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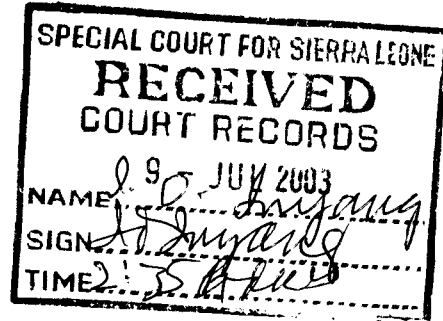
**SPECIAL COURT FOR SIERRA LEONE
FREETOWN - SIERRA LEONE**

IN THE TRIAL CHAMBER

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

Registrar: Mr. Robin Vincent

Dated Filed: 9 July 2003



THE PROSECUTOR

Against

**Moinina Fofana
CASE NO. SCSL - 2003 - 11 - PT**

**DEFENCE OFFICES'S APPLICATION FOR AN EXTENSION OF TIME TO RESPOND
TO PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR
VICTIMS AND WITNESSES AND FOR NON-PUBLIC DISCLOSURE**

Office of the Prosecutor:

Desmond de Silva, QC

Defence Office

Sylvain Roy, Acting Chief of Defence
Claire Carlton-Hanciles, Defence Associate
Ibrahim sorie Yillah, Defence Associate
Haddijatou Kah Jallow, Defence Associate
Sam Scratch, Defence Intern

I. INTRODUCTION

1. On the 4th July 2003, the Office of the Prosecutor (the OTP) filed a Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure (the Prosecution Motion). The Prosecution requested a designated Judge or Chamber to issue (11) protective measures. The Defence Office now requests an extension of time for recently assigned counsel, Mr. Michiel Pestman, to file a response to that motion.

2. The Defence Office through the then Acting Chief, Mr. John Jones consulted with the accused, Moinina Fofana at the Bonthe Detention Facility on the 27th June 2003 regarding the appointment of counsel. In the process, the accused was shown several curriculum vitae of counsel who had applied and expressed interest to represent him and other accused persons. The accused asked for time to consider the matter before making a final decision. However, Sam Scratch, an intern attached to the Defence Office, spoke to Mr. Fofana via telephone on the 4th day of July 2003 on the same issue and he indicated through an interpreter that he has settled for Michiel Pestman to be assigned to him. That assignment was formalised by the Registrar on the 8th day of July 2003. It is exhibited here for perusal and consideration. The Defence Office acting pursuant to its mandate under Rule 45 and Rule 54 of the Rules of Procedure and Evidence hereby files this request, for an order seeking an extension of time of seven (7) days from the day Counsel receives the Prosecution Motion to file a response.

II. PROCEDURAL BACKGROUND

3. On the 30 May 2003, the accused, then only a suspect, declared himself indigent and completed a "Request for Legal Assistance" and a "Declaration of Means". On the 4th July 2003, he expressed a preference for the assignment of Michiel Pestman. Subsequently, the Defence Office contacted and confirmed with Counsel his acceptance of the said assignment.

4. The Defence Office in its "*Request Application- By the Defence Office for the Suspension of Consideration of the Prosecution's Motion For Protective Measures Until Counsel is assigned*" (dated the 18th June 2003- SCSL-2003-10-PT), sets out in detail the jurisprudence that have evolved on the assignment of counsel, where the accused declares indigent and the submissions therein are here incorporated by reference. The referred application is exhibited here for consideration.

III A SUBSTANTIVE RESPONSE BY THE DEFENCE OFFICE MAY PREJUDICE THE POSITION OF ASSIGNED COUNSEL

5. The Defence Office has filed responses to protective measures motions in several cases before the Chamber. (*The Prosecutor v. Issa Sesay and Morris Kallon amongst others*). The issue of standing to file papers on behalf of accused persons is not in question. In the instant case, the accused has been assigned Counsel. The Office therefore seeks by way of this Request an order for extension of time so that Counsel may have sufficient time and opportunity to file a substantive response to the *Prosecution Motion*.

