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SCSL-2004-15-PT
(6217-6227)

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IN THE SPECIAL COURT FOR SIERRA LEONE
DEFENCE OFFICE
FREETOWN-SIERRA LEONE
THE TRIAL CHAMBER

BEFORE:

REGISTRAR: Mr. Robin Vincent

DATE: 14th May 2004

PROSECUTOR against

MORRIS KALLON
(Case NO. SCSL 2004-15-PT)

KALLON - DEFENCE RESPONSE TO RENEWED PROSECUTION MOTION
FOR PROTECTIVE MEASURES PURSUANT TO ORDER TO THE
PROSECUTION FOR RENEWED MOTION FOR PROTECTIVE MEASURES
DATED 2 APRIL 2004

OFFICE OF THE PROSECUTOR:

Luc Cote, Chief of Prosecutions

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DEFENCE:

Shekou Touray

Raymond M. Brown

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Wilfred Bola Carrol

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
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14 MAY 2004
NAME: *Shekou Touray*
SIGN: *[Signature]*
TIME: *15:28*

INTRODUCTION

1. The Defence for Kallon files this “Response” in answer to the Prosecution “Renewed Motion for Protective Measures” (“the Renewed Motion”) on 4 May 2004 pursuant to the Order of 2 April 2004 to the Prosecution for Renewed Motion for Protective Measures (“the Order”).
2. In compliance with the Order, the Prosecution has divided the 266 Witnesses on the Prosecution Witness List filed on 26th April 2004, into two groups: Group I made up of Witnesses of Fact; further divided into three categories, namely: (A). Victims of Sexual Assault and Gender Crimes; (B). Child Witnesses and (C). Insider Witnesses. Group II is made up of Expert Witnesses/those who have waived their rights to protection.
3. In paragraph five of the Renewed Motion, the Prosecution states that the Witness List, is not final and that the actual number of Witnesses called could be less, and therefore the actual number of Witnesses who will be subjected to the Protective Measures sought, if granted, will be less than 266.
4. The Renewed Motion, has under Annex A, the pseudonyms of Group I Witnesses divided into the three categories mentioned and in Annex B, the list of Group II Witnesses, both summing up to 94 Witnesses. The Defence finds the difference between the statements of the Prosecution that 266 Witnesses will testify and the sum total of 94 Witnesses in both Annex A and B attached to the Motion confusing. Accordingly, the Defence does not actually know which number of Witnesses the Protective Measures is intended to cover.
5. In respect of the two Expert Witnesses, the Prosecution concedes that as a rule Expert Witnesses should testify in Open Court, without the use of pseudonym nor screens; it undertook to release to Defence Counsel the names of the Witnesses in this group soon after confirmation from them that this step will not be an impediment to their ability to testify nor pose security risks.

Prosecution v. Sesay, Kallon and Gbao SCSL, 2004-15-PT

6. On the 11th May 2004, the Court issued an Order for commencement of Trial fixing Monday 5 July 2004 for the commencement of Trial of the Accused Persons. The Defence finds it objectionable that although trial is imminent, not a single name of any Expert Witness has been released in order to facilitate the selection of Defence Expert Witness and avoid a clash in selection.

PROSECUTION CONSIDERATIONS - LEGAL AND FACTUAL

7. The Prosecution relies on Article 16 & 17 of the Statutes of the Special Court, (the Statute) and Rules 69, 75, 79 of the Rules of Procedure and Evidence of the Special Court (the Rules) in support of the Motion, stating that these provisions establish considerations, which are relevant to the Court in making decisions about safeguard on the privacy and security of Victims and Witnesses.
8. It concedes that the decisions made to safeguard the privacy and security of Victims and Witnesses should be consistent to the rights of the Accused and that International Jurisprudence make it clear that a balance must be struck between security for the protection of witnesses and fairness to the Defence. Further that Judges of the International Tribunal have a sovereign power to evaluate the measures deemed most appropriate to ensure the protection of victims and witnesses. (Citing, *Tadic* and *Blaskic*).
9. It states that the protective measure sought for the respective categories of Witnesses include (a). non-disclosure of the identity of witnesses of fact to the public, (b). delayed disclosure of the identity of witnesses to the Defence, until 42 days before testifying in Court, (c). the use of voice alteration devices during the testimony of some witnesses and (d). the use of close- circuit television through which some witnesses will give their testimony.
10. It submits, that the protective measures would not derogate from the public interest or the right of the Accused to a fair and public hearing and that measures of confidentiality on the identity of witnesses in relation to the public and the media are

quite consistent with the doctrinal reasons for and practical application for a fair and public hearing, in that knowing the identity of every witness is not relevant to the public and media in so far as hearing, understanding or reporting the evidence giving by those witnesses or observing that the trial process is fair.

