SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

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

Registrar: Robin Vincent

Date: 5th of April 2005

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

DECISION REGARDING THE PROSECUTION'S FURTHER RENEWED WITNESS LIST

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
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Defence 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 Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

SEIZED of the Prosecution's *Further Renewed Witness List Pursuant to Order to the Prosecution Concerning Renewed Witness List*, filed on the 10th of February 2005 ("Motion");

NOTING the *Defence Response* to the Motion, filed by Counsel for the First Accused, Issa Hassan Sesay, on the 18th of February 2005 ("*Sesay* Response");

NOTING the *Kallon: Defence Response* to the Motion, filed by Counsel for the Second Accused, Morris Kallon, on the 21st of February 2005 ("*Kallon* Response");

NOTING the *Bao Response* to the Motion, filed by Counsel for the Third Accused, Augustine Gbao, on the 21st of February 2005 ("*Gbao* Response");

NOTING the *Prosecution Consolidated Reply to Defence Responses*, filed by the Prosecution on the 23rd of February 2005 ("Consolidated Reply");

NOTING the *Order to Prosecution Concerning Witness List* filed on the 3rd of December 2004 in which this Chamber ordered the Prosecution to seek leave of this Chamber to add a series of witnesses to the "core" and "back-up" witness lists of the Renewed Witness List;

NOTING the Trial Chamber's *Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial* of the 1st of April 2004, wherein the Trial Chamber ordered the Prosecution to file by the 26th of April 2004 a witness list of all the witnesses that the Prosecution intended to call at trial with the name or the pseudonym of each witness, and that, should the Prosecution seek to add any witnesses to this list after the 26th of April 2004, it should be permitted to do so only upon good cause being shown;

NOTING that the Prosecution filed a witness list on the 26th of April 2004 ("Witness List");[1]

NOTING that the Prosecution filed a modified witness list on the 12th of July 2004 ("Modified Witness List");[2]

NOTING the Prosecution Renewed Witness List filed on the 23rd of November, 2004 and the Corrigendum thereto, filed on the 25th November, 2004 ("Renewed Witness List");

NOTING the *Order to Prosecution Concerning Renewed Witness List* of the 3rd of December 2004;

PURSUANT to the provisions of Article 17 of the Statute of the Special Court ("Statute") and Rules 26*bis*, 66(A)(ii), 67, 68, 69, 73*bis*(E) and 75 of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING RULING:

I. SUBMISSIONS OF THE PARTIES

A. The Motion

1. In response to the specific orders of this Chamber in the *Order to Prosecution Concerning Witness List*, the Prosecution states that it does not seek leave of the Trial Chamber to add witnesses TF1-189 and TF1-274 to its "core" witness list or to add witnesses TF1-106, TF1-146, TF1-103, TF1-276, TF1-103, TF1-155 and TF1-302 to its "back-up" witness list. The Prosecution also states that it does not seek leave to add witness TF1-126 to its "core" list, but that this witness does appear on the "back-up" list.[3]

2. The Prosecution affirms that it does seek leave of the Trial Chamber to add witness TF1-210 to its "core" witness list. The Prosecution explains that this witness has an identical name to another protected witness and that the removal of this witness from the "core" witness list "arose from confusion between the two witnesses."

3. The Prosecution states that it has decided to move witnesses TF1-029 and TF1-122 from the "back-up" list to the "core" list of witnesses. The Prosecution submits that it does not require leave of the Chamber in order to move witnesses between the "core" and "back-up" lists since all of the witnesses on both lists were identified in the original witness list of the 26th of April 2004.

4. If the Chamber finds that leave is required, the Prosecution submits that it may seek to substitute "core" witnesses with "back-up" witnesses due to the "inability, unsuitability or latent unwillingness" of "core" witnesses to testify. The Prosecution clarifies that it intends to call witness TF1-029 instead of witness TF1-085 and to call witness TF1-122 instead of witness TF1-126.

