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SCSL-03-01-T
(17088 — 17103)

17088



THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 15 May 2008

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
15 MAY 2008	
NAME	VINCENT TISHEKWA
SIGN	<i>[Signature]</i>
TIME	14:35

THE PROSECUTOR

—v—

CHARLES GHANKAY TAYLOR

PUBLIC WITH ANNEXES A AND B

**DEFENCE MOTION PURSUANT TO RULE 75(G) TO MODIFY
KALLON & GBAO DEFENCE PROTECTIVE MEASURES DECISIONS OF
19 MARCH 2007 AND 1 MARCH 2007
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
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

Counsel for Charles G. Taylor

Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. On 19 March 2007, Trial Chamber I issued a *Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure*,¹ and on 1 March 2007, Trial Chamber I issued a *Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses*² (collectively the “Kallon and Gbao Protective Measures Decisions”).³ In part, the Kallon and Gbao Protective Measures Decisions order that identifying data of protected witnesses “shall not be disclosed to the public”.⁴
2. The Kallon Defence team began its case-in-chief in April 2008. The Gbao Defence team is expected to commence its case next month. Many of the witnesses for both Gbao and Kallon have been or are going to be heard in closed-session or with non-disclosed names, and the unredacted transcripts of those proceedings are not available and will not ordinarily become available to the Taylor Defence team. Yet, due to the temporal and geographical nexus of the allegations between Mr. Taylor’s case and the Kallon and Gbao cases, coupled with conversations that defence investigators and a Legal Assistant have inadvertently had with some of the Kallon and Gbao protected defence witnesses, the Defence is of the view that the transcripts from the Kallon and Gbao Defence cases contain exculpatory material that may be of “material assistance to its case”.⁵
3. Therefore, and pursuant to Rules 75(F) and (G) of the Court’s Rules of Procedure and Evidence, the Defence hereby applies to Trial Chamber II to vary the Kallon and Gbao Protective Measures Decisions slightly by ordering that the Court Management Services

¹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-739, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 19 March 2007 (“Kallon Protective Measures Decision”).

² *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-716, Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses, 1 March 2007 (“Gbao Protective Measures Decision”).

³ *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”).

⁴ Kallon Protective Measures Decision, para. 34(f); Gbao Protective Measures Decision, para. 43(f).

⁵ *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i), 11 March 2005, pg. 3 (“Stanisic Variance Decision”).

(CMS) serve all closed-session and/ or non-public transcripts and exhibits from the Kallon and Gbao cases on the Taylor Defence, such that the Taylor Defence can access and evaluate exculpatory material contained therein. Additionally, the Defence requests a minor modification of the Kallon and Gbao Protective Measures Decisions such that the Kallon and Gbao Defence teams may provide to the Taylor Defence team only (and not to the general public), the names of all Kallon and Gbao Defence witnesses and copies of any statements given to the Kallon and Gbao Defence teams that may contain exculpatory material.

4. Lead Counsels for both Mr. Kallon and Mr. Gbao do not oppose the requested variations. Indeed, Lead Counsel for Mr. Gbao takes the further view that such modifications should be made in the interests of justice.⁶

II. Applicable Rules and Legal Principles

5. The Defence initially notes that Article 17(2) of the Statute of the Special Court for Sierra Leone ensures that an accused “shall be entitled to a fair and public hearing” subject only to measures ordered by the Special Court for the protection of victims and witnesses. This notwithstanding, Article 17(4)(e) states that an accused before the Special Court shall be entitled to obtain the attendance and examination of witnesses on his behalf. Furthermore, it is a general principal of law that “a party is always entitled to seek material from any source to assist in the preparation of its case if the document sought has been identified or described by its general nature and if a legitimate forensic purpose has been shown”.⁷ Indeed, this Trial Chamber has recently reaffirmed this principle when it stated that “a Party is entitled to seek material from any source, including from another case before the Court, to assist in the preparation of its case”.⁸

⁶ See Email from Mr. Charles Taku, to the Taylor Defence Team, dated 14 May 2008 [Annex A]; Email from Mr. Scott Martin to the Taylor Defence Team, dated 9 May 2008 [Annex B].

⁷ *Prosecutor v. Limaj, Bala, Musliu*, IT-03-66-T, Decision on Motion of Assigned Counsel in *Milosevic* for Variance of Protective Measures Pursuant to Rule 75, 14 April 2005, pg. 3 (“Limaj Variance Decision”), citing *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Decision on Momcilo Gruban’s Motion for Access to Material, 13 January 2003, para. 5.

⁸ *Prosecutor v. Taylor*, SCSL-03-01-T-Decision on, Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Witness Testimony and

6. The Defence acknowledges that pursuant to Rule 75(F)(i), 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 shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in Rule 75(F).
7. The Defence brings forth this application for variation before Trial Chamber II inasmuch as under Rule 75(G), “A party to the second proceedings [the Taylor case] seeking to rescind, vary or augment protective measures ordered in the first proceedings [the Kallon and Gbao cases] shall apply to the Chamber seized of the second proceedings”. In the course of evaluating the merits of this request, which would serve to decrease the protective measures granted to the victims or witnesses by Trial Chamber I in the first proceedings, the Defence anticipates that in accordance with Rule 75(H), Trial Chamber II will “obtain all relevant information” from Trial Chamber I and may “consult” with any Judge from Trial Chamber I or the Chamber itself.⁹
8. The Defence does acknowledge in bringing forth this application that Rule 75(D) provides for the practice whereby the Witnesses and Victims Section is to ensure that a witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75(F).

Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 14 March 2008, pg. 3 (“Sesay Protective Measures Modification Decision”), citing *Prosecutor v. Rwambakuba*, ICTR-98-44C-T, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13, 24 February 2006, para. 5; *Prosecutor v. Blaskic*, Decision on Joint Motion of Ever Hadzihasanovic, Mehmed Alagic and Amir Kubura for Access to All Confidential Material, Transcripts, and Exhibits in the Case Prosecutor v. Tihomir Blaskic, 24 January 2003, pg. 4.

⁹ For instance, this was the procedure followed by Trial Chamber II in determining the merits of the Sesay Protective Measures Modification Decision. See, pg. 3.

III. Submissions

9. This Trial Chamber has confirmed¹⁰ the ICTY decision in *Prosecutor v. Milosevic*¹¹ which sets forth two criteria for determining when access to confidential material from another case should be granted:

(A) when the party seeking the material can establish that it may be of **material assistance**¹² to its case, or at least there is a “good chance”¹³ that it would be of material assistance, and

(B) when the relevance of the material is determined by showing the **existence of a nexus** between the applicant’s case and the cases from which such material is sought, i.e., if the cases stem from events alleged to have occurred in the same geographic area and at the same time.

10. The nexus between Mr. Taylor’s cases and the RUF cases (including those of Kallon and Gbao) is clear because the respective indictments and allegations against Mr. Taylor¹⁴ and against Mr. Kallon and Mr. Gbao¹⁵ are closely-linked. The RUF Indictment alleges that, “At all times relevant to this Indictment and in relation to all acts and omissions charged herein, Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, through their association with the RUF, acted in concert with Charles Ghankay Taylor aka Charles Macarthur Dapkpana [sic] Taylor”.¹⁶ Similarly, the Taylor Indictment alleges that, “...[Mr. Taylor] while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, is individually criminally responsible...”¹⁷

¹⁰ Sesay Protective Measures Modification Decision, pg. 4.

¹¹ Stanasic Variance Decision, pg. 3.

¹² *Prosecutor v. Nahimana et al*, ICTR-99-52-A, Decision on Joseph Nzirorera’s Motion for Access to Appeal Briefs, 9 September 2005, pg. 3; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Nzirorera Request for Access to Protected Material, 19 May 2006, para. 2.

¹³ *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence’s Motion for Access to Confidential Material, 9 March 2005, pg. 3; *Prosecutor v. Blagojevic & Jokic*, IT-02-60-A, Decision on Motion by Radivoje Militec for Access to Confidential Information, 9 September 2005.

¹⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-263, Prosecution’s Second Amended Indictment, 29 May 2007 (“Taylor Indictment”).

¹⁵ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-619, Corrected Amended Consolidated Indictment, 2 August 2006 (“RUF Indictment”).

¹⁶ RUF Indictment, para. 35.

¹⁷ Taylor Indictment, para. 34.