6. Moreover, the Office notes that two of the applications it filed on behalf of Issa Sesay and Morris Kallon have been subjected to applications for re-consideration, partly on the grounds that counsel were not assigned when the Defence Office filed its substantive responses and that assigned counsel take a different view of certain matters from that taken by the Office.

7. The Defence Office submits it would therefore not be in the interests of justice for the Office to submit a substantive response now to the Prosecution Motion, only for assigned counsel at a later stage to file applications for the matter to be re-considered and/or appealed. Now that Mr. Michiel Pestman is assigned, he is responsible for responding to the Prosecution's motion. To require the Office to file a response would interfere with assigned counsel's exercise of his duties to his client. It is submitted therefore that it is in the interests of all parties for an extension of time to be granted and Counsel given adequate opportunity to respond to the Prosecution Motion on its merits.

IV ROLE AND STANDING OF DEFENCE OFFICE

8. Rule 45 of the Rules calls for the establishment of the Defence Office with duties amongst others to provide initial legal advice and representation to accused persons and also ensuring respect for the rights of accused persons. Jurisprudence abound establishing the point that the Defence Office has standing to file papers on behalf of accused persons. The distinguishing factor in the instant case is that the Defence Office on its part has completed its duties by having Counsel assigned.

9. The Office submits that the current application is part of the process of upholding and ensuring the rights of the accused. The Office is in the process of transmitting the motion papers to assigned Counsel. The Trial Chamber in its jurisprudence in the *Prosecutor v. Brima Bazzy Kamara-SCSL-2003-10-PT- Order on the Request By the Defence Office for Suspension of Consideration of the Prosecution's Motion for Protective Measures Until Counsel is Assigned*) stated that “*Although the Special Court concludes that the Defence Office would have had the capacity and authority to act for the Accused it would appear preferable and would provide for more expeditious proceedings, given that the Defence Counsel has now been assigned , to consider, in the interests of all parties, such Counsel as the Counsel of Record for the Accused*”. In the current application, the Office submits that the distinguishing factor here is that Counsel has been assigned and is on record representing the accused as at today's date.

V. THE APPLICATION CONSTITUTES GOOD CAUSE

10. In support of the current application is the Declaration of Sam Scratch dated the 9th day of July 2003 setting out the facts surrounding the assignment of Counsel in the instant case. The Declaration states that the Order for the Assignment of Counsel was filed on the 8th July 2003. In effect as the date of filing this request for extension of time, the Assignment of Counsel has been perfected by the Registrar. It would therefore be improper for the Office to draft a substantive response when the accused has been assigned Counsel and he is now on record as representing the accused.

VI. DELAY IS JUSTIFIABLE

11. The Office notes that the current application seeking extension of time would result in delay of proceedings. What the Office actually invites the Chamber to consider is whether the delay is reasonable and for good cause. The Office has stated in the preceding that it relies on the Declaration of Sam Scratch to support its contention that the delay that may arise as a result of this application is borne out of good cause that is; the administration of the assignment of Counsel. This position is fortified on account of the fact that in this case, the assignment of Counsel has been formalised. Any further delay of a response caused by serving the original motion on counsel will be minimal.

VII. RELIEF SOUGHT

12. That in light of the forgoing, an extension of time of seven (7) days from the day Counsel receives the Prosecution Motion be granted for the filing of response by the Defence to the above-mentioned motion.

Freetown, 9th day of July 2003.

For the Defence Office

.....
Sylvain Roy, Acting Chief of Defence and Legal Advisor
Claire Carlton-Hanciles, Defence Associate
Ibrahim Sorie Yillah, Defence Associate
Haddijatou Kah-Jallow, Defence associate
Sam Scratch, Defence Intern

DEFENCE INDEX OF AUTHORITIES

1. **DECLARATION OF SAM SCRATCH DATED THE 9TH DAY OF JULY
2003**
2. **FILED DECISION OF THE REGISTRAR CONFIRMING
ASSIGNMENT OF COUNSEL**
3. **REQUEST OF DEFENCE OFFICE FOR SUSPENSION OF
CONSIDERATION OF PROTECTIVE MEASURES UNTIL COUNSEL
IS ASSIGNED- PROSECUTOR v. BRIMA KAMARA –SCSL-10**

DECLARATION

I, SAM SCRATCH, Barrister and Solicitor and member of the Ontario Bar, presently attached to the Defence Office of the Special Court for Sierra Leone affirmatively state as follows:

1. I work as a Pro Bono Attorney in the Defence Office of the Special Court for Sierra Leone. My duties include: “providing initial legal advice and representation to suspects and accused persons held pursuant to the authority of the Special Court for Sierra Leone”.

