

770)

SCSL-03-01-T  
(24923-24937)

24923



SPECIAL COURT FOR SIERRA LEONE

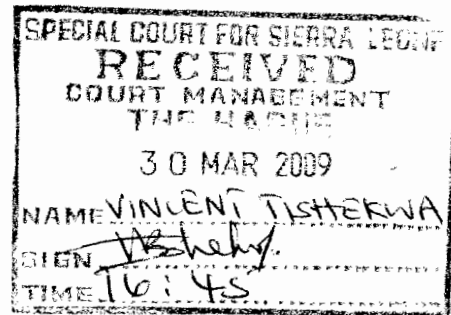
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 30 March 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

---

DECISION ON DEFENCE MOTION PURSUANT TO RULES 66 AND 68 FOR THE  
DISCLOSURE OF EXCULPATORY MATERIAL IN REDACTED WITNESS STATEMENTS  
OF WITNESSES THE PROSECUTION DOES NOT INTEND TO CALL

---

Office of the Prosecutor:

Brenda J. Hollis  
Nicholas Koumjian  
Kathryn Howarth

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”);

**SEISED** of the “Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call”, filed on 25 February 2009 (“Motion”);<sup>1</sup>

**NOTING** the “Prosecution Response to Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call”, filed on 5 March 2009 (“Response”);<sup>2</sup>

**NOTING ALSO** the “Defence Reply to Prosecution Response to Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call”, filed on 9 March 2009 (“Reply”);<sup>3</sup>

**COGNISANT** of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 54, 66, 68, 70, 73 of the Rules of Procedure and Evidence (“Rules”);

**HEREBY DECIDES AS FOLLOWS**, based solely on the written submissions of the parties, pursuant to Rule 73(A).

## I. SUBMISSIONS

### A. Motion

1. The Defence seeks disclosure of the unredacted copies of witness statements of 63 witnesses that the Prosecution never intended to call to testify (“Non-Trial Witnesses”) and 22 witnesses that the Prosecution no longer intends to call to testify (“Unused-Trial Witnesses”)<sup>4</sup> and requests the Trial Chamber to:

- i) Modify the protective measures of 60 of the non-trial witnesses (excluding TF1-605, TF1-606, TF1-607) and 22 “unused-trial witnesses” as listed in the Confidential Annex to the

---

<sup>1</sup> SCSL03-01-T-746.

<sup>2</sup> SCSL03-01-T-756.

<sup>3</sup> SCSL03-01-T-760.

<sup>4</sup> Motion, para. 1.

Motion to the extent necessary to allow disclosure of identities of the witnesses and unredacted witness statements;

- ii) Order the Prosecution to immediately disclose to the Defence only, the identities and unredacted versions of the witness statements of the 85 witnesses listed in the confidential Annex to the Motion; and
- iii) Grant the Defence permission to contact any of the witnesses that the Defence deems useful after evaluation of the disclosed exculpatory material through the Witness and Victims Section ("WVS") of the Special Court;<sup>5</sup>

2. The Defence submits that the exculpatory nature of the witness statements constitutes "good cause" for Rule 66 purposes and that unredacted statements of all 85 witnesses will be of material assistance to the preparation of the Defence case; these statements have all already been identified by the Prosecution as containing exculpatory material and that unredacted disclosure would be significantly helpful to an understanding of important inculpatory and exculpatory evidence already on record as well as of evidence to be presented during the Defence case.<sup>6</sup>

3. It further submits that the targeted evidentiary material is specified as the complete and unredacted witness statements of the 85 witnesses that the Prosecution either no longer intends to call at trial or never intended to call at trial and that the targeted evidentiary material is *prima facie* exculpatory in nature, as the Prosecution has disclosed the material in redacted format under Rule 68.<sup>7</sup> As the Prosecution has disclosed the existence of the exculpatory material, but has withheld some of the information through the redaction process, the targeted evidentiary material is *prima facie* in the custody of the Prosecution.<sup>8</sup> The Defence claims that the Prosecution has failed to disclose the targeted exculpatory material, as the exculpatory portions of the witness statements are either redacted completely or the redactions make the exculpatory portions of little use to the Defence because the context is obscured and the identities of the witnesses unknown.<sup>9</sup>

---

<sup>5</sup> Motion, para. 33.

<sup>6</sup> Motion, para. 20.

<sup>7</sup> Motion, paras 21-23.

<sup>8</sup> Motion, para. 24.

<sup>9</sup> Motion, para. 25.

4. The Defence argues that the protective measures ordered in respect of 82 witnesses do not prevent the disclosure of the requested material. It notes that Witnesses TF1-605, TF1-606 and TF1-607 have never been granted protective measures and therefore their unredacted statements should be disclosed forthwith.<sup>10</sup> In relation to the other witnesses, the Defence submits that the Appeals Chamber has stated that the existence of protective measures does not affect the Prosecution's disclosure obligations pursuant to Rule 66 and 68<sup>11</sup> and that unredacted statements must be disclosed under Rule 68 where the identity of the witnesses who made the statements is inextricably connected with the substance of the statements.<sup>12</sup>

5. The Defence further submits that the 82 witnesses are no longer in need of protection based on the limited degree to which the Defence is seeking disclosure. Furthermore, there has been a change of circumstances in that the security situation facing the witnesses has decreased since none of the 82 witnesses will testify for the Prosecution any longer and that therefore any potential threats against the witnesses have diminished. In addition, Sierra Leone and Liberia continue to consolidate the peace and improve the general security situation of the region, so that the environment that existed when the protective measures order was made no longer exists. The Defence notes that it is impossible to give a subjective analysis of the security situation of each witness as the Defence does not know the identity of the witnesses and the Prosecution have not provided information on each witness's security situation.<sup>13</sup>

6. Lastly, the Defence submits that the modification of the protective measures must be evaluated in light of the Trial Chamber's obligation to respect the rights of the accused and have due regard to the need for witness protection.<sup>14</sup>

---

<sup>10</sup> Motion, para. 26.

<sup>11</sup> Motion, para. 27, referring to *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1146, Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 23 May 2008.

<sup>12</sup> Motion, para. 27, referring to *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecutor's Application Pursuant to Rule 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Confidential Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A), 4 July 2006, para. 8.

<sup>13</sup> Response, paras 28-30.

<sup>14</sup> Motion, para. 31.

**B. Response**

7. Prosecution submits that the Motion should be denied on the grounds that:
- i) the Motion is procedurally defective as the Defence requests multiple forms of relief in one pleading;<sup>15</sup>
  - ii) the Prosecution has complied with its disclosure obligations pursuant to Rule 66 by the disclosure of redacted versions of the witness statements, since the obligation to provide unredacted statements disclosing the identifying data of witnesses relates only to those witnesses whom the Prosecution calls to testify at trial;<sup>16</sup>
  - iii) the Prosecution has met its disclosure obligation under Rule 68, since all potentially exculpatory material contained in the witness statements has been disclosed, and the only information that has been redacted is information relating to their identity, which does not fall within the ambit of Rule 68, and not to “material pieces of evidence without which the Defence cannot evaluate the significance of the [individual] statement”;<sup>17</sup>
  - iv) the Defence has incorrectly identified the “targeted evidentiary material” as being the “complete and unredacted witness statements” rather than the redacted portions of the statements;<sup>18</sup>
  - v) The Defence has failed to demonstrate how any of the redacted material in the statements, that is, the names and identifying information, is *prima facie* exculpatory in nature;<sup>19</sup>
  - vi) the Defence has failed to satisfy the requirements of the test for variation of the witnesses’ protective measures;<sup>20</sup>
  - vii) Witnesses TF1-605, TF1-606 and TF1-607 are sources from whom the Prosecution received confidential information intended to generate new evidence pursuant to Rule 70, but that

---

<sup>15</sup> Response, paras 2, 24.

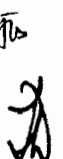
<sup>16</sup> Response, paras 5-7.

<sup>17</sup> Response, paras 8-10.

<sup>18</sup> Response, para. 12.

<sup>19</sup> Response, paras 13.

<sup>20</sup> Response, para. 16.



24928

nevertheless the evidence provided by these sources falling within the ambit of Rule 68 has been disclosed and there is no requirement of provide any additional information;<sup>21</sup>

viii) existing protective measures provide procedures that allow the Defence to request contact with a particular witness and the Prosecution has no objection to a variance of any existing protective measure order to allow access through WVS.<sup>22</sup>

### C. Reply

8. In its Reply the Defence reiterates its request and submits that:

- i) there is no prohibition against combining several request for relief in one motion, especially where, as in the present case, the requests are inter-related and can easily be addressed within a single document and within the prescribed page limit and this makes judicial economy;<sup>23</sup>
- ii) it has shown good cause for disclosure pursuant to Rule 66;<sup>24</sup>
- iii) the disclosure by the Prosecution pursuant to Rule 68 is not complete and that the Defence is entitled to the complete and unredacted witness statements that contain exculpatory material;<sup>25</sup>
- iv) the Defence has satisfied the test for the modification of protective measures as the simple fact that those identified persons are no longer called to testify for the Prosecution is a changed circumstance and that any potential threats could be dealt with through contempt proceedings;<sup>26</sup>
- vi) in relation to witnesses TF1-605, TF1-606, TF1-607, Rule 70 does not allow the Prosecution to withhold information given to it on a confidential basis in so far as Rule 68

---

<sup>21</sup> Response, para. 23.

