SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before:	Hon. Judge Benjamin Mutanga Itoe, Presiding Judge Hon. Judge Bankole Thompson Hon. Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	29 July 2004

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

DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES

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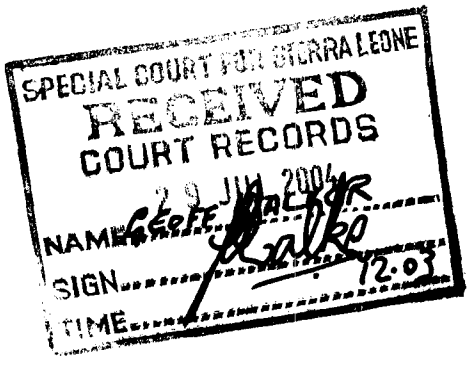

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

SEIZED of the "Prosecution Request for Leave to Call Additional Witnesses", filed on 16 July 2004;

NOTING the "Joint Response of Second and Third Accused to Prosecution's Request for Leave to Call Additional Witnesses" filed on 23 July 2004 ("Joint Response");

NOTING the "Response of First Accused to Prosecution's Request for Leave to Call Additional Witnesses" filed on 26 July 2004 ("Accused's Response");

NOTING the "Prosecution Reply to "Joint Response of Second and Third Accused to Prosecution's Request for Leave to Call Additional Witnesses", filed on 27 July 2004 ("Prosecution Reply");

NOTING the Trial Chamber's Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, delivered on 1 April 2004, where the Trial Chamber ordered the Prosecution to file by 26 April 2004, a witness list for all the witnesses that the Prosecution intended to call at trial with the name or the pseudonym of each witness, and that should the Prosecution seek to add any witnesses to this list after 26 April 2004, it should be permitted to do so only upon good cause being shown;

NOTING that the Prosecution filed a Witness List on 26 April 2004, as part of its filing of "Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004" ("Witness List");

NOTING that the Prosecution filed a Modified Witness List on 5 May 2004, as part of its filing of "Supplemental Materials Filed Pursuant to Order from the Bench During Pre-Trial Conference Held 28 April 2004 and Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement o f Trial of 1 April 2004" ("Modified Witness List");

HEREBY ISSUES THE FOLLOWING RULING:

I. SUBMISSIONS OF THE PARTIES

Prosecution Submissions

1. The Prosecution seeks to vary the Modified Witness List by adding three witnesses to it, namely, Witness TF2-221, Witness TF2-222 and Witness TF1-223. The Prosecution submits that the content of the expected testimonies from these witnesses meets the "good cause" standard for the addition of witnesses to the Witness List, as required by the Trial Chamber in its Decision of 1 April 2004. According to the Prosecution, the anticipated testimony for each witness is not merely corroborative or cumulative, but is direct, and will provide distinctive evidence on the individual criminal responsibility of one or more of the Accused at unique times and locations.

2. The Prosecution asserts that the statements of these witnesses were recently taken by OTP investigators and have been disclosed as soon as practicable after their statements were available and the Prosecution had formed the intent to call them at trial, and that the statements for these witnesses were disclosed to the Defence on 5 July 2004. The Prosecution further argues that the Accused's rights are protected as the hearing of evidence during the trial has just commenced and the

Accused will have significant time to examine and prepare for these additional witnesses, given that the Prosecution does not plan to call these witnesses to testify until a much later stage of the trial.

Defence Submissions of Second and Third Accused

3. The Defence submits that the Prosecution failed to illustrate the materiality of the evidence to be presented by the prospective additional witnesses. They argue that the Prosecution failed to show that the content of the expected testimonies was not merely cumulative or corroborative. They submit that Witnesses TF2-002, TF2-005, TF2-008, TF2-014, TF2-017, TF2-023, TF2-148, TF2-150, and TF2-201 can testify to the same points and issues as the additional witnesses, and that the addition of the proposed witnesses would be repetitive and cumulative.[1]

4. The Defence submits that allowing additional witnesses will cause prejudice to the right of the Accused to a fair and expeditious trial. The Defence states that given the Court's limited mandate and the Trial Chamber's expression of serious concern for delay in its Decision of 8 June 2004, together with the fact that only four witnesses were called to testify during the first month of trial, bringing additional witnesses would unduly hinder the expeditiousness of the trial and cause prejudice to the Accused.[2]

