

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

SEIZED OF the "Fofana Application for Leave to Call Additional Witnesses", filed by Court Appointed Counsel for the Second Accused ("Counsel for Fofana") on the 27th of June 2006 ("Motion"), seeking leave to add an additional seven fact witnesses and one expert witness to the witness list of the Second Accused;

NOTING the "Prosecution Response to Fofana Application for Leave to Call Additional Witnesses", filed by the Office of the Prosecutor ("Prosecution") on the 7th of July 2006 ("Response");

NOTING the "Reply to Prosecution Response to Fofana Application for Leave to Call Additional Witnesses", filed by Counsel for Fofana on the 12th of July 2006 ("Reply");

NOTING that on the 5th of December 2005, Counsel for Fofana filed their "Fofana Materials Filed Pursuant to the Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case",¹ which contained a list of 25 "confirmed" witnesses, including two experts, and a list of 17 "unconfirmed" witnesses² ("Witness List of the 5th of December 2005");

NOTING that on the 13th of January 2006, following the instructions given by The Chamber at the Pre-Trial Conference on the 11th of January 2006,³ Counsel for Fofana filed their "Revised Fofana Witness List", which contained a list of 35 "core" witnesses, including two experts, and a list of 7 "back-up" witnesses⁴ ("Witness List of the 13th of January 2006");

NOTING that on the 23rd of January 2006, Counsel for Fofana filed their "Fofana Materials Filed Pursuant to the Consequential Order to the Status Conference of 18 January 2006",⁵ which contained identifying information for witnesses listed on the Witness List of the 13th of January 2006 and re-filed summaries of testimonies of some of the witnesses⁶ ("Witness List of the 23rd of January 2006");

NOTING the "Fofana Notice of Reduction of Witnesses", filed on the 5th of May 2006, wherein Counsel for Fofana removed 11 "core" witnesses and also six remaining "back-up" witnesses from the Witness List of the 23rd of January 2006 and annexed a list of 20 "core" witnesses to be called for the Second Accused⁷ ("Witness List of the 5th of May 2006");

NOTING the "Additional Fofana Notice of Reduction of Witnesses", filed on the 27th of June 2006, wherein Counsel for Fofana removed four more witnesses from the Witness List of the 5th of May 2006, including expert Raymond Murphy PhD, and annexed a list of 16 "core" witnesses to be called for the Second Accused,⁸ which included two common witnesses to the First Accused, namely No. 8 H.E. Alhaji

¹ SCSL-04-14-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", the 28th of November 2005.

² SCSL-04-14-500.

³ Transcript of the 11th of January 2006, pp. 24-27.

⁴ SCSL-04-14-526.

⁵ SCSL-04-14-534, "Consequential Order to the Status Conference of 18 January 2006", the 18th of January 2006.

⁶ SCSL-04-14-540.

⁷ SCSL-04-14-591.

⁸ SCSL-04-14-639.

Dr. Ahmad Tejan Kabbah⁹ and No. 12 Major-General Abdul One Mohammed¹⁰ ("Witness List of the 27th of June 2006");

NOTING that by their Motion Counsel for Fofana now seek leave to add an additional seven factual witnesses, namely, Billoh Conteh, Steven Lahai Fassay, Morris Ngobeh, Momoh Pemba, Hon. Sheku Tejan Sankoh, Ibrahim Tucker, Baimba Zorokong, and one expert witness Daniel A. Yarmey, PhD, to the Witness List of the 27th of June 2006;

NOTING that the Motion is filed pursuant to sub-Rule 73ter(E) of the Rules of Procedure and Evidence of the Special Court ("Rules"), which reads as follows:

After the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

RECALLING The Chamber's "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case" of the 28th of November, 2005, stating that "[s]hould the Defence seek to add any witnesses to this list after the 5th of December, 2005 it may be permitted to do so only upon good cause being shown";¹¹

RECALLING The Chamber's previous ruling outlining the factors which should be taken into consideration when interpreting Rule 73ter(E) and the circumstances that could give rise to a showing of "good cause" and the "interests of justice", such as "the materiality of the testimony, the complexity of the case, prejudice to the [other Party], including elements of surprise, on-going investigations, replacements and corroboration of evidence";¹²

