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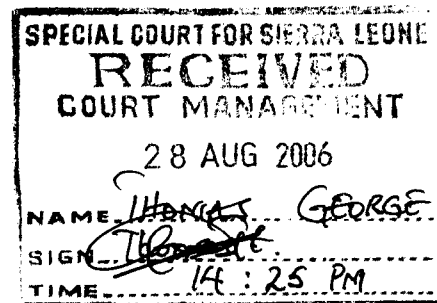
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**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown - Sierra Leone

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 28 August 2006



**THE PROSECUTOR**

**Against**

**Alex Tamba Brima  
Brima Bazzy Kamara  
Santigie Borbor Kanu**

Case No. SCSL-04-16-T

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**PUBLIC**

**PROSECUTION REPLY TO DEFENCE RESPONSE TO MOTION FOR RELIEF IN RESPECT OF  
VIOLATIONS OF THE TRIAL CHAMBER'S DECISION OF 9 MAY 2006**

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Office of the Prosecutor:  
Mr. James C. Johnson  
Mr. Karim Agha  
Ms. Nina Jørgensen

Defence Counsel for Alex Tamba Brima  
Mr. Kojo Graham  
Ms. Glenna Thompson

Defence Counsel for Brima Bazzy Kamara  
Mr. Andrew Daniels  
Mr. Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu  
Mr. Geert-Jan Alexander Knoops  
Ms. Carry Knoops  
Mr. Abibola E. Manly-Spain

## I. INTRODUCTION

1. The Prosecution hereby files its Reply to the “Public Joint Defence Response to Prosecution Motion (“**Motion**”) for Relief in Respect of Alleged Violations of the Trial Chamber’s Decision of 9 May 2006” (“**Joint Defence Response**”), dated 21 August 2006.<sup>1</sup>
2. In its Motion, the Prosecution requested an order from the Trial Chamber for the immediate disclosure by the Defence of the identities of all remaining protected Defence witnesses, including any additional witnesses appearing on the final Defence witness lists.
3. This request is opposed by the Defence. Notably, however, in their “Confidential Joint Defence Disclosure of Individual Witnesses for the 1<sup>st</sup> and 2<sup>nd</sup> Accused pursuant to the Order of the Trial Chamber II” (“**Joint Disclosure Motion**”), dated 21 August 2006,<sup>2</sup> the Defence for the First and Second Accused have disclosed the names of the witnesses on their individual witness lists to the Prosecution together with pseudonyms. This has been done notwithstanding the simultaneous filing of a “Joint Defence Application for Protective Measures for Defence Witnesses appearing from 4 September 2006 Onwards” (“**Protective Measures Motion**”)<sup>3</sup> requesting protective measures for all hitherto unprotected Defence witnesses, and the request that until a decision is made on the Protective Measures Motion, the witnesses in the Joint Disclosure Motion be treated as if they were covered by the protective measures requested.
4. The Prosecution acknowledges that the Defence for the First and second Accused have now provided the names of their individual witnesses, and as it concerns the Second Accused, the aliases. However, the names alone are of little use to the Prosecution in terms of its ability to carry out investigations. The Prosecution requires further identifying data, such as date of birth and occupation, as envisaged in the Order for Disclosure of 26 April 2006<sup>4</sup> and paragraph (d) of the orders on protective measures

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<sup>1</sup> SCSL-04-16-T-531.

<sup>2</sup> *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-530, “Confidential Joint Defence Disclosure of Individual Witnesses for the 1<sup>st</sup> and 2<sup>nd</sup> Accused pursuant to the Order of the Trial Chamber II”, 21 August 2006.

<sup>3</sup> *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-532, “Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 Onwards”, 21 August 2006.

