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SCSL-04-15-T
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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

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

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 1st of May 2007

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
01 MAY 2007	
NAME	<i>Aduera Nsiima K.</i>
SIGN	<i>Nsiima</i>
TIME	<i>10:41</i>

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

Public Document

DECISION ON THE PROSECUTION MOTION THAT THE SECOND ACCUSED COMPLY WITH RULE 67

Office of the Prosecutor:

James C. 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") 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;

RECALLING this Chamber's Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, issued on the 30th of October 2006 ("Scheduling Order");

NOTING that a Pre-Defence Conference was held on the 20th of March 2007 for the purpose of further considering the preparation and presentation of the Defence case and, in particular, for considering the Defence compliance with the Scheduling Order;

HAVING HEARD the statement of Defence Counsel for the Second Accused, Morris Kallon ("Kallon Defence"), at the said Pre-Defence Conference, that the Accused would not be relying on any special defences or alibi pursuant to Rule 67(A) of the Rules of Procedure and Evidence ("Rules");

HAVING RECEIVED correspondence from the Kallon Defence on the 28th of March 2007 correcting this statement, and indicating that the Kallon Defence will be relying on the defence of alibi and other non-special defences;

SEIZED of the Motion that the Second Accused Comply with Rule 67, filed by the Office of the Prosecutor ("Prosecution") on the 30th of March 2007 ("Motion");

NOTING the Response filed by the Kallon Defence on the 16th of April 2007 ("Response") and the Reply filed by the Prosecution on the 20th of April 2007 ("Reply");

PURSUANT to Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 26bis, 53, 67, 69 and 75 of the Rules of Procedure and Evidence;

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

A. The Motion

1. At the Pre-Defence conference on the 20th of March 2007, the Kallon Defence indicated that it would not be relying on the defence of alibi.¹ On the 28th of March 2007, the Kallon Defence issued

¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Transcript, 20 March 2007, p. 84.

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a notification correcting this statement, and indicating that it would in fact be relying on such a defence.²

2. The Prosecution submits that this notification does not comply with Rule 67(A)(ii), as it does not specify the place or places at which the accused claims to have been present at the time of the alleged crime, the names and addresses of witnesses or any other evidence upon which the accused intends to rely.³

3. Where the accused seeks to rely on Rule 67(B), the Prosecution notes that the jurisprudence has held that the Chamber may take the failure to give notice into account when assessing the credibility of the alibi.⁴ The Prosecution claims that in submitting an incomplete alibi notice, the Defence cannot expect that the court will treat alibi evidence similarly to alibi evidence where a notice was filed in compliance with Rule 67(A)(ii).⁵

4. The Prosecution therefore requests that on or before the 30th of April 2007 or such other appropriate date as the Chamber sees fit, the Chamber order the Kallon Defence to deliver to the Prosecution a notice of alibi containing the following information:

- a. the place or places at which the Second Accused claims to have been present at the time of the alleged crimes;
- b. the names and addresses of witnesses who the Second Accused intends to call in support of the alibi;
- c. any other evidence upon which the Second Accused intends to rely to establish the alibi.⁶

B. The Defence Response

5. In its Response, the Kallon Defence submits that the notice provided was not intended to be a notification pursuant to Rule 67(A)(ii)(a), which it submits it planned to provide in due course.⁷

6. The Defence further submits that Rule 67 must be read in conjunction with the protective measures that have already been granted to Kallon witnesses,⁸ insofar as several of the requirements of Rule 67 would infringe on such protective measures.⁹

² Correction of Statement made at Pre-Defence Conference Conference, 28 March 2007.

³ Motion, para 5.

⁴ Motion, para 6, referring to *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic, Papic and Santic*, IT-95-16, Decision, 11 January 1999, Order (v), *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para 237, *Prosecutor v. Brima, Kamara and Kanu*, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, 26 July 2006.

⁵ Motion, para 7.

⁶ Motion, para 8.

⁷ Response, para 3.

