

TRIAL CHAMBER I (“The Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

SEIZED OF the “Prosecution Request for Order to Defence Pursuant to Rule 73^{ter} to Disclose Written Witness Statements”, filed by the Prosecution on the 6th of December, 2005 (“Motion”);

NOTING the “Response by the First Accused to the Prosecution Request for Order to Defence Pursuant to Rule 73^{ter} to Disclose Written Witness Statements”, filed by Court Appointed Counsel for the First Accused (“Counsel for Norman”) on the 8th of December, 2005 (“Norman Response”);

NOTING the “Fofana Response to the Prosecution Request for Order to Defence Pursuant to Rule 73^{ter} to Disclose Written Witness Statements”, filed by Court Appointed Counsel for the Second Accused (“Counsel for Fofana”) on the 8th of December, 2005 (“Fofana Response”);

NOTING the “Kondewa Response to the Prosecution Request for Order to Defence Pursuant to Rule 73^{ter} to Disclose Written Witness Statements”, filed by Court Appointed Counsel for the Third Accused (“Counsel for Kondewa”) on the 8th of December, 2005 (“Kondewa Response”);

NOTING the “Prosecution Consolidated Reply to Defence Responses to Request for Order to Defence Pursuant to Rule 73^{ter} to Disclose Written Witness Statements”, filed by Prosecution on the 9th of December, 2005 (“Reply”);

MINDFUL of the “Order Concerning the Preparation and Presentation of the Defence Case” delivered by The Chamber on the 21st of October, 2005 (“Order of the 21st of October, 2005”);

NOTING that a Status Conference was held pursuant to this Order on the 27th of October, 2005, for the purpose of considering the preparation and presentation of the Defence case;

NOTING the “Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof” filed jointly by the Defence for all the Accused in this case on the 17th of November, 2005 (“Joint Defence Materials”);

NOTING that a further Status Conference was held on the 25th of November, 2005, for the purpose of considering the preparation and presentation of the Defence case and, in particular, for considering the Defence compliance with the Order of the 21st of October, 2005;

MINDFUL of the “Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case” delivered by The Chamber on the 28th of November, 2005 (“Order of the 28th of November, 2005”);

NOTING the “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” filed by Counsel for Norman on the 5th of December, 2005 (“Norman 5th of December Materials”);

NOTING the “Fofana Materials Filed Pursuant to the Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of Defence Case” filed by Counsel for Fofana on the 5th of December, 2005 (“Fofana 5th of December Materials”);

NOTING the “Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order

for Compliance with the Order Concerning the Preparation and Presentation of Defence Case” filed by Counsel for Kondewa on the 5th of December, 2005 (“Kondewa 5th of December Materials”);

MINDFUL of the “Order to the Defence for the Filing of an Evidentiary Chart” delivered by The Chamber on the 9th of December, 2005 (“Order re. Evidentiary Chart”);

NOTING the “First Accused Evidentiary Chart Pursuant to the Chamber Consequential Order for Compliance of 28th November 2005” filed by Counsel for Norman on the 14th of December, 2005;

NOTING the “Materials Filed by Third Accused Allieu Kondewa Pursuant to Order for the Filing of an Evidentiary Chart” filed by Counsel for Kondewa on the 14th of December, 2005;

NOTING the “Additional Fofana Materials Filed Pursuant to the Disclosure Orders of Trial Chamber I” filed by Counsel for Fofana on the 16th of December, 2005;

NOTING that the Pre-Defence Conference was held on the 11th of January, 2006 to consider the preparation and presentation of the Defence case and, in particular, for the purpose of facilitating and further considering the Defences’ compliance with the Order of the 21st of October, 2005;

NOTING the “Materials Re-Filed by Third Accused Allieu Kondewa Pursuant to Order for Non-Confidential Filing of Materials in Compliance with Order Concerning the Preparation and Presentation of the Defence Case” filed by Counsel for Kondewa on the 11th of January, 2006;

NOTING the “Revised Fofana Witness List” filed by Counsel for Fofana on the 13th of January, 2006;

NOTING the “List of the Order of the Proposed First Sixteen Witnesses to be Called in the Sixth Trial Session by the Norman Defence” filed by Counsel for Norman on the 12th of January, 2006;

NOTING the “Notice of Issues Proposed to be Raised by the Prosecution at the Hearing on 17 January 2006” filed by the Prosecution on the 16th of January, 2006;

NOTING that a Status Conference was held on the 18th of January, 2006, as a follow up of the Pre-Defence Conference of the 11th of January, 2006, and finalize and clarify issues, in order to start the Defence case expeditiously and on the basis of common understanding;

MINDFUL OF The Chamber’s Oral Ruling delivered at the Status Conference of the 18th of January 2006, denying the Prosecution Motion at this point in time in respect of its request for disclosure of written defence witness statements;

CONSIDERING however, that the Court may, in this regard and on a case by case basis in the interests of justice and a fair determination of the case, make such order or orders as it may deem necessary in the circumstances;

NOTING The Chamber’s “Consequential Order to the Status Conference of 18 January 2006” (“Consequential Order of the 18th of January, 2006”);