<sup>4</sup> *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-478, “Order for Disclosure pursuant to Rule 73ter and the Start of the Defence Case”, 26 April 2006, order 1(a)(ii).

issued by the Trial Chamber on 9 May 2006 (“**Decision on Protective Measures**”).<sup>5</sup>

5. The Third Accused’s witness list and the common witness list<sup>6</sup> identify witnesses by pseudonym only. The Prosecution recognizes, however, that in an e-mail sent by the Defence to the Prosecution on 11 August 2006, the names and pseudonyms of the next 20 witnesses to be called from the common witness list were provided.<sup>7</sup> The Prosecution has also been informed, via e-mail correspondence, of the order of presentation of these witnesses, and of the fact that one witness has been removed from the list on the basis that that witness has already testified. However, the fact that this disclosure was in accordance with the 21 days required does not detract from the ongoing prejudice suffered by the Prosecution as a result of the piecemeal and erratic nature of Defence disclosure.
6. In particular, it should be noted that a majority of the 20 common witnesses whose identifying data has now been disclosed fall within the so called category of “crimebase witnesses”. The Prosecution therefore submits that there is a high likelihood that these witnesses, as with other crimebase witnesses who have already given evidence, may be dealt with quite expeditiously. This situation, as has happened earlier in the trial, is likely to lead to the Prosecution receiving less than the 21 days notice of the identifying data of witnesses which it is entitled to pursuant to the order of this Trial Chamber. In turn such late disclosure is once again likely to lead to the Prosecution suffering prejudice in preparing for cross-examination and may even compel the Prosecution to seek adjournments whilst it investigates the particular witness.

## II. ARGUMENT

### Facts Relating to Defence Disclosure

7. The Defence does not deny that the identifying data of some Defence witnesses was not disclosed 21 days before their testimony, but submits that it has acted reasonably in the face of unforeseen circumstances.
8. In relation to paragraph 3 of the Joint Defence Response, the Prosecution submits that the

<sup>5</sup> *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-488, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses”, 9 May 2006.

<sup>6</sup> *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-534, “Confidential Kanu – Defence Filing of Witness List pursuant to Trial Chamber Order of 17 May 2006”, 21 August 2006.

<sup>7</sup> See Joint Defence Response, para. 9.

fact that disclosure of the identifying information of the first seventeen witnesses was made more than 21 days in advance does not justify a subsequent breach of the Court's order. Therefore, this fact does not constitute a relevant omission from the Motion.

9. The subsequent unforeseen circumstances referred to by the Defence essentially relate to the fast pace of the testimony. The Prosecution does not agree that the pace of the testimony can be characterized as "unforeseen". The Defence could be expected to base its assessment as to the pace of testimony on the anticipated length of its examination in chief and not on the anticipated length of cross-examination which is likely to be highly variable. In any event, the Defence can be expected to err on the side of caution to ensure that it meets its obligations as ordered by the Court. Indeed, as it became apparent to the Defence "[a]fter the *first week* of defence witnesses testifying in court",<sup>8</sup> that the pace of testimony was considerably faster than expected, and as it became known to the Defence that some of the original seventeen witnesses were no longer willing to testify, the Defence should have sought the appropriate orders from the Court.
10. The Defence states in paragraph 6 of the Joint Defence Response that "it can not be held that the Defence is in violation with the Trial Chamber Decision when interpreted in conformity with its aim and purpose". This assertion lacks any foundation. The aim and purpose of the Court's order imposing a 21 day disclosure period was to balance the need to safeguard the privacy and protection of witnesses with the need for the Prosecution to have sufficient time to prepare for the cross-examination of those witnesses. This balance was struck at the 21 day limit and any shortening of that period necessarily shifts the balance and prejudices the Prosecution.
11. The Defence refers to the order issued orally by the Trial Chamber on 19 July 2006, requiring that the identifying data of Defence witnesses 32 to 49 be disclosed to the Prosecution by 5.00pm on Friday, 21 July 2006.<sup>9</sup> The Defence complied with this order and it is true that in the circumstances, the Prosecution consented to disclosure on that date. However, the Prosecution informed the Court that it had been pressing the Defence for the disclosure of the identifying data of the next witnesses and that the Prosecution did not feel that it should have to continue reminding the Defence to comply with a Court

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<sup>8</sup> Joint Defence Response, para. 5, emphasis added.

<sup>9</sup> *Prosecutor v Brima, Kanu, Kamara*, Transcript, 19 July 2006, p. 32.

order “if the late compliance will seriously prejudice the Prosecution and potentially lead to adjournments”.<sup>10</sup> The Prosecution had little choice but to consent to the disclosure of the witness’s identities as soon as feasible in order to allow the proceedings to continue as expeditiously as possible. As a result, the Prosecution’s ability to undertake investigations into certain of those witnesses for the purposes of preparation for cross examination was extremely limited. The Prosecution submits that it is unfair for it to be placed in such a position as a result of the Defence’s failure to comply with the 21 day disclosure period and wishes to ensure that the remainder of the proceedings does not continue in this fashion. Any consent by the Prosecution under such circumstances should not be construed as a waiver of the requirement for timely disclosure.

12. In relation to paragraph 8 of the Joint Defence Response, the Prosecution submits that the Defence should have notified the Court of its difficulties in meeting its obligations well before the 19 July 2006 order. Ongoing communications, while of immense value to both parties, could not alter the fact of a breach by the Defence of a Court order and, moreover, the Prosecution had repeatedly been requesting compliance as opposed to accepting the breach.

### **Adjournments**

13. The Prosecution recognizes that it may seek an adjournment to enable it to have the period it is entitled to under the Decision on Protective Measures to prepare for cross-examination. However, the possibility of a remedy that reduces the prejudice suffered by the Prosecution as a result of the Defence’s failure to meet its obligations, does not justify this failure. Furthermore, the Prosecution may not receive the full 21 day period to which it is entitled by way of an adjournment, and, indeed, in the interests of proceeding without undue delay, may feel compelled to avoid seeking a lengthy adjournment. If, as suggested in paragraph 12 of the Joint Defence Response, the Defence were to continue calling witnesses for examination-in-chief during an adjournment to reduce delay, the result would be a piecemeal presentation of the Defence case causing potential difficulties in relation to the availability of witnesses. The Prosecution notes that compliance with the 21 day requirement may not in all cases eliminate the need for

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<sup>10</sup> Ibid, pp. 30-31.

adjournments, where, for example, summaries are inadequate.

### **Prejudice to the Defence**


14. The Prosecution does not agree that an early disclosure of the identifying data of the remaining Defence witnesses would prejudice the Defence by potentially endangering the protective status of Defence witnesses or unnecessarily burdening the Defence. The terms of the Decision on Protective Measures ensure that the identities of witnesses will not be made known to the public and it is difficult to see how revealing the identities will place any additional burden on the Defence. The Prosecution has regularly disclosed identifying data of its witnesses in advance of the 42 day period generally ordered with no adverse consequences.<sup>11</sup> The Prosecution reiterates that this is a more practicable solution, consistent with the right to a fair trial, than requiring proceedings to be adjourned whenever insufficient notice is given.

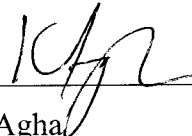
### **III. CONCLUSION**

15. The Prosecution submits that its request for an order from the Trial Chamber for the immediate disclosure by the Defence of the full identities of all remaining Defence witnesses should in all the circumstances be granted.

Filed in Freetown,  
28 August 2006

For the Prosecution,

  
\_\_\_\_\_  
James C. Johnson  
Chief of Prosecutions

  
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Karim Agha  
Senior Trial Attorney

<sup>11</sup> See *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004, Order (p).

### Index of Authorities

1. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-531, “Public Joint Defence Response to Prosecution Motion for Relief in Respect of Alleged Violations of the Trial Chamber’s Decision of 9 May 2006”, 21 August 2006.
2. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-530, “Confidential Joint Defence Disclosure of Individual Witnesses for the 1<sup>st</sup> and 2<sup>nd</sup> Accused pursuant to the Order of the Trial Chamber II”, 21 August 2006.
3. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-532, “Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 Onwards”, 21 August 2006.
4. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-534, “Confidential Kanu – Defence Filing of Witness List pursuant to Trial Chamber Order of 17 May 2006”, 21 August 2006.
5. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-488, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses”