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SPECIAL COURT FOR SIERRA LEONE

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IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon Kamanda

Registrar: Herman von Hebel

Date: 23 May 2008

PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao
(Case No. SCSL-04-15-T)

DECISION ON PROSECUTION APPEAL OF DECISION ON THE SESAY DEFENCE MOTION REQUESTING THE LIFTING OF PROTECTIVE MEASURES IN RESPECT OF CERTAIN PROSECUTION WITNESSES

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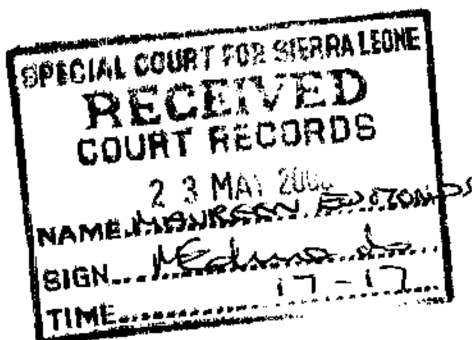

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice George Gelaga King, Presiding Judge, Justice Emmanuel Ayoola, Justice Renate Winter, Justice Raja Fernando and Justice Jon Kamanda;

SEISED of the "Prosecution Notice of Appeal and Submissions Regarding 'Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses'" ("Motion"), dated 3 March 2008;[1]

CONSIDERING the "Sesay Response to Prosecution Appeal Submissions Regarding Decision on Request to Lift Protective Measures" ("Sesay Response"), dated 14 March 2008, and the "Prosecution Reply to 'Sesay Response to Prosecution Appeal Submissions Regarding Decision on Request to Lift Protective Measures'" ("Prosecution Reply"), dated 31 March 2008;[2]

HEREBY DECIDES the Motion based on the written submissions filed by the Parties.

I. INTRODUCTION

1. In the "Confidential Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses" ("Sesay Defence Motion"),[3] the Defence requested that the Trial Chamber lift the protective measures extended to certain Prosecution witnesses in order that the unredacted statement of each witness is made available to the Defence.[4] The Defence further sought permission to contact each of the said Prosecution witnesses directly or in the alternative through the Witnesses and Victims Section ("WVS").

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[1] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-T,* Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 9 November 2007 [Trial Chamber's Decision]; *Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-*T, Prosecution Notice of Appeal and Submissions Regarding 'Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses,' [Prosecution Motion on Appeal], 3 March 2008

[2] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-*T, Sesay Response to Prosecution Appeal Submission Regarding Decision on Request to Lift Protective Measures, 14 March 2008 [Sesay Response]; *Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-T,* Prosecution Reply to 'Sesay Response to Prosecution Appeal Submissions Regarding Decision on Request to Lift Protective Measures', 31 March 2008 [Prosecution Reply].

[3] *Prosecutor v Sesay, Kallon and Gbao, SCSL-04-15-T,* Confidential Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 19 January 2007, [Sesay Defence Motion].

[4] Sesay Defence Motion, para. 10.

2. The Defence submitted that the redacted statements from several Prosecution witnesses listed in the Motion as well as in the Addendum thereto which were originally disclosed under Rule 68 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules"), contained significant exculpatory evidence in favour of the Accused Sesay, and further that redacted statements from several other witnesses also listed in the Motion that were initially disclosed under Rule 65 of the Rules, also contain exculpatory evidence relating to him. The Defence provided details of the significance of this evidence in Annex A of the Motion and Annex A of the Addendum.[5]

3. In its "Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses" ("Trial Chamber Decision"), the Trial Chamber ordered the Prosecution to disclose to the Defence the unredacted statements of the witnesses listed in the Motion[6] The Trial Chamber also granted the Defence leave to contact these witnesses through WVS.[7]