2. I have been informed by John Jones, former Acting Chief of the Defence Office, and believe that on 27 June 2003 he visited the accused, Moinina Fofana at the Bonthe Detention Facility and consulted with him about the appointment of counsel. Mr. Fofana was shown the *curriculum vitae* of several counsel deemed qualified to represent him by the former Acting Chief and expressed an interest in being represented by Mr. Michiel Pestman. However, he asked for time to consider the matter before making a final decision.

3. I had intended to visit with Mr. Fofana on 4 July 2003 at the Bonthe Facility. Due to the cancellation of the UNAMSIL helicopter flight that day I was unable to visit him. Nonetheless, I was able to speak with him by phone that same day through a relative who translated for me. Mr. Fofana’s relative spoke to him in Mende as I posed questions. His relative then relayed Mr. Fofana’s responses to my questions. During that conversation he indicated he wished Mr. Pestman to be assigned to him.

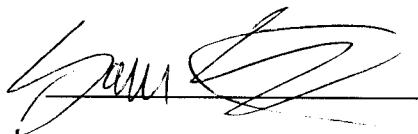
4. On 8 July 2003, after consulting with the new Acting Chief of the Defence Office, Sylvain Roy, I drafted a decision from the Registrar provisionally assigning Mr. Pestman

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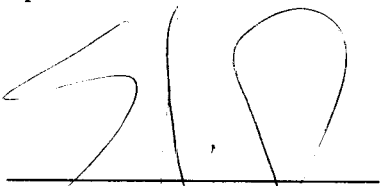
as counsel to Mr. Fofana. Mr. Roy assumed his duties on 7 July 2003 but was unavailable on that day owing to training. The decision was filed 8 July 2003.

I, SAM SCRATCH, affirm that the information contained herein is true to the best of my knowledge, information and belief. I understand that wilfully and knowingly making false statements in this declaration could result in prosecution before the Special Court for giving false testimony. I have not wilfully and knowingly made any false statements in this declaration.

Dated this 9th day of July 2003



Sam Scratch
Defence Office
Special Court for Sierra Leone



Witness

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SCSL-2003-11-PT-023

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SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

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Case No. SCSL-2003-11

The Prosecutor v. Moinina Fofana

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT RECORDS	
NAME	<i>R. Pestman</i>
SIGN	<i>[Signature]</i>
TIME	<i>5:05 pm</i>

DECISION

THE REGISTRAR,

CONSIDERING the Statute of the Special Court for Sierra Leone and in particular Article 17 thereof;

CONSIDERING the Rules of Procedure and Evidence as adopted by the Plenary meeting of the Special Court for Sierra Leone on 7 March 2003 and in particular Rules 44 and 45 thereof;

CONSIDERING the request of Mr. Moinina Fofana for the appointment of counsel on 30 May 2003;

CONSIDERING that the Registrar may, in the interests of justice, assign a counsel to represent the accused on a provisional basis;

CONSIDERING that Mr. Michiel Pestman meets the requirements for the provisional assignment of counsel to an indigent accused;

CONSIDERING that the accused does not have sufficient means at the present time to retain counsel on his own;

CONSIDERING that Mr. Pestman has agreed to represent the accused provisionally for a period of two (2) months or until such time as he enters into a legal services contract with the Defence Office of the Special Court for Sierra Leone for the provision of services to the accused, whichever event occurs first; and

CONSIDERING that Mr. Pestman has agreed to represent the accused provisionally and for the period set out above for the sum of US\$5,000.00, travel costs to Freetown during the period of provisional assignment and US\$115.00 Daily Living Allowance for all days spent in Freetown.

