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Prosecutor v. Norman, Fofana, and Kondewa (SCSL-2004-14-PT)

**THE SPECIAL COURT FOR SIERRA LEONE  
FREETOWN – SIERRA LEONE**

**IN THE TRIAL CHAMBER**

Before: Judge Bankole Thompson, Presiding judge  
Judge Benjamin Mutanga Itoe  
Judge Pierre Boutet

Date filed: 24<sup>th</sup> May 2004

**THE PROSECUTOR**  
Against  
**SAMUEL HINGA NORMAN**  
**MOININA FOFANAH**  
**ALLIEU KONDEWA**  
CASE NO. SCSL-2004-14-PT

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**REPLY TO THE PROSECUTION’S RESPONSE TO MOTION  
TO COMPEL THE PRODUCTION OF EXCULPATORY  
WITNESS STATEMENTS, WITNESS SUMMARIES AND  
MATERIALS PURSUANT TO RULE 68**

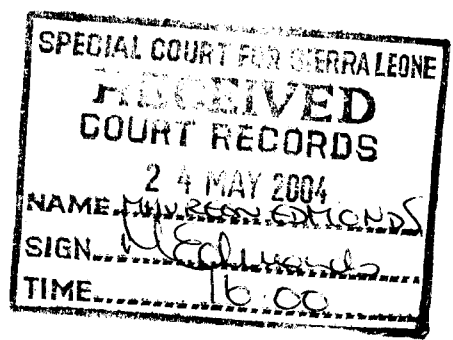
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**Office of Prosecutor:**

Mr. Luc Cote  
Mr. James C. Johnston

**Applicant’s Counsel:**

Mr. Charles F. Margai  
Mr. Yada H. Williams  
Mr. Thomas G. Briody  
Ms. Susan L. Wright  
Mr. Ansu Lansana



1. The Defence files this reply to the “Prosecution Response to Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68” filed on the 17<sup>th</sup> May 2004 (the “Motion”).

2. Rule 68(B) provides that:

*The Prosecutor shall, within 30 days of the initial appearance of the accused make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.*

3. In the Response, the Prosecution rightly notes that the provision of Rule 68 which requires the Prosecution to “make a statement” was introduced by the new Rules of Procedure and Evidence (the “Rules”) adopted at the 5<sup>th</sup> Plenary session in March 2004. The Rules also provide that “[A]n amendment shall, unless otherwise indicated, enter into force immediately.”<sup>1</sup> Since the amendment to Rule 68 does not have any indication to the contrary, it can be inferred that the said Rule came into force immediately i.e. on the 14<sup>th</sup> March 2004.
4. Given the date of amendment, the Defence cannot expect compliance with the precise time frame (30 days) set forth in Rule 68. But the Court and the Defence can and should expect compliance with the substance of the Rule itself. The Defence does not allege that the Prosecution has entirely failed to disclose any exculpatory material, as the Prosecution’s Motion seems to imply.
5. The Defence will reiterate that between the 14<sup>th</sup> March and the filing of its “Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68” on the 5<sup>th</sup> May 2004 the Prosecution had been in breach of Rule 68 to the extent that it had failed to make any statement regarding “..... *the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence* .....
6. Contrary to the Prosecution’s averment that they had complied with the earlier Rule 68, the Defence will submit that they were in breach of the said rule as even the witness statements/summaries disclosed prior to the coming into force of the new Rule 68 were so badly redacted – including names of places and dates - that it could not

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<sup>1</sup> Rule 6(D)

properly be said that they had disclosed to the Accused “the existence of evidence” that suggested the innocence or mitigate the allegations against the Accused.

