

SCSL-2004-14-T
(9104 - 9109)

Special Court for Sierra Leone

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet
Registrar: Robin Vincent
Date: 30 August 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 EXPERT WITNESS

Office of the Prosecutor:

Luc Côté
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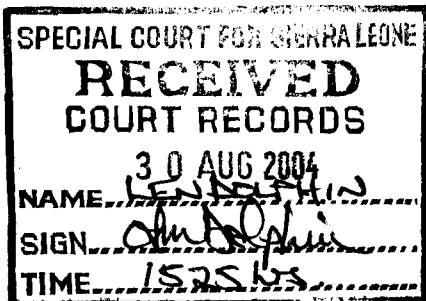
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Defence Counsel for Allieu Kondewa:

Charles Margai
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Samuel Hinga Norman



Introduction

1. The Defence for 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 Expert Witness” (the “**Response**” & the “**Request**”).
2. The Prosecution submits that the proposed additional witness meets the standard of “good cause” and the Court should therefore allow his 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 an additional witness because it has failed to timely disclose the evidence to the defense and because the addition of the witness causes prejudice to the Accused’s right to a fair and expeditious trial.
4. 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 law

5. Rule 94*bis* provides:
(A) Notwithstanding the provisions of Rule 66(A), Rule 73 bis (B)(iv)(b) and Rule 73 ter (B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and

shall be filed with the Trial Chamber not less than twenty one days prior to the date on which the expert is expected to testify.

(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:

- i. It accepts the expert witness statement; or
- ii. It wishes to cross examine the expert witness.

(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

1. Rule 94*bis* mirrors ICTR rule 94*bis*, which was added “to expedite the trial proceedings” and nearly mirrors ICTY rule 94*bis* which was likewise added “to expedite trial proceedings, in this case by arranging for early exchange of expert reports to facilitate definition of the issues in dispute and to identify the need or otherwise to call the expert witness to testify in person.”¹

The Prosecution failed to disclose the evidence in a timely manner

2. The Prosecution has misconstrued Rule 94 *bis* in a way that undermines the intent to expedite the trial proceedings by failing to arrange for the early exchange of reports. They claim to have adhered to their construction which dictates disclosure to the defense “as soon as possible after having received possession of the Report” but the facts would seem to indicate otherwise.²
3. The Prosecution concedes, and Dr. Haglund’s Expert Report confirms, that it was finalised on 27 February 2004.³ Through the Chief of Investigations, the Prosecution had contact with Dr. Haglund at least as early as 25 March 2004, which contact

¹ Jones and Powles, International Criminal Practice (3rd edition, 2003), p. 752.

² Request, para. 8.

established that “the report was complete.”⁴ On 22 April 2004 the Chief of Investigations returned to Sierra Leone from a trip to the United States during which he had collected the report and on that same date delivered the report to the Investigations Commander.⁵

4. In its Request, the Prosecution makes no reference to any such contact, leaving the impression that contact was exclusively between the Expert and the Investigations Unit, and later between the Expert Report and the Evidence Unit. According to the Expert Report, the project was “undertaken at the request of the Officer of the Prosecutor of the Special Court for Sierra Leone.”⁶ Unless this statement is untrue, it can be inferred that the Expert had contact with the Office of the Prosecutor.
5. Despite the fact that the report was complete on 27 February, that this fact was communicated as early as 25 March, and the report was delivered by the Chief of Investigations upon his return to Sierra Leone on 22 April, the Prosecution represented to the Trial Chamber on 28 April 2004 and on 1 June 2004 that “the Prosecution was not at that point in possession of any expert statements.”⁷
6. While the Accused are cognizant of the demands placed upon all parties in the late stages of trial preparation, given the fact that considerable logistical arrangements had to be undertaken to engage the Expert, preparations made for his month- long field visit, including access to sites to which he was directed by the Prosecution,⁸ it seems clear the Prosecution should have anticipated and expected the voluminous Expert Report which Dr. Haglund prepared. There are numerous logistical issues, such as expert compensation and Prosecutorial staff apportionment, which should have flagged the issue long before the Prosecution received “a copy of the Expert Report

³ Request, para. 11.

⁴ Request, Annex A, para. 1.

⁵ *Ibid.*

⁶ Expert Report, p. 1.

⁷ Request, para. 19.

⁸ Expert Report, pages 3 and 11.

on the second week of June.”⁹ Given these factors, it was perhaps incumbent upon them to follow up on the report’s status.

7. The Prosecution failed to comply with the Trial Chamber’s Order of 1 April 2004. It likewise failed to comply with its own misconstruction of the Order by failing to deliver the evidence as soon as possible after its receipt. In so doing it failed to deliver the evidence in a timely manner and should be barred from seeking to do so at this late date.

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

8. The Prosecution notes that “its request is being brought at a very early stage in the proceedings” and notes that it intends to call the Expert “at a much later stage in the trial.”¹⁰
9. However, as previously noted in the Accused’s “Reponse to the Prosecution’s Request to Call Additional Witnesses” dated 26 July 2004, the Trial Chamber has emphasized the importance of “the public interest, national and international, in the expeditious completion of this trial” noting:¹¹

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.¹²

10. The Defence notes that the Prosecution had declared its intent to call more than 154 witnesses in this case, and is mindful of the Court’s limited mandate and the serious

⁹ Request, para. 20.

¹⁰ Request, para. 26.

¹¹ 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).

concern for delay raised by the Trial Chamber. Given the issues raised by the testimony of an expert witness of Dr. Haglund's qualifications and experience, his addition even at this early stage unduly hinders the expeditiousness of the trial. Much of Dr. Haglund's report recounts in detail the methodology used and - as is commonly the case with experts - is of a complex and specialized nature which places the Accused in the untenable position of being unable to subject his evidence to the kind of scrutiny which ensures accuracy and fairness. As a consequence the Accused are prejudiced.

Conclusion

11. The Prosecution has not demonstrated the existence of good cause and the Request should therefore be denied.

Freetown, Sierra Leone
30 August 2004

COUNSEL FOR THE ACCUSED

For Moinina Fofana:

Michiel Pestman

For Allieu Kondewa:

Susan Wright

¹² *Ibid.* para. 26(v).