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SCSL-2004-15-T

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**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:** 11<sup>th</sup> of October, 2004

**PROSECUTOR**                      **Against**                      **Issa Hassan Sesay**  
**Morris Kallon**  
**Augustine Gbao**  
(Case No. SCSL-2004-15-T)

**KALLON - DECISION ON CONFIDENTIAL MOTION ON BEHALF OF MORRIS KALLON**

**Office of the Prosecutor:**

Luc Côté  
Lesley Taylor

**Defence Counsel for Issa Hassan Sesay:**

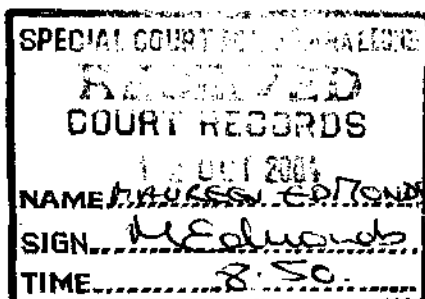
Wayne Jordash  
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**Defence Counsel for Morris Kallon:**

Shekou Touray  
Melron Nikol-Wilson

**Defence Counsel for Augustine Gbao:**

Girish Thanki  
Andreas O'Shea



**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 Confidential Motion on Behalf of Morris Kallon (“Confidential Motion”), filed on the 14<sup>th</sup> of July, 2004;

**NOTING** the Prosecution Response to Confidential Motion on Behalf of Morris Kallon (“Response”), filed on the 26<sup>th</sup> of July, 2004 by the Office of the Prosecutor (“Prosecution”);

**NOTING** the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1<sup>st</sup> of April, 2004 (“Order to File Disclosure Materials”);

**NOTING** the Pre-Trial Conference of the 29<sup>th</sup> of April, 2004; and the oral submissions of the parties about disclosure of exculpatory material by the Prosecution on the 6<sup>th</sup> of July, 2004;

**NOTING** the provisions of Rule 73 of the Rules of Procedure and Evidence (“Rules”);

**NOW CONSIDERS** the matter on the basis of the written briefs of the Parties;

## I. SUBMISSIONS OF THE PARTIES

### *A) The Confidential Motion*

1. The Defence’s Confidential Motion is premised on the voluminous interviews and handwritten notes of Prosecution Witness TF1-046 that were disclosed to the Defence by the Prosecution. According to the Defence, these statements reveal that the aforementioned witness was an admitted confidante of Foday Sankoh during the war, and was also a primary Revolutionary United Front (“RUF”) battlefield commander.<sup>1</sup>

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<sup>1</sup> Confidential Motion, para. 1.

2. The Defence submits that despite the fact that this witness was asked to initial and sign several "suspect statements" in which he was advised that he was suspected of being a participant in war crimes and or crimes against humanity, as well as the fact that he played a critical role in the wartime activities of the RUF, there has been no disclosure from the Prosecution to the Defence of documents which fall under the following categories<sup>2</sup>:

- (i) written or verbal promises of non-prosecution;
- (ii) conversations related to the expectation of the witness that he will not be prosecuted under the Statute of the Special Court;
- (iii) any evidence known to the Prosecution and not disclosed in the witness' statement of the witness' violation of the laws of armed conflict, of any crime recognised by the Statute of the Special Court, or any crime of Sierra Leone or its neighbouring States.<sup>3</sup>

3. The Defence avers that in an interview conducted with the witness by the Prosecution on the 25<sup>th</sup> of March, 2003, the following conversation was recorded: "in return for providing truthful information and other assistance, the OTP [Office of the Prosecutor] has agreed to use its best effort to provide me with security or other services that may be necessary in return."<sup>4</sup> The Defence submits that the details of such security and "other support services" to be provided in return for the witness' testimony must be revealed to the Defence pursuant to Rule 68(B).<sup>5</sup>

4. The Defence submits that the Prosecution has violated the continuing obligation to disclose all exculpatory evidence to the Defence, as stipulated in Rule 68(B) of the Rules. It posits that the failure by the Prosecution to abide by this Rule has deprived the Accused of necessary information that it needs to effectively raise issues of credibility concerning the statements of the witness. It further submits that since the Initial Appearance of the Accused on the 6<sup>th</sup> of April, 2003, the Prosecution has failed to produce any material or documents that "in any way tend to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of Prosecution evidence" as it relates to Witness TF1-046.<sup>6</sup>

<sup>2</sup> *Id.*, para. 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, para. 4.

<sup>5</sup> *Id.*, para. 13.

<sup>6</sup> *Id.*, para. 9.

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5. The Defence submits that the interview with the witness reveals some pertinent facts that demonstrate his possible criminal liability for conduct falling within the ambit of the Statute of the Special Court, like his admission that in February 1996 he organized an ambush on a convoy of military and civilian vehicles in which some civilians were injured in the crossfire.<sup>7</sup>

6. The Defence posits that pursuant to Rule 68(B), the Defence is entitled to know what promises were made to the witness, and/or what exchanges with the Prosecution led the witness to any expectations that he may have that he will not be prosecuted. It further submits that any evidence relating to the credibility of a witness, specifically promises of benefits made by the Prosecution to a witness or co-schemer who is not indicted is pertinent material that must be disclosed under Rule 68.<sup>8</sup>

***B) The Response***

7. The Prosecution submits that the Defence motion is speculative and the assumption by the Defence that the aforementioned three categories of documents exist are unfounded.<sup>9</sup>

8. The Prosecution asserts that Witness TF1-046 was initially treated as a suspect and afforded the rights enumerated in Rules 42 and 43 of the Rules. However, the Prosecution subsequently exercised its discretion not to indict the witness. The Prosecution further submits that while a decision to use a previous suspect as a witness will create an expectation on the part of that witness that he will not be prosecuted, it does not follow either as a matter of logic or legal practice, that the Prosecution must therefore have made a promise of non-prosecution to that witness.<sup>10</sup>

9. It further avers that the Defence made an assumption that there must be documents relating to promises of non-prosecution of the witness based on an excerpt from the transcript of an interview dated the 25<sup>th</sup> of March, 2003. The Prosecution submits that the interview is self-explanatory. The Prosecution submits that details of security and other like services provided to the witness, or any witness, do not fall within the ambit of Rule 68(B) disclosure

<sup>7</sup> *Id.*, paras 10-11.

<sup>8</sup> *Id.*, para. 12.

<sup>9</sup> The Response, para. 3.

<sup>10</sup> *Id.*, paras 6-8.

obligations of the Prosecution as they cannot be construed as affecting the credibility of Prosecution evidence. The Prosecution relies on Rule 39 of the Rules which provides that:

**Rule 39: Conduct of Investigations**

In the conduct of an investigation, the Prosecutor may:

...

(ii) Take all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources;<sup>11</sup>

10. Concerning the second category of materials, the Defence claims that there has been no disclosure of conversations related to the witness' expectation that he would not be prosecuted. The Prosecution avers that the transcript excerpt containing the conversation with the witness may have formed an expectation that the witness would not be prosecuted. The Prosecution affirms that there are no documents about any such conversations that have not been disclosed to the Defence.<sup>12</sup>

11. The Prosecution asserts that it has disclosed, in their entirety, the transcripts of the interviews of the witness on the 27<sup>th</sup> of February, 2004. The 'pertinent facts' detailed from the transcripts of the interview and quoted by the Defence in its Confidential Motion, contradict the assertion of the Defence that no documents falling within category three have been disclosed to the Defence.<sup>13</sup>

12. The Prosecution notes that with respect to these 'pertinent facts' which are described as proving the witness' "possible criminal liability for conduct falling within the ambit of the Special Court Statute," the only fact mentioned concerns events that occurred in February 1996. The Prosecution states that these events are irrelevant to criminal responsibility under the Statute of the Special Court, as they fall outside the temporal jurisdiction of the Special Court.<sup>14</sup>

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<sup>11</sup> *Id.*, para. 9.

<sup>12</sup> *Id.*, para. 11.

<sup>13</sup> *Id.*, para. 12.

<sup>14</sup> *Id.*, para. 13.

13. The Prosecution submits that the activities of TF1-046 undertaken within the RUF, have been disclosed to the Defence within numerous other witness statements pursuant to the Prosecution's obligations under Rules 66 and 68, and also emphasises the fact that the Defence have been in possession of the unredacted interviews of the witness since 27<sup>th</sup> of February, 2004. It further asserts that the Defence have had adequate time to analyse and cross-reference the witness' interviews with the witness statements of other Prosecution witnesses.<sup>15</sup>

14. The Prosecution avers that it has complied with its Rule 68 obligations. It submits that the Defence's Confidential Motion seeks no ruling or relief, is ill-founded and should be dismissed in its entirety for being premised on speculation.<sup>16</sup>

## II. PROCEDURAL ISSUES

15. Both the Motion and the Response thereto were filed confidentially and, accordingly, have not been disclosed to the public.

16. This Chamber would like to reiterate that as a matter of general principle, all documents filed before the Special Court should be public, unless a cogent reason is offered to the contrary.<sup>17</sup> In reviewing this matter and in rendering this Decision on the Motion, the Chamber however concludes now that there is no reason why such a decision should not be made public.

17. The Chamber will dispose of the confidential submissions pertaining to the Motion in accordance with Rule 81(B) of the Rules.<sup>18</sup>

<sup>15</sup> *Id.*, para. 14.

<sup>16</sup> *Id.*, paras 15-17.

<sup>17</sup> See also *Prosecutor v. Morris Kallon*, SCSC-03-07-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, paras 19-20.

<sup>18</sup> Rule 81(B) of the Rules, on the records of proceedings, provides that:

"The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist."

### III. DELIBERATIONS

18. Without seeking any specific relief from the Chamber, the Confidential Motion asserts that the Prosecution has violated the continuing obligation imposed upon it by Rule 68. The Motion also enumerates the categories of exculpatory evidence which the Defence expects the Prosecution to disclose pursuant to Rule 68:

- (i) Evidence which in any way tends to suggest the innocence of the Accused; or
- (ii) Evidence which in any way tends to mitigate his guilt; or
- (iii) Evidence which may affect the credibility of the Prosecution evidence

19. The Chamber has taken notice of the fact that the Defence did not raise any of these disclosure issues at the Status Conference held on 23<sup>rd</sup> of June, 2004.

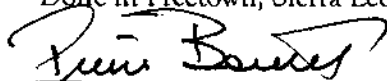
20. We note that the unredacted transcripts of the interviews of Witness TF1-046 were disclosed to the Defence on the 27<sup>th</sup> of February, 2004 and that its Order to the Prosecution to File Disclosure Materials became effective on the 26<sup>th</sup> of April, 2004. The Chamber is of the view that the Defence had sufficient time to analyse the material concerning Witness TF1-046 contained both in the interview with TF1-046 and in other disclosed witness statements before the 5<sup>th</sup> of July, 2004, when the trial in this matter commenced. The Chamber further notes that Witness TF1-046 has not yet been called by the Prosecution to testify and, when he will testify, the Defence will have the opportunity to challenge his evidence during cross-examination.

21. It is the considered opinion of the Chamber that Rule 73(A) of the Rules clearly provides that motions at this stage of the process are to be entertained for the purpose of seeking a ruling or relief. This provision does not provide for a declaration.<sup>19</sup> The Chamber has noted that while the Defence has asserted that the Prosecution has violated its disclosure obligations under Rule 68, the Defence failed to seek any ruling or relief in its Confidential Motion.

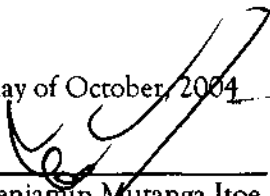
## III. DISPOSITION

FOR ALL THE ABOVE REASONS and since no particular ruling or relief has been sought,  
**THE CHAMBER DISMISSES** the Confidential Motion.

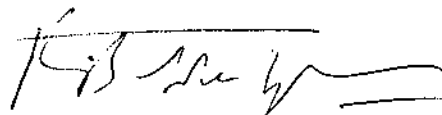
Done in Freetown, Sierra Leone, this 11<sup>th</sup> day of October, 2004



Hon. Judge Pierre Boutet



Hon. Judge Benjamin Mutanga Itoe  
 Presiding Judge  
 Trial Chamber



Hon. Judge Bankole Thompson



<sup>19</sup> Prosecutor v. Sesay et al., SCSL-2004-15-T, Sesay - Defence Motion, 15 July 2004, para. 13.