11. Furthermore, the temporal and geographical jurisdiction for the three accused is identical.¹⁸ Indeed, this Trial Chamber has agreed that there is a good chance that the information sought in regard to allegations involved in the RUF case would be of material assistance to the Taylor case “given the geographical and temporal overlap” between the two cases.¹⁹
12. It is common sense, then, that there is more than a good chance that non-public testimony, exhibits, and statements of witnesses testifying in defence of Mr. Kallon and/ or Mr. Gbao would be of material assistance to the preparation of Mr. Taylor’s case. Moreover, and in the course of their own investigations, the Taylor Defence team investigators and legal assistant have come into contact with numerous potential witnesses who have either already testified in the Kallon or Gbao Defence cases, or are preparing to testify later in the trial session.²⁰ Based on preliminary statements which have been made by such past and prospective witnesses, the exculpatory nature of the requested transcripts, exhibits, and statements has become evident.
13. The ICTR case of *Prosecutor v. Rwamakuba* held that while Rule 75(F) does not directly apply to testimony of defence witnesses (for whom the prosecution has no obligation of disclosure), where a defence witness has testified in one trial and is scheduled to or could possibly testify as a defence witness in another trial, there is a legitimate forensic purpose in ordering disclosure of the prior testimony to the defence in the second trial.²¹ Inasmuch as the Taylor Defence team is interested in potentially calling these Kallon and Gbao Defence team witnesses who are in possession of exculpatory material, the Defence has

¹⁸ See Limaj Variance Decision, pg. 3 (“material may be considered relevant where a nexus exists between the applicant’s case and the case from which such material is sought (e.g. where the charges arise out of events with geographic and temporal identity”).

¹⁹ Sesay Protective Measures Modification Decision, pg. 4.

²⁰ Interviews of such witnesses typically take place without members of the Taylor Defence team knowing that any such witness is connected to any other Defence case. It is almost always later on that it becomes apparent that the witnesses being interviewed have given, or are soon to give, evidence on the behalf of another Defence team. It would therefore be inapposite to suggest any intention on the part of the Taylor Defence team to influence witnesses before their giving of evidence in another case.

²¹ *Prosecutor v. Rwambakuba*, ICTR-98-44C-T, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Witness 3/13, 24 February 2006.

shown a legitimate forensic purpose for being granted such access through a variation of the Kallon and Gbao Protective Measures Decisions.²²

14. The Taylor Prosecution probably has access to closed-session testimony, non-public exhibits and witness statements across trial teams at the Special Court.²³ Thus, it would be unfair to deny the Defence a similar opportunity, especially where there is no objection from the Defence teams whose Protective Measures Decisions stand to be modified. In fact, the ICTR, in *Prosecutor v. Bagosora et al*, has acknowledged that such disclosure between Defence teams “enhances trial fairness”.²⁴ This Trial Chamber has determined that it is the Chamber’s “obligation” to ensure that a “correct balance is struck between the right of a party to access information in preparation of its case and the need to ensure the protection of witnesses and the integrity of confidential information”.²⁵
15. The variation of the Kallon and Gbao Protective Measures Decisions will not adversely impact the safety and/ or protection of the protected defence witnesses, inasmuch as the limited disclosure requested is to the Defence Team alone and not to the public. Indeed, the general purpose of protective measures is to conceal the identity of the protected witness from the public at large,²⁶ not from another Defence team, seeking to access information and seeking to ascertain the truth.
16. However, if given access to the names and identifying data of all protected witnesses that are subject to the Kallon and Gbao Protective Measures Decisions, and in order to allay any concerns of investigatory impropriety or abuse of process, Taylor Defence team members would agree to follow the procedure outlined in pages 5 and 6 of the Sesay

²² *Prosecutor v. Hadzihasanovic et al*, IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, pg. 3; *Prosecutor v. Nahimana et al*, ICTR-99-52-A, Decision on Joseph Nzirorera’s Motion for Access to Appeal Briefs, 9 September 2005, pg. 2.

²³ For instance, in the ICTR, the Appeals Chamber has held that any person within the Office of the Prosecutor may be designated to have access to protected information in any case before the Tribunal. *Prosecutor v. Bagosora et al*, ICTR-99-52-A, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-46; See also, *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of Witness DM-190, 16 May 2006, para. 5 (“Bagosora Closed Session Decision”).

²⁴ *Id.*

²⁵ Sesay Protective Measures Modification Decision, pg. 5.

²⁶ Bagosora Closed Session Decision, para. 4.

Protective Measures Modification Decision of 14 March 2008. This procedure would require the Taylor Defence to inform the Witnesses and Victims Section of their intention to interview a witness listed as a witness for the second or third RUF Accused. This is aimed at enabling the witness to make an informed decision regarding whether or not he or she wishes to give the interview.

17. Additionally, the Defence anticipates that the Prosecution will comply with its continuing obligations under Rule 68 to disclose exculpatory material contained in closed-session transcripts from the RUF Prosecution case and in statements taken from protected RUF Prosecution witnesses, if any of these same witnesses will also testify for the Prosecution in the Taylor case.²⁷ The Defence has every reason to believe that these transcripts and/or statements will be disclosed in unredacted format 42 days in advance of a witness' anticipated testimony, pursuant to the 5 May 2006 Protective Measures Decision.²⁸ Thus these categories of material are not the subject of this Motion.
18. The Defence notes that it is possible that the Kallon or Gbao Defence teams may have taken preliminary statements of protected witnesses that have since become Taylor Prosecution witnesses and are now covered by a second set of protective measures.²⁹ The possibility of this is likely, given recent correspondence between Lead Defence Counsel and Ms. Brenda Hollis. Lead Counsel had asked for acknowledgement from the Prosecution of the existence of Rule 68 exculpatory material in the form of statements given to other Special Court Defence Teams prior to those people becoming Prosecution Witnesses in the Taylor Case. In her Response, Ms. Hollis acknowledged that the Prosecution is aware of a "very limited number" of statements taken by Defence teams in other cases; however there is no indication that the Prosecution is aware of the contents of

²⁷ The Defence recognize that Rules 75(F) and (G) do not create a substantive right to disclosure which does not already exist under Rules 66 and 68. See *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Juvenal Kajeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits, and Pre-Trial Statements of Prosecution Witnesses GBU and GFA, 24 November 2004.

²⁸ *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, para. 1(b).

²⁹ *Id.*

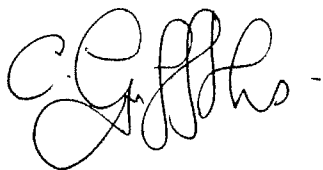
the material.³⁰ If some of these statements of a very limited number area indeed in the possession of the Kallon or Gbao Defence teams, then the Defence accept that the Kallon and/or Gbao Defence teams could not disclose those statements to the Taylor Defence in unredacted format more than 42 days in advance of that witness' anticipated testimony, so as not to be in violation of the 5 May 2006 Protective Measures Decision in the Taylor case.

IV. Conclusion

19. On the basis of all of the foregoing, the Defence respectfully requests that the Kallon Protective Measures Decision of 19 March 2007 and the Gbao Protective Measures Decision of 1 March 2007 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 Kallon and Gbao Defence cases by Court Management on an ongoing basis;
- (B) Disclosure of the witnesses' names and identifying data of witnesses subject to the Kallon and Gbao's Protective Measures Decisions; and
- (C) Disclosure of statements taken by the Kallon and Gbao Defence teams.

Respectfully submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 15th Day of May 2008,
The Hague, The Netherlands

³⁰ See Annexes A and B of *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 Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 14 December 2007

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Prosecutor v. Taylor, SCSL-03-01-T-263, Prosecution's Second Amended Indictment, 29 May 2007

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Prosecutor v. Taylor, SCSL-03-01-T-439, Decision on Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 14 March 2008

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17100

ANNEX A

17101

Re: Request for Modification of Kallon Prot Measures

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**SCSL Defence-
Kallon/SCSL@SCSL**

14/05/2008 15:29

To Logan Hambrick/SCSL@UNLB@UNITED NATIONS LOGISTICS
BASE
cc
bcc
Subject Re: Request for Modification of Kallon Prot Measures

Dear Logan,

Chief Taku says he does not object to the Taylor Defence team getting information from our witness testimonies (Kallon Defence) which will help your case.

Kind regards

Defence Team for Morris Kallon
Room 14 A6
Special Court for Sierra Leone
+232 (0) 2229 7154

17102

ANNEX B

17103

protective measures

Page 1 of 1



SCSL Defence-Gbao/SCSL

09/05/2008 11:28 GMT

To Logan Hambrick/SCSL@SCSL
cc
bcc
Subject protective measures

Dear Taylor Defence Team,

As Co-Counsel for the Third Accused in the RUF Trial, Augustine Gbao, I (and the Lead Counsel John Cammegh) do not have any opposition to your request for a modification or variation of the Gbao Protective Measures Decision of 1 March 2007.

I believe it is in the interests of justice to allow your Defence Team access to this information.

Kind Regards,
Scott Martin

Gbao Defence Team
Extension: 7155
Email: defence-gbao@sctl