

020

SCSL - 2003 - 13 - PT

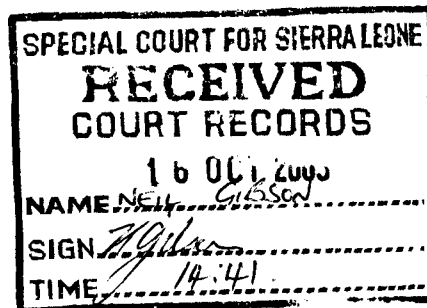
460

(460 - 477)
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE

Before: Judge Benjamin Itoe
Designated Judge

Registrar: Robin Vincent

Date filed: 16 October 2003



THE PROSECUTOR

Against

**SANTIGIE BORBOR KANU, also known as 55 also known as
FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as
S. B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU
also known as BORBOR SANTIGIE KANU**

CASE NO. SCSL - 2003 - 13 - PT

**PROSECUTION REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR
IMMEDIATE PROTECTIVE MEASURES**

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel
Boi-Tia Stevens, Assistant Trial Counsel

Defence Counsel:
Sylvain Roy, Acting Chief of Defence Office
Geert-Jan Knoops, Defence Counsel
Ibrahim Yillah, Defence Associate

**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE**

THE PROSECUTOR

Against

SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S. B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL – 2003 – 13 – PT

**PROSECUTION REPLY TO DEFENCE RESPONSE TO PROSECUTION
MOTION FOR IMMEDIATE PROTECTIVE MEASURES**

INTRODUCTION

1. The Prosecution files this reply to “Defence Response to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place” (the Response) filed on behalf of Santigie Kanu (the Accused) on 8 October 2003. In the Response, the Defence argues for the dismissal of the Prosecution’s Motion for Immediate Protective Measures (the Motion) or in the alternative that the identity of Prosecution witnesses be disclosed at least 42 days before each witness testifies in court. The Defense argument is based on the following:

- A. the non-disclosure of the identity of Prosecution witnesses until 21 days before they testify in Court is a serious infringement of

- the rights of the Accused under Article 17(4)(b) of the Special Court's Statute (the Statute);
- B. the Prosecution request for protective measures violates Rule 69(A) of the Rules of Procedure and Evidence of the Special Court (the Rules) which requires that request for witness protection be made on a case by case basis;
 - C. there is insufficient factual basis to justify the Prosecution request for protective measures for its witnesses, and
 - D. the Prosecution's request that the Defence notify the Court and that due notice be given to the Prosecution before the Defence contacts any of the Prosecution's protected witness is a violation of the right of the Defence to develop its litigation strategy free of revelation to the Prosecution at an early stage of the proceedings.
2. The arguments raised in the Response of Defence Counsel should be rejected as they are either incorrect or are not supported by the jurisprudence of the Special Court or the international ad hoc tribunals. The arguments disregard the accepted practice and jurisprudence of the Special Court and the International Criminal Tribunals for Yugoslavia and Rwanda that the non-disclosure of witness identifying data prior to testimony is an appropriate balance between the rights of the Accused and the need for protective measures for witnesses and victims.

ARGUMENT

A. Compliance with Article 17(4)(b) of the Statute

3. The Defence argument for the dismissal of the Prosecution motion for protective measures on the basis that the nature of the non-disclosure of the

identity of Prosecution witnesses sought is a serious infringement on the rights of the Accused to a fair trial is without merit.

4. The Prosecution is fully cognizant of the rights of the Accused as stipulated in Article 17 of the Special Court's Statute¹. The Prosecutor submits however, that the rights of the Accused must be balanced against the need to protect victims and witnesses. Pursuant to Article 17(2) of the Statute, the rights of the Accused to a fair trial can be derogated from in exceptional circumstances such as the protection of victims and witnesses.
5. The Prosecution finds ample support for this position in decisions from the Special Court which have acknowledged that the provisions of the Statute and the Rules of Procedure and Evidence of the Special Court "seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection".² Further, the jurisprudence from the Special Court and the ad hoc tribunals reveal numerous decisions granting similar measures for witness protection which permit the Prosecution to temporarily withhold the identity of witnesses.³
6. With regard to the specific nature of the protective measures sought, the Prosecution submits that they do not seriously compromise the right of the Accused to adequate time and facilities to prepare his defence. The Accused is not being denied the substance of the expected testimony of the witnesses, which is essential to the preparation of its case. Identifying details of

¹ Of note, the language of Article 17 of the Statute of the Special Court for Sierra Leone ("the Statute") is almost identical to Article 20 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).

² See paragraph 15 of "Decision on the Prosecutor's Motion For Immediate Protective Measures For Witnesses and Victims and for Non-Public Disclosure", dated 23 May 2003 in *Prosecutor Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Prosecutor Against Alex Tamba Brima*, SCSL-2003-06-PT, *Prosecutor Against Morris Kallon*, SCSL-2003-07-PT, and *Prosecutor Against Samuel Hinga Norman*, SCSL-2003-08-PT, all cited in the Prosecution's Motion for Protective Measures.

³ For cases from the Special Court, see *Prosecutor Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, and *Samuel Hinga Norman*, SCSL-2003-08-PT, *supra*, note 2; For cases from the ICTR see *Prosecutor v. Nsengimana*, ICTR-2001-69-T, 2 September 2002, *Prosecutor v. Nyiramasuhuko*, ICTR 97-21-T, 27 March 2001, *Prosecutor v. Nzirorera*, ICTR 98-44-I, 12 July 2000; *Prosecutor v. Juvenal Kajelijeli*, ICTR-98-44-I, 6 July 2000, all cited in the Prosecution's Motion for Protective Measures.

witnesses, such as name, place of birth, etc. go towards the credibility of witnesses, and whilst the Prosecution appreciates the need for the Defence to have such details, such data well in advance of trial is not required for the Accused to know and answer the case against him.

7. The disclosure of such information twenty-one (21) days before testimony is therefore sufficient time to allow the Defence to conduct any inquiries relating to remaining issues such as the credibility of the identified witness. This position is not only consistent with the practice which obtains at the ICTR⁴, but is reflected in the most recent decision on witness protective measures in the Special Court case of *Prosecutor v. Kondewa*, which granted the Prosecution's Motion for the non-disclosure of witness identifying data until twenty-one (21) days before testimony.⁵
8. The Prosecution submits therefore that the nature of the non-disclosure orders sought do not prejudicially infringe upon the rights of the Accused to adequate preparation for trial, but rather strike an appropriate balance between the rights of the Accused and the need to protect the safety of victims and witnesses, consistent with the jurisprudence of international criminal law. Accordingly, the Defence argument that the nature of the protective measures seriously infringes on the rights of the Accused under Article 17(4)(b) of the Statute should be dismissed.

B. Compliance with Rule 69(A) of the Rules

9. The Prosecution understands the Defence argument contained under the subheading "Rule 69(A) of RPE-SCSL" on page 3 of the Defence Response to mean that the Prosecution is required under Rule 69(A) to demonstrate through specific evidence, on a case by case basis, the dangers attendant to the

⁴ See *Prosecutor v. Nsengimana*, supra note 3; *Prosecutor v. Nyiramasuhuko*, supra note 3; *Prosecutor v. Nzirorera*, supra note 3; *Prosecutor v. Juvenal Kajelijeli*, supra note 3.

⁵ See *Prosecutor v. Kondewa*, SCSL-2003-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003, paragraph 29(a).

disclosure to the Defence of identifying data of each witness. The Prosecution submits that this is an incorrect interpretation of the onus outlined in Rule 69(A) and should therefore be dismissed.

10. The plain reading of Rule 69(A) reveals that the Rule requires only a showing of exceptional circumstances to justify the protective measures sought. No where in the Rule is the showing of specific evidence on a case by case basis mandated.
11. The Defence contention that the use of the adjective “a witness” in Rule 69(A) warrants the conclusion that the drafters of the Rules of the Special Court intended for Rule 69 (A) to be used only on a case by case basis is also not supported by the Rules. Rule 2(B) explains the use of words in the Rules. It clearly explains that the use of the singular in the Rules includes the plural. Defence reliance on the singular use of the word “witness” in the Rule in support of its argument is therefore misplaced.
12. The instant case is one where the Prosecution has argued that the conditions in the country put Prosecution witnesses at risk. Indeed, it would be a wasteful use of Court’s time and resources for the Prosecutor to bring individual requests for individual witnesses at this stage of the pre-trial process. As reflected by jurisprudence of the Special Court, “it would be unrealistic to expect ... the Prosecution ... to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation”.⁶
13. The arguments raised by the Defence should therefore be dismissed as they have no basis in law.

⁶ *Prosecutor v. Sesay, supra*, note 3 at paragraph 14; *Prosecutor v. Brima, supra*, note 3 at paragraph 14; *Prosecutor v. Kallon supra*, note 3 at paragraph 15; *Prosecutor v. Norman, supra*, note 3 at paragraph 14.
⁷ See, e.g., *Prosecutor v. Sesay, supra*, note 3; *Prosecutor v. Brima, supra*, note 3; *Prosecutor v. Kallon supra*, note 3; *Prosecutor v. Norman, supra*, note 3.

C. Demonstration of Sufficient Factual Bases

- 14. The Prosecution submits that the Motion provides sufficient factual bases to satisfy the requirement of exceptional circumstances for the protective measures sought for each witness, and accordingly the Defence argument should be rejected.
- 15. It is noted that the Defence argument on this point is in part similar in substance to its argument under the subheading “Rule 69” of its response. To this extent, the Prosecution reiterates its arguments contained in paragraph 12 above.
- 16. Contrary to the Defence assertion that the circumstances described in the seven attachments to the Prosecution Motion are not particular to each witness, the circumstances describe the conditions in the country, and more importantly, **the precarious conditions under which each witness will testify**. It could hardly be said in this instance that the said conditions are not reflective of the security situation of each witness or are not particular to each witness. Indeed there are ample precedents from the jurisprudence of the Special Court showing that these conditions meet the exceptional circumstances requirement of Rule 69(A) and that they show a real and objective basis of the fears of these witnesses.⁷
- 17. The Defence argument that measures should have first been taken by the Victims and Witness Unit fails to appreciate that Rule 69(A) specifically provides for measures to be taken in exceptional circumstances. Further, the request for the non-disclosure of the identity of witnesses takes into account the limited ability of the Victims and Witness Unit to provide safety measures for witnesses.

D. Right of the Accused to Develop his Litigation Strategy

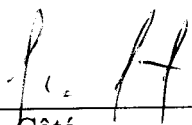
18. The Prosecutor submits that the request for judicial and Prosecution notification prior to Defence contact with protected Prosecution witnesses is consistent with allaying the fears and protecting the privacy of witnesses and victims which the Statute and Rules provide for. The measure is not prejudicially intrusive on the right of the Defence to develop its litigation strategy; it merely seeks to facilitate contact between protected Prosecution witnesses and the Defence when necessary. Indeed, protective measures for witnesses would be rendered meaningless if the parties had carte blanche access to protected witnesses.

CONCLUSION


For the foregoing reasons, the Prosecution requests that the Defence arguments be rejected in their entirety and the relief requested in the Prosecution motion for protective measures be granted. The Prosecution reasserts its request for provisional transmittal to the Registry of disclosure materials within the period of disclosure, or alternatively a suspension of the Prosecution's disclosure obligation under Rule 66(A)(i), if by 23 October 2003, the Designated Judge has not given a ruling on the Prosecution's motion for protective measures filed on 30 September 2003.

Done in Freetown, 16 October 2003.

For the Prosecution,



Luc Côté
Chief of Prosecutions



Robert Petit
Senior Trial Counsel

PROSECUTION AUTHORITY

Prosecutor v. Kondewa, SCSL-2003-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003.

038

SCSL-2003-12-PT

(1067-1075)

1067

469



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

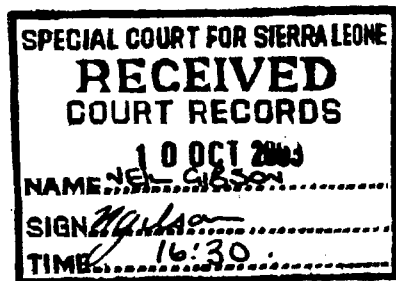
THE TRIAL CHAMBER

Before: His Lordship, the Rt. Hon Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 10th day of October, 2003.

The Prosecutor against
(Applicant)



Allieu Kondewa
(Respondent)

SCSL-2003-12-PT

RULING ON THE PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE AND URGENT REQUEST FOR INTERIM MEASURES UNTIL APPROPRIATE PROTECTIVE MEASURES ARE IN PLACE

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Sharan Parmar, Assistant Trial Counsel

Defence Counsel:
John Jones, Acting Chief of Defence Office
Claire Carlton - Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE
DESIGNATED JUDGE

This is my ruling on this Motion.

1. In an 8 count Indictment dated 24th June 2003, signed by the Prosecutor of the Special Court and approved on the 26th of June 2003, by the designated Judge, His Lordship, The Hon. Judge Bankole Thompson, the Respondent stands charged with committing varied and serious offences not only against international humanitarian law as defined in the Geneva Convention of 12th August, 1949, but also against the Sierra Leonean law committed in the territory of Sierra Leone since 30th November 1996 as stipulated not only in Article 1 of the Agreement dated the 16th of January 2002 between the United Nations Organisation and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, but also in Articles 1, 2, 3, 4, and 5 of the Statute of the Court that is annexed to and forms an integral part of the said Agreement.

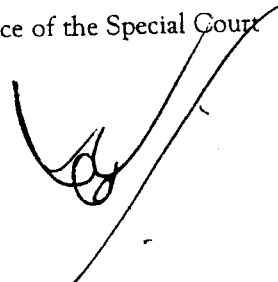
2. The provisions of both the Agreement and the Statute adequately guarantee the rights, particularly of accused persons like the respondent in this case, as they also do, those of witnesses and victims of those offences for which the respondent stands indicted.

3. In this regard, Article 17(2) of the Statute stipulates that the Accused shall be entitled to a fair and public hearing but this, subject to measures ordered by the Special Court for the protection of victims and witnesses.

4. Under Article 17 (4) (b) of the Statute, the accused enjoys the right to have adequate time and facilities for the preparation of his or her defence and under Article 17 (4) (d), the right to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing. Furthermore, under Article 17 (4) (e), the accused reserves the right 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.

5. As far as the protection of witnesses and victims is concerned, Article 16 (4) of the Statute creates a Victim's and Witnesses' Unit within the Registry charged with providing protective measures and security arrangements and other appropriate assistance for witnesses and victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.

6. Furthermore, Rule 69 of the Rules of Procedure and Evidence of the Special Court provide as follows:



69 (A) " 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 the Chamber decides otherwise"

69 (B) "In the determination of protective measures for victims and witnesses, the Judge or the Trial Chamber may consult the Victims and Witness Unit"

69 (C) "Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before the witness is to be called to allow adequate time for the preparation of the prosecution and defence"

7. Under Rule 75 of the Rules:

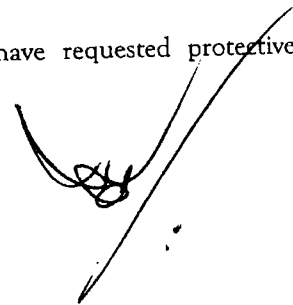
"A Judge or a Chamber may, on its own motion or at the request of either party or of the victim or witness concerned, or of the Victims and Witness Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused."

8. It is with the background of these facts and preceding statutory and regulatory recital that the Prosecution/Applicants filed, on the 3rd of July 2003, a motion for immediate protective measures for witnesses and victims and for non disclosure in relation to those concerned and issues affected by the indictment against the Respondent.

9. The Applicants in this motion requests the Designated Judge or the Trial Chamber to order immediate measures to protect the identity of the witnesses and to protect the confidentiality of all non public materials disclosed to the Defence. The Applicants contend that it is necessary to take adequate measures to safeguard the security and privacy of witnesses and victims and the integrity of the evidence and those proceedings.

10. The Applicants seek protection for persons who fall into 3 categories, all of whom, they contend, require protective measures and these include:

- (a) Witnesses who presently reside in Sierra Leone and who have not affirmatively waived their right to protective measures.
- (b) Witnesses who presently reside outside Sierra Leone but in other Countries in West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their right to protective measures, and
- (c) Witnesses residing outside West Africa who have requested protective measures.



11. In this same Motion, the Applicants seek the issue of a Prohibitive Order restraining the Defence from disclosing to the public or media, any non- public materials which are provided to them as part of the disclosure package under Rule 66 of the Rules of Procedure and Evidence.

12. It is argued by the Applicant that the disclosure of such material by the Defence, except to the limited extent necessary for their investigation of this case, may compromise on-going investigations and existing indictments because since some accused persons are still at large, a public disclosure of all the Prosecution's information could provide them with a means to obstruct justice or to fabricate evidence.

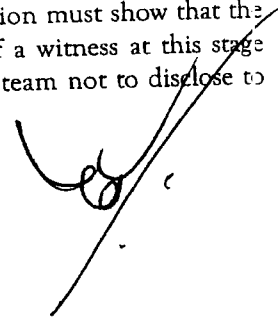
13. It is submitted by the Applicants and observed as well that the provisions of Rules 69, 75 and others, are very similar to if not a replica of those of the ICTR and ICTY and that the jurisprudence of those earlier sister jurisdictions on these issues which are similar, could provide a guide to determining the issues before me.

14. Counsel for the Respondent has made submissions in reply to the Applicant's Motion. Primarily, he argues that Rule 69 provides that the Court can entertain non-disclosure applications of this nature only "in exceptional circumstances" and that the material produced by the Applicants does not fulfil the requirements of "exceptional circumstances". Counsel for the Respondent further argues that Article 17 of the Statute of the Special Court accords to the accused, the right to a fair trial including adequate time and facilities to prepare for his defence and that non-disclosure of material in the manner sought by the Applicants deprives the Respondent of his guaranteed rights under principles of natural justice, to a fair trial.

15. The Respondent's Counsel further argues that no evidence is advanced by the Applicants identifying any specific threat made by the accused himself or others at his direction against any witness or victim nor is there any evidence before the Court for a conclusion to be drawn that the Respondent himself has directed others to make threats against any witness or victim. In the absence of evidence to this effect, the Respondent's Counsel argues, the application for non-disclosure is unfounded as it severely prejudices the Respondent's right and ability to prepare for a fair trial to which he is constitutionally entitled.

16. The Applicants in the reply maintain that non-disclosure at this stage is necessary in that potential witnesses or their families who live in the same areas as some of the perpetrators of the crimes charged or their sympathisers could be exposed to some danger of recriminations should they be detected as working in collaboration with institutions seeking to bring them to justice.

The test to be applied in matters of this nature is that the Prosecution must show that the disclosure to the accused and this defence team of the identity of a witness at this stage despite the obligation imposed upon the accused and his defence team not to disclose to



1071 473

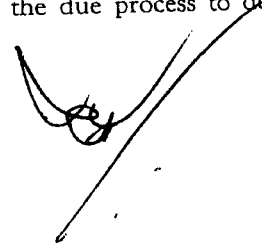
the public may put the witness in danger or at risk. There must be some objective foundation for the fear that the witness may be in danger or at risk. *Archbold: International Criminal Courts Practice, Procedure and Evidence*, Para 8-64 c.

17. To highlight these fears and to meet up with the vital ingredient of proving "exceptional circumstances" in order to secure non-disclosure, the Applicants have produced some Sworn Declarations of Mr. Gbekie, an Investigator, Dr. White, the Chief of Investigations, Alan Quee, the Director of Post Conflict Re-integration Initiative for the development and Empowerment, an NGO which deals directly with combatants, Saleem Vahidy, the Chief of the Witness Unit and the former and present Inspector General of Police for Sierra Leone. These Declarations have the common denominator of outlining the fears expressed by the Applicants for the safety of potential witnesses and their families if a non-disclosure order were not made to protect their identities for the time being as real threats of elimination, according to the said Declarations, exist if they are identified as testifying against the indictee, the Respondent in this Motion.

18. In the cases of *The Prosecutor vs. Alfred Musema*, ICTR-96-13-T and *The Prosecutor vs. Tadic*, IT-94-I-T 1995, the Trial Chambers of the ICTR and ICTY, applying the same Rules as our Rules 69 and 75, it was held that for a witness to qualify for the protection of his identity from disclosure to the public and the media, there must be real fear for the safety of the witness or his or her family and there must always be an objective basis to the fear. In the same decisions, it was held that a non-disclosure Order may be based on fears expressed by persons other than the witness as is the case in the matter under adjudication where the Applicants are relying on the declarations of a number of privileged Officials who are closely and very involved in the process of investigation, custody and a follow-up of the actors of this violent and gruesome internal conflict in Sierra Leone.

19. In the case of the *Prosecutor vs. Brdanin*, November 8, 2000, at Paragraph 13, it was held that there must be some objective foundation for the fear that the witness may be in danger and that the fears of a potential witness are not themselves sufficient to establish a real likelihood that the witness may be in danger. Something more than that has to be demonstrated before an interference with the right of the accused to know the witnesses' identity is warranted. Still on another application by the Prosecution for non-disclosure in the *Brdanin* case, July 3, 2003, the Trial Chamber of the ICTY held that in the absence of evidence of risk that particular witnesses will be interfered with, it is logical to conclude that the exceptional circumstance provided for under Rule 69 cannot be justified.

20. Indeed, the current doctrine of non-disclosure constitutes a fast developing hide-and-seek legal strategy and gimmick between the Prosecution and the Defence, which, in traditional legal practice, has not enjoyed the predominance it does today in the International Criminal Justice system. In a hitherto and currently dominant adversarial system which is based on the 2 parties enjoying a parity in the privileges to which they are entitled to present their cases and particularly the accused whose right to a guaranteed fair trial with a special reference to acceding to facilities under the due process to defenc.



himself, this situation certainly leads me to categorise the doctrine of disclosure as the rule and non-disclosure which can only be applied if and where the Prosecution, within the context of Rule 69 of the Rules of Evidence and Procedure, demonstrates that exceptional circumstances exist to warrant a non- disclosure, the exception.

21. This said, and as was observed in the case of *Kayishema and Ruzindana* on a motion filed by the Prosecution on the protection of victims and witnesses, November 6th 1996, "the need to maintain a perfect balance between, on the one hand, the rights of the accused to a fair trial, and on the other hand, the rights of victims and witnesses as well as the interest of the International Community that justice is done in the most diligent manner possible"

22. It must be conceded, however, that this balance is very difficult to strike as the very thin line of demarcation separating the fundamental interests of the accused to protect his entrenched legal and Constitutional entitlement to a fair trial as against the statutorily evolving right of a witness or a victim to protection and non-disclosure which is an emanation of International Statutes and Rules of practice in ad hoc and exceptional International Criminal Jurisdictions, is too slim, or rather, too faint to ensure the equilibrium and justice of the said balance without violating in one way or the other, ones or the other's legal rights.

23. In whatever circumstances, the instant matter comes up after the end of a gruesome and cruel civil war that had ravaged and destroyed not only human beings, but also property within the territory of Sierra Leone. The wounds caused by that civil conflict are still healing. The actors, perpetrators, victims and witnesses alike, are living relatively in peace in the same community where there is of course a genuine fear of judicial action looming over the heads of many and sundry. The evidence required will be given here in the Special Court that will sit in Freetown very much unlike the Yugoslavian or Rwandan situations where the Tribunals are operating and sitting in cities other than those of the locus delicti, indeed, the Countries where the crimes were committed.

24. The Republic of Sierra Leone is a relatively small Community where people are bound to and in fact know and identify themselves very easily thereby increasing the danger of risk of a recruitment of hostilities against potential witnesses and victims and their families if they are identified by the indictees or their sympathisers as those whose testimony would incriminate them, or in due course and more still, the indictees who they support out there.

25. One of the goals targeted by the International community is to track down and bring before justice, those who bear the greatest responsibility for a breach of International Humanitarian Law by committing heinous crimes against humanity. In view of the particularly bloody, hostile, and vicious environment in which these gruesome offences were cruelly perpetrated and the necessity to fulfil the procedural imperatives of an adversarial system of justice governing the Courts by providing witnesses to sustain the

475
1073

charges, a mechanism had to be worked out to achieve the targeted objectives. One of this is certainly to create incentives geared towards encouraging victims and witnesses of those crimes to testify, albeit against those front line perpetrators and one of these measures is to put in place, a protective wall between the victim or witness and the accused so that neither the latter nor his sympathisers would identify the former for possible recriminations and eventual eliminations. It is only to this strategy that International Criminal Justice owes its exceptional survival, for, in the absence of these protected witnesses and victims, there will be no trials and consequently, no end to the criminal impunity that the International Community is endeavouring to contain and to combat through the International Criminal Courts which function virtually on the same basis and on similar rules of procedure and evidence as do the Municipal Criminal Jurisdictions.

26. This accounts for the consistent and constant sympathy of these jurisdictions to impose non disclosure measures not indefinitely though but on a temporary basis, in favour of the prosecution at the pre-trial stages of the proceedings. This said, it must be emphasised however, that the measures so ordained can only be made on a temporary basis so as to avoid violating the statutory rights of the accused to a fair trial.

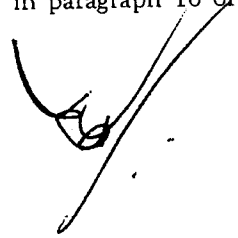
27. In saying this, I share and concur with the diction of the ICTY in the case of the *Prosecutor vs. Blaskic*, IT-95-14 where Their Lordships had to this to say:

“The philosophy which imbues the Statute and Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused during preliminary proceedings and until a reasonable time before the start of the trial itself; from that time however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.”

28. In the light of the foregoing analysis, I am of the opinion that the Applicants, through their factual and legal analysis in the presentation of the Motion brought before me, have sufficiently discharged the burden of establishing “exceptional circumstances” an ingredient that is the gateway to acceding to an Order for non disclosure, just as they have satisfied me, given the security situation in Sierra Leone and the threats to the security and life of the witnesses and victims, that there is merit in, and an imperative necessity to grant their motion seeking to protect all the 3 categories of witnesses solicited coupled with other remedies they have applied for.

29. Consequently, I am granting at this pre-trial stage, the application introduced by the Applicant and do order the immediate protection and non- disclosure of all the categories of witnesses solicited and non-public materials in this case until a further Order to the contrary and in particular, I ORDER , and it is hereby ordered:

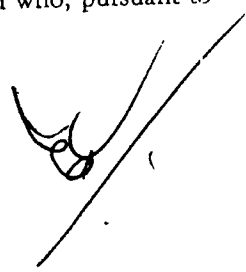
- (a) That the Prosecution withholds, identifying data of the persons the Prosecution is seeking protection for as set forth in paragraph 16 or any



1074 476

other information which could lead to the identity of such a person to the Defence until twenty-one (21) days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at trial, unless otherwise ordered;

- (b) That the names and other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;
- (c) That the Prosecution is permitted to designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such person;
- (d) That the names and other identifying information concerning all witnesses described in paragraph 23 (a), be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;
- (e) That it is prohibited do disclose to the public or the media the names and any other identifying data or information in a file with the Registry, or any other information which could reveal the identity of witnesses and victims, and that this order shall remain in effect after the termination of the proceedings in this case;
- (f) That the Defence is prohibited 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;
- (g) That the Defence maintains 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 other non-public material, as well as the date of the disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;
- (h) That the Defence shall provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to



477
1075

paragraph 23(f) above, have access to any information referred to in paragraphs 23(a) through 23 (e) above, and requiring the Defence to advise the Chamber and Prosecution in writing on any changes in the composition of this Defence team;

- (i) That the Defence shall ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;
- (j) That the Defence returns 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;
- (k) That the Defence Counsel makes a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution.

AND FINALLY, That these Orders be carried out.

Done at Freetown, this 10th day of October 2003.



HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

