SPECIAL COURT FOR SIERRA LEONE TRIAL CHAMBER I

Before:

Hon. Justice, Benjamin Mutanga Itos HERNELEGURT FOR SIERRALEONE RECEIVED

Hon. Justice Bankole Thompson

Hon. Justice Pierre Boutet

COURT MANAGEMENT

Registrar: Mr. Herman Von Hebel

Date filed: 25th March 2008

THE PROSECUTOR

against

ISSA HASSAN SESAY **MORRIS KALLON**

AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

KALLON REQUEST FOR LEAVE TO VARY WITNESS LIST AND FOR RESPECTIVE PROTECTIVE MEASURES AND CONFIDENTIAL ANNEXE A

Office of the Prosecutor:

Peter Harrison Reginald Fynn

Counsel for Morris Kallon

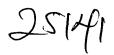
Charles Taku Kennedy Ogeto Lansana Dumbuya Tanoo Mylvaganam

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Wayne Jordash Sareta Ashraph

Court-Appointed Counsel for Augustine Gbao

John Cammegh **Scott Martin**



INTRODUCTION

- 1. The Kallon Defence proposes to add ten witnesses who have all been discovered in recent investigations, and to withdraw seven een witnesses from the Kallon "core witness list," for a net reduction of 7 further witnesses. This variation of the witness list will streamline the process, and shorten the presentation of the Defence case for Kallon.
- 2. The proposed additional witnesses, who are discussed individually *infra*, are: DMK400, DMK 422, DMK 444, DMK 488, DMK 550,DMK 600,DMK 660 and DMK 700,DMK770 AND DMK880.
- 3. The Kallon Defence proposes that the following witnesses be withdrawn from the list: DMK 134, DMK 135, DMK 002, DMK 037, DMK 095, DMK 120, DMK 017, DMK 073, DMK 126, DMK 006, DMK 027, DMK 042, DMK 050, DMK 075, DMK 098, DMK 114, DMK 115.

PROCEDURAL HISTORY

- 4. On the 30 October 2006, the Chamber ordered each of the Defence Teams to file the following materials, ("the Defence Materials") by 16 February 2007:¹
 - a. a "core" and "back-up" witness list;
 - b. an indication of common witnesses;
 - c. an indication as to whether or not the accused person will testify;
 - d. a list of expert witnesses;
 - e. a list of exhibits expected to be tendered;
 - f. a chart indicating the documentary and testimonial evidence upon which the Defence will rely to defend the Accused against the allegations contained in each paragraph in the indictment.

P v Sesay et al., SCSL-04-15-T-659, Scheduling Order Concerring the Preparation and Commencement of the Defence Case, 30 Oct. 06, see para 1.

- 5. On 18 January 2007, the "Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" was filed.² The motion was granted on 19 March 2007.³
- 6. On 28 January 2007, the Kallon Defence team filed an application for an extension of time for the filing of the Defence Materials. The Chamber granted the application on 7 February 2007 and, in so doing, ordered that the filing of the Defence Materials should be done not later than 5 March 2007. On 5 March 2007, the Kallon Defence filed the Defence Materials.
- 7. On 28 March 2007, the Chamber made the following orders, inter alia:
 - a. that the Defence teams "review their respective [m]aterials, with a view to reducing their current witness lists";⁷
 - b. that "any reviewed and reduced witness list" by each of the Defence teams should be filed not later than 16 April 07;8 and
 - c. that such the Defence teams should provide "detailed" witness summaries.⁹
- 8. On 16 April 2007, the "Kallon Defence Filing in Compliance with Consequential Orders Concerning the Preparation and Commencement of the Defence Case" was filed in compliance with the orders of 28 Marc 1 2007.¹⁰
- 9. On 16 January 2008, the Trial Chamber granted the Kallon Defence leave to call 5

P v Sesay et al., SCSL-04-15-T-682, Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 Jan. 07.

P v Sesay et al., SCSL-04-15-T-739. Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non Public Disclosure, 19 March 07.

P v Sesay et al., SCSL-04-15-T-, Kallon Defence Application to Vary the 16 February 2007 Filing Date, 28 Jan. 07.

P v Sesay et al., SCSL-04-15-T-705, Decision and Order on Defence Applications for an Adjournment of 16th February Deadline for Filing Defence Material, 7 Feb. 07.

P v Sesay et al., SCSL-04-15-T-727, Confidential Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence case, 5 March 07.

P v Sesay et al., SCSL-04-15-T746, Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 28 March 07, see para 1.

P v Sesay et al., SCSL-04-15-T-746. Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 28 March 07, see para 2.

r' v Sesay et al., SCSL-04-15-T-746, Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 28 March 07, see para 3 and 4.

⁰ P v Sesay et al., SCSL-04-15-T-750, Public Kallon Defence Fi ing in Compliance with Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 16 April 07.

SHIST

new witnesses and to withdraw seventeen others. The Chamber further ordered the Defence to file an updated witness list.¹¹

- 10. On 30 January 2008, the Defence filed its updated and reduced witness list containing 73 core witnesses including 98 bis and Expert witnesses¹².
- 11. The Kallon Defence is constantly reviewing its witness list in order to make an efficient presentation of its witnesses without unnecessary duplication and repetion of testimonies. It is in this regard that the Defence is proposing to remove from its core list the above seventeen witnesses. In the Final analysis the Kallon Defence shall endeavour to call no more than 35 witnesses after further review of the remaining witnesses.
- 12. The addition of the proposed 10 new witnesses will help the Kallon Defence advance its object of a shorter, concise and judicially economical presentation of its defence case. These 10 witnesses will address a wide range of issues and will thus facilitate a significant reduction of the number of witnesses that the Kallon Defence would have had to call.
- 13. Several of these witnesses will be short and will testify for an average of 2hrs in Chief.

I. PROPOSED WITNESSES

The Law

14. The standard for the addition of witnesses is er shrined in Rule 73ter (E), which states:

"After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called".

15. On the subject of additional witnesses, the jurisprudence has established the key principles to be taken into consideration. Firstly, such application should be

¹¹ Prosecutor v. Sesay et al,SCSL-04-14-T-940,Decision On Kallon Request For Leave To Vary Witness List And Protective Measures

Prosecutor v. Sesay et al,SCSL-04-14-T-963,Public,Kallon Updated And Reduced Witness List And Indictment Chart.

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considered in the interests of justice.¹³ Secondly, there must be good cause for the application, in other words there must be a credible reason for not varying the witness list at an earlier stage of the proceedings.¹⁴

- 16. An analysis of the jurisprudence reveals that, in making a determination as to whether the interests of justice will be served and good cause has been shown in respect of the addition of witnesses to the witness list, the Chamber may consider the following, *inter alia*:
 - a. the Paramount importance of hearing the best possible evidence, albeit lately-discovered;
 - b. the potential prejudice to the Defence caused by denying such an application;
 - c. the materiality of the testimony;
 - d. the exercise of due diligence in trying to discover the witness at an earlier stage;
 - e. the timing of the application and whether the late amendment to the witness list would cause prejudice to any of the parties;
 - f. the complexity of the case.
- 17. Denying an application for the addition of material Defence witnesses in the present circumstances would be a violation of the applicant's right to make full answer to the Prosecution case and would be contrary to the interests of justice, as indicated by *Delalic* in the following terms:

"The Trial Chamber is enjoined to utilize all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties. It is thus important to adopt a flexible approach when considering the management of witnesses. Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute of the International Tribunal ("the Statute") and Rules." ¹⁵

³ P. v. Norman et al., SCSL-04-14-T-167, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 04, at para 25; P. v. Sesay et al., SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 Feb. 05, at para 25.

¹⁴ P. v. Sesay et al., SCSL-2004-15-T-320. Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 Feb. 05, at para 25.

¹⁵ P. v. Delalic, IT-96-21-T, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4

- 18. In *Nahimana et al.*, the Trial Chamber of the International Criminal Tribunal for Rwanda ("the ICTR") held that considerations such as "materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, ongoing investigations, replacement and corroboration of evidence" were material factors in satisfying the requirements of the "interests of justice" and of "good cause."
- 19. In addition, in response to a second request from the Prosecution for leave to amend its list of witnesses the Chamber held stated that:
 - "... As long as a witness of the nature of X is available and capable of giving relevant direct testimony on crucial allegations, the Chamber should not exclude such testimony" [Emphasis added.]
- 20. This Chamber has held that in granting an application for the addition of witnesses, it is material that the evidence could not have been discovered or made available earlier, notwithstanding the exercise of due diligence.¹³³

Submissions

21. As regards the complexity of the case and the preparation of the Defence and its ongoing investigations, the Defence notes the lack of pre-trial notice provided by the indictment and pre-trial briefs in this case. Defence investigations are necessarily responsive to Prosecution allegations. To a large extent in this case, these allegations have only emerged during the Prosecution case, in the absence of a detailed indictment. This has created a situation of considerable complexity for the Defence in

Sept. 97, para 7.

⁵ P. Nahimana et al., ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 01, see para 19 and 20; see als 5 P. v. Nahimana et al., ICTR-99-52-I, Decision on Prosecutor's Application to Add Witness X to the List of Prosecution Witnesses and for Protective Measures, 14 Sept. 01; P. v. Delalic, IT-96-21-T, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4 Sept. 97, at para 10; P. v. Norman et al., SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 04, at para 16.

⁷ P. v. Nahimana et al., ICTR-99-52-I, Decision on Prosecutor's Application to Add Witness X to the List of Prosecution Witnesses and for Protective Measures, 14 Sept. 01, at para 13.

⁸ P.v. Sesay et al., SCSL-2004-15-T-320. Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 Fεb. 05, para 35.

its investigations. Moreover an 18 count indictment with a multiplicity of allegations against the accused some several of which are clearly outside the scope of the indictment must necessarily be complex. According to the jurisprudence cited above, this should be considered by the Chamber in its assessment of the merits of this application.

- 22. As regards the timing of this application and potential prejudice to the parties, the Defence is undertaking to disclose the identities of the witnesses to the Chamber and parties by 30th of MARCH 2008; thereby providing ample time for investigation. Therefore, no prejudice can be said to result from this application.
- 23. The proposed witnesses will provide aspects of testimony that would have been elicited from several of the witnesses who are being dropped. This will serve to expedite the trial in furtherance of judicial economy. More significantly, some of the proposed witnesses will provide evidence on matters not covered by any of the witnesses on the current list.
- 24. Annexed to this application are the summaries of the proposed witnesses for the Chamber's inspection, with reference to which it is hoped that the Chamber will be able to be satisfy itself as to the materiality of the proposed testimonies.
- 25. It is submitted that in respect of each one of the proposed witnesses the Defence exercised due diligence in its investigations but, that notwithstanding, their inclusion in the witness list has not been possible until now.
- 26. **DMK-400** is an ECOMOG officer familiar with AFRC-RUF operations on the ground between 1997 and 1999.He will explain that it was the AFRC to the exclusion of RUF that attacked FREETOWN early 1999.He will state that the accused Kallon was not a person readily identifiable as relevant within the RUF command structure during this period.
- 27. DMK-422 was actively involved in the Abidjan and LOME peace talks. He is

familiar with the agreements that came out of the talks as he played a key role in those talks. He played a significant role in bringing Sankoh to the negotiating table. He is capable of explaining to the Court the kind of person Sankoh was. He will talk about the violations of the Abidjan and LOME peace Accords.

- 28. **DMK-444** was a senior UNAMSIL Commander from 1999 upto the time JETLEY left in September when the witness was promoted and continued working with UNAMSIL. Witness will explain Jetley's role in the failed disarmament process.
- 29. Witness will further discuss the role of the COME ACCORD in the disarmament process.
- 30. **DMK-488** was ECOMOG Battalion commander based in Makeni-Magburaka in 1999 and will discuss RUF efforts to establish peace in Sept 1999 to DEC 1999. The witness worked closely with both the RUF and the accused.
- 31. **DMK-550** was an ECOMOG COMMANDER in 1998-1999 and knew the accused was not involved in the atrocities committed by the AFRC. He will explain the relationship between the AFRC and RUF and will state that it is the AFRC that attacked Freetown IN JAN 1999 and committed atrocities there.
- 32. **DMK-600** was involved in the UN Observer Mission in Sierra Leone that Preceded UNAMSIL in which he served in a senior capacity. He will explain the RUF effort to secure peace. He will explain the Lome agreement and its importance to the peace process.
- 33. **DMK-660** was Brigade commander of ECOMOG. He led attacks in various parts of Sierra Leone against both the RUF and AFRC between 1998-1999. Witness is capable to explain that Morris Kallon did not occupy any position of command responsibility in KONO at the time.
- 34. **DMK-700.** Witness served as UNAMSIL OFFICER based at LUNSAR and PORT LOKO between April 2000 and early 2001. He will testify to the role the accused KALLON played in the peace process during that period.

- 35. **DMK-770** was a senior UNAMSIL officer after Jetley and will discuss the challenges of the peace process.
- 36. **DMK-880** is a media functionary who will discuss the media propaganda against the RUF from 1998-1999

II. PROTECTIVE MEASURES

- 37. All the above witnesses have only recently been traced by the Defence team. All the 10 witnesses reside outside Sierra Leone, are a l busy personalities engaged in various activities in their respective countries. Despite all the best effort and due diligence, it was not possible to contact these witnesses until late February 2008. We have only recently met them save for DMK 600,DMK770 and DMK880 who the Defence is yet to meet. It was not possible therefore for the Defence to file this motion earlier.
- 38. The Kallon Defence requests that the pre-existing protective measures granted to witnesses in the "core" witness list 19 be applied to the proposed additional witnesses.
- 39. The Defence submits that for now due to the security concerns of the witnesses the identities of these witnesses should only be disclosed to the Chamber and parties in these proceedings.
- 40. It is submitted that if the identities of these witnesses are revealed to the public at this point in time the witnesses 'safety and security would be placed in jeopardy leading to their non appearance to testify hence occasion irreparable prejudice to the accused, as far as his ability fully respond to the Prosecution case is concerned.

