

TRIAL CHAMBER I (“Trial Chamber”) 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 “Confidential, with *Ex Parte* Under Seal Annex Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures pursuant to Rules 69 and 73bis(E)” filed confidentially by the Office of the Prosecutor (“Prosecution”) on the 10th of March, 2006 (“Motion”);

NOTING the Response to the Motion filed by Defence for the First Accused, Issa Sesay, on the 20th of March, 2006 (“Sesay Response”);

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

NOTING the Response to the Motion filed by Defence for the Third Accused, Augustine Gbao, on the 20th of March, 2006 (“Gbao Response”);

NOTING the Reply filed by the Prosecution on the 27th of March, 2006 (“Reply”);

NOTING the Prosecution “Updated Witness List” filed on the 20th of February, 2006 (“Witness List”);

NOTING the “Prosecution Re-Filed Proposed Order of Appearance of Witnesses – Eighth Trial Session” filed on the 5th of July, 2006;¹

MINDFUL of this Trial Chamber’s jurisprudence on the addition of witnesses to the Prosecution witness list.²

MINDFUL of the various Decisions and Orders of this Trial Chamber concerning protective measures, including the “Decisions on the Prosecutor’s Motion for Immediate Protective Measures

¹ See also *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Order for Public Disclosure of the Identity of Certain Prosecution Witnesses, 2 June 2006.

² For the relevant jurisprudence on this subject, see *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005 (“Decision of the 11th of February, 2005”); *id.*, Decision on Prosecution Request for leave to Call Additional Witnesses, 29 July 2004 (“Decision of the 29th of July, 2004”); See also *Id.*, Decision on Prosecution Request for Leave to Call and Additional Witness and Notice to Admit Witness’ Solemn Declaration pursuant to Rule 73bis(E) and Rule 92bis, 5 April 2006.

for Witnesses and Victims and for Non-Public Disclosure” for each individual accused in the RUF trial³ and, in particular, the “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses” filed on the 5th of July 2004;⁴

MINDFUL of this Trial Chamber’s “Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Orders for Protective Measures” filed on the 6th of April, 2006;

CONSIDERING that, in the said Decision, the Chamber granted the Motion and indicated that a comprehensive and reasoned Decision will be filed in due course;

PURSUANT TO Article 17 of the Statute of the Special Court (“Statute”) and Rules 26bis, 54, 66, 69, 73bis and 75 of the Rules of Procedure and Evidence (“Rules”);

NOW HEREBY ISSUES THE FOLLOWING REASONED DECISION:

I. SUMMARY OF PARTIES SUBMISSIONS

A. *The Motion*

1. Pursuant to Rule 73bis(E) of the Rules, the Prosecution seeks for leave to add proposed witness TF1-371 (“Proposed Witness”) to its current “core” Witness List, and further seeks an order for the extension of the current applicable protective measures for its protected witnesses to the said Proposed Witness and, in particular, that he be categorized as Group I Witness, Category C, namely insider witness.⁵

2. The Prosecution submits that there has been no undue delay in bringing the present Motion and that the identity of the Proposed Witness was known to the Prosecution since 2002 but he was only located and contacted through a source in October 2005. The Prosecution states that,

³ *Prosecutor v. Sesay*, Case No. SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003, *Prosecutor v. Kallon*, Case No. SCSL-03-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003, and *Prosecutor v. Gbao*, Case No. SCSL-03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 10 October 2003.

⁴ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004. See also *id.*, Order to Review Current Protective Measures, 31 March 2006.

⁵ Motion, paras 3, 15-16.

subsequently, only since January 2006 and after various meetings with the Prosecution, did the Proposed Witness agree to collaborate with the Prosecution and to testify at trial.⁶ In addition, the Prosecution submit that the evidence of the Proposed Witness will corroborate existing testimonies and is material and relevant in various areas to this case, including the membership and function of the Supreme Council, the command structure of the RUF, various alleged crimes contained in the Amended Consolidated Indictment and the individual criminal responsibility of all the Accused.⁷

3. The Motion is accompanied by two Annexes, namely a Declaration from the Chief of Investigations concerning the efforts to locate and secure the cooperation of the Proposed Witness,⁸ and a collection of excerpts of his witness statements.⁹ These annexes were filed *ex-parte* and under seal by the Prosecution in order to protect the identity of the Proposed Witness.¹⁰

B. The Sesay Response

4. The Defence submits that the Motion is in form and in substance an *ex-parte* application which denies the Defence any meaningful opportunity to respond to the Prosecution submissions. In particular, the Defence submits that it is not in the position to assess whether the Motion has been brought forward without any undue delay as this is solely based on assertions made by the Prosecution, as well as to assess the level of seniority within the organization of the Proposed Witness because the summary of his evidence provided in the Motion does not amount to reasonable notice of his actual testimony.¹¹ In addition, reiterating its recent submissions as presented in various motions already decided upon by this Chamber, the Defence also submit that by calling the Proposed Witness the Prosecution is intentionally seeking additions to the factual allegations against the Accused.¹²

C. The Gbao Response

5. The Defence submits that the Motion has been brought at a much too late stage of the proceedings, particularly given the wide ranging nature of the Proposed Witness evidence, and that

⁶ *Id.*, paras 10-11.

⁷ *Id.*, paras 9, 12-13.

⁸ *Id.*, Annex 1: Declaration of Gilbert Morisette dated 9 March 2006.

⁹ *Id.*, Annex 2: Statement Extracts.

¹⁰ *Id.*, paras 11-13.

¹¹ *Sesay Response*, see in particular paras 1, 5, 7, 13-17.

¹² *Id.*, paras 8-9, 17.

the *ex-parte* nature of the annexes to the Motion unfairly deprives the Defence of any opportunity to properly consider its merits.¹³

II. THE APPLICABLE LAW

6. Rule 66(A)(ii) of the Rules, on the disclosure of witness statements, provides that the Prosecution shall:

(ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time. [emphasis added]

7. The law governing applications by the Prosecution to vary the witness list and add additional witnesses is Rule 73bis(E) of the Rules, which 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. [emphasis added]

8. This Chamber has, in its previous Decisions set out the guiding principles in respect of the variation of the witness list, reference to which is made herein for the purposes of this Decision.¹⁴ To this end, we have clearly held that, when interpreting the provisions of Rule 66(A)(ii) of the Rules, and articulating the circumstances that give rise to a showing of good cause and the interest of justice, certain factors should be taken into consideration.¹⁵ In so holding, the Chamber adopted the reasoning in the *Nahimana* case of the ICTR 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.

¹³ *Gbao* Response, see in particular paras 1-4, 7.

¹⁴ See Decision of the 29th of July, 2004, *supra* note 2, paras 28-32. See also *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004.

¹⁵ Decision of the 29th of July, 2004 *supra* note 2, para. 29.

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.¹⁶

9. As regards the requirement of good cause being shown, the operative principle is that the Prosecution must advance credible reasons for failing to fulfil, within the time limits imposed by Rule 66(A)(ii), the obligation of disclosing to the Defence the existence of these witnesses and, in particular, must satisfy the Chamber that it has met these stipulated criteria:

- i) That the circumstances surrounding these reasons as advanced by the Prosecution are directly related, and are material to the facts in issue;
- ii) That the facts to be provided by these witnesses in their statements and eventually in their testimony, are relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice;
- iii) That granting leave to call new witnesses and the disclosure of new statements, will not unfairly prejudice the right of the accused to a fair and expeditious trial as guaranteed by Article 17(4)(a) and 17(4)(b) of the Statute as well as by the provisions of Rules 26bis of the Rules;
- iv) That the evidence the Prosecution is now seeking to call, could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence on their part.¹⁷

III. DELIBERATIONS

A. On the Initial Public Filing of the *Sesay* Response

10. The *Sesay* Response was initially filed publicly, due to an internal oversight by the Defence. Subsequently, the said Response was reclassified as confidential by the Court Management Section. In its Reply, the Prosecution complained about the possible breach of confidentiality arising from this

¹⁶ *Prosecutor v. Nahimana et al.*, 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. See also *id.*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 5. In addition, see also *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003, para. 14. See also *Prosecutor v. Simba*, Case No. ICTR-01-76-I, Decision on the Prosecution's Motion to Vary the Witness List, 27 August 2004, para. 7.

¹⁷ Decision of the 11th of February, 2005, *supra* note 2, paras 34-35.

oversight and, in particular that this might lead to the possible identification of the Proposed Witness.¹⁸

11. The Chamber wishes to emphasize that, although the initial confidentiality of a Motion does not necessarily require that any subsequent submission should be filed confidentially however, after a careful review of the contentions on both sides, the Chamber finds that a potential for a breach of confidentiality did exist. However, the Chamber is satisfied that the prompt reclassification of the Sesay Response by the Court Management Section did reduce the likelihood of further damage to the Prosecution and, in particular, to the Proposed Witness. The Chamber, therefore, enjoins all parties to exercise the utmost diligence when dealing with confidential issues and, in particular, when the identification of potential witnesses is involved.¹⁹

B. On the *Ex-Parte* Nature of the Annexes to the Motion

12. Both the Defence for the First and the Second Accused, in their respective responses, contend that the *ex-parte* nature of the annexes to the Motion effectively deprived them of the possibility of adequately addressing the Prosecution submissions and, in particular, of evaluating whether the addition of the Proposed Witness is in the interest of justice and whether good cause has been shown for the subsequent disclosure of his statements to the Defence.

13. In the Chamber's opinion, generally *ex-parte* applications are warranted when they are made in the interest of justice and where their disclosure to the other party in the proceedings would either prejudice the applicant or other persons related to the application, for instance, in cases where witness protection is sought.²⁰ Examples of *ex-parte* applications may include a request for the review of an Indictment, *subpoenas* and the freezing of assets or, as in the present case, certain applications involving the protection of victims and witnesses.²¹

¹⁸ Reply, paras 2-5.

¹⁹ See also *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL04-16-T, Order Regarding the Disclosure of the Identity of a Protected Witness TF1-081, 8 March 2005.

²⁰ *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 39; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motions to Exclude Testimony of Prosecution Witness ADE, 30 March 2006, para. 8.

²¹ For an overview of the various circumstances in which an *ex-parte* proceeding might be appropriate, see *Prosecutor v. Simic et al.*, supra note 20, para. 41. See also, as an example, *Prosecutor v. Taylor*, Case No. SCSL03-01-I, Decision on Prosecution's Application to Amend the Indictment and on Approval of Amended Indictment, 16 March 2006. See also *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Confidential and *Ex-Parte* Motion for Subpoenas Directed to Defence Witnesses, 20 January 2006. See also *Prosecutor v. Dyilo*, Case No. ICC-01/04-01/06, Decision

14. With specific reference to the *ex-parte* filing of the annexes to the Motion, the Chamber finds that in the particular circumstances of the Proposed Witness, disclosure of the information contained in such annexes to the Defence might be prejudicial to him in that it may lead to a disclosure of his identity or his present whereabouts pending an application for protective measures.²² In addition, based on the applicable standards for applications of this nature, the Chamber is satisfied of the sufficiency of the information provided by the Prosecution in the Motion for the Defence to address properly the merits thereof.

15. Having regard to the principle requiring that criminal trials be conducted in public and consistent with the established jurisprudence of the Court,²³ the Chamber deems it necessary that this Decision should now be filed publicly, omitting, if necessary and as required, any information that could disclose the identity of the Protected Witness.

C. On the Merits of the Motion

16. Consistent with the relevant jurisprudence on this issue, the Chamber emphasizes that in determining the merits of the present application, the factors to be considered include mainly, the materiality and relevance of the Proposed Witness testimony, the complexity of the case, the stage the proceedings have reached and the reasons for the late discovery of the evidence. It is significant to note that these factors should be ultimately balanced against the right of the Accused to have adequate time and facilities to prepare their Defence and the right to be tried without undue delay.²⁴

Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, paras 8-20.

²² The filing of *ex-parte* annexes to Motions filed *inter partes* is a common procedure with reference to certain issues regarding protective measures for victims and witnesses. See for instance *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on *Ex Parte* Motion, 10 November 2004. The Chamber notes that the Prosecution previously filed, in the CDF case, certain witness statements on an *ex-parte* basis in order to protect the identity of its witnesses. See *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004.