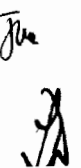
<sup>22</sup> Response paras 3, 20-22.

<sup>23</sup> Reply, paras 4-6.

<sup>24</sup> Reply, paras 7-8.

<sup>25</sup> Reply paras 10-14.

<sup>26</sup> Reply, para. 16.



is concerned, and since the targeted evidentiary material is exculpatory, it must be disclosed in full.<sup>27</sup>

## II. APPLICABLE LAW

9. The Trial Chamber takes note of the following applicable legal provisions:

### Article 17: Rights of the accused

[...]

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

[...]

e. To examine, or have examined, the witness against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

### Rule 66: Disclosure of materials by the Prosecutor

(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

(i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 bis at trial.

(ii) 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.

### Rule 68: Disclosure of Exculpatory Evidence

(A) [...]

(B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which

---

<sup>27</sup> Reply, para. 19.

24930

in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

**Rule 70: Matters not Subject to Disclosure**

(A) [...]

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

### III. DELIBERATIONS

#### A. Prosecution's Objection on Procedural Grounds

10. The question of whether or not several requests for relief can appropriately be combined in the same motion is one that must be decided on a case-by-case basis, but there is no general rule that this cannot be done, provided that the motion is confined to the length prescribed in the Practice Direction<sup>28</sup>. In the present case, the Motion does not exceed the prescribed length and the several requests are inter-related. The Trial Chamber therefore finds no merit in the Prosecution's objection that the Motion is procedurally defective and dismisses the objection.

#### B. Disclosure of Exculpatory Material under Rule 68(B)

11. The Defence requests the disclosure of the unredacted versions of the witness statements of 85 witnesses listed in the confidential Annex A to the Motion pursuant to Rule 66(A)(ii) and Rule 68(B).

12. Rule 68(B) requires the Prosecution to disclose continuously exculpatory evidence, that is, evidence that in any way leads to suggest the innocence of the accused, or evidence that in any way

---

<sup>28</sup> Article 6(C) of the Practice Direction on dealing with Documents in The Hague Sub-Office provides that a motion shall not exceed 10 pages or 3,000 words, whichever is greater.





tends to mitigate the guilt of the accused or evidence favourable to the accused that may affect the credibility of the prosecution evidence.<sup>29</sup>

13. The Trial Chamber has held that in order to establish that the Prosecution has breached its Rule 68(B) disclosure obligations, the Defence must

- (1) specify the targeted evidentiary material;
- (2) make a prima facie showing that the targeted evidentiary material is exculpatory in nature;
- (3) make a prima facie showing that the material is in the Prosecution's custody and control; and
- (4) show that the Prosecution has in fact, failed to disclose the targeted exculpatory material.<sup>30</sup>

14. The Defence argues that Rule 68 requires the Prosecution to disclose the identities and full statements of witnesses where "the identity of the witness who made the statement is inextricably connected with the substance of the statements" and refers to the ICTR case of *Karemera*.<sup>31</sup> The Trial Chamber does not agree with this submission. The principle espoused in *Karemera* can be distinguished as being applicable to the particular facts of that case in which - unlike the present case - the witnesses were not subject to any protective measures ordered by a Trial Chamber.

15. Moreover, the Defence in the present case has not shown that the identities of the witnesses are "inextricably connected" to the exculpatory information. The information provided in Annex A to the Motion does not support the conclusion that it is necessary to know the identity of a witness in order to understand the exculpatory information provided in his or her statement. The Trial Chamber finds that the submissions of the Defence amount to speculation, rather than a *prima facie* showing that the targeted evidentiary material is exculpatory in nature.

---

<sup>29</sup> *Prosecutor v. Sesay et al*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 35; *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 5.

<sup>30</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, para. 5.

<sup>31</sup> Motion, para. 13, referring to *The Prosecutor v. Karemera et al*; Case No. ICTR-98-44-T, Decision on 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.



16. The Defence claims that the “targeted evidentiary material” is the complete and unredacted statement of each of the witnesses<sup>32</sup>. That cannot be correct. The Defence does not dispute that it has already been served with redacted statements, so it cannot be said that the Prosecution was in breach of its Rule 68 disclosure obligations in relation to those redacted statements. The alleged exculpatory material in respect of which the Defence is seeking disclosure is the redacted portions of the statements which the Defence has not seen. It must follow that those redacted portions comprise the “targeted evidentiary material” that is the subject of the present Defence application. It is in respect of this “targeted evidentiary material” that the Trial Chamber finds that the Defence has failed to satisfy the above-mentioned test pursuant to Rule 68(B) in that the Defence has failed to make a *prima facie* showing that such material is exculpatory in nature.

17. Furthermore, the Defence has not substantiated in any way that the Prosecution has acted in bad faith<sup>33</sup> by claiming that it has met its disclosure obligations under Rule 68 in that it has disclosed all potentially exculpatory material.<sup>34</sup> The Trial Chamber therefore accepts, in the absence of evidence to the contrary, that the Prosecution has acted in good faith by disclosing all exculpatory evidence within the meaning of Rule 68 in accordance with its disclosure obligations<sup>35</sup>.

18. Accordingly, the Trial Chamber finds that the Prosecution is not under any obligation pursuant to Rule 68 to disclose the identity of the providers of the witness statements.

### C. Disclosure of unredacted Witness Statements under Rule 66(A)(ii)

19. Under to Rule 66(A)(ii), the Prosecution has a duty, *inter alia*, to make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. In relation to witness statements of additional prosecution witnesses that the Prosecution does not intend to call, the Trial Chamber may order that copies of the statements be made available upon “good cause being shown” by the Defence. The Defence argues that in the present case, “good cause” is established by the exculpatory nature of the witness statements<sup>36</sup>.

---

<sup>32</sup> Reply, para. 14.

<sup>33</sup> *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigator’s Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para. 16.

<sup>34</sup> Response, paras 8, 9.

<sup>35</sup> See *Prosecutor v. Taylor*, SCSL-03-01-T-735, Decision on Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68, 18 February 2009, para. 8.

<sup>36</sup> Motion, para. 11.





24933

20. In view of the above finding by the Trial Chamber that the Defence has failed to make a *prima facie* showing that the targeted evidentiary material is exculpatory in nature, it follows that the Defence has failed to show good cause. Accordingly, the Trial Chamber finds that the Prosecution has complied with Rule 66(A)(ii) by disclosing the said witness statements in accordance with its obligations under this Rule and with the orders for protective measures made in various decisions of Trial Chamber I and Trial Chamber II.

#### D. Modification of the Protective Measures

21. Various previous protective measures were ordered in the present case and in other cases before the Special Court that relate to the witnesses mentioned in Annex A to the Motion.<sup>37</sup> The relevant orders for protective measures are the following:

(a) That the Prosecution may withhold identifying data of a witness for whom the Prosecution is seeking protection as set forth in paragraph 6 of the first Motion or any other information which could reveal the identity of such witness until 42 days before the witness is due to testify at trial;

(b) That the Prosecution disclose the material envisaged in Rule 66(A)(i) of the Rules in redacted form omitting identifying data until 42 days before the witness is due to testify at trial;

[...]

(m) That the Defence Counsel shall not directly or indirectly contact any protected Prosecution witness except with the written consent of the Prosecution or leave of the Court.”<sup>38</sup>

---

<sup>37</sup> *Prosecutor v. Sesay*, SCSL-03-05-PT-038, Decision on Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Kallon*, SCSL-03-7-PT-033, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Gbao*, SCSL-03-09-PT-048, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003; *Prosecutor v. Brima*, SCSL-03-06-PT-036, Decision on Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Kamara*, SCSL-03-010-PT-040, Decision on Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003; *Prosecutor v. Kanu*, SCSL-03-13-PT-037, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims, 24 November 2003; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; *Prosecutor v. Taylor*, SCSL-03-01-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; *Prosecutor v. Taylor*, SCSL-03-01-PT, Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, 15 September 2006.

ms  
S

22. Where an application is made to rescind, vary or augment protective measures, the Appeals Chamber has 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 establishing on a preponderance of probabilities that the witness is no longer in need of such protection.<sup>39</sup>

23. The Appeals Chamber interpreted this test as meaning

“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”<sup>40</sup>

and, in particular, where

“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”.<sup>41</sup>

24. The Appeals Chamber held that this test must be met with respect to both Rule 68 and Rule 66 witnesses.<sup>42</sup>

25. The Defence submits that the 82 witnesses are no longer in need of protection in respect of the limited degree that the Defence is seeking disclosure<sup>43</sup>. However, even if the variations to the protective measures are minimal, the appropriate legal test must first be applied and the Defence must show that changed circumstances warrant such a variation, not that its consequences will be only to a “limited degree”. The Trial Chamber must determine whether the Defence has satisfied the

---

<sup>38</sup> *Prosecutor v. Taylor*, SCSL-03-01-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.

<sup>39</sup> *Prosecutor v. Sesay, Kallon, Gbao*, 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, 23 May 2008, para. 35; see also *Prosecutor v. Taylor*, SCSL-03-01-T-636, Confidential Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168, 17 October 2008, para. 17.

<sup>40</sup> *Prosecutor v. Sesay, Kallon, Gbao*, 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, 23 May 2008, para. 36.

<sup>41</sup> *Prosecutor v. Sesay, Kallon, Gbao*, 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, 23 May 2008, para. 37.

<sup>42</sup> *Prosecutor v. Sesay, Kallon, Gbao*, 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, 23 May 2008, para. 37.

<sup>43</sup> Motion, para. 28.

above mentioned test before it determines the appropriate nature and extent of any variation to be ordered.<sup>43</sup>

26. The Defence argues that circumstances have changed and the protective measures may be varied as requested because the witnesses are no longer expected to testify in the case against the Accused.<sup>44</sup> The Trial Chamber, however, notes the finding of the Appeals Chamber that protective measures are not superseded by the fact that a witness will not be called to testify.<sup>45</sup> The protection continues even after the end of the proceedings.

27. The Defence further argues that a variation of protective measures is warranted because the general security situation of the region has improved and the hostile environment that existed when the protective measures order was made no longer exists<sup>46</sup>. However, it does not necessarily follow from this submission that the witnesses would not still be the target of threats and in this regard the Trial Chamber notes that the submission was not accompanied by any supporting evidence.

28. Accordingly, the Trial Chamber finds that the Defence has not satisfied the test for an alteration of protective measures in that it has not presented supporting evidence capable of establishing on a preponderance of probabilities that the witnesses are no longer in need of the present orders for protective measures.

#### E. Witnesses TF1-605, TF1-606 and TF1-607

29. The Prosecution states that these individuals were not originally listed as witnesses and that the information in their statements was provided on a confidential basis for the purpose of generating new evidence pursuant to Rule 70. The Trial Chamber notes that, notwithstanding that Rule 70(B) provides that information of that nature, as well as its origin, shall not be disclosed by the Prosecutor without the consent of the person or entity providing the information, the potentially exculpatory portions of the statements have already been disclosed to the Defence. Nevertheless, in the absence of

---

<sup>43</sup> *Prosecutor v. Sesay, Kallon, Gbao*, 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, 23 May 2008, paras 36-40; see also *Prosecutor v. Taylor*, SCSL-03-01-T-636, Confidential Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168, 17 October 2008, para. 38.

<sup>44</sup> Motion, para. 29.

<sup>45</sup> *Prosecutor v. Sesay, Kallon, Gbao*, 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, 23 May 2008, paras 6 and 39.





24936

consent by these persons, the Trial Chamber declines to make any order for disclosure of the redacted portions of their statements.

**F. Contact with potential Witnesses**

30. The above-mentioned protective measures provide that Defence Counsel shall not directly or indirectly contact any protected Prosecution witness except with the “written consent of the Prosecution or leave of the Court.”<sup>47</sup>

31. The Defence seeks permission to contact any of the witnesses through the Witness and Victims Section and the Trial Chamber sees no reason not to make an appropriate order in this regard since the Prosecution does not oppose it.

32. The Prosecution points out that the existing protective measures provide procedures whereby the Defence can request to be allowed to contact a particular witness. To the extent that the Defence request to use WVS to initiate such contact is at variance with any existing order the Prosecution has no objection to variance of that order to allow access through WVS.<sup>48</sup>

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**ALLOWS** the Motion in part;

**GRANTS** the Defence leave to contact witnesses through the Witness and Victims Section in accordance with established procedures; and

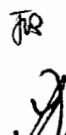
**DENIES** the remainder of the Motion.

---

<sup>46</sup> Motion, para. 29.


<sup>47</sup> See only Order 1(m) of the *Prosecutor v. Taylor*, SCSL-03-01-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.


<sup>48</sup> Response, paras 20-22.

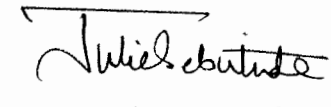


24937

Done at The Hague, The Netherlands, this 30<sup>th</sup> day of March 2009.

  
Justice Teresa Doherty

  
Justice Richard Lussick  
Presiding Judge

  
Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