CONCLUSION

41. The proposed new witnesses are necessary to make full answer and Defence for the accused, Mr. Kallon. Their evidence is relevant and probative. They replace a larger

¹⁹ P v Sesay et al., SCSL-04-15-T-739, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non Public Disclosure, 19 March 07, at para 34.

number of witnesses that would be removed, thus shortening and streamlining the Defence. They are all witnesses who have only recently been discovered by the Kallon Defence Team, and thus could not have been included in the earlier witness lists. The information about them is being communicated now, in good time for all the relevant parties to carry out their investigations.

42. It is manifestly in the interests of justice that the Chamber permit the Kallon Defence to vary its witness list as requested.

PRAYER

- 43. In light of the foregoing, the Chamber is prayed to:
 - a. **PERMIT** the variation of the Kallon Defence witness list, by adding the following witnesses: DMK400, DMK 422, DMK 444, DMK 488, DMK 550,DMK 600,DMK 660 and DMK 703,DMK 770 AND DMK 880
 - b. **PERMIT** the variation of the Kallon Defence witness list, by removing the following witnesses: DMK 134, DMK 135, DMK 002, DMK 037, DMK 095, DMK 120, DMK 017, DMK 073, DMK 126, DMK 006, DMK 027, DMK 042, DMK 050, DMK 075, DMK 098, DMK 114, DMK 115. and, to the extent that prayer (a) is granted,
 - c. ORDER the existing protective measures in respect of the Kallon Defence witnesses to apply to the proposed witnesses.

DONE in Freetown on this 25th day of March...., 2008.

For Defendant KALLON,

ry.

The Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao Case No. SCSL -2004-15-T CHARLES TAKU

KENNEDY OGETO

TANOO MYLVAGANAM

LANSANA DUMBUYA

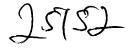
LIST OF AUTHORITIES

A. International Conventions

1. Rules of Procedure and Evidence of the Special Court for Sierra Leone

B. Decisions and Judgments

- (i) Special Court for Sierra Leone:
- 2. P v Sesay et al., SCSL-04-15-T, Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 28 March 07.
- 3. *P v Sesay et al.*, SCSL-04-15-T, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non Public Disclosure, 19 March 07.
- 4. P v Sesay et al., SCSL-04-15-T, Decision and Order on Defence Applications for an Adjournment of 16th February Deadline for Filing Defence Material, 7 Feb. 07.
- 5. *P v Sesay et al.*, SCSL-04-15-T, Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 30 Oct. ()6.
- 6. P v. Sesay et al., SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 Feb. 05.
- 7. Pv. Norman et al., SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 04.



- (ii) International Criminal Tribunal for the Former Yugoslavia:
- 8. *P v. Delalic*, IT-96-21-T, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4 Sept. 97.
- (iii) International Criminal Tribuna, for Rwanda:
- 9. Pv. Nahimana et al., ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 01.
- 10. P v. Nahimana et al., ICTR-99-52-I, Decision on Prosecutor's Application to Add Witness X to the List of Prosecution Witnesses and for Protective Measures, 14 Sept. 01.

C. Motions

- 11. P v Sesay et al., SCSL-04-15-T, Public Kallon Defence Filing in Compliance with Consequential Orders Concerning the Preparation and Commencement of the Defence Case, 16 April 07.
- 12. *P v Sesay et al.*, SCSL-04-15-T, Confidential Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 5 March 07.
- 13. P v Sesay et al., SCSL-04-15-T, Kallon Defence Application to Vary the 16 February 2007 Filing Date, 28 Jan. 07.
- 14. *P v Sesay et al.*, SCSL-04-15-T, Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 Jan. 07.



SPECIAL COURT FOR SIEFRA LEONE

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Court Management Section - Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Goao
Case Number: SCSL-2004-15-T
Document Index Number: 1064
Document Date 25th March, 2008
Filing Date: 25th, March, 2008 at 09:30am
Number of Pages: 13
Page Numbers: 25153-25156
Document Type: -
□ Affidavit
□ Indictment
□ Motion
□ Order
□ Other
□ Reply
□ Response
☐ Application

Document Title: Kallon Request For Leave To Vary Witness List And For Respective Protective Measures And Confidential Annexe A

Name of Officer:

Thomas George

Signed: