SCSL-04-14-T
(19372-19386)

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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: 13 October 2006

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PROSECUTION MOTION FOR LEAVE TO CALL EVIDENCE IN REBUTTAL AND FOR IMMEDIATE PROTECTIVE MEASURES FOR PROPOSED REBUTTAL WITNESS

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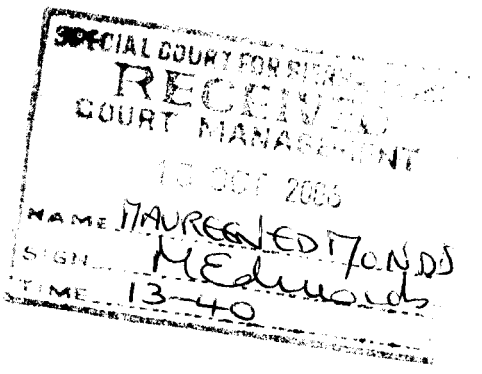

I. INTRODUCTION

1. Pursuant to Rules 73 and 85(A)(iii) of the Rules of Procedure and Evidence ("**Rules**"), the Prosecution files this Motion seeking:

   (i) Leave to call evidence in rebuttal at the conclusion of the Defence case;

   (ii) If the request for rebuttal evidence is granted, immediate protective measures for the rebuttal witness.

II. ARGUMENT FOR REBUTTAL

A. Applicable Rule

2. Rule 85(A) of the Rules sets out the sequence for the presentation of evidence as follows:

   (iii) Evidence for the prosecution;
   (iv) Evidence for the defence;
   (v) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
   (vi) Evidence ordered by the Trial Chamber.

3. Rule 85(A) (iii) does not create an entitlement for the Prosecution to call evidence in rebuttal but requires the leave of the Trial Chamber to be sought.[1] The Prosecution submits that while it may be customary to seek leave to call rebuttal evidence at the conclusion of the Defence evidence,[2] it is more expedient to file an application at the earliest opportunity. An early application ensures that rebuttal evidence may be heard without delay directly after completion of Defence evidence. Early application also allows the Defence sufficient time to prepare for cross-examination.

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[1] See *Prosecutor v Ntagerura et al.*, ICTR-99-46-T, "Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal pursuant to Rules 54, 73, and 85(A)(III) of the Rules of Procedure and Evidence", Trial Chamber, 21 May 2003, ("***Ntagerura* Decision**"), para. 31.

[2] In cases before the ICTY and ICTR, motions for leave to call rebuttal evidence have tended to be filed towards, or even after, the conclusion of the defence case, sometimes according to a timetable laid down by the Trial Chamber. See e.g. *Prosecutor v Semanza*, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence", Trial Chamber, 27 March 2002 ("***Semanza* Decision**"); *Prosecutor v Kamuhanda*, ICTR-99-54A-T, "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence pursuant to Rule 85(A)(III) of the Rules of Procedure and Evidence", Trial Chamber, 13 May 2002; *Prosecutor v Kajelijeli*, ICTR-98-44A-T, "Decision on the Prosecution Motion for Leave to Call Rebuttal Evidence (Rule 85)", Trial Chamber, 12 May 2003 ("***Kajelijeli* Decision**"); *Prosecutor v Naletilić and Martinović*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006; *Prosecutor v Orić*, IT-03-68-T, "Decision on the Prosecution Motion with Addendum and Urgent Addendum to present Rebuttal Evidence pursuant to Rule 85(A)(III)", Trial Chamber, 9 February 2006 ("***Orić* Decision**").

