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SCSL-04-14-T
(14455-14460)

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SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Interim Registrar: Mr Lovemore Munlo

Date: 14 December 2005

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

**FOFANA REPLY TO PROSECUTION RESPONSE TO
URGENT FOFANA REQUEST FOR LEAVE TO APPEAL
THE 7 DECEMBER 2005 DECISION OF TRIAL CHAMBER I**

For the Office of the Prosecutor:

Mr James C. Johnson
Mr Kevin Tavener
Ms Nina Jørgensen
Mr Marco Bundi

For Moinina Fofana:

Mr Victor Koppe
Mr Arrow Bockarie
Mr Michiel Pestman
Mr Andrew Ianuzzi

For Samuel Hinga Norman:

Mr John Wesley Hall
Dr Bu-Buakei Jabbi
Ms Clare DaSilva
Mr Kingsley Belle

For Allieu Kondewa:

Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Ms Susan Wright
Mr Martin Michael

SPECIAL COURT FOR SIERRA LEONE
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INTRODUCTION

1. Considering the 'Prosecution Response to Urgent Fofana Request for Leave to Appeal the 7 December 2005 Decision of Trial Chamber I' filed on 13 December 2005¹ (the "Response"), counsel for Mr Fofana (the "Defence") hereby files its submissions in reply.

SUBMISSIONS

The Defence Request Does Not Contain Any New Arguments

2. Contrary to the assertions of the Office of the Prosecutor² (the "Prosecution"), the 'Request for Leave to Appeal the 7 December 2005 Decision of Trial Chamber I' (the "Request") contains no "additional arguments"³. Rather, the Request merely reiterates and embellishes arguments already advanced in the 'Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof'⁴ (the "Joint Materials and Request") and the 'Urgent Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber I'⁵ (the "Motion for Reconsideration").

The Relevant Issue with Respect to Disclosure of Witness Names is Equality of Arms, Not Protective Measures

3. The Defence submits that it has never intimated that "the purpose of protective measures for witnesses is ... to give a procedural advantage or procedural disadvantage to any of the parties"⁶. From the outset, the Defence has conceded that such advantage is collateral in nature. However, the Defence submits that this does not in any way diminish the force of its original objection. Indeed, as noted previously by the Defence, the granting of protective measures to the Prosecution's witnesses merely describes the context of what is essentially an equality of arms issue.

¹ *Prosecutor v. Norman et al.*, SCSL-2004-14-T-517.

² Response, ¶ 16.

³ *Norman et al.*, SCSL-2004-14-T-516, 12 December 2005.

⁴ *Norman et al.*, SCSL-2004-14-T-482, 17 November 2005.

⁵ *Norman et al.*, SCSL-2004-14-T-493, 1 December 2005.

⁶ Response, ¶ 18.

The Prosecution Seeks to Downplay the Extent of the Disclosure Orders

4. The Prosecution mischaracterises what is called for in paragraph 2(d) of the ‘Order Concerning the Preparation and Presentation of the Defence Case’⁷ (the “Original Order”) and the ‘Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case’⁸ (the “Consequential Order”) (collectively, the “Disclosure Orders”). The Prosecution’s assertion that the Defence is “merely required to indicate the relevant paragraphs of the indictment to which the items of its evidence relate”⁹ seems to overlook the fact that this is already required by paragraphs 2(a)(iii) of the Disclosure Orders. It is the additional requirement of producing a wholly separate chart to which the Defence objects.

It is Unnecessary to Make Global Determinations of Relevance at this Juncture

5. Contrary to the Prosecution’s assertions¹⁰, cursory determinations of relevance can be made at this point based on the information already provided pursuant to paragraphs 2(a)(iii) of the Disclosure Orders. The Defence has already given an indication of its proposed witnesses and the points and paragraphs of the indictment to which they intend to testify. It is submitted that such information should be sufficient for present purposes and that more detailed evaluations of relevance could be made at the time the proposed evidence is proffered.

