

SCSL-04-16-T
(18126 - 18133)

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

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

Registrar: Lovemore G. Munlo, SC

Date filed: 8 May 2006

THE PROSECUTOR

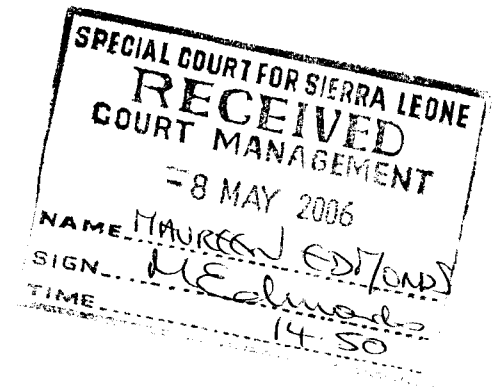
against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU



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

Office of the Prosecutor:
Christopher Staker
Karim Agha

Defence Counsel for Kanu:
Geert-Jan A. Knoops
Cary J. Knoops
A.E. Manly-Spain

Defence Counsel for Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

INTRODUCTION

1. The Defence filed the “Joint Defence Application for Protective Measures for Defence Witnesses” (“**Motion**” or “**Application**”)¹ on 25 April 2006. The Defence further filed the “Public Annexes to Motion Entitled ‘Joint Defence Application for Protective Measures for Defence Witnesses’” (“**Declarations**”)² on 28 April 2006.
2. On 1 May 2006, the Prosecution filed a “Prosecution Response to Public Joint Defence Application for Protective Measures for Defence Witnesses” (“**Prosecution Response**”).³
3. The Defence herewith files its “Public Joint Reply to Prosecution Response to Joint Defence Application for Protective Measures for Defence Witnesses” (“**Reply**”).

THE PROSECUTION’S ARGUMENT IN SUMMARY

General Submissions on the Requirements of Witness Protection Motions

4. The Defence does not object to the Prosecution on its “general submissions” contained in paragraphs 2 to 3 of the Response, but argues that the proposition of law and fact submitted therein were, with respect, misconstrued and that a wrong interpretation was given of the said propositions in applying them to the submissions of the Defence in the Motion and the Declarations.

¹ *Prosecutor v. Brima, Kamara and Kanu*, Joint Defence Application for Protective Measures for Defence Witnesses, 25 April 2006, Case No. SCSL-2004-16-T-476.

² *Prosecutor v. Brima, Kamara and Kanu*, “Public Annexes to Motion Entitled ‘Joint Defence Application for Protective Measures for Defence Witnesses’”, 28 April 2006, Case No. SCSL-2004-16-T-479.

³ *Prosecutor v. Brima, Kamara and Kanu*, Prosecution Response to Public Joint Defence Application for Protective Measures for Defence Witnesses, 1 May 2006, Case No. SCSL-2004-16-T-481.

5. The Defence particularly submits that the Motion conformed with the requirements for an application for protective measures and that it did not, by any stretch of reason, assume that protective measures for Defence Witnesses shall be an “automatic exercise”, hence the application.
6. Both the Motion and the Declarations, as shall be argued herein, disclosed sufficient claims of fear by potential witnesses whose personal (subjective) fears were assumed within the context of a broader, unsafe and threatening environment that yet prevails, particularly if any of these witnesses is known to be a witness for the Defence. It is submitted that such “environment” is a sufficient “objective” determinant of whether protective measures should be granted to Defence witnesses.
7. The unique nature of the Court being located in Sierra Leone, where the offences were allegedly committed, has ‘substantial impact on security consideration for witness and victims’.⁴ It is an objective factor for the assessment of witness security and the need for protective measures.
8. *A fortiori*, it cannot be argued that potential Defence witnesses indeed have fears to testify⁵, but that such fears, which affect them directly, should be discountenanced because they are not “objective”. The Defence argues that the primary “objective” determinant of a witness’s fears stems from the witness’s perception of the fear to him or her person and/or members of his/her family. The Defence further avers that ample indications of personal fear by witnesses as well as “threats and/or harassments” by the institutions they serve and the community or groups that they live and work in were respectively made in the Declarations.
9. The Declarations by Mr. Kamara, Mr. Kargbo and Mr. Marrah demonstrate, within the bounds of reasonable foreseeability and not absolute certainty, the

⁴ *Prosecution v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, Ruling on Motion for Modification of Protective Measures for Witnesses, 18 November 2004.

⁵ As the Prosecution itself admits in its Response, para 10.

delicate and complex nature of the security situation in the country as well as the level of threats to Defence witnesses.⁶ For the Prosecution to say that it has not discovered any “objective” justification for the fears that the potential Defence witnesses have⁷ amounts to treating the Declarations herein lightly, especially in the absence of evidence to the contrary. It has been argued before that such threats may well pose serious problems to witnesses.⁸

REQUEST FOR MEASURES AFFECTING DISCLOSURE

Paragraph 13(d) of the Motion

10. The Defence submits that the Motion complies with the said Order of the Trial Chamber, but also facilitates the presentation of the Defence case to the Court within minimum timeframe and without let or hindrance. The Prosecution is fully aware that the Defence is constrained by time, given the Orders of the Court that the Defence should *inter alia* commence its case in the first week of June 2006. The 42 days disclosure rule will therefore not naturally apply in this case as it will delay the trial further.
11. Thus, whilst the Motion does not seek to withhold the names and identities of Defence Witnesses from the Prosecution, it essentially harmonizes the fears of such witnesses about disclosure of their identities to anyone (including the Prosecution) with the order for disclosure by requesting a reasonable period of 14 days to disclose on a rolling basis. The Defence is of the view that in the absence of any intention by the Prosecution to interfere with Defence witnesses and their independent testimonies to the Court, the period of 14 days is adequate to do any independent check on a given witness.

⁶ See further *Prosecutor v. Kamara*, SCSL-2003-10-PT-040, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003, para 15.

⁷ Prosecution Response, paras. 10-15

⁸ *Prosecutor v. Kamara*, SCSL-2003-10-PT, para 15.

12. The fact that the Motion and the Declarations allege potential threats to the Defence witnesses from *the Sierra Leone Government, police and military, from pro-government supporters and from chiefs and local communities* creates a sufficient objective determinant of public perception of and reaction to those who agree to serve as witnesses for the Defence in order that their testimonies can be heard and reasonably assessed by the Court.
13. Also, the Motion has not suggested in any way that the Special Court for Sierra Leone and the Prosecution are a risk to Defence witnesses. Rather, it only seeks to balance the general and particular fears of Defence witnesses about compromising their personal security with the requirement for disclosures.
14. In answer to paragraph 6 of the Prosecution Response, the Defence repeats paragraphs 7, 10 and 11 of this Reply.

Paragraph 13(f) of the Motion:

15. The Defence submits that paragraph 13(f) of the Motion did not and was not designed to ask the Witness and Victims Section (WVS) to set the timing for disclosure. The Motion was, in the reverse, respectfully asking the Trial Chamber to urge WVS to quickly put measures in place to effect the orders sought in the Motion when hopefully granted by the Court. Defence witnesses shall be better assured of their safety if WVS puts relevant and adequate measures in place to safeguard them. At that stage, it shall logically be necessary to disclose the identities of witnesses to the Prosecution on a rolling basis without fear for their persons and/or members of their respective families.

Paragraph 13(k) of the Motion

16. The Defence submits that if its witnesses are protected by this Trial Chamber, it shall be improper for the Prosecution or any non-member of the Defence to

contact or interfere with them unbeknown to the Defence. The Prosecution's objection to the Motion under paragraph 13(k) of the Defence Motion should therefore be dismissed.

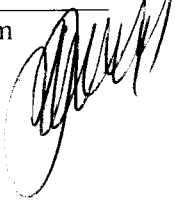
REQUEST FOR MEASURES TO WITHHOLD THE IDENTITY OF WITNESSES FROM THE PUBLIC


17. The Defence repeats paragraphs 4 to 15 of this Defence Reply in answer to paragraphs 10 to 16 of the Prosecution Response.
18. The Declarations herein gave ample indications of subjective and objective fears expressed by each of the three categories of witnesses contained in the Motion. In particular, paragraphs 4 and 5 of the Declaration By Mr. Ibrahim Kargbo alludes to both personal experiences and concerns for the security of Defence witnesses as well as to objective perception of the "depth of feelings amongst the people of Sierra Leone for the events that took place [during the "Junta period" and after]". The other Declarations similarly refer to personal and general fears expressed by potential Defence witnesses about their safety.
19. It must be particularly noted that what the Defence seeks to solicit from the three categories of Defence witnesses whom it considers directly relevant to the Defence case is the untainted truth as independently experienced by them. It is submitted that the Trial Chamber may not receive this independent truth if witnesses are in perpetual fear of being harassed, taunted, molested, shunned and eventually threatened.
20. The Defence, with respect, considers paragraphs 18 and 19 of the Prosecution Response as a dictation to the Court and ought to be altogether dismissed.

CONCLUSION

21. For the foregoing reasons, concerns and submissions, the Defence prays that the Prosecution Response be dismissed in its entirety, and that the Defence Motion be upheld.

Respectfully submitted,
On 8 May 2006

Kojo Graham
for Kojo Graham



Geert-Jan Alexander Knoops

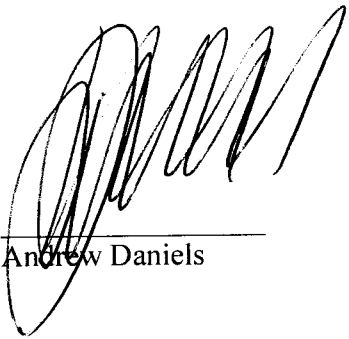

Andrew Daniels

TABLE OF AUTHORITIES

Prosecutor v. Brima, Kamara and Kanu, Joint Defence Application for Protective Measures for Defence Witnesses, 25 April 2006, Case No. SCSL-2004-16-T-476.

Prosecutor v. Brima, Kamara and Kanu, Public Annexes to Motion Entitled 'Joint Defence Application for Protective Measures for Defence Witnesses, 28 April 2006, Case No. SCSL-2004-16-T-479.

Prosecutor v. Brima, Kamara and Kanu, Prosecution Response to Public Joint Defence Application for Protective Measures for Defence Witnesses, 1 May 2006, Case No. SCSL-2004-16-T-481.

Prosecution v. Norman ,Fofana, Kondewa, SCSL-04-14-T – 274, Ruling on Motion for Modification of Protective Measures for Witnesses, 18 November 2004

Prosecution V Kamara, SCSL-2003-10-PT-040, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003.

Prosecutor v. Brima, Kamara and Kanu, Order for Disclosure Pursuant to Rule 73ter and the Start of the Defence Case, 26 April 2006, Case No. SCSL-2004-16-T-478.