11. That the delayed disclosure of the identity of Prosecution Witnesses will not be prejudicial to the Defence as 42 days before testimony is sufficient time to allow the Defence to conduct any enquiries on the remaining issues such as credibility of the identified witness, and that sufficient notice of the anticipated testimony of witnesses has been given to the Defence by way of disclosure of witness statements, which should facilitate preparation of their case.
12. The Prosecution relies on some attached Declarations mainly of officials attached or affiliated to the Office of the Prosecutor, with the exception of the Inspector-General of the Sierra Leone Police (Annex C) as evidence establishing that stability in Sierra Leone post-conflict society is still fragile and that on an objective basis the fear of reprisals expressed by witnesses and victims for themselves and their families continue to be real and present.
13. It maintains that conditions in Sierra Leone posed difficulties for witnesses and victims, which make it necessary for continued witness protection measures to safeguard the security and privacy of witnesses and victims and the integrity of the evidence in the Proceedings. Further, that this fragile situation may well be made more precarious during the course of the trial proceedings having regard to the planned withdrawal of UNAMSIL in December 2004.
14. In paragraph 20 of the Renewed Motion, the Prosecution request, (i). That the current Orders authorizing non-disclosure of the identity of Prosecution Witnesses to the public and delayed disclosure to the Defence of the identity of witnesses, until 42 days before they testify in Court to remain in force. (ii). That Witnesses of Fact testify in Court, using pseudonyms and from behind a screen that will shield them from public view. (iii). That photography, filming and other recording of the

Prosecution v. Sesay, Kallon and Gbao SCSL, 2004-15-PT

identity of witnesses be prohibited. Assurance is made that these are minimal measures which will not pose any impediment to the Defence preparation for trial and are justified having regard to the twin concerns of the general security situation in Sierra Leone and the objectively established fear of reprisals of witnesses and victims, and that the measures are consistent with standard practice at ICTR where these measures apply and Open hearing without protective measure the exception.

DEFENCE ARGUMENTS**LEGAL CONSIDERATIONS*****Delayed disclosure of the identity of witnesses to the Defence***

15. The Prosecution in paragraph 20 of the Renewed Motion requests that the current Orders delaying disclosure to the Defence of the identity of witnesses until 42 days before they testify in Court to remain in force. The Defence submits, that the request has not been embodied as an Order sought by the Prosecution in paragraph 35 of the Renewed Motion and therefore the Court cannot properly take due cognizance of it.
16. The Defence further submits that as trial is almost imminent and the pre-trial phase concluding, the rights of the Accused to an equitable trial must take precedence and require the veil of an anonymity to be lifted in his favour¹.
17. The Defence submits that immediate disclosure of the identity of witnesses on the eve of the trial at this pointing time, will much facilitate the Defence in preparing its case and making the necessary inquiries so as to be able to test witness reliability and credibility or to demonstrate credibility, hostility, or designed untruthfulness or that a witness is simply erroneous. The public interest therefore demands that the Defence be given sufficient and adequate time and facility to be able to elicit either directly or indirectly facts and matters, which go to the credit of witnesses and other related issues.

¹ Prosecutor v. Blaskic IT-95-14 : Decision on the application of the Prosecution, dated 17th October 1996, requested of Protective Measure for Victims and Witnesses, 5th November 1996.

Prosecution v. Sesay, Kallon and Gbao SCSL, 2004-15-PT

18. Accordingly the Defence invites the Court to rule on the point as to whether the Prosecution having failed to include in the Orders sought from the Court in the Renewed Motion, the continuation of the Current Order, that Order could not now be regarded as a spent force and of no relevance at this stage of the proceedings.

Applicable principles to measures/orders sought***Proportionality -Test***

19. The Defence for Kallon submits that in striking a proper balance between security and protection for victims and witnesses on the one hand, and fairness to the Defence on the other hand, the Court in evaluating the proposed measures/orders should apply the proportionality- test to ensure that the proposed measure is not disproportionate to achieve the end in view; that it is suitable to attain the desired end; it is necessary in the sense that there is no other option less restrictive of the Accused rights which will yield the same result, and that any invasion of the rights of the Accused should be kept to the minimum; for procedural measures should never be capricious or excessive.² How that balance is struck will depend on the facts of each case and on a case by case assessment³.