DIRECTS the assignment of Mr. Michiel Pestman as provisional Lead Counsel to the accused effective 30 June 2003 for a period of two (2) months or until such time as Mr. MacGuill enters into a legal services contract with the Defence Office of the Special Court for Sierra Leone for the provision of services to the accused, whichever event occurs first.

Dated at Freetown this 8th day of July, 2003.



Robin Vincent
Registrar

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SCSL-2003-10-PT-010
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THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson
Designated Judge

Registrar: Robin Vincent

Date filed: 18 June 2003

THE PROSECUTOR

v.

**BRIMA BAZZY KAMARA also known as
IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA**

Case No. SCSL-2003-10-PT

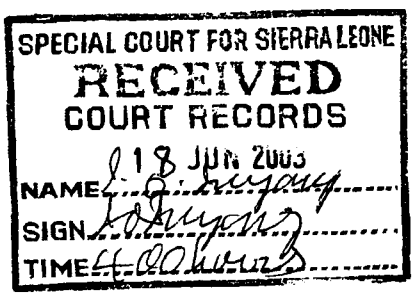
**REQUEST BY THE DEFENCE OFFICE FOR SUSPENSION OF
CONSIDERATION OF PROSECUTION'S MOTION FOR PROTECTIVE
MEASURES UNTIL COUNSEL IS ASSIGNED**

Office of the Prosecutor

Luc Côté, Chief of Prosecutions
Brenda J. Hollis, Senior Trial Counsel

Defence Office

John R.W.D. Jones, Acting Chief of Defence Office and Legal Advisor
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern



I. INTRODUCTION

1. On 11 June 2003, the Office of the Prosecutor (the “OTP”) filed a *Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure* (the “**Prosecution Motion**”). The Prosecution requested a Designated Judge or Chamber to issue (11) protective measures.
2. The Defence Office is in the process of assigning Counsel to Mr. Ibrahim Kamara (the “**Accused**”), pursuant to the “Request for Legal Assistance” signed by Mr. Kamara on 30 May 2003. Given that at this stage, no Counsel is assigned, even provisionally, to represent the Accused, the Defence Office acting pursuant to its mandate set out in Rule 45 of the Rules of Procedure and Evidence (the “**Rules**”) of the Special Court for Sierra Leone (the “**Special Court**”) hereby files this request, made pursuant to Rule 54 of the Rules, for an order suspending consideration of the *Prosecution Motion* until Counsel has been assigned and has had the opportunity to file a substantive Response to the *Prosecution Motion*.

II. PROCEDURAL BACKGROUND

3. On 30 May 2003, the Accused declared himself indigent and completed a “Request for Legal Assistance” and a “Declaration of Means”. On the same date, he expressed a preference for the assignment of Mr. Cecil Osho-Williams and Mr. Ajibola Manley-Spaine as his Counsel, by completing a “Power of Attorney”. At the same time, the Accused made it clear that he did not have the means to appoint his own Counsel. It was therefore for the Defence Office to assign a Counsel to the Accused, albeit taking into account the preferences expressed by the Accused.
4. It is important, in this regard, to bear in mind that an accused who has the means to engage his own counsel can engage the Counsel of his choice. If he does not have such means, then he has the right to have Counsel assigned to him, but not necessarily Counsel of his own choice. This is clear from Article 17(4)(d) of the Statute and Rules 44 and 45 of the Rules.

5. The jurisprudence of the International Criminal Tribunal for Rwanda (“ICTR”), moreover, confirms this position. In a Decision in *Gerard Ntakirutimana* on 11 June 1997, the ICTR Trial Chamber declared that Article 20(4) of the ICTR Statute cannot be interpreted as giving the indigent accused the absolute right to be assigned the legal representation of his or her choice. The Chamber added:

“nonetheless . . . mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused”.

