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SCSL-03-01-T
(14389-14399)

14389

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 14 January 2008

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

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

Office of the Prosecutor
Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for Charles G. Taylor
Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction and Procedural History

1. This is the Defence Reply to the 7 January 2008 *Prosecution Response to the Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material.*[1]

2. In its Motion,[2] the Defence requested:

   (A) Service of copies of unredacted transcripts from the Sesay Defence case by Court Management on an ongoing basis;[3]
   (B) Disclosure of the witnesses' names and identifying data of witnesses subject to the Sesay Protective Measures Decision; and
   (C) Disclosure of statements taken by the Sesay Defence team.

3. The Prosecution Response proposes an unnecessarily restrictive approach to the Defence's already limited request for modification of the *Sesay Protective Measures Decision* of 30 November 2006.[4] While conceding that the criteria regarding the geographical and temporal nexus between the crimes charged in the Taylor Indictment and the RUF Indictment "have been established,"[5] the Prosecution would only grant limited and conditional access to the requested closed session transcripts, and would deny completely access to statements taken by the Sesay Defence team. This is in spite of the fact that lead counsel for Sesay, who requested that the protective measures be put in place to begin with, does not oppose the modifications as requested by the Taylor Defence.[6]

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-381, Prosecution Response to the Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 7 January 2008 ("Response").
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-377, Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 14 December 2007, para. 20 ("Motion").
[3] By requesting material on an "ongoing" basis, this of course assumes that relevant transcripts would also be provided on a retroactive basis.
[4] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-668, Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006 ("Sesay Protective Measures Decision").
[5] Response, para. 6.
[6] See Email from Mr. Wayne Jordash, to the Taylor Defence Team, dated 14 January 2008 [Annex A]. This is the "understanding" referred to in the Motion at para. 4.

4. The Prosecution makes a limited attempt to "not oppose" some modifications as requested in the Defence Motion,[7] but in reality, the non-opposed aspects would only grant the Defence access to redacted copies of closed session testimony which would not even include the names and identifying data of witnesses. Additionally, the Prosecution "does oppose" modifications which would permit the Defence to receive disclosure of any statements taken by the Sesay Defence team during the course of investigations and in preparation for trial.[8] These oppositions have no justifiable basis in law or fact and should not be considered by the Trial Chamber.

II. Submissions

Both Parties Agree that Nexus between RUF Indictment and Taylor Indictment is Clear

5. In paragraph 6 of its Response, the Prosecution concedes that "the geographical and temporal nexus of the crimes charged in the RUF Indictment with those in the Taylor Indictment and also the fact that the Accused and Issa Sesay are accused of being members of the same common plan, design or purpose, or joint criminal enterprise" is evident. However, even given this nexus, the Prosecution would only allow conditional access to requested closed session transcripts.

6. The Prosecution seem to believe that exculpatory testimony given on behalf of a defendant whose case has a close nexus to Mr. Taylor's would not necessarily be exculpatory for Mr. Taylor. This is nonsensical. Cases, such as those at hand, that share such a close geographical and temporal nexus undoubtedly have information that is both material and relevant to the other, thus justifying unrestricted access to closed session transcripts for the Taylor Defence team.[9] The Prosecution confuse the test for whether disclosure of confidential information should be allowed. As set out in *Prosecutor v. Milosevic*, it is not whether the Defence can prove that the information is indeed exculpatory, but whether the

[7] Response, para. 3.
[8] Response, para. 4.
[9] See Response, para. 7.

Defence can prove that the material requested may be of "material assistance" to the second case and whether the temporal and geographic nexus exists.[10]

The Rights of the Accused Are Paramount to the Rights of Witnesses

7. In paragraph 8 of its Response, the Prosecution implies that the rights of the Accused should not be "above those of the witness",[11] and that because of witnesses' privacy concerns, the Defence should not be able to access unredacted copies of closed session transcripts.[12]

8. The Defence is aware that Article 16 of the Statue of the Special Court provides that the Registry set up a Victims and Witnesses Unit to provide "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". Additionally, Article 17, regarding the Rights of the Accused provides that the accused shall be "entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses". Furthermore, Rule 75(A) grants the Trial Chamber the ability to "order appropriate measures to safeguard the privacy and security of victims". However, this may only be done if the measures are "consistent with the rights of the accused". Clearly, the "rights" of victims and witnesses are circumscribed by the long-recognized rights of the accused specified in Article 17(2) and (4) of the Special Court Statute.