B. The Responses

5. Counsel for Sesay and Gbao do not address the issue of the request by the Prosecution for leave of the Trial Chamber to add witness TF1-210 to the "core" witness list. Counsel for Kallon states that it is not opposed to the retention of TF1-210 in the "core" list given the reasons advanced by the Prosecution.[4]

6. Counsel for all three Accused submit that the Prosecution should have to demonstrate good cause pursuant to Rule 66 before witnesses may be moved from the "back-up" list to the "core" list. Defence for Sesay and Gbao submit that Article 17 of the Statute implicitly provides that the Defence have a right to know, with certainty, which witnesses will be giving evidence against the Accused. Further, the replacement of one witness for another may involve significant changes in the nature and the quality of the case that an accused has to meet.[5]

7. Counsel for Gbao submits that the procedure of requesting leave is a safeguard against any violation of the rights of the accused including being taken by surprise or having inadequate preparation of its defence.[6] Counsel continues that Rule 73(E)[7] requires the Prosecution to seek leave to vary its decision on the witnesses and to justify the reasons for the non-testimony of the witnesses to be replaced and the genuine nature of the replacement.[8]

8. Defence for Kallon submits that the Prosecution cannot "chop and change" the list and shuffle backwards and forwards from the "core" list to the "back-up" list.[9] Further, after reviewing the changes in the "core" and "back-up" lists proposed by the

Prosecution, Counsel concludes that they "evince marked inconsistency and caprice on the part of the Prosecution".[10]

9. Defence Counsel submit that the Prosecution's general assertion that "core" witnesses may need to be replaced due to the inability, unsuitability or latent unwillingness to give evidence cannot constitute good cause.[11]

10. Counsel then examine specifically the substitutions sought by the Prosecution's Motion. With regard to the replacement of witness TF1-029 by witness TF1-085, Counsel for Sesay and Kallon submit that the witnesses will testify about different incidents in different areas.[12] With regard to the replacement of witness TF1-126 by witness TF1-122, Counsel for Kallon submits that he is not opposed to the substitution as they both relate to nearly similar events in the same Kenema Crime Base area.[13] Counsel for Sesay, in contrast, submits that this substitution impacts on issues of command responsibility and joint criminal enterprise for the death of B. S. Massaquoi.[14]

C. Prosecution Reply

11. The Prosecution refers to the *Order to Prosecution to Produce Witness List and Witness Summaries* and submits that this Chamber clearly envisaged that the Prosecution might deem it necessary to substitute from time to time certain witnesses appearing on its "core" list with witnesses appearing on its "back-up" list. The Prosecution highlights that the Order did not provide that the Prosecution should seek leave or show good cause in order to make these substitutions.[15]

12. The Prosecution emphasises that this is the first time that it has asserted its right to move witnesses from the "back-up" list to the "core" list. It submits that it has provided sufficient grounds, if leave is required, for witnesses TF1-029, TF1-122 and TF1-210.[16]

13. The Prosecution highlights that it has complied with its disclosure obligations under Rule 66(A) of the Rules for all of the witnesses appearing on both the "core" and "back-up" lists. The Prosecution submits that the testimony of witnesses TF1-029 and TF1-122 will address the same or similar issues as the witnesses they replace. It states that it intends to call witness TF1-122 towards the end of the next trial session and does not intend to call TF1-029 until a later trial session.[17]

14. The Prosecution submits that since the Trial Chamber has not made an order at a Pre-Trial Conference pursuant to Rule 73*bis*(D) of the Rules, then an application cannot be made pursuant to Rule 73*bis*(E) as suggested by the Defence.[18]

II. LEGAL ANALYSIS

A. Application for Leave to Add Witness TF1-210

15. This Chamber has already reviewed in detail the applicable law concerning the request of the Prosecution to add additional witnesses.[19]

16. In these Decisions, the Chamber noted that the law governing the request of the Prosecution to vary the witness list and add additional witnesses, is Rule 73*bis*(E) of the Rules. Thus, this Chamber disagrees with the Prosecution assertion that this Rule only

applies subsequent to an order of the Trial Chamber or Judge to reduce the number of Prosecution witnesses pursuant to Rule 73*bis*(D). Rule 73*bis*(E) reads as follows:

(E) After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

17. We emphasized in our previous Decisions that when interpreting the provisions of Rule 66(A)(ii) of the Rules and the circumstances that give rise to a showing of good cause and the interest of justice, certain factors should be taken in to consideration.[20] Quoting from the *Nahimana* case of the ICTR, we noted that:

In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as 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. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay. [21]

18. Continuing, we observed that additional factors "include the sufficiency and time of disclosure of the witness information to the Defence and the probative value of the proposed testimony".[22] Quoting from the *Bagosora* case of the ICTR, that expanded on the factors identified in the *Nahimana* case above, we further noted that:

These considerations [under Rule 73*bis*(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.[23]

19. Consistent with these recent Decisions, we reassert the principle of law that the Prosecution should not be allowed to surprise the Defence with additional witnesses and should fulfil in good faith its disclosure obligations.

20. The Prosecution state that they have always had the intention of calling witness TF1-210 as one of their "core" witnesses but that the witness was inadvertently left out of the "core" list due to an oversight. Disclosure of the statements of TF1-210 has been provided to Defence Counsel within the statutory time frames. Counsel for Kallon state that they do not oppose the application in light of the explanation of the Prosecution. Counsel for Sesay and Gbao have not taken a position with regard to this Application.

21. In light of the foregoing, this Chamber is satisfied that the Prosecution has established a showing of "good cause" under the provisions of Rule 66(A)(ii) of the Rules, warranting and justifying the granting of the application to add witness TF1-210 to the Prosecution's "core" Renewed Witness List.

B. Moving of witnesses TF1-029 and TF1-122 from the "back-up" list to the "core" list

22. The Prosecution submits that it does not need to seek leave in order to move witnesses between its "back-up" and "core" witness lists. The Defence, on the other hand, submit that the Prosecution cannot replace witnesses from the "core" list with witnesses from the "back-up" list without leave of the Chamber.

23. The Chamber notes that in accordance with its *Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial*, the Prosecution is required to show good cause in order to add any witness to their witness list that was filed by the 26th of April 2004. The Witness List filed on that day contained 266 witnesses.

24. Pursuant to our *Order to Prosecution to Produce Witness List and Witness Summaries*, the Prosecution was required to specify from its Witness List a list of "core" witnesses and a list of "back-up" witnesses. In ordering this, the Chamber noted that it is in the interests of justice for the Prosecution to disclose to the Defence and the Court a modified witness list that identifies clearly which witnesses the Prosecution has identified as its "core" witnesses and which witnesses are meant to be used only as "back-up" witnesses if some of the "core" witnesses are not available to testify.

25. On the 12th of July 2004, the Prosecution filed a Modified Witness List identifying its "core" witnesses. On the 23rd of November 2004, the Prosecution filed a Renewed Witness List which included both a reduced "core" witness list and a "back-up" witness list.

26. This Chamber opines that while the Prosecution has been ordered to distinguish between "core" witnesses and "back-up" witnesses in order to facilitate the work of the Defence and the Court, this does not change the fact that the Prosecution is still relying on the same witness list that was filed on the 26th of April 2004. Moreover, as noted above, our Order envisaged that these lists were not static since the "back-up" witnesses were meant to replace "core" witnesses who were not available to testify.

27. This Chamber recently recognised in its *Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements* that:

> [I]n trials of this magnitude and complexity, it would not be unusual for some key witnesses to manifest, for diverse reasons, a reluctance and a lukewarmness to cooperate with investigators and the Prosecution in their attempt to get them to volunteer statements and to eventually testify on matters relevant to the issues for determination.[24]

28. Although Counsel for Kallon suggested that these changes to the "core" and "back-up" lists demonstrate "inconsistency and caprice on the part of the Prosecution", this Chamber finds that no grounds have been established by the Defence as a basis for this assertion. The Chamber notes that this is the first occasion on which the Prosecution has sought to move witnesses from the "back-up" list to the "core" list.

29. The Chamber finds that the Defence has been provided with disclosure pursuant to Rules 66 and 68 of the Rules with regard to all of the witnesses on both the "core" and "back-up" witness lists. Moreover, the trial was commenced on the basis that all of these 266 witnesses could be called at trial.

30. This Chamber concludes that the Prosecution may, from time to time, substitute witnesses from the "back-up" list for witnesses from the "core" list who are not able to

testify. In particular, the Chamber is satisfied that the Prosecutor may add witnesses TF1-029 and TF1-122 to its "core" witness list to replace witnesses TF1-085 and TF1-126.

31. The Chamber is cognisant of the critical importance of the right of the Accused under Article 17(4)(b) of the Statute of the Special Court for Sierra Leone to have "adequate time and facilities for the preparation of his or her defence". Thus, this Chamber notes that the Defence may, in the appropriate circumstances, seek the remedy of an adjournment of testimony in order to allow adequate preparation. In relation to the two witnesses at bar, the Chamber is satisfied that the Prosecution has indicated that it intends to call witness TF1-122 towards the end of the April-May 2005 trial session and that witness TF1-029 will be called at a later trial session.

32. For all of these reasons, this Chamber finds that the Prosecution may move witnesses TF1-029 and TF1-122 from its "back-up" list to its "core" list without leave of the said Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion requesting the addition of witnesses TF1-210, TF1-029 and TF1-122 to the "core" list of the Further Renewed Witness List.

Done at Freetown this 5th day of April, 2005

Hon. Justice Pierre Boutet | Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I | Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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[1]See Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of the 1st of April, 2004, 26 April 2004.

[2] See Materials Filed Pursuant to 'Order to Prosecution to Produce Witness List and Witness Summaries', 12 July 2004.

[3] Unlike the other witnesses listed for whom this Chamber ordered that leave was necessary in order to add them to the "back-up" list because they had been specifically withdrawn from the witness list, witness TF1-126 was never withdrawn from the "back-up" list. This witness was omitted from the "core" Modified Witness List.

[4] Kallon Response, para. 21.

[5] Sesay Response, paras 2-5 and Gbao Response, para. 5.

[6] Gbao Response, para. 5.

[7] Presumably, Counsel is actually referring to Rule 73*bis*(E) of the Rules.

[8] *Id*., para. 6.

[9] Kallon Response, paras 16 and 19.
[10] *Id*., para. 15.
[11] Sesay Response, para. 9 and Gbao Response, para. 6.
[12] Sesay Response, para. 6 and Kallon Response, para. 22.
[13] Kallon Response, para. 20.
[14] Sesay Response, paras 6-7.
[15] Prosecution Reply, para. 4.
[16] *Id*., para. 6.
[17] *Id*., para. 7.
[18] *Id*., para. 9.
[19] *Prosecutor v. Sesay et al*., SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004 ("Decision of the 29th of July 2004") and *Prosecutor v. Sesay et al*., SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005. See also *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004.
[20] *Prosecutor v. Sesay et al*., *supra* note 19, Decision of the 29th of July 2004, para. 29.
[21] *Prosecutor v. Nahimana*, ICTR-96-11, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20. See also *Prosecutor v. Nahimana*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 5.
[22] Decision of the 29th of July, 2004, para. 30.
[23] *Prosecutor v. Bagosora*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis*(E), 26 June 2003, para. 14.
[24] *Prosecutor v. Sesay et al*., *supra* note 19, Decision of the 29th of July 2004, para. 36.