4. In its appeal, the Prosecution submits that the Trial Chamber erred in ordering that it disclose unredacted versions of witness statements, portions of which had originally been disclosed under Rule 68 of the Rules, ("First Ground of Appeal").[8] The Prosecution similarly submits that the Trial Chamber erred in ordering that it disclose unredacted versions of witness statements originally disclosed in redacted form in order to protect the identities of the witnesses under Rule 66 ("Second Ground of Appeal").[9] The Prosecution further submits that the Trial Chamber erred in ordering that the Defence may contact the witnesses subject to the Motion, by first asking WVS to ascertain if the witnesses consent to speak to the Defence, and where consent is given for WVS to arrange interviews with the Defence ("Third Ground of Appeal").[10]

5. With respect to its Second and Third Grounds of Appeal, the Prosecution requests that the Appeals Chamber set aside the Trial Chamber's Decision and dismiss the Sesay

[5] Sesay Defence Motion, para. 9 and Annex A.
[6] Trial Chamber's Decision, Disposition.
[7] *Ibid* at Disposition.
[8] Prosecution Motion on Appeal, para. 10.
[9] *Ibid* at para. 11.
[10] *Ibid* at para. 12.

Defence Motion.[11] The Prosecution requests, in the alternative, that the Appeals Chamber determine whether summaries or further redacted statements which continue to protect the identities of the witnesses at issue should be disclosed.[12] The Prosecution requests in the further alternative, that the Appeals Chamber remit the matter to the Trial Chamber for further submissions on the applicable law and the facts.[13] Regarding Ground Three of its appeal, the Prosecution requests that the Trial Chamber's order varying the applicable protective measures by permitting WVS (instead of the Prosecution) to approach witnesses in order to seek their consent to speak to the Defence, be set aside.[14]

II. THE FINDINGS OF THE TRIAL CHAMBER

6. The Trial Chamber placed the witnesses who were potentially the subject of the Motion into three categories in order to determine which protective measures applied to the witnesses, before making its findings.[15] Category I consisted of witnesses who were expected to testify in the RUF Trial, and were subject to the protective measures granted to Prosecution witnesses in that Trial but who did not subsequently testify. These witnesses were also not potential witnesses in the Taylor Trial. The Trial Chamber considered that witnesses listed in Category I were still generally subject to the protective measures granted to all Prosecution witnesses in the RUF Trial despite the fact that they will not be called to testify.[16] In particular, in the view of the Trial Chamber, "such witnesses may still be targets of threats and intimidation if it becomes known that they

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[11] *Ibid* at para. 13.
[12] *Ibid.*at para. 13.
[13] *Ibid.*at para. 13.
[14] *Ibid* at para. 14. The Prosecution argues that this order varied previous decisions of the Trial Chambers in both the RUF and the Taylor cases. The decision in the RUF case requires that the Defence makes a written request to the Trial Chamber when it wishes to contact a Prosecution witness. At the direction of the Trial Chamber, the Prosecution shall then contact the witness to ask for his or her consent and then undertake the necessary arrangements to facilitate such contact. See *Prosecutor v Sesay, Kallon and Gbao, SCSL-04-15-T-180*, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, DISPOSITION pp. 15-17 [RUF Protective Measures Decision]. The decision in the Taylor case requires the written consent of the Prosecution or leave of the Court. See: *Prosecutor v Taylor, SCSL-03-1-PT-99*, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, and on Confidential Prosecution Motion for Leave to Substitute a Corrected and Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 5 May 2006, para. 1(m). [Taylor Protective Measures Decision].
[15] Trial Chamber's Decision, paras. 18-20.
[16] *Ibid* at para. 21.

were intending to testify for the Prosecution ...."[17] They were therefore subject to the protective measures granted in the RUF Trial but not to those granted in the Taylor Trial.[18]

7. Category II consisted of witnesses who were subject to the protective measures granted to Prosecution witnesses in the RUF Trial, and were now also listed as witnesses in the Taylor Trial.[19] They were, therefore, also subject to the protective measures ordered in the latter Trial. The Trial Chamber then interpreted the Taylor Protective Measures Decision to mean that for witnesses for whom protective measures had already been ordered in earlier proceedings (including the RUF Trial), the same measures would continue to have effect *mutatis mutandis* in the Taylor proceedings.[20] These witnesses were therefore in the view of the Trial Chamber, subject to the protective measures ordered in the RUF Trial.[21]

