

873)

SCSL-04-15-T  
(31748-31762)

31742



**SPECIAL COURT FOR SIERRA LEONE**

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

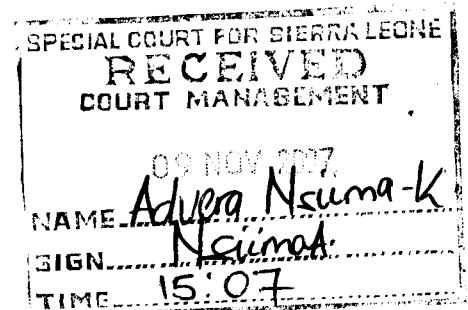
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

**TRIAL CHAMBER I**

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

**Registrar:** Mr. Herman von Hebel

**Date:** 9<sup>th</sup> of November 2007



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

**Public Document**

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

Office of the Prosecutor:

Peter Harrison  
Reginald Fynn

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash  
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray  
Charles Taku  
Kennedy Ogetto

Court Appointed Counsel for Augustine Gbao:

John Cammegh

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

SEIZED of the Motion Requesting the Lifting of Protective Measures in Respect of Requested Witnesses, filed confidentially by Counsel for the First Accused, Issa Hassan Sesay (“Defence”) on the 19<sup>th</sup> of January 2007 (“Motion”);

NOTING the Response filed confidentially by the Office of the Prosecutor (“Prosecution”) on the 29<sup>th</sup> of January 2007 (“Response”) and the Reply thereto filed publicly by the Defence on the 5<sup>th</sup> of February 2007 (“Reply”);

NOTING the Addendum to the Motion, filed publicly with a confidential Annex A by the Defence on the 25<sup>th</sup> of September 2007 (“Addendum”);


MINDFUL of the Decisions and Orders of this Trial Chamber concerning protective measures for Prosecution witnesses, including the *Decisions on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure* for each individual accused in the RUF trial<sup>1</sup> and the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses*, filed on the 5<sup>th</sup> of July 2004 (“July 2004 Decision”);<sup>2</sup>

MINDFUL of the protective measures granted to witnesses in the case of *Prosecutor v. Taylor*,<sup>3</sup>

<sup>1</sup> *Prosecutor v. Sesay*, SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, *Prosecutor v. Kallon*, SCSL-03-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, and *Prosecutor v. Gbao*, SCSL-03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003.

<sup>2</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004.

<sup>3</sup> See for instance *Prosecutor v. Taylor*, SCSL-03-01-PT, 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 [*Taylor Decision*]; *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; *Prosecutor v. Taylor*, SCSL-03-01-PT, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which Filed *Ex Parte*, 22 January 2007; *Prosecutor v. Taylor*, SCSL-03-01-PT, Decision on Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and on Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List as Annex A(4) of the Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure Filed on 8 March 2007 and on Public Urgent Prosecution Request for Interim Measures, 26 March 2007.

B 

  
9 November 2007

NOTING that given that the measures requested have the effect of decreasing the protective measures granted to certain witnesses in the Taylor trial (in Category III as defined in this Decision),<sup>4</sup> the Chamber has sought all relevant information from Trial Chamber II regarding these witnesses, and has communicated with Trial Chamber II with a view to consulting with it regarding the variation of these measures;<sup>5</sup>

PURSUANT to Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 26bis, 34, 53, 66, 68, 69 and 75 of the Rules of Procedure and Evidence ("Rules");

**THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:**

## I. SUBMISSIONS OF THE PARTIES

### A. *The Motion*

1. The Defence submits that redacted statements from several Prosecution witnesses (listed in the Motion as well as in the Addendum thereto) originally disclosed under Rule 68 of the Rules contain significant exculpatory evidence in favour of the Accused Sesay. The Defence also submits that redacted statements from several other witnesses (also listed in the Motion) that were initially disclosed under Rule 66 also contain exculpatory evidence relating to the Accused Sesay. In support thereof, the Defence provides details of the significance of the evidence of these witnesses in Annex A of the Motion as well as in Annex A of the Addendum.<sup>6</sup>

2. The Defence requests that the Chamber lift the protective measures extended to the aforementioned witnesses in order that the unredacted statement of each witness is made available to the Defence.<sup>7</sup> The Defence further seeks permission to contact each of the aforementioned witnesses directly. In the alternative, the Defence requests permission to contact the witnesses through the Witnesses and Victims Section ("WVS").<sup>8</sup>

<sup>4</sup> See para 20.

