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SCSL-04-16-T

18098

(18098 - 18108)

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

TRIAL CHAMBER II

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 1 May 2006

THE PROSECUTOR

Against

**ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU**

Case No. SCSL – 2004 – 16 – T

PUBLIC

**PROSECUTION RESPONSE TO PUBLIC JOINT DEFENCE APPLICATION FOR
PROTECTIVE MEASURES FOR DEFENCE WITNESSES**

Office of the Prosecutor

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Mr. Karim Agha

Defence Counsel for Brima

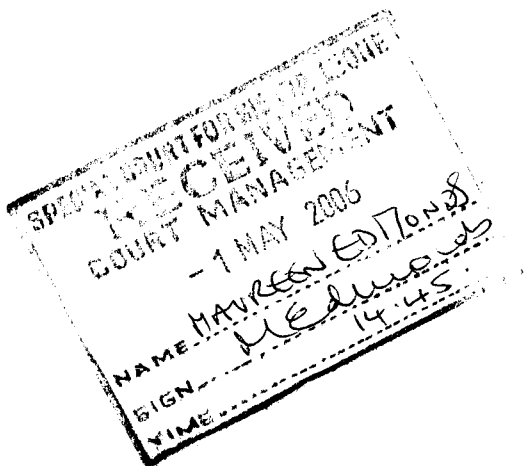
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Ms. A.E. Manly-Spain



I. INTRODUCTION

1. The Prosecution files this Response to the “Public Joint Defence Motion for Protective Measures for Defence Witnesses” filed by the defence for all three Accused (“**Defence**”) on 25 April 2006 (“**Motion**”).¹ Subject to the submissions below, the Prosecution submits that the Motion should be rejected.

II. ARGUMENTS

General submissions on the requirements of witness protection motions

2. Rule 69 of the Rules of Procedure and Evidence (“**Rules**”) states 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.*” An application for protective measures must be supported by sufficient evidence on the basis of which the Court may make a reasonable and objective assessment of the appropriateness of the measures requested. This requirement is consistent with a broader principle that where facts are relied upon in a motion as providing the basis for an order sought from the Chamber, affidavit or other evidence of these facts must be provided by the moving party, unless the facts are uncontested.²
3. While the Prosecution takes no issue with the fact that the potential for protective measures applies equally to Defence as to Prosecution witnesses by virtue of Rules 69 and 75, it notes that the granting of protective measures is not automatic exercise³ and that unsupported claims of fears expressed by witnesses, without more, does not suffice for this purpose. To meet the Rule 69 test of “exceptional circumstances”, the applicant must not only establish sufficient facts supporting the *subjective* fears of witnesses, but must also provide evidence from other sources indicating an *objective* basis for assessing

¹ *Prosecutor v. Brima et al.*, SCSL-04-16-T-476. The Motion when filed did not include certain Annexes that were intended to form part of it, apparently because the Annexes were locked in a cupboard and the Defence teams had lost the key (*Prosecutor v. Brima et al.*, SCSL-04-16-T, Transcript, 26 April 2006, p. 2 (lines 15-18), p. 7 (lines 6-10 and 22-28)). At the Pre-Defence Conference held on 26 April 2006, the Defence promised that these Annexes to the Motion would be filed “at the latest much later today or first thing tomorrow morning” (Transcript, 26 April 2006, p. 7 (lines 26-28)). The annexes were in fact only served on the Prosecution in the afternoon of 28 April 2006.

² *Prosecutor v. Delalić et al. (Čelebići case)*, *Decision on Motion to Preserve and Provide Evidence*, Case No. IT-96-21-A, Appeals Chamber, 22 April 1999, pp. 4-5; and see also the *Separate Opinion of Judge Hunt*, paras. 7-9.

³ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Transcript, 27 October 2005, p. 19, lines 20-23; p. 23, lines 15-21.

whether a threat to the witnesses' security exists.⁴ The subjective feelings of the witnesses are not the only factor to be taken into account,⁵ and the subjective feeling of a witness is not in itself conclusive.⁶

The request for measures affecting disclosure to the Prosecution

Paragraph 13(d) of the Motion

4. The Trial Chamber's order of 26 April 2006 (the "**26 April 2006 Order**")⁷ requires the Defence to disclose certain materials to the Prosecution by 10 May 2006, including the names and other identifying details of Defence witnesses. The measure requested in paragraph 13(d) of the Motion, if granted, would lead to the 26 April 2006 Order being varied, so that the names of Defence witnesses would be provided to the Prosecution only on a rolling basis, 14 days before each witness testifies. The Prosecution submits that the Motion does not establish any factual or legal basis for varying the terms of the 26 April 2006 Order, and the Prosecutor opposes the request for this measure.
5. The Motion does not identify *any* possible threat to a Defence witness that might arise if the names of all of the Defence witnesses are disclosed *to the Prosecution* in advance of the commencement of the Defence case, in accordance with the 26 April 2006 Order. The potential threat to Defence witnesses alleged in the Motion is a threat from the Sierra Leone Government, police and military,⁸ from "pro-government supporters",⁹ and from chiefs and local communities.¹⁰ There is no suggestion in the Motion that the Special Court is incapable of maintaining the security of its confidential documents. There is also no suggestion in the Motion that members of the Office of the Prosecutor pose any threat to witnesses.
6. Furthermore, in requesting an order that the names of Defence witnesses be provided to the Prosecution on a rolling basis, the Defence does not provide any justification for the proposed 14-day time frame. A period of 14 days would be insufficient to allow the

⁴ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, Ruling on Motion for Modification of Protective Measures for Witnesses, 18 November 2004, para. 38 & 40 ("**Ruling on Modification of Protective Measures**").

⁵ *Id.*, para. 38

⁶ *Id.*, para. 40.

⁷ *Prosecutor v. Brima et al.*, SCSL-01-16-T-478, 'Order for Disclosure Pursuant to Rule 73ter and the Start of the Defence Case', 26 April 2006.

⁸ Motion, paras. 7, 8, 10 and 11.

⁹ Motion, para. 8.

¹⁰ Motion, paras. 9 and 12.

Prosecution to conduct proper investigations. Where such rolling disclosure is provided for, a more realistic timeframe that is consistent with previous practice at the Special Court would be **42** days.¹¹ The Prosecution submits that in cases of rolling disclosure, 42 days should provide the initial yardstick, and that this period should only be adjusted on the basis of compelling arguments and supporting evidence put forward by the Defence.

Paragraph 13(f) of the Motion

7. The Prosecution submits that this requested measure should not be granted, for two reasons. First, it is for the Trial Chamber and not the VWU to set the timing of disclosure. To make the timing of disclosure expressly subject to whether VWU has or has not taken certain measures would throw the timing of the disclosure process (and therefore the timing of the trial itself) into a state of uncertainty. There is nothing on record to indicate that the VWU is presently unprepared for Defence witnesses at this time, or that the VWU (which has been in operation for over two years) is not capable of implementing the necessary measures within the timeframe ordered by the Trial Chamber.
8. Secondly, paragraph 13(f) of the Motion, if granted, would make disclosure subject to the taking of “measures determined as necessary by the Victims and Witnesses Unit.” However, the decision as to protective measures rests with the Court and not the VWU. The Trial Chamber cannot appropriately delegate to VWU the responsibility for determining for which witness protection measures are necessary. In any event, there is nothing in the Motion to suggest that VWU considers that there are any specific measures that ought to be taken in relation to these witnesses.

¹¹ See e.g. *Prosecutor v. Norman*, SCSL-2003-08-PT-33, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 23 May 2003; *Prosecutor v. Kallon*, SCSL-2003-07-PT-33, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 23 May 2003; *Prosecutor v. Brima*, SCSL-2003-06-PT-36, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 23 May 2003. The only exceptions were in the cases of Kondewa and Kanu where a 21 day disclosure period was ordered, see *Prosecutor v. Kondewa*, SCSL-2003-12-PT-38, ‘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; *Prosecutor v. Kanu*, SCSL-2003-13-PT-37, ‘Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims’, 24 November 2003. In the CDF case, in the cases of Norman and Fofana, after the Prosecution presented further arguments relating to increased threats to witnesses at the relevant stage of the proceedings, this period was changed to 21 days for all Prosecution witnesses in the CDF case: *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-126, ‘Decision on Prosecution Motion for Modification of Protective Measures for Witnesses’, 8 June 2004, para. 36.

Paragraph 13(k) of the Motion

9. The Motion fails to demonstrate the need for this measure. Nothing in the Motion suggests that there is any threat to Defence witnesses from the Prosecution, or that the measures requested in this paragraph would assist in protecting witnesses from those threats that are alleged in the Motion. The Prosecution opposes the granting of this measure.

The request for measures to withhold the identity of witnesses from the public (paragraphs 13(a), (b), (c), (e), (g), (h) and (j) of the Motion)

Introduction

10. In relation to the three categories of witnesses to which the Motion applies (“serving soldiers”, “former soldiers” and “civilian witnesses living in rural communities”), the Prosecution accepts that the three declarations attached to the Motion¹² provide evidence of subjective fears held by all three categories of witnesses. However, as argued above, a motion for protective measure must also provide evidence indicating an *objective* basis for protective measures. The Prosecution submits that the three declarations annexed to the Motion do not establish that there is any objective justification for the fears that may be held by these witnesses. For this reason, subject to the submissions in paragraph 19 below, the Prosecution submits that the request for these measures should also be rejected.

Serving soldiers

11. The Kamara declaration states that of the soldiers who were members of the AFRC, some have been imprisoned by the Government, and some were dismissed from the Army.¹³ However, it is noted that it is not clear from the Motion or the three declarations in support whether all of the Defence witnesses listed in the Motion under the category of “serving soldiers” were also serving soldiers at the times material to the Indictment in this case, or if so, whether they fought as part of the AFRC. In any event, there is nothing to suggest that there is any objective reason for a serving soldier who has not previously

¹² Declaration of Osman Keh Kamara (Legal Assistance to the Brima Defence team) (the “**Kamara declaration**”); Declaration of Ibrahim Kargbo (Investigator for the Kamara Defence team) (the “**Kargbo declaration**”); and Declaration of Bockarie Marrah (Witness Support Assistant in the Office of the Principal Defender) (the “**Marrah declaration**”).

¹³ Kamara declaration, para. 6(a).

been so imprisoned or dismissed to fear that such imprisonment or dismissal would be the consequence of testifying before the Special Court on behalf of the Defence. The Kamara statement says that there are “reports” of some soldiers being picked up and interrogated about visiting the Special Court.¹⁴ However, no detail at all is given of these reports, and in the absence of any further information it is impossible to assess whether these reports are reliable, or whether the circumstances of any such “interrogations” suggest that there would be repercussions for soldiers who testify for the Defence in this case.

12. Paragraph 7 of the Motion states that serving soldiers fear “death threats”. Nothing in any of the three declarations supports this specific allegation. Paragraph 11 of the Motion states that the military hierarchy in Sierra Leone believes that it is unlikely that current soldiers would want to testify on behalf of the Defence. However, no evidence is provided that members of the military hierarchy actually do hold this belief (none of the three annexed declarations refer to this at all). Furthermore, even if it is assumed that members of the military hierarchy do hold this view, no indication is given as to *why*, in the opinion of the military hierarchy, current soldiers would be unwilling to testify on behalf of the Defence. In the absence of any such detail, the objective basis for the fears of the witnesses cannot be assessed.

Ex-soldiers

13. The three declarations annexed to the Motion are inconsistent as to the nature of the fears of ex-soldiers. The Kamara declaration suggests that ex-soldiers fear repercussions from the community and their employers.¹⁵ On the other hand, the Kargbo declaration¹⁶ and Marrah declaration¹⁷ suggest that they fear that they may be deemed by the Government to be a “threat to the State” or a “threat to national security” if they testify on behalf of the Defence in this case. No further information is provided in any of the statements on the basis of which it could be assessed whether there is any objective basis to these fears.
14. Paragraph 10 of the Motion refers to an alleged attack against potential defence witnesses by the police in December 2005. However, no details or evidence of the incident are provided in the Motion, and none of the three annexed declarations refer to it. According

¹⁴ *Ibid.*

¹⁵ Kamara declaration, para. 6(c).

¹⁶ Kargbo declaration, para. 6(c).

¹⁷ Marrah declaration, para. 6(c).

to the Motion, this incident was the subject of a Defence motion filed before the Trial Chamber. However, no reference to such a motion is given, and the Prosecution is unaware of any such motion having ever been filed. The Prosecution notes that at the status conference on 4 April 2006, Defence counsel appeared to refer to this alleged incident,¹⁸ but made no motion in respect of it. The Prosecution further notes that in May 2005, the Defence filed a motion alleging that a potential Defence witness had been arrested in April 2005 following a visit to the Special Court. The Trial Chamber dismissed that motion, finding *inter alia* that there was no evidence of a connection between the person's arrest and the fact that he was a potential witness, and indeed, that there was no evidence that the arresting officers even knew that he was a potential witness for the Defence.¹⁹ In a similar way, in relation to the alleged December 2005 incident, even if the facts stated in paragraph 10 of the Motion were presumed to be true despite the lack of any evidence or details, these facts do not establish any connection between the alleged attack and the fact that those involved were potential Defence witnesses.

Civilian witnesses living in rural communities

15. Paragraph 12 of the Motion states that in February 2006, shortly after certain witnesses were interviewed by Defence teams in the Koinadugu District, two of the witnesses were “threatened and harassed”. Paragraph 7 of the Kamara declaration appears to refer to this incident, although it states only that the two persons concerned were harassed (as opposed to threatened). The nature of the harassment is not specified, and it appears that the harassment was the result of speaking at a Defence Outreach event, as opposed to the result of speaking to Defence investigators. No information is given as to what these witnesses actually said at the Outreach event. Paragraph 6(d) of the Marrah declaration appears to be referring to the same incident when it states that witnesses in Koinadugu District have “complained of suspicion from their community people” as a result of speaking at Outreach events. However, the Marrah declaration speaks only of “suspicion” rather than “threats and harassment”, and confirms that the problem is connected with witnesses speaking at Outreach events, rather than from witnesses speaking to Defence investigators. Furthermore, the Marrah declaration does not indicate how many witnesses

¹⁸ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Transcript, 4 April 2006, p. 12 (lines 18-29).

¹⁹ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-274, ‘Decision on Joint Defence Motion for General Orders Pursuant to Rule 54’, 28 July 2005, para. 33.

have suffered such problems as a result of speaking at Outreach events (the Kamara declaration suggests there were two such witnesses). The Prosecution acknowledges that their physical location of the Special Court in Sierra Leone has a substantial impact on security considerations for witnesses and victims, and that “witnesses and their families might particularly be endangered by threats arising in the specific milieu of their local community”.²⁰ However, from the extremely limited information provided in the Motion and annexed declarations, it is not possible to make any assessment whether there is any objective basis for the fears expressed by civilian witnesses living in rural communities.

The request for measures directed to Victims and Witnesses Unit (VWU)

Paragraph 13(i) of the Motion

16. To the extent that this paragraph refers to the need to treat Prosecution and Defence witnesses equally, the Prosecution does not object as a matter of principle. However, the “level of protection and assistance” provided to witnesses by the VWU, and the conditions under which such assistance is provided, will vary from witness to witness, depending on the witness’s individual circumstances. It is not the case that the services provided by VWU are identical for each Prosecution witness, nor is it to be expected that they would necessarily be identical for each Defence witness. There is no suggestion or evidence in the Motion that VWU does not or cannot provide the necessary and appropriate level of protection and assistance to Defence witnesses. In the circumstances, a request for a blanket order that VWU shall provide Defence witnesses with the same level of protection and assistance as Prosecution witnesses is meaningless.

III. CONCLUSION

17. For the reasons given in paragraphs 4-9 and 16 above, the Prosecution submits that the request for the measures requested in paragraphs (d), (f), (i) and (k) of the Motion should be rejected.

18. For the reasons given in paragraphs 10-15 above, the Prosecution submits that the Defence has failed to provide any sufficient evidence of an *objective* basis for the fears held by the witnesses in question. For this reason, the request for the measures in

²⁰ Ruling on Modification of Protective Measures, para. 38.

paragraphs 13(a), (b), (c), (e), (g), (h) and (j) of the Motion should also be rejected. However, given that the Defence has provided evidence of *subjective* fears of witnesses, and given the importance of witness protection, the Prosecution would not oppose an order by the Trial Chamber granting leave to the Defence to re-file a motion for such protective measures to withhold the identities of the relevant Defence witnesses *from the public* (but not *from the Prosecution*), supported by further evidence of the *objective* justification for the fears held by witnesses. The relevant Defence witnesses are those listed in Annex A to the Motion.²¹

19. The Prosecution would also not oppose an interim order, applicable to the relevant Defence witnesses, in terms of the measures in paragraphs 13(a), (b), (c), (e), (g), (h) and (j) of the Motion (which withhold the identities of the witnesses from the public, but not the Prosecution), until such time as the Trial Chamber rules on any such re-filed Defence motion. After the Trial Chamber's ruling on any re-filed motion, the confidentiality of the identities of the Defence witnesses could then be lifted, to the extent that the confidentiality is not required to be maintained by that ruling. Any such interim order should expire if a motion is not re-filed by the Defence within a specified time limit.

Done in Freetown,

1 May 2006

For the Prosecution,



Christopher Staker
Deputy Prosecutor



Karim Agha
Senior Trial Attorney

²¹ The Prosecution notes that the measures requested in paragraph 13 of the Motion are expressed to apply to "All defence witnesses" (para. 13(a)) or to "defence witnesses" in general (para. 13(b) etc). However, the reasoning in the Motion, and the declarations provided in support, apply only to the three specified categories of witnesses (serving soldiers, ex-soldiers and civilian witnesses living in rural communities), and those Defence witnesses falling in these three categories are listed in Annex A to the Motion.

Index of Authorities

A. ORDERS, DECISIONS AND JUDGMENTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, ‘Ruling on Motion for Modification of Protective Measures for Witnesses’, 18 November 2004, para. 38 & 40;
2. *Prosecutor v. Kondewa*, SCSL-03-12-PT-038, ‘Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Disclosure and Urgent Request for Interim Measure until Appropriate Protective Measures are in Place’, 10 October 2003, paras. 17-19 & 28;
3. *Prosecutor v. Fofana*, SCSL-03-11-PT-039, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Disclosure’, 16 October 2003, paras. 10 – 12;
4. *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-274, ‘Decision on Joint Defence Motion for General Orders Pursuant to Rule 54’, 28 July 2005, para. 33;
5. *Prosecutor v. Brima et al.*, SCSL-01-16-T-478, ‘Order for Disclosure Pursuant to Rule 73ter and the Start of the Defence Case’, 26 April 2006;
6. *Prosecutor v. Norman*, SCSL-2003-08-PT-33, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 23 May 2003;
7. *Prosecutor v. Kallon*, SCSL-2003-07-PT-33, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 23 May 2003;
8. *Prosecutor v. Brima*, SCSL-2003-06-PT-36, ‘Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 23 May 2003;
9. *Prosecutor v. Kanu*, SCSL-2003-13-PT-37, ‘Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims’, 24 November 2003;
10. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-126, ‘Decision on Prosecution Motion for Modification of Protective Measures for Witnesses’, 8 June 2004, para. 36;

11. *Prosecutor v. Delalić et al. (Čelebići case)*, Case No. IT-96-21-A, 'Decision on Motion to Preserve and Provide Evidence', Appeals Chamber, 22 April 1999, pp. 4-5; and 'Separate Opinion of Judge Hunt', paras. 7-9.
[<http://www.un.org/icty/celebici/appeal/decision-e/90422EV37228.htm>]
[<http://www.un.org/icty/celebici/appeal/decision-e/90422EV37230.htm>]

B. TRIAL TRANSCRIPTS

1. *Prosecutor v. Brima et al.*, SCSL-04-16-T, Transcript, 26 April 2006, p. 2 (lines 15-18), p. 7 (lines 6-10 and 22-28);
2. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Transcript, 27 October 2005, p. 19, lines 20-23; p. 23, lines 15-21;
3. *Prosecutor v. Brima et al.*, SCSL-04-16-T, Transcript, 4 April 2006, p. 12 (lines 18-29).

C. DECLARATIONS

1. Declaration of Osman Keh Kamara (Legal Assistance to the Brima Defence team);
2. Declaration of Ibrahim Kargbo (Investigator for the Kamara Defence team);
3. Declaration of Bockarie Marrah (Witness Support Assistant in the Office of the Principal Defender).