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SCSL-04-15-T  
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**SPECIAL COURT FOR SIERRA LEONE**

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**THE TRIAL CHAMBER**

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

**Registrar:** Mr. Lovemore G. Munlo SC

**Date:** 5<sup>th</sup> of April, 2006

**PROSECUTOR**                      **Against**                      **ISSA HASSAN SESAY**  
**MORRIS KALLON**  
**AUGUSTINE GBAO**  
(Case No. SCSL-04-15-T)

**Public Document**

**DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL AN ADDITIONAL WITNESS AND NOTICE TO ADMIT WITNESS' SOLEMN DECLARATION PURSUANT TO RULES 73 bis(E) AND 92 bis**

**Office of the Prosecutor:**

Desmond de Silva QC  
James Johnson  
Peter Harrison

**Defence Counsel for Issa Hassan Sesay:**

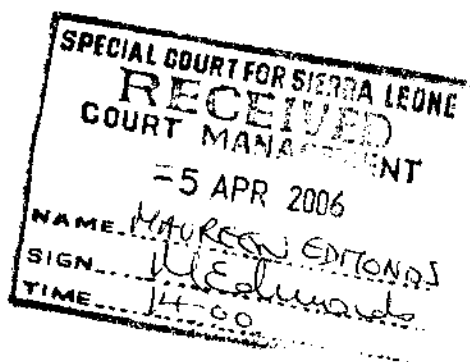
Wayne Jordash  
Sareta Ashraph

**Defence Counsel for Morris Kallon:**

Shekou Touray  
Charles Taku  
Melron Nicol-Wilson

**Court Appointed Counsel for Augustine Gbao:**

Andreas O'Shea  
John Cammegh



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

SEIZED of the "Prosecution Request for Leave to Call Additional Witness And Notice To Admit Witness's Solemn Declaration Pursuant to Rules 73bis(E) and 92bis filed by the Office of the Prosecutor ("Prosecution") on the 10<sup>th</sup> of February, 2006 ("Motion");

NOTING that the Prosecution requests that the Trial Chamber allow the addition of a witness, Alfred Sesay, a Prosecution Investigator ("Proposed Witness") to the Prosecution's witness list pursuant to Rule 73bis(E) of the Rules of Procedure and Evidence of the Special Court ("Rules");

NOTING that the Prosecution does not intend to call the Proposed Witness to testify, rather it seeks to have his solemn declaration dated the 7<sup>th</sup> of July, 2005 ("Solemn Declaration") admitted into evidence pursuant to Rule 92bis of the Rules;<sup>1</sup>

NOTING that the Defence Counsel for the First Accused, Issa Sesay, did not file any response to the Motion within the prescribed time limits but he indicated during the Status Conference held in this case on the 27<sup>th</sup> of February, 2006 that he does not oppose to the said Motion;<sup>2</sup>

NOTING that the Defence Counsel for the Second Accused, Morris Kallon, did not file any response to the Motion within the prescribed time limits;

NOTING that the Defence Counsel for the Third Accused, Augustine Gbao did not file any response to the Motion within the prescribed time limits;

NOTING the Prosecution "Updated Witness List" filed on the 20<sup>th</sup> of February, 2006;

NOTING that the Prosecution did not seek any protective measures for the Proposed Witness;

MINDFUL of this Chamber's jurisprudence on the issue of Additional Prosecution Witnesses<sup>3</sup> as to the general principles of law applicable to the variation of the witness list and its holding that when interpreting provisions of Rule 73bis(E) together with Rule 66(A)(ii), and the circumstances that give

<sup>1</sup> See Motion, Annex A.

<sup>2</sup> Transcripts, Status Conference, 27 February 2006, p. 27.

<sup>3</sup> *Prosecutor against Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004; *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund, 1 October 2004; see also

rise to a showing of "good cause" and the "interests of justice", certain factors should be taken into consideration;

NOTING that these factors, as elaborated in the *Nahimana* Case at the ICTR, are as follows:

[...] the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence [...]<sup>4</sup>

NOTING that the *Bagosora* Case at the ICTR expanded the factors identified in the *Nahimana* case as follows:

These considerations [under Rule 73bis (E)] require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witness<sup>5</sup>;

NOTING that in applying the above-mentioned factors, the Chamber must adhere to "the principle of law that the Prosecution should not be allowed to take the Defence by surprise with additional witnesses and should fulfil in good faith its disclosure obligations;"<sup>6</sup>

MINDFUL that Rule 92bis of the Rules provides that:

- (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
- (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, if it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
- (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

*Prosecutor against Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Prosecution Request for Leave to Call Additional Witness and Disclose Additional Witness Statements, 11 February 2005 ("Decision of the 11<sup>th</sup> of February, 2005").

<sup>4</sup> *Prosecutor against Nahimana, Ngeze and Barayagwiza*, 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, para. 20.

<sup>5</sup> *Prosecutor against Bagosora, Kabiligi, Ntabakuze and Nsengiyumwa*, Case No. ICTR, 98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E), 26 June 2003, para. 14.

<sup>6</sup> Decision of the 11<sup>th</sup> February, 2005, supra note 3, para. 27.

**MINDFUL** that one of the principles that has emerged from this Chamber's jurisprudence concerning Rule 92bis of the Rules, is that at the stage of admission, the Chamber must determine whether documents admitted under Rule 92bis are relevant, whether they possess sufficient *indicia* of reliability and whether their admission would not prejudice unfairly the Defence, such as if documents pertaining to the acts and conduct of the Accused are admitted into evidence without giving the Defence the opportunity of cross-examination;<sup>7</sup>

**CONSIDERING** that the Prosecution has indicated that it has no objection to the cross-examination of the Proposed Witness by the Defence Counsel for the three Accused and that it wishes to reserve its right to re-examine the witness if he is cross-examined;

**CONSIDERING** that it is in the interests of justice that the trial proceeds fairly and expeditiously;

**NOTING** also the broad nature of Rule 92bis which places no limitation on the type of evidence admissible under this Rule to only background evidence;

**FINDING** that the evidence to be provided by the Proposed Witness is material and relevant to the issues pertaining to the trial and would contribute to serving the overall interest of justice;

**FINDING** that the evidence contained in the Solemn Declaration is not 'new' evidence but rather supplementary information provided to assist the Trial Chamber in its analysis of existing documentary evidence<sup>8</sup> and its evaluation of that evidence in the context of all the other evidence before the Court;

**SATISFIED** that the evidence the Prosecution is seeking to admit, namely the Solemn Declaration of Alfred Sesay, is relevant for the purpose for which it is sought to be admitted and that its reliability is susceptible to confirmation and that the Prosecution has shown "good cause" for calling the evidence and that it is in the interest of justice for the Proposed Witness to be added to the Prosecution Witness List;

**PURSUANT** to Rules 73bis(E), 89(C) and 92bis of the Rules;

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<sup>7</sup> *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89 (C), 15 July 2005; *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-T, Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcripts of Testimony of Witnesses TF1-156 and TF1-179, 3 April 2006; *id.*, Decision on the Prosecution Confidential Notice Under 92bis to Admit the Transcript of Testimony of TF1-081, 21 February 2006; *id.*, Decision on the Prosecution Confidential Notice Under 92bis to admit the Transcripts of Testimony of TF1-023, TF1-104 and TF1-169, 9 November 2005.

<sup>8</sup> See Motion, Schedule 1.

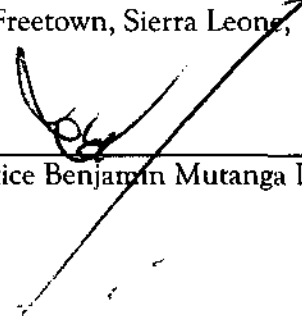
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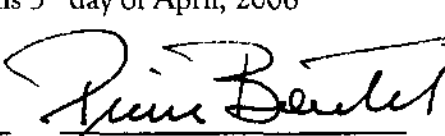
**THE CHAMBER GRANTS THE MOTION, AND ORDERS AS FOLLOWS:**

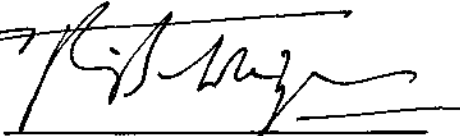
- (i) That Prosecution Investigator Alfred Sesay be added to the Prosecution Updated Witness List filed on the 20<sup>th</sup> of February, 2006; and,
- (ii) That the Solemn Declaration of Alfred Sesay dated the 7<sup>th</sup> of July, 2005 be admitted into evidence.

**AND FURTHER ORDERS** that Defence Counsel may cross-examine Witness Alfred Sesay and that the Prosecution may re-examine the Witness on matters raised in cross-examination by Defence Counsel subject to the rules governing re-examination.

Done at Freetown, Sierra Leone, this 5<sup>th</sup> day of April, 2006

  
\_\_\_\_\_  
Hon. Justice Benjamin Mutanga Itoe

  
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Hon. Justice Pierre Boutet  
Presiding Judge  
Trial Chamber I

  
\_\_\_\_\_  
Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

