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SCSL-04-14-T
(19000-19007)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 21 July 2006

THE PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

PUBLIC

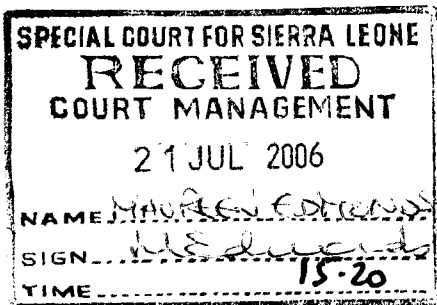
**PROSECUTION RESPONSE TO FIRST ACCUSED'S URGENT MOTION FOR LEAVE
TO FILE ADDITIONAL EXHIBITS DATED 18 JULY 2006**

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I. INTRODUCTION

1. The Prosecution files this Response to the “First Accused’s Motion for Leave to File Additional Exhibits” filed on 18 July 2006 (“Motion”).¹
2. In the Motion, the Defence for the First Accused seeks leave to file two additional exhibits, which are described as a “Periodic Report Civil Defence Force ‘Kamajors’ dated 7 August 1997” and a “Letter from President Ahmed Tejan Kabbah to CSO Mustapha with an Action Plan captioned Operation Athens dated 13th August 1997”.²

II. BACKGROUND

3. On 28 November 2005, the Trial Chamber issued a *Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case* (“Order”),³ in which the Trial Chamber ordered the Defence to file a list of exhibits the Defence intends to offer in its case, and further ordered that should the Defence seek to add any exhibit to this list after the 5 December 2005 it would be permitted to do so only upon good cause being shown⁴.
4. On 5 December 2005, the Defence filed their “Defence List for the First Accused as per the Consequential Order for Compliance of 28 November 2005 Concerning the Preparation and Presentation of the Defence Case”, which included a list of 23 Exhibits.
5. On 6 April 2006, the Trial Chamber allowed the Defence to add 17 exhibits to their Exhibit List of 5 December 2005.⁵

¹ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-667, “First Accused’s urgent Motion for Leave to File Additional Exhibits”, 18 July, 2006.

² *Ibid*, Annex A.

³ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-489, “Order Concerning the Preparation and Presentation of the Defence Case”, 28 November 2005.

⁴ *Ibid*, para D.

⁵ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-585, Decision on First Accused Urgent Motion for Leave to File Additional Witnesses and Exhibits List dated 6 April 2006, p.5.

III. SUBMISSIONS

6. In accordance with the order of the Trial Chamber of 28 November 2005, the burden is in this instance on the Defence to establish “good cause” for adding further exhibits to the Defence exhibits list.
7. This Trial Chamber has held that in assessing the interests of justice and good cause in relation to the addition of witnesses, the factors to be considered include mainly the materiality and relevance of the proposed testimony, the complexity of the case, the stage that the proceedings have reached and the reasons for the late discovery of the evidence.⁶ The Trial Chamber has also stated that in relation to the addition of witnesses, the operative principle is that the party seeking to call the additional witness must satisfy certain stipulated criteria, including (1) that the facts to be provided by the proposed additional witnesses are relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice, and (2) that the proposed additional evidence could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence.⁷
8. In determining the materiality of the proposed testimony of a proposed additional witness, factors to be considered include whether the proposed testimony would be direct evidence or only indirect evidence,⁸ and whether the evidence is merely corroborative or cumulative of other evidence.⁹

⁶ See, for instance, *Prosecutor v. Sesay et al., Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witnesses TF1-371 and for Order of Protective Measures*, Case No. SCSL-04-15-T, Trial Chamber 15 June 2006.

⁷ *Ibid.*

⁸ *Prosecutor v. Nahimana, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses*, Case No. ICTR-99-52-I, Trial Chamber, 26 June 2001, para. 28, where the Trial Chamber denied a request to add a witness whose statement “mainly contains indirect evidence and would seem to be of limited value for the Chamber”.

⁹ *Prosecutor v. Sesay et al., Decision on Prosecution Request for Leave to Call Additional Witnesses*, Case No. SCSL-04-15-T, Trial Chamber 29 July 2004 (noting that “This evidence is distinguishable from corroborative or cumulative evidence ...”); *Prosecutor v. Bagosora et al., Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 72bis(E)*, Case No. ICTR-98-41-T, Trial Chamber, 21 May 2004 (noting in relation to proposed witness AMI that “Although the evidence is material to the Prosecution’s case, it is repetitive as it relates to evidence previously given by other witnesses”; and in relation to proposed witness ANC that “the evidence relating to attacks by para-commandos has already been adduced through other witnesses”).

9. The Prosecution submits that analogous principles and considerations must apply in determining whether good cause has been established for including additional exhibits in a party's exhibits list. Paragraph 8 of the Motion appears not to dispute this.
10. The Prosecution notes that the Trial Chamber has in this case previously decided in relation to an earlier application by the First Accused to file additional exhibits lists that the Prosecution will have the opportunity to object to the authenticity, relevance and admission of an exhibit once it is disclosed and is in the process of being tendered through a particular witness.¹⁰ However, this decision does not expressly state that issues of relevance and materiality play no part in the determination of whether good cause has been established for the filing of additional exhibits list. Consistently with the general principles referred to above, the Prosecution submits that a good cause motion to file additional witness lists must make a showing of materiality and relevance, and a showing that the additional exhibits will not be merely repetitive of other evidence.
11. The Prosecution submits that the summary as contained in Annex A of the Motion makes it difficult if not impossible to assess the materiality and relevance of the proposed exhibits in question. On the information given in the Motion, it is not evident how the proposed exhibits will assist in the determination of guilt or innocence of the First Accused. The documents appear generally to re-echo a theme of the Defence for the First Accused that ECOMOG had military operations in Sierra Leone and provided administrative and logistical requirements within a certain timeframe of the conflict in Sierra Leone, and that President Ahmed Tejan Kabbah was aware of the ECOMOG involvement in the conflict. The Prosecution does not dispute these facts. In other words, the Motion does not establish that the proposed additional exhibits are material to any disputed issue in the case, or that they will bring anything new of beneficial interest to the Trial Chamber, and does not establish that the proposed additional exhibits will not be merely cumulative of other evidence. The mere fact that the Motion asserts that the proposed additional exhibits are "very material to the case of the First Accused"¹¹ is not sufficient to establish good cause. Materiality must be a matter to be determined by the

¹⁰ See *Prosecutor v. Norman et al., Decision on the First Accused's Urgent Motion for Leave to File Additional Witnesses and Exhibits Lists*, Case No. SCSL-04014-T, Trial Chamber, 6 April 2006.

¹¹ Motion, para. 7.

Trial Chamber, not the party required to establish good cause. On the information provided in the Motion, it is submitted that materiality has not been established. Thus, contrary to what is suggested in paragraph 9 of the Motion, the Defence for the First Accused has not established how any “manifest injustice” would be caused to the First Accused if the Motion were denied.

12. The Prosecution submits that the Motion also fails to establish that the proposed additional exhibits could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence”.¹² The proposed additional exhibits have been in the possession of the Defence since at least 3 June 2006.¹³ The Defence for the First Accused has on numerous occasions being urged to make all necessary filings to finalize the presentation of the Defence case for the First Accused before the end of the seventh trial session, 16 June 2006.¹⁴ Notwithstanding this, the Defence Motion was not filed until 18 July, over 6 weeks later. The Defence Motion gives no explanation for this delay.

IV. CONCLUSION

13. It is for the Defence to satisfy the Trial Chamber of all relevant matters to be considered by the Trial Chamber in determining whether good cause has been established. The Motion fails to do so, and should therefore be denied.
14. In the event that the Trial Chamber were minded to grant the Motion, the Prosecution seeks an order that copies of the complete exhibits be provided to it, so as to enable the Prosecution to adequately conduct proper investigations and prepare for cross-examination, in order to avoid potential delays in the future.

¹² In relation to this requirement, see also *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-167, “Decision on Prosecution Request for Leave to Call Additional Witnesses”, 29 July 2004; *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-213, “Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund”, 1 October 2004; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-320, “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements”, 11 February 2005, paras 34 and 35; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-399, “Decision on Prosecution Request for Leave to Call an Additional Expert Witness”, 10 June 2005; *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-365, “Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) pursuant to Rule 73bis(E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) pursuant to Rule 94bis”, 5 August 2005.

¹³ Motion, para. 7.

¹⁴ *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-642, Decision on First Accused Urgent Motion For Extension of time to Submit Documents Pursuant to Rule 92bis.

15. In the event that the Trial Chamber were minded to grant the Motion, the Prosecution also reserves its right to state its objections to the authenticity of the proposed Exhibits once they are disclosed.

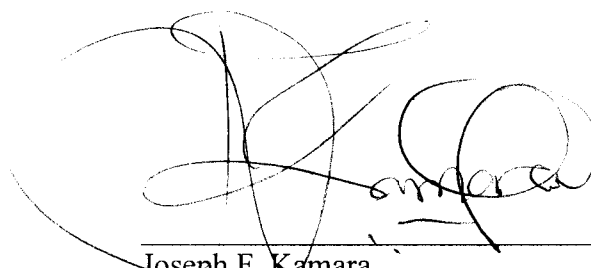
Filed in Freetown,

21 July 2006

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INDEX OF AUTHORITIES

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3. *Prosecutor v. Norman, Fofona, Kondewa*, SCSL-2004-14-T-482, Joint Defense Materials Filed pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification thereof, 17 November 2005.
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6. *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses, 26 June 2001. (<http://65.18.216.88/default.htm>)
7. *Prosecutor v. Bagosora et al.*, *Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 72bis(E)*, Case No. ICTR-98-41-T, Trial Chamber, 21 May 2004.
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17. *Prosecutor v. Ndayambaje*, ICTR-96-8-T, Decision on Prosecutor's Motion to Modify Her List of Exhibits, 14 December 2001. (<http://65.18.216.88/default.htm>)
18. *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence, 15 October 1998.
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19. *Prosecutor v. Delic*, IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002.
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