

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 27 July 2004

THE PROSECUTOR

Against

SAM HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

**PROSECUTION REPLY TO “JOINT RESPONSE OF SECOND AND THIRD
ACCUSED TO PROSECUTION’S REQUEST FOR LEAVE TO CALL ADDITIONAL
WITNESSES”**

<u>Office of the Prosecutor:</u> Luc Côté James C. Johnson Bianca E. Suciú	<u>Defence Counsel:</u> Michiel Pestman Charles Margai
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SPECIAL COURT FOR SIERRA LEONE
RECEIVED
 COURT RECORDS
 27 JUL 2004
 NAME: *Bankole Thompson*
 SIGN: *[Signature]*
 TIME: 11:35

INTRODUCTION

1. On 16 July, the Prosecution filed a “Request for Leave to Call Additional Witnesses” (the “Request”). The Prosecution files this reply to the “Joint Response of Second and Third Accused to Prosecution’s Request for Leave to Call Additional Witnesses” (the “Response”) filed on 23 July 2004 to respond to the objections raised by the Defence.

SUMMARY OF DEFENCE OBJECTIONS

2. The Defence argues in its Response that the Prosecution’s Request should be dismissed. The Defence submits that the Prosecution did not meet the standard for “good cause” for adding new witnesses on the witness list as: the Prosecution failed to demonstrate the materiality of the new evidence it seeks to adduce and that the addition of witnesses will prejudice the rights of the accused. With regard to the last consideration the Defence stated that disclosure of the respective witnesses’ statements was not done in a timely manner, and was incomplete; there was no effective corroboration of the Prosecution’s assertion that it encountered insurmountable difficulty in finding and interviewing these witnesses; and finally that the addition of new witnesses will compromise the expeditiousness of trial.

ARGUMENT

The evidence is material

3. The Prosecution entirely disagrees with Defence’s objection that the testimony of the proposed additional witnesses is not material to Prosecution’s case. As demonstrated in Prosecution’s Request, the proposed evidence touches the most vital issues of its case. These witnesses will testify to the direct involvement of all three accused by *planning* and *ordering*, in the atrocities committed by kamajors, which will have a direct effect in the determination of the accused’ culpability. As the Trial Chamber in *Delalic* expressed: “Where the testimony

*of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute of the International Tribunal and Rules”.*¹

4. The Prosecution stresses that the evidence it hereby seeks to add might seem similar at first glance to that of other witnesses², however, upon a thorough examination, difference is manifest in the scope, detail, time and place. The expected testimony of the proposed additional witnesses is unique and distinctive in the following points:

(i) **TF2-221**

- Moinina Fofana and Allieu Kondewa spoke at the Base Zero meeting for the Operation Black December Offensive, urging compliance and support for Hinga Norman’s instructions.
- A report of the outcome of the battle of Tongo was given directly to HN.

(ii) **TF2-222**

- Orders were given by Hinga Norman for the Black December Operation with respect to specific locations and sequence of attacks.
- Specific orders issued at Base Zero from Moinina Fofana clearly adding in reference to the Black December Operation that “any commander that fails should kill himself instead of coming back to base Zero”.
- Report of the Tongo attack directly made to Moinina Fofana & Allieu Kondewa.
- Specific orders issued at Base Zero by Hinga Norman not to spare police and civil servants believed to be collaborators.

(iii) **TF2-223**

- Evidence with respect to Hinga Norman’s arrival at Base Zero with fighters referred to as Special Forces from Liberia.
- Meeting at Zimmi evidencing Hinga Norman’s instructions for the curtailing of both junta and civilian movement; the presence of Moinina Fofana at that relevant point in time; and speech given by Moinina Fofana reinforcing Hinga Norman’s instructions.

¹ *Prosecutor v. Delalic et al*, ICTY-96-21-T, “Decision on Confidential Motion to Seek Leave to Call Additional Witnesses”, 4 September 1997, para 7.

² The Defence enumerates nine witnesses, however witnesses TF2-002 and TF2-023 are not listed as witnesses for the prosecution though disclosure of their statements was made pursuant to Rule 68 (B).

- Evidence that Moinina Fofana followed the movement of fighters from axis to axis encouraging and motivating compliance with Hinga Norman's instructions.
- Allieu Kondewa's presence at the meeting in Zimmi.
- Confessions of direct killings of collaborators at different locations whilst Kamajor troops were enroute to various identified targets in compliance with HN's instructions.
- Evidence of burning of civilians by tire or butter by Kamajors- Special Squad for burning, set up by Magonna.
- Detailed evidence in relation to SS Camp such as: specific details as to the internal workings at the SS Camp; direct evidence on torture, mode of interrogation and extra-judicial executions; direct evidence to HN's regular physical presence and visits at the Camp; direct evidence that HN regularly studied and examined the 'Occurrence Book' detailing activities at the Camp; direct evidence of Moinina Fofana's regular visits to SS Camp and finally Moinina Fofana's of the activities occurring at SS Camp.

5. In the same vein, the Prosecution submits that having regard to the gravity of the crimes the accused persons are charged with and Prosecution's burden to prove its case beyond a reasonable doubt, the Prosecution has a "*duty under the Statute to present the best available evidence to prove its case*"³. Contrary to what the Defence alleges in its Response, the testimony of the additional witnesses who only recently became available, is deemed necessary to attain the threshold for proving the individual criminal responsibility of *all three accused* for the atrocities committed by the kamajors, specifically in the Tongo Field and Kenema crime bases.⁴

³ *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses", 26 June 2001 ('*Nahimana*, 26 June 2001'), para 20.

⁴ Upon diligent analysis of the seven witnesses' statements that the Defence enumerated in its Response (witness TF2-002 and TF2-023 are not on Prosecution witness list) it becomes evident that there is only one or at the most two witnesses overlapping per every fragment of evidence that is similar. It is the Prosecution's respectful submission that such cumulativeness of evidence can not be viewed as a futile repetition, but it must be considered essential for establishing the reliability of the evidence and for the Prosecution to meet the required standard of proof.

There is no prejudice being caused to the accused

1) Late disclosure

6. In paragraph 10 of its Response the Defence blames the Prosecution of having waited two months before disclosing to the Defence the redacted statements of witnesses pseudonymed TF2-221, TF2-222 and TF2-223. The Prosecution respectfully submits that disclosure of the said statements was served on the Defence as soon as possible after Prosecution formed its intention to call these witnesses, namely on 5 July.⁵ As such, the Prosecution did not in any way preclude the Defence of the “*opportunity to investigate the allegations set forth in these statements during the month of July*” as alleged by the Defence.⁶
7. Furthermore, it is submitted that the Defence will have ample time from now on to complete the necessary investigation, considering that two of the above mentioned witnesses are to testify for the Tongo Field crime base, which is the last crime base to be presented by the Prosecution. In respect to witness TF2-223, who is intended to be called at the end of the presentation of evidence for the Kenema crime base, which will most likely take place in the November trial session, the Defence has over four months to complete its investigation.⁷
8. However, should the Defence deem it necessary to investigate beyond that point, “the Defence may apply for leave to recall this witness for further cross-examination”, as expressed by the Trial Chamber in the *Nahimana* case.⁸

⁵ See Disclosure Letter, annex A.

⁶ See Defence’s Response para. 10.

⁷ As it stands now and should the present request be granted, witness TF2-223 is the fifteenth witness in line to be called to testify. Considering that the Trial Chamber estimates to hear approximately 10 witnesses per trial session; and in light of the fact that during the first RUF trial session which is scheduled to end on Friday, 30 July, a total of 10 or 11 witnesses would have likely testified, there are strong indications that witness TF2-223 will not be heard during the September trial session but rather during the November session.

⁸ *Nahimana*, 26 June 2001, para. 32. See also *Prosecutor v. Nahimana et al*, ICTR-99-52-I, “Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures”, 14 September 2001 (‘*Nahimana*, 14 September 2001’) para 17; where the Trial Chamber stated : “the fact that the witness is added several months into the trial is not decisive.”

2) Incomplete disclosure

9. With regard to Defence's allegation that Prosecution failed to make complete disclosure as it did not disclose the investigator's notes, the confirmation reports and the information relevant to the compensation of witnesses "*pursuant to paragraphs 8-15 of the Court's Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004*"⁹, (the "Disclosure Decision") the Prosecution replies the following: a) the declarations of witnesses TF2-221, TF2-222, TF3-223 were recorded as 'witness statements' and were disclosed as such¹⁰; and no confirmation reports have been thus far obtained from the respective witnesses. In connection to compensation made to the witnesses, the Prosecution has provided the Defence with such information in reference to the first twenty-one witnesses that have been thus far disclosed in an un-redacted form. As indicated in the letter dated 13 July 2004¹¹, the Prosecution is in the process of collating a list of payments made to the remaining witnesses which will be disclosed as soon as possible.
10. Finally, the Prosecution argues that information related to witness payments is a matter of cross-examination and therefore the time of disclosure of such material should not bear any determinative effect on the present Request.

3) Corroboration of the Prosecution's assertion that it encountered insurmountable difficulty in finding and interviewing these witnesses

11. In relation to this objection, the Prosecution replies that it has provided the Defence with sufficient information, without disclosing the witnesses' identity, regarding its difficulty in finding and interviewing witnesses TF2-221, TF2-222, TF2-223. The Prosecution highlights that in carrying out investigations into the conduct of the accused persons the Prosecution has exercised all due diligence, being mindful of the need to expedite the trial. Finally, the

⁹ See Defence's Response para. 11.

¹⁰ Disclosure Decision para 14: where the Trial Chamber states: "[...] the Prosecution is required to make available to the Defence, the witness statement in the form in which it has been recorded."

¹¹ See Letter dated 13 July 2004, Annex A.

Prosecution contends that the Defence failed to cite any authority in virtue of which the Prosecution would be obligated to submit corroborative evidence related to the above mentioned assertion. This argument should therefore be rejected.

4) The addition of new witnesses will not compromise the expeditiousness of trial

12. Contrary to what the Defence argues in its Response, the addition of the three witnesses in question will not cause undue delays to the proceedings.¹² The Prosecution is in the process of reducing its witness list for trial by dividing it into “core witnesses” and “back up witnesses”. Consequently, the actual number of witnesses to be called by the Prosecution will most likely be reduced from 154 to 105.
13. Moreover, the Prosecution submits that the passage cited by the Defence from the “Decision on the application of Samuel Hinga Norman for Self-Representation under 17(4)(D) of the Statute of the Special Court” to state that “[t]he complications relating to Prosecution witnesses thus far, therefore already demonstrated the “high potential” for disruptive delay to the proceedings”¹³ is entirely taken out of context and the analogy made is flawed.
14. In fact, in that decision the Trial Chamber stresses the imminent risks to the expeditiousness of trial that could result from an unqualified right to self-representation, in light of the complexities of an international trial. The Prosecution argues that the addition of three witnesses to the trial does not in any way amount to delays of the same magnitude, especially in view of the fact that the witness list will be considerably cut down. Moreover, the worth of the proposed testimonies in the determination of the trial clearly outweighs any such minimal delays that could result. Any prejudice to the accused must be assessed in the context of the overall interest of justice in a full and final determination of the guilt of the accused.

¹² See Defence’s Response para 9.

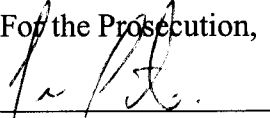
¹³ *Id.*

- 15. Given the complexity of the case, the materiality of the evidence to Prosecution’s case and the lack of undue delays of the expeditiousness of trial, the Prosecution reiterates that this request is in accord with the rights of the accused and therefore submits that it will be contrary to the interests of justice to exclude these witnesses’ testimony.

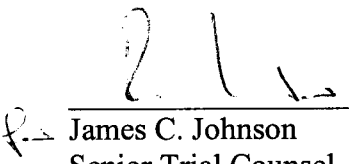
CONCLUSION

- 16. For the reasons stated above, the Prosecution prays that its Request be granted and the Defence objections rejected.

Freetown, 27 July 2004

For the Prosecution,


 Luc Côté
 Chief of Prosecutions



 James C. Johnson
 Senior Trial Counsel

PROSECUTION INDEX OF AUTHORITIES

Annex A

1. Disclosure Letter, dated 2 July 2004.
2. Letter dated 13 July 2004.

Annex A

1. Disclosure Letter, dated 2 July 2004.



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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

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2 July 2004

Ms. Quincy Whitaker
c/o James Cockayne
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Special Court for Sierra
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Freetown, Sierra Leone

Mr. Michiel Pestman
c/o Mr. Michiel Uiterwaal
Defence Office
Special Court for Sierra
Leone
Freetown, Sierra Leone

Mr. Charles Margai
c/o Yada Williams
Banta Chambers
N01 Goderich Street
Freetown, Sierra Leone

Dear Ms. Whitaker and Mssrs. Pestman and Margai,

Re: **The Prosecutor Against Samuel Hinga Norman (*et al.*), SCSL-2004-14-T**

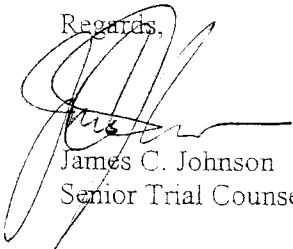
Pursuant to its continuing disclosure obligations under the Rules of Procedure and Evidence including Rules 66 and 68, the Prosecution hereby serves you with the attached witness statements. The Prosecution has also provided you with detailed receipts itemizing the witness statements disclosed. Please review the receipt and material provided, sign the receipt and return it to the Prosecution as soon as possible. Please advise the Prosecution in writing of any missing witness statements.

In the near future, the Prosecution intends to file a motion seeking good cause to add these witnesses to its witness list

This disclosure has been made subject to the "Orders for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure" issued on 23 May 2003 and "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses" issued on 8 June 2004. The disclosed material is intended solely for your use in connection with the above-captioned case. The material is not to be disclosed to the public or the media, nor kept for personal use. Should you withdraw from representation of this Accused prior to the conclusion of proceedings in this case, please remit the disclosed materials to your replacement counsel or to the Defence team. At the conclusion of proceedings in this case, all material disclosed to the defence team by the Prosecution be remitted to the Registry for appropriate disposition.

Thank you for your cooperation.

Regards,


James C. Johnson
Senior Trial Counsel



SPECIAL COURT FOR SIERRA LEONE

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PROSECUTOR Against Samuel Hinga Norman (*et al*)

CASE NO. SCSL-2004-14-T

RECEIPT

Pursuant to the prosecution's disclosure obligations, the below listed redacted witness statements were submitted on a compact disk to

_____ on _____:

Witness Pseudonym	Date of Interview/Summary	No. of Pages
TF2-221	19 May 2004	7
TF2-222	18 May 2004	12
TF2-223	20 May 2004	7

Annex A

2. Letter dated 13 July 2004.

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

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13 July 2004

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Bohler Franken Koppe De Feijter
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1017 EM Amsterdam
Netherlands

Mr. Charles Margai
Banta Chambers
N01 Goderich Street
Freetown, Sierra Leone

Dear Mssrs. Yillah, Pestman and Margai,

I am enclosing a list of payments made from the OTP budget to the witnesses that we have so far disclosed to you in an un-redacted form. Please note that this does not include payments made by the Witness and Victims Unit as this is run under the auspices of the Registry as stipulated by Rule 34(A) of the Rules and Evidence. Any request for information about payments made by this Unit should therefore be addressed to the Unit directly. We are also at the moment in the process of collating a list of payments made to the remaining witnesses on our witness list, and we will give you this information as soon as it is available.

Regards,

James C. Johnson
Senior Trial Attorney
Office of the Prosecutor

RECEIVED 14 JULY 2004 BY JAMES COCKAYNE