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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

Registrar: Mr. Lovemore G. Munlo SC

Date: 28th of February 2007

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

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

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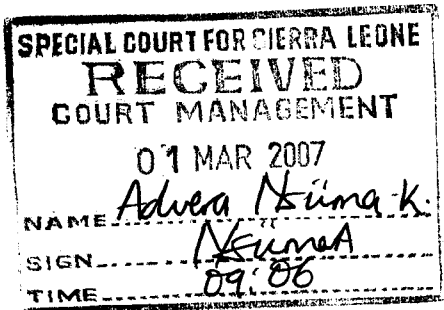
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TRIAL CHAMBER I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet, and Hon. Justice Benjamin Mutanga Itoe;

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SEIZED of the Application for Leave to Appeal the Decision (30th November 2006) on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed publicly by Defence Counsel for the First Accused, Issa Hassan Sesay, ("Defence") on the 4th of December 2006 ("Application");

NOTING the Response to the Motion filed by the Office of the Prosecutor ("Prosecution") on the 14th of December 2006 ("Response");

NOTING that no reply was filed by the Defence within the prescribed time limits;

PURSUANT to Rules 26bis, 54 and 73 of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. INTRODUCTION

1. On the 30th of November 2006, this Chamber issued its Decision on Sesay Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure ("Impugned Decision"), partially granting a Defence Motion for protective measures for its witnesses. In particular, the Chamber found that:

(i) That the Defence has established a *prima facie* case for the issuing of proposed protective measures (a), (b), (i), (j), (k), (l) and the first part of (f) 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.¹

2. In addition, consistent with its more recent jurisprudence in the case of *Prosecutor v. Norman*², the Chamber also Ordered that, *inter alia*:

¹ Impugned Decision, para. 24. Footnotes omitted, emphasis added.



j. Upon disclosure of the witnesses' names or any other identifying data by the Defence [...], the Prosecution, the Defence for the Second Accused, Morris Kallon, 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 First Accused, Issa Sesay. The Witnesses and Victims Section [{"WVS"}], 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 interview shall not take place at the outset of the witness' testimony in court.

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II. SUBMISSIONS OF THE PARTIES

A. The Application

3. Pursuant to Rule 73(B), the Defence seeks leave to appeal the Impugned Decision on the basis of two alleged errors by the Trial Chamber. The Defence submits that these errors constitute exceptional circumstances and might cause irreparable prejudice to the Defence.³

Alleged Error I

4. The Defence submits that the Trial Chamber erred in law in concluding that no *prima facie* case has been shown for the issuing of protective measures to "potential witnesses resident outside West Africa". The Defence contends that the Trial Chamber based its Decision on "essentially the same materials" relied upon by the Prosecution for an earlier motion for protective measure for its witnesses.⁴ The Chamber granted the relief for such witnesses.⁵ The Defence thus submits that this Chamber erred by assessing the "same evidentiary material differently thus inconsistently and unfairly requiring more of the Defence than the Prosecution".⁶

Alleged Error II

5. The Defence further claims that the Chamber erred in failing to order as follows:

That the Prosecution make a written request to the Trial Chamber or Judge thereof, for permission to contact any protected witnesses or any relative of such person and that such request be timely served on the Sesay Defence. At the direction of the Trial Chamber or a Judge thereof, the Sesay Defence shall contact the protected person and ask his or her consent of the parents or guardian of that person

² See *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20 June 2006 ("Norman Decision").

³ Application, paras. 13-19.

⁴ *Ibid.*, para. 2.

⁵ The Defence refers to this Chamber's Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003 and the Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004 ("Prosecution Protective Measures Decisions").

⁶ Application, paras. 2-3.

if that person is under the age of 19 to an interview by the Prosecution or the Kallon or Gbao Defence and shall undertake the necessary arrangements to facilitate such contact.

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Instead, the Chamber issued order (j) above.

6. The Defence claims that the Chamber's ruling is logically and legally inconsistent in that the Chamber previously granted a similar order in an application for protective measures for Prosecution witnesses.⁷ In addition, the Defence also claims that the order granted is inconsistent with the *Norman* Decision in that those circumstances involved defence witnesses for which no protective measures were applicable.⁸

B. The Prosecution Response

7. The Prosecution submits that there are no exceptional circumstances present which would justify a grant of leave to appeal. The Prosecution states that by declining to extend protective measures to potential witnesses living outside of West Africa, this Chamber acted within its discretion. Even though this Chamber "granted the bulk of the protective measures based on the same evidentiary material"⁹ which the Prosecution previously relied upon, it was within this Chamber's discretion to evaluate the security situation differently at the present time.¹⁰

6. Regarding the Defence's claims about Alleged Error II, the Prosecution contends that the Defence has failed to demonstrate that this Chamber abused its discretion, and that the relief granted is consistent with this Chamber's jurisprudence in the *Norman* Decision.¹¹

7. In addition, the Prosecution states that because the Defence may still file a motion for protective measures on a case-by-case basis, the Defence has not suffered irreparable prejudice as a result of this Chamber's refusal to grant blanket protection to potential witnesses who reside outside of West Africa.¹² Furthermore, since the Defence has failed to demonstrate that WVS will fail to protect the rights and safety of potential witnesses, it has also failed to demonstrate that it will suffer irreparable prejudice as a result of Alleged Error II.¹³

⁷ The Defence again refers to the Prosecution Protective Measures Decisions.

⁸ *Ibid.*, paras. 4-5.

⁹ Response, para. 18.

¹⁰ *Ibid.*, para. 18.

¹¹ *Ibid.*, para. 19.

¹² *Ibid.*, para. 27.

¹³ *Ibid.*, paras. 29-30.

III. APPLICABLE LAW

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8. Rule 73(B) of the Rules establishes the standard which governs appeals on motions for interlocutory relief. The relevant jurisprudence of this Chamber in this regard is extensive.

9. According to Rule 73(B), the Trial Chamber may give leave to appeal in exceptional circumstances and to avoid irreparable prejudice to a party. The standard is conjunctive, as can be deduced from both the plain and literal interpretation of the Rule and this Chamber's settled jurisprudence on the subject.¹⁴

10. Specifically, the Chamber has consistently held that interlocutory decisions generally cannot be appealed, and that Rule 73(B) requires that a high threshold be met before the Court can grant leave to appeal,¹⁵ the rationale behind this Rule being "only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision."¹⁶

11. By way of further guidance, the Chamber has defined "exceptional circumstances" for the purposes of Rule 73(B) in these terms:

"Exceptional circumstances" may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.¹⁷

11. As regards the requirement of "irreparable prejudice", this Chamber previously held that this expression refers to prejudice that "may not be remediable by appropriate means within the final disposition of trial."¹⁸

¹⁴ See, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Application by the Second Accused for Leave for Interlocutory Appeal against the Majority Decision of the Trial Chamber of the 9th of December 2004 on Issue of Urgent Concern to the Accused Morris Kallon, 2 May 2005, para. 17; *Ibid.*, Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay-Motion seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, 15 June 2005, para. 15.

¹⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF-141, 28 April 2005, para. 17.

¹⁶ *Ibid.* at para. 18.

¹⁷ *Ibid.* at para. 26.

¹⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decisions on Motion by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 28 June 2006, para. 13; See also *Ibid.*, Decision on Joint Request for Leave to Appeal against Decision on Prosecution's Motion for Judicial Notice, 19 October 2004, para. 23.

12. Endorsing the legal standard for granting or refusing applications for interlocutory appeals by this Chamber, the Appeals Chamber had this to say:

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The underlying rationale for permitting [interlocutory] appeals is that certain matters cannot be cured or resolved by final appeal against judgement. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.¹⁹

III. DELIBERATION

Preliminary Considerations

13. From the outset, the Trial Chamber is of the opinion that the Application seeks to advance at this stage possible grounds of appeal of the Impugned Decision, in the form of alleged errors by the Chamber in reaching the said Decision. Having regard to the principle of judicial hierarchy and the legal standard prescribed in Rule 73(B), the Chamber finds that any such grounds of appeal are irrelevant for the purposes of the Chamber's determination as to whether the prescribed test for leave to appeal has been met.²⁰

Exceptional Circumstances

14. Specifically as regards the requirement of exceptional circumstances, the Defence submits that exceptional circumstances exist in the present case because, more particularly, this Chamber's refusal to grant the requested protective measures could wholly undermine the cause of justice.²¹

15. The Chamber wishes to emphasize that in the Impugned Decision, it found that the evidence presented by the Defence constituted *prima facie* evidence that certain Defence witnesses had subjective fears of reprisal by ex-RUF fighters or by individuals with antipathy toward the RUF.²² In its Motion for protective measures, the Defence also relied upon investigators' statements from 2003, which the Prosecution had originally relied upon in its own application specifically for protective measures for Prosecution witnesses, generally indicating that potential witnesses in Sierra Leone and

¹⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Appeal Against The Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal, 17 January 2005, para. 29.

²⁰ See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF-141, 28 April 2005, paras. 15-16; *Prosecutor v. Bizimungu, Mugenzi, Bicumumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Bicumumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 Decision on the Motion of Bicumumpaka and Mugenzi for Disclosure of Relevant Material, 4 February 2005, para. 28.

²¹ Application, para. 13.