B. Standard for Rebuttal Evidence

4. The ICTY Appeals Chamber, in *Prosecutor v Delalić*, stated that admissible rebuttal evidence "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated."[3] In the *Ntagerura* case, the ICTR Trial Chamber held that the Prosecutor could present rebuttal evidence where: "(i) the evidence she seeks to rebut arose directly ex improviso during the presentation of the Defence's case-in-chief and could not, despite the exercise of due diligence, have been foreseen; and (ii) the proposed rebuttal evidence has significant probative value to the determination of an issue central to the determination of the guilt or innocence of the Accused".[4]

5. It is accepted that "[r]ebuttal evidence may not be called by the Prosecution merely because its case has been met by contradicting evidence or in order to reinforce its case-in-chief".[7] However, a Trial Chamber has a wide discretion to admit, limit or preclude rebuttal evidence depending on the circumstances of the case and bearing in mind the need to proceed expeditiously.[9] As a Trial Chamber of the ICTY has pointed out:

> [I]n a system where, as in this Tribunal, at the pre-trial stage the Prosecution is limited in the number of witnesses it can produce and time in which it needs to conclude its case, a rigid application of the characteristically high or strict standard of admissibility for rebuttal evidence may consequently encourage or even compel the prosecution to seek to admit an over-abundance of evidence in its case-in-chief in order to avoid the risk of foreclosure of evidence deemed critical by the Prosecution at the rebuttal stage of the proceedings, and that a flexible application of the standard of admissibility is preferred by this Trial Chamber as it might avert such an undesirable approach in conducting trials

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[3] *Prosecutor v Delalić et al.*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, para. 273. See also *Semanza* Decision, para. 8 (" [w]here...the defence adduces evidence of a fresh matter that the Prosecution could not reasonably have foreseen, rebuttal evidence may be called".")

[4] *Ntagerura* Decision, para. 34. See also *Kajelijeli* Decision, para. 25, finding that the Prosecution, where seeking to call rebuttal evidence, "must demonstrate that the circumstances of the case are such that rebuttal evidence is permissible" and requiring that "the specific rebuttal evidence, which the Prosecution wishes to call, must be suitable for that purpose". .

[7] See e.g. *Prosecutor v Limaj et al.*, IT-03-66-T, "Decision on Prosecution's Motion to Admit Rebuttal Statements via Rule 92bis", Trial Chamber, 7 July 2005, para. 6.

[9] See *Ntagerura* Decision, para. 31.

before the Tribunal.[10]

6. Rule 89 of the Rules provides:

> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (C) A Chamber may admit any relevant evidence.

7. It is submitted that a flexible application of the standard of admissibility of rebuttal evidence is consistent with both Rule 89 and the practice before the Special Court.[11]

C. Proposed Rebuttal Case

8. The Prosecution seeks leave to call a witness to rebut a specific aspect of the testimony of Defence witness Mohammed Fallon.[12] Mohammed Fallon gave evidence that his "brother" Mustapha Fallon was killed in battle in Koribundo. His evidence was in direct contradiction to Prosecution witness TF2-014, who testified that Mustapha Fallon was ritually murdered in the Poro Bush near Talia Yawbeko in the presence of all three accused, and at the behest of the Third Accused.[13] This event is a significant issue that can be clarified by the evidence of the proposed rebuttal witness, thereby helping the Trial Chamber determine the guilt or innocence of all the Accused, by the hearing of specific, probative evidence.

9. Witness TF2-014 was not challenged during cross-examination by the Second Accused in his account of the death of Mustapha Fallon. He was not given an opportunity to respond

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[10] See *Orić* Decision. The Trial Chamber went on to conclude that in the circumstances of the specific case, "admission of the rebuttal evidence proposed by the Prosecution, even if permissible under a more flexible application of the high or strict standard of admissibility would be outweighed by the need to ensure a fair and expeditious trial."

[11] See, for example, *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-AR65, "Fofana – Appeal Against Decision Refusing Bail", 11 March 2005 at paras 22-24; *Prosecutor v. Sesay, Kallon, Gbao*, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker", 23 May 2005 paras 3-7.

[12] *Prosecutor v. Norman Fofana, Kondewa*, SCSL-04-14-T, Trial Transcript, 27 September 2006, pp. 24-32.

[13] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Trial Transcript, 10 March 2006, pp. 54-59.

to the version of events now raised by Mohammed Fallon. The version of events raised by Mohammed Fallon could not with reasonable diligence have been foreseen by the Prosecution.

10. Furthermore, the Defence would suffer no prejudice from the introduction of the proposed rebuttal evidence. The proposed rebuttal witness was on the Second Accused's witness list until removed on 5 May 2006.[14] His evidence has been known to the Defence since last year.

11. The proposed rebuttal evidence relates to a significant issue that could not have been foreseen and is of probative value. The Prosecution submits that the proposed rebuttal evidence is directly related to an issue central to the determination of the guilt or innocence of the Accused. The Prosecution submits that the rebuttal evidence will not cause any significant delay, and will assist the Court in properly assessing this area of contested testimony.

12. An additional, subsidiary, consideration is that the Prosecution was not in a position to call this witness in its case. Although this witness, in previous interviews with the Prosecution, declared some knowledge of the events surrounding Mustapha Fallon's death in Talia Yawbeko, he did not reveal to the Prosecution the extent of his knowledge, including in relation to the relationship between Mohammed and Mustapha Fallon, until a 28 July 2006 interview, after the close of the Prosecution case. The Prosecution has attempted to obtain the cooperation of the proposed rebuttal witness many times. It is only recently that he has agreed to testify freely on behalf of the Prosecution.

13. In order to assist the Trial Chamber in determining the relevance of the proposed rebuttal witness, the Prosecution has compiled **Annex A**, setting out (1) the pseudonym of the proposed rebuttal witness, (2) a brief summary of the evidence he would be called to

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[14] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-591, "Fofana Notice of Reduction of Witnesses", 5 May 2006.

[15] Rule 75 (A) states: "A Judge or a Chamber may . . . at the request of either party . . . order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused." Rule 75 (B) details the protective measures available for witnesses: "(i)(a) Expunging names and identifying information from the Special Court's public records; (b) Non-disclosure to the public of any records identifying the victim or witness; (c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and (d) Assignment of a pseudonym; (ii) Closed sessions, in accordance with Rule 79; (iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television."

rebut with the transcript reference for this evidence, (3) a brief summary of the proposed rebuttal evidence, and (4) the anticipated length of his testimony.

III. Request for Protective Measures

14. The Prosecution requests that should the Court allow the presentation of rebuttal evidence, protective measures for the rebuttal witness in accordance with Rule 75 of the Rules be put in place.[16]

15. The Prosecution requests that the witness be placed under the protective measures regime applicable to Prosecution witnesses as set out in the Trial Chamber's orders of 8 June 2004.[17] The Prosecution seeks non-disclosure to the public of any records identifying the witness and requests the assignment of a pseudonym for this purpose.

16. Protective measures are justified in this instance as the security situation for Prosecution witnesses remains unchanged. Recent developments highlight the need to make provision for the safety of witnesses. On 29 August 2006, First Accused Sam Hinga Norman released an "Exhortation to Kamajors" ("**Annex B**") not to join any political party but the SLPP. **Annex B** tells Kamajors that the Accused are detained "in proxy for [Kamajors'] own alleged activities during the war." This communication incorrectly implies that it is not simply the three Accused on trial, but the entire Kamajor organization. The very existence of **Annex B** suggests that Prosecution witnesses may be viewed as traitors to the Kamajor movement and remain in danger.

17. According to the general protective measures regime in place for Prosecution witness, the identifying data for the witness must be disclosed 42 days prior to the date on which the witness testifies. The Prosecution seeks a shorter disclosure period for this witness. In this respect, the Prosecution notes the comments of the Presiding Judge during the Status Conference in the *Norman et al.* proceedings on 12 September 2006. The Presiding Judge indicated that it is not yet settled whether the Prosecution should announce its intent to call rebuttal evidence after each defendant's case or at the conclusion of the entire defence case.[18] He also noted that there is no firm ruling as to the appropriate time to

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[17] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-126, "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses", 8 June 2004.
[18] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T, Trial Transcript, 12 September 2006, p. 23.

request rebuttal evidence.[19] These comments suggest that a shorter disclosure period with respect to rebuttal evidence might be appropriate to avoid delay.

