SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Pierre Boutet

Registrar: Robin Vincent

Date: 1 April 2004

PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-PT)

ORDER TO THE PROSECUTION TO FILE DISCLOSURE MATERIALS AND OTHER MATERIALS IN PREPARATION FOR THE COMMENCEMENT OF TRIAL

Office of the Prosecutor:
Luc Côté
Robert Petit

Defence Counsel for Issa Hassan Sesay:
Timothy Clayson
Wayne Jordash

Defence Counsel for Morris Kallon:
Shekou Touray

Defence Counsel for Augustine Gbao
Andreas O'Shea

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

NOTING the Status Conference held in this case on 2-3 March 2004, and the extensive discussions therein on, *inter alia*, compliance with disclosure obligations under Rule 66 of the Rules of Procedure and Evidence of the Special Court ("Rules"), the number of witnesses to be called by the Office of the Prosecutor ("Prosecution") during the presentation of its case, and the state of preparedness for trial of the Prosecution and the defence counsel ("Defence") for Issa Hassan Sesay, Morris Kallon and Allieu Kondewa ("Accused");[1]

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CONSIDERING that Rule 66 ("Disclosure of materials by the Prosecutor") of the Rules in force at the time of the Status Conference provided:

(A) Subject to the provisions of Rules 53, 69 and 75, the Prosecutor shall:

- (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.
- (ii) At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the defence of the categories of. Or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

[...]

CONSIDERING that Rule 66 of the Rules currently in force[2] provides:

(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

(i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.

(ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecution does not intend to call be made available to the defence within a prescribed time.

(iii) At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

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(B) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting *ex parte* and *in camera*, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

CONSIDERING that the Trial Chamber seeks to ensure that the rights of the Accused are not infringed, but rather are enhanced, by the amendment of Rule 66 of the Rules;

NOTING that Rule 73 *bis* of the Rules outlines materials which the Trial Chamber may order the Prosecution to file at a Pre-Trial Conference, which include *inter alia* (1) a list of witnesses the Prosecutor intends to call with: (a) The name or pseudonym of each witness, (b) A summary of the facts on which each witness will testify, (c) The points in the indictment on which each witness will testify, and (d) The estimated length of time required for each witness; and (2) (v) A list of exhibits the Prosecutor intends to tender in evidence stating, where possible, whether or not the defence has any objection as to authenticity;

RECALLING the submissions of the Prosecution at the Status Conference on the issue of its compliance with disclosure obligations under the former Rule 66(A)(i) of the Rules, including *inter alia* (a) that it has disclosed witness statements in compliance with Rules 66 and 68 of the Rules; (b) that it provided the Defence with witness summaries or redacted witness statements in accordance with the Rules, which, it asserts, is in compliance with Decisions for protective measures issued by this Trial Chamber which permits the Prosecution to withhold "identifying data" of the persons for whom protective measures have been granted;[3] and (c) that disclosure has been ongoing, as it has a "continuing disclosure" obligation and that "rolling disclosure" is permitted;

RECALLING the submissions of the Defence at the Status Conference, including *inter alia* that under Rule 66(A)(i), as in force at the time of the Status Conference, that the Prosecution should not be allowed to call those witnesses for whom witness statements or summaries were disclosed after the initial "30 day" disclosure, and that the disclosure of summaries or heavily redacted witness statements is not in compliance with the disclosure obligation on the Prosecution provided for in Rule 66(A)(i);

RECALLING the submissions of the Prosecution at the Status Conference in relation to the number of witnesses it intends to call in this case, namely that the Prosecution intends to call over 100 witnesses, to testify *viva voce*, indicating that the Prosecution may require more than 150 witnesses to testify *viva voce*;

RECALLING the submissions by the Defence at the Status Conference in relation to the alleged impact of the Decisions for protective measures issued in this case, and the Prosecution's interpretation thereof, on its ability to prepare its defence;

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RECALLING the Prosecution's submissions on the issue of protective measures, namely that witness protection remains a primary concern, and for that reason, the Prosecution has yet to disclose the identity of any witness whom it intends to call to the Defence;

CONSIDERING that Article 17(4) ("Rights of the Accused") of the Statute prescribes certain minimum guarantees that must be afforded to each accused, including the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her; the right to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing; the right to be tried without undue delay; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and the right not to be compelled to testify against himself or to confess guilt;

CONSIDERING the fundamental right of each Accused to a fair and expeditious trial;

CONSIDERING the rights and protections afforded to victims and witnesses under the Statute of the Special Court, as recognised in Article 17(2) of the Statute and as provided for through Rules 69 and 75 of the Rules;[4]

CONSIDERING that one of the primary purposes of placing disclosure obligations upon the Prosecution, as prescribed by the Rules – and indeed ensuring its compliance with those obligations – is to ensure that the rights of the accused are respected;

CONSIDERING that the right of the Accused to be tried promptly must be interpreted in light of the right of the Accused to have adequate time and facilities to prepare his defence;

FINDING that the rights of the Accused in this case would be enhanced by requiring the Prosecution to provide to the Defence certain materials forthwith, as well as to provide the Defence and Trial Chamber with concrete information in relation to the case it intends to present;

CONCLUDING that, upon review of the materials and information detailed in this Order, the Trial Chamber will be better positioned to set a date for the commencement of trial proceedings in this case and to make any subsequent orders to the Prosecution to reduce its witness list, if deemed necessary, pursuant to Rule 73 *bis* (D) of the Rules, thereby promoting the right of each Accused to a fair and expeditious trial;

PURSUANT TO Article 17 of the Statute of the Special Court, and Rules 54, 66, 67, 68, 73 *bis* and 92 *bis* of the Rules;

HEREBY ORDERS that the Prosecution file, by 26 April 2004:

1. A witness list for all the witnesses the Prosecution intends to call at trial with the name or the pseudonym of each witness. Should the Prosecution seek to add any witnesses to this list after 26 April 2004, it shall be permitted to do so only upon good cause being shown;

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2. A compliance report indicating: the number of witnesses for whom witness statements or summaries have been disclosed; the date upon which each statement or summary was disclosed; and the total number of pages of each statement or summary;
3. A summary for each witness on the witness list specified in (1), indicating the exact paragraph and/or count in the Indictment to which the witness will testify, as well as an estimated length of time required for each witness;
4. A list of exhibits the Prosecution intends to tender in evidence trial. Should the Prosecution seek to add an exhibit to this list after 26 April 2004, it shall be permitted to do so only upon good cause being shown; and
5. A copy of each exhibit which appears on the list as indicated in (4). The Prosecution is permitted to file the proposed exhibits either in paper form or on CD-ROM.

AND FURTHER ORDERS that the Prosecution file, by 3 May 2004:

6. A chart which indicates, for each paragraph in the Indictment, the testimonial evidence and primary documentary evidence upon which the Prosecution will rely to establish the allegations contained therein.

AND FURTHER ORDERS that the Prosecution, by 26 April 2004, disclose to the Defence:

7. Any statements in full, with redactions as necessary pursuant to the Decisions for protective measures, that have not yet been disclosed for each witness that appears on the witness list indicated in (1) above.

Done at Freetown this 1st day of April 2004

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

[Seal of the Special Court for Sierra Leone]

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[1] The Trial Chamber recalls that Morris Kallon was represented by Duty Counsel from the Defence Office at the Status Conference. Accordingly, references to the “Defence” throughout this Order is generally related to Defence Counsel for Issa Hassan Sesay and Augustine Gbao. In order that Mr. Kallon suffers no adverse effects, the Trial Chamber has considered the rights of Mr. Kallon in light of the submissions made by Defence Counsel for Mr. Sesay and Mr. Gbao.
[2] The Rules of Procedure and Evidence of the Special Court were amended at the 5th Plenary Session held in Freetown 11-14 March 2004.
[3] See, e.g., *Prosecutor v.Issa Hassan Sesay*, SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Augustine Gbao*, SCSL-03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-

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public Disclosure, 10 October 2003; and *Prosecutor v. Morris Kallon*, SCSL-03-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003. The Prosecution sought, and was granted, protective measures for: (i) witnesses who presently reside in Sierra Leone and who have not affirmatively waived their right to protective measures; (ii) witnesses who presently reside outside Sierra Leone but who have relatives in Sierra Leone, and who have not affirmatively waived their rights to protective measures; and (iii) witnesses residing outside West Africa who have requested protective measures.

[4] Rule 69 ("Protection of Victims and Witnesses") provides: (A) In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise. (B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Unit. (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.

Rule 75 ("Measures for the Protection of Victims and Witnesses") provides, in part: A) A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, 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. (B) A Judge or a Chamber may hold an in camera proceeding to determine whether to order: (i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as: (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. (C) A Judge or a Chamber shall control the manner of questioning to avoid any harassment or intimidation.

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