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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

Before:

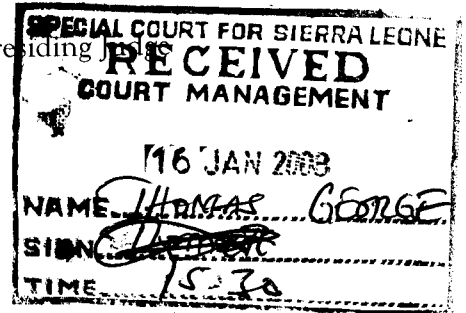
Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar:

Mr. Herman von Hebel

Date:

16th of January 2008



PROSECUTOR

Against

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

Public Document

**DECISION ON KALLON REQUEST FOR LEAVE TO VARY
WITNESS LIST AND FOR PROTECTIVE MEASURES**

Office of the Prosecutor:

Peter Harrison
Reginald Fynn

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Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Charles Taku
Kennedy Ogetto
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Court Appointed Counsel for Augustine Gbao:

John Cammegh
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TRIAL CHAMBER I ("Trial Chamber") 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 Kallon Request for Leave to Vary Witness List and for Protective Measures and Annex A filed by Defence Counsel for the Second Accused, Morris Kallon, ("Defence") on the 11th of December 2007 ("Request");

NOTING the Response to the Motion filed by the Office of the Prosecutor ("Prosecution") on the 7th of January 2008 ("Response");

NOTING that no Reply thereto was filed by the Defence;

MINDFUL of the Witness List filed by the Defence on the 16th of April 2007;

MINDFUL of the Decisions of this Trial Chamber concerning the variation of witness lists and the granting of protective measures, including the Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, filed on the 16th October 2007 with Corrigendum filed on the 18th of October 2007 and the Decision on Gbao Request for Leave to Call Two Additional Witnesses, filed on the 10th of January 2008

PURSUANT to Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 26bis, 34, 69, 73^{ter} and 75 of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

1. The Request

1. The Defence seeks leave of the Trial Chamber to add five additional witnesses to its Witness List. The proposed witnesses have been given the pseudonyms DMK-159, DMK-160, DMK-161, DMK-162 and DMK-163.¹

¹ Request, para 2.

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2. The Defence also proposes to withdraw seventeen witnesses from its Witness List. The witnesses sought to be withdrawn are DMK-024, DMK-143, DMK-151, DMK-158, DMK-008, DMK-155, DMK-059, DMK-020, DMK-028, DMK-031, DMK-033, DMK-019, DMK-043, DMK-149, DMK-097, DMK-110 and DMK-103.²
3. The Defence submits that as a matter of law, a Party making an application to call additional witnesses must show that such an application is supported by good cause and that the addition of the proposed witnesses would serve the interests of justice.³ The Defence submits that in reaching a decision on the issue, the Chamber should be satisfied, *inter alia*, as to the materiality of the proposed testimony, the potential prejudice to the Defence which would be caused by denial of the application, whether due diligence has been exercised by the Party moving the application and the question of whether the timing of the application might cause prejudice to any of the other Parties.⁴
4. In relation to proposed witness DMK-159's non-inclusion in its previous Witness Lists, the Defence states that it was not until June 2007 that the witness agreed to meet with its investigators and it was therefore impossible to include him on the Witness List filed in April 2007.⁵ The Defence states that DMK-159 is an international witness who was attached to UNAMSIL and was stationed at the Makeni-Magburaka axis at times relevant to the Indictment.⁶ It is stated by the Defence that he will give unique testimony in relation to the command structure and discipline of the RUF in that area as well as the Second Accused's relationship with UNAMSIL and the civilian population.⁷ Although DMK-159 is stated to be an international witness, no information as to his geographical location is provided.
5. DMK-160 was not included in the April 2007 Witness List because, according to the Defence, contact with him was only established in September 2007,⁸ and that he did not agree to

² *Ibid.*, para 3.

³ *Ibid.*, para 10.

⁴ *Ibid.*, para 11.

⁵ *Ibid.*, para 21.

⁶ *Ibid.*, para 21-23 and Annex A.

⁷ *Ibid.*

⁸ *Ibid.*, para 24.

