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(26957-26970)

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SPECIAL COURT FOR SIERRA LEONE

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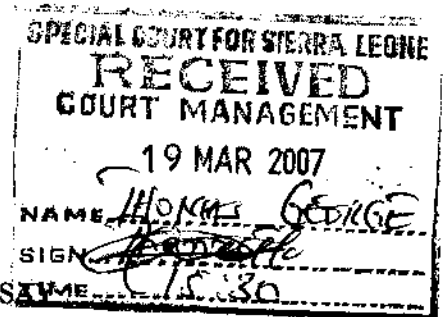
TRIAL CHAMBER I

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

Acting Registrar: Herman von Hebel

Date: 19th of March 2007

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



Public Document

DECISION ON KALLON DEFENCE MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:

James C. Johnson
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
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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") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet, and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of the Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure filed publicly by Defence Counsel for the Second Accused, Morris Kallon ("Defence") on the 18th of January 2007 ("Motion");

NOTING the Response filed by the Office of the Prosecutor ("Prosecution") on the 26th of January 2007 ("Response") and the Reply thereto filed by the Defence on the 31st of January 2007 ("Reply");

RECALLING the Order for Defence Submissions and Interim Order on Kallon Motion for Immediate Protective Measures filed on the 1st of March 2007 ("Order");¹

NOTING the Defence Submissions on Kallon Motion for Immediate Protective Measures filed on the 7th of March 2007 ("Defence Submissions"), and the Prosecution Submission filed in response on the 8th of March 2007;

MINDFUL of the Scheduling Order Concerning the Preparation and the Commencement of the Defence Case filed on the 30th of October 2006 and the Decision and Order on Defence Applications for an Adjournment of 16th of February Deadline for Filing of Defence Material filed on the 7th of February 2007;

MINDFUL of the Decisions and Orders of this Trial Chamber concerning protective measures for prosecution witnesses, including the Decisions on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure for each individual accused in the RUF trial² and, in particular, the Decision on Prosecution Motion for Modification of Protective Measures for Witnesses filed on the 5th of July 2004;³

¹ A corrigendum to this Order was later filed (*Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Corrigendum - Order for Defence Submissions and Interim Order on Kallon Protective Measures, 5 March 2007).

² *Prosecutor v. Sesay*, SCSL03-05-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*, SCSL03-07-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*, SCSL03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003.

³ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004.

MINDFUL of the Chamber's Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 30th November 2006 ("Sesay Decision") and its Decision on Sesay Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 1st of March 2007; and of its Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, filed on the 1st of March 2007 ("Gbao Decision");

PURSUANT to Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 26bis, 34, 53, 54, 69 and 75 of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

A. *The Motion*

1. Pursuant to Rules 69 and 75, the Defence seeks protection for all its categories of witnesses who have not affirmatively waived their right to protective measures and who fall into one of the following four categories:

- a) Witnesses who reside in Sierra Leone
- b) Witnesses who presently reside in other countries in West Africa.
- c) Witnesses who reside outside Sierra Leone who have relatives in Sierra Leone
- d) Witnesses who reside outside West Africa.⁴

2. The Defence states that the considerations that the Chamber found relevant to the Sesay witnesses in its recent decision granting protective measures⁵ apply to the Kallon witnesses in establishing a *prima facie* case for the issuing of certain protective measures. The Defence submits that potential witnesses for its case fear the social and economic consequences of testifying for the Defence, including reprisals from ex-combatants seeking to sabotage the Defence case, as well as public condemnation for associating with the RUF. In addition, potential witnesses living in areas

⁴ Motion, para 13.

⁵ Sesay Decision.

where there is substantial anti-RUF sentiment also fear condemnation, social exclusion, and physical violence if others learn of their intention to testify on behalf of the Defence.⁶

3. The Defence notes that the proceedings take place in Sierra Leone, which it submits should be an important factor in weighing the need for granting protective measures to victims and witnesses.⁷ Witnesses have reported stigmatization, intimidation and insults to Kallon investigators and legal assistants. The Defence also describes the arrest of a Kallon Defence Investigator and a witness in a province of Sierra Leone following false allegations made to the police by a member of the community, who indicated that he had made the allegations because of the witness's status as an ex-RUF combatant.⁸

4. The Defence relies for objective evidence on materials submitted by the Prosecution and the Sesay Defence in support of their motions for protective measures, including the Report of the Secretary-General of the United Nations Integrated Office, Security Council Resolutions 1657, 1682 and 1683 and the statements of Mr. Morie Lengor and Dr. Alan White.⁹ The Defence notes that the Chamber recently affirmed that there had been no changes in the security situation that would warrant a variation of the protective measures regime.¹⁰ The Defence observes that this evidence supports the concerns of witnesses in West Africa and particularly Sierra Leone.¹¹

5. Consequently, the Defence requests the Trial Chamber to implement the following protective measures:

- a) All protected witnesses should testify with the use of a screening device from the public;
- b) There should be no photographing, audio or video recording, sketching or reproducing in any other manner of images of such witnesses without prior leave of the Trial Chamber;
- c) The Kallon Defence should be allowed to withhold the name or any other identifying data of its witnesses until 42 days prior to their testimony at trial;
- d) The Registry should seal the names or other identifying data of all Kallon Defence Witnesses, and this information should not be included in any of the public records of the Special Court;
- e) The Kallon Defence should designate a pseudonym for each of its witnesses, to be used during pre-defence case disclosure of witness materials and other materials and during trial procedures;

⁶ Motion, para 8.

⁷ *Ibid.*, para 9.

⁸ *Ibid.*, para 10.

⁹ *Ibid.*, para 11.

¹⁰ *Ibid.*, referring to *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group 1 Witnesses TF1-042 and TF1-044, 23 May 2006 ("Variation Decision").

The page contains three handwritten signatures or initials in black ink. The first is a large, stylized cursive signature. The second is a set of initials, possibly 'RS'. The third is a large, bold letter 'B'.

- f) The names or other identifying data of Kallon Defence witnesses should not be disclosed to the public or the media, during and after the conclusion of the proceedings;
- g) The Prosecution, Sesay Defence and Gbao Defence should not share or reveal any disclosed witness related non-public materials to any entity other than the Kallon Defence;
- h) The Prosecution should maintain a log indicating the name, address and position of anyone who receives a Defence witness statement, interview report, summary of expected testimony, or any non-public material, as well as the date of disclosure; the Prosecution shall ensure that individuals to whom information is disclosed adhere to the non-disclosure order;
- i) The Prosecution, Sesay Defence and Gbao Defence should, at the conclusion of the proceedings, return to the Registry all disclosed witness-related materials which have not become part of the public record;
- j) The Prosecution, Sesay Defence and Gbao Defence should make a written request to the Trial Chamber or Judge, for permission to contact any protected witness or relative thereof, and this request shall then be served on the Kallon Defence. At the direction of the Trial Chamber or Judge, the Kallon Defence shall contact the protected person and ask for their consent, or the consent of their parents or guardian if that person is under the age of 19 to an interview by the Prosecution, Sesay Defence or Gbao Defence and shall undertake the necessary arrangements to facilitate such contact.¹²

6. The Defence acknowledges that two aspects of its motion were denied by the Chamber in the *Sesay* Decision; namely its request that the measures extend to witnesses who reside outside of West Africa, and the order it requests in j) regarding contacting protected witnesses.¹³

7. The Kallon Defence emphasizes that identical measures were granted to the Prosecution witnesses for both of these requests, based on the same security concerns as put forward in the Motion.¹⁴ It further submits that protective measures must be extended to witnesses residing outside of West Africa or this will impact on their readiness to testify.¹⁵

8. With respect to measure j), the Defence submits that this measure was granted with respect to witnesses testifying in the AFRC case,¹⁶ and would have been granted in the CDF case if the Defence had made the necessary applications and shown that the witnesses expressed fear that by placing their

¹¹ *Ibid.*, para 11.

¹² *Ibid.*, para 15.

¹³ *Ibid.*, paras 14 and 16.

¹⁴ *Ibid.*, paras 14 and 16.

¹⁵ *Ibid.*, para 14.

¹⁶ *Prosecutor v. Brima, Kamara and Kanu*, SCSL04-16-T, Decision on Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006.

names on the witness list, they would expose themselves to harassment by agents of the Prosecution.¹⁷ The Defence submits that many of its witnesses would be reluctant to testify without the assurance that they could only be contacted by the Prosecution following an order by the Trial Chamber and that, if this was granted, they would be informed by persons from the Kallon Defence who they know rather than unfamiliar representatives of Witness and Victims Services.¹⁸

B. The Prosecution Response

9. In its Response, the Prosecution submits that in order to meet the Rule 69 test of "exceptional circumstances", the Defence must establish both facts supporting the subjective fears of the witness and evidence indicating an objective basis for those fears. The Prosecution submits that the Defence has filed no evidence in support of this motion, and in particular, no evidence as to why the protective measures of the Kallon witnesses should be different from those granted to the Sesay witnesses.¹⁹

10. The Prosecution submits that generally motions without supporting evidence should not be entertained. However, the Prosecution acknowledges that the recent Sesay Decision provides some basis for some the relief sought in the Motion, and for that reason does not take strong issue with the orders sought in paragraphs (a) to (i) with respect to witnesses from Sierra Leone and West Africa.²⁰

11. However, it submits that the measures requested that were denied in the Sesay Decision should be dismissed. The Prosecution claims that despite the fact that protective measures were initially ordered for witnesses in all four categories, owing to the changed security situation particularly for witnesses residing outside of West Africa, some of these measures were considered no longer necessary from March 2006, and that following a Prosecution application the measures were rescinded for several witnesses.²¹ The Prosecution submits that the Chamber was correct in denying protective measures to this category of witness in the Sesay Decision, and that the Defence has shown no principled reason why the Kallon Defence Witnesses should be treated differently from the Sesay Defence witnesses.²²

¹⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20 June 2006, para 18.

¹⁸ Motion, para 16.

¹⁹ Response, para 3.

²⁰ *Ibid.*, paras 5 and 18.

²¹ *Ibid.*, para 16, referring to *Prosecutor v. Sesay, Kallon, Gbao*, SCSL04-15-T, Order to Review Current Protective Measures, 29 March 2006, p. 2 ("Review Order"). See also Transcripts, 28 March 2006, p. 110-124, and Variation Decision, p. 4.

²² *Ibid.*, paras 11-13.

12. With respect to the order requested in j), the Prosecution asserts that no evidence has been adduced to demonstrate to the Trial Chamber why Kallon witnesses should be treated differently from Sesay witnesses, and emphasizes that the circumstances of Defence witnesses are different than those of Prosecution witnesses in that persons connected to the alleged joint criminal enterprise could pose a danger to its witnesses, and that no similar evidence of threats or danger was adduced in the Kallon application with respect to its witnesses.²³

C. The Defence Reply

13. In its Reply, the Defence asserts that it has relied on materials that are before the record of the court that were submitted by the Prosecution and by the first accused in supporting their motions for protective measures for their witnesses. It asserts there is no need to provide separate or additional evidence in order to meet the Rule 69 test of "exceptional circumstances".²⁴

14. The Defence points to the affidavit evidence of Ms. Chantal Refahi, Senior Legal Assistant for the First Accused, which was submitted by the First Accused in its motion, as substantiating the subjective fears faced by its witnesses. The Defence submits that it would be reasonable to deduce that the fears similar to those expressed by witnesses to Ms. Refahi would be faced by defence witnesses for other RUF accused, many of whom would be common witnesses.²⁵

15. With respect to the category of witnesses who reside outside of West Africa, the Defence submits that while measures were rescinded for some Prosecution witnesses outside of West Africa, it was a significant factor that these witnesses had indicated that they wished to testify without protective measures, and notes that the Prosecution still asserted that protective measures were necessary for the remainder of its witnesses who resided outside of West Africa.²⁶

16. With respect to the method of contacting Defence witnesses, the Defence reiterates that its witnesses have a legitimate fear of being harassed by Prosecution agents, and that the position of its witnesses is therefore no different than that of Prosecution witnesses.²⁷

D. The Chamber's Order

²³ *Ibid.*, paras 14-17.

²⁴ Reply, paras 3-6.

²⁵ *Ibid.*, para 7.

²⁶ *Ibid.*, paras 8-10.

²⁷ *Ibid.*, paras 11-13.

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17. In its Order, the Chamber found that the original Motion was unsupported by any affidavit or documentary evidence substantiating the subjective fears of the Kallon witnesses. It therefore ordered the Defence to provide adequate and appropriate materials in support of the Motion. In consideration of the imminence of the filing date for the Defence materials (the 5th of March 2007), the Chamber ordered that Kallon witnesses for which protective measures are sought be referred to by pseudonyms and their summaries redacted as necessary, pending a final decision on the Motion.

E. The Defence Submissions

18. In response to this Order, the Defence filed the statement of Samuel Koroma, an investigator for the Kallon Defence team.²⁸ The statement indicates that many civilians are fearful of becoming outcasts in their communities, and that many former members of the RUF fear they will be vilified in their communities and by other ex-combatants if it is known that they are considering testifying for Kallon.²⁹ It also indicates that as a result of persistent harassment and intimidation, some potential witnesses have had to be relocated by the Witnesses and Victims Section ("WVS") on a temporary basis.³⁰ Moreover, it documents the arrest of the investigator and a potential witness described in the original Motion.³¹

F. The Prosecution Submission

19. In response to the Defence Submissions, the Prosecution indicated that it continued to rely on the submissions made in its original Response and had no further submissions.³²

II. APPLICABLE LAW

20. This Chamber has stated in its prior decisions that the issue of witness and victim protection in the jurisdiction of the Special Court is governed by Article 16 of the Court's Statute. Accordingly, Article 16(4) provides, *inter alia*, thus:

²⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Public Kallon Defence Submissions on Kallon Motion for Immediate Protective Measures, 7 March 2007.

²⁹ *Ibid.*, Investigator's Witness Statement, Annex A, paras 6-8.

³⁰ *Ibid.*, para 10.

³¹ *Ibid.*, para 9.

³² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Public Prosecution Submission to the Kallon Defence Submissions on Kallon Motion for Immediate Protective Measures, 8 March 2007.

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

21. Furthermore, Rule 26bis of the Rules empowers the Trial Chamber and the Appeals Chamber to “ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

22. The Chamber emphasizes that the overriding principle that has consistently guided its Decisions based on Articles 16(4) and 17(2) of the Statute and specifically on Rules 75(A) and (B), 53(A), 69, and 26bis relating to protective measures for witnesses is that “a decision on protective measures requires a balance to be struck between full respect for the rights of the Accused and the protection needs of victims and witnesses within the legal framework of the Statute and Rules within the context of a fair trial.”³³

23. In one of our seminal Decisions on this issue, the Chamber held that the unique feature of the Special Court being located in Sierra Leone, the locus of the alleged offences, is a key factor in weighing the need for granting protective measures to victims and witnesses.³⁴ To this end, the Chamber, in *Prosecutor v. Kondewa*, held as follows:

The Republic of Sierra Leone is a relatively small community where people are bound to and in fact know and identify themselves very easily thereby increasing the danger of risk of a [resumption] of hostilities against potential witnesses and victims and their families if they are identified by the indictees or their sympathisers as those whose testimony would incriminate them, or in due course and more still, the indictees who they support out there;³⁵

³³ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Order on Protective Measures for Additional Witnesses, 24 November 2004, p. 3. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; Variation Decision. See also *Prosecutor v. Musema*, ICTR-96-13-A, Judgement (AC), 16 November 2001, paras 68-69.

³⁴ *Prosecutor v. Gbao*, SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 10 October 2003, paras 21-25; see also *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, para 29.

³⁵ *Prosecutor v. Kondewa*, SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003, para 30. In addition, more specifically referring to RUF insiders, this Court held that “insider witnesses as well as their families are particularly vulnerable to acts of retaliation and potential harm if their identities were to be known to the public”. See, for instance *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Amend Protective Measures for Witnesses TF1-168 and TF1-041, 9 May 2006.

24. It is also noteworthy that the Prosecution, in response to a recent request from the Trial Chamber, did find that there were no significant changes in the security situation in the country that could warrant a variation of the protective measures regime.³⁶

25. This Chamber has also noted that a party seeking protective measures is required to provide evidence from sources other than its witnesses indicating an objective basis for assessing whether a threat to the witnesses' security exists. In a previous decision in the CDF case, the Chamber held that the subjective feelings of the witnesses are not the only factor to be taken into account, and that the subjective fears of witnesses are not decisive of the issue of whether protective measures should be granted.³⁷

26. Guided by the foregoing principles, the Chamber now proceeds to examine the merits of the Defence Motion.

III. DELIBERATION

27. The Chamber notes that, in essence, the Defence is herein seeking for its witnesses protective measures that are substantially similar to those previously granted to the Prosecution and to the Sesay and Gbao witnesses, and relies on the same objective evidentiary material to support its claims. Additionally, the Defence has now submitted, as subjective evidence substantiating these fears, the statement of an investigator for the Kallon team.

28. Based on the evidence submitted, the Chamber is satisfied that the fears of Kallon witnesses residing within West Africa are real and that they do feel threatened as a consequence of potentially testifying for the Accused Kallon. It is, however, the Chamber's view that a party seeking protective measures is required to provide evidence from sources other than its witnesses indicating an objective basis for assessing whether a threat to the witnesses's security exists.³⁸

While these considerations were primarily directed to witnesses testifying for the Prosecution, they might apply, *mutatis mutandis*, to witnesses willing to testify on behalf of the Accused.

³⁶ Variation Decision. A similar finding was also made more recently by Trial Chamber II. See *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on Joint Defence Application for Protective Measures for Defence Witnesses Appearing From 4 September 2006 Onwards, 13 September 2006, p. 2.

³⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ruling on Motion for Modification of Protective Measures for Witnesses, 18 November 2004, paras 38 and 40. See also *Gbao* Decision, para 31. See also *Prosecutor v. Rugambarara*, ICTR-00-59-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 28 October 2005, para 6 and *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para 2.

³⁸ See *supra*, para 25 and footnote 37.

29. The Chamber notes that the Defence relies solely on the reports submitted by the Prosecution and the Sesay Defence in support of their requests for protective measures, and does not supply any independent objective evidence in support of its claims. However, the Chamber reiterates its recent affirmation that there has not been a significant change in the security situation that would warrant changing the protective measures for Prosecution witnesses³⁹, and its assessment in the *Sesay* and *Gbao* Decisions that the security situation in Sierra Leone and West Africa still warranted the granting of protective measures for witnesses residing in those regions.⁴⁰

30. Moreover, the Chamber acknowledges that the Prosecution does not oppose the protective measures sought by the Defence in paragraphs 5 (a)-(i) above for witnesses residing Sierra Leone and West Africa, and therefore holds that, while it would have been preferable for the Defence to have filed independent objective evidence to substantiate its requests, sufficient objective evidence has been presented for it to grant such measures in the circumstances.

31. In the *Sesay* Decision, the Chamber held that no *prima facie* case had been shown substantiating the fears of potential witnesses residing outside of West Africa.⁴¹ It also recently denied leave to appeal on this issue.⁴² The Defence has submitted no evidence in addition to that filed by the *Sesay* Defence about the threats facing potential witnesses residing outside West Africa. The Chamber accordingly finds no merit in the Defence application in respect of potential witnesses residing outside of West Africa.

32. The Chamber decided in the *Sesay* Decision that the WVS, rather than the Defence or the Prosecution, is in the best position to determine how to contact a protected witness who may otherwise feel intimidated, to explain to a witness his or her right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained for a witness⁴³ and denied leave to appeal on this issue.⁴⁴ The Defence has provided no evidence to suggest that the WVS will not be able to adequately fulfil the role assigned to it with respect to the Kallon witnesses. The Chamber likewise finds this claim lacking in merit.

³⁹ Variation Decision.

⁴⁰ *Sesay* Decision, para 24(i); *Gbao* Decision, para 42(i). The Chamber also notes the recent Report of the Secretary-General on cross-border issues in West Africa, S/2007/143, 13 March 2007.

⁴¹ *Sesay* Decision, para 24(ii). See also *Gbao* Decision, paras 34 and 42(ii).

⁴² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, *Sesay* Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 1 March 2007.

⁴³ *Sesay* Decision, para 24 (viii). See also *Gbao* Decision, paras 35 and 42(iv).

⁴⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, *Sesay* Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 1 March 2007.

33. Based on the aforementioned general legal principles, and the evidence before it, the Chamber, also taking into consideration the present stage of the trial proceedings and in particular the preparation for the commencement of the Defence case, finds significantly as to the merits of the present application as follows:

- (i) That the Defence has established a *prima facie* case for the issuing of proposed protective measures listed in paragraph 5 (a)-(i) as acceptable and minimally intrusive methods of protecting the safety and privacy of witnesses resident in Sierra Leone and other parts of West Africa, and those living outside West Africa who have indicated their willingness to testify.
- (ii) That no *prima facie* showing has been made by the Defence for the issuing of protective measures in respect of potential witnesses resident outside West Africa.⁴⁵
- (iii) That in respect of proposed protective measure 5(j), the WVS, rather than the Defence or Prosecution, is in the best position to determine how to contact a protected witness who may otherwise feel intimidated, to explain to a witness his or her right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained from the witness.

IV. DISPOSITION

34. In light of the foregoing considerations, the Chamber **GRANTS** the Defence Motion in part and consequently, with regard to the relevant witnesses of the Defence for the Second Accused, Morris Kallon, **ORDERS** as follows:

- a. All witnesses for the Defence for the Second Accused, Morris Kallon, shall testify with the use of a screening device from the public, unless otherwise directed by the Court;
- b. There shall be no photographing, audio or video recording, sketching or reproducing in any other manner of images of such witnesses without prior leave of the Trial Chamber;
- c. The Defence for the Second Accused, Morris Kallon, shall be allowed to withhold the names or any other identifying data of its witnesses until 42 days prior to their testimony at trial;

⁴⁵ For further reference, see *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Prosecutor's Motion for Protective Measures CCF, CCJ, BLC, BLS and BLJ (TC), 29 November 2006, paras 4-7.

d. The Registry shall seal the names or any other identifying data of all these witnesses, and this information shall not be included in any of the public records of the Special Court;

e. The Defence for the Second Accused, Morris Kallon, shall designate a pseudonym for each of its witnesses, to be used during pre-defence case disclosure of witness summaries and other materials⁴⁶ and during trial proceedings;

f. The names or any other identifying data of these witnesses shall not be disclosed to the public or the media, and this order shall remain in effect after the conclusion of proceedings;

g. The Prosecution,⁴⁷ the Defence for the First Accused, Issa Sesay, and the Defence for the Third Accused, Augustine Gbao, respectively, shall not share or reveal any disclosed witness-related non-public materials to any entity other than the Defence for the Second Accused, Morris Kallon;

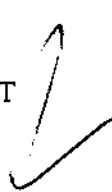


h. The Prosecution shall maintain a log indicating the name, address, and position of anyone who receives a Defence witness statement, interview report, summary of expected testimony, or any non-public material, as well as the date of disclosure; the Prosecution shall ensure that individuals to whom information is disclosed adheres to the non-disclosure order;

i. The Prosecution, the Defence for the First Accused, Issa Sesay, and the Defence for the Third Accused, Augustine Gbao, respectively, shall, at the conclusion of proceedings, return to the Registry all disclosed witness-related materials which have not become part of the public record;

j. Upon disclosure of the witnesses' names or any other identifying data by the Defence pursuant to order (c) above, the Prosecution, the Defence for the First Accused, Issa Sesay, and the Defence for the Third Accused, Augustine Gbao, respectively, shall inform the Witnesses and Victims Section of their intention, if any, to interview a witness listed as a witness for the Defence for the Second Accused, Morris Kallon. The Witnesses and Victims Section, upon being informed beforehand of the location of the witness, shall contact the witness and inform him or her of any party's intention to interview him or her and of his or her right not to consent or give the interview. Should the witness consent to the interview, the Witnesses and Victims Section shall inform the relevant party as to the location for the interview. Except under exceptional circumstances, any such

⁴⁶ See, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, 30 October 2006.

⁴⁷ For the purposes of the present Decision and consistent with established jurisprudence from other international criminal tribunals, any reference herein to the Prosecution's obligations concerning disclosure and, in particular, protective measures for witnesses, should not be construed as limited to specific teams within the Office of the Prosecution but rather extends to such Office as an undivided unit. See, for instance, *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005.

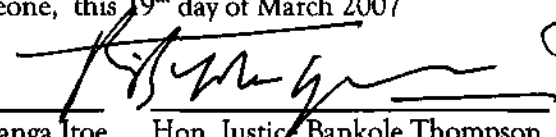
  


interview shall not take place at the outset of the witness' testimony in court.

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Done at Freetown, Sierra Leone, this 19th day of March 2007


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I


Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