CONSIDERING that Article 17(4)(c) of the Statute of the Special Court provides that the Accused shall be entitled “to be tried without undue delay”;

PURSUANT TO Rule 54 and 73^{ter}(B) of the Rules of Procedure and Evidence of the Special Court

("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. Pursuant to its Order of the 21st of October, 2005, The Chamber ordered, *inter alia*, that Defence Counsel for Norman, Fofana, and Kondewa, file the following materials, no later than the 17th of November, 2005:

a) A list of witnesses that each Defence Team intends to call, including:

- i) the name of each witness;
- ii) a summary of their respective testimony;
- iii) the points of the Indictment to which each witness will testify;
- iv) the estimated length of time for each witness to testify;
- v) an indication of whether the witness will testify in person or pursuant to Rule 92bis.

2. Subsequently, on the 17th of November, 2005, Defence Counsel for Norman, Fofana, and Kondewa filed the Joint Defence Materials. The Joint Defence Materials contain brief summaries of expected testimony; the estimated length of time required by each witness; and the expected mode of testimony for each witness. For Norman and Kondewa witnesses, the paragraphs of the Indictment that the witness will address are identified; however, for Fofana witnesses, only the subject or counts are mentioned, e.g. "general allegations". All witnesses are identified only through pseudonyms.

3. Following the Status Conference of the 25th of November, 2005, The Chamber requested the Defence to provide further information. Pursuant to its Order of the 28th of November, 2005, The Chamber ordered, *inter alia*, that the Defence Counsel for Norman, Fofana, and Kondewa, file individually the following materials, no later than the 5th of December, 2005, at 04:00pm:

a) A list of witnesses that each Defence Team intends to call, including:

- i) The names or, subject to any protective measures that might have been ordered by The Chamber, the pseudonym of each witness;
- ii) A summary of the respective testimony of all witnesses that should be sufficiently descriptive to allow The Chamber to appreciate and understand the nature of the proposed testimony;
- iii) The points of the Indictment to which each witness will testify, including the exact paragraph and the specific counts;
- iv) The estimated length of time for each witness to testify;
- v) An indication of whether the witness will testify in person or pursuant to Rule 92bis of the Rules;
- vi) The language in which each witness intends to testify;

4. Subsequently, on the 5th of December, 2005, Counsel for Norman filed the Norman 5th of December Materials, which included witness names, expanded summaries, paragraph references linking expected testimony to specific paragraphs of the Indictment, the expected length of time for testimony, mode of testimony, and the language in which testimony was expected to be given.

Counsel for Fofana filed the Fofana 5th of December Materials, which included, pseudonyms for the witnesses, expanded summaries, paragraph references linking expected testimony to specific paragraphs of the Indictment, the expected length of time for testimony, mode of testimony, and the language in which testimony was expected to be given. However, the Fofana 5th of December Materials did not include the real names of the defence witnesses to be called by Fofana. Counsel for Kondewa filed the Kondewa 5th of December Materials, which included witness names, expanded summaries, paragraph references linking expected testimony to specific paragraphs of the Indictment, the expected length of time for testimony, mode of testimony, and the language in which testimony was expected to be given.¹

5. Following the Status Conference of the 18th of January, 2006, The Chamber issued its Consequential Order of the 18th of January, 2006. In this order, The Chamber ordered, *inter alia*, that

Counsel for Norman, Kondewa and Fofana to disclose to the Prosecution and file with the Court any identifying information which is available for all the witnesses they are intending to call; This information shall include family name, first name and nicknames, date and place of birth (if known), names of parents, religion, occupation at the time relevant to the Indictment, and current address, no later than Monday, the 23rd of January, 2006, at 4 p.m.

II. PARTIES SUBMISSIONS

6. The Prosecution request that The Chamber use its discretion, as set out in the final paragraph of Rule 73^{ter}(B), to order the Defence to file any written witness statements in their possession to ensure “that the proceedings during the Defence case are as expeditious as possible, and to avoid unnecessary delays.”² The Prosecution cite “lack of precision and detail, especially as concerns time frames” as problems with “many” of the summaries received to date.³ The Prosecution state that defence witness statements would materially contribute to the preparation of cross-examinations, and that furthermore, such statements would be useful to The Chamber as it evaluates whether or not to reduce the number of Defence witnesses.⁴

7. Counsel for all three Accused oppose the Motion.⁵ The Defence Counsel submit that as Rule 73^{ter}(B) sets out a discretionary standard, The Chamber should adopt a “cautious approach” to its interpretation and that the disclosure sought by the Prosecution should be ordered “only in extraordinary circumstances and only with specific reference to the evidentiary justification for such order.”⁶ The Defence argue that the updated summaries, as filed on the 5th of December, 2005, are sufficiently detailed to allow the Prosecution to test defence evidence and to prepare for cross-examination and further, that they are sufficient to assist The Chamber in managing the trial.⁷

III. APPLICABLE LAW

8. The law governing applications before the Trial Chambers of the Special Court for Sierra

¹ Collectively, these three submissions may hereinafter be referred to as “the 5th of December Materials”.

² Motion, para. 6.

³ *Ibid.*

⁴ *Ibid.* paras. 9, 12.

⁵ The Responses submitted by Counsel for Norman and Fofana are nearly identical; the Kondewa Response contains no argument, but “associates itself with the Fofana Response to the Request.” [Hereinafter “the Responses”, and “Defence Counsel”].

⁶ Norman Response, para. 10; Fofana Response para. 12.

⁷ Norman Response, para. 17; Fofana Response, para. 18.

Leone for disclosure of written statements of Defence witnesses to the Prosecution is Rule 73ter(B) last paragraph of the Rules of Procedure and Evidence which states that:

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.

IV. DELIBERATIONS

9. The Chamber wishes to emphasize, at the outset, that having regard to the plain and ordinary meaning of the last paragraph of Rule 73ter(B), there being no imprecision or ambiguity in the formulation of the said Rule, it is absolutely clear that The Chamber possesses an undoubted discretion as to whether it is judicially proper to order disclosure to the Prosecution of written statements of each witness the Defence intends to call to testify at the trial.

10. We have, in most of our recent decisions on Motions coming before The Chamber on a variety of issues, stressed the importance of giving effect to the plain and ordinary meaning of a statutory provision or rule as an imperative in determining legal issues coming before The Chamber from time to time. For instance, we recently underscored this judicial approach in our "Decision On Motions For Judgment of Acquittal Pursuant to Rule 98"⁸ when we observed that in interpreting rules The Chamber should be guided by the contextual approach in a quest for its plain and ordinary meaning.⁹

11. Giving effect to the plain and ordinary meaning of Rule 73ter(B), last paragraph, The Chamber opines, as a matter of law, that the Prosecution logically has no right to disclosure of Defence witness statements, and thereby there is no correlative legal obligation on the Defence to produce such witness statements to the Prosecution.¹⁰

12. The Chamber wishes to emphasize that given the prominence in the presentation of evidence at international criminal trials, consistent with the letter and spirit of the prescribed rules of procedure and evidence, of the principle of orality, meaning that the ascertainment of the truth depends primarily upon witnesses being heard at trial in the presence of the accused, it is not perceived to be necessary to insist upon reciprocal disclosure of witness statements on the part of the Defence (especially where the rules do not so stipulate) except where the Prosecution will suffer undue irreparable prejudice by such non-disclosure. There is, accordingly, in The Chamber's opinion, no *a priori* entitlement in the Prosecution to a production of Defence witness statements.

13. For the Prosecution to succeed in its application for such disclosure pursuant to The Chamber's discretionary authority in the matter, the Prosecution must demonstrate by *prima facie* evidence that by failure to disclose such Defence witness statements, the Prosecution will suffer undue or irreparable prejudice.

14. Guided by the foregoing principles, The Chamber finds that no *prima facie* showing of undue or irreparable prejudice has been demonstrated by the Prosecution to justify the exercise by the Chamber its discretion in the matter. The fact that summaries of Defence witness statements are not

⁸ *Prosecutor Against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL04-14-T, the 21st of October, 2005.

⁹ *Ibid.*, paras 34 and 35; see "Separate and Concurring Opinion of Hon. Justice Bankole Thompson on Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", the 21st of October, 2005, paras 7-11.

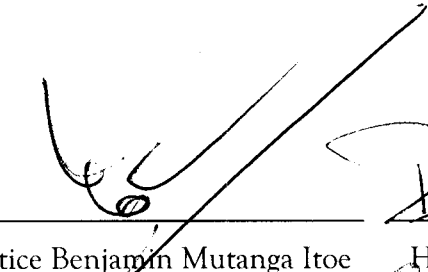
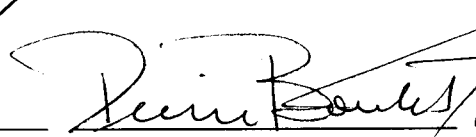
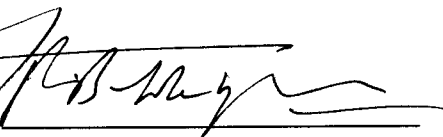
¹⁰ See *Prosecutor v. Tadic*, Case No. IT-91-1-A, Appeals Chamber, "Judgment", Majority Decision, 15 July 1999, para 319 for the proposition that "there is no blanket right for the Prosecution to see the witness statement of a Defence witness."

comprehensive is not a conclusive factor in determining the issue, given that such an assessment cannot be meaningfully embarked upon without the presentation of oral testimonies.¹¹ However, The Chamber does not rule out the possibility of ordering the production of Defence witness statements, if such action were appropriate to satisfy the interests of justice in the future.

V. DISPOSITION

15. Based on the foregoing analysis, The Chamber, at this point in time, **DENIES** the Prosecution Motion for the disclosure of Defence witness statements.

Done in Freetown, Sierra Leone, this 21st day of February, 2006.

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet

Hon. Justice Bankole Thompson

Presiding Judge

Trial Chamber I

[Seal of the Special Court for Sierra Leone]



¹¹ See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, “Decision on Sufficiency of Defence Witness Summaries”, 5 July 2005, para. 6 for this reasoning.