



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

TRIAL CHAMBER I

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

Registrar: Robin Vincent

Date: 10<sup>th</sup> of June 2005

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

DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL AN ADDITIONAL EXPERT WITNESS

Office of the Prosecutor:

Luc Côté  
Lesley Taylor  
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

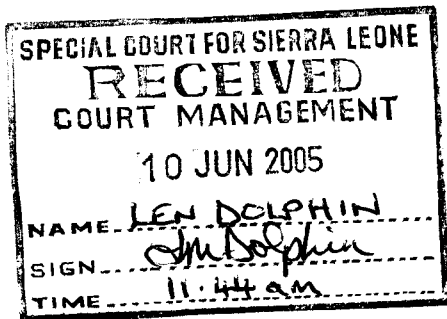
Wayne Jordash  
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray  
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O'Shea  
John Cammegh



TRIAL CHAMBER I (“The 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 *Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis(E)*, filed on the 4<sup>th</sup> of May 2005 (“Motion”) by the Office of the Prosecutor (“Prosecution”);

NOTING that the Defence did not file any response to the Motion within the prescribed time limits;

NOTING the *Order for Compliance of Prosecution with Rule 94bis* of the 9<sup>th</sup> of March 2005;

CONSIDERING the Materials Filed Pursuant to the Consequential Order to the Decision on Further Renewed Witness List Dated 13 April 2005, filed by the Prosecution on the 5<sup>th</sup> of May 2005, and in particular Annex D thereof, namely the Prosecution Core Witness List;

PURSUANT TO Rules 54, 66(A)(ii), 73bis(E), and 94bis of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”);

ISSUES THE FOLLOWING DECISION:

#### A) The Prosecution Submissions

1. Pursuant to Rule 73(E) of the Rules the Prosecution seeks leave to add a proposed expert witness, Mrs. Zainab Hawa Bangura to its current witness list as an expert witness on the issue of forced marriage. Contextually, the Prosecution also seeks to disclose to the Defence, pursuant to Rules 66(A)(ii) and 94bis of the Rules, the proposed expert report of Mrs. Bangura.<sup>1</sup>

2. In support of its request for leave, the Prosecution submits that the strong relevance and materiality of the testimony of the proposed expert witness to the Prosecution case demonstrates good

<sup>1</sup> The Prosecution attaches to the Motion the curriculum vitae of Mrs. Bangura as well as her proposed expert report, respectively, as Annex A and B.

cause, is in the interest of justice and will not cause any unfair prejudice to the Defence as the proposed expert is not expected to testify until a later stage in the proceedings.<sup>2</sup>

### B) Defence Response

3. The Defence did not file any response to the Motion.

### C) The Applicable Law

4. Rule 66 of the Rules of Procedure and Evidence of this Court governs disclosure of materials by the Prosecution to the Defence. In particular, Rule 66(A)(ii) provides that the Prosecutor shall:

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.

5. It is noteworthy that this Rule has been a recurring subject of the evolving jurisprudence of this Court.<sup>3</sup> As regards the nature and scope of the disclosure obligations imposed by the Rule, this Chamber previously held that “[i]t is of course the role of the Trial Chamber to enforce disclosure obligations in the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute, to examine or have examined, the witnesses against him or her, are respected”.<sup>4</sup>

<sup>2</sup> Motion, paras 26-31.

<sup>3</sup> See, for example: *Prosecutor v. Sesay et al.*, Case No. SCSL04-15-T, Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated Respectively 9<sup>th</sup> October 2004, 19<sup>th</sup> and 20<sup>th</sup> October 2004 and 10<sup>th</sup> January 2005, 3 February 2005; *Id.*, *Sesay* - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004. See also *Prosecutor v. Brima, Kamara and Kanu*, Case No SCSL04-16-PT, *Kanu* - Decision on Motions for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, 30 July 2004; *Id.*, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or Rule 68, 4 May 2005.

<sup>4</sup> *Prosecutor v. Norman et al.*, Case No. SCSL04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 7.

6. Specifically, also, Rule 94bis provides for the disclosure of the full statement of an expert witness. It states as follows:

(A) Notwithstanding the provisions of Rule 66(A), Rule 73 bis (B)(iv)(b) and Rule 73 ter (B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:

- (i) It accepts the expert witness statement; or
- (ii) It wishes to cross-examine the expert witness.

(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

7. Equally relevant is the law governing requests by the Prosecution to vary the witness list and add additional witnesses. It is Rule 73bis(E), which reads thus:

(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.

8. In its various Decisions on previous requests by the Prosecution for leave to add proposed witnesses to its witness lists, this Chamber has reiterated the guiding principle for this type of application, namely, that the Prosecution must demonstrate that such requests are justified by “good cause” and are in the “interests of justice”.<sup>5</sup> We have also observed that additional factors to be taken into account when considering the circumstances giving rise to “good cause” and the “interests of justice” include the time of disclosure of the relevant witness information to the Defence and the probative value of the proposed testimony.

<sup>5</sup> See *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July, 2004; *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004; See also *Prosecutor v. Nahimana*, 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; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Prosecution’s Motion for Leave to Add a Handwriting Expert to His Witness List, 14 October 2004.

9. More recently, further elaborating on these criteria, we held that the Prosecution must demonstrate the following:

- “i) That the circumstances surrounding these reasons or explanations 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, at this stage, 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.”<sup>6</sup>

#### D) Deliberation

10. The Prosecution submits that the issue of forced marriages, as charged in Count 9 of the Amended Consolidated Indictment, warrants an expert opinion being presented to the Trial Chamber. The Prosecution further submits that it was only in January 2005 that it managed to identify Mrs. Bangura as a suitable local expert to testify as to the specific context of the crime of forced marriage. Mrs. Bangura, according to the Prosecution, is an internationally renowned civil and gender activist and was only recently able to submit the final draft of her report due to her pressed schedule of commitments overseas. The Prosecution, it has to be noted, does not seek within its Motion any specific protective measures for such proposed expert witness.

11. In the absence of any evidence to the contrary, this Chamber finds the explanation put forward by the Prosecution as to the difficulties encountered in securing the cooperation of the proposed expert witness and the final preparation of her report acceptable.

12. Significantly, however, the Trial Chamber finds preliminarily that the evidence of the proposed Expert Witness, Mrs. Zainab Hawa Bangura, seems relevant for the Prosecution’s case with

respect to Count 9 of the Amended Consolidated Indictment. The Chamber wishes to emphasize that its aforementioned preliminary finding does not in any way relate to key procedural issues about eligibility to give expert testimony or the admissibility of such testimony or any substantive evidentiary aspects or evaluation of the proposed testimony.

13. In applications of this nature, especially relating to proposed expert evidence, the Chamber must seek to balance, on one hand, the pre-eminent statutory right of the accused persons to a fair and expeditious trial and, on the other hand, the paramount obligation and attendant burden of the Prosecution to prove the guilt of the accused beyond all reasonable doubt.<sup>7</sup> To this end, the Prosecution must enjoy the latitude to furnish the Court with any expert evidence that would contribute to fulfilling its mission of ensuring that justice is done to all parties.

14. The Chamber, therefore, is of the opinion that good cause has been shown by the Prosecution and that it is in the interests of justice to add Mrs. Zainab Hawa Bangura as an Expert Witness to the current Prosecution Core Witness List. Likewise, the Chamber holds that the Defence will have adequate time and resources to investigate and prepare for the cross-examination of the Expert Witness, if it wishes to do so, in the light of the Prosecution's indication that it will only call her upon to testify at the end of its case.

15. Accordingly, with reference to the specific request of the Prosecution for the disclosure of the proposed expert report, already presented as an annexure to the Motion, the Chamber also holds that good cause exists for its disclosure to the Defence and its official filing with the Chamber pursuant to Rules 66(A)(ii) and 94bis of the Rules.

#### E) Conclusion

In the light of the foregoing considerations, THE CHAMBER GRANTS the Motion and ORDERS as follows:

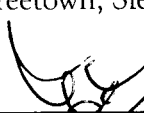
- 1) That the Prosecution is permitted to add Mrs. Zainab Hawa Bangura to its current Core Witness List as an Expert Witness;

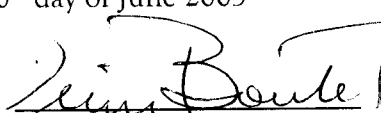
<sup>6</sup> *Prosecutor v. Sesay et al.*, Case No. SCSL04-15-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005.

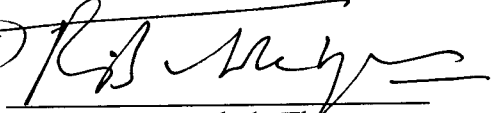
<sup>7</sup> *Prosecutor v. Norman et al.*, Case No. SCSL04-14-T, Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Hanglund, 1 October 2004, para. 22.

- 2) That the Prosecution disclose to the Defence and file with the Trial Chamber her expert report immediately;
- 3) That the Defence, within fourteen days of the receipt of the expert report, shall file a notice to the Trial Chamber indicating whether they accept the expert report or wish to cross-examine the Expert Witness;
- 4) That the Prosecution may call this Expert Witness to testify in the RUF trial at the end of the presentation of the Prosecution case, but not earlier unless otherwise agreed to by the Defence, should the Defence intend to cross-examine the said Expert Witness;
- 5) That these Orders be carried out.

Done in Freetown, Sierra Leone, this 10<sup>th</sup> day of June 2005

  
\_\_\_\_\_  
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]