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testify until late November 2007.⁹ The Defence further discloses that DMK-160 was a Kamajor attached to the CDF forces in Gerihun, and it is intended that he will give unique exculpatory testimony in relation to the Prosecution's allegation that the Second Accused was involved in the murder of the Paramount Chief Demby in Gerihun.¹⁰

6. The Defence states that it became aware of proposed witness DMK-161 during interviews with other witnesses but was unable to locate him and take his statement until November 2007,¹¹ and that DMK-161 was an RUF commander during the period of time relevant to the Indictment. According to the Defence, it is intended that he will give unique evidence in relation to the structure of the RUF command and the abduction of UNAMSIL personnel as well as exculpatory evidence in respect of the alleged involvement of the Second Accused in mining and robbery in Kono and the burning of Koidu.¹²

7. Furthermore, the Defence discloses that DMK-162 was not located until November 2007.¹³ The Defence states that he will give exculpatory evidence in relation to the Second Accused's alleged involvement in murders at Tumbodu and that no other witness currently on the Witness List is capable of providing such evidence.¹⁴

8. In addition, the Defence avers that DMK-163's location was not established by the Defence investigators until November 2007,¹⁵ and that during the conflict, DMK-163 was an RUF radio operator and it is expected that he will give evidence calling into question the veracity of testimony of Prosecution witnesses TF1-360 and TF1-361 in relation to their own roles within the RUF.¹⁶

9. The Defence contends that failures on the part of the Prosecution in relation to giving notice of allegations against the Second Accused have created a situation of "considerable complexity" for the Defence in its investigations and that this fact ought to be taken into consideration by the Chamber in evaluation of the merits of the application.¹⁷ It further asserts

⁹ *Ibid.*, para 24.

¹⁰ *Ibid.*, paras 24-26 and Annex A.

¹¹ *Ibid.*, para 27.

¹² *Ibid.*, para 28 and Annex A.

¹³ *Ibid.*, para 27.

¹⁴ *Ibid.*, para 29 and Annex A.

¹⁵ *Ibid.*, para 27.

¹⁶ *Ibid.*, para 30 and Annex A.

¹⁷ *Ibid.*, para 16.

that because its application is brought “at least four months” before the proposed witnesses are likely to testify, neither the Prosecution nor the other Accused will be prejudiced by being deprived of adequate time for investigation.¹⁸

10. The Defence also states that because the expected testimony of the proposed witnesses means that other witnesses can now be withdrawn, the addition of these proposed witnesses will serve to expedite the trial.¹⁹

11. The Defence also requests that the pre-existing protective measures granted to witnesses in the “core” Witness List be applied to the proposed additional witnesses on the basis that disclosure of their identities would place them in unnecessary jeopardy, would violate the rights of the Second Accused and would deprive the Chamber of their material testimony.²⁰

2. The Response

12. The Prosecution does not object to the Defence request for leave to call additional witnesses but rejects the Defence contention that there has been a failure on the part of the Prosecution to give the Defence adequate pre-trial notice of allegations in the Indictment and Pre-Trial Briefs.²¹

II. APPLICABLE LAW

1. Addition of Witnesses

13. Rule 73ter (E) sets out the criteria for variation of a Defence witness list during the Defence phase of the trial. The Rule provides that:

After the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, 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.

14. This Chamber has consistently affirmed that in order to ground a case for variation of its witness list in accordance with Rule 73ter (E), the Defence must show “good cause” and that such

¹⁸ *Ibid.*, para 17.

¹⁹ *Ibid.*, para 18.

²⁰ *Ibid.*, paras 31-33.

²¹ Response, para 2.

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variation is “in the interests of justice”.²² We have held further, based on our own previous decisions and relying on jurisprudence of the ICTR, that the submissions of the Party seeking to modify its Witness List should be examined in the light of such factors as, *inter alia*, the materiality of the testimony, the complexity of the case, the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the opposition to make an effective cross-examination of the proposed testimony, and the justification offered for the addition of the witness.²³

2. Protective Measures

15. As regards protective measures, the Chamber recalls that it has the discretion under Rule 75 to order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused. However, we have consistently held that a condition precedent for exercising this discretion is that the Party seeking protective measures must indicate an objective basis for assessing whether a threat to the witnesses' security exists.²⁴

²² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Two Additional Witnesses and for Order for Protective Measures, 10 January 2008, para 12. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, 16 October 2007, paras 11, 14.

²³ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Two Additional Witnesses and for Order for Protective Measures, 10 January 2008, para 12. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, 16 October 2007, para 14 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Request to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para 26, quoting *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumwa*, ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003, para 14. See too *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004, paras 28-32, *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, 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 and *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para 5.

²⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Two Additional Witnesses and for Order for Protective Measures, 10 January 2008, para 13. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, 16 October 2007, para 13 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, 1 March 2007, para 31.

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III. DELIBERATIONS

1. Preliminary Issue

16. The Chamber finds it unnecessary to address the allegations of failure to give adequate pre-trial notice made by the Defence and denied by the Prosecution in its deliberations.

2. Addition of Witnesses

17. The Chamber opines that the complexity of a trial may affect the ease with which material witnesses can be identified and their cooperation secured, and that in trials of this magnitude and complexity, some potential witnesses may be expected to manifest a reluctance to cooperate with investigators and to testify before the Court.²⁵ The Chamber accepts the reasons proffered by the Defence to justify the late addition of DMK-159, DMK-160, DMK-161, DMK-162 and DMK-163 to the Second Accused's Witness List and is satisfied that the Defence has demonstrated due diligence and shown good cause.

18. The Chamber has examined the summaries of the proposed testimonies of DMK-159, DMK-160, DMK-161, DMK-162 and DMK-163 provided by the Defence. We are satisfied that these witnesses will give relevant and material testimony as to the role of the Second Accused in relation to multiple counts of the Indictment. The Chamber also wishes to emphasise that the late addition of witnesses can potentially endanger the right of the opposing Party to make an effective cross-examination.²⁶ However, it appears that in this case there is ample time to allow the Prosecution and the other Defence teams to adequately prepare for cross-examination of the proposed witnesses. Accordingly, the Chamber is satisfied that the addition of the proposed witnesses is in the interests of justice.

²⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Two Additional Witnesses and for Order for Protective Measures, 10 January 2008, para 14 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, 16 October 2007, para 16.

²⁶ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Two Additional Witnesses and for Order for Protective Measures, 10 January 2008, para 16. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Request for Leave to Call Additional Witnesses and for Order for Protective Measures, 16 October 2007, para 18.

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3. Protective Measures

19. With regard to protective measures, the Chamber recalls its own previous findings that the security situation in Sierra Leone and West Africa warrants the grant of protective measures to victims residing within West Africa.²⁷ For this reason, the Chamber has ordered blanket protective measures to all Defence witnesses in this category. Proposed witnesses DMK-160, DMK-161, DMK-162 and DMK-163 fall within this category, and in the light of the facts that the security situation has not changed and that the Prosecution have made no objection to the grant of such measures, the Chamber decides to grant such measures in respect of these proposed witnesses

20. However, the Chamber notes that proposed witness DMK-159 is an international witness. As noted above, no information has been provided by the Defence as to this witness' place of residence or why he is in need of protective measures. Consistent with our previous decisions relating to international witnesses and the restrictive nature of our protective measures privilege, the Chamber declines to grant protective measures in respect of DMK-159 until further information is supplied to the Chamber in relation to his place of residence and, in the event that he is resident outside the West African region, a *prima facie* showing is made substantiating his need for protection.²⁸

²⁷ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Motion for Immediate Protective Measures, 30 November 2006, para 21-24, *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, paras 27-30, and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witness, 1 March 2007, paras 30-32.

²⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Motion for Immediate Protective Measures, 30 November 2006, para 24(ii), *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 31 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Gbao Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witness, 1 March 2007, para 34.

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IV. DISPOSITION

FOR THESE REASONS, THE CHAMBER

GRANTS leave to call additional witnesses DMK-159, DMK-160, DMK-161, DMK-162 and DMK-163 and to withdraw witnesses DMK-024, DMK-143, DMK-151, DMK-158, DMK-008, DMK-155, DMK-059, DMK-020, DMK-028, DMK-031, DMK-033, DMK-019, DMK-043, DMK-149, DMK-097, DMK-110 and DMK-103; and

CONSEQUENTIALLY ORDERS

- 1) that the existing protective measures ordered in this case for the Defence witnesses be extended to DMK-160, DMK-161, DMK-162 and DMK-163; and
- 2) that within 15 days of the present Decision, the Defence file with the Court, with redactions as necessary, a “core” and a “back-up” Updated Witness List of all the witnesses that it intends to call, including:
 - (a) the name or, where appropriate, pseudonym of each witness;
 - (b) a detailed summary of each witness’ testimony. The summary should, subject to any protective measures that have been ordered by the Chamber, be sufficiently descriptive to allow the Prosecution and the Chamber to fully appreciate and understand the nature and content of the proposed testimony;
 - (c) the points of the Indictment about which each witness will testify, including the exact paragraph/s and the specific count/s;
 - (d) the estimated length of time for each witness to testify and the language in which the testimony is expected to be given; and

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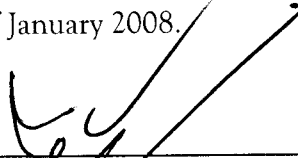
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- (e) an indication of whether the witness will testify in person or pursuant to Rule 92bis, 92ter or 92quater of the Rules.

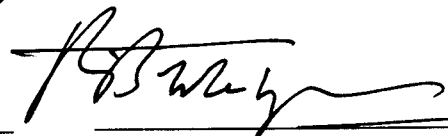
Done at Freetown, Sierra Leone, this 16th of January 2008.



Hon. Justice Pierre Boutet



Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson

