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SCSL-2004-16-PT
(5418-5422)

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**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-PT

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

Registrar: Robin Vincent

Date filed: May 13, 2004

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

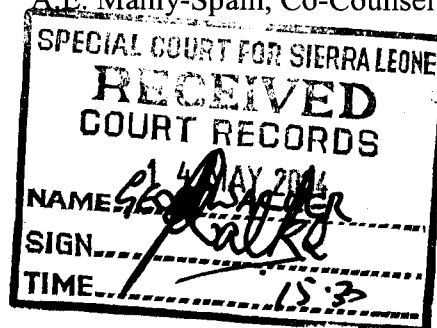
KANU – DEFENSE RESPONSE TO “RENEWED PROSECUTION MOTION FOR PROTECTIVE MEASURES PURSUANT TO ORDER TO THE PROSECUTION FOR RENEWED MOTION FOR PROTECTIVE MEASURES DATED 2 APRIL 2004”

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I INTRODUCTION

1. Pursuant to the “Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004,” (“**Prosecution Motion**”) filed by the Prosecution on May 4, 2004, as well as the Trial Chamber’s “Order to the Prosecution for Renewed Motion for Protective Measures” of April 2, 2004, the Defense herewith files its “Kanu – Defense Response to ‘Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004.’”

II LEGAL FRAMEWORK

2. Both the Statute and the Rules of Procedure and Evidence (“Rules”) of the Special Court reflect the basic principle of the Accused’s right to examine or have examined the witnesses against him, but also indicate the importance of the victims’ and witnesses’ right to be protected.
3. Rule 17(4) of the Rules reads as follows:

“In the determination of any charge against the accused pursuant to the present Statute, [the Accused] shall be entitled to the following minimum guarantees, in full equality:

(...);

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(...).”

4. Rule 69 of the Rules provides under (A) that “In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise” (emphasis added), while the provision of Rule 69(C) indicates that the witnesses’ identity should be disclosed so as to provide the other party sufficient time to prepare its case.

5. Rule 75(A) formulates the possibility for a Judge or a Chamber to 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. Section (B) of this provision provides several measures for protecting the identity of victims and witnesses.

III LEGAL ARGUMENT

Primary Argument: Request for Each Witness Specifically

6. Case law from the ICTY reveals that in order to ask for protective measures for witnesses, there should be exceptional circumstances justifying them, the imposition of which measures must be reviewed on a case-by-case basis.¹ In addition, the Prosecution needs to specifically indicate its reasons for requesting those for each individual.²
7. The Defense holds the humble opinion that the Prosecution has not been sufficiently precise in making its request for protective measures. The order sought intends to divide a total group of 260 witnesses in three mentioned categories, based on apparently general assessments, without individualization. The Prosecution apparently requests for protective measures for each group as such, instead of asking for specific protective measures for each witness on an individual basis, setting out the conditions for that specific witness.
8. As a consequence, the Prosecution's Motion in its current form should, according to the humble view of the Defense, at least be reformulated to the extent that for each individual witness it is required to impose specific protective measures.

Alternative Argument: Prosecution Request Too Broadly Formulated

9. In the case the honorable Trial Chamber would not agree with the Defense argument above, and even in case the Prosecutor were to specify the reasons for the protective

¹ See Decision on Prosecutor's Motion requesting protective measures for Witnesses A and D at trial, ICTY Trial Chamber Decision, Prosecutor v. Furundzija, 11 June 1998 paras. 7 and 8.

² See e.g. *Prosecutor v. Blaskic*, IT-95-14, Decision of Trial Chamber 1 on the Prosecutor's Requests of 5 and 11 July 1997 for Protection of Witnesses, dated July 10, 1997, where the Prosecutor specifically indicated why two expert witnesses from humanitarian organizations required specific protective measures.

measures, the Defense is of the view that the orders specifically sought by the Prosecution under (j) and (k) on p. 8 of the Prosecution Motion, should not be granted.

10. Under (j), the Prosecution requests that *“the Defence shall refrain 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 Defence.”* This request, also taking into account that protective measures have been requested for all Prosecution witnesses, is, according to the Defense, too broadly formulated. If such order would *de facto* amount to a general prevention to the Defense to discuss any information contained in any of the witness statements to anyone, even though no mention would be made of the name of the particular witness, or any information which could possibly lead to the identification of this witness, is practically impossible. Thus, discussing any issues related to the contents of the case to other persons than the members of the Defense team is practically impossible. The Defense is of the humble opinion that therefore this measure handicaps the Defense in properly preparing its case. It is moreover questionable whether it serves a purpose from the perspective of victims and witnesses. According to the Defense, this specific request may be deemed disproportional with the aim sought.

11. Balancing on these two interests, the following change to the Prosecution’s proposed text, could serve the purpose sought while at the same time endorsing the Defense interests. Instead of the wording formulated in the Prosecution Motion, the Defense proposes the following wording, partly derived from ICTY case law, to be inserted under (j): *“The Defence shall not disclose to the public or to the media the identity, whereabouts or any other identifying information of witnesses, except for reasons related to the preparation of the case; The Defence shall not disclose to the public or to the media, the substance, in part or in whole, of the witness statements which the Prosecutor disclosed, except for reasons related to the preparation of the case.”*

‘Verify’ Instead of ‘Ensure’

12. Under para. (k) of the Prosecution Motion, the Prosecution requests the Trial Chamber to order that the Defense shall maintain a log, containing certain specific information. In the last part under (k), the Prosecution moreover requests that *“the Defence shall*

ensure that the person to whom such information was disclosed follows the order of non-disclosure.”³ Also here, it should be seriously questioned whether this request is formulated too general, and the application thereof in practice not workable for the Defense. For the Defense can never ensure that persons to whom it discloses such information follow the order of non-disclosure. Instead of the word “*ensure*,” the Defense therefore suggests to use the word “*verify*,” which is a less strict formulation, and therefore more realistic for the Defense to comply with.⁴

IV CONCLUSION

13. For the reasons set out above, the Defense respectfully prays the honorable Trial Chamber to **primarily** deny the Prosecution Motion in its entirety and to order the Prosecution to reformulate its request for protective measures, in the sense that it is set out for each individual witness why he or she needs that specific form of protective measure.
14. **Alternatively**, the Defense prays the honorable Trial Chamber to order that the wording as used under (j) of the Prosecution Motion be narrowed, in that the wording as suggested by the Defense under para. 11 above be inserted instead of the wording formulated by the Prosecution under (j) on p. 8 of the Prosecution Motion.
15. And finally, the Defense requests the Prosecution’s formulation “*ensure*” under para. (k) on p. 8 of the Prosecution Motion to be replaced by the word “*verify*,” as mentioned in para. 12 above.

Respectfully submitted,
Done at this 13th day of May 2004

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³ Emphasis added.

⁴ This wording, namely the obligation of the defense to ‘verify’ that those individuals who have received a copy of the statements comply strictly with their obligation not to reproduce them, was also followed by the ICTY Trial Chamber Decision in Prosecutor v. Blaskic, , IT-95-14-T, 6 June 1997.