6. In accordance with this law and practice, the Defence Office is in the process of considering whether to assign Mr. Osho-Williams to the Accused, either singly or in combination with another Counsel, since the Accused has also requested the Defence Office to assign to him a Counsel with international criminal law expertise. The members of the Defence Office made it clear at the Accused’s Initial Appearance on 4 June 2003, that Mr. Osho-Williams had not yet been assigned to the Accused (Mr. Osho-Williams kindly agreed to appear at the Initial Appearance in a *pro bono* capacity) and that his application was being considered. The Defence Office must take into account the requirements for assigning Counsel set out in Rule 45(C) of the Rules, and only assign Counsel whom the Defence Office considers has the requisite qualifications. Moreover, the Defence Office is faced with the difficulty that Mr. Osho-Williams is currently subject to the United Nations Travel Ban (see Press Release SC/7782/Rev. 1), which while it does not pose insuperable difficulties to the assignment of Mr. Osho-Williams, is nonetheless a matter that requires due deliberation and, if possible, resolution.
7. Notwithstanding these difficulties, the Defence Office expects to be in a position to assign Counsel to the Accused in the next two (2) days.

III. A SUBSTANTIVE RESPONSE BY THE DEFENCE OFFICE MAY PREJUDICE THE POSITION OF ASSIGNED COUNSEL

- 8. In the cases of two other accused persons before the Special Court – Issa Sesay and Morris Kallon – the Prosecution, on 7 April 2003, filed motions for Protective Measures, to which the Defence Office filed substantive responses on 23 April 2003. The Defence stated in each case that the Response was “*without prejudice to the position that might be taken by their assigned counsel once such counsel is assigned*” (paragraph 3 of the Defence Responses).
- 9. The Defence notes that both the assigned Counsel for Sesay and the assigned Counsel for Kallon are now seeking reconsideration of the Order of Judge Thompson made on 23 May 2003, partly on the grounds that Counsel were not assigned when the Defence Office filed its substantive response and that assigned Counsel take a different view of certain matters from that taken by the Defence Office.¹ Those applications are currently under consideration.
- 10. The Defence Office anticipates that, acting entirely reasonably and in accordance with their rights and duty to defend their client, Counsel to be assigned to the Accused will also wish to file their own substantive response to the *Prosecution Motion*. It would, therefore, not be in the interests of justice for the Defence Office to submit a substantive reply now to the *Prosecution Motion*, only for assigned Counsel at a later stage to have to file applications for the matter to be reconsidered and/or appealed. Moreover, if the Defence Office were to submit a reply, it might in fact prejudice the position of assigned Counsel. It is submitted, therefore, that it is in the interests of all parties for the matter to be suspended until Counsel have been assigned to the Accused, at which point the assigned Counsel should have adequate opportunity to respond to the *Prosecution Motion* on the merits.

¹ *The Prosecutor v. Issa Hassan Sesay* (Case No. SCSL 2003-05-PT), *Application for Reconsideration of and/or leave to appeal regarding the Order of Judge Bankole Thompson (Protective Measures for Witnesses and Victims)* rendered on the 23rd May 2003, 30 May 2003; *The Prosecutor v. Morris Kallon* (Case No. SCSL 2003-07-PT), *Application for Reconsideration of and/or leave to appeal 'Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure*, 29 May 2003

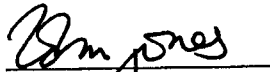
11. Suspending the matter until Counsel is assigned will not unduly delay the proceedings since, in any event, the Prosecution is not obliged, under Rule 66(A)(i) of the Rules, to disclose supporting material to the defence of the Accused until 4 July 2003 (i.e. 30 days after the Accused's Initial Appearance). As stated above, Counsel will be assigned to the Accused within two (2) days, which affords ample time for the Defence to respond to the Prosecution and for the Prosecution to reply before 4 July 2003.

IV. **CONCLUSION**

12. For the above reasons, the Defence Office an order suspending consideration of the *Prosecution Motion* until Counsel has been assigned and has had sufficient time and opportunity to file a substantive Response to the *Prosecution Motion*.

Dated this 18th day of June 2003.

DEFENCE OFFICE



John R. W.D. Jones, Acting Chief of Defence Office and Legal Advisor
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern