

SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Interim Registrar: Mr. Lovemore Munlo SC

Date: 7th of December, 2005

PROSECUTOR **Against** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

DECISION ON URGENT MOTION FOR RECONSIDERATION OF THE ORDERS FOR COMPLIANCE WITH THE ORDER CONCERNING THE PREPARATION AND PRESENTATION OF THE DEFENCE CASE

Office of the Prosecutor:

Luc Côté
James Johnson
Kevin Tavener

Court Appointed Counsel for Sam Hinga Norman:

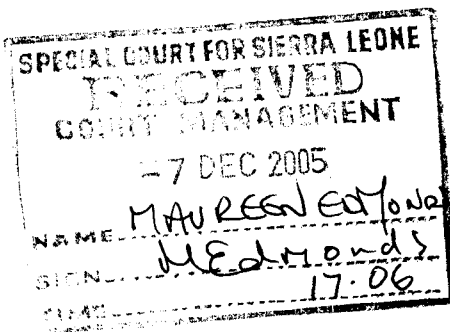
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Clare da Silva (*Legal Assistant*)

Court Appointed Counsel for Moinina Fofana:

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

Court Appointed Counsel for Allieu Kondewa:

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



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;

BEING SEIZED OF the “Urgent Fofana Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November 2005 Consequential Order of Trial Chamber I”, filed by Counsel for the Second Accused, Moinina Fofana, on the 1st of December, 2005 (“Motion”);

NOTING the “Order on Urgent Motion for Reconsideration or, in the Alternative, for Leave to Appeal the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case” of the 29th of November, 2005 and the “Order for Expedited Filing” of the 1st of December, 2005;

NOTING the Response to the Motion filed by the Office of the Prosecutor (“Prosecution”) on the 2nd of December, 2005 (“Response”);

MINDFUL of the “Order Concerning the Preparation and Presentation of the Defence Case” filed 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 the “Scheduling Order for Status Conference” filed on the 18th of November 2005 and the Order Re-Scheduling a Status Conference and Order for Submissions by the Prosecution” filed on the 21st of November, 2005;

NOTING the Prosecution Response to the Joint Defence Materials, filed on the 23rd of November, 2005;

NOTING that a further Status Conference has been 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 November, 2005;

HAVING HEARD the Parties during the said Status Conference on the 25th of November, 2005;

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

MINDFUL of the various materials filed by the Defence pursuant to the Order for Compliance on the 5th of December, 2005;¹

¹ *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Defence Witness and Exhibit List for the First Accused as per the Consequential Order for Compliance of 28th November 2005 Concerning the Preparation and Presentation of the Defence Case, 5 December 2005; *id.*, Fofana Materials Filed Pursuant to the Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 5 December 2005; and

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 7, 26bis, 54, 65bis, 69, 73, 73ter, of the Rules of Procedure and Evidence of the Special Court ("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. The Trial Chamber ordered by its Order of the 21st of October, 2005, that the Defence Teams for Norman, Fofana and Kondewa, to 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.
- b) A list of expert witnesses with an indication of when their report will be ready and made available to the Prosecution.
- c) A list of exhibits the Defence intends to offer in its case, containing a brief description of their respective nature and contents, and stating where possible whether or not the Prosecution has any objection as to their authenticity.
- d) A chart which indicates, for each paragraph in the Indictment, the testimonial evidence and documentary evidence upon which the Defence will rely to defend the Accused against the allegations contained therein.

2. On the 27th of October, 2005, a Status Conference was held for the purposes of considering the preparation and presentation of the Defence Case. In particular, during the said Status Conference, the nature and purpose of the materials indicated above were discussed by the Chamber and the Parties were invited to make comments.²

3. On the 17th of November, 2005, the Trial Chamber received the Joint Defence Materials. However, the Defence requested the Trial Chamber to reconsider its Order of the 21st of October, 2005 and to adopt certain modifications thereof, as proposed by the Defence. The Defence also assured the Chamber that "it intends to fully comply with the Rules of this Court and, barring any unforeseen eventualities, will be ready to commence its case promptly on the 17th January 2005".³

id., Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 5 December 2005.

² Transcripts, Status Conference, 27 October 2005.

³ Joint Defence Materials Filed, para. 3.

4. The Prosecution filed its submissions on the Joint Defence Materials on the 23rd of November, 2005 following an Order of the Chamber on the 21st of November, 2005 issued pursuant to Rule 7(C) and 54 of the Rules. The Prosecution requested that the Defence objections to the Order of the 21st of October, 2005 be dismissed and that the Chamber orders the Defence to comply fully with the said Order so as to avoid further delay to the proceedings.

5. On the 25th of November, 2005, another Status Conference was held for the purposes of further considering the preparation and presentation of the Defence Case and, in particular, the Defence compliance with the Order of the 21st of October, 2005. The Joint Defence Materials and the Prosecution Response thereto were discussed by the Chamber and the Parties were invited to make comments. During the said Status Conference, the Chamber dismissed with an oral Ruling, a request by the Defence for the Second Accused that the Joint Defence Materials be deemed a motion and, consequently, that the Defence be given the opportunity to file a written reply to the Prosecution submissions, on the basis that the Joint Defence Materials are in contravention of the Order of the 21st of October, 2005 and that there is no legal or statutory basis for such a request ("Oral Ruling").⁴

6. Subsequently, on the 28th of November, 2005, the Chamber issued its Order for Compliance, noting that the Defence had failed to comply with its Order of the 21st of October, 2005 and ordered, *inter alia*, that each of the Defence Teams for Norman, Fofana and Kondewa individually files 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;

Should the Defence seek to add any witnesses to this list after the 5th of December, 2005 it may be permitted to do so only upon good cause being shown;

b) A list of expert witnesses, whose names must appear on the list of witnesses referred to above, with a brief description of the nature of their evidence and a preliminary indication of when their reports will be ready and its availability to the Prosecution.

c) A list of exhibits the Defence intends to offer in its case, containing a brief description of their respective nature and contents, and stating where possible whether or not the Prosecution has any objection as to their authenticity. Should the Defence seek to add any exhibit to this list after the 5th of December, 2005 it may be permitted to do so only upon good cause being shown;

⁴ Transcript, Status Conference, 25 November 2005, page 18.

- d) A chart which indicates, for each paragraph in the Indictment, the testimonial evidence and documentary evidence upon which the Defence will rely to defend the Accused against the allegations contained therein.
- e) An indication of whether each of the Accused intends to testify in his own Defence and this, pursuant to Rule 85(C) of the Rules;

II. PARTIES SUBMISSIONS

7. Reiterating the submissions contained in the Joint Defence Materials, the Defence submit that paragraphs (a)(i) and (d) of the Order for Compliance respectively violate the principle of equality of arms and offend the presumption of innocence enjoyed by the Accused and accordingly request the Trial Chamber to reconsider its Orders.⁵ In particular, the Defence submits that it complied with the Order of the 21st of October, 2005, in that the filing within the prescribed time limits of reasoned objections in the form of the submissions contained in the Joint Defence Materials is a form of compliance with such Order and that the Trial Chamber possesses the inherent discretionary power to reconsider its own decisions.⁶ The Defence also request the Chamber to stay the filings of the materials indicated in paragraphs (a)(i) and (d) of the Consequential Order it objected to.

8. The Prosecution submit that the Defence Motion should be dismissed. In particular, the Prosecution submit that, according to the jurisprudence of the ICTY and the ICTR, a Chamber inherent power to reconsider its own previous decisions should be appropriately exercised only in exceptional circumstances⁷, that the Defence did not contest the provisions of the Order of the 21st of October 2005 during the Status Conferences held on the 27th of October and the 25th of November, 2005 and that, therefore, the Defence has not submitted any convincing arguments as to why the Chamber should reconsider its validly issued Order of the 21st of October, its Oral Ruling and its Order for Compliance.⁸

III. APPLICABLE LAW

9. This Motion confronts us with the task of articulating the nature of the exceptional jurisdiction of this Court to reconsider its previous decisions and the extent or scope of such a jurisdiction. In effect, the Chamber is called upon to delineate the boundary line between its statutory and inherent jurisdiction by way of authority to review a previous decision.

Applicable Standards for Reconsideration

10. In the Chamber opinion, under the adversarial scheme for international criminal adjudication set up by the Special Court system, there is no express statutory authority conferred upon a Trial Chamber of the Special Court to reconsider a previous interlocutory decision once it is

⁵ Motion, paras 24-28.

⁶ *Id.*, paras 15-19.

⁷ Response, paras 16-18.

⁸ *Id.*, paras 10-13 and 19.

functus officio.⁹ However, the fact that the Rules are silent as to whether a Chamber can reconsider its decisions is not necessarily inconsistent with a judicial body's inherent jurisdiction to exercise this power in exceptional circumstances.¹⁰

11. In the absence of an express statutory provision vesting the Trial Chamber with powers to reconsider its previous decision, the instant issue is whether the Chamber can exercise such a power by virtue of its inherent jurisdiction. Indeed, the Appeals Chamber has previously held that a Chamber has an inherent jurisdiction to reconsider its own decisions in the event of a clear error of reasoning and to avoid injustice or a miscarriage of justice.¹¹

12. This Chamber consequently holds that, as a matter of law, it can exercise its power to reconsider a previous decision under its inherent jurisdiction. Whether or not a Chamber does reconsider its own previous decisions is in itself a discretionary decision.¹² However, in the Chamber's opinion, the critical question for preliminary determination is in what circumstances is such a power exercisable?

13. Established jurisprudence of the ICTY and the ICTR confirms that a Chamber has an inherent power to reconsider its own decisions only in exceptional circumstances.¹³ In this regard, the Chamber finds persuasive and accordingly adopts, the view taken by Trial Chamber III of the ICTR in its *Decision On Prosecution Motion For Variation, Or, In Alternative Reconsideration Of The Decision On Protective Measures For Defence Witnesses*.¹⁴ On this issue, the Chamber stated:

“following the jurisprudence of the Tribunal, a Trial Chamber has an instant power to reconsider its own decision where (i) a clear error of reasoning in the previous decision has been demonstrated and (ii) the decision sought to be reconsidered has led to an injustice.”¹⁵

14. We also adopt, for persuasive reasons, the reasoning of Trial Chamber II of the aforementioned ICTR in its *Decision on Renzaho's Motion To Reconsider The Decision On Protective Measures For Victims And Witnesses To Crimes Alleged In The Indictment*¹⁶ where, alluding to the circumstances, the Chamber observed that such circumstances include but are not limited to the following:

⁹ See *Prosecutor against Issa Sesay*, Case No. SCSL-03-05-PT, Order on the Defence Application for Reconsideration of and/or Leave to Appeal “Decision on the Prosecutor's Motion for Protective Measures for Witnesses and victims and for Non-Public Disclosure”, 16 July 2003; *Prosecutor against Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Decision on Renewed Motion for Defects in the Form of the Indictment and Application for Extension of Time, 24 May 2005, para. 8.

¹⁰ See also *Prosecutor against Renzaho*, Case No. ICTR-97-31-I, Decision on Renzaho's Motion to Reconsider the Decision on Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 9 November 2005, para. 20.

¹¹ *Prosecutor against Norman, Fofana and Kondewa*, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File and Interlocutory Appeal, 17 January 2005, paras 35 and 40.

¹² *Prosecutor against Bagosora et al*, ICTR-98-41-A, Decision on Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of “Lack of Jurisdiction”, 2 May 2002, par 10.

¹³ See, for instance, *Prosecutor against Mucic, Delic and Landzo*, Case No. IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, para. 49; *Prosecutor against Semanza*, Case No. ICTR-97-20-A, Decision on Appeal against the Oral Decision Dismissing the Motion for Review, 16 April 2002.

¹⁴ *Prosecutor against Rwamakuba*, Case No. ICTR-98-44C-T; Decision on Prosecutor Motion for Variation, or in the Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses, 2 November 2005.

¹⁵ *Id.* para 4.

¹⁶ *Prosecutor against Renzaho*, Case No. ICTR-97-31-I, Decision on Renzaho's Motion to Reconsider the Decision on Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 9 November 2005, paras 20-21.

“(i) where the impugned decision was erroneous in law or an abuse of discretion when decided and for this reason a procedural irregularity has caused a failure of natural justice; or,

(ii) where the new material circumstances have arisen since the decision was issued.”¹⁷

IV. DELIBERATIONS

Introduction

15. The Defence submits that the timely filing of a reasoned objection as contained in the relevant submissions within the Joint Defence Materials amounts to compliance with the Trial Chamber Order of the 21st of October, 2005 and, reiterating such submissions, requests the Chamber to reconsider, *inter alia*, its subsequent Order for Compliance. However, the Chambers preliminarily notes that the Defence did not put forward any new and specific grounds for which the Order for Compliance should now be reconsidered pursuant to the Defence Motion.

16. During the Status Conference held on the 27th of October, 2005 following and pursuant to the issuing of the Order of the 21st of October, 2005, the Defence was invited on various occasions to make comments concerning the preparation of its case and, in particular, the various materials to be filed pursuant to the said Order of the 21st of October, 2005. In response to the Chamber, the Defence specifically reassured that “work is well under way to fulfil the order”.¹⁸ On the 17th of November, 2005, the final day for the filing by the Defence of the various materials requested by the Chamber in its Order of the 21st of October, 2005, the Defence, advancing arguments that were not previously indicated, objected in its Joint Defence Materials to, *inter alia*, the filing of a witness list and of an evidentiary chart as provided for in paragraphs (a)(i) and (d) of this Order.

Have the Defence Met the Applicable Standards for Reconsideration?

17. As already discussed and deliberated upon during the Status Conference held on the 25th of November, 2005 the Chamber finds and reiterates that the filing of last minute and novel objections by the Defence is inconsistent with the position previously expressed by the Defence in open court and, therefore, cannot constitute a form of compliance with a Chamber’s order.¹⁹

18. In addition, the Chamber wishes to stress that when an Order is issued and, in particular, when specific time limits are provided for, a party must comply with such Order. Should any party wish to raise any unexpected issues concerning the non-compliance with an Order, it must do so within the overall purview of the Rules. An objection cannot be considered to constitute a compliance with a clear and specific order of the Chamber.

¹⁷ *Id.* para 21. See also *Prosecutor against Bizimungu, Ndindiliyimana, Nzuwonemeye and Sagahutu*, Case No. ICTR-00-56-T, Decision on Bizimungu’s Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber’s Decision of 13 May 2005, 24 November 2005, paras 18-19. See also *Prosecutor against Karemera, Ndirumpatse and Nzirorera*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8.

¹⁸ Transcripts, Status Conference, 27 October 2005, page 20.

¹⁹ See also *Prosecutor against Karera*, Case No. ICTR-01-74-PT, Decision on Motion for Protective Measures for Prosecution Witnesses, 1 December 2005, paras 1-3.

19. Indeed, a cursory reading of Rule 5 of the Rules requires a party to raise any objection on the ground of non-compliance at the earliest opportunity.²⁰ The Defence waited nearly one month before putting forward its objections to the Order of the 21st of October, 2005. Considering the current phase of preparation for the imminent commencement of the Defence case, the Defence is called to exercise diligence in the discharge of its obligations, to act scrupulously and to respect and comply with Orders issued by the Chamber in relation thereto. The Defence position in this regards is manifestly untenable from the perspective of two grounds analogous to the context of the exercise of an equitable jurisdiction, namely (i) that delay defeats equity and (ii) that he who seeks equity must do equity.

20. These considerations were the basis for the Chamber's Oral Ruling and the Order for Compliance, which now mandates the Defence to file, within a newly prescribed time limit, essentially the same materials that the Defence ought to have previously filed pursuant to the Order of the 21st of October, 2005.

21. The Chamber opines further, that no new material circumstances or facts have been put forward by the Defence in support of its Motion for reconsideration and furthermore, that the Defence has failed to demonstrate that the Chamber erred in law in rendering the Oral Ruling and the Order for Compliance and that these Orders might consequently cause any prejudice to the Accused. The Chamber is of the opinion that the Defence, in seeking reconsideration of these Orders, is now simply attempting to re-litigate issues for which it has been previously given ample opportunity to present arguments and which have already been deliberated upon by the Chamber.

V. CONCLUSIONS

22. The Chamber therefore finds that the Motion fails to indicate or to demonstrate that the Oral Ruling and the Order for Compliance constituted a clear error of reasoning or that the said decisions have led to an injustice or might prejudice the rights of the Accused and, consequently, warrant their reconsideration.

23. Accordingly, and with specific reference to the Defence request for a stay of the filing of materials indicated in the Order for Compliance, the Chamber reiterates that the filing of any motion will not operate as a stay of proceedings.²¹

VI. DISPOSITION

Based on the foregoing considerations the Trial Chamber **DISMISSES** the Motion in its entirety and **ORDERS** as follows:

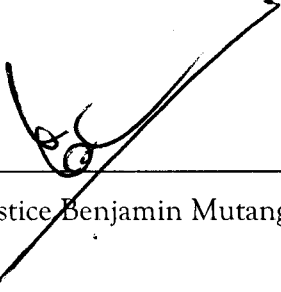
²⁰ See also, more specifically referring to objections on the ground of non-compliance with disclosure obligations, *Prosecutor against Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Ruling on Application for Exclusion of Certain Supplemental Statements of Witness TF1-316 and Witness TF1-122, 1 June 2005, paras 31-32.

²¹ See also *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Order on Urgent Motion for Reconsideration or, in the Alternative, for Leave to Appeal the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 29 November 2005.

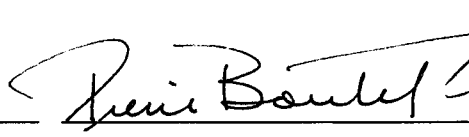
- a) that the Defence for the Second Accused, Moinina Fofana, and each Defence Team duly and fully complies with the Order for Compliance;
- b) that this Order be carried out.

AUTHORIZES the Court Management Section of the Special Court to serve the present order after 5:00pm, today the 1st of December, 2005.

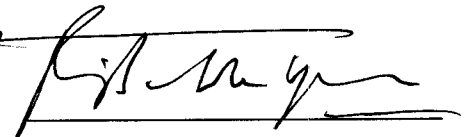
Done at Freetown, Sierra Leone, this 7th day of December 2005,



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Boutet



Hon. Justice Bankole Thompson

Presiding Judge,
Trial Chamber I



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