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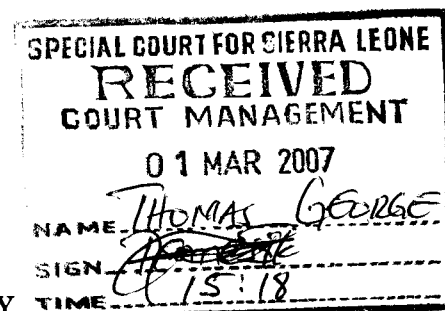
SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

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

Registrar: Mr. Lovemore G. Munlo SC

Date: 1st of March 2007



PROSECUTOR

Against

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

Public Document

**DECISION ON GBAO DEFENCE MOTION FOR IMMEDIATE PROTECTIVE MEASURES
AND CONFIDENTIAL MOTION FOR DELAYED DISCLOSURE AND RELATED
MEASURES FOR WITNESSES**

Office of the Prosecutor:

James C. Johnson
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Charles Taku
Melron Nicol-Wilson

Court Appointed Counsel for Augustine Gbao:

Andreas O'Shea
John Cammegh

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;

SEIZED of the Gbao Motion for Immediate Protective Measures filed publicly by Court Appointed Counsel for the Third Accused, Augustine Gbao ("Defence") on the 26th of January 2007 ("Initial Motion");

NOTING the Response filed by the Office of the Prosecutor ("Prosecution") on the 8th of February 2007 ("Response") and noting that no Reply was filed by the Defence within the prescribed time limits;

SEIZED of the Gbao Motion for Delayed Disclosure and Related Measures for Witnesses filed confidentially by the Defence on the 14th of February 2007 ("Additional Motion");

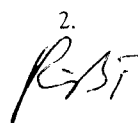
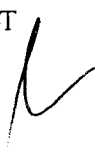
RECALLING its Order for Expedited Filing, issued on the 14th of February 2007, in which the Chamber requested that any Response by the Prosecution to the Additional Motion be filed by the 16th of February 2007 and that any Reply thereto be filed by the 19th of February 2007;

NOTING the Response to the Additional Motion filed confidentially by the Prosecution on the 16th of February 2007, and the Reply thereto confidentially filed by the Defence on the 19th of February 2007;

MINDFUL of the Scheduling Order Concerning the Preparation and the Commencement of the Defence Case filed on the 30th of October 2006 and the Decision and Order on Defence Applications for an Adjournment of 16th of February Deadline for Filing of Defence Material filed on the 7th of February 2007;

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 trial¹ and, in particular, the Decision on Prosecution Motion for Modification of Protective Measures for Witnesses filed on the 5th of July 2004;²

¹ *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



MINDFUL of the Chamber's Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 30th November 2006 ("Sesay Decision") and its 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 filed on the 1st of March 2007;

PURSUANT to Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 26bis, 34, 53, 54, 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 Initial Motion*

1. Pursuant to Rules 69 and 75, the Defence seeks protection for all Gbao Defence witnesses who have not affirmatively waived their right to protective measures.³
2. The Defence alleges that witnesses may fear retaliation from the state or from their communities if it is known that they will testify for the Accused Gbao. The Defence alleges that these witnesses may refuse to testify if their identities are not kept secret.⁴
3. The Defence states that the principle of equality of arms requires that the protective measures for Defence witnesses must be at least as effective as those afforded to witnesses for the Prosecution or to the other accused.⁵
4. To support its factual contentions, the Defence makes reference to materials relied on by the Prosecution and the Sesay Defence in seeking protective measures for their witnesses, including the statements of Morie Lengor,⁶ Alan White⁷, Saleem Vahidy⁸, and Chantal Refahi.⁹ The Defence also

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.

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

³ Initial Motion, paras 1 and 5.

⁴ *Ibid.*, para 2.

⁵ *Ibid.*, para 3.

⁶ *Prosecutor v. Sesay*, SCSL-03-09-PT, Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, Attachment A, 7 April 2003.

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refers to this Chamber's prior finding that there was a *prima facie* case for protective measures for witnesses for the First Accused,¹⁰ and states that the "same principles apply by implication to the third accused."¹¹

5. The Defence requests that the following protective measures be implemented for all Gbao defence witnesses:

- a) All witnesses are to be referred to by pseudonym during the proceedings;
- b) The names, addresses, whereabouts, and identifying information of protected witnesses shall not be included in public records of the tribunal;
- c) Documents containing information regarding protected witnesses shall not be disclosed to the media;
- d) All witnesses shall testify with the use of a screening device from the public;
- e) Prohibition of recording or reproducing the images of any witnesses within the precincts of the Court;
- f) The Prosecution and other Defence teams shall refrain from sharing, discussing, or revealing any disclosed non-public materials to any person or entity other than the Gbao Defence;
- g) The Prosecution and other Defence teams shall notify the Witnesses and Victims Section of the Special Court ("WVS") of all individuals on their teams who have access to protected information, and will update WVS in the event of any changes.¹²

6. The Defence further requests that insider witnesses be permitted to testify using voice distortion, and that children testify over closed-circuit television.¹³

B. The Prosecution Response

7. In its Response, the Prosecution requests that the Chamber dismiss the Motion on the basis that the Defence has not provided factual materials to support its allegations. If the Chamber does

⁷ *Prosecutor v. Sesay*, SCSL-03-09-PT, Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, Attachment B, 7 April 2003.

⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Renewed Prosecution Motion for Protective Measures Pursuant to Order to The Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, Annex F, 4 May 2004.

⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, Annex A, 25 July 2006.

¹⁰ Sesay Decision, para 24.

¹¹ Initial Motion, para 4.

¹² *Ibid.*, para 5.

¹³ *Ibid.*, paras 6-7.

grant the requested relief, the Prosecution does not oppose such relief to the extent that it protects the identity of Defence witnesses from the public, rather than from the Prosecution.¹⁴

8. The Prosecution alleges that it is unclear which witnesses will testify for the Accused Gbao, and that as such, the materials filed by the Prosecution in 2003 and the Sesay Defence in 2006 are not, under the circumstances, dispositive as to the issue of necessary protective measures for the Gbao witnesses.¹⁵ Because the Defence has not yet identified its witnesses, the Prosecution requests this Chamber to dismiss the Motion as premature.¹⁶

9. The Prosecution further states that the principal of equality of arms does not require that Defence witnesses be granted protective measures identical to those ordered for witnesses for the Prosecution or for the accused's co-defendants.¹⁷ The Prosecution further submits that the Defence has failed to provide any supporting evidence for its proposition that witnesses may fear retribution from the state.¹⁸

10. In regard to the specific protective measures requested, the Prosecution does not object to any of the measures set forth in paragraph 5, above, to the extent that they are intended to protect the identity of witnesses from the public, rather than the Prosecution. In regard to the proposed remedy set forth in paragraph 5(g), above, the Prosecution states that other protective measures required such lists to be given to the Registry, rather than the WVS, and that the Registry may be the more appropriate institution.¹⁹

11. The Prosecution does not object to the use of voice distortion or closed-circuit television as detailed in paragraph 6, above.²⁰

C. The Additional Motion

12. In its Additional Motion, the Defence requests the following additional protective measures:

- a) That the names and any other identifying data of Defence witnesses for Gbao not be disclosed to the Prosecution or other Defence teams until 42 days prior to their testimony, unless waived by Defence Counsel for Gbao;

¹⁴ Response, para 4.

¹⁵ *Ibid.*, para 7.

¹⁶ *Ibid.*, para 15.

¹⁷ *Ibid.*, paras 8-9.

¹⁸ *Ibid.*, para 10.

¹⁹ *Ibid.*, para 13.

²⁰ *Ibid.*, para 14.

- b) That the parties not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of such persons;
- c) That the Prosecution or other Defence teams not be permitted to contact Defence witnesses for Gbao without consent of Defence Counsel for Gbao or first making application to the Trial Chamber; that the Defence be entitled to make representations on the matter; that in the event that leave is granted that the witness be contacted for his consent by witness protection where the witness is employing their assistance or by the Defence where he is not.²¹

13. The Defence asserts that disclosure prior to 42 days before testimony was a protective measure granted to both the Prosecution and the Sesay witnesses, and that there is a reasonable basis for affording the same protection to the Gbao witnesses.²² The Defence submits that Defence witnesses have expressed fear of testifying if their names may be subject to inadvertent disclosure in the public arena.²³ The Defence provides as evidence of such fears the statement of an investigator for the Gbao team.²⁴

D. The Prosecution Response to the Additional Motion

14. The Prosecution does not oppose the relief sought in paragraph 12(a) above, given that this measure was granted to the Sesay witnesses, except for the provision that the Defence be entitled to waive the protective measures. This, it claims, was not granted to the Sesay Defence, and submits that it is not for the Defence to waive this measure but for the witnesses themselves.²⁵

15. The Prosecution submits that the measure sought in paragraph 12(b) above was denied by the Chamber for the Sesay witnesses on the basis that it was "too restrictive in scope and is not justified in the circumstances"²⁶, and submits that the Gbao Defence has not provided any argument to suggest that this decision was in error or based on facts different from those currently before the Chamber. The Prosecution therefore opposes this measure.²⁷

²¹ Additional Motion, para 10.

²² *Ibid.*, paras 6 and 9.

²³ *Ibid.*, paras 4-5.

²⁴ *Ibid.*, Annex A.

²⁵ Prosecution Response to Additional Motion, paras 5-6.

²⁶ Sesay Decision, para 24 (vii).

²⁷ *Ibid.*, paras 7-8.

16. With respect to the measure sought in paragraph 12(c) above, the Prosecution submits that it was denied in the Sesay Decision, and that the Gbao Defence has not adduced any evidence that its witnesses should be treated differently from the Sesay witnesses.²⁸

17. Moreover, the Prosecution submits that the Gbao Defence has not met the Rule 69 test of “exceptional circumstances”, as it has only provided, via the statement of the investigator, evidence of the subjective fears of witnesses, and has not adduced any objective evidence to substantiate these fears.²⁹

E. The Defence Reply

18. In its Reply, the Gbao Defence claims that its witnesses have a legitimate fear for their safety, and that therefore a *prima facie* case has been made out for the protective measures it seeks.³⁰

19. The Defence asserts that fairness dictates that the witnesses for one Accused should not be deprived of protective measures which are accorded to witnesses for another Accused, but submits that such measures may vary slightly, and that the determination of protective measures should be made on a case by case basis.³¹ It asserts that if there is no prohibition on the independent verification of a witness's identity, the purpose of the protective measures will be undermined. The Defence suggests that the order might instead be worded to prohibit parties from “deliberately independently verifying the identity of witnesses”.³²

20. The Defence also asserts that there is no reason why it should not be entitled to waive delayed disclosure on behalf of witnesses.³³

II. APPLICABLE LAW

21. This Chamber has stated in its prior decisions that the issue of witness and victim 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:

²⁸ *Ibid.*, paras 9-10.

²⁹ *Ibid.*, paras 12-16.

³⁰ Defence Reply to Additional Motion, para 3.

³¹ *Ibid.*, para 4. The Defence also submits that there may be a category of witnesses that do not fall under the assistance of witness protection, which is why it has requested a different procedure for contacting protected witnesses than that granted to the Sesay Defence (*Ibid.*, para. 6).

³² *Ibid.*, para 5.

³³ *Ibid.*, para 7.

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

22. Furthermore, Rule 26bis of the Rules empowers the Trial Chamber 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.”

23. The Chamber emphasizes that the overriding principle that has consistently guided its 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.”³⁴

24. In one of our seminal Decisions on this issue, the Chamber held that the unique feature of the Special Court being located in Sierra Leone, the *locus* of the alleged offences, is a key factor in weighing the need for granting protective measures to victims and witnesses.³⁵ To this end, the Chamber, in *Prosecutor v. Kondewa*, held as follows:

The Republic of Sierra Leone is a relatively small community where people are bound to and in fact know and identify themselves very easily thereby increasing the danger of risk of a [resumption] of hostilities against potential witnesses and victims and their families if they are identified by the indictees or their sympathisers as those whose testimony would incriminate them, or in due course and more still, the indictees who they support out there;³⁶

³⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Order on Protective Measures for Additional Witnesses, 24 November 2004, p. 3. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-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.

³⁵ *Prosecutor v. Gbao*, SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 10 October 2003, paras 21-25; see also *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, para 29.

³⁶ *Prosecutor v. Kondewa*, SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003, para 30. In addition, more specifically referring to RUF insiders, this Court held that “insider witnesses as well as their families are particularly vulnerable to acts of retaliation and potential harm if their identities were to be known to the public”. See, for instance *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Amend Protective Measures for Witnesses TF1-168 and TF1-041, 9 May 2006.

25. It is also noteworthy that the Prosecution, in response to a recent request from the Trial Chamber, did find that there were no significant changes in the security situation in the country that could warrant a variation of the protective measures regime.³⁷

26. This Chamber has also noted 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.³⁸

27. Guided by the foregoing principles, the Chamber now proceeds to examine the merits of the Defence Motion.

III. DELIBERATION

A. *Preliminary Issues*

28. As a preliminary matter, the Chamber notes that the Additional Motion, and the Response and Reply thereto, were filed confidentially. The Chamber is of the opinion that this Motion should have been filed publicly, with a confidential annex as necessary, as no sufficient justification was provided by the Gbao Defence for filing the motion confidentially in its entirety. In accordance with Rule 78 and the jurisprudence of the Special Court,³⁹ the Chamber is also of the view that this Decision should be issued publicly as no cogent reason has been shown why it should be issued confidentially.

29. The Chamber also notes preliminarily that subjective evidence, in the form of the statement of a Gbao investigator, was provided in support of the Additional Motion, but that no similar evidence was filed with the Initial Motion in order to substantiate the claims made in that motion. The Chamber considers that in this case, it is in the interests of justice and judicial economy to

While these considerations were primarily directed to witnesses testifying for the Prosecution, they might apply, *mutatis mutandis*, to witnesses willing to testify on behalf of the Accused.

³⁷ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006. A similar finding was also made more recently by Trial Chamber II. See *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on Joint Defence Application for Protective Measures for Defence Witnesses Appearing From 4 September 2006 Onwards, 13 September 2006, p. 2.

³⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006; Transcripts of Trial Proceedings, 28 March 2006, p. 110-124.

³⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-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*, SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, paras 19-21, *Prosecution v. Brima, Kamara and Kanu*, SCSL-04-16-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 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.

consider both motions together; the Additional Motion being considered as being consequential to the Initial Motion. The evidence submitted in support of these motions shall therefore be considered jointly. However, the Chamber wishes to note that the a party will not generally be entitled to rely on evidence submitted with respect to one motion to substantiate claims made in another motion.

B. Merits of the Defence Motions

30. The Chamber notes that, in essence, the Defence is herein seeking for its witnesses protective measures that are substantially similar to those previously granted to the Prosecution and to the Sesay witnesses, and relies on the same objective evidentiary material to support its claims. Additionally, the Defence relies, as subjective evidence substantiating these fears, on the statement of an investigator for the Gbao team.

31. Based on the evidence submitted, the Chamber is convinced that the fears of Gbao witnesses residing within West Africa are real and that they do feel threatened as a consequence of potentially testifying for the Accused Gbao. It is, however, the Chamber's view that a party seeking protective measures is required to provide evidence from sources other than its witnesses indicating an objective basis for assessing whether a threat to the witnesses' security exists. Reinforcing this position, we held in a previous decision in the CDF case that the subjective feelings of the witnesses are not the only factor to be taken into account, and that the subjective fears of witnesses are not decisive of the issue of whether protective measures should be granted.⁴⁰

32. The Chamber notes that the Defence relies solely on the reports submitted by the Prosecution and the Sesay Defence in support of their requests for protective measures, and does not supply any independent objective evidence in support of its claims. In this regard, the Chamber reiterates its recent affirmation that there has not been a significant change in the security situation that would warrant changing the protective measures for Prosecution witnesses⁴¹, and its assessment in the Sesay Decision that the security situation in Sierra Leone and West Africa still warranted the granting of protective measures for witnesses residing in those regions.

⁴⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ruling on Motion for Modification of Protective Measures for Witnesses, 18 November 2004, paras 38 and 40. See also *Prosecutor v. Rugambarara*, ICTR-00-59-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 28 October 2005, para 6 and *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para 2.

⁴¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006.

33. Moreover, the Chamber acknowledges that the Prosecution does not oppose the protective measures sought by the Defence in paragraphs 5 (a), (b), (d), (e), (f) and the first part of 12(a) above for witnesses residing Sierra Leone and West Africa, and therefore holds that, while it would have been preferable for the Defence to have filed independent objective evidence to substantiate its requests, sufficient objective evidence has been presented for it to grant such measures in the circumstances.

34. The Chamber observes that the Defence has not indicated which geographic categories of witnesses the measures it requests are to apply to. In the Sesay Decision, the Chamber held that no *prima facie* case had been shown substantiating the fears of potential witnesses residing outside of West Africa.⁴² It also recently denied leave to appeal on this issue.⁴³ The Gbao Defence has submitted no evidence in addition to that filed by the Sesay Defence about the threats facing potential witnesses residing outside West Africa. The Chamber accordingly finds no merit in the Defence application in respect of potential witnesses residing outside of West Africa.

35. In the Sesay Decision, the Chamber decided 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 witness⁴⁴ and denied leave to appeal on this issue.⁴⁵ The Gbao Defence claims that there are certain categories of witnesses who do not fall under the assistance of the WVS, and that therefore they should be entitled to contact these witnesses directly to ascertain their consent. The Chamber's response to this claim is that the Defence has provided no evidence to suggest that the WVS will not be able to adequately fulfil the role assigned to it. It likewise finds this claim lacking in merit.

36. The Defence requests an order that the parties not make an independent determination of the identity of the witnesses, although suggests in its Reply that this might instead be worded to prohibit parties from "deliberately independently verifying the identities of witnesses".⁴⁶ The Chamber notes that a similar order was denied in the Sesay Decision on the basis that it was too

⁴² Sesay Decision, para 24(ii).

⁴³ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 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.

⁴⁴ Sesay Decision, para 24 (viii).

⁴⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 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.

⁴⁶ Defence Reply to Additional Motion, para. 5.



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restrictive in scope and not justified in the circumstances.⁴⁷ No evidence having been adduced by the Defence to justify a review of this order in the context of the witnesses for the Accused Gbao, the Chamber finds that the request lacks merit.

37. The Defence further requests that the Prosecution and co-defendants provide lists of all persons working on their respective teams to the WVS. The Chamber considers that, as it has held in previous decisions,⁴⁸ the Registry, rather than the WVS, is the more appropriate institution for such lists to be provided to.

38. The Defence requests that it be entitled to waive the 42-day disclosure requirement. The Chamber holds that, consistent with its previous jurisprudence, it is the Chamber that is vested with the authority, upon application by the parties, rather than the parties themselves, to grant specific variations to or lift protective measures previously granted to witnesses.⁴⁹ The Chamber therefore finds the request to be misconceived and legally untenable.

39. It is also the Chamber's view that the Defence requests for voice distortion for insider witnesses and that child witnesses testify by means of closed circuit television are premature at this point in time. The Chamber granted similar measures to Prosecution Witnesses only once a list of the specific witnesses in each such category had been provided by the Prosecution.⁵⁰ Rather than granting blanket protection for such witnesses prior to the commencement of the Defence case, therefore, the Chamber will make an appropriate order to that effect if and when a specific list of the witnesses in each such category has been provided by the Defence, with sufficient supporting evidence.

40. Furthermore, the Chamber considers that rather than grant the order requested by the Gbao Defence in 5(c), the Chamber is disposed to grant the Defence a reformulated order:

The names or any other identifying data of these witnesses shall not be disclosed to the public or the media, and this order shall remain in effect after the conclusion of proceedings;

⁴⁷ Sesay Decision, para. 24 (vii).

⁴⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Prosecutor's Motion for Modification of Protective Measures for Witnesses and Victims, 5 July 2004, p. 16.

⁴⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006; Transcripts of Trial Proceedings, 28 March 2006, p. 110-124.

⁵⁰ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, 4 May 2004.

41. Although not specifically requested by the Gbao Defence, the Chamber also considers that, bearing in mind its responsibilities under Rule 26bis, and in order to harmonize the protective measures regimes for the witnesses for the three Accused and guarantee their effectiveness, the following additional protective measures should be granted for the Gbao witnesses:

- a) The Prosecution shall maintain a log indicating the name, address and position of anyone who receives a Defence witness statement, interview report, summary of expected testimony, or any non-public material, as well as the date of disclosure; the Prosecution shall ensure that individuals to whom information is disclosed adhere to the non-disclosure order;
- b) The Prosecution, Sesay Defence and Kallon Defence shall, at the conclusion of the proceedings, return to the Registry all disclosed witness-related materials which have not become part of the public record.

C. Conclusions

42. Based on the aforementioned general legal principles, and the evidence before it, the Chamber, also taking into consideration the present stage of the trial proceedings and in particular the preparation for the commencement of the Defence case, finds significantly as to the merits of the present application as follows:

- (i) That the Defence has established a *prima facie* case for the issuing of proposed protective measures listed in paragraph 5 (a), (b), (d), (e), (f) and the first part of 12(a) above 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.⁵¹
- (iii) That, for the reasons given above, protective measures 12(b) and the second part of 12(a) should not be granted.
- (iv) That in respect of proposed protective measure 12(c), the WVS, rather than the Defence or 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

⁵¹ For further reference, see *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Prosecutor's Motion for Protective Measures CCF, CCJ, BLC, BLS and BLJ (TC), 29 November 2006, paras 4-7.

to be interviewed and to make sure that a proper consent for an interview was obtained from the witness.

(v) That in respect of proposed protective measure 5(g), the Registry, rather than the WVS, is the organ of the court that should be notified of all individuals on the Prosecution and Defence teams who have access to protected information.

(vi) That the proposed protective measure in paragraph 5(c) be reworded as specified in paragraph 40 above.

(vii) That additional protective measures, as specified in paragraph 41 above, shall be granted to Gbao witnesses.

IV. DISPOSITION

43. In light of the foregoing considerations, the Chamber **GRANTS** the Defence Motions in part and consequently, with regard to the relevant witnesses of the Defence for the Third Accused, Augustine Gbao, **ORDERS** as follows:

- a. All witnesses for the Defence for the Third Accused, Augustine Gbao, shall testify with the use of a screening device from the public, unless otherwise directed by the Court;
- b. There shall be no photographing, audio or video recording, sketching or reproducing in any other manner of images of such witnesses without prior leave of the Trial Chamber;
- c. The Defence for the Third Accused, Augustine Gbao, shall withhold the names or any other identifying data of its witnesses until 42 days prior to their testimony at trial;
- d. The Registry shall seal the names or any other identifying data of all these witnesses, and this information shall not be included in any of the public records of the Special Court;
- e. The Defence for the Third Accused, Augustine Gbao, shall designate a pseudonym for each of its witnesses, to be used during pre-defence case disclosure of witness summaries and other materials⁵² and during trial proceedings;
- f. The names or any other identifying data of these witnesses shall not be disclosed to the public or the media, and this order shall remain in effect after the conclusion of proceedings;

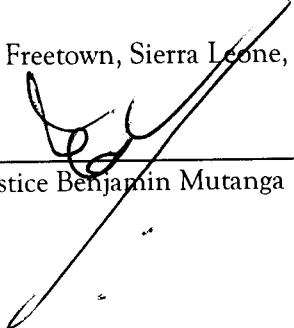
⁵² See, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, 30 October 2006.

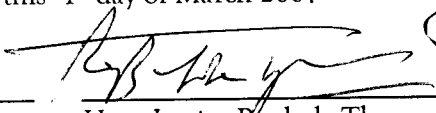
- g. The Prosecution,⁵³ the Defence for the First Accused, Issa Sesay, and the Defence for the Second Accused, Morris Kallon, respectively, shall not share or reveal any disclosed witness-related non-public materials to any entity other than the Defence for the Third Accused, Augustine Gbao;
- h. The Prosecution shall maintain a log indicating the name, address, and position of anyone who receives a Defence witness statement, interview report, summary of expected testimony, or any non-public material, as well as the date of disclosure; the Prosecution shall ensure that individuals to whom information is disclosed adheres to the non-disclosure order;
- i. The Prosecution, the Defence for the First Accused, Issa Sesay, and the Defence for the Second Accused, Morris Kallon, respectively, shall, at the conclusion of proceedings, return to the Registry all disclosed witness-related materials which have not become part of the public record;
- j. The Prosecution, the Defence Team for the First Accused, Issa Sesay, and the Defence Team for the Second Accused, shall notify the Registry of all individuals on their teams who have access to protected information, and will update the Registry in the event of any changes;
- k. Upon disclosure of the witnesses' names or any other identifying data by the Defence pursuant to order (c) above, the Prosecution, the Defence for the First Accused, Issa Sesay, and the Defence for the Second Accused, Morris Kallon, 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 Third Accused, Augustine Gbao. 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 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.

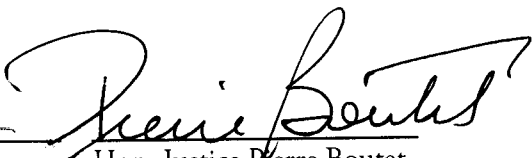
⁵³ For the purposes of the present Decision and consistent with established jurisprudence from other international criminal tribunals, any reference herein to the Prosecution's obligations concerning disclosure and, in particular, protective measures for witnesses, should not be construed as limited to specific teams within the Office of the Prosecution but rather extends to such Office as an undivided unit. See, for instance, *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumwa*, ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005.

44. The Chamber further **ORDERS** the Court Management Section to reclassify the Confidential Gbao Motion for Delayed Disclosure and Related Measures for its Witnesses as a public document, with the investigator's statement and name contained in a Confidential Annex.

Done at Freetown, Sierra Leone, this 1st day of March 2007


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I


Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