<sup>5</sup> Interoffice Memorandum from Honourable Justice Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber I to Honourable Justice Julia Sebutinde, Presiding Judge, Trial Chamber II, 26 September 2006 which was electronically transmitted that same day.

<sup>6</sup> Motion, para 9 and Annex A.

9 November 2007

**B. The Prosecution Response**

3. The Prosecution contends that disclosure of unredacted statements will disclose to the Accused, the identity of the persons who made the statement and who may still desire to maintain their anonymity. The Prosecution states that many of the individuals who gave statements have refused to assist the Prosecution any further.<sup>9</sup> The Prosecution further submits that many of the witnesses that are the subject of this Motion are also witnesses in the Taylor trial, and that several testified in the AFRC trial, many being insider witnesses, while others were child soldiers or ex-AFRC combatants. These witnesses are therefore, in the submission of the Prosecution, particularly vulnerable to threats or reprisals if their identities are exposed and may still be targeted even after the trial has finished.<sup>10</sup>

4. In addition, the Prosecution asserts that even though Rule 66(A) requires the Prosecution to disclose statements of witnesses it intends to call to testify, it does not intend to call any of the witnesses listed in the Motion.<sup>11</sup>

5. The Prosecution submits that even though Rule 68 requires the Prosecution to disclose the existence of exculpatory evidence, it does not require it to provide the Defence with the full unredacted version of any statement that may include Rule 68 material. According to the Prosecution, the Motion does not establish any way in which the Defence has been prejudiced, as the Defence can seek to interview protected witnesses under the terms of the July 2004 Decision.<sup>12</sup>

6. The Prosecution further states that one witness, TF1-182, is now deceased. It therefore submits that continued protective measures may be necessary to protect the relatives of the deceased. Finally, the Prosecution expresses its willingness to submit both redacted and unredacted versions of TF1-182's statements to the Chamber to allow it to assess whether redactions remain necessary.<sup>13</sup>

**C. The Defence Reply**

7. The Defence argues that it seeks the disclosure of identifying information only to the Defence, not to the public. It submits also that its Motion is an application, pursuant to Rule 75(A),

---

<sup>7</sup> Motion, para 10.

<sup>8</sup> *Ibid.*, para 11.

<sup>9</sup> Response, para 11.

<sup>10</sup> *Ibid.*, paras 23-24.

<sup>11</sup> *Ibid.*, para 12.

<sup>12</sup> *Ibid.*, para 13.

<sup>13</sup> *Ibid.*, para 25.

4

(F) and (G) of the Rules to vary both the July 2004 Decision of Trial Chamber I and the *Taylor* Decision of Trial Chamber II.<sup>14</sup>

8. With respect to the witnesses covered by protective measures in the RUF trial, the Defence contends that there has been a change in circumstances justifying a variation of protective measures. The Defence states that the July 2004 Decision was drafted with the sole purpose of protecting witnesses who were expected to testify in the RUF trial and that since the specified witnesses will not testify against the Accused Sesay, and are likely to provide material assistance to the Defence, it submits that circumstances have changed sufficiently to justify the disclosure of identifying information.<sup>15</sup>

9. The Defence further states that the witnesses are *de facto* no longer Prosecution witnesses, and accordingly fall within the jurisdiction of WVS and should be contacted by them, rather than the Prosecution.<sup>16</sup> The Defence cites this Chamber's most recent jurisprudence in support of its submission that the WVS is in the best position to determine how to contact a protected witness and obtain consent for an interview.<sup>17</sup>

10. As regards the *Taylor* witnesses, the Defence contends that the Prosecution and Defence have agreed that these witnesses are of material assistance to the Defence and that on this basis, the unredacted statements should be disclosed.<sup>18</sup>

## II. APPLICABLE LAW

11. The Chamber recalls that Rules 66 and 68 of the Rules specify the disclosure obligations of the Prosecution. The relevant provisions of these Rules provide as follows:

### Rule 66

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

[...]

(ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to

<sup>14</sup> Reply, para 2.

<sup>15</sup> *Ibid.*, para 5.

<sup>16</sup> *Ibid.*, para 5.

<sup>17</sup> *Ibid.*, para 16, citing *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-668, Decision on Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non-Public Disclosure, 30 November 2006, para 24 (viii).

<sup>18</sup> *Ibid.*, para 6.

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

(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 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.

12. This Chamber has laid down a principle that when the Defence seeks the disclosure of evidence under Rule 68, it must be specific as to the evidence that it wishes to have disclosed and make a *prima facie* showing that such evidence is exculpatory.<sup>19</sup> The Chamber has further taken the view in this regard that it is insufficient to simply allege non-compliance with disclosure obligations on the part of the Prosecution and that instead, “the Chamber must be satisfied that the request from the Defence has been specific as to the targeted material alleged to be in the Prosecution’s possession, control or custody” and the extent to which it is exculpatory.<sup>20</sup>

13. We have also stated in our prior decisions that the granting of witnesses and victims’ protection in the jurisdiction of the Special Court is governed by Article 16 of the Court’s Statute. Accordingly, Article 16(4) provides, *inter alia*, thus:

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

<sup>19</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-T, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, (TC), 9 July 2004, paras 43-44 [*Sesay Disclosure Decision*]; *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, (TC), 8 July 2004, para 24. See also *Prosecutor v. Karemera, Ndirumbatse and Nzizorera*, ICTR-98-44-T, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution (TC), 19 October 2006, para 6; *Prosecutor v. Karemera, Ndirumbatse and Nzizorera*, ICTR-98-44-AR73.6, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para 13; *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006 para 2 [*Bagosora Decision*]. In the *Bagosora Decision*, the ICTR has held that “information will be exculpatory if it tends to disprove a material fact alleged against the accused, or if it undermines the credibility of evidence intended to prove material facts.” (para 4).

<sup>20</sup> *Sesay Disclosure Decision*, para 43.

trauma, including trauma related to crimes of sexual violence and violence against children.

31754

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

15. It is, likewise, for purposes of such applications, necessary to emphasize that the overriding principle that has consistently guided our Decisions based on Articles 16(4) and 17(2) of the Statute and specifically on Rules 75(A) and (B), 53(A), 69, and 26bis relating to protective measures for witnesses is that “a decision on protective measures requires a balance to be struck between full respect for the rights of the Accused and the protection needs of victims and witnesses within the legal framework of the Statute and Rules within the context of a fair trial.”<sup>21</sup>

16. A related principle governing applications of this nature is that parties are under an obligation to seek leave of the Chamber for the variation of any protective measures previously granted to any of their witnesses.<sup>22</sup>

### III. DELIBERATION

#### A. Preliminary Issue

17. As a preliminary matter, the Chamber notes that the Motion and the Response thereto were filed confidentially, although the Reply was filed publicly. The Chamber is of the opinion that this Motion should have been filed publicly, with a confidential annex as necessary, because sufficient justification was not advanced by the Defence for filing the Motion confidentially in its entirety. In accordance with Rule 78 and the jurisprudence of the Special Court,<sup>23</sup> the Chamber rules that this

<sup>21</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Order on Protective Measures for Additional Witnesses, 24 November 2004, p. 3. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006. See also *Prosecutor v. Musema*, ICTR-96-13-A, Judgement (AC), 16 November 2001, paras 68-69.

<sup>22</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006; Transcript, 28 March 2006, pp. 110-124.

<sup>23</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures, 15 June 2006, para 15; *Prosecutor v. Kallon*, SCSL04-15-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, paras 19-21; *Prosecution v. Brima, Kamara and Kanu*, SCSL04-16-T, Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005, para 22; *Prosecutor*

Decision should now be issued publicly as no cogent reason has been put forward for it to be issued confidentially.

**B. Protective Measures in the Various Proceedings**

18. It is the Chamber's understanding there are potentially three categories of witnesses who have been granted protective measures that are the subject of the Motion. The first category consists of those witnesses who were expected to testify in the RUF trial, and subject to protective measures granted to Prosecution witnesses by this Trial Chamber in its initial protective measures decisions and in the July 2004 Decision but who did not subsequently appear during the trial, and who are not witnesses in the Taylor trial and are therefore not subject to protective measures in those proceedings ("Category I").

19. The Chamber also notes that the second category involves witnesses who were originally subject to the protective measures granted to Prosecution witnesses in the RUF Case, and are now also listed as witnesses in the Taylor Case, and are therefore also subject to these protective measures in that case ("Category II"). The Chamber's interpretation of the *Taylor* Decision is that it specifies that for those witnesses for whom protective measures had already been ordered in earlier proceedings (including the RUF proceedings), those same measures continue to have effect *mutatis mutandis* in the Taylor proceedings.<sup>24</sup> We therefore opine that the said measures would apply to the Taylor witnesses who are the subject of this Motion and are covered by the previous protective measure orders granted by this Trial Chamber in the RUF case.

20. The Chamber further notes that the third category comprises witnesses who were added to the Prosecution witness list after protective measures had been granted to Prosecution witnesses in the RUF trial. This category is not subject to protective measures ordered by this Trial Chamber in these proceedings, even though they are now witnesses in the Taylor trial ("Category III"). We are therefore of the opinion that such witnesses would only be subject to the protective measures that have been ordered by Trial Chamber II in the Taylor proceedings.<sup>25</sup>

*v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (TC), 12 May 2005, paras 2-4.

<sup>24</sup> *Taylor* Decision, pp. 2-3.

<sup>25</sup> See for instance *Taylor* Decision; *Prosecutor v. Taylor*, SCSL03-01-PT, Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, 15 September 2006; *Prosecutor v. Taylor*, SCSL03-01-PT, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which Filed *Ex Parte*, 22 January 2007; *Prosecutor v. Taylor*, SCSL03-01-PT, Decision on Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-



*i. Protective Measures in the RUF Proceedings*

21. In the Chamber's view, the RUF witnesses listed in this Motion belonging to Category I are, generally, still subject to protective measures granted to all Prosecution witnesses in the RUF trial despite the fact that they will not be called to testify by the Prosecution. We hold that such witnesses may still be targets of threats and intimidation if it becomes known that they were intending to testify for the Prosecution, especially given the particularly vulnerable status of many of them. Moreover, the Chamber notes the judicial trend in several cases where it has been held that protective measures should remain in place for witnesses who have been removed from the Prosecution witness list, and who will no longer be called to testify. In particular, the Chamber notes that it has been held that information such as statements previously given by such witnesses should remain protected.<sup>26</sup> We remain guided by those Decisions which we deem relevant in determining this application.

*ii. Protective Measures in Taylor Proceedings*

22. The Chamber recalls that the Prosecution indicated that many of the listed witnesses are also witnesses in the Taylor trial and therefore fall under Categories II and III of our analysis. The Defence therefore also requests a variation of the protective measures granted to these witnesses by Trial Chamber II in those proceedings, and has applied for the lifting of these protective measures pursuant to Rule 75, the relevant sections of which stipulate as follows:

- (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")

---

Public Disclosure and on Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List as Annex A(4) of the Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure Filed on 8 March 2007 and on Public Urgent Prosecution Request for Interim Measures, 26 March 2007.

<sup>26</sup> See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Confidential Order on Motion to Vary Protective Measures in Relation to Witness TF1-151, 21 September 2006, which involved a request to lift certain protective measures. The Chamber held that although the witness had not been called to testify in the Prosecution case in the trial, he was still the subject of protective measures (p. 2). See also *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-PT, where the Chamber held that an order for protective measures for "potential" witnesses continued to apply to witnesses who had been removed from the witness list, stating that "nothing in the Protective Orders implies that their application ceases upon the Witness' removal from the Prosecution Witness list" (para 21). In *Prosecution v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Motion of Accused for Disclosure of Exculpatory Evidence, 23 April 2004, the Chamber held that since the Prosecution no longer intended to call these persons as witnesses, it was "of the view that these particular persons can no longer be classified as potential Prosecution witnesses", and that therefore the Defence was free to conduct its own enquiries and interviews with these witnesses, without further reference to the Trial Chamber or the Prosecution (para 14). However, the Chamber held that information previously obtained from the witnesses remained protected by the order (para 15).

B 9 L

unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this 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 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 victim or 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.

24. In the case of witnesses belonging to Category II, the Chamber is of the view that the Defence application does not fall under Rule 75(G), in that the relevant protective measures applicable to those witnesses were first ordered by this Chamber in connection with the RUF proceedings. Accordingly, as for witnesses belonging to Category I, the Chamber will directly dispose of the Defence application with respect to witnesses belonging to Category II.

25. In the case of witnesses belonging to Category III, the Chamber takes the position that this is an application by the Defence, a party to the RUF case (the "second proceedings") to vary the protective measures originally granted by Trial Chamber II in the Taylor case (the "first proceedings") by applying to Trial Chamber I (the Chamber seized of the "second proceedings") pursuant to Rule 75(G).

*C. Variation of Protective Measures*

*i. Disclosure of identities and unredacted statements of the witnesses*

*a. Witness statements originally disclosed under Rule 68*

26. The Chamber is of the view that by force of logic, due to its initial disclosure of these statements under Rule 68, the Prosecution has already acknowledged that these statements do contain exculpatory material. The clearly established principle is 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".<sup>27</sup> The Chamber is satisfied, from the summaries of the statements that the Defence has provided in Annex A of the Motion as well as in Annex A of the Addendum, that the identity and unredacted portions of the statement are inextricably linked to the substance of the statement given that without this information, the Defence will not be in a position to determine whether the witnesses can assist with its defence of the Accused Sesay.

27. The Chamber notes that the variations to the protective measures requested by the Defence are minimal and therefore finds that they will not significantly diminish the protection available to the witnesses since the Defence is not requesting that the names and other identifying information of witnesses be revealed to the public, but only to the Defence whose legal obligation to comply with the rest of the protective measures, and in particular, that of non-disclosure of any identifying information to third parties, remains in full force.

28. With specific reference to the protective measures in place for witnesses belonging to Category III, the Chamber notes that according to Rule 75(F)(ii), the fact that protective measures have been ordered in the Taylor proceedings does not prevent the Prosecutor from discharging its disclosure obligations in the RUF proceedings, provided that the Prosecution notifies the Defence of the protective measures in place in the Taylor trial.

29. The Chamber is therefore of the view that the statements of the witnesses initially disclosed under Rule 68 should now be disclosed by the Prosecution in an unredacted form.

***b. Witness statements originally disclosed under Rule 66***

30. The Prosecution contends that it has no disclosure obligations under Rule 66 with respect to witnesses it does not intend to call. However, the Chamber notes that Rule 66(A)(ii) provides as follows:

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

---

<sup>27</sup> *Prosecutor v. Karemera, Ntirumpatse and Nzirorera*, ICTR-98-44-T, 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; *Prosecutor v. Karemera, Ntirumpatse and Nzirorera*, ICTR-98-44-T, Scheduling Order (TC), 30 March 2006, para 6, *Prosecutor v. Karemera, Ntirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 20; *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumwa*, ICTR-98-41-T Decision on Disclosure of Identity of Prosecution Informant (TC), 4 May 2006, para 5.

Prosecutor *does not intend to call* be made available to the defence within a prescribed time.<sup>28</sup>

31759

31. The Chamber finds that the Defence, in Annex A, has shown that the provision of the unredacted statements will be of material assistance to the Defence, and that the requested variations to the measures are minimal and involve disclosure of the identity of witnesses only to the Defence. We therefore hold that the Defence has established a *prima facie* case that there is good cause for the disclosure of such statements in an unredacted form.

32. The Defence asserts that it has determined that these statements contain exculpatory evidence. Following the principle and the law we have laid down that when the Defence claims that the obligation to disclose exculpatory material has been violated, it must (i) identify the material sought with reasonable specificity; (ii) establish that the material is in the custody or control of the Prosecution; and (iii) make a *prima facie* showing of the exculpatory character of the materials requested,<sup>29</sup> the Chamber holds that the unredacted statements are clearly within the control of the Prosecution, and have been identified with reasonable specificity. The Chamber also holds that in Annex A, the Defence has made a *prima facie* showing with respect to each witness that he/she may disprove specific allegations against the Accused, and thus that they are exculpatory.

33. Furthermore, the Chamber finds that it is clear from the summaries provided by the Defence in Annex A, that the identity and redacted portions of the statement are inextricably linked with the identity of the witness. Therefore, as with the Rule 68 statements, the Chamber is of the view that the Prosecution has an obligation to disclose the full unredacted statements to the Defence.

34. With specific reference to the protective measures in place for witnesses belonging to Category III, the Chamber reiterates that according to Rule 75(F)(ii), the fact that protective measures have been ordered in that proceeding does not relieve the Prosecutor of the onus of discharging its disclosure obligations in the RUF proceedings, provided that the Prosecution notifies the Defence of the protective measures in place in the Taylor case.

35. The Chamber is therefore of the view that the unredacted statements of the witnesses initially disclosed under Rule 66 should be disclosed to the Prosecution.

---

<sup>28</sup> Emphasis added.

<sup>29</sup> See para 12 above.



36. The Prosecution indicates that Witness TF1-182, whose statement falls into this category, is now deceased, and consequently suggests that the Chamber evaluate the redacted and unredacted versions of his statements in order to determine whether the unredacted version should be disclosed. In the Chamber's view, there is no need, nor is there any authority conferred upon us to make an independent evaluation of this statement with a view to determining whether it should, in the circumstances, be disclosed. Given that the Defence has made a *prima facie* showing that the statement contains exculpatory evidence, the Chamber is satisfied, and accordingly, holds that the unredacted statement should be disclosed by the Prosecution.

*ii. Contacting witnesses*

37. In its earlier protective measures decisions for Prosecution witnesses, the Chamber laid down a procedure whereby the Defence had to make a written request to the Trial Chamber for permission to contact Prosecution witnesses, and that upon receiving such permission, the Prosecution would contact the witness in order to determine whether or not the witness consented to be interviewed.<sup>30</sup> However, in its more recent decisions granting protective measures to Defence witnesses, the Chamber has held that the WVS, rather than the Defence or the Prosecution, is in the best position to determine how to contact a protected witness who may otherwise feel intimidated, to explain to a witness his or her right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained for a witness, thereby modifying the earlier procedure.<sup>31</sup>

38. The Chamber considers this Motion to be a written request to the Trial Chamber to grant leave to contact the listed Prosecution witnesses, in accordance with the order in the July 2004 Decision. The Chamber is satisfied that the fact that the witnesses may be in possession of exculpatory evidence is a sufficient reason for the Chamber to grant leave for the Defence to contact

<sup>30</sup> *Prosecutor v. Sesay*, SCSL03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, order k; July 4 Decision, order k.

<sup>31</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non-Public Disclosure, 30 November 2006, para 24 (viii), and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, 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, 1 March 2007, para 17. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, paras 35 and 42(iv) and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 19 March 2007, paras 32 and 34(j).

B

the witnesses.<sup>32</sup> However, in line with its recent protective measures decisions, the Chamber rules that such contact should be made through the WVS, rather than through the Prosecution.

39. The Chamber notes that the *Taylor* Decision is silent on the means by which contact should be made with regard to the witnesses subject to that Decision.<sup>33</sup> The Defence has therefore asserted that no variation is requested in this regard with respect to the *Taylor* witnesses.<sup>34</sup> However, in order to harmonize the procedure applicable to all of these witnesses, the Chamber is of the view that the Defence should also contact the Category III witnesses through the intermediary of the WVS.<sup>35</sup>

IV. DISPOSITION

BASED ON THE FOREGOING CONSIDERATIONS, THE TRIAL CHAMBER GRANTS THE MOTION and

ORDERS the Prosecution to disclose to the Defence the unredacted statements of the witnesses listed in the Motion;

GRANTS the Defence leave to contact the witnesses that are the subject of the Motion upon obtaining their consent via the Witnesses and Victims Section and, therefore;

ORDERS that the Defence shall inform the Witnesses and Victims Section of its intention, if any, to interview any of the witnesses listed in the Motion. The Witnesses and Victims Section, upon being informed beforehand of the location of the witness, shall contact the witness and inform him or her of the Defence's intention to interview him or her and of his or her right not to consent or give the

<sup>32</sup> See *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Prosper Mugiraneza's [sic] for Exculpatory Evidence Pursuant to Rule 68 and to Vary Protective Measures (TC), 7 December 2003, para 11. See also *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Vary Protective Measures and to Order the Prosecutor to Provide an Unredacted Copy of Admittedly Exculpatory Statement (TC), 29 January 2004, para 15.

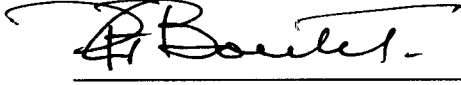
<sup>33</sup> Order 1(m) of the *Taylor* Decision provides only that "the Defence Counsel shall not directly or indirectly contact any protected Prosecution witness except with the written consent of the Prosecution or leave of the Court" (p. 4).

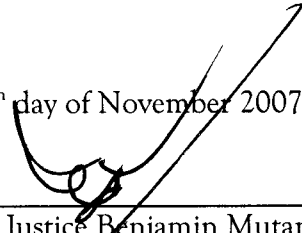
<sup>34</sup> Reply, para 2. As noted in paragraph 19 of this Decision, the *Taylor* Decision specifies that for those witnesses for whom protective measures had already been ordered in earlier proceedings, namely witnesses belonging to Category II as identified in this Decision, those measures continue to have effect *mutatis mutandis* in the *Taylor* proceedings. The requirement that if leave is granted by the Chamber, the Prosecution would contact the protected witnesses to ask for their consent and undertake the necessary arrangements would therefore still be applicable to the witnesses at issue in this Motion who are also covered by protective measures in RUF.

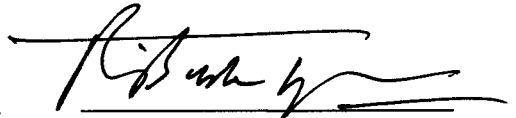
<sup>35</sup> Although this increases the protective measures granted to these witnesses, the Chamber nevertheless communicated with Trial Chamber II with a view to consulting about these measures (Interoffice Memorandum from Honourable Justice Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber I to Honourable Justice Julia Sebutinde, Presiding Judge, Trial Chamber II, 26 September 2006, which was electronically transmitted that same day).

interview. Should the witness consent to the interview, the Witnesses and Victims' Section shall inform the Defence as to the location for the interview.

Done at Freetown, Sierra Leone, this 9<sup>th</sup> day of November 2007

  
\_\_\_\_\_  
Hon. Justice Pierre Boutet

  
\_\_\_\_\_  
Hon. Justice Benjamin Mutanga Itoe  
Presiding Judge -  
Trial Chamber I

  
\_\_\_\_\_  
Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