18. The Prosecution does not wish to delay proceedings because of its disclosure obligations. In the interests of justice and fair play the Prosecution will disclose interview notes and the unredacted statement of the rebuttal witness in its possession to the Defence immediately, if this application is granted. The rebuttal witness would be called directly after the conclusion of evidence for the Third Accused.

IV. RESERVATIONS AND LIMITATIONS

19. The Prosecution reserves its right to bring subsequent motions for leave to call rebuttal evidence all the Defence evidence has been heard.

20. The examination-in-chief of any rebuttal witness will be limited in scope to the areas identified as being relevant to the rebuttal case. Similarly, the Prosecution submits that the scope of cross-examination would be strictly limited to those areas addressed during evidence-in-chief and to the credibility of the witness.[20] Should the cross-examination move into other areas, the Prosecution reserves the right to address issues that arise under cross-examination during re-examination.[21]

V. CONCLUSION

21. The Prosecution submits that for the reasons set forth above that it should be permitted to

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[19] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T, Trial Transcript, 12 September 2006, pp. 26-27.

[20] See e.g. *Prosecutor v Naletilić and Martinović*, IT-98-34, Transcript, 9, 11 and 14 October 2002, where it was clear from the discussion in court that the scope of cross-examination was limited to credibility and to the one distinct topic in relation to which the rebuttal witness had been allowed to be called. See also *Prosecutor v Galić*, IT-98-29-T, Transcript, 24 March 2003, where the Prosecution argued that "a very different rule applies to cross-examination of a rebuttal witness in terms of latitude" and the Trial Chamber noted that "the Defence was aware of this limited scope of the rebuttal evidence accepted"; and *Prosecutor v Kupreškić et al.*, Transcript, IT-95-16-A, 17 May 2001, p. 178, where during an appeal hearing pursuant to the ICTY's Rule 115, the Appeals Chamber stated: "when it comes time to hear Prosecution rebuttal witnesses, that the rebuttal and the cross-examination should be limited to matters which the witnesses have actually testified to or which directly impugn their credibility, not the much broader area for cross-examination that Rule 90, in the ordinary trial, permits, where one side may, having the witness on the stand, use it as an opportunity to enhance that person's own case. We will limit cross-examination to matters which directly affect the testimony of the main witness or impugn his or her credibility".

[21] See *Prosecutor v Vasiljević*, IT-98-32-T, Transcript, 11 January 2002, where, although in this instance the Prosecution had re-opened its case to call an additional witness, following a ruling that the evidence of that witness did not constitute evidence in rebuttal, the Chamber drew the attention of the defence to the prospect that a broad cross-examination would mean that the prosecution would be entitled to deal with those issues further in the same way as it would if the witness had been called in the prosecution case in chief.

call in rebuttal the witness whose proposed evidence is described in Annex A. If rebuttal evidence is permitted, the Prosecution requests immediate protective measures for the rebuttal witness. This motion is without prejudice to any subsequent motion for leave to call rebuttal evidence after the evidence for the Third Accused.

Filed in Freetown, 13 October 2006

For the Prosecution,

James C Johnson
Chief of Prosecutions

Joseph F Kamara
Senior Trial Attorney

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Prosecutor v Ntagerura et al., ICTR-99-46-T, "Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal pursuant to Rules 54, 73, and 85(A)(III) of the Rules of Procedure and Evidence", Trial Chamber, 21 May 2003.

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Prosecutor v Mitar Vasiljevic, IT-98-32-T, Transcript, 11 January 2002.

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ANNEX A

FIRST CATEGORY

WITNESS	SUMMARY OF EVIDENCE TO BE REBUTTED & TRANSCRIPT REFERENCE	SUMMARY OF PROPOSED REBUTTAL EVIDENCE	RELEVANT COUNTS OF THE INDICTMENT	ESTIMATED LENGTH OF TESTIMONY	LANGUAGE OF TESTIMONY
TF2-225	Mohammed Fallon testified that his brother Mustapha Fallon was not killed at the Poro Bush near Talia, Yawbeko as indicated by Prosecution witness TF2-014 (SCSL-04-14-T, Trial Transcript, 10 March 2005, p. 54-59). Mr Fallon testified rather that his brother was killed in an attack on Koribundu. (SCSL-04-14-T, Trial Transcript 27 September 2006, p. 24-32)	TF2-225 will rebut the novel point in the evidence of Mohammed Fallon (27 September 2006, p. 24-32) that Mustapha Fallon was killed in Koribundo by the AFRC/RUF. TF2-225 will give evidence that he was a friend of Mustapha Fallon and accompanied Fallon to the Poro Bush near Talia. TF2-225 was present when Fallon was killed in that bush.	¶25, Counts 1-2	2 hours	Mende

ANNEX B: EXHORTATION TO KAMAJORS

1. STANDARD TIMES (FREETOWN), *Hinga Norman Wants Berewa Out!*, 29 Aug 2006 at 1, 11.

2. STANDARD TIMES (FREETOWN), *Exhortation to* Kamajors, 29 Aug 2006 at 11.

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Political promises and economic realities: Two strange bedfellows SEE PAGE 2

STANDARD TIMES

Vol. 16 No. 27 Tuesday August 29, 2006 Le1,000

In the interest of the party...

Hinga Norman wants Berewa out!

Hinga Norman

BY AUGUSTINE BEECHER

Contrary to widespread speculations that the in carcerated former deputy defence minister, Chief Sam Hinga Norman is out to bring the ruling party (SLPP, of which he is a member) down, the former deputy minister of the present government and also former coordinator of the now defunct civil defence force has confirmed in a public statement that he has no case with the Party.

He made this declaration in an "Exhortation to Kamajors" dated 26th August 2006, which was initially read out by Dr. Bubuakei Jabbie, a leading member of the Chief's legal team, on the same day at the Bo Town Council Hall to a mammoth crowd.

In that statement, the chief stated among other things that he has been a member of the SLPP and has no intention of defecting to another in the foreseeable future.

He reiterated some of the highlights of his struggles for the party and his contribution to the restoration of peace and democracy in the country, as well as the establishment of the Special Court for Sierra Leone that is now trying them.

He maintained that despite their present predicament "neither the Party nor you as members are responsible...The Party has not done anything to hurt me. And so I will never take any action against the Party or anyone..."

The Chief nevertheless insisted that the Kamajors should not join

CONTINUED PAGE 11

Berewa

As councillor meddles with Council's Education Policy...

Trouble brews at Municipal Schools

CID Director loses car

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Hinga Norman wants Berewa out!

FROM PAGE 1

any other political party (new or old) but wait for the decision to the matter he took to the Supreme Court against the eligibility of Vice President Solomon Berewa for the leadership of the ruling SLPP is still dangling in the court.

According to Dr. Jabbie, the matter by Chief Norman is "saying that it is unconstitutional for a vice President (Solomon Berewa in this case) to also at the same time as vice President to be the Leader of a political party."

He said the provisions of the 1991 Constitution of Sierra Leone and sub section 4 of section 35, sub section 1H of section 76, and sub section 1 of section 14 of the political Parties Act.

In short, the incarcerated chief wants the Supreme Court to declare that the SLPP leadership election of 2005 in Makeni is unconstitutional and null and void, thereby effectively eliminating Mr. Berewa as party leader and presidential flag bearer of the ruling SLPP.

Asked what the chief plans to do if the matter is decided against him, the learned legal official said it is better not to speculate on what could happen in such a scenario, but expressed the hope that the decision of the court will finally lay the matter to rest.

He said there is no love lost between Mr. Berewa and Chief Norman, but insisted that the chief is constrained to take the matter to court because of his concern for the party and its future.

Hinga Norman wants Berewa out!

FROM PAGE 1

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CID Director loses car to thieves

FROM PAGE 1

merous police officers allegedly deployed by the CID Director.

A source at Bathurst Street told this reporter that he was not certain if Mr. Lappia was having any official documents and thus state secrets in his car that may have been taken away by the thieves. But considering that most of our state officials are in the habit of cramping their vehicles, be they private or official, with official documents, it is very possible the loss of the CID Director's car to thieves may as well involve some important state documents, a source at Krio Wendys offered to say.

In fact, a daily lady frequenter of Krio Wendys opined, when interviewed by this reporter about the incident, "I cannot understand how a whole CID Director would be so careless to keep on enjoying himself in a bar and leaving his car at the mercy of thieves. This is how some of our security officials sacrifice the security of the state to marauding night robbers," concluding, "If he cannot secure himself and his car, I wonder who else the CID Director can secure".

Trouble brews at Municipal Schools

FROM PAGE 1

supervisors and teachers affected by an earlier letter dated June 27, 2006 from the education department of since it is an inner house exercise orchestrated by the education department of the council.

This press has further chaos and confusion in the municipal schools, more so when in the example of the Akibo Betts Municipal the new head teacher has al-

EXHORTATION TO KAMAJORS

BY CHIEF SAMUEL HINGA NORMAN

1. **I have been a MEMBER of the SIERRA LEONE PEOPLES PARTY (SLPP) since 1972, and up until today I still am. And a fully paid-up Grand Chief Patron at that for several years now.**

2. **I have suffered immensely in my time, in one way or another, for the SLPP. I was charged with treason and sentenced to death in the early years of APC power for allegedly participating in activities in support of the SLPP during the crisis years of 1966 to 1972. I spent a total of four (4) years in prison before my release on winning my appeal; and nearly another two (2) years' detention in solitary confinement (1974 to 1975).**

3. **And when the SLPP government was overthrown in May 1997 after only fourteen (14) months in office, President Ahmad Tejan Kabbah fled into exile and made a passionate plea to the people of Sierra Leone to do everything in their power to restore his government back to power. You and many others, including my humble self even as his Deputy Minister of Defence, eagerly took to the bush for several months and finally succeeded in bringing back the President and his government in March 1998, a job we selflessly did without any prior conditions of remuneration or other reward.**

4. **The government subsequently made an agreement with the United Nations to establish a Special Court for Sierra Leone. And today, three of us who were among the most instrumental in securing that restoration are standing trial before that Court right in the heart of Freetown, where we have been detained for over three (3) years now, all in proxy for your own alleged activities during the war.**

5. **Neither the Party (SLPP – Palm Tree) nor you as its members are responsible for what is happening to me and my two colleagues. The Party, as a party, has not done anything to hurt me. And so I will never take any action against the Party or anyone who has not hurt me. Our reward lies in the bosom and contemplation of the Lord Allah, and will surely come one day.**

6. **You may be aware that I have taken two judicial actions in recent months in respect of the Party, one of which is still pending in the Supreme Court. Time will tell that both actions were taken for the protection of the Party itself, so that other political parties do not invoke the national Constitution against it at an inauspicious moment to the detriment of the Party, especially considering its twenty-nine (29) years in the political wilderness from 1967 to 1996. After the Supreme Court decision, hopefully in the next few weeks, you will hear again from me as a matter of URGENCY.**

7. **Until then, PLEASE, in the name of God and the dear lives that were lost in the defence of our country and our Party, I repeat PLEASE, *DO NOT JOIN ANY OTHER POLITICAL PARTY* (new or old) for the purposes of the next general elections.**

8. **WAIT ! BE PATIENT AND STEADFAST !!**

DATE: 26th August 2006.

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