20. It is the position of the Defence that some of the measures sought by the Prosecution do not pass the test of proportionality and submits that if granted by the Court would derogate from the public interest in the conduct by the Court of their proceedings in public and would undermine the rights of the Accused to a fair and public hearing.

FACTUAL CONSIDERATIONS**Assessment of Declarations**

21. The Defence asserts that as a result of the inequality of arms between the Prosecution and the Defence, it has not been able to file an affidavit on the facts, within the short span of 10 days in opposition to the sworn Declarations in Annex C to G. However, on the general security situation in the country the Defence

² Hadzihasanovic et al: Decision granting provisional release December 19th 2001.

³ Prosecution and Tadic: Case IT-94-1-T, Decision on the Prosecution Motion requesting Protective Measures for Witnesses R, 31st July 1996-second Tadic Protective Measure Decision.

Prosecution v. Sesay, Kallon and Gbao SCSL, 2004-15-PT

invites the Court to take Judicial Notice pursuant to Rule 94 (A) of the Rules as a fact of common knowledge that the security of the country and neighboring countries is much improved than it was in May 2003 when it gave its decision on the Prosecution Motion for immediate Protective Measures for Witnesses and Victims and for non-public disclosure at the early stage of the pre-trial phase. Paragraph 3 of the Declaration of the Inspector -General of Police in **Annex C** concedes an overall improvement in the security situation in the country and that the threats alleged to undermine the Special Court and Prosecutions of Accused persons is attributed not to the RUF, but to another group.

22. In *Brdanin*, paragraph 11 it was held that the prevailing circumstances within the former Yugoslavia cannot by themselves amount to exceptional circumstances under an identical Rule 69 of the Rules. It further held that to be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing circumstances in the former Yugoslavia.
23. The fact that it is acknowledged in the Declaration of the Inspector- General that the security situation has improved and the situation not therefore worse than it was before the establishment of the Special Court in Sierra Leone, the present security situation however threatening does not amount to an exceptional circumstance to invoke the application of Rule 69 (A) which places the onus upon the Prosecution to demonstrate exceptional circumstances justifying the grant of the orders/measures sought. Defence submits that the Prosecution has failed to show exceptional circumstances in so far as heavy reliance is put on the security situation in the country, as necessitating the requests for the orders/measures.
24. On the issues of interference and intimidation of Prosecution Witnesses, and to the general fear and apprehension of reprisals as deposed to by the Chief of Investigation, Special Court **Annex D**, the statement is limited to a general fear, and the only specific instant of active attempt to identify and intimidate witnesses of the Court, again is not attributed to the RUF, but to another fraction. The Declaration

of Lahun an Investigator in the Office of the Prosecutor **Annex E**, does not also further the alleged threat of fear of reprisals beyond the general. The Declaration of the Chief of Witnesses and Victims Unit **Annex F**, takes the form more of an Expert Opinion and Reports than a sworn declaration of facts and deserves very little weight.

25. The Defence submits that it is not enough to justify the protective orders/measures by a mere blanket general fear of reprisals without assisting the Court with instances of specific threats, intimidation, fear of reprisals known to the Declarant. The reliance put by the Prosecution on the Declarations is accordingly specious and ought not to be given any weight at all.

CATEGORIES OF WITNESSES

Category A. – Witnesses – Sexual Assaults witnesses and victims.

26. Some of the Witnesses in this group also fall under category C. – “Insiders Witnesses”. The Defence does accept that the confidentiality and privacy of sexual assault witnesses and victims properly so called, excluding insider witnesses within that group, need to be protected vis-à-vis the public and media. Notwithstanding the expert reports in **Annex G**, it is submitted however, that the proposed measure to allow this group of witnesses to testify with the aid of voice distortion equipment will not satisfy the balancing test or the proportionality test for reasons that there are other options provided in the rule which are less restrictive of the right of the Accused to a fair an public hearing.
27. The Defence submits that the situation is one in which the name and address of the witness or victim may not have been of concern to the accused, or that the victim or witness was not known to the Accused by the disclosed name but by another name, or alias. Therefore the voice and image, and other identifying data of the victim or witness may be the only relevant means of identification to the Accused withholding these essentials from the Defence, will have the tendency of

Prosecution v. Sesay, Kallon and Gbao SCSL, 2004-15-PT

undermining the rights of the Accused. The proposed measure of voice distortion is excessive in the circumstances even if not capricious.

