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(24190 - 24203)

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Justice Pierre Boutet, Presiding

Justice Bankole Thompson

Justice Benjamin Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 25th July 2006

The Prosecutor

-v-

Issa Hassan Sesay

Morris Kallon

Augustine Gbao

Case No: SCSL - 2004 - 15 - T

PUBLIC

**SESAY DEFENCE MOTION FOR IMMEDIATE PROTECTIVE MEASURES
FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE**

Office of the Prosecutor

James C. Johnson

Peter Harrison

Defence

Wayne Jordash

Sareta Ashraph

Defence Counsel for Kallon

Shekou Touray

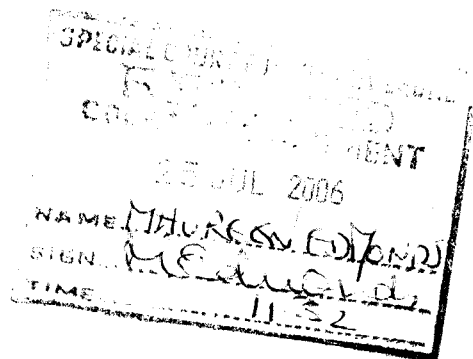
Charles Taku

Melron Nichol-Wilson

Defence Counsel for Gbao

Andreas O'Shea

John Cammegh



INTRODUCTION

1. The need and importance of protective measures for witnesses and victims is set out in Articles 16(4) and 17 of the Statute. Consistent with these Articles and pursuant to Rules 53(A), 54, 69, 73 and 75 the Defence, on behalf of Issa Sesay (the “Sesay Defence”), applies for protective measures for its witnesses and victims and for non-public disclosure.

2. For the purposes of this Motion:
 - a) “Sesay Defence” means and includes the Accused Sesay, the Defence Counsel and the immediate legal assistants and staff, and others specifically assigned by the Special Court for Sierra Leone¹ to the Accused Sesay’s trial defence team in conformity with Rule 44;
 - b) “Kallon Defence” means and includes the Accused Kallon, the Defence Counsel and the immediate legal assistants and staff, and others specifically assigned by the Special Court to the Accused Kallon’s trial defence team in conformity with Rule 44;
 - c) “Gbao Defence” means and includes the Accused Gbao, the Defence Counsel and the immediate legal assistants and staff, and others specifically assigned by the Special Court to the Accused Gbao’s trial defence team in conformity with Rule 44;
 - d) “the Prosecution” means and includes the Prosecutor of the Special Court and his staff;
 - e) “witnesses” means and includes potential witnesses and defence witnesses of the Sesay defence;
 - f) “protected witnesses” means and includes the witnesses in the categories as set forth in paragraph 20 below;
 - g) “victims” means and includes a person against whom a crime over which the Special Court has jurisdiction has allegedly or has been found to have been committed;

¹ From herein the “Special Court”

- h) “the public” means and includes all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the Special Court and staff of the Prosecution, Witness and Victims Unit and Sesay, Kallon and Gbao Defence as identified above. The term specifically includes, without limitation, Prosecution witnesses, both called and uncalled, their family, friends and associates;
 - i) “Prosecution witnesses” means and includes all persons called and uncalled to testify on behalf of the prosecution in the RUF, CDF, AFRC and Charles Taylor trials ongoing at the Special Court for Sierra Leone;
 - j) “the media” means and includes all video, audio and print media including journalists, authors, television and radio personnel, their agents and representatives and
 - k) “non-public disclosure” means and includes all witness statements, interview notes and summaries relevant to the case disclosed to the Prosecution as part of any future Defence disclosure.
3. The Defence requests the Designated Judge or Trial Chamber order immediate measures to protect the identity of witnesses and to protect confidentiality of all non-public materials disclosed to the Prosecution. The Defence submits that such measures are necessary to safeguard the security and privacy of witnesses and victims and the integrity of the evidence and these proceedings.

SUBMISSIONS

4. Rule 69(A) of the Rules states “a party may apply to a Judge or Trial Chamber to order the non-disclosure of identity of a victim or witness who may be in danger or at risk, until the Judge or Trial Chamber decides otherwise.”
5. The Trial Chamber’s power to order protective measures derives principally from Rule 75(A) of the Rules which reads:
- A Judge or Trial Chamber may, of its own motion, or at the request of either party, or of the Witnesses and Victims Sections, order appropriate measures

to safeguard the privacy and security of victims and witnesses provided that the measures are consistent with the rights of the accused.

6. Rule 75(B) of the Rules sets out the wide range of measures that can be put in place in order to protect the identity of victims and witnesses. Pursuant to this Rule, the Designated Judge or Chamber may hold an in camera proceeding to determine whether to order:
 - I. Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or witness, or of persons related to or associated with him by such means as:
 - a. Expunging names and identifying information from the Special Court's public records;
 - b. Non-disclosure to the public of any records identifying the victim or witness;
 - c. Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and
 - d. Assignment of a pseudonym;
 - II. Closed sessions, in accordance with Rule 79;
 - III. Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

7. Rule 53(A) of the Rules affords that a Designated Judge may "in the interests of justice, order the non-disclosure to the public of any documents or information until further order."

Factual Bases for the Request

8. The integrity of the Special Court and trial process depends on its ability to safeguard the witnesses who appear before it. The Trial Chamber has accepted the importance of the witness protection mechanism.² Emphasis has been placed on the fact that the trial takes place within Sierra Leone and that it operates within a

² Prosecutor v. Sesay, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" 23rd May 2003, SCSL-2003-05-PT-038 at para. 9

relatively small community: witnesses live alongside those who may not welcome their participation in the process of the Special Court.

9. The Sesay Defence submits that the dangers to witnesses who testify on behalf of the RUF accused and Mr. Sesay are especially high. Prosecution witnesses have spoken of the difficulties of reintegrating into a community having been attached, willingly or unwillingly, with the RUF. This is a concern for Sesay Defence witnesses, both ex-combatants and civilians. There is a fear of possible social and economic consequences from giving evidence on behalf of any of the RUF accused.
10. In respect of all witnesses, the dangers of testifying in support of Mr. Sesay are particularly acute. Mr. Sesay led the RUF to disarm against the wishes of many RUF commanders and hundreds of the 'rank and file' members. Many RUF ex-combatants went from being respected or feared as combatants to being amongst the most destitute unemployed of Sierra Leone: a change in status and quality of life for which they hold Mr. Sesay personally responsible. As a result, RUF insiders and civilians who wish to testify on behalf of Mr. Sesay face the prospect of reprisals from ex-combatants who wish to sabotage the judicial process and the defence in particular.
11. The national and international media allege substantial acts of misconduct, against the RUF as a group, of a type which invoke a significant level of condemnation. The inevitable consequence of this is the stigmatisation of both RUF members and those associated with them. It is submitted that witnesses will necessarily suffer stigma and a fear of reprisals should it be known that they intend to testify on behalf of the accused.
12. Civilian witnesses living in areas where there is significant anti-RUF sentiment have expressed grave concern for their safety should their intention to testify for Mr. Sesay become known to the chiefs and persons in their localities. These witnesses fear public condemnation, social exclusion, arrest, assault and even death.

13. Furthermore, and in support of the above, the Sesay Defence received information from a prospective defence witness in late 2005 reporting attempts to dissuade the witness from testifying on behalf of Issa Sesay or to co-operate with the Special Court. The witness reported harassment by both ex-combatants who stand in opposition to Mr. Sesay and agents of the Government of Sierra Leone. Earlier this year, a potential witness was threatened with dismissal if seen to speak further with the Sesay Defence team. The inevitable consequence is that such pressures impact upon a witness's willingness to testify and still further if they risk their identity being revealed to the public and media. In the latter example, the potential witness refused to speak further despite an earlier willingness to testify.
14. Attached to this motion is a statement by Chantal Refahi, Senior Legal Assistant in charge of Investigations for the Sesay Defence team, which calls attention to the reports of genuine fear and harassment, experienced by witnesses interviewed by the Sesay Defence representatives.

Legal Bases

15. Protective measures sought are consistent with Rules 66, 67 and 69. In accordance with Rule 69(C) and Rule 75 of the Rules, it is submitted that the protective measures set out below are required to safeguard the identity and security of all witnesses residing both in-country and abroad.³
16. The principle of the equal protection of Prosecution and Defence witnesses is enshrined in Rule 75 and Article 17(4)(e) which states that the accused is entitled to the minimum guarantee, in full equality, "to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her". It is submitted that this guarantee can only be ensured if witnesses are afforded protective measures with immediate effect.

³ Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-286, "Order on Protective Measures for Additional Witnesses", 24th November 2004, p.9626

17. In accordance with the Decision of Trial Chamber II dated 9th May 2006⁴, disclosure of identifying information to the Prosecution must be 21 days prior to testimony of witness at trial. There may also be a need (as with the Prosecution in this case) to file individual requests for specific protective measures for specific witnesses if necessary.
18. It is submitted that protective measures may be ordered “on the basis of a current security situation”⁵. The Sesay Defence invite the Chamber to consider the recent ruling by Trial Chamber II with regards to the entire security situation in Sierra Leone where the Chamber deemed that there was risk to witnesses for the defence in light of national security concerns even where the existence of threats or fears as regards specific witnesses has not been demonstrated.⁶
19. Furthermore, should the Chamber accept that national security concerns will necessitate protective measures for witnesses at the Special Court; the Chamber is further invited to order these measures with immediate effect.

Witness Categorisation

20. The Defence seeks protection for four categories of witnesses namely:
 - a. Witnesses who reside in-country and who have not affirmatively waived their right to protective measures;
 - b. Witnesses who presently reside outside Sierra Leone either in other countries in West Africa or who have relatives in Sierra Leone who have not affirmatively waived their rights to protective measures; and
 - c. Witnesses residing outside West Africa who have not affirmatively waived their rights to protective measures.

Non-Public Material

⁴ Prosecutor v. Brima, Kamara & Kanu, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses” (the “AFRC Decision”), 9th May 2006, SCSL-04-16-488.

⁵ Prosecutor v. Muvunyi et al, “Decision on the Prosecutor’s Motion or Orders for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment”, 25 April 2001, ICTR-2000-55-1, paras 21,22.

⁶ The AFRC Decision, SCSL-04-16-488, pg 18135

21. Pursuant to Rules 66, 67 and 68 the Defence requests that the Prosecution be prohibited from disclosing to the public or media any non-public materials that are provided as part of the Defence case either at trial or on appeal. This request is made in light of the on-going security concerns of witnesses should their identities and/or locations or of those associated with them be made public as set out above.

Orders sought

22. In light of the serious and immediate problems and fears of its witnesses, the Sesay Defence has significant concerns that the safety of their witnesses, their willingness to continue cooperating, their willingness to testify and the integrity of these proceedings will be substantially jeopardised if witnesses' identities and statements are prematurely disclosed under circumstances in which they cannot be protected. In addition, it is the position of the Sesay Defence that public disclosure of non-public material of any sort is likely to undermine the Sesay Defence's investigative efforts and the integrity of proceedings before the Special Court.
23. The Sesay Defence requests that Trial Chamber issue the following Orders:
- a. An Order that all witnesses be screened from the public when testifying;
 - b. An Order that there shall be no photographing, audio or video recording, or sketching of witnesses without leave of this Trial Chamber;
 - c. An Order that the Witness and Victim Unit shall afford witnesses for the Defence the same level of protection and assistance under the same conditions as witnesses who testified on behalf of the Prosecution and in other trials at the Special Court;
 - d. An Order allowing the Sesay Defence to withhold identifying data of the persons the Sesay Defence is seeking protection for as set forth in paragraph 20 or any other information which could lead to the identity of such a person to the Prosecution until 21 days before trial⁷;

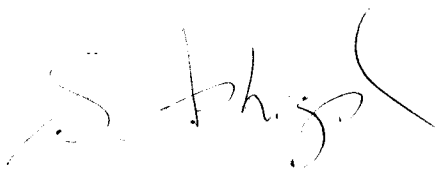
⁷ As ordered by Trial Chamber II in "The AFRC Decision". SCSL-04-16-488. See p. 18136 at para (d).