²³ See, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, paras 19-21. See also *Prosecution v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005, para. 22. See also *Prosecutor v. Muwunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, paras 2-4.

²⁴ In addition to the jurisprudence cited above, see also, more recently, *Prosecutor v. Muwunyi*, Case No. ICTR-2000-55A-T, Decision on Accused's Motion to Expand and Vary the Witness List, 28 March 2006, para. 11. See also *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His List of Witnesses, 14 October 2004, para. 11.





17. As to the specific contentions of Counsel for the Second Accused about the prosecutorial practice of disclosure, the Chamber reiterates the legal distinction between the obligation of the Prosecution to disclose evidence designed to establish the material facts underlying the charges and allegations in the indictment and the obligation to set out the material facts constituting the charges against the Accused in the indictment and as to the form and contents of the indictment.²⁵

18. Recalling the general operative principles in determining applications of this type and the specific factors to be taken into account, the Chamber finds significantly as follows:

- (i) that the evidence of the Proposed Witness appears to be material and relevant to various crimes alleged in the Amended Consolidated Indictment;
- (ii) that by reason of (i), the facts as contained in the statements of the Proposed Witness may contribute to serving the overall interest of justice;
- (iii) that granting leave to the Proposed Witness will not unfairly prejudice the right of the Accused to a fair and expeditious trial as governed by Article 17 of the Statute and Rule 26bis of the Rules;
- (iv) that the evidence in question could not reasonably have been discovered or made available earlier notwithstanding the exercise of due diligence on the part of the Prosecution.

19. Based on the foregoing considerations and in the light of the significant findings herein, the Chamber therefore holds that the good cause has been shown by the Prosecution warranting the granting of the Motion and that the addition of the Proposed Witness to its current Witness List serves the interest of justice. The Chamber further holds that, given the position that the Witness would have had within the RUF at the relevant time, the current applicable protective measures for Prosecution insider witnesses shall be immediately applicable to the Proposed Witness and, in particular, that he shall be referred to by the pseudonym of Witness TF1-371.

20. However, in order to ensure that the Defence adequately prepare for the examination of the said witness, it is the view of the Trial Chamber that the redacted statement of Witness TF1-371 be immediately disclosed by the Prosecution and that adequate time be accordingly granted to the Defence.

²⁵ See, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041, 20 March 2006, para. 11.

FOR THE ABOVE REASONS, THE CHAMBER

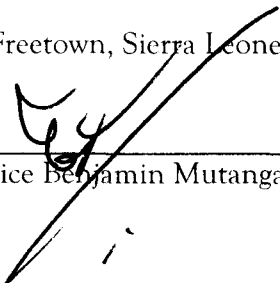
REITERATES its Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Orders for Protective Measures of the 6th of April, 2006,

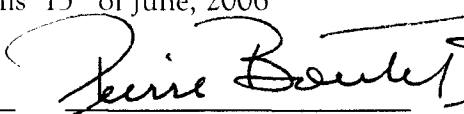
GRANTS the Prosecution Motion; and consequentially

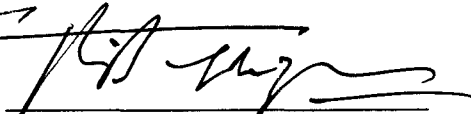
ORDERS as follows:

- 1) That Witness TF1-371 be added to the current Prosecution "Core" Witness List;
- 2) That Witness TF1-371 be categorized as Group I Witness, Category C, namely Insider Witness, and accordingly be granted the relevant protective measures of the Decision on Prosecution Motion for Modification of Protective Measures for Witnesses of the 5th of July, 2004;
- 3) That the redacted statements of protected Witnesses TF1-371 be immediately disclosed to the Defence;
- 4) That the Prosecution call Witness TF1-371 to testify at the end of the presentation of the Prosecution case, but not earlier unless otherwise agreed to by the Defence.

Done at Freetown, Sierra Leone, this 15th of June, 2006


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I


Hon. Justice Bankole Thompson