5. The Defence submits that the Prosecution caused a delay between the May 2004 investigation of the additional witnesses and the disclosure of their redacted statements in mid-July 2004, almost two months later. They assert that the Prosecution had ample opportunity during the trial in June to bring this new evidence to the Court's attention. The Defence further submit that the Prosecution's disclosure on 16 July 2004 is incomplete and that disclosure should include "information recorded in due procedure, such as investigator's notes, confirmation reports or any information relevant to the compensation of witnesses".[3]

6. The Defence further submits that the Accused are prejudiced by the absence of any effective corroboration of the Prosecution's assertions with respect to the difficulty of finding or interviewing the prospective additional witnesses.[4]

Submissions of First Accused

7. The Accused submits that the Prosecution Request does not meet the standard of "good cause" for granting leave to call additional witnesses pursuant to Rule 66A(ii) and Rule 73*bis* of the Rules. The Accused argues, in terms of the indicia for establishing "good cause" set forth in the jurisprudence of the *ad hoc* international criminal tribunals, that the Prosecution has failed to demonstrate the materiality of the evidence to be presented by the additional witnesses; that it has not shown that the Accused will not be prejudiced by adding witnesses to the witness list; and that it has not disclosed this evidence in a timely manner to the Accused or justified the lateness of the Request.[5] The Accused, furthermore, submits that the Special Court is not bound by the jurisprudence of the *ad hoc* international criminal tribunals, when considering whether "good cause"

[1] Joint Response, paras 5-6.
[2] Joint Response, paras 7-8.
[3] Joint Response, paras 11-12.
[4] Joint Response, para. 12.
[5] Accused's Response, para. 5.

is shown and is entitled to consider other facts such as the specific circumstances of the Accused, and the imprecision of the Request.[6]

8. The Accused adopts the submissions outlined in paragraphs 5 and 6 of the Joint Response, as outlined above in paragraph 3 of this Decision, and in addition, makes further allegations that the proposed testimony of the additional witnesses is repetitive.[7]

9. The Accused adopts paragraphs 7 to 9 and 11 and 12 of the Joint Response, as outlined above in paragraphs 4, 5 and 6 of this Decision. The Accused notes that the Request before the Trial Chamber is distinct from some of the cases cited by the Prosecution in support of its Request, in that the effect of granting the Request will be to increase the number of witnesses, not to reduce the number of witnesses as, for instance, in the *Nahimana* case.[8]

10. The Accused submits that there is no "good cause" for the addition of further witnesses to the Witness List given their calculation of the average time for hearing of a witness and the Court's limited mandate.[9]

11. The Accused adopts paragraph 10 of the Joint Response, as outlined above in paragraph 5 of this Decision. The Accused submits that in demonstrating "good cause", the Prosecution must justify the lateness of newly obtained potential evidence and any tardiness in disclosing that evidence. According to the Accused, the Prosecution has been in possession of the witness statements of TF2-221 and TF2-223 for over two weeks before the first day of trial. The Accused asserts that the Prosecution was obliged to reveal the names of additional witnesses, as described by the Trial Chamber in the *Delalic* case, "as soon as it formed the intent to call these additional witnesses in proof of the guilty of the accused persons".[10]

12. The Accused submits that the purpose of pre-trial disclosure of witness lists, is to give the Defence "sufficient notice and adequate time".[11] He argues that the addition of "even a single Prosecution witness causes irreparable damage to the prospects of this Accused receiving a fair and expeditious trial far beyond the damage it causes to the Second and Third Accused, since they are not defending themselves".[12] The Accused asserts that the Prosecution failed to avert itself to his specific circumstances and that he "confronts the Prosecution's armies of attorneys and teams of investigators alone, assisted only by four Standby Counsel, three of whom are located overseas". The Accused concludes that the Prosecution have failed to discharge the onus of showing "good cause".[13]

13. The Accused asserts that the Prosecution Request is vague and imprecise and has failed to provide a sufficiently detailed explanation of the nature of the proposed testimony, including how it

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[6] Accused's Response, paras 5-7.
[7] Accused's Response, paras 8-10.
[8] *Prosecutor v. Nahimana*, Decisoin on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001.
[9] Accused's Response, paras 11-13.
[10] *Prosecutor v. Delalic*, Decision on the Confidential Motion to Seek Leave to Call Additional Witnesses, 4 September 1997. Accused's Response, paras 14-17.
[11] In making this submission the Accused cites the Decision of the ICTR Trial Chamber, cited as "*Prosecutor v. Bagilishema*, ICTR-96-1-T, 2 December 1999".
[12] Accused's Response, para. 22.
[13] Accused's Response, paras 18-23.

varies from the proposed testimony of witnesses on the Witness List, and therefore has failed to discharge the onus of showing "good cause".[14]