8. Category III involved witnesses who were added to the Prosecution witness list after protective measures had been granted to Prosecution witnesses in the RUF Trial, and were therefore not subject to those protective measures. Because these witnesses were however witnesses in the Taylor Trial, the Trial Chamber opined that they were subject to the protective measures granted in the Taylor proceedings.[22]

9. The Trial Chamber then dealt with the issue of variation of the protective measures, by considering the witnesses in terms of (i) witness statements originally disclosed under Rule 68, and (ii) witness statements originally disclosed under Rule 66. With respect to witness statements originally disclosed under Rule 68, the Trial Chamber stated that according to clearly established principle unredacted statements must be disclosed by the Prosecution under Rule 68 notwithstanding any protective measures where "the identity [of the witness who made the statement] is inextricably connected with the substance of

[17] *Ibid* at para. 21.
[18] *Ibid* at para. 18.
[19] *Ibid* at para. 19.
[20] *Ibid* at para. 19.
[21] *Ibid* at para. 19.
[22] *Ibid* at para. 20.

the statement."[23] The Trial Chamber then held that it was satisfied that the identity of the witnesses and the unredacted portions of the witness statements were inextricably linked to the substance of the witness statements,[24] because it considered that without this information, the Defence would not be "in a position to determine whether the witnesses can assist in its defence of the Accused Sesay."[25]

10. The Trial Chamber further found that the variations to the protective measures requested by the Defence were minimal and that they would not significantly diminish the protection available to the witnesses because the Defence was not requesting the public disclosure of the witnesses' identifying information.[26] Instead, the Defence was requesting disclosure only to its Defence team, which is legally obliged to comply with the rest of the protective measures, particularly the non-disclosure of identifying information to third parties.[27]

11. With respect to Category III witnesses specifically, the Trial Chamber noted that pursuant to Rule 75(F)(ii), the Prosecution was not prevented from discharging its disclosure obligations in the RUF Trial as a result of the protective measures ordered in the Taylor Trial, provided it notifies the Defence of the protective measures in place in the Taylor Trial.[28] Thus, the Trial Chamber ordered that the statements of the witnesses initially disclosed under Rule 68 should be disclosed by the Prosecution in an unredacted form.[29]

12. With respect to witness statements originally disclosed under Rule 66, contrary to the Prosecution contention that it had no disclosure obligations under Rule 66 with respect to witnesses it did not intend to call, the Trial Chamber relied on Rule 66(A)(ii) to find that the defence had established a *prima facie* case that there is good cause for the disclosure

[23] Trial Chamber's Decision, para. 26, quoting several decisions of the ICTR Trial Chambers, in particular *Prosecutor v Karemera, Ngirumpatse and Nzirorera, ICTR-98-44-T*, International Criminal Tribunal for Rwanda, Decision on the Prosecutor's Application Pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A), TC, 4 July 2006, para. 8.
[24] Trial Chamber's Decision, para. 26.
[25] *Ibid* at para. 26.
[26] *Ibid* at para. 27.
[27] *Ibid* at para. 27.
[28] *Ibid* at para. 28.
[29] *Ibid* at para. 29.

of such statements in an unredacted form.[30] In particular, the Trial Chamber was of the view that the Defence had shown that the provision of the unredacted witness statements would be of material assistance to it and that the requested variations were minimal and involved the disclosure of the identities of the witnesses only to the Defence.[31] The Trial Chamber further found that the Defence had also made a *prima facie* showing of the exculpatory character of these witness statements.[32]

13. The Trial Chamber also found that because it was clear from the summaries provided by the Defence in Annex A, that the identities of the witnesses and the redacted portions of their statements were inextricably linked with the substance of their witness statements,[33] the full statements of the witnesses initially disclosed under Rule 66 should be disclosed by the Prosecution in an unredacted form.[34]

14. With respect to Category III witnesses specifically, the Trial Chamber similarly noted that pursuant to Rule 75(F)(ii), the Prosecution was not prevented from discharging its disclosure obligations in the RUF Trial as a result of the protective measures ordered in the Taylor Trial, provided it notifies the Defence of the protective measures in place in the Taylor Trial.[35]

15. On the issue of contacting of Prosecution witnesses by the Defence, the Trial Chamber held that in light of its previous decisions in which it held that WVS is best situated to determine how a protected witness should be contacted, WVS, rather than the Prosecution, should make contact with the witnesses.[36]

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[30] Trial Chamber's Decision, para. 31. Rule 66(A)(ii) provides that "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."
[31] Trial Chamber's Decision, para. 31.
[32] *Ibid* at para. 32.
[33] *Ibid* at para. 33.
[34] *Ibid* at para. 35.
[35] Ibid at para. 34.
[36] *Ibid* at paras 37-38.

III. THE SUBMISSIONS OF THE PARTIES

A. Prosecution Ground One: Witness Statements Disclosed Pursuant to Rule 68

16. The Prosecution submits that the Trial Chamber erred in law, or alternatively in the exercise of its discretion, in ordering the Prosecution to disclose to the Defence the full unredacted statements of witnesses whose Rule 68 information had already been provided to the Defence.[37] The Prosecution advances several arguments in support of this Ground of Appeal. It submits first, that the Trial Chamber erred in failing to strike the appropriate balance between the rights of the Accused on one hand, and the rights of victims and witnesses on the other.[38] The Prosecution argues that in so doing, the Trial Chamber referred to decisions of the International Criminal Tribunal (ICTR) in support of its reasoning that notwithstanding any protective measures, "unredacted statements must be disclosed by the Prosecution under Rule 68 where the identity of the witness who made the statement is inextricably connected with the substance of the statements ...."[39]

17. The Prosecution submits that it is apparent, however, from the wording of the ICTR Rule 68, in particular Rule 68(D),[40] that these decisions do not support the principle that disclosure of exculpatory material must be made without regard for other interests.[41] Furthermore, submits the Prosecution, even though the cases referred to by the Trial Chamber interpret the ICTR Rule 68, "those cases also acknowledge the existence and purpose of Rule 68(D) and ... were determined on the basis that 'the Prosecution has made no application to the Chamber under Rule 68(D).'"[42]

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[37] Prosecution Motion on Appeal, para. 26.
[38] *Ibid* at para. 27.
[39] Prosecution Motion on Appeal, para. 28, *citing* the Trial Chamber's Decision, para. 26; *Prosecutor v. Karemera, ICTR-98-44-T*, International Criminal Tribunal for Rwanda, Trial Chamber, Decision on the Prosecutor's Application Pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A), 4 July 2006, para. 8; *Prosecutor v. Bagosora, ICTR-98-41-T*, International Criminal Tribunal for Rwanda, Trial Chamber, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, para. 5.
[40] ICTR Rule 68(D) provides relief to the Prosecutor from disclosure of information "if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any state..."
[41] Prosecution Motion on Appeal, para. 28. The Prosecution cites in particular Rule 68(D) of the ICTR Rules. That section reads: "The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential."
[42] Prosecution Motion on Appeal, para. 30.

18. In particular, the Prosecution submits that even though the SCSL Rule 68, unlike the ICTR Rule 68, does not create an exception to the disclosure obligations in certain circumstances, this difference is accounted for by the limited wording of the SCSL Rule, namely, "to make a statement … disclosing to the defence the existence of evidence known to the Prosecutor …."[43] The Prosecution submits therefore that not only had it complied with the obligation created by the SCSL Rule 68 by extracting the Rule 68 information from the witness statements, but that it had also exceeded it by giving the extracts verbatim to the Defence.[44]

19. Second, the Prosecution argues that the Trial Chamber erred in interpreting the plain language of Rule 68, to mean that the Rule requires disclosure of all evidence from the witness including evidence which does not meet the definition of Rule 68 material. Consequently, the Prosecution submits that the Trial Chamber erred in holding that the Accused had an absolute right to not only the witnesses' identities, but also to their full unredacted statements, if such statements have any information which falls within Rule 68's very broad language, even where Rule 68 material has been previously provided.[45]

20. Furthermore, it adds that there is no suggestion in the Rule that the Defence is entitled to unredacted statements taken for other proceedings and investigations, and that although it may be consistent with the purpose of the Rule to permit the Defence the opportunity to seek consent to speak to a witness who has given Rule 68 evidence, no such consent was sought by the Defence. The Prosecution argues that the Trial Chamber failed in this regard to balance properly the competing interests of the victims and witnesses on the one hand, and that of the accused on the other by not considering less intrusive measures to provide the Defence with the information to which it was entitled under the Rules.