The Request Raises Important Issues with Respect to the Limits of Defence Disclosure Obligations Under International Criminal Procedure

6. The Defence has provided an “indication as to the particular nature ... of the matters sought to be appealed in this case”¹¹ by framing two discrete questions for appeal¹². Further, it has addressed the matters’ “significance”¹³ by pointing out that the answer to both questions will affect not only Mr Fofana, but also his co-accused as well as the six other individuals now facing charges before this Court, all of whom—by virtue of

⁷ *Norman et al.*, SCSL-2004-14-T-474, Trial Chamber I, 21 October 2005.

⁸ *Norman et al.*, SCSL-2004-14-T-489, Trial Chamber I, 28 November 2005.

⁹ Response, ¶ 20.

¹⁰ *Ibid.*

¹¹ Response, ¶ 21.

¹² See Request, ¶ 14.

¹³ Response, ¶ 21.

the standing Disclosure Orders—may suffer similar collateral irregularities or be called upon to undertake tasks not commensurate with their burden of proof.

7. This Chamber has very recently reiterated the instances which may, within the context of a request for leave to appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence (the “Rules”), rise to the level of “exceptional circumstances”. These include the presentation of “some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems”¹⁴. The Defence submits that the questions framed in its Request present just such a case.

Mr Fofana Will Suffer Prejudice as a Result of the Disclosure Orders

8. The Prosecution attempts to downplay the significance of the disputed portions of the Disclosure Orders¹⁵. However, the Defence submits that to afford more time to one party than another for the identical task is patently unfair, whether such result was intended or collateral. Further, whether or not the Defence has had adequate time to prepare the disputed evidentiary chart is immaterial. The salient question is whether undertaking such a task is something the Defence can rightly be called upon to do in any event, regardless of how much time was afforded for the proposed endeavour. While these may seem like trivial concerns to the Prosecution, it is the Defence position that the Disclosure Orders, as they currently stand, set a dangerous precedent for the unjustified incremental expansion of defence disclosure obligations.

A Stay of the Disputed Portions of the Orders Should Have Been Ordered

9. The Defence has objected to the failure of the Chamber to issue a stay of the disputed portions of the Disclosure Orders¹⁶. Indeed, such failure forms part of the basis for the pending Request. The Defence does not, as the Prosecution indicates, consider that it can make unilateral determinations¹⁷ with respect to orders of this Court and is keenly aware of its obligation to comply with them. However, the Defence is equally

¹⁴ *Norman et al.*, SCSL-2004-14-T-515, Trial Chamber I, ‘Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence’, 9 December 2005, ¶ 6.

¹⁵ See Response, ¶¶ 24, 25.

¹⁶ See Motion for Reconsideration, ¶ 28 and Request, ¶¶ 26-27.

¹⁷ See Response, ¶ 29.

alive to its responsibility, as it has stated previously, to exhaustively contest those orders it considers objectionable and to seek to clarify, within the overall purview of the Rules, the limits of the Chamber's authority with respect to defence disclosure.

10. On 12 December 2005, within the time period for which to seek leave to appeal the Modification Decision, the Defence made a further application for a stay of the disputed portions of the Disclosure Orders pursuant to Rule 73(B) and as part of its Request. The Defence acknowledges that, should its latest request be denied, it will have run out of procedural options with which to challenge the disputed portions of the Disclosure Orders and have no alternative but to disclose the ordered material. Despite the Prosecution's insinuation and innuendo¹⁸, the Defence does not intend to be provocative, but rather only to zealously protect Mr Fofana's rights and challenge what it considers to be abusive exercises of discretion.

CONCLUSION

11. For the above-stated reasons and the reasons set forth in the Request, the Defence respectfully requests the Chamber to grant leave to appeal the Modification Decision. Again, the Defence reiterates its application for a stay of the disputed portions of the Disclosure Orders pending a final determination of the matter.

COUNSEL FOR MOININA FOFANA

RP 

Victor Koppe

¹⁸ See Response, ¶ 30.

DEENCE LIST OF AUTHORITIES**Statutes & Rules**

1. SCSL Rules of Procedure and Evidence: Rule 73

Jurisprudence

2. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-515, Trial Chamber I, 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', 9 December 2005