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7. The Defence therefore requests the Chamber to order that on or before the 2nd of May 2007, the Defence supply to the Prosecution a notice of alibi containing the following information:

- a. the place or places at which Mr. Kallon claims to have been present at the time of the alleged crimes;
- b. the pseudonyms of witnesses who Mr. Kallon intends to call in support of the alibi; and
- c. any other evidence upon which Mr. Kallon intends to rely to establish the alibi.¹⁰

8. Further, the Defence requests that it be permitted to disclose the names of the above mentioned witnesses 42 days prior to their testimony at trial. It also requests that if, following such disclosure, the Prosecution or the Defence for the First or Third Accused wish to interview any of the witnesses, they should follow the procedure laid out in the Protective Measures Decision.¹¹

C. The Prosecution Reply

9. In its Reply, the Prosecution notes the *Kallon* Defence's late notification of the defence of alibi, which occurred only after the Protective Measures Decision had been issued.¹²

10. The Prosecution submits that alibi constitutes a *lex specialis* and therefore takes precedence over protective measures granted to witnesses, such that the specific measures of Rule 67(A)(ii)(a) should be enforced.¹³ The Prosecution also submits that the Protective Measures Decision states only that the *Kallon* Defence "shall be allowed to" withhold the names of protected witnesses for 42 days, not that is compelled to do so.¹⁴

11. The Prosecution therefore submits that the *Kallon* Defence is wilfully violating Rule 67, and hiding behind a protective measure which gives it a discretion about whether to disclose the witnesses's identities. The Prosecution indicates that without full compliance with Rule 67, it will be prejudiced as it will be unable to carry out an investigation into the alibi.¹⁵

⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 19 March 2007, para 34(c), (e), (f) and (j) ("Protective Measures Decision").

⁹ Response, paras 4-11.

¹⁰ Response, para 12.

¹¹ Response, paras 13-14, referring to the Protective Measures Decision, para 34(j).

¹² Reply, para 2.

¹³ Reply, paras 3-5.

¹⁴ Reply, paras 6-7, referring to Protective Measures Decision, para 34(c).

¹⁵ Reply, para 9.

II. APPLICABLE LAW

12. The relevant portions of Rule 67 of the Rules provide as follows:

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Subject to the provisions of Rules 53 and 69:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

[...]

(ii) The defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

[...]

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

13. In effect, it is the considered view of this Chamber that although Rule 67(B) permits the Defence to rely on the defence of alibi even in the absence of notice, the Chamber is entitled to take into account any failure to comply with the requirements of Rule 67(A)(ii)(a) in assessing the merit of the aforesaid defence of alibi,¹⁶ and this might impact on the weight to be attached to such evidence.


III. DELIBERATION

14. The Chamber notes that the *Kallon* Defence essentially agrees that it needs to comply with the requirements of Rule 67, as long as these requirements are modified so that they do not violate the protective measures already in place for *Kallon* witnesses.

15. It is evident from the state of the filing that the *Kallon* Defence did not provide notification of the defence of alibi until well after the commencement of the trial, and that it stated at the Status Conference on the 27th of October 2006 that it "had no indication to make at that point in time". The said Defence Team also stated emphatically at the Pre-Defence Conference on the 20th of March 2007 that it did not intend to rely on an alibi defence.¹⁷ The *Kallon* Defence further claims that the notice it provided on the 28th of March 2007 was not intended to be a formal notification under Rule 67, but that such formal notification will be provided in due course. Given the state of the record,

¹⁶ See for instance *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, 26 July 2006, para 18; *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic, Papic and Santic*, IT-95-16, Decision, 11 January 1999, Order (v); *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-I-T, Judgement, 21 May 1999, para 237.

¹⁷ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript, 27 October 2006, p. 20, Transcript, 20 March 2007, p. 84.



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the Chamber opines that even if the *Kallon* Defence were now to provide a notification under Rule 67, it would clearly be in breach of the stipulation that it should have given "as early as reasonable practical or in any event prior to the commencement of the trial".

16. Moreover, the Chamber holds that where the Defence indicates an intent to put forward a defence of alibi, but does not provide the particulars thereof as required by Rule 67, this constitutes a breach of the said Rule.¹⁸ The Chamber subscribes to the view that compliance with Rule 67 "reduces delays, contributes to the fairness of the trial and supports the proper administration of justice".¹⁹ The Chamber, therefore, finds the *Kallon* Defence to be in breach of Rule 67(A)(ii)(a).

17. It is noteworthy that Rule 67 explicitly states that its requirements are subject to Rule 53 (regarding non-disclosure) and Rule 69 (regarding the protection of witnesses and victims). Instructively, in *Prosecutor v. Karera*, the Court held that in cases in which protective measures are in place, the requirements of Rule 67 may be modified to be made compatible with such measures.²⁰ We subscribe to that view. Hence, the Chamber disagrees with the Prosecution's contention that alibi constitutes a *lex specialis* that overrides any protective measures.


18. Furthermore, the Prosecution's submission that it will suffer prejudice in that it will not be able to conduct an investigation of the alibi defence until these names are revealed is untenable for the reason that the *Kallon* Defence has agreed to disclose the pseudonyms of the alibi witnesses, as well as the places at which the Accused was alleged to be present, and any other evidence that the Accused is relying on to establish the alibi. Moreover, as with the other Defence witnesses that it investigates, the Chamber is of the opinion that the Prosecution will be able to conduct an investigation into any alibi witnesses 42 days prior to their testimony.

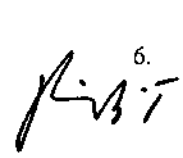
19. Therefore, given that Rule 67 is explicitly made subject to the protective measures requirements in Rules 53 and 69, and the disclosure that the *Kallon* Defence will be providing, the

¹⁸ See *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, Decision on Defence Compliance with Rule 67 of the Rules, 5 April 2007, where the court held that "when the Defence communicated its intent to rely on a defence of alibi without communicating any further information, it demonstrably breached Rule 67" (para 9).

¹⁹ *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, Decision on Defence Compliance with Rule 67 of the Rules, 5 April 2007, para 10. See also *Prosecutor v. Karemera*, ICTR-98-44-T, Decision on Prosecutor's Motion for an Order to File Notice of Alibi, 22 March 2007, para 16.

²⁰ *Prosecutor v. Karera*, ICTR-01-74-T, Decision on Motion for Further Alibi Particulars, 7 March 2006, where the court held that in light of the protective measures applicable to the witnesses, "addresses of witnesses" under Rule 67 would be considered to refer only to their addresses during the events about which they would testify, not their present addresses (para 3).

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Chamber is satisfied that the Prosecution will not be unduly prejudiced if the *Kallon* Defence remains entitled to withhold the identity of the protected alibi witnesses until 42 days prior to their testimony.

20. The Chamber notes that the Prosecution appears to take no issue with the procedure for contacting witnesses through the Witnesses and Victims Section, once their identity has been disclosed, as laid out in the Protective Measures Decision.²¹ Hence, the *Kallon* Defence will, accordingly, be permitted to disclose the names of the above mentioned witnesses 42 days prior to their testimony at trial. Further, once their identities have been disclosed, if the Prosecution or the Defence for the First or Third Accused wish to interview any of the protected *Kallon* witnesses, they must follow the procedure set out in paragraph 34(j) of the Protective Measures Decision.

IV. DISPOSITION


THE TRIAL CHAMBER

DECLARES that the *Kallon* Defence has failed to comply with the requirements of Rule 67(A)(ii);

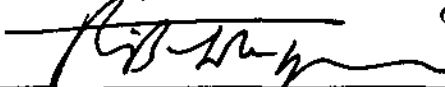
ORDERS the *Kallon* Defence, within 7 days of the service of the present Decision, to provide the Prosecution with a notice of alibi containing the following information:

- a. the place or places at which the Second Accused claims to have been present at the time of the alleged crimes;
- b. the pseudonyms of witnesses who the Second Accused intends to call in support of the alibi; and
- c. any other evidence upon which the Second Accused intends to rely to establish the alibi.

Done at Freetown, Sierra Leone, this 1st day of May 2007



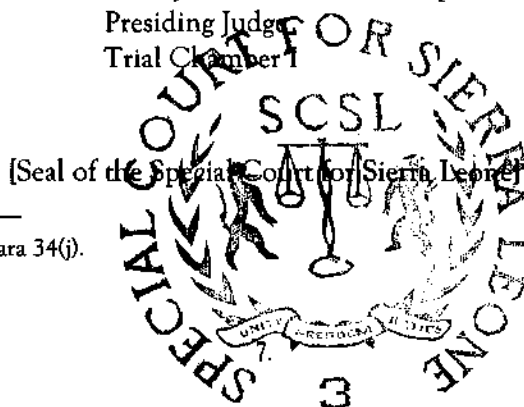
Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber 1



Hon. Justice Pierre Bouter



²¹ Protective Measures Decision, para 34(j).