CONSIDERING that Counsel for Fofana have continuously made efforts to reduce the number of witnesses to be called for the Second Accused, which will contribute to the expeditiousness of the trial;

CONSIDERING that the proposed evidence of witnesses Billoh Conteh, Steven Lahai Fassay, Morris Ngobeh, Momoh Pemba, Hon. Sheku Tejan Sankoh, Ibrahim Tucker and Baimba Zorokong, as described in their witness summaries, appears to be relevant to the charges outlined in the Indictment against the Second Accused, could be material to his Defence case and not duplicative of evidence to be presented by the rest of the witnesses listed on the Witness List of the 27th of June 2006 and therefore it is in the interests of justice that their evidence be heard;

CONSIDERING that the inability of Counsel for Fofana to secure the attendance of witnesses Steven

⁹ The Motion for the issuance of a subpoena for a testimony and pre-testimony interview with this witness is pending for the determination before the Appeals Chamber of the Special Court; See also SCSL-04-14-617, "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", the 14th of June 2006.

¹⁰ See also, SCSL-04-14-619, "Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session", the 14th of June 2006, paras 14 and 17(a)(ii).

¹¹ See, *supra* note 1.

¹² SCSL-04-14-585, "Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists", the 6th of April 2006, p. 4; See also, SCSL-04-14-435, "Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures", the 23rd of June 2005, p. 3.

Lahai Fassay,¹³ Hon. Sheku Tejan Sankoh¹⁴ and Baimba Zorokong earlier, due to their reluctance to testify for the reasons of having certain subjective fears,¹⁵ amounts to a showing of "good cause";

CONSIDERING that the proposed witness Morris Ngobeh was only recently contacted and will be called to replace the deceased witness Eddie Samu;¹⁶

CONSIDERING that the inability of Counsel for Fofana to secure the attendance of witnesses Billoh Conteh and Momoh Pemba earlier due to the numerous unsuccessful attempts to reach them in the remote areas of Bonthe District¹⁷ amounts, in the circumstances, to a showing of "good cause";

CONSIDERING that Counsel for Fofana while conducting their on-going investigations only recently discovered and confirmed the attendance of Ibrahim Tucker, there would be then "good cause" to add him to the Witness List of the 27th of June 2006;¹⁸

CONSIDERING that no prejudice will ensue to the Prosecution by allowing these seven witnesses to be added to the Witness List of the 27th of June 2006, as the Prosecution will have more than two months to conduct their own investigations and prepare for the cross-examination of these witnesses, since the Defence case for the Second Accused will only start on the 13th of September 2006 during the eighth trial session;

RECALLING that since Rule 94bis "Testimony of Expert Witnesses", does not provide for a definition of an expert, The Chamber has ruled that an "expert" be defined as: "A person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute";¹⁹

RECALLING further that The Chamber has stated that an expert's testimony is "testimony intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific

¹³ The Chamber notes that this witness was listed as a proposed "back-up" witness for the First Accused but was never called by him, *see, inter alia*, SCSL04-14-587, "Norman Further Filing Following Consequential Order to the Status Conference of 22 March 2006 and the Status Conference of 5 April 2006", No 12; This witness is also listed as a proposed witness for the Third Accused, *see, inter alia*, SCSL04-14-593, "Updated Witness List of the Third Accused Allieu Kondewa", the 8th of May 2006, No. 2, Stephen [sic!] Lahai Fassay.

¹⁴ The Chamber notes that this witness was listed as an "unconfirmed" witness on the Witness List of the 5th of December 2005, was then listed as a "back-up" witness on the Witness List of the 13th of January 2006 and the Witness List of the 23rd of January 2006 and was only dropped from the Witness List of the 5th of May 2006. However, The Chamber is satisfied with the explanation provided by Counsel for Fofana in their Reply, para. 12.

¹⁵ Motion, Appendix B, pp. 18658-18659; *see also*, Reply, para. 5.

¹⁶ Motion, Appendix B, p. 18658. Witness Eddie Samu has been listed as a witness for the Second Accused since the 5th of December 2005.

¹⁷ Motion, Appendix B, pp. 18658-18659.

¹⁸ *See, inter alia*, SCSL04-14-167, "Decision on Prosecution Request for Leave to Call Additional Witnesses", the 29th of July 2004, paras 17-18.

¹⁹ SCSL04-14-435, "Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures", the 21st of June 2005, p. 4, citing *Prosecutor v. Stanislav Galic*, IT-98-29-T, "Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps", 3 July 2002, p. 2; *See also*, SCSL04-14-650, "Decision on Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PhD", the 7th of July 2006, p. 3.

field” and that “[t]he purpose of expert evidence is to provide a court with information that is outside its ordinary experience and knowledge”;²⁰

NOTING that, according to Counsel for Fofana’s submissions, the proposed area of testimony of Daniel A. Yarmey, PhD, is “a factual, scientific assessment of the disputed evidence”²¹ of Prosecution witness TF2-057, who testified that he had heard the Second Accused calling for two men to be removed from a cell and that allegedly these two men were murdered later by the associates of the Second Accused,²² and that Daniel A. Yarmey, PhD will assist The Chamber with its analysis and evaluation of the testimony of this witness²³ by providing “a context or framework of general conclusions from voice identification research as a means of helping the Chamber in determining the likely accuracy of identification in this case”;²⁴

CONSIDERING that, although proposed witness Daniel A. Yarmey, PhD, appears to have the necessary qualifications and experience to be accepted as an expert in the field of forensic voice recognition, The Chamber is composed of professional Judges quite capable of assessing and evaluating the evidence of witness TF2-057, nothing in the proposed area of his testimony would appear to be of such a nature and quality that would likely assist The Chamber in performing this function without such an assistance;

PURSUANT TO Rule 54, 73^{ter}(E) and 94^{bis} of the Rules;

THE CHAMBER, based upon the foregoing reasons, **FINDS** that good cause has been established and it would be in the interests of justice to grant leave in this case to add seven witnesses, namely Billoh Conteh, Steven Lahai Fassay, Morris Ngobeh, Momoh Pemba, Hon. Sheku Tejan Sankoh, Ibrahim Tucker and Baimba Zorokong, to the Witness List of the 27th of June 2006;

FURTHER FINDS that it is not in the interests of justice to add the proposed witness Daniel A. Yarmey, PhD, to the Witness List of the 27th of June 2006;

THE CHAMBER GRANTS the Motion in part and **ORDERS** as follows:

- 1) Counsel for Fofana shall add witnesses Billoh Conteh, Steven Lahai Fassay, Morris Ngobeh, Momoh Pemba, Hon. Sheku Tejan Sankoh, Ibrahim Tucker and Baimba Zorokong to the Witness List of the 27th of June 2006;
- 2) Counsel for Fofana shall re-file as soon as possible but not later than the 21st of August 2006 the Witness List of the 27th of June 2006, which shall include the names of the additional seven witnesses, the summary of their proposed testimony that should be sufficiently descriptive, the points of the Indictment to which they will testify, the estimated length of time for their

²⁰ SCSL-04-14-435, “Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures”, the 21st of June 2005, p. 4, citing *Prosecutor v Akayesu*, ICTR-96-4-T, “Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness”, 9 March 1998 and Richard May and Marieke Wierda, *International Criminal Evidence: Transnational 2002*, p. 199, para 6.83.

²¹ Reply, para. 18.

²² Motion, para. 13 referring to Transcript of the 29th of November 2004, pp. 117-123 and Transcript of the 30th of November 2004, pp. 1-12; see also, Reply, para. 18.

²³ Motion, para. 13, Reply, para. 18.

²⁴ Reply, para. 18 and related footnote 45.

testimony, the mode of their testimony and the language of their testimony;

- 3) Counsel for Fofana shall file as soon as possible but not later than the 21st of August 2006 the identifying information for the additional seven witnesses, which shall include family name, first name and nicknames, date and place of birth (if known), names of parents, religion, occupation at the time relevant to the Indictment and current address;

THE CHAMBER, however, **DISMISSES** the Motion in respect of the addition of witness Daniel A. Yarmey, PhD, to the Witness List of the 27th of June 2006.

Done in Freetown, Sierra Leone, this 17th day of July 2006.

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Bankole Thompson

Hon. Justice Pierre Boutet

Presiding Judge
Trial Chamber I

[Seal of the Special Court for Sierra Leone]