Prosecution Reply

14. In reply to the Defence submissions, the Prosecution state that the proposed evidence of the additional witnesses "touches the most vital issues of its case",[15] and is different to that of other witnesses in "scope, detail, time and place".[16] The Prosecution set forth "unique" and "distinctive" points relating to the proposed testimony of the additional witnesses.[17] It is argued that given the burden of the Prosecution to prove its case beyond a reasonable doubt, it has a "duty under the Statute to present the best available evidence to prove its case".[18] The Prosecution asserts that the testimony of the additional witnesses is deemed necessary to "attain the threshold for proving the individual criminal responsibility of *all three accused* for the atrocities committed by the kamajors, specifically in the Tongo Field and Kenema crime bases".[19]

15. The Prosecution submits that there is no late disclosure and that it disclosed the said statements of the additional witnesses as soon as possible after it formed an intention to call the witnesses, namely, on 5 July. The Prosecution, furthermore, submits that two of the witnesses will testify for the Tongo Field crime base, which is the last crime based to be presented by the Prosecution. It is submitted that Witness TF2-223 is intended to be called at the end of the presentation of the Kenema crime base, which is likely to take place in the November trial session, for which the Defence has over four months to complete its investigation.[20]

16. The Prosecution asserts that the declarations of witnesses TF2-221, TF2-222 and TF3-223 were recorded as 'witness statements' and were disclosed as such, and that no confirmation reports have been obtained thus far from these witnesses. The Prosecution states that it has provided the Defence with information about the compensation made to witnesses and as indicated by its letter of 13 July 2004, it is in the process of collating a list of the payments made to the remaining witnesses that it will disclose as soon as possible. The Prosecution argues that this information on witness payments is related to a matter of cross-examination and that the time of disclosure of this material should not bear any determinative effect on the Request.[21]

17. The Prosecution claims that it has provided the Defence with sufficient information to support its Request.[22] The Prosecution also states that it is in the process of reducing its witness list for trial and dividing witnesses between "core witnesses" and "back up witnesses" and as a consequence, the actual number of witnesses "will most likely be reduced from 154 to 105". The Prosecution asserts that the worth of the proposed testimonies in the determination of the trial clearly overweighs any minimal delays that could result from bringing three additional witnesses to testify.[23]

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[14] Accused's Response, paras 24-25.
[15] Prosecution Reply, para. 3.
[16] Prosecution Reply, para. 4.
[17] Prosecution Reply, para. 4.
[18] Prosecution Reply, para. 5.
[19] Prosecution Reply, para. 5.
[20] Prosecution Reply, paras 6-7.
[21] Prosecution Reply, paras. 9-10.
[22] Prosecution Reply, para. 11.
[23] Prosecution Reply, paras 12-14.

II. THE APPLICABLE LAW

14. The law governing the request of the Prosecution to vary the witness list and add three additional witnesses, is Rule 73*bis*(E) of the Rules. Rule 73bis(E) is in these terms:

> (E) After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

15. Rule 73*bis*(E) becomes applicable after the commencement of the trial, and where it is in the interests of justice. It serves as an instrument to vary the list of witnesses disclosed prior to trial, pursuant to Rule 67 of the Rules. With respect to the disclosure of witness statements after the commencement of trial, Rule 66(A)(ii), stipulates that where copies have not been submitted within 60 days before the date for trial, or as otherwise ordered by the Judge, or Trial Chamber, the Prosecution must show good cause to disclose the witness statements.

16. Rule 73bis(E) is similar in formulation to the corresponding ICTR Rule. The Chamber notes that when interpreting this Rule, together with Rule 66(A)(ii), and the circumstances that give rise to a showing of "good cause" and the "interests of justice", Trial Chambers of the ICTR have taken into account a number of factors that include, the complexity of the case, the materiality of the testimony, and any prejudice caused to the Defence.[24] For instance, the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in the *Nahimana* case,[25] noted that:

> In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.

17. We note that additional factors that Trial Chambers have taken into account when considering the circumstances giving rise to "good cause" and the "interests of justice", include the sufficiency and time of disclosure of the witness information to the Defence, and the probative value of the proposed testimony. The Trial Chamber of the ICTR in the *Bagosora*[26] case, went further to expand on the factors identified in the *Nahimana* decision and observed that:

> These considerations [under Rule 73*bis*(E)] require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witness.

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[24] *Prosecutor v. Nahimana*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20; *Prosecutor v. Nahimana*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 5; *Prosecutor v. Bagosora*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E), para. 8.

[25] *Prosecutor v. Nahimana*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20.

