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SCSL-04-14-T
(18233 - 18242)
SPECIAL COURT FOR SIERRA LEONE

18233

In Trial Chamber I

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Mutanga Itoe
Registrar: Mr Lovemore Munlo, SC
Date: 11 May 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

URGENT JOINT DEFENCE MOTION REGARDING THE
PROPRIETY OF CONTACTING DEFENCE WITNESSES

For the Office of the Prosecutor:

Mr Desmond de Silva, QC
Mr Christopher Staker
Mr James C. Johnson
Mr Joseph Kamara
Ms Nina Jorgensen

For Samuel Hinga Norman

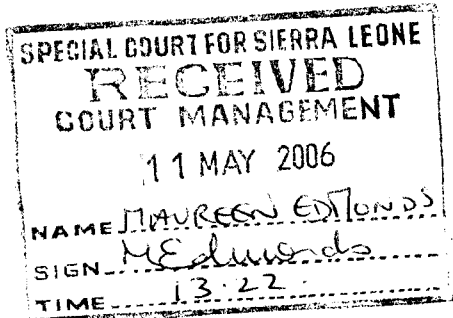
Mr John Wesley Hall Jr
Dr Bu- Buakei Jabbi
Mr Alusine Sani Sesay
Ms Clare da Silva
Mr Kingsley Belle

For Moinina Fofana

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

For Allieu Kondewa:

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



SCSL-2004-14-T

INTRODUCTION

1. Counsel for the First, Second, and Third Accused (the “Defence”) hereby jointly submit its motion for clarification as to the propriety of contacting and interviewing confirmed defence witnesses during the defence stage of the trial proceedings prior to their testimony.

2. During the cross-examination on 9 May 2006 of Ms Wuiyatta Sheriff, defence witness for the First Accused, it became evident that representatives of the Office of the Prosecutor (the “Prosecution”) have been contacting and conducting interviews with defence witnesses without the prior knowledge of the Defence. It also appears that the Prosecution has taken statements from defence witnesses with, at the very least, a view to challenging their credibility during cross-examination¹. Knowledge of these activities and the manner in which they have taken place raises two issues of common concern for the Defence which are hereby submitted for urgent determination by the Chamber:
 - (i) Is it proper for the Prosecution to directly contact and conduct interviews with defence witnesses after the list of names has been made known to the parties and the witnesses’ summaries have been filed with the court?

 - (ii) If so, are certain procedural safeguards necessary in order to ensure a fair determination of the matters before the Chamber in consonance with the spirit of the Statute and the general principles of law?

3. The Defence submits that, as a general principle, the Prosecution cannot directly contact and interview confirmed defence witnesses. Rather, it is our submission that the Prosecution must first request to do so, upon showing that such a request is reasonable, either to the Defence or through the Witness and Victims Protection Unit (the “WVS”).

¹ See Transcript, *Norman et al.*, 09 May 2006: ‘Q. Do you remember being at the police station in Koribundo on that date? A. No. Q. Madam Witness, I am putting it to you that you gave a statement to two investigators from the Office of the Prosecutor on March 24, 2006 (pg. 29, lines 23-28); Ms Suci: Yes, Your Honours. We do have a statement from this witness – that appears to be from this witness. All I want to do is to show that this witness’s credibility is not reliable. I’m not trying to prove what it says in this statement. I’m just try to show that at one point there might have been an inconsistency to what the witness has said today in court’ (pg. 30, lines 19-24).

In terms of procedural safeguards, it is our submission that the witness must provide a fully informed consent to the interview and that such consent must be obtained without their harassment or intimidation.

SUBMISSIONS

It is Improper for the Prosecution to Directly Contact and Interview Confirmed Defence Witnesses

4. The Rules of Procedure and Evidence (the “Rules”) do not expressly address the propriety of a party seeking an interview with a confirmed witness of another party at the trial stage, nor is there any relevant directive from any Chamber or administrative organ of the Special Court.
5. While there appears to be no absolute bar to such contact as a matter of law, in cases of such evidentiary lacunae, Rule 89(B) directs that the Chamber “shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law”.
6. Article 17(4) of the Statute of the Special Court provides, in pertinent part, as follows:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.
7. The Defence submits that, as a matter of basic procedural propriety, it is customary that once a list of witnesses is made known permission is sought by the other party before approaching a confirmed witness.
8. The Defence further submits that it is manifestly unfair to allow the Prosecution to conduct interviews with confirmed defence witnesses when, in fact, the Defence was foreclosed of the same opportunity. Because protective measures were in place with

respect to nearly all prosecution witnesses², defence counsel were enjoined by the Chamber from directly contacting those individuals³. In practice, this meant that defence requests to interview prosecution witnesses were channelled through the WVS, which forwarded such requests to the Prosecution⁴. Accordingly, counsel were not themselves permitted to query the witnesses directly as to their willingness to submit to interviews, but rather were required to accept the assurances of the Prosecution, which effectively acted as proxy for the witnesses. Naturally, defence requests to interview prosecution witnesses were denied *in toto*.

9. The Defence is not suggesting that this anticipated collateral effect had any bearing on the Prosecution's decision to seek protective measures for nearly ninety-five percent of its witnesses. However- as in the case of the Chamber's decisions concerning the disclosure obligations of the Accused⁵ - it is nevertheless a consequence which arguably puts the Accused at a significant procedural disadvantage in violation of their statutory right "to obtain the attendance of witnesses on [their] behalf under the same conditions as witnesses against [them]". Simply put, the fact that all defence witnesses have chosen to testify in the open without the cloak of protective measures, affords the Prosecution a rather significant tactical advantage over the Defence.

10. It is well-established that the principle of equality of arms operates, in part, to help the accused achieve some measure of procedural equality with the prosecution, which—by the very nature of the process—enjoys tremendous, not to say fundamental,

² Some 70 out of a total of 75 prosecution witnesses testified under some form of protective measures.

³ *Prosecutor v. Norman et al.*, SCSL-2004-14-T-126, Trial Chamber I, 'Decision on Prosecution Motion for Modification of Protective Measures for Witnesses', ¶ 2(k) at p. 18.

⁴ See 'Letter to Chief of Victims and Witness Support from Defence Counsel for Norman, Fofana and Kondewa, Re: Interviewing of Prosecution Witnesses by Defence Counsel Prior to Testifying', 8 September 2004. This letter requested that *both* protected and unprotected prosecution witnesses be contacted as to their willingness to be interviewed by one or more defence counsel.

⁵ See for example, *Prosecutor v. Norman et al.*, SCSL-2004-14-T-534, Trial Chamber I, 'Consequential Order to the Status Conference of 18 January 2006' whereby the Defence was ordered to disclose to the Prosecution any identifying information which is available for all witnesses including family name, first name and nicknames, date and place of birth, names of parents, religion, and occupation. The Defence has objected to the scope of its disclosure obligations. See *Prosecutor v. Norman et al.*, 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', where the Defence argued 'The Chamber appears to associate non-disclosure solely with concerns regarding protective measures...In any event, the Defence knows of no reason why the Prosecution should gain a procedural advantage simply because its witnesses chose to take advantage of protective measures while defence witnesses have largely indicated their willingness to testify openly without fear of reprisal' (¶ 19).

advantages over the accused persons⁶. “The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side”⁷.

11. As a fundamental matter of fairness, the Prosecution should have notified the Defence of its intention to contact confirmed defence witnesses, who could have in turn been apprised by the Defence of their right to refuse to speak to representatives of the Prosecution, something Mrs Sheriff no doubt failed to comprehend. While this may not reflect the state of the law in a technical sense, it is surely the better practice to avoid allegations of bad faith and interference with witnesses⁸, which unfortunately have arisen in the instant case. Indeed, the Defence submits that once a list of confirmed witnesses is filed with the Chamber by any party, those individuals listed thereon should come under the auspices of the WVS⁹, an independent organ statutorily tasked with protecting witnesses.
12. A contrary rule will encourage the filing of applications for protective measures, as a matter of course, in order to prevent parties from interfering with each other’s witnesses. Indeed, one issue of common concern to defence witnesses especially those who took part in combat was the - now apparently well-founded - fear that by placing their names on defence witness lists, they would expose themselves to

⁶ See Jones & Powels, *International Criminal Practice*, 3rd Ed. (Oxford 2003), pg 659 § 8.5.352. The Prosecution’s investigative facilities include not only its own cadre of international and local investigators but also the inherent means of coercion afforded to it through statutorily mandated cooperation of local police, prison, and prosecutorial machinery. The Defence has no such tools in its arsenal.

⁷ *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, ‘Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements’, 27 November 1996, ¶ 5, citing P. Van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2d Ed. 1990) at 319 (“For criminal cases, where the character of the proceedings already involves a fundamental inequality of the parties, this principle of ‘equality of arms’ is even more important ...”)

⁸ See Transcript, *Prosecutor v. Naser Oric*, IT-03-68-T, Trial Chamber, 7 December 2005. The Trial Chamber issued its oral decision on a Defence motion for an order regarding a prosecutorial contact with a scheduled Defence witness. In its decision it stated ‘...the question [is] whether one party in a case has a right to seek an interview with a proposed and declared witness of the other party...[i]n seeking to interview a witness, who to the Defence’s knowledge is to be called by the Prosecution, the Defence may well expose itself to the suggestion that it has improperly interfered with the witness. In order to avoid such allegations of such nature, it could be prudent for the Defence to discuss its intentions to interview a witness or potential witness with the Prosecution and record the interview. In my opinion, *this would equally apply in the inverse situation, that is when it is the OTP seeking to interview a Defence witness*, as is in this case...The Trial Chamber find that there is nothing which would support such a restriction [to interview witnesses], although *in such a matter caution and reasonableness are to be recommended so as not to introduce in the trial environment an aura of distrust and mutual suspicions and accusations of foul play.*’ (pg 14516-14522) (emphasis added).

⁹ The WVS is set up pursuant to the Statute, Article 16(4).

harassment by agents of the Prosecution. The Defence did not imagine that it might need to seek protective measures with respect to the actions of Prosecution agents.

Procedural Safeguards Are Necessary to Ensure Informed Consent and Prevent Harassment

13. Assuming, *arguendo*, the propriety of interviewing confirmed defence witnesses as a general matter, the Defence submits that it is necessary for the Chamber to endorse certain procedural safeguards in order to ensure that witnesses submit to interviews voluntarily and to protect them from unwarranted harassment and coercive tactics.
14. In denying a request by the defence to interview prosecution witnesses prior to trial, a Trial Chamber of the International Criminal Tribunal for Rwanda (the “ICTR”) appeared to adopt the arguments advanced by the ICTR Prosecutor that such request could only be granted if the Chamber was satisfied that the request was reasonable and the witnesses gave their consent to be interviewed, and that such request should be denied in order to avoid harassment and intimidation of witnesses prior to trial¹⁰. The Defence submits that this Chamber should adopt a similar approach.
15. Although the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) has upheld a Trial Chamber’s decision rejecting a defence request to establish rules governing communication with the witnesses for the opposing party¹¹, it nonetheless emphasized “that this freedom to contact potential witnesses is *not without limitation*”¹². Further, the ICTY Appeals Chamber intimated that parties should proceed in such a manner to avoid any “interference with the course of justice” and that “caution is needed where the Prosecution is seeking to

¹⁰ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Trial Chamber II, ‘Decision on Defence Motion Seeking to Interview Prosecutor’s Witnesses or Alternatively to be Provided With a Bill of Particulars’, 12 March 2001

¹¹ *Prosecutor v. Mrksic*, IT-95-13/1-AR73, Appeals Chamber, ‘Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party’, 30 July 2003. There, the Appeals Chamber held that pursuant to Article 18(2) of the Statute and Rule 39 of the Rules, it was “clear that the Prosecution has the power to request interviews with potential defence witnesses and may seek assistance from state authorities to facilitate this contact”. However, the Defence notes that this case referred to interviews conducted at the *pre-trial* stage when the witnesses in question were only *potential* defence witnesses. The Defence does not quarrel with the right of either party to conduct interviews with unconfirmed witnesses at the pre-trial stage of the proceedings. In *Mrksic*, the Trial Chamber had stated that at the pre-trial stage, the potential witnesses are not attached to either party and the fact that a potential witness may have given a statement to a party does not preclude the other party from seeking an interview.

¹² *Ibid.* [emphasis added]

interview a witness who has declined to be interviewed by the Prosecution, since in such a case the witness may feel coerced or intimidated”¹³.

16. Witnesses not subject to court order are free to speak with whomever they please. However, voluntary cooperation with representatives of an adverse party must be ensured especially in a post-conflict context such as in Sierra Leone, where many witnesses may be naturally suspect and even fearful of figures of authority. The Defence submits that the use of police facilities and/or staff to conduct such interviews automatically lends a coercive element to the process. There is a very real danger that witnesses will feel *compelled* to give interviews to the Prosecution, especially if they are told to report to the police station and the Prosecution’s agents present themselves to witnesses clothed in the uniforms of state authority.
17. It appears from the cross-examination of Mrs Sheriff that representatives of the Prosecution interviewed her at the Koribondo Police Station. It is unclear whether the witness understood her right to decline to be interviewed let alone that she understood that the interview was for the Prosecution and might be used by the Prosecution during her appearance in Court. There is no indication to suggest that full and free consent was given by this witness.
18. Furthermore, another witness for the Defence, Joe Nunie, stated that he was summoned to the police station in Bo by representatives of the Prosecution, who made threatening remarks to him when he declined to be interviewed. He further stated that he continues to feel threatened by these agents of the Prosecution.¹⁴
19. The mere fact that interviews may have been conducted in police stations strikes the Defence as a highly problematic practice, to say the least, and should provide reason enough to implement the requested procedures. The notion of the Prosecution enlisting the aid of the local police authorities to interrogate or attempt to interrogate defence witnesses is reprehensible and repugnant to the ideal of a fair trial. The

¹³ *Ibid.*

¹⁴ Court Proceedings, May 11, 2006. The witness stated this information during his cross examination by Counsel for the Second Accused (transcript not yet available).

Defence submits that any statements taken from defence witnesses under such conditions should be automatically barred from the proceedings pursuant to Rule 95¹⁵.

CONCLUSION

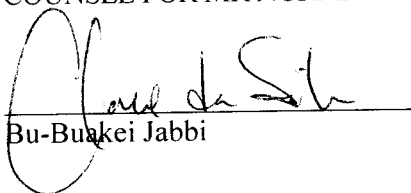
20. It is the submission of the Defence that the Prosecution must seek permission from the Defence or through the WVS prior to contacting any confirmed Defence witness. Full and informed consent from the witness must be obtained without intimidation or harassment prior to the Prosecution interviewing or obtaining any statements from a witness.
21. The Defence further submits that in the interest of justice any statements that have been taken from Defence witnesses to date are inadmissible and cannot be used by the Prosecution during the trial proceedings. These statements should be deemed to have been taken without informed consent or coerced and their use in the trial proceedings would bring the administration of justice into disrepute.

¹⁵ Rule 95 provides: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute". Furthermore, without intending to assign blame at this stage, the Defence simply notes that Rule 77(A)(iv) authorizes a Chamber to punish for contempt any person who "threatens, intimidates ... or otherwise interferes with a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber".

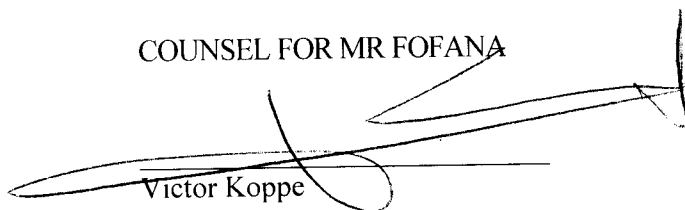
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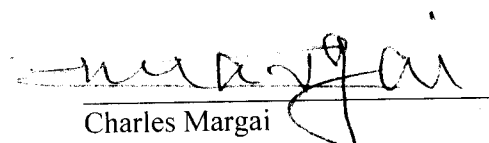
COUNSEL FOR MR NORMAN

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Bu-Buakei Jabbi

COUNSEL FOR MR FOFANA


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COUNSEL FOR MR KONDEWA


Charles Margai

APPENDIX A**Defence List of Authorities****Statute and Rules**

1. SCSL Statute, Article 16(4)
2. SCSL Statute, Article 17(4)
3. SCSL Rules of Procedure and Evidence: Rules 77(A)(iv), 89(B), 95

Jurisprudence**SCSL**

4. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-126, Trial Chamber I, 'Decision on Prosecution Motion for Modification of Protective Measures for Witnesses' 8 June 2004
5. *Prosecutor v Norman et al.*, SCSL-2004-14-T-534, Trial Chamber I, 'Consequential Order to the Status Conference of 18 January 2006', 18 January 2006
6. *Prosecutor v Norman et al.*, 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' of 18 January 2006' 17 November 2005

Other

7. *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, 'Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements', 27 November 1996
8. *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Trial Chamber II, 'Decision on Defence Motion Seeking to Interview Prosecutor's Witnesses or Alternatively to be Provided With a Bill of Particulars', 12 March 2001
9. *Prosecutor v. Mrksic*, IT-95-13/1-AR73, Appeals Chamber, 'Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party', 30 July 2003.

Transcripts

10. Transcript, *Norman et al.*, SCSL-2004-14-T, 09 May 2006, pg 29-230
11. Transcript, *Prosecutor v. Naser Oric*, IT-03-68-T, Trial Chamber, 7 December 2005. pg 14516-14522)

Other Authorities

12. Jones & Powels, *International Criminal Practice*, 3rd Edition (Oxford, 2003)