

512)

SCSL-04-14-T
(14406-14415)

14406

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Interim Registrar: Mr. Lovemore Munlo

Date filed: 9 December 2005

THE PROSECUTOR

Against

Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

**PROSECUTION CONSOLIDATED REPLY TO DEFENCE RESPONSES TO REQUEST
FOR ORDER TO DEFENCE PURSUANT TO RULE 73TER TO DISCLOSE WITNESS
STATEMENTS**

Office of the Prosecutor:

Christopher Staker
James C. Johnson
Nina Jørgensen
Marco Bundi

Court Appointed Defence Counsel for Norman

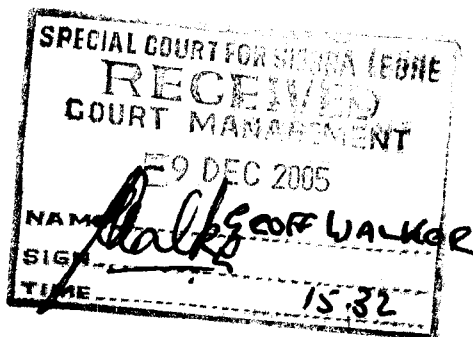
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Clare DaSilva (*Legal Assistant*)

Court Appointed Defence Counsel for Fofana

Victor Koppe
Arrow J. Bockarie
Michiel Pestman
Andrew Ianuzzi (*Legal Assistant*)

Court Appointed Defence Counsel for Kondewa

Charles Margai
Yada Williams
Ansu Lansana
Martin Michael (*Legal Assistant*)



I. INTRODUCTION

1. On 6 December 2005, pursuant to Rule 73ter of the Rules of Procedure and Evidence of the Special Court (“Rules”), the Prosecution requested that the Trial Chamber order the Defence to file any written witness statements in its possession (“**Prosecution Request**”).¹
2. Subsequently, the Trial Chamber issued an “Order for Expedited Filing” where it ordered the Defence to file any Response to the Prosecution Request no later than 8 December 2005 and ordered the Prosecution to reply in a consolidated form, no later than 9 December 2005.²
3. On 8 December 2005, the Defence for all three Accused filed separate responses³, arguing that the Prosecution Request should be denied. The Kondewa Response associated itself with the Fofana Response. The Norman Response, save for paragraphs 15 and 16, is in almost identical terms to the Fofana Response.
4. The Prosecution hereby files this consolidated Reply to the Defence responses.

II. ARGUMENTS

(I) DISCLOSURE ONLY IN EXTRAORDINARY CIRCUMSTANCES

5. The Defence submits that 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.”⁴ However, the final paragraph of Rule 73ter(B) does not include the phrase “in extraordinary circumstances”. Nor does it even include the phrase “in exceptional circumstances”, which is found in other provisions of the Rules and legislation of the Special Court where it is intended that this is a criterion to be applied by

¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-501, “Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, (“**Prosecution Request**”), 6 December 2005, para. 5

² *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-503, “Order for Expedited Filing”, 7 December 2005.

³ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-509, “Fofana Response to the Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, (“**Fofana Response**”), 8 December 2005; SCSL-2004-14-T-510, “Kondewa Response to the Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, (“**Kondewa Response**”), 8 December 2005; SCSL-2004-14-T-511, “Response by the First Accused to the Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, (“**Norman Response**”), 8 December 2005.

⁴ Fofana Response, para. 12; see also Norman Response, para. 10.

a Chamber or Judge in deciding whether to exercise a discretionary power.⁵ Rule 73ter(B) merely states a discretionary power, in unqualified terms. This fact helps to explain why the ICTR authorities cited by the Prosecution do not contain elaborate reasoning behind the order to the Defence to disclose witness statements, as the judges are simply exercising a discretion afforded to them by the Rules. The Prosecution notes that its informal inquiries into the practice at the ICTR have indicated that the practice has been increasingly commonplace in recent years, and that often the orders are made orally. The decisions cited in the Prosecution Request also support the contention that such orders do not require a showing of extraordinary or even exceptional circumstances by the Prosecution.⁶

6. The Defence submits that the practice that should be followed by the Special Court is that established in the case law of the ICTY. This argument misses the point that the ICTY Rules do not contain any provision equivalent to the final paragraph of Rule 73ter(B) in the Rules of both the ICTR and the Special Court. Because the final paragraph of Rule 73ter(B) of the Rules of the Special Court is worded in the same way as the equivalent provision in the ICTR Rules, it necessarily follows that the practice of the ICTR is the relevant precedent to be followed. The practice of the ICTY is simply inconsistent with

⁵ See, for example, Rules 54(A), 69(A).

⁶ Contrary to the Fofana Motion, para. 13, the cited authorities by Prosecution unmistakably show practice at the ICTR. See in these regards *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, where the Trial Chamber ordered the Defence, *inter alia*, to disclose “copies of unredacted written witness statements of each witness, if available, (...) fourteen (14) days before the Defence witnesses testify at trial.” and the subsequent decision *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, “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, para. 13, where the Trial Chamber noted that with “respect to the disclosure of unredacted witness statements (...) could have been disclosed earlier” and that the Chamber therefore “giving the Prosecutor more time to prepare for the cross-examination.”; see also *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, para. 6, where the Trial Chamber recalled “its Decision of 14 October 2005 ordering the Defence to commence the presentation of its case on 14 November 2005, and that of 20 October 2005 instructing the Defence to disclose to the Prosecution, at least 21 days prior to their respective dates of testimony, all the identifying information concerning each of the Defence witnesses as well as their unredacted written statements.” See also para. 8, where the Trial Chamber reminded the Defence of its obligations pursuant to Rule 73 ter (B), including the obligation to disclose relevant information to the Prosecution in a timely fashion.” and *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, “Decision on Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses”, 20 October 2005, where the Trial Chamber ordered the Defence to “disclose to the Prosecution, no later than 21 days prior to the day the witness is scheduled to testify the unredacted statements and all the identifying information concerning its witnesses, so as to allow the Prosecution adequate time to prepare its case.”

the express wording of Rule 73ter(B), which states clearly that a Trial Chamber or Judge may order the disclosure of Defence witness statements prior to commencement of the Defence case.

7. The Defence suggests that the Prosecution contradicted itself in paragraph 13 of the Prosecution Request, by conceding that the approach of the ICTR to disclosure of Defence witness statements is restrictive.⁷ That is not correct. In paragraph 13 of the Prosecution Request, the reference was to the approach of the ICTY being restrictive, not the approach of the ICTR.
8. The Norman Defence submits that it prepared its case on the basis of an assumption that witness statements are privileged and not subject to disclosure.⁸ The argument seems to be that statements should not be disclosed even in extraordinary or exceptional circumstances. The Prosecution submits that in the light of the express wording of Rule 73ter(B) of the Rules, the Defence made such an assumption at its own peril. Indeed, even under the more restrictive approach of the ICTY such an assumption could not be made by Defence counsel, since in the ICTY, an order for disclosure of Defence witness statements may be made under certain (not necessarily exceptional) circumstances. The Norman Defence goes on to argue that witnesses might not have come forward had they known of the possibility that their statements, given under the assurance of confidentiality, might be disclosed. Given that statements are intended to provide an indication of what the witness will say in court, the Prosecution fails to follow this argument. If the Defence is suggesting that witnesses might be in some danger because of their statements, then the Defence should provide evidence to support this contention and/or seek appropriate protective measures. The Trial Chamber has repeatedly indicated its willingness to consider such applications.
9. The Norman Response argues that the Trial Chamber can seek “guidance as appropriate” on the question of disclosure of Defence witness statements from the national law of Sierra Leone. The Norman Response refers to the *Criminal Procedure Act 1965 of Sierra Leone*, although it does not elaborate what is the position with respect to disclosure of

⁷ Fofana Response, para. 16; Norman Response, para. 14.

⁸ Norman Response, para. 15; Norman Response, para. 17.

Defence witness statements under that Act.⁹ Rather, the Defence Norman Response appears merely to assume, without argument, that the position in Sierra Leone is the same as that stated in one decision of the Supreme Court of Canada. In this Canadian case, it was said that “the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution”.¹⁰ However, that case, which was cited in the separate opinion of one Judge of the Trial Chamber of the ICTY in the *Tadic* case,¹¹ was not referred to at all by the Appeals Chamber of the ICTY when it ruled that in the legal system of the ICTY, disclosure of Defence witness statements can be ordered in certain circumstances. That decision of the Supreme Court of Canada is also inconsistent with the plain wording of Rule 73ter(B) of the Rules of the Special Court. If there is an inconsistency between an express provision of the Special Court’s Rules, and a decision of a national court, clearly the decision of the national court is of little persuasive authority in determining how to interpret and apply the Rule.¹²

10. In the legal system of the Special Court, it is clear that an accused is entitled always to the presumption of innocence. An accused is also entitled to a speedy trial. The public and society also have a very strong interest in prompt trials.¹³ Given the magnitude of the cases that are dealt with by the Special Court, the Rules of the Special Court, like those of other international criminal tribunals, may necessarily be required to contain certain provisions not commonly found in national legal systems, in order to satisfy this interest of the accused, the public and society in achieving a prompt trial. Thus, for instance, Rule 73ter(B) contains a variety of measures that the Defence may be ordered to take in the interests of efficient case management. Requiring the Defence to undertake such measures is not in any way inconsistent with the presumption of innocence and such action assists in ensuring that the trial can be completed within an acceptable time.

⁹ Norman Response, para. 16.

¹⁰ Norman Response, para. 16, quoting *R v. Stinchcombe* (1991) 68 CCC (3d) 1, 7 (Supreme Court of Canada), as quoted by Judge Stephen in *Prosecutor v. Tadic, Decision on Prosecution Motion for Production of Defence Witness Statements, Separate Opinion of Judge Stephen*, Case No. IT-94-1-T. Trial Chamber, 27 November 1996.

¹¹ See the previous footnote.

¹² *Prosecutor v. Tadic, Judgement*, Case No. IT-94-1-A. Appeals Chamber, 15 July 1999, paras. 318-326.

¹³ *Barayagwiza v. Prosecutor, Decision*, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, para. 105.

(II) NECESSITY OF DISCLOSURE

11. The Defence submits that the Prosecution has failed to show how the witness summaries filed by the Defence are in any way deficient.¹⁴ However, the Prosecution Request was not based exclusively upon the inadequacy of Defence witness summaries. The Prosecution Request noted that the Prosecution's tasks were made more difficult by the lack of detail in some of the summaries and the absence of time frames in many of them.¹⁵ The Prosecution Request for the disclosure of statements should not be misconstrued as a request for more elaborate summaries. The Prosecution does not agree that it may only be entitled to disclosure of written witness statements if it can substantiate a claim that the summaries lack sufficient precision and detail to enable it to prepare effectively. The Prosecution submits that the Trial Chamber can also exercise its discretion on the basis that disclosure of written witness statements by the Defence will assist the Prosecution in preparing for the Defence case, will expedite the trial proceedings during the Defence case, and will assist the Trial Chamber in reaching a fair determination of the case.
12. The Prosecution has already acknowledged that its disclosure obligations are more specific and burdensome than those of the Defence.¹⁶ However, the Prosecution notes that in the ICTY case of *Kupreskic*, the Trial Chamber considered that the extremely succinct and summary nature of many Defence witness statements violated the principle of equality of arms. The Prosecution communicated much more detailed prosecution witness statements to the Defence and to the Trial Chamber before the presentation of its case, thereby enabling the Defence to prepare for cross-examination of prosecution witnesses.¹⁷ The Trial Chamber stated that the Prosecution would be given the

¹⁴ Fofana Response, para. 18.

¹⁵ See in these regards i.e. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-498, "Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order for Compliance with the Order Concerning Preparation and Presentation of the Defence Case", 5 December 2005, where the witness summaries of DWK-012, DWK-013, DWK-024, DWK-026, DWK-027, DWK-030 provide no time frames and are otherwise vague. The summary of DWK-030 for example states that "[w]itness was a section chief and will testify about what happened at his village and surrounding areas during the war and on alleged Kamajor atrocities." However, the summary does not say to what village and what surrounding areas this witness statement is referring to.

¹⁶ Prosecution Request, para. 12.

¹⁷ See in these regards *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, "Decision", 11 January 1999.

opportunity to interview the witnesses from whom more detailed statements had not been received.

(III) RIGHTS OF THE ACCUSED

13. The Defence argues that requiring it to routinely disclose witness statements would be contrary to the principles of fairness.¹⁸ However, the Defence does not advance any reasons why such disclosure would adversely affect the principles of fairness. In the Prosecution's submission, witness statements, regardless of their form, would assist in preparing for cross-examination and in meaningfully testing the evidence. It also would assist the Trial Chamber in managing and steering the presentation of the Defence case, in particular, in making any decisions to possibly reduce the number of Defence witnesses¹⁹. Therefore, the proposed disclosure would not be contrary to the principles of fairness. It is unambiguously mentioned in the Rules, and the power to order such disclosure is exercised in other international criminal tribunals.

III. CONCLUSION

14. For these reasons the Prosecution requests the Trial Chamber to grant the Prosecution Request and order the Defence to immediately file any written witness statements that are available. These statements should indicate, where possible, identifying information for the witness, including family 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.

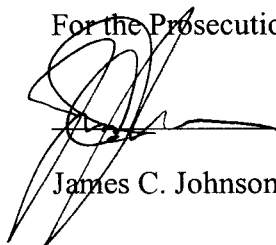
¹⁸ Fofana Response, para. 17; Norman Response, para. 16.

¹⁹ See Rule 73ter(C) and (D). This is an important consideration in this case, given that the number of witnesses proposed to be called by the Defence seems to exceed what the Trial Chamber is expecting. (See *Prosecutor v. Norman et al.*, Status Conference Transcript, 25. November 2005, p. 30, where the Presiding Judge stated that: "a total of 149 witnesses for the Defence, over double the number of prosecution witnesses called at this particular time, which we find difficult to understand and accept. (...) All we are saying at this particular moment is we are seriously concerned by the number of witnesses that are intended to be called at this particular moment.").

Filed in Freetown,

9 December 2005

For the Prosecution,



James C. Johnson



Nina Jørgensen

VI. INDEX OF AUTHORITIES

A. MOTIONS, ORDERS, DECISIONS AND JUDGMENTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-501, “Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, 6 December 2005.
2. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-503, “Order for Expedited Filing”, 7 December 2005.
3. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-509, “Fofana Response to the Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, 8 December 2005.
4. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-510, “Kondewa Response to the Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, 8 December 2005.
5. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-511, “Response by the First Accused to the Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements”, 8 December 2005.
6. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-498, “Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order for Compliance with the Order Concerning Preparation and Presentation of the Defence Case”, 5 December 2005
7. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-499, “Defence Witness 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.
8. *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>
9. *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, “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, para. 13. <http://65.18.216.88/ENGLISH/cases/Nahimana/decisions/170103.htm>

10. *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, para. 6.
<http://65.18.216.88/ENGLISH/cases/Muvunyi/decisions/091105.htm>
11. *Prosecutor v Muvunyi*, ICTR-2000-55A-T, “Decision on Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses”, 20 October 2005.
<http://65.18.216.88/ENGLISH/cases/Muvunyi/decisions/201005.htm>
12. *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, “Decision”, 11 January 1999
<http://www.un.org/icty/kupreskic/trialc2/decision-e/90111EV24959.htm>
13. *R v. Stinchcombe* (1991) 68 CCC (3d) 1, 7 (Supreme Court of Canada), as quoted by Judge Stephen in *Prosecutor v. Tadic*, Decision on Prosecution Motion for Production of Defence Witness Statements, Separate Opinion of Judge Stephen, Case No. IT-94-1-T. Trial Chamber, 27 November 1996.
<http://www.un.org/icty/tadic/trialc2/decision-e/61127WS26398.htm>
14. *Prosecutor v. Tadic, Judgement*, Case No. IT-94-1-A. Appeals Chamber, 15 July 1999, paras. 318-326.
<http://www.un.org/icty/tadic/appeal/judgement/index.htm>
15. *Barayagwiza v. Prosecutor, Decision*, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, para. 105.
<http://trim.unictt.org/>

B. RULES OF PROCEDURE AND EVIDENCE

Rules of Procedure and Evidence of the Special Court, Rule 73(B) Amended 14 May 2005.

C. TRANSCRIPTS

Prosecutor v. Norman et al., Status Conference Transcript, 25 November 2005, p. 30.