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SPECIAL COURT FOR SIERRA LEONE

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet
Registrar: Robin Vincent
Date: 23 July 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

**JOINT RESPONSE OF SECOND AND THIRD ACCUSED TO PROSECUTION'S
REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES**

Office of the Prosecutor:

James C. Johnson

Charles Caruso

Defence Counsel for Moinina Fofana:

Michiel Pestman

Arrow J. Bockarie

Victor Koppe

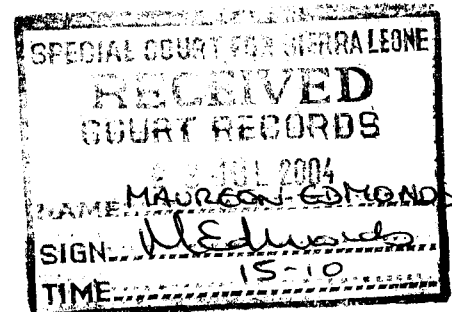
Defence Counsel for Allieu Kondewa:

Charles Margai

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Susan Wright

Samuel Hinga Norman



Introduction

1. The Defence for Mr. Moinina Fofana (the “**Second Accused**”) and the Defence for Allieu Kondewa (the “**Third Accused**”) hereby file this joint response to the “Prosecution’s Request for Leave to Call Additional Witnesses” (the “**Response**” & the “**Request**”).
2. The Prosecution submits that each of the proposed additional witnesses meets the standard of “good cause” and the Court should therefore allow their addition to the modified witness list.
3. In this Response, the Second Accused and Third Accused (the “**Accused**”) submit that the Prosecution has not met the standard of “good cause” for the grant of leave to call additional witnesses under Rule 66(A) of the Rules of Procedure and Evidence (the “**Rules**”) because it has failed to illustrate the materiality of the evidence to be presented by the additional witnesses and because the addition of witnesses causes prejudice to the Accused’s right to a fair and expeditious trial.

The law

4. Rule 66(A) states:

Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

- (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial

Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.

- (ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecution does not intend to call be made available to the defence within a prescribed time.

In the “Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial”, issued on 1 April 2004, the Trial Chamber stated that should the Prosecution seek to add any witness or exhibits to the lists submitted on 26 April 2004, “it shall be permitted to do so only upon good cause being shown”.

The Prosecution failed to illustrate the materiality of the evidence to be presented by the additional witnesses

5. In Paragraph 9 of its Request, the Prosecution purports to set forth the materiality of the evidence to be presented but has failed to show that the content of the expected testimonies is not merely corroborative or cumulative. Numerous previously disclosed witness statements address the issues raised by TF2-221, TF2-222 and TF2-223. Specifically, the Prosecution has submitted that the following witnesses can testify to the same points and issues raised in the Request:

TF2-005 and TF2-017 – Hinga Norman’s alleged order to kill collaborators as well as Moinina Fofana’s alleged reiteration of such orders.

TF2-014 – Hinga Norman’s alleged direct orders not to spare the lives of prisoners of war.

TF2-005 – Hinga Norman’s alleged direct orders with respect to Black December.

TF2-014, TF2-148 and TF2-201 – direct evidence of the planning and coordination of the three Accused with respect to Tongo Fields.

TF2-014 – individual criminal responsibility of all three Accused, offering direct evidence of the planning and coordination of the three Accused with respect to Black December.

TF2-008 and TF2-201 – the Accused’s role in senior war planning.

TF2-002 and TF2-201 – both present as CDF members participating in operations at the SS Camp near Kenema during 1997 and 1998.

TF2-148, TF2-023 and TF2-150 – interrogation, torture and extrajudicial killings at the SS Camp and in and around Kenema.

TF2-148 – specific testimony about Hinga Norman ordering attacks on Kenema.

6. Accordingly, the Defence respectfully submits that the addition of witnesses TF2-221, TF2-222, TF2-223 is not necessary as it is repetitive of previously disclosed witness statements and thus merely cumulative.

The addition of witnesses causes prejudice to the right of the Accused to a fair and expeditious trial

7. The Prosecution notes that the hearing of evidence during the trial for the Accused has only recently commenced¹.
8. However, in its “Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(D) of the Statute of the Special Court”, the Trial Chamber emphasised the importance of “the public interest, national and international, in the expeditious completion of this trial”². The Trial Chamber went on to state that:

“there is the high potential for further disruption to the Court’s timetable and calendar which we are already witnessing in this case. In fact, two Prosecution witnesses whom the Chamber insisted should testify on the 3rd of June, after opening statements and ceremonies, were taken back without achieving this objective. Given the limited mandate of the Court, this creates a serious cause for concern.”³

9. The complications relating to Prosecution witnesses thus far have, therefore, already demonstrated the “high potential” for disruptive delay to the proceedings.⁴ The Defence notes that prior to this Request, the Prosecution had declared its intent to call 154 witnesses in this case, and that in the first month of trial only four of these were indeed called to the stand. Given the Court’s limited mandate and the serious concern for delay raised by the Trial Chamber, the Defence respectfully submits that the addition of witnesses, even at this early stage, unduly hinders the expeditiousness of the trial and thus causes prejudice to the Accused.

¹ Request, para. 10.

² Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(D) of the Statute of the Special Court, 8 June 2004, para. 26(iv).

³ *Ibid.* para. 26(v).

⁴ See *supra*, note 2 at para. 26(v).

10. The rights of the Accused to a fair and expeditious trial are further unduly compromised by the delay between the May 2004 investigation dates and the disclosure of redacted statements in mid-July 2004, almost two months later. While the Prosecution assures that it does not plan to call these witnesses to testify until “a much later stage of this trial”,⁵ such assurances are of little weight given that the Prosecution had ample opportunity during trial in June to bring this new evidence to the Court’s attention. Had the intention to call additional witnesses been communicated upon the completion of investigation, the Prosecution could have allowed the Defence the opportunity to investigate the allegations set forth in these statements during the month of July. Instead the Prosecution waited until just before the August recess to disclose them, effectively preventing the Defence from launching an adequate investigation until October, after the completion of the next trial period.
11. Alternatively, the Defence respectfully submits that the Prosecution’s disclosure on 16 July 2004 is incomplete pursuant to paragraphs 8 – 15 of the Court’s Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004. Accordingly, disclosures should contain all witness statements in the possession of the Prosecution, regardless of their form or source.⁶ This may include information recorded in due procedure, such as investigator’s notes, confirmation reports or any information relevant to the compensation of witnesses. As the Prosecution failed to furnish any of this information to the Defence in support of its Request, the disclosure is incomplete.
12. Finally, the Accused are additionally prejudiced by the absence of any effective corroboration of the Prosecution’s assertion that it encountered insurmountable difficulty in finding or interviewing the three witnesses in question.

⁵ Request, para. 10.

⁶ Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para 11.


Conclusion

13. In conclusion, the Prosecution's arguments in paragraphs 9 and 10 of its Request do not demonstrate the existence good cause pursuant to Rule 66(A)(ii), and the Request should therefore be denied.

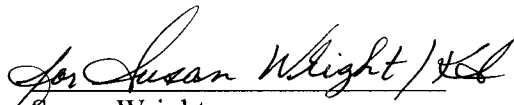
Freetown, Sierra Leone 23 July 2004

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