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Document(s) **Sesay Response To Prosecution Appeal Submission Regarding Decision On Request To Lift Protective Measures.**

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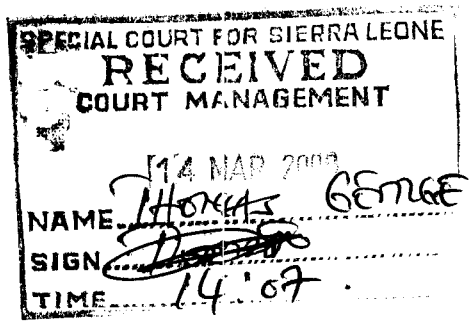
SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding
Justice Emmanuel Ayoola
Justice Raja Fernando
Justice Renate Winter
Justice Jon. M. Kamanda

Registrar: Mr. Herman Von Hebel

Date filed: 14th March 2008



THE PROSECUTOR against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-T

PUBLIC

SESAY RESPONSE TO PROSECUTION APPEAL SUBMISSIONS REGARDING DECISION ON REQUEST TO LIFT PROTECTIVE MEASURES

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INTRODUCTION

1. On 3rd March 2008, the Prosecution filed a Notice of Appeal and Submissions[1] appealing the 9th November 2007 "Decision on Sesay Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses" ("The Decision").[2] The Defence herewith files its Response in opposition to the Appeal.

2. The deadline for filing a response to the Prosecution's Appeal Submissions was the 13th March 2008. The Defence seeks leave of the Appeals Chamber to file this Response out of time. Due to the exigencies of completing Mr. Sesay's defence case, this Response was neglected. The Defence request that the Response be considered to ensure development and confirmation of the law.

3. The Prosecution's appeal is based on three grounds: i) the Trial Chamber erred in ordering the Prosecution to disclose unredacted versions of witness statements of Rule 68 witnesses; ii) the Trial Chamber erred in ordering the Prosecution to disclose unredacted versions of witness statements disclosed pursuant to Rule 66; and iii) the Trial Chamber erred in ordering that the Defence may contact Prosecution witnesses through WVS, rather than through the OTP.

RESPONSE

Ground One: Did the Trial Chamber err in ordering the Prosecution to disclose unredacted versions of witness statements of Rule 68 witnesses?

4. The Trial Chamber correctly stated there exists a "clearly established principle" 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".[3]

5. As noted in the case of *Bagasora* at the International Criminal Tribunal for Rwanda, this is

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[1] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-1021, "Prosecution Notice of Appeal and Submissions Regarding 'Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses'", 3 March 2008 ("Prosecution Appeal").

[2] *Prosecutor* v. *Sesay et al.*, SCSO-040-15-873, "Decision on Sesay Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses," 9 November 2007 ("Decision").

[3] *Decision*, para. 26 relying upon *Prosecutor* v. *Karemera, Ngirumpatse 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)", 4th July 2006, para. 8; *Prosecutor* v. *Karemara, Ngirumpatse and Nzirorera*, ICTR-98-44-T, "Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC)", 5th July 2005, para. 20; *Prosecutor* v. *Bagasora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, "Decision on Disclosure of Identity of Prosecution Informant (TC)", 4th May 2006, para. 5.

the correct application of the law when identity is "inextricably connected with the substance of the statements" and when "the statement cannot be properly understood without knowing the author's ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given .... Accordingly, the identity of [the] witness ... and any portions of the statement redacted to protect the witness's identity must be considered to be exculpatory within the meaning of Rule 68 ...."[4]

6. This is settled law and is neither exceptional, unusual or in any way novel. It is standard procedure at all International Tribunals and has been applied frequently through many years of Tribunal jurisprudence. This is the balance that has been struck between prosecutorial investigative interests, rights of victims and witnesses, and the accused's rights to material that might prove his innocence.[5] It is accepted as fair and reasonable by prosecutors in other International Tribunals and the law applicable to the present circumstances. This balancing exercise begins with Article 17 of the Statute which states that the trials are conducted with "*full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses" and not – as the Prosecution suggests – with its so-called duty to "present the best available evidence to prove its case".[6] This was the appropriate balance in the circumstances and no error of law or exercise of discretion could possibly arise.

7. It is now unusual for Prosecuting authorities to dispute or seek to deny or modify this disclosure obligation, even less to make claim to an error of law or exercise of discretion. The Prosecution Appeal lacks jurisprudential support and none is cited that would justify the claim that the Trial Chamber erred in law or in the exercise of its discretion. The Prosecution has cited no circumstances that would distinguish the instant case from this line of authority or the norm and thus no error of law or exercise of discretion arises.

8. According to the Prosecution's interpretation of Rule 68, in contrast to the object and purpose of the Rule, the Prosecution needs only to disclose to the Defence the *existence* of exculpatory evidence known to the Prosecutor. The Prosecution has wilfully misinterpreted the law by ignoring the full text of Rule 68 which is not – as they claim – limited to the

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[4] *Prosecutor* v. *Bagosora et al.*, ICTR-98-41-T, "Decision on Disclosure if Identity of Prosecution Informant", 24th May 2006, para. 5.
[5] *See Prosecutor* v. *Milosevic*, IT-02-54-T, "Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69", 19th February 2002.
[6] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-877, "Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", 12th November 2007, para. 17.

obligation to disclose "to the defence the existence of evidence known to the Prosecutor" but also creates a "continuing obligation to disclose *any such exculpatory material*" [emphasis added]. The Prosecution's assertion that the Trial Chamber erred by failing to strike a reasonable balance between the rights of the Accused and the rights of victims and witnesses[7] must be seen in light of this misreading of the Rule.

9. The Prosecution's claim that the Trial Chamber failed to consider the interests of witnesses and victims is unfounded. The Trial Chamber correctly balanced the Accused's right to the exculpatory material (and not merely a statement indicating its existence) with the rights of victims and witnesses. This was considered and explicitly dealt with in the Decision.[8]

10. It was correct in law and a reasonable exercise of discretion to conclude that the full exercise of the Rule 68 obligation required more than providing the Accused with little other than extracts of discombobulated anonymous pieces of evidence (rather than full statements with context and source). Moreover, that the provision of this material to the defence was a reasonable balance to be struck, taking into account all relevant considerations, given the disclosure could be achieved with minimal variation of the protective measures. In light of these competing interests and giving due regard to the paramount importance to provide the Accused with effective rights to evidence which *might be used* to prove his innocence, this was the only reasonable conclusion open to the Trial Chamber.

11. The Prosecution suggests that the Trial Chamber erred by failing to conclude that there were less intrusive measures by which the information could be provided to the Defence. The Prosecution suggests that the Prosecution provide a summary of the additional points to which the witness can testify rather than a full unredacted statement of the witness.[9] This argument ignores the finding by the Trial Chamber that the identity of the statement maker is "inextricably connected with the substance of the statements".[10] This was at the heart of the Trial Chamber's finding and a prerequisite of the balancing exercise.

12. The Prosecution links the purported need for less intrusive means with protective measures for Prosecution witnesses in the Taylor trial and states that those witnesses may be chilled from testifying because of objective threats to their security, attempts to interfere with the

[7] Prosecution Appeal, para. 27.
[8] For example: *Id,* Para. 26 and 27.
[9] Prosecution Appeal, para. 42.
[10] Id, Para. 26.

administration of justice, and non-compliance with protective measures orders.[11] This is nothing more than speculative insinuation lacking *any* evidential basis. There was no proper evidence, information or argument which would have allowed the Trial Chamber to take these assertions/considerations into account.

13. The Trial Chamber was correct to ignore the Prosecution's offensive remarks concerning the "attitude of the RUF Accused and Defence to protective measures"[12] and the baseless allegation that there had been "non-compliance with protective measures orders".[13] The Prosecution has contorted Defence's statements to cast aspersions on the RUF accused where none are justified and where the Prosecution has failed to bring a single official complaint against either the RUF Accused or the RUF Defence as regards any alleged "disregard of protective measures".[14]

14. In these circumstances, the Prosecution's suggestion that the Trial Chamber erred by failing to consider the effect of the disclosure on further or ongoing Taylor investigations is unsustainable and plainly wrong. In light of the Trial Chamber's unambiguous conclusion that the "variations to the protective measures requested by the Defence are minimal and ... [do] not significantly diminish the protection available to the witnesses"[15] something more was required than this type of specious allegation. The notion that the first Accused or the Sesay Defence has any interest but to ensure that the witnesses remain confident of their security is fanciful and a demonstration of nothing other than collective paranoia of the Prosecution.

Change in Circumstances/New Information

Ex–RUF witnesses

15. The Prosecution suggests that the Trial Chamber erred in failing to apply the correct test when considering a variation in protective measures. This is plainly wrong. Notwithstanding the submissions set out in paragraphs 44-48 of the Prosecution Appeal, an application for a review (leading to variation) can be requested on the basis of new information, notably in regards to a change in the circumstances[16] surrounding the initial Decision(s). It is submitted that there had been a clear change of circumstances sufficient to justify the limited variations

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[11] Prosecution Appeal, paras. 38, 44-48.
[12] Prosecution Appeal, para. 38.
[13] Prosecution Appeal, para. 46.
[14] Prosecution Appal, Para. 44.
[15] The Decision, para. 27.
[16] *Prosecutor v. Niramashuhuko et al,* ICTR-97-21-T, "Decision on the Prosecutor's Motion for, *inter alia,* Modification of the Decision of 8th June 2001", quoted in Jones and Powles, International.

requested. First, concerning the 6th July 2004 Decision, this was carefully drafted with one aim in mind, to protect the security and privacy of witnesses who were expected to testify in the RUF trial. None of the witnesses who were the subject of the Decision will now do so.[17]

Taylor Witnesses

16. The Trial Chamber correctly balanced the fact that as regards the Taylor witnesses, the witnesses were of material assistance to the Defence case and that this information (not known at the time of the 5th May 2006 Decision) could properly form the basis for the minimal variation of the protective measures.

Ground Two: Did the Trial Chamber err in ordering the Prosecution to disclose unredacted versions of witness statements disclosed pursuant to Rule 66?

17. The Prosecution's complaint is difficult to discern. The arguments appear to be i) that the Trial Chamber erred by ordering the disclosure of the whole statement (as opposed to only the Rule 68 material within the statement); (ii) that the Trial Chamber erred by finding that good cause had been demonstrated and iii) that the Trial Chamber unreasonably exercised its discretion following a finding of good cause pursuant to Rule 66(A)(ii). The Prosecution's complaints appear to be nothing than a reiteration of Ground 1 and ought to be dismissed for the reasons aforementioned.[18]

Ground Three: Did the Trial Chamber err in ordering that the Defence may contact Prosecution witnesses through WVS?

18. It is submitted that the Trial Chamber was not only correct in deciding that consent should be sought to contact the protected persons (both RUF and Taylor witnesses) through the auspices of the WVS, but any other decision would have been inconsistent with previous decisions and with the Prosecution's previously stated positions. In these circumstances the Trial Chamber would have erred in law if it had decided differently, without good cause.

19. The Prosecution had previously referred to the WVS as the "guardian of the needs of witnesses ... (protecting) ... the rights of a witness to refuse an interview".[19] As the Prosecution previously stated "It is inconceivable why the WVS, which the Trial Chamber has put in charge for establishing contact and which is a separate, neutral entity not aligned with either the Prosecution or the Defence and whose sole and statutory purpose is to best

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[17] See Paras. 11 and 17 of the Response.
[18] *Supra*, paras. 4-16.
[19] *Prosecutor v Sesay et al*, SCSL-04-15-T-671, Prosecution Response to Application for Leave to Appeal the Decision on Sesay Defence Motion for Protective Measures, 14th December 2006, Para. 24 and Para. 29.

protect the interests of the witnesses of the Court, should not be able to *best* reassure the witness that no contact will be made without their consent and their rights be respected"[20] (emphasis added). The Prosecution's attempt to resile from this position and to now allege an error of law is nonsensical and frivolous.

20. As noted above, the decision that consent should be sought through WVS is consistent with the position adopted by Trial Chamber I in its previous Decision which stated *inter alia* that the WVS, "rather than the Defence or the Prosecutor is in the best position, to determine how to contact a protected witness, who may otherwise feel intimidated, explain to a witness his right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained from the witness".[21]

21. It is most instructive that this position was not only accepted by the Prosecution but vigorously sought. Clearly, there is no reason to depart from this line of judicial reasoning or any error of law or erroneous exercise of discretion which arises. It is submitted that any departure from this established practice, would itself be cause for complaint and in the circumstances a fundamental breach of the statutory right of the Accused, pursuant to Article 17(4)(e) of the Statute, to "obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him".

REQUEST

22. The Defence requests that the 9th November 2007 Decision be upheld.

Dated 14th March 2008

Wayne Jordash
Sareta Ashraph

[20] Ibid at Para 29.
[21] *Prosecutor v. Sesay et al*, SCSL-04-15-T-668, Decision on Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non- Public Disclosure, 30th November 2006, pp. 11, Order 24(viii). See also *Prosecutor v. Norman at al*, SCSL–04-14–T-629, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20th June 2006, Para. 23.

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LIST OF AUTHORITIES

Decisions

Prosecutor v. *Bagasora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, "Decision on Disclosure of Identity of Prosecution Informant (TC)", 4 May 2006.

Prosecutor v. *Bagasora*, ICTR-98-41-T, "Decision on Disclosure if Identity of Prosecution Informant", 24 May 2006.

Prosecutor v. *Karemara, Ngirumpatse Nzirorera*, ICTR-98-44-PT-AR73.6, "Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC)", 5 July 2005.

Prosecutor v. *Karemera, Ngirumpatse 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.

Prosecutor v. *Sesay et al.*, SCSO-040-15-873, "Decision on Sesay Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses," 9 November 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-936, "Decision on Sesay Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii)", 10 January 2008.

Motions

Prosecutor v. *Sesay et al.*, SCSL-04-15-671, "Prosecution Response to Application for Leave to Appeal the Decision on Sesay Defence Motion for Protective Measures", 14 December 2006.

Prosecutor v. *Sesay et al.*, SCSL-04-15-884, "Sesay Defence Response to Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", 19 November 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-1021, "Prosecution Notice of Appeal and Submissions Regarding 'Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses'", 3 March 2008.