7. In its Response the Prosecution makes a distinction between the statement of witnesses who are slated to testify and those who are not. It is notable that Rule 68 makes no such distinction. It is however true that relative to witnesses who are slated to testify, an additional burden is placed on the Prosecution by virtue of the right of the Accused to confront and cross-examine witnesses against him.
8. That the Prosecution on the 17<sup>th</sup> May 2004 served on Defence Counsel for Allieu Kondewa, the 3<sup>rd</sup> Accused herein witness statements and testimonies of witnesses the Prosecution does not intend to call at the trial of the Accused and which are exclusively or largely exculpatory of the said Accused person. It was clear from the accompanying letter signed by James C. Johnson that the said witnesses statements and summaries were disclosed pursuant to Rule 68. A copy the said letter dated 17<sup>th</sup> May 2004 is attached as Annex A.
9. That the Defence do concede that certain witness statements/summaries whilst bearing exculpatory materials/facts might also be incriminating and that the Prosecution can and should seek or claim protective measures for such witnesses the Defence however finds it inconceivable how the Prosecution can claim such protective measures for witnesses whose statements/summaries are 100% exculpatory or mitigating of an accused person as such witnesses could not in any way be “.... *be in danger or at risk...*”<sup>2</sup> from anybody.
10. That the argument proffered by the Prosecution in an attempt to evade its obligation under the Ruling of this Court on the “Prosecution’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure” dated the 10<sup>th</sup> October 2003 is flawed as the witnesses referred to in paragraphs 8 and 9 supra could not be “*in danger or at risk*” the basis of a Rule 69 application for protective measures for witnesses.
11. That it is clear from the witness statements/ summaries that the Prosecution disclosed on the 17<sup>th</sup> May 2004 and reports/findings of investigator’s hired on behalf of the Accused that the Prosecution have in their possession witness statements/summaries that are wholly exculpatory of the Accused person which should be disclosed pursuant to Rule 68.

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<sup>2</sup> Rule 69 (A).

12. The Prosecution in paragraph 26 of its Response states that it is “..... aware of its obligation under Rule 68” but does not gainsay the allegation of the Accused that it has never made a statement pursuant to the said Rule which to all intent and purpose amounts to a violation of the said Rule.
13. That unlike the Rules of Procedure and Evidence applicable to the ICTR & ICTY, Rule 68 of the Special Court is novel to the extent that it requires the Prosecution to make periodic statements under the said Rule without specifying the nature or contents of such statement(s) and it is therefore imperative that the Trial Chamber makes a pronouncement on the issue.
14. That unless compelled by the Trial Chamber, the Prosecution will continue with its non-disclosure or piecemeal disclosure of even witness statements/summaries which the Prosecution does not intent to use or call and that are exculpatory or might mitigate the allegations against the Accused, Allieu Kondewa as was evident by the Prosecution’s disclosure on the 17<sup>th</sup> May 2004.

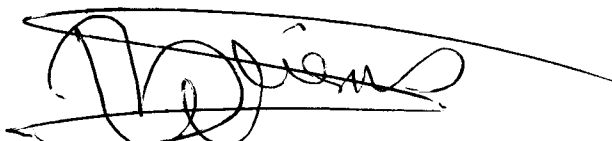
#### **CONCLUSION**

15. For the foregoing reasons the Defence respectfully reaffirms it’s the Orders prayed for and moves the Court to compel the Prosecution to comply with Rule 68.

Freetown, 24<sup>th</sup> May 2004

ALLIEU KONDEWA

By his Counsel,



YADA HASHIM WILLIAMS

**Annex A – Correspondences**

1. 17<sup>th</sup> May 2004



**SPECIAL COURT FOR SIERRA LEONE**

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**Office of the Prosecutor**

**17 May 2004**

Mr Charles Margai  
Banta Chambers  
N01 Goderich Street  
Freetown  
Sierra Leone

**Re: The Prosecutor Against Samuel Hinga Norman (*et al*), SCSL-2004-14-PT**

Pursuant to its continuing disclosure obligations under Rule 68 of the Rules of Procedure and Evidence, the Prosecution hereby serves you with the attached unredacted statements from witnesses the Prosecution does not intend to call at trial.

The Prosecution has also provided you with detailed receipts itemizing the witness statements disclosed. Please review the receipt and material provided, sign the receipt and return it to the Prosecution.

This disclosure has been made subject to the "Orders for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure" issued on 23 May 2003. The disclosed material is intended solely for your use in connection with the above-captioned case. The material is not to be disclosed to the public or the media, nor kept for personal use. Should you withdraw from representation of this Accused prior to the conclusion of proceedings in this case, please remit the disclosed materials to your replacement counsel or to the Defence team. At the conclusion of proceedings in this case, all material disclosed to the defence team by the Prosecution be remitted to the Registry for appropriate disposition.

Thank you for your cooperation.

Yours Faithfully,

A handwritten signature in black ink, appearing to read 'James C. Johnson', is written over the typed name and title.

James C. Johnson  
Senior Trial Counsel

CC: Court Management (Case File)