9. The Defence emphasize that according to Rule 75(D):

> "The Witnesses and Victims Section shall ensure that the witness has been informed before giving evidence that his or her testimony or his or her identity may be disclosed at a later date in another case, pursuant to Rule 75(F)" (emphasis added).

[10] See Motion, para. 9.
[11] Response, para. 8.
[12] Response, paras. 7-8.

Thus, witnesses who have testified in the Sesay Defence case are on notice that their testimony and identities may be disclosed in another case.

Gaining Access to and Service of Closed Session Transcripts, Including Names

10. The Defence consequently believe that closed session transcripts should be served with the names and identifying data of the Sesay Defence witnesses intact. This proposition is consistent with the ruling in *Prosecutor v. Sesay, Kallon, and Gbao* from 9 November 2007 where the Trial Chamber held that under Rule 68, when exculpatory information is at stake, "where the [identity of the witness who made the statement] is inextricably connected with the substance of the statements" the names and identifying data should be disclosed because otherwise the Defence would not be in a position to determine whether the witnesses could assist with its defence of the Accused Sesay.[13]

11. The Prosecution states that allowing the Taylor Defence team to know the names and identifying data of Sesay Defence witnesses is "excessive, particularly when it is not clear whether a witness will, in the end, agree to testify".[14] However, it is not possible for the Taylor Defence to determine whether it wants to contact a witness through WVS if it does not know who that witness is. After the Defence learn who a witness is, it may decide of its own initiative that it is not worth attempting to contact that witness through WVS. Additionally, the willingness of a witness to testify for the Taylor Defence is a secondary concern which should be handled by the Defence team via WVS, not through restrictions requested by the Prosecution.

12. The Prosecution relies on a decision in the *Prosecutor v. Rajic* for the proposition that the Prosecution should only have to provide witness details to the defence if it was found to be justified following a consideration of the material by the Defence.[15] However, the *Rajic* decision was made during the pre-trial phase when the Defence may not have known

[13] *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-PT-873, Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 9 November 2007.
[14] Response, para. 8.
[15] Response, paras. 12 and 13, and footnotes 14 and 16.

whether the material sought would assist them in their defence. In the instant case, now fully in trial mode, the Taylor Defence is convinced that the material requested will assist them greatly and therefore permission to approach the witnesses via WVS should be granted immediately.

13. The Defence understand that because of existing Protective Measures in place for Taylor Prosecution witnesses, redactions of the closed session transcripts for the limited purpose of deleting names and identifying data of protected Prosecution witnesses whose identity has not yet been disclosed in accordance with the 42-day rule may be necessary.[16]

14. It should go without saying that the Taylor Defence does not require any "sensitive information relating to case administration and conduct".[17] The Defence agrees that the Prosecution should be allowed to redact that material. However, the Defence is cognizant of the fact that redactions take time because of the administrative burden it imposes. And this exculpatory material is time-sensitive, especially now that trial is underway and cross-examination takes place on a regular basis. In terms of trial efficiency, it is better to allow the Defence access to this material as soon as possible, in order to avoid having to recall witnesses at a later point.

15. In paragraph 15 of its Response, the Prosecution creates an elaborate system by which it believes the Trial Chamber should grant the Defence limited access to non-public Sesay Defence material. For reasons explained above, the Defence do not accept the restrictions suggested in paragraph 15(i)(A) that without "express leave" of the Trial Chamber, the Defence should not be disclosed names or identifying data of Sesay Defence witnesses. The Defence, however, does not object to the restrictions imposed in paragraph 15(i)(b),(c), and (e), because as the Defence stated in its Motion, the Defence want disclosure for its own purposes, not for the general public's attention.[18]

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[16] See Response, para. 16.
[17] Response, para. 16.
[18] See Motion, para. 15.

16. As proposed by the Prosecution in paragraph 15(i)(c) and 15(ii), the Defence has already agreed to abide by the procedure laid out in paragraph 25(j) of the *Sesay Protective Measures Decision* when contacting witnesses.[19]

17. In paragraph 15(iii), the Prosecution puts the burden on the Sesay Defence team to disclose the requested material in a redacted format. However, the Defence believes that the closed session testimony is exculpatory material and therefore the Prosecution is under an obligation to disclose it pursuant to Rule 68.

Access to and Disclosure of Sesay Defence Pre-Trial Statements

18. By requesting access to unredacted pre-trial statements taken by the Sesay Defence team, the Taylor Defence is not attempting to be in a privileged position vis-à-vis the RUF Prosecution, the Kallon Defence, or the Gbao Defence.[20] The Taylor Defence will patiently await the 42-day period imposed on the Prosecution and the other defence teams in regard to statements taken from upcoming Sesay Defence witnesses. However, the Taylor Defence would expect immediate disclosure by the Sesay Defence team of statements from witnesses who have already testified.

19. The Defence is specifically interested in any and all preliminary statements of protected Sesay Defence witnesses who have since become Taylor Prosecution witnesses and are now covered by a second set of protective measures. The Prosecution is the only entity with knowledge of whether any Sesay Defence protected witnesses are now Taylor Prosecution protected witnesses. The Prosecution should not be allowed to deny the Defence access to this information, which the lead counsel for Mr. Sesay believes would be exculpatory material for Mr. Taylor. Thus, the Prosecution should be ordered to collaborate with the Sesay Defence team in order to compare TF1 numbers and, where there is a common witness, the Prosecution should let the Sesay Defence know the 42-day

[19] Motion, para. 16.
[20] See Response, para. 14.

period within which the Sesay Defence team could disclose an unredacted copy of the relevant pre-trial statement(s) to the Taylor Defence team.

III. Conclusion

20. Access to witnesses and information for the purposes of preparing the defence for Mr. Taylor should not be unnecessarily limited simply because it is the last case to be heard before the Special Court and because most of the witnesses who are relevant to the allegations against Mr. Taylor are, by now, subject to Protective Measures for either the Prosecution or for other defence teams.

21. Thus, the Defence respectfully request that the Sesay Protective Measures Decision of 30 November 2006 be varied by Trial Chamber II, in consultation with Trial Chamber I, to allow the Taylor Defence:

(A) Service of copies of unredacted transcripts from the Sesay Defence case by Court Management on an ongoing basis (alternatively, the only redactions should be in regard to names and identifying data of protected Prosecution witnesses);

(B) Disclosure of the witnesses' names and identifying data of witnesses subject to the Sesay Protective Measures Decision; and

(C) Disclosure of statements taken by the Sesay Defence team (pursuant to the 42-day disclosure rule where applicable).

Respectfully Submitted,

For Courtenay Griffiths Q.C.

Lead Counsel for Charles G. Taylor

Dated this 14th Day of January 2008

Done in Freetown, Sierra Leone.

Table of Authorities

Special Court for Sierra Leone Cases

Prosecutor v. Taylor, SCSL-03-01-T-377, Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 14 December 2007

Prosecutor v. Taylor, SCSL-03-01-T-381, Prosecution Response to the Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 7 January 2008

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-668, Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006

Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-PT-873, Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 9 November 2007

14398

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SCSL-2003-01-T

Annex A

TO THE

PUBLIC

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

Annex A
14399

SCSL Defence-Sesay/SCSL
01/14/2008 01:16 PM

To SCSL Defence-Taylor/SCSL@SCSL
cc
bcc
Subject

Dear Taylor Defence Team,

As lead counsel for Mr. Issa Sesay, first accused in the RUF case, and despite the Protective Measures Decision of 30 November 2006, I have no objection to the Taylor Defence team obtaining access to closed session testimony (or any related exhibits, etc) from our Defence case. Nor do I have any objection to your defence team knowing the names and identifying data of these witnesses.

I believe that the testimony of every witness we have called thus far, and of every witness we intend to call as our case progresses, contains exculpatory material as regards my client's case, as well as Mr. Taylor's case. The allegations against Mr. Sesay and Mr. Taylor are so intertwined that I believe it is in the interests of justice for your team to have access to this information as it will greatly assist the preparation of your own defence case.

Additionally, our team has taken a number of preliminary statements from witnesses that we have now decided not to call, for various reasons. I believe that these statements also contain exculpatory material for your client, and if existing protective measures are modified, I would be willing to share this information with your team.

Regards,
Wayne