

SCSL-04-14-T

14303

(14303 - 14311)

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

So1

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Interim Registrar: Mr. Lovemore Munlo

Date filed: 6 December 2005

THE PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

**PROSECUTION REQUEST FOR ORDER TO DEFENCE PURSUANT TO RULE 73TER
TO DISCLOSE WRITTEN WITNESS STATEMENTS**

Office of the Prosecutor:

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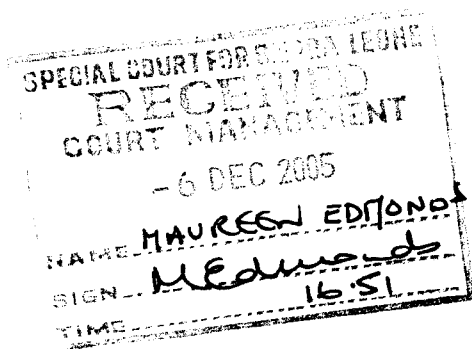
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I. INTRODUCTION

1. On 21 October 2005, Trial Chamber I filed an Order Concerning the Preparation and Presentation of the Defence Case (“Order”)¹ in which it ordered a Status Conference to be held on 27 October 2005, the Defence to file specific Materials no later than 17 November 2005, a Pre-Defence Conference to be held on 11 January 2006 and the commencement of the Defence Case on 17 January 2006.
2. Following the Status Conference on 27 October 2005,² on 17 November 2005,³ the Defence filed its Joint Defence Materials together with a request for partial modification of the Order. Thereafter, Trial Chamber I scheduled a further Status Conference for 25 November 2005.⁴ Following the Status Conference, the Chamber issued a “Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case” dated 28 November 2005 (“Consequential Order”).⁵
3. During the Status Conference on 25 November 2005, the Prosecution informed the Court that it would be requesting that the Trial Chamber exercise its discretionary power pursuant to Rule 73*ter* to order the Defence to disclose witness statements.⁶ The Presiding Judge responded that no decision had so far been made on that issue and that no order had been issued yet.⁷
4. In its Consequential Order, the Trial Chamber ordered the Defence to file by 5 December a number of materials, but did not order the filing of witness statements.
5. On 5 December 2005, the Accused filed their materials pursuant to the Consequential

¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-474, “Order Concerning the Preparation and Presentation of the Defence Case”, (“Order”), 21 October 2005.

² *Prosecutor v. Norman, Fofana, Kondewa*, Transcript (“Status Conference”), 27 October 2005.

³ *Prosecutor v. Norman, Fofana, Kondewa*, 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.

⁴ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-485, “Order Re-Scheduling Status Conference and order for submissions by the Prosecution”, 21 November 2005.

⁵ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-489, “Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case”, 28 November 2005 (“Consequential Order”).

⁶ *Prosecutor v. Norman, Fofana, Kondewa*, Transcript, 25 November 2005, p. 46.

⁷ *Ibid.*

Order⁸ (“5 December 2005 materials”). Having had the opportunity to peruse those materials, the Prosecution is of the view that the disclosure by the Defence of written statements of its witnesses would materially contribute to ensuring that the proceedings during the Defence case are as expeditious as possible, and to avoid unnecessary delays. The Prosecution therefore hereby requests that the Defence be ordered to file any written witness statements in its possession.

II. ARGUMENTS

6. The final paragraph of Rule 73ter(B) provides:

The Trial Chamber or the said Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to call to testify.

7. The case of *Norman et al.* is the first before the Special Court to reach the Defence case stage and there is therefore no precedent on the application of the final paragraph of Rule 73ter(B). However, the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“ICTR”) contain an identical provision,⁹ and in the practice of the ICTR, the ordering of the disclosure of witness statements is commonplace.
8. The first consideration is whether Defence witness statements are available, as the ordering of their disclosure is dependent on their availability.¹⁰ The Prosecution is cognisant of the fact that there is no general obligation on the Defence to take witness statements akin to the obligations imposed on the Prosecution, hence the need to inquire into the availability of such statements.
9. The Defence has not so far been asked to indicate if written witness statements are available. According to the jurisprudence of the Special Court, a witness statement is

⁸ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-498, “Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case”, 5 December 2005; SCSL-04-14-T-499, “Defence Witness and Exhibit Lists for the First Accused as per the Consequential Order for Compliance of 28th November 2005 Concerning the Preparation and Presentation of Defence Case”, 5 December 2005; SCSL-04-14-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 Amendment to the Rules of Procedure and Evidence, Eighth Plenary Session, 26 June 2000.

¹⁰ *Prosecutor v Nahimana et al.*, ICTR-99-52-T, “Decision on the Prosecutor’s Motion to Compel the Defence’s Compliance with Rules 73ter, 67(C), and 69(C)”, 3 October 2002.

“any statement or declaration made by a witness in relation to an event he witnesses and recorded in any form by an official in the course of an investigation”,¹¹ or, indeed, “anything that comes from the mouth of the witness.”¹² In view of this broad definition of a witness statement, the Prosecution submits that such statements are almost certainly available. They could take the form of comprehensive, signed statements, or simply interview notes prepared in the third person.¹³ This Trial Chamber has held that the lack of a signature does not detract from the statement’s substantive validity.¹⁴ Witness statements, regardless of their form, would assist the Prosecution in preparing for cross-examination and in testing the evidence meaningfully. They would also assist the Trial Chamber in managing the presentation of the Defence case, in particular in making any decisions to reduce the number of Defence witnesses to a realistic and manageable level. These elements help to ensure a fair trial for the Accused.

10. The practice of the ICTR indicates that disclosure of defence witness statements may be ordered, often orally, following pre-defence status conferences together with orders to file witness and exhibit lists and other materials, similar to the materials ordered to be disclosed in the current case in the Trial Chamber’s Order and Consequential Order. Normally a time frame is imposed, for example, 10 days prior to the commencement of the defence case¹⁵ or 14 days before the witness is due to testify,¹⁶ or along with the identifying information for the witness when protective measures are in place.¹⁷
11. The ICTR has also ordered that personal information of each Defence witness must be provided in the same format as that provided by the Prosecution in respect of Prosecution witnesses. This information has included, in particular, the witness’s activities at the time

¹¹ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-PT-152, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004, para. 23.

¹² *Ibid*, para. 22.

¹³ *Ibid*, para. 24.

¹⁴ *Ibid*, para. 22.

¹⁵ *Prosecutor v Ntakirutimana*, ICTR-96-10-T, ICTR-96-17-T, “Decision on the Defence Application for an Extension of Time for Submission of Witness Statements Rule 67(A) of the Rules of Procedure and Evidence”, 17 January 2002.

¹⁶ *Prosecutor v Nahimana et al.*, ICTR-99-52-T, “Decision on the Prosecutor’s Motion to Compel the Defence’s Compliance with Rules 73ter, 67(C), and 69(C)”, 3 October 2002; “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.

¹⁷ *Prosecutor v Muvunyi*, ICTR-2000-55A-T, “Decision on the Prosecutor’s Motion for Disclosure of Identifying Information Concerning Defence Witnesses pursuant to Rules 69(C) and 73ter”, 9 November 2005; “Decision on Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses”, 20 October 2005.

of the Indictment against the Accused, parentage and birthplace, and country of present residence.¹⁸ The information is necessary to enable the Prosecution to be sure it is dealing with the right person given the similarity of some Sierra Leonean names.

12. The Prosecution acknowledges that its disclosure obligations are more specific and burdensome than those of the Defence¹⁹ and that it has no “blanket right”²⁰ to see Defence witness statements. Nonetheless, the Prosecution submits that it has the right to sufficient disclosure as to enable it to prepare fully and effectively for cross-examination.
13. It is acknowledged that the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) demonstrates a more restrictive approach to ordering the disclosure of defence witness statements. However, this is because in the Rules of the ICTY, there is no provision equivalent to the final paragraph of Rule 73ter(B) of the Special Court’s Rules. Rule 73ter(B) of the ICTY Rules provides merely that the Defence may be ordered to file witness lists, witness names and summaries of testimony. The Appeals Chamber of the ICTY has noted that this provision of the ICTY Rules “does not require that the Defence file its witness statements”. However, the Appeals Chamber of the ICTY has said that nevertheless “the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.”²¹ An ICTY Trial Chamber has alluded to the need to develop a practice, in a given case, that enables the Prosecution “to cross-examine the witness effectively and not to be with empty hands and be taken by surprise”.²² The final paragraph of Rule 73ter(B) of the Special Court’s Rules fulfils this same need, by expressly authorising the Trial Chamber to order disclosure by the Defence of written statements of its witnesses.
14. Furthermore, even in the absence of any provision for the disclosure of written statements of Defence witnesses in the Rules of the ICTY, the ICTY Appeals Chamber has held that the disclosure of Defence witness statements can be ordered in certain circumstances. In

¹⁸ *Prosecutor v Bagosora et al.*, ICTR-98-41-T, “Decision on Sufficiency of Defence Witness Summaries”, 5 July 2005 (“Bagosora Decision”), para. 8.

¹⁹ Bagosora Decision, para. 6.

²⁰ See *Prosecutor v Tadic*, IT-94-1, Judgement, 15 July 1999, para. 319.

²¹ *Ibid*, para. 323.

²² *Prosecutor v Galic*, IT-98-29, Transcript of 3 October 2002, p. 13176.

particular, in the ICTY, the Prosecution has the power to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to order disclosure based on the particular circumstances of the case at hand.²³ This discretion will be exercised where a Trial Chamber is satisfied that in the particular circumstances disclosure would assist it in determining the truth.²⁴

15. Thus, it is submitted, that there is nothing inconsistent with the rights of an accused to order the Defence to disclose statements of its witnesses. Indeed, the disclosure of Defence witness statements is a valuable tool in enabling the Trial Chamber to establish the truth. Rule 73ter(B) of the Special Court's Rules sets out in express terms the extent of the obligations that were intended to be imposed on the Defence vis-à-vis the Prosecution. These obligations were intended to include the disclosure of witness statements where appropriate in the circumstances of a given case. The Prosecution submits that in view of the broad definition of a witness statement adopted by this Chamber, and so as to enable the Prosecution to conduct meaningful investigations, an order for the disclosure of statements would be appropriate in this case. This is particularly so, given the lack of precision and detail, especially as concerns time frames, of many of the summaries provided in the 5 December 2005 materials.
16. The Prosecution therefore requests that the Trial Chamber exercise its discretion to order the disclosure of witness statements in accordance with a time frame to be decided by the Chamber. Since no protective measures are currently in place and the Defence case is due to commence on 17 January, the Prosecution submits that unredacted statements could be disclosed immediately. The Prosecution notes that disclosure would not be required if it would result in a breach of the provisions relating to self-incrimination.

III. CONCLUSION

17. For these reasons, the Prosecution requests that the Trial Chamber order the Defence to file immediately any written witness statements that are available, such statements to indicate, where possible, the identifying information for the witness including family

²³ Ibid, para. 319.

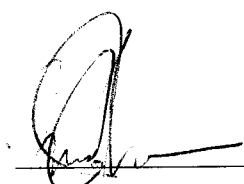
²⁴ Ibid, Separate Opinion of Judge Shahabuddeen, para. 52.

name, first name and nicknames; date and place of birth; names of parents; religion; occupation at the time relevant to the Indictment; and current address.

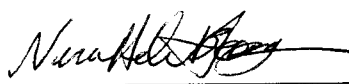
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6 December 2005

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Nina Jørgensen

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGMENTS

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2. *Prosecutor v. Norman, Fofana, Kondewa*, 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.
3. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-485, “Order Re-Scheduling Status Conference and order for submissions by the Prosecution”, 21 November 2005.
4. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-489, “Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case”, 28 November 2005 (“Consequential Order”).
5. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-PT-152, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004, para. 23.
6. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-498, Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 5 December 2005.
7. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-499, Defence Witness and Exhibit Lists for the First Accused as per the Consequential Order for Compliance of 28th November 2005 Concerning the Preparation and Presentation of Defence Case.
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9. *Prosecutor v Nahimana et al.*, ICTR-99-52-T, “Decision on the Prosecutor’s Motion to Compel the Defence’s Compliance with Rules 73ter, 67(C), and 69(C)”, 3 October 2002. <http://65.18.216.88/ENGLISH/cases/Nahimana/decisions/031002.htm>
10. *Prosecutor v Ntakirutimana*, ICTR-96-10-T, ICTR-96-17-T, “Decision on the Defence Application for an Extension of Time for Submission of Witness Statements Rule 67(A) of the Rules of Procedure and Evidence”, 17 January 2002. <http://65.18.216.88/ENGLISH/cases/NtakirutimanaE/decisions/170102.htm>
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Witness RM-10 and for other Relief based on the Ngeze Defence's Violations of Court Decisions and Rules", 17 January 2003.
<http://65.18.216.88/ENGLISH/cases/Nahimana/decisions/170103.htm>

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<http://65.18.216.88/ENGLISH/cases/Muvunyi/decisions/201005.htm>
13. *Prosecutor v Bagosora et al.*, ICTR-98-41-T, "Decision on Sufficiency of Defence Witness Summaries", 5 July 2005.
<http://65.18.216.88/ENGLISH/cases/Bagosora/decisions/050707.htm>
14. *Prosecutor v Tadic*, IT-94-1, Judgement, 15 July 1999, para. 319.
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B. RULES OF PROCEDURE AND EVIDENCE

Rules of Procedure and Evidence of the Special Court, Rule 73ter(B), Amended 29 May 2005.

C. TRANSCRIPTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, Transcript, 27 October 2005.
2. *Prosecutor v. Norman, Fofana, Kondewa*. Transcript, 25 November 2005.
3. *Prosecutor v Galic*, IT-98-29, Transcript, 3 October 2002, p. 13176.
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