21. Third, the Prosecution submits that the Trial Chamber erred in failing to apply the correct test for considering a variation in protective measures, according to which the party

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[43] Prosecution Motion on Appeal, para. 29.
[44] Ibid at para. 39
[45] *Ibid* at paras 39-40.

seeking to vary the measures must present "supporting evidence capable of establishing on a preponderance of possibilities that the witness is no longer in need of such protection."[46] The Prosecution argues that the Trial Chamber's finding that the protective measures would be minimal and would not diminish the protection available is inconsistent with this test, as well as being factually inaccurate.[47]

22. Finally, the Prosecution submits that it will suffer irreparable prejudice due to the disclosure of unredacted witness statements to the Defence, because they will "likely adversely impact the witnesses' subjective assessment of their security and may also add to the objective risk to their security," particularly given that many of the witnesses are also protected witnesses in the Taylor trial.[48]

23. The Defence responds that the Trial Chamber correctly applied the well-established principle under Rule 68.[49] The Defence argues that the Prosecution "has cited no circumstances that would distinguish the instant case from this line of authority or the norm and thus no error of law or exercise of discretion could possibly arise."[50] The Defence also argues that the Prosecution has misinterpreted Rule 68 by ignoring its full text which requires not only the disclosure of the existence of evidence known to the Prosecutor, but also creates a "continuing obligation to disclose any such exculpatory material."[51]

24. The Defence further argues that the Trial Chamber correctly concluded that the Rule 68 obligation required full statements with context and source instead of extracts of evidence.[52] Moreover, the Defence argues that the Trial Chamber struck a reasonable balance given that such disclosure would require a minimal variation of the protective measures.[53] Finally, the Defence submits that the Prosecution's argument that the Trial

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[46] Prosecution Motion on Appeal, para. 44.
[47] *Ibid* at para. 44.
[48] *Ibid* at para. 49.
[49] Sesay Response, paras. 4-6, *citing Prosecutor v. Bagosora, ICTR-98-41-T*, International Criminal Tribunal for Rwanda, Trial Chamber, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, para. 5.
[50] Sesay Response, para. 7.
[51] *Ibid* at para. 8.
[52] *Ibid at* para. 10.
[53] *Ibid* at para. 10.

Chamber erred by failing to order less intrusive measures ignores the Trial Chamber's finding that the identity of the witness is inextricably linked to the substance of the statement.[54]

B. Ground Two: Witness Statements Disclosed Pursuant to Rule 66

25. In arguing that the Trial Chamber erred by ordering the disclosure of unredacted witness statements pursuant to Rule 66, the Prosecution submits that the same errors were made regarding: a failure to strike the appropriate balance between the rights of victims and witnesses and that of theAaccused; the correct test to be applied when considering a variation of protective measures and contacting of witnesses by WVS rather than by the Prosecution.[55]

26. The Prosecution further submits that because the Defence did not seek relief pursuant to Rule 66(A)(ii), the Prosecution did not have the opportunity to address the proper application of this Rule at the Motion stage. It was therefore unfair for the Trial Chamber to have decided the Motion on bases not raised or addressed by the Parties.[56] The Prosecution argues that in any case pursuant to Rule 66(A)(ii), it is for the applicant to show good cause, and that even where such good cause is demonstrated, the Trial Chamber has a discretion whether or not to order the disclosure of additional witness statements.[57]

27. The Prosecution submits that no good cause has been demonstrated regarding the 15 (fifteen) Rule 66 witnesses listed in Annex A to the Motion who, it is argued, meet the test imposed by Rule 66(A)(ii).[58] In particular the Prosecution argues that a finding of "materiality" does not "constitute a showing of good cause under Rule 66(a)(ii),[59] neither is a "finding that a statement contains some exculpatory material ... sufficient in and of

[54] *Ibid* at para. 11.
[55] Prosecution Motion on Appeal, paras 51, 58.
[56] *Ibid* at para. 52.
[57] *Ibid* at para. 55.
[58] *Ibid* at para. 57.
[59] *Ibid*. para. 53.

itself to require that all information obtained from that witness is 'material' and should be disclosed to the Defence."[60]

28. The Prosecution submits that the Trial Chamber therefore erred in that instead of applying the law to the information contained in Annex A to the Motion, it speculated that the statements may contain exculpatory material.[61] The Prosecution therefore submits that it would suffer similar prejudice as outlined with respect to the Rule 68 witnesses should the unredacted statements of witnesses previously disclosed in redacted form pursuant to Rule 66 be disclosed to the Defence.[62]

29. The Defence responds that the Prosecution's Second Ground of Appeal appears to reiterate its First Ground of Appeal, and ought to be dismissed for the same reasons.[63]

C. Ground Three: Contact with Witnesses Through WVS

30. With respect to the RUF Protective Measures Decision, the Prosecution submits that the Defence submitted no supporting evidence to the Court to justify a variation of the existing protective measures.[64] The Prosecution reiterates that the test to be applied is whether the party seeking the variation has presented "supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection,"[65] and argues that the same test should apply in the case of the witnesses subject to the Taylor Protective Measures Decision, irrespective of the Trial Chamber's consultations with Trial Chamber II on the issue.[66]

31. Finally, the Prosecution submits that not only was there no supporting evidence before the Trial Chamber to justify a variation of the protective measures, but in addition the Trial Chamber erred in finding that the Taylor Protective Measures Decision was silent

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[60] Prosecution Motion on Appeal, para. 53.
[61] *Ibid* at para. 57.
[62] *Ibid* at para. 58.
[63] Sesay Response, para. 17.
[64] Prosecution Motion on Appeal, para. 61.
[65] *Ibid* at para. 61.
[66] *Ibid* at paras. 62-63.

on the means of contacting Prosecution witnesses The Trial Chamber, therefore, erred in ordering that they be contacted by WVS instead of by the Prosecution.[67]

32. The Defence submits that the Trial Chamber correctly decided that the Defence may contact Prosecution witnesses through WVS.[68] The Defence refers to the Trial Chamber's decision holding that WVS, rather than the Defence or the Prosecution, is best positioned to contact witnesses.[69] The Prosecution replies that it seeks consistency regarding the application of existing orders and "submits that there is no reason to depart from a process with which Prosecution witnesses are familiar and comfortable."[70]

IV. DELIBERATIONS

33. The Sesay Defence Motion was in essence an application to the Trial Chamber for a variation of existing protective measures extended to certain Prosecution witnesses. Several issues were raised in this appeal including when disclosure of the identities and unredacted statements of witnesses by the Prosecution can be ordered by the Trial Chamber. The substance of the appeal, however, is that it seeks to set aside the decision of the Trial Chamber which varied earlier protective measures applicable to these Prosecution witnesses in the RUF Trial. These protective measures were granted to the Prosecution witnesses in both the RUF and Taylor trials. The Appeals Chamber will therefore first consider whether the Trial Chamber applied the correct test in ordering a variation of the protective measures already granted to the witnesses. If the Appeals Chamber finds that the Trial Chamber did not err in its application of the test, then it will consider whether the Trial Chamber erred in the extent to which such variations were ordered.

34. Rule 75 of the SCSL Rules deals with the issue of protection of witnesses and victims. The relevant sections are as follows:

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[67] Prosecution Motion on Appeal, paras. 67-68.
[68] Sesay Response, para. 19.
[69] *Ibid* at para. 20. See *Prosecutor v. Sesay, Kallon and Gabo, SCSL-04-15-T*, Decision on Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non-Public Disclosure, 30 November 2006.
[70] Prosecution Reply, para. 11.

"(F) Once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in the Rule; but:

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the Disclosure is being made of the nature of the protective measures ordered in the first proceedings.

G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings shall apply to the Chamber seized of the second proceedings ...

(H) Before determining an application under Sub-Rule (G) above, if the effect of the change serves to decrease the protective measures granted to the ... witness by the Chamber in the first proceedings, the Chamber seized of the second proceedings shall obtain all relevant information from the first proceedings, and may consult with any Judge who ordered the protective measures in the first proceedings, or the relevant Chamber.

(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber ...."

35. Rule 75 vests the Court with authority to grant protective measures to victims and witnesses.[71] Rule 75(F) also expressly provides for rescinding, varying or augmenting of protective measures ordered in the "first proceedings" by a Chamber in the "second proceedings." Rule 75, is however silent on the issue of rescinding, varying or augmenting protective measures granted in the "first proceedings" by a party to the same proceedings. The Rules also do not provide a standard to be applied by the Trial Chamber when faced with an application to rescind, vary or augment protective measures. Faced with this lacuna in the Rules, the Trial Chamber drawing on persuasive guidance from the ICTY,[72] previously held that

"where a Party in a case seeks to rescind, vary or augment protective measures granted to the witness, it should present supporting evidence capable of

[71] Rule 75(A), (B)

[72] *Prosecutor v Dusko Tadic, IT-94-1*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996.

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establishing on a preponderance of probabilities that the witness is no longer in need of such protection."[73]

36. The Appeals Chamber sees no reason to depart from this standard articulated by the Trial Chamber, and the issue then becomes whether the Trial Chamber, applied this standard in ordering a variation of the existing protective measures granted to the witnesses. The applicable test has been interpreted to mean that a party seeking to alter protective measures must show that existing protective measures are no longer necessary because of changed circumstances, such as that the potential threats to the security of the witnesses have diminished since the order for protective measures was made.[74]

37. In particular where as in the present case, a party wishes to rescind protective measures previously granted to a witness, it should present supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection.[75] The Trial Chamber must thus be satisfied that there is a change in the security situation facing the witness such as a diminution in the threat level faced by the witness that justifies a variation of protective measures orders. It is the view of the Appeals Chamber therefore, that this test must be met with respect to both Rule 68 and Rule 66 witnesses, whether they are Category I, II or III witnesses. This determination does not affect the Prosecution's disclosure obligations pursuant to Rules 66 and 68. As the Appeals Chamber earlier stated, a consideration of this matter including the extent to which such disclosure was to be made would have been the next issue for the Trial Chamber's determination.

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[73] *Prosecutor v Norman, SCSL-04-14-T-274,* Ruling on Motion for Modification of Protective Measures for Witnesses, 18 November 2004, para. 43. See also *Prosecutor v Taylor, SCSL-03-01-PT-209*, Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses", 21 March 2007. See also *Nyiramasuhuko et al, ICTR-97-21,* International Criminal Tribunal for Rwanda, Trial Chamber, Decision on the Prosecutor's Motion for *inter alia*, Modification of the Decision of 25 September 2001, para. 11, where the Trial Chamber stated that "a review of Decision on protective measures for witnesses, or, as in this case, of one having an impact on the protection of one party's witnesses can at all times be requested on the basis of new information, notably in regard of a change in the circumstances surrounding the initial decision."

[74] *Prosecutor v. Taylor*, SCSL-03-01-PT, Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses, 21 March 2007, para. 38.

[75] *Prosecutor v Norman, SCSL-04-14-T-274,* Ruling on Motion for Modification of Protective Measures for Witnesses", 18 November 2004, at para. 43.

38. The Trial Chamber was therefore first required to determine whether the Sesay Defence had satisfied this obligation, warranting a variation of the protective measures orders, and then to determine the nature and extent of the variations to be ordered. A perusal of the Trial Chamber's decision, however, shows that it includes no evaluation of whether the Defence provided supporting evidence demonstrating that the witnesses at issue are no longer in need of the protection afforded to them by the protective measures ordered by it.

39. The Sesay Reply, briefly argued that the witnesses were no longer in need of such protection for the following reasons: first, that none of the RUF witnesses who are the subject of this Motion will be testifying against Sesay, although the RUF Protective Measures Decision was drafted to protect witnesses who were expected to testify in the RUF Trial.[76] Second, that the Taylor witnesses who are the subject of this Motion are of material assistance to the Defence case, and that this was not known at the time of the Taylor Protective Measures Decision.[77] The Appeals Chamber finds that both arguments fail to demonstrate a substantial change in circumstances regarding the security of the witnesses to justify a variation of the protective measures previously accorded to these witnesses. With respect to the RUF witnesses in particular, the Trial Chamber found that they were still subject to the protective measures granted to Prosecution witnesses in the RUF Trial, even though they would no longer be testifying in the Trial.[78]

40. Instead of applying the correct test to determine whether the Defence had advanced reasons to justify a variation of existing protective measures, the Trial Chamber merely concluded that "the variations to the protective measures requested by the Defence are minimal" and that they "will not significantly diminish the protection available to the witnesses ...."[79] By focusing solely on the minimal nature of the variations requested by the Defence, the Trial Chamber failed to apply the appropriate legal test for determining whether to vary protective measures, namely, whether changed circumstances have

[76] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-T*, Reply to the Prosecution's Response to Defence Motion Requesting the Lifting of Protective Measures in Respect of Requested Witnesses, 5 February 2007, para. 5.
[77] *Ibid* at para. 6.
[78] Trial Chamber's Decision, para. 21.
[79] *Ibid* at paras 27, 31.

diminished the need for the protective measures. The party seeking a variation must show that changed circumstances warrant such a variation, not that its consequences will be minimal.

41 With particular reference to the Category III witnesses, (those subject to protective measures ordered in the Taylor Trial), the Trial Chamber rightly stated that the Defence application fell under Rule 75(G) and that it had consulted with Trial Chamber II pursuant to Rule 75(H) in this regard particularly on the issue of contact of Prosecution witnesses by the Defence. The Appeals Chamber holds that compliance with this Rule notwithstanding, the Trial Chamber was still obliged to apply the correct test for determination of whether a variation of the protective measures granted to these witnesses was justified.

42. In the circumstances, the Appeals Chamber finds it unnecessary to consider the Prosecution's submissions on the extent of the variations to protective measures ordered by the Trial Chamber, in particular, whether summaries or further redacted statements which continue to protect the identities of the witnesses at issue should be disclosed.

V. DISPOSITION

BASED ON THE FOREGOING CONSIDERATIONS, THE APPEALS CHAMBER

FINDS that the Trial Chamber erred by misdirecting itself as to the applicable legal principle in determining when to order a variation of existing protective measures;

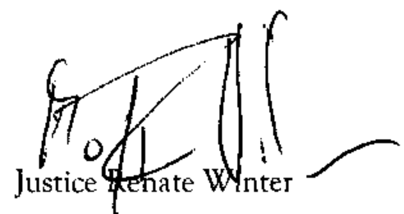
ALLOWS the Prosecution's appeal;

SETS ASIDE the Trial Chamber's Decision; and

DISMISSES the Sesay Defence Motion.

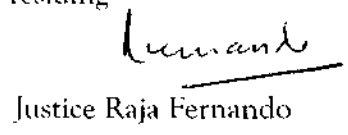
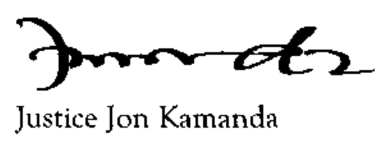
26718.

Done at Freetown, Sierra Leone, this 23 day of May 2008.



Justice George Gelaga King Justice Emmanuel Ayoola Justice Renate Winter

Presiding

Justice Raja Fernando Justice Jon Kamanda

[Seal of the Special Court for Sierra Leone]