rule 66(A)(ii), Rules of Evidence and Procedure, Special Court for Sierra Leone, we will provide you access to inspect any books, documents, photographs and tangible objects in our custody or control which are intended by the Prosecution for use at trial. I am currently exploring the possibility of providing you with copies of these materials on CD. Please contact me in order to make arrangements for this inspection.

With regard to your final request, please be advised the witness pseudonyms TF2-075, TF2-102 and TF2-104, have not as yet been assigned to any prospective witnesses.

Regarding pseudonym TF2-082, that summary has already been disclosed to you however it appears it was referred to, in error, as TF2-101. Please find attached hereto the corrected copy. I apologize for any inconvenience this oversight may have caused.

Sincerely,


James C. Johnson
Senior Trial Counsel

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Re: Prosecutor v. Fofana / SCSL-2003-11-PT

Dear Mr. Johnson,

At the Status Conference on 5 March 2004 the Trial Chamber asked me to make suggestions with regard to two related topics.

First, in response to the many objections raised by the various defence teams to the extensive use of redacted material, I was instructed to formulate acceptable criteria for the redaction of prosecution witness statements subject to the order for protective measures.

It will come as no surprise to you that the current redaction of the statements is unacceptable to the defence, as it makes it impossible for us to prepare effectively for trial.

If in your view redactions remain necessary in order to protect the identity of witnesses, I strongly believe that as little information as possible should be kept secret from the defence. Only personal details with regard to the witness and his or her direct relatives, such as name and specific address, should be deleted from the statements. Other information should be available to the defence, with the possible exception of information which is unique to the witness and could therefore directly lead his or her identification. Unique infor-

11 March 2004, page 2

mation, in my view, would include, for example, military rank, if this were of such a high level that it was shared by only a few individuals.

All other information should never be redacted, certainly not information about the place or date of the alleged events.

Second, in response to my application to interview prosecution witnesses under the terms of the order for protective measures, the Trial Chamber requested suggested guidelines for these interviews, which would safeguard the identity of protected witnesses.

I suggest no questions should be asked which could directly lead to the identification of the protected witness. For these questions the criteria set out above should also apply, i.e. no questions would be allowed with regard to personal details or unique witness information. If the witness so desires, the interview could also be conducted in the presence of a representative of the prosecution, whose job it would then be to ensure that the witness does not answer any question which would disclose his or her identity, according to the same criteria.

Where the prosecution intends to seek or has already gained an order to the effect that the witness will be hidden from the defence and the accused during testimony under Rule 75, a screen could separate the witness and the member of the defence team during the interview.

I look forward to hearing your comments on my proposals and I hope we can reach an agreement between ourselves. If we are unable to do so by 19 March 2004, I will file a motion to this effect before the Trial Chamber.

Best regards,


Michiel Pestman

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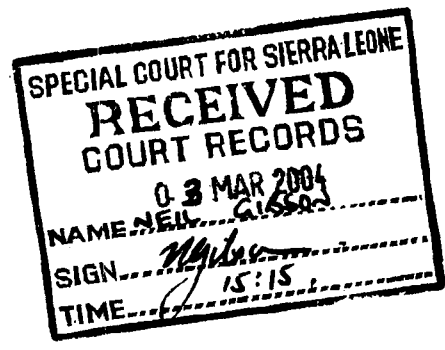
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STATUS CONFERENCE
Prosecutor v. Norman, Fofana and Kondewa
SCSL-2004-14-PT
3 March 2004

List of documents for the Status Conference
(Mr. Moinina Fofana)

1. Witness statements 'disclosed' by the Prosecution to the Defence for Mr. Moinina Fofana, 3 March 2004.
2. Letter from Defence Counsel, Mr. Michiel Pestman to the Prosecutor, 19 January 2004.
3. Written response by the Prosecutor, Mr. James C. Johnson, to Defence Counsel, Mr. Michiel Pestman, 5 February 2004.



Prosecutor v. Norman, Fofana and Kondewa
SCSL-2004-14-PT
3 March 2004

Witness statements 'disclosed' by the Prosecution
to the Defence of Mr. Moinina Fofana

1) 30 July 2003:

TF2-001 t/m 101

TF2-103

TF2-105 t/m 113

As well as various articles: Sierra Leone website, Human Rights Watch Report, UNICEF Report, S-G Report, Amnesty International Report.

2) 18 November 2003:

TF2-007

TF2-013

TF2-021

TF2-055

TF2-087

TF2-063

TF2-081

TF2-097

TF2-114 t/m 125

TF2-139-143

3) 20 February 2004:

TF2-002

TF2-005

TF2-008

TF2-010

TF2-011 t/m 015

TF2-017

TF2-020

TF2-021

TF2-023

TF2-025

TF2-029

TF2-030

TF2-033

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TF2-116
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TF2-134
TF2-135
TF2-136
TF2144 t/m 197