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SCSL-03-01-T
(16355-16360)

16355



SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 14 March 2008

PROSECUTOR

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
14 MAR 2008	
NAME	VINCENT T. LISTERWA
SIGN	<i>[Signature]</i>
TIME	12:30

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE MOTION PURSUANT TO RULE 75(G) TO MODIFY SESAY DEFENCE PROTECTIVE MEASURES DECISION OF 30 NOVEMBER 2006 FOR ACCESS TO CLOSED SESSION DEFENCE WITNESS TESTIMONY AND LIMITED DISCLOSURE OF DEFENCE WITNESS NAMES AND RELATED EXCULPATORY MATERIAL

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Leigh Lawrie

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEIZED of the "Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", filed on 14 December 2008 ("Motion")¹ in which the Defence states that "due to the temporal and geographical nexus of the allegations between Mr. Taylor's case and Mr. Sesay's case, and due to conversations Defence investigators and a legal assistant have incidentally had with some of Mr. Sesay's protected defence witnesses," it believes that transcripts, exhibits, and pre-trial statements from the Sesay Defence case contain exculpatory material that may be of "material assistance" to its case,² and that, therefore, the Defence requests that protective measures granted to defence witnesses by Trial Chamber I in its *Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure* ("Sesay Protective Measures Decision")³ in the case of *Prosecutor v. Sesay et al* ("Sesay Case") be varied by the Trial Chamber, in consultation with Trial Chamber I, to allow the Taylor Defence-

- (i) service in an un-redacted format of all closed session or non-public transcripts and exhibits from the testimony of defence witnesses in the Sesay Defence Case by the Court Management Section on an ongoing basis;
- (ii) disclosure by the Sesay Defence team of the names and identifying data of the witnesses subject to the *Sesay Protective Measures Decision*; and
- (iii) disclosure of all statements taken by the Sesay Defence team during the course of investigations and in preparation for trial;⁴

NOTING the "Public with *Ex Parte* Annex Prosecution Response to 'Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material'", filed 7 January 2008 ("Response")⁵ in which the Prosecution does not oppose a modification of the *Sesay Protective Measures Decision* provided that-

- (i) such modification only permits the Defence access to redacted copies of closed session transcripts from the Sesay Defence case;
- (ii) the Defence are only served with those parts of such closed session transcripts which consist of Sesay Defence witness testimony;
- (iii) the transcripts of testimony are redacted to remove (a) the names and identifying data of the witness testifying in closed session in the Sesay Defence case and (b) any information covered by protective measures orders imposed by decisions other than the *Sesay Protective*

¹ SCSL-03-01-T-377.

² Motion, para. 2.

³ Filed 30 November 2006, SCSL-04-15-T-668.

⁴ Motion, para. 3.

⁵ SCSL-03-01-T-381.

Measures Decision (including decisions in the current proceedings) such as the names of Prosecution witnesses;⁶ and

- (iv) any access granted to the Defence to non-public Sesay Defence material should be subject to all existing protective measures, except those preventing access to the information including a requirement that "(i) absent the express leave of this Chamber, based on a sufficient showing that disclosure and / or contact with the witness may materially assist the Accused's case and that such assistance is not otherwise reasonably available to it, the Defence shall not (a) be entitled to disclosure of the name or identifying data of the witness subject to any protective measures order issued by the Special Court including the *Sesay Protective Measures Decision*; (b) disclose to any third party including the public in general or to the media, any non-public information or documentary material including without limitation testimony and / or exhibits received from the Sesay Defence team, except as permitted under the terms of any existing protective measures orders; (c) disclose to any third party, the name of any protected witness; (d) contact any witness whose identity is subject to protective measures save as provided below; (e) shall not disclose the whereabouts or other contact information of any Sesay Defence witness to any third party; and (ii) where leave is granted pursuant to sub-clause (i) above to contact any witness whose identity is subject to protective measures, such contact be in accordance with the procedure laid out in paragraph 25 (j) of the *Sesay Protective Measures Decision*; and (iii) any permitted disclosure of non-public material or information should be made by the Sesay Defence team to the Defence and, where leave is granted as above, by the Defence to a third party subject always to notice of the nature of the above applicable protective measures."⁷

NOTING the Prosecution's confidential and *ex-parte* submissions in its Response;⁸

NOTING the "Defence Reply to Prosecution Response to Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material", filed 14 January 2008 ("Reply")⁹ in which the Defence submits that the conditional disclosure proposed by the Prosecution in its Response has no justifiable basis in law or fact and should not be considered¹⁰, but that in any event the Defence is willing to abide by the requirements of paragraphs 25 (c) and (j) of the *Sesay Protective Measures Decision*;¹¹

NOTING the Defence submission that the Sesay Defence is not opposed to the requested variation;¹²

HAVING consulted with Trial Chamber I of the SCSL pursuant to Rule 75(H) of the Rules of Procedure and Evidence of the Special Court ("Rules");

⁶ Response, paras. 3, 17

⁷ Response, paras. 15, 17

⁸ *Ex Parte* Annex to Response.

⁹ SCSL03-01-T-387.

¹⁰ Reply, para. 4

¹¹ Reply, paras. 9, 16

¹² Motion, para. 4; Reply, Annex A.

CONSIDERING that a Party is entitled to seek material from any source, including from another case before the Court, to assist in the preparation of its case¹³ and that a Party may be granted access to material provided that it is able to identify the material sought or describe it by its general nature and to show a legitimate forensic purpose for such access;¹⁴

COGNISANT of the criteria for determining when access to confidential material from another case should be granted, namely-

- (a) when the party seeking the material can establish that it may be of material assistance¹⁵ to its case, or at least there is a good chance¹⁶ that it would be of material assistance; and
- (b) when the relevance of the material is determined by showing the existence of a nexus between the applicant's case and the cases from which such material is sought, i.e. if the cases stem from events alleged to have occurred in the same geographic area and at the same time;¹⁷

NOTING the submissions by both parties acknowledging "the geographic and temporal nexus of the crimes charged in the RUF Indictment with those in the Taylor Indictment and also of the fact that the accused Charles Taylor and Issa Sesay are accused of being members of the same common plan, design or purpose, or joint criminal enterprise;"¹⁸

SATISFIED that the Defence has sufficiently described the material by reference to its general nature and has established that there is a good chance that the information sought would be of material assistance to their case given the geographical and temporal overlap¹⁹ between the Prosecution's case against Mr. Taylor and the Prosecution's case against Mr. Sesay;

FINDING FURTHER that the concerns raised in the Prosecution submission in the confidential and *ex parte* annex²⁰ have not been substantiated;

¹³ *Prosecutor v. Rwamakuba*, "Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13" ICTR-98-44-C-T (Trial Chamber), 24 February 2006 at para. 5; *Prosecutor v. Blaškic*, "Decision on Joint Motion of Ever Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case Prosecutor v. Tihomir Blaškic (Appeals Chamber), 24 January 2003, p. 4.

¹⁴ *Prosecutor v. Kvočka et al.*, "Decision on Momcilo Gruban's Motion for Access to Material", ICTY IT-98-30/1-A (Appeals Chamber), 13 January 2003, para. 5 ["Kvočka Decision"]; *Prosecutor v. Hadžihasanović et al.*, "Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case", ICTY IT-01-47-AR73 (Appeals Chamber), 23 April 2002, p. 3.

¹⁵ *Prosecutor v. Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Access to Appeals Briefs, 9 September 2005, p.3; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nzirorera Request for Access to Protected Material, 19 May 2006, para.2.

¹⁶ *Prosecutor v. Prlic et al.*, Case No. IT-02-60-A, Decision on Motion by Radivoje Militec for Access to Confidential Information, 9 September 2005, p.3.

¹⁷ *Prosecutor v. Milosevic*, Case No. IT-02-54-T & IT-03-69-PT, Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i), 11 March 2005, p.3.

¹⁸ Motion, paras. 10-12; Response, para.6

¹⁹ Kvočka Decision, *ibid.*; *Prosecutor v. Blaškic*, ICTY IT-95-15-A, "Decision on Appellants Dario Kordic and Mario Cerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v. Blaškic", 16 May 2002 [Blaškic Decision] at para. 14.

²⁰ Response, Confidential and Ex Parte Annex.

CONSIDERING that it is the obligation of the Chamber to ensure that a correct balance is struck between the right of a party to access information in preparation of its case and the need to ensure the protection of witnesses and the integrity of confidential information;²¹

PURSUANT TO Rules 75(D), (F), and (G) of the Rules;

HEREBY GRANTS the Motion and ORDERS that the protective measures ordered in the *Sesay Protective Measures Decision* be varied so as to permit the following:

1. Service on an on-going basis, of un-redacted copies of all closed session Sesay Defence witness transcripts and related exhibits by the Court Management Section to the Taylor Defence team;
2. Disclosure to the Taylor Defence team of the names and identifying data of witnesses protected under the *Sesay Protective Measures Decision*, subject to paragraph 25(c) of the said Decision; and
3. Disclosure to the Taylor Defence team of statements taken by the Sesay Defence team during the course of investigations and in preparation for trial.

The Chamber FURTHER ORDERS that the Taylor Defence shall comply with all other aspects of the *Sesay Protective Measures Decision*, including, but not limited to, the following:

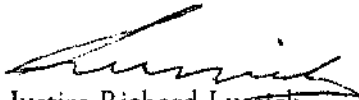
1. The names or any other identifying data of the Sesay Defence witnesses shall not be disclosed to the public or other media, and this order shall remain in effect after the conclusion of proceedings;
2. The Taylor Defence shall not share or reveal any disclosed Sesay Defence witness related non-public materials to any entity;
3. The Taylor Defence shall maintain a log indicating the name, address, and position of anyone who receives a Sesay Defence witness statement, interview report, summary of expected testimony, or any non-public material, as well as the date of disclosure; and the Taylor Defence shall ensure that individuals to whom information is disclosed adhere to the non-disclosure order;
4. The Taylor Defence shall, at the conclusion of proceedings, return to the Registry all disclosed Sesay Defence witness-related materials which have not become part of the public record;
5. Upon disclosure of the Sesay Defence witnesses' names or any other identifying data pursuant to this Order, the Taylor Defence shall inform the Witnesses and Victims Section of their intention, if any, to interview a witness listed as a witness for the Sesay Defence. 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 the Taylor Defence's intention to


²¹ *Prosecutor v. Radjic*, "Decision on Joint Defence Motion for Access to Confidential Supporting Material, Filings, Transcripts and Exhibits in the *Radjic Case*", ICTY IT-95-12-PT (Trial Chamber), 15 September 2003; *Blaškić Decision*, *ibid.* at para. 29.


interview him or her and of his or her right not to consent to give the interview. Should the witness consent to the interview, the Witnesses and Victims Section shall inform the Taylor Defence as to the location for the interview. Except under exceptional circumstances, any such interview shall not take place at the outset of the witness' testimony in court;

6. The aforesaid orders shall apply to the present proceedings only.

Done at The Hague, The Netherlands, this 14th day of March 2008.


Justice Richard Lusstick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

