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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

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: 5th 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 73*bis*(E) and 92*bis* filed by the Office of the Prosecutor ("Prosecution") on the 10th 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 73*bis*(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 7th of July, 2005 ("Solemn Declaration") admitted into evidence pursuant to Rule 92*bis* of the Rules;[1]

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 27th of February, 2006 that he does not oppose to the said Motion;[2]

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 20th 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[3] as to the general principles of law applicable to the variation of the witness list and its holding that when interpreting provisions of Rule 73*bis*(E) together with Rule 66(A)(ii), and the circumstances that give

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[1] See Motion, Annex A.
[2] Transcripts, Status Conference, 27 February 2006, p. 27.
[3] *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 [...][4]

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

> 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[5];

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;"[6]

MINDFUL that Rule 92*bis* 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, SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witness and Disclose Additional Witness Statements, 11 February 2005 ("Decision of the 11th of February, 2005").

[4] *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.

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

[6] Decision of the 11th February, 2005, supra note 3, para. 27.

MINDFUL that one of the principles that has emerged from this Chamber's jurisprudence concerning Rule 92*bis* of the Rules, is that at the stage of admission, the Chamber must determine whether documents admitted under Rule 92*bis* 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;[7]

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 92*bis* 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[8] 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 73*bis*(E), 89(C) and 92*bis* of the Rules;

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[7] *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 92*bis* 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 92*bis* to Admit the Transcripts of Testimony of Witnesses TF1-156 and TF1-179, 3 April 2006; *id.*, Decision on the Prosecution Confidential Notice Under 92*bis* to Admit the Transcript of Testimony of TF1-081, 21 February 2006; *id.*, Decision on the Prosecution Confidential Notice Under 92*bis* to admit the Transcripts of Testimony of TF1-023, TF1-104 and TF1-169, 9 November 2005.

[8] *See* Motion, Schedule 1.

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 20th of February, 2006; and,

(ii) That the Solemn Declaration of Alfred Sesay dated the 7th 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 5th day of April, 2006

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

[Seal of the Special Court for Sierra Leone]