[26] *Prosecutor v. Bagosora*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis*(E), 26 June 2003, para. 14.

18. This Trial Chamber acknowledges its important role in ensuring a fair and expeditious trial when weighing the abovementioned factors consistent with Rule *26bis* of the Rules and the rights of Accused persons to adequate time and facilities for the preparation of their defence, as set forth in Article 17(4)(b) of the Statute. The Prosecution should not be allowed to surprise the Defence with additional witnesses, who were accessible to it prior to the commencement of trial. As we noted in our recent Decision on Disclosure of Witness Statements and Cross-Examination, we emphasize that the Prosecution is required to fulfil in good faith its disclosure obligations.[27]

19. Taking our judicial cue from the reasoning of the ICTY in the *Delalic* case, where it stated that it will "[u]tilise all its powers to facilitate the truth finding persons in the impartial adjudication of the matter between the parties",[28] this Chamber will approach the determination of this issue with due regard for the doctrine of "equality of arms".

20. Guided by the above considerations, the Chamber now proceeds to consider the merits of the application.

III. THE MERITS OF THE APPLICATION

Witness TF2-221

21. The Prosecution asserts that Witness TF2-221 will testify on the 1st Accused giving orders to kill collaborators and of the 2nd Accused reiterating these instructions and that the witness will also give detailed direct evidence on the planning and coordination by all three Accused with respect to the Black December and Tongo Field operations. It is further stated by the Prosecution that the witness will also testify on other incidents and events based on his direct knowledge. The paragraphs of the Consolidated Indictment that the witness will testify to include paragraphs 20, 23, 24, 25, 26 and 28.

22. The Prosecution indicates that a statement was obtained from this witness on 19 May 2004. Investigators were not able to locate and speak to this witness until recently, due to the witness's residence in a remote area and his frequent movement throughout Sierra Leone.

23. The Prosecution considers that the testimony of this witness has significant value as he has unique evidence relating to the individual criminal responsibility of the 1st and 2nd Accused.

24. The Trial Chamber considers that the proposed evidence of this witness appears relevant and could have probative value in relation to the allegations in paragraphs 20, 23, 24, 25, 26 and 28 of the Indictment. The Chamber also notes that the proposed evidence purports to be direct evidence of the individual criminal responsibility of the 1st and 2nd Accused and is distinguishable from corroborative or cumulative evidence. The Chamber, having weighed the timing of the application and disclosure of the witness statement on 19 May 2004 against the materiality of the evidence, considers that good cause has been shown and it is in the interests of justice to add this witness to the Modified Witness List. Given that the trial of the Accused persons commenced on 3 June 2004, and the representation by the Prosecution that it would not be calling this witness until a much later stage in the trial, the Trial Chamber does not consider that the Defence would suffer any prejudice to its

[27] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, 16 July 2004, para. 9.
[28] *Prosecutor v. Delalic*, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4 September 1997, para. 7.

case. The Trial Chamber is of the opinion that the Defence will have adequate time and resources to investigate and prepare for the cross-examination of this witness.

Witness TF2-222

25. The Prosecution asserts that Witness TF2-222 will give testimony on his direct knowledge of events, that includes evidence of commands given by the 1st Accused, and that the witness will testify that the 1st Accused gave orders not to spare the lives of collaborators or prisoners of war, and of the participation of all three Accused in senior war planning meetings. According to the Prosecution, the witness will also provide unique evidence on the planning of operations that include the Black December and Tongo Field operations. The paragraphs of the Consolidated Indictment that the witness will testify to include paragraphs 20, 24, 25, 26 and 28.

26. The Prosecution submits that a statement was obtained from this witness on 18 May 2004. Investigators were only recently able to identify the witness's location and secure an interview with this witness. Investigations relating to this witness have included allaying security concerns and the repeated use of intermediaries, sent on behalf of the investigators.

27. The Prosecution considers the testimony of this witness to be significant as the witness was a high ranking CDF member and will provide direct evidence relating to the individual criminal responsibility for all three Accused persons.

28. The Trial Chamber considers that the proposed evidence of this witness appears relevant and could have probative value in relation to the allegations in paragraphs 20, 24, 25, 26 and 28 of the Indictment. The Chamber also notes that the proposed evidence purports to be direct evidence of the individual criminal responsibility of all three Accused. The Chamber, having weighed the timing of the application and disclosure of the witness statement on 18 May 2004 against the materiality of the evidence, considers that good cause has been shown and it is in the interests of justice to add this witness to the Modified Witness List. Given that the trial of the Accused persons commenced on 3 June 2004, and the representation by the Prosecution that it would not be calling this witness until a much later stage in the trial, the Trial Chamber is not convinced that the Defence would suffer any prejudice to its case. The Trial Chamber is of the opinion that the Defence will have adequate time and resources to investigate and prepare for the cross-examination of this witness.

Witness TF1-223

29. The Prosecution asserts that Witness TF1-223 will provide direct evidence, as an eye witness, on the individual criminal responsibility for the 1st Accused, that includes orders given to attack Kenema, orders given to kill any soldiers caught during Operation Black December and his knowledge of activities undertaken at SS Camp, and that the witness will also give direct and unique evidence on the planning and coordination of CDF attacks on Kenema, Zimmi and the Black December Operation. Further, according to the Prosecution, the witness will testify to the involvement of all three Accused in these attacks. The paragraphs of the Consolidated Indictment that the witness will testify to include paragraphs 20, 23, 24, 25, 26 and 28.

30. The Prosecution also asserts that a statement was obtained from this witness on 20 May 2004. Investigators were only recently able to identify and obtain access to the witness's location, due to the witness residing in a remote area and living away from his residence.

31. The Prosecution considers the witness's testimony to be significant as the witness was present as a CDF member participating in operations at the SS Camp near Kenema during 1997 and 1998,

and can provide unique testimony relating to the interrogation, torture and extrajudicial killings at the SS Camp and in and around Kenema.

32. The Trial Chamber is of the opinion that the proposed evidence of this witness appears relevant and could have probative value in relation to the allegations in paragraphs 20, 23, 24, 25, 26 and 28 of the Indictment. The Chamber also notes that the proposed evidence purports to be direct evidence of the individual criminal responsibility of the 1st Accused, and to the involvement of all three Accused in the attacks on Kenema, Zimmi and the Black December Operation. The Chamber, having weighed the lateness of the application and disclosure of the witness statement on 20 May 2004 against the materiality of the evidence, finds that good cause has been shown and it is in the interests of justice to add this witness to the Modified Witness List. Given that the trial of the Accused persons commenced on 3 June 2004, and the representation by the Prosecution that it would not be calling this witness until a much later stage in the trial, the Trial Chamber does not consider that the Defence would suffer any prejudice to its case. The Trial Chamber is of the opinion that the Defence will have adequate time and resources to investigate and prepare for the cross-examination of this witness.

Allegations of Irreparable Damage to 1st Accused

33. In making this Ruling, the Trial Chamber has considered all submissions by the Defence and Prosecution. The Trial Chamber finds no basis in the argument of the 1st Accused that he will suffer irreparable damage to his case, and that such damage would be "far beyond the damage it causes to the Second and Third Accused", on account of his representing himself. The 1st Accused, of his own volition, requested to represent himself in this trial.[29] The Trial Chamber permitted the 1st Accused to represent himself, and furthermore, in the interests of justice, and mindful of the 1st Accused's right to a fair and expeditious trial, ordered the Registrar to assign to him a Standby Defence Team, composed of four Standby Counsel, to assist him in the exercise of his right to self-representation.[30]

Allegations of Non-Disclosure by Prosecution

34. The Trial Chamber finds that there is no evidence that the disclosure by the Prosecution on 16 July 2004 was incomplete and breached Rule 66(A)(i) of the Rules. As previously held by this Chamber, the Defence must "make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution".[31] The Trial Chamber holds that there is no *prima facie* showing of materiality by the Defence that further witness statements were in the possession or control of the Prosecution that were not disclosed.

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[29] Letter filed by Samuel Hinga Norman addressed to The Principal Defender of the Special Court for Sierra Leone dated the 3rd of June 2004.

[30] *Prosecution v. Norman, Fofana, Kondewa*, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court, 8th of June 2004; *Prosecutor v. Norman, Fofana, Kondewa*, Consequential Order on Assignment and Role of Standby Counsel, 14 June 2004; Order for Assignment of Standby Counsel for Samuel Hinga Norman, 15 June 2004.

[31] *Prosecutor v. Sesay*, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Para. 27. See also *Prosecutor v. Kondewa*, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and materials Pursuant to Rule 68, 8 July 2004, *cited in Prosecutor v. Norman, Fofana, Kondewa*, Decision on Disclosure of Witness Statements and Cross Examination, 16 July 2004.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion with respect to Witnesses TF2-221, TF2-222 and TF1-223.

Done in Freetown, Sierra Leone, this 29th day of July 2004

Hon. Judge Pierre Boutet | Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber | Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]