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other West African nations feared for their safety if it became known they were testifying before the Court.²³ No evidence was otherwise specifically introduced by the Defence which would indicate that similar security concerns exist for potential witnesses residing outside West Africa.²⁴ However, this Chamber did rule that the evidence submitted by the Defence was sufficient to support blanket protective measures for witnesses residing outside West Africa who had indicated their willingness to testify.²⁵

16. We are, therefore, of the view that the mere fact that the Chamber declined to extend protective measures limited to potential witnesses living elsewhere than Sierra Leone or West Africa, when the Defence’s own pleadings made no allegations which would support or require the implementation of such measures, cannot wholly undermine the cause of justice and consequently be considered sufficient to constitute exceptional circumstances.

17. On the related issue, namely the appropriateness of WVS to “offer the same level of reassurance or explanation [to Defence witnesses] as can a known representative of the Defence,”²⁶ the short response of the Chamber is that, given the overall duty of the Chamber to conduct a fair and expeditious trial, its power to order appropriate measures in this regard and its statutory authority to grant the responsibility of contacting witnesses to the WVS, the adoption of this new procedure by the Chamber cannot, likewise, in itself or cumulatively constitute exceptional circumstances for the purposes of the instant Application for leave to file an interlocutory appeal.

18. It is worth noting that only in its current Application did the Defence note that “Witnesses have already expressed a fear about some of the individuals who work in the Witness and Victims Unit”.²⁷ In the absence of any evidence as such, this Chamber had no basis, in the Impugned

²² Impugned Decision, para. 21.

²³ *Ibid.*, para. 23.

²⁴ Emphasis added. It is perhaps significant to note that in replying to submissions from the Prosecution that the original Motion for protective measures filed by the Defence did not provide any information concerning, *inter alia*, witnesses residing in West Africa and outside West Africa, the Defence expressly addressed security concerns only pertaining to the West African region and concluded that “there has been no material alteration, and no evidence led as to any material alteration, in the security situation in Sierra Leone or the West African region”. See Defence Reply to Prosecution Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 2 August 2006, paras. 13, 15, 17 and 19.

²⁵ Impugned Decision, para. 24(i) and (ii). Emphasis added. The Chamber is cognizant of the Defence indication that it might have perceived a degree of ambiguity in the wording of the Impugned Decision as a basis for its current Application. See Application, footnote 1.

²⁶ See Application, para. 17.

²⁷ See *Ibid.*, para. 16 and, in particular, footnote 15. No evidence has been presented by the Defence in support of this submission.

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Decision, for a finding that WVS cannot adequately fulfil its duties in a manner consistent with the rights of witnesses and of the Accused.

19. Accordingly, the Chamber finds that the Defence has failed to establish any exceptional circumstances justifying granting leave to appeal the Impugned Decision.

Irreparable Prejudice


22. According to the Chamber's practice, a finding that no exceptional circumstances exist would be sufficient to dismiss the Application.²⁸ However, with reference to the second prong of the test for the granting of an application for leave to appeal, namely an "irreparable prejudice" arising from the Impugned Decision, the Chamber wishes to observe that the denial of blanket protective measures does not irrevocably impede the granting of effective protection to certain witnesses. The Defence is still at liberty to seek specific protective measures for individual witnesses, provided that such request is supported by sufficient evidence, if it feels that the current applicable protective measures regime will unduly prejudice them.

BASED ON THE FOREGOING CONSIDERATIONS

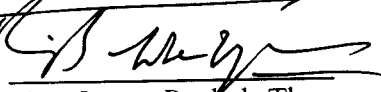
THE CHAMBER, accordingly

DISMISSES the Application its entirety.

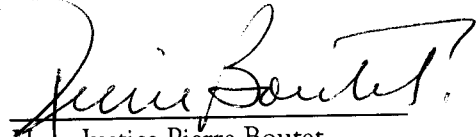
Done at Freetown, Sierra Leone, this 28th day of February 2007.



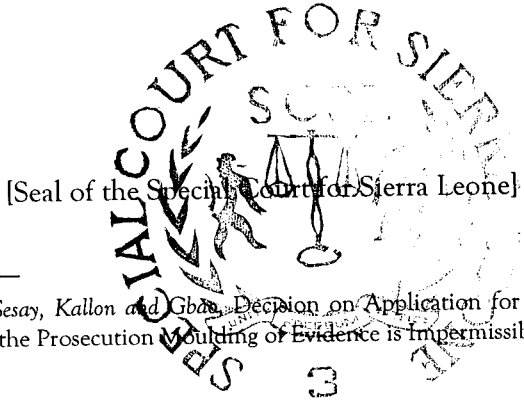
Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I



Hon. Justice Pierre Boutet



²⁸ See, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Application for Leave to Appeal the Decision on Defence Motion for a Ruling that the Prosecution's Moulding of Evidence is Impermissible, 2 February 2007, para. 15.