- e. An Order requiring the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Special Court;
- f. An Order permitting the Sesay Defence to designate a pseudonym for each witness, which was and will be used for pre-defence case disclosure of witness summaries and whenever referring to such witness in Special Court proceedings, communications and discussions between the parties to the trial, and the public. It is understood that the Prosecution, Kallon Defence and Gbao Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aide any person to attempt to determine the identity of any such person;
- g. An Order that the names and any other identifying information concerning all witnesses described in paragraph 20, be communicated to the Victim and Witness Unit of the Special Court and Prosecution no more than 21 days before witness testifies and only then in order to implement protection measures for these individuals;
- h. An Order that the names and any other identifying information concerning all witnesses described in paragraph 20, only be communicated to the Prosecution when it is established that the Victim and Witness Unit of the Special Court has taken all measures referred to herein as well as measures determined as necessary by the Victim and Witness Unit.
- i. An Order prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry or any other information which could reveal the identity of witnesses and victims, and this order shall remain in effect after the termination of the proceedings in this case;
- j. An Order prohibiting the Prosecution, and the Kallon and Gbao Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Sesay Defence;
- k. An Order that the Prosecution shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information

from, a witness statement, interview report or summary of expected testimony, or any non-public material, as well as the date of disclosure; and that the Prosecution shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

- l. An Order requiring the Prosecution and Kallon and Gbao Defence to return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;
 - m. An Order that the Prosecution make a written request to the Trial Chamber or Judge thereof, for permission to contact any protected witnesses or any relative of such person and that such request shall be timely served on the Sesay Defence. At the direction of the Trial Chamber or a Judge thereof, the Sesay Defence shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 19 to an interview by the Prosecution or the Kallon or Gbao Defence and shall undertake the necessary arrangements to facilitate such contact.
24. The Sesay Defence reserves its right to apply to the Trial Chamber to amend the protective measures sought or seek additional protective measures if to do so may ensure the safety and security of witnesses and those associated with them.
25. It is submitted that the aforementioned measures are necessary to enable witnesses to give full and free testimony on behalf of Mr. Sesay. The Defence requests that the Trial Chamber or Designated Judge grants this motion and issues the orders sought, as set out above in paragraph 23.

Dated 25th July 2006



Wayne Jordash

Sareta Ashraph

BOOK OF AUTHORITIES

Prosecutor v. Sesay, “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 23rd May 2003
SCSL-2003-05-PT-038

Prosecutor v. Sesay, Kallon & Gbao, “Order on Protective Measures for Additional Witnesses”, 24th November 2004, SCSL-04-15-286, p.9626

Prosecutor v. Brima, Kamara & Kanu, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses” (“The AFRC Decision”), 9th May 2006,
SCSL-04-16-488.

Prosecutor v. Muvunyi et al, “Decision on the Prosecutor’s Motion or Orders for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment”, 25 April 2001, ICTR-2000-55-1

Annex A

Statement of Ms. Chantal Refahi, Senior Legal Assistant (Investigations), Sesay Defence team, dated 20th July 2006.



24202

SPECIAL COURT FOR SIERRA LEONE

INVESTIGATOR'S WITNESS STATEMENT

Defence team for Issa Sesay

I, Chantal Refahi, Senior Legal Assistant (Investigations) to the Defence on behalf of Mr. Sesay (the "Sesay Defence team"), Special Court of Sierra Leone, Freetown, Republic of Sierra Leone on this day, 20th July 2006, affirm the following:

1. I work as a Senior Legal Assistant in charge of Investigations for the Sesay Defence team. I joined the team in October 2005. I have over five years of experience of criminal defence investigations. Furthermore, I am a lawyer called to the Bar of England and Wales in 2005.
2. My investigative duties include interviewing potential defence witnesses on behalf of Mr. Sesay, the research and review of documentation relating to the defence case and the analysis of investigators' notes made by other investigators on behalf of Mr. Sesay.
3. In the course of the substantial number of interviews that I have conducted and those I have reviewed, I am informed of the following:
4. Potential defence witnesses for Mr. Sesay have expressed fear and concern for their own safety and security and that of those close to them if it is known publicly that they are co-operating with the Special Court; in particular if their identities are revealed to the general public, the media or to the state authorities, before protective measures can be put in place.
5. All investigators working on behalf of the Sesay defence team report that potential witnesses have expressed fear of condemnation and/or reprisals should it be known that they intend to testify on behalf of the RUF defence. In particular potential witnesses fear condemnation and reprisals by both the state authorities and individuals in support of other factions in the war who might object to what may be seen as an action in support of the RUF.
6. There are significant concerns expressed by potential witnesses:
 - a. The RUF as an organisation and those connected with it have been repeatedly vilified by the Government of Sierra Leone (the "GOSL") and the national press. Potential witnesses have been made aware of the GOSL's assurances to witnesses by the investigators however they fear public condemnation and possible interference by those representing the authorities.
 - b. Many potential witnesses live in mixed communities where ex-combatants and supporters of the various armed factions live together. However, this is a

fragile cohabitation. Some of the potential witnesses were civilians who were victims of attacks by opposing factions. Those we have spoken with are concerned that should it be known that they intend to testify for the defence of Mr. Sesay, these war-time differences might manifest themselves in reprisals towards both themselves and their families.

- c. That there have been or may be further attempts to dissuade witnesses from testifying for Mr. Sesay. Witnesses fear pressure by community members including those who have given evidence for the Prosecution to harassment by both ex-combatants who stand in opposition to Mr. Sesay and agents of the Government of Sierra Leone
7. It is my view that these fears are genuinely held. The significant proportion of potential witnesses with whom the Sesay defence team has met have reported to myself and other investigators in our team that they encountered pressure from their community where it was known that they had spoken with a RUF defence team and in some cases; harassment by both ex-combatants who stand in opposition to Mr. Sesay and agents of the Government of Sierra Leone.
 8. By way of example, after receiving threats this year a potential witness who had agreed to testify has refused to meet again with representatives of the Sesay Defence team. It emerged that the employer had learned a visit by the team and threatened the witness with dismissal if seen to speak further with our team. The Sesay Defence team is concerned that more reports will emerge as the Defence case approaches.
 9. Many of the potential witnesses live in rural areas without proximate security. Furthermore most often the police represent the only security there is available which is of concern to those potential witnesses who fear the wrath of the state should their intention to testify for Mr. Sesay be made public.
 10. In order to safeguard the privacy and security of the individuals who seek to testify for the defence of Mr. Sesay, I believe it is essential that any identifying information regarding these potential witnesses be withheld from the public until appropriate protective measures are in place. Such information might include the identity and whereabouts of the witness and of persons related to or associated with him/her.

Affirmation:

I Charantal Refali affirm that I have read or have had this statement read to me in the English language or in a language that I understand. I give this statement voluntarily and I understand that this statement may be used in legal proceedings before the Special Court of Sierra Leone and that I may be called to give evidence before the Court. I understand that wilfully and knowingly making false statements in this statement could result in proceedings before the Special Court for giving false testimony. I have not wilfully or knowingly made any false statements in this statement. I understand the importance of speaking only the truth, and the information contained in this statement is true and correct to the best of my knowledge and belief.

Signature: 