28. The Defence accordingly objects to the proposal, but it prepared to accept that the situation is one that warrants the application of Rule 79 (A) (ii) i.e. the use of closed sessions, which it is submitted will strike the proper balance.

CATEGORY B: CHILDREN

29. According to the Prosecution, these Witnesses are both Victims and Insider Witnesses and will provide evidence on the individual criminal responsibility of the Accused persons. Their evidence will be of crucial importance to the Defence.

30. If therefore, the Victims and Witnesses Protection Unit provided for in Article 16 (4) of the Statute has been playing its role effectively, particularly of trauma healing and counseling, which the Defence has no cause to doubt, then it is submitted, less fear should be entertained in having these Witnesses to face the Accused persons.

31. Again, in applying the proportionality test/balancing of rights, the Defence submits that the holding of close-sessions under Rule 79 (A) (ii) will be the least restrictive of the rights of the Accused and at the same time, achieve the desired result of protecting minors. The Defence objects to the suggested measures by the Prosecution on grounds that they are unsuitable, unnecessary and savours of over protection to the detriment of the Accused.

CATEGORY C WITNESSES- INSIDERS

32. These are Witnesses who it is presumed have offered on their own free will to give evidence “on the structure of the RUF, and AFRC and directly implicate the Accused in the crimes alleged often in unique or particular notable atrocities” they are often themselves implicated in the commission of atrocities according to the Prosecution.

33. The Defence agrees with the Prosecution that face to face confrontation between insiders witnesses and the Accused will be particularly important to the Defence and the Chamber in assessing credibility of the evidence given and also watch their demeanor.
34. It is submitted, that non-disclosure of the identity of a Witness with an extensive criminal background or of an accomplice ought not to be allowed and that or unless the Chambers is satisfied that there is no prima facie evidence that the witness is untrustworthy and no ground for supposing that the witness is not impartial or have an axe to grind “granting an anonymity in the circumstances will prejudice the case of the Defence beyond unreasonable degree”. The Prosecution ought therefore to have provided a report on the reliability of such witnesses and disclosing the report to the Defence and the Court, so far as is consistent with the anonymity sought, to enable the Court to apply the balancing of interest.⁴ The Prosecution has neither proffered any report on the reliability of the insider witnesses nor have they disclosed under Rule 68 (B) of the Rules, any matter affecting the credibility of the Prosecution evidence. The Defence accordingly objects to the proposed measures for the protection of these witnesses and submit that like Expert witnesses in group II, Insider witnesses should be made to testify in open court, without the use of pseudonyms nor screens or voice distortion equipments. The public interest in the conduct by the Court of their proceedings in public and the right of the Accused to a fair and public hearing together demand no less.

CONCLUSION

1. The Defence is not opposed to Orders 35 (a)-(c) in respect of witnesses in category A and B, but certainly not in respect of Insider Witnesses.

⁴ Rv. Taylor 17 Cr. App. Crim. Div. 22 July 1994 discussed in para 60 – 66 in Tadic A/K/A “Dule” IT-94-1, separate opinion of Judge Stephen on the Prosecutors Motion requesting Protective Measures of Victims and Witnesses 10th August 1995.

Prosecution v. Sesay, Kallon and Gbao SCSL, 2004-15-PT

2. 35 (d) and (j) – The Orders if granted, will unduly hamper the Defence in the preparation of its case for reasons that disclosure to the public may be necessary in order to investigate the witness; likewise, it may be found necessary to discuss or share, such materials either directly or indirectly with persons other than the Defence. Granting the Order will therefore infringe the rights to a fair trial and ought to be rejected unless qualified appropriately.
3. Order 35 (e), (g), (h) and (i) are entirely unacceptable to the Defence, for the reasons advanced in the Defence arguments.
4. Order 35 (a), the Defence should not be required to maintain any such log and most definitely should not be required to disclose the details of persons working with the Defence to either the Court or the Prosecution. In *Brdjanin* and *Tadic* it was held to be oppressive and rejected⁵.
5. Order 35 (n), this order sought is devoid of merits, the documents may be necessary for the purposes of appeal or proceedings in between judgment and the appeal. The return of such documents therefore, makes no sense; it is unduly restrictive and an infringement on the rights of an Accused to a fair trial, it also would unnecessarily expose Defence Counsel to the risk of contempt proceedings.

The Defence urges the Court to dismiss the Prosecution Motion except as to the Orders not objected to by the Defence.



Shekou Touray

Raymond Brown

Melron Nicol-Wilson

Dated 14th May 2004

⁵ Prosecutor v. Bradnin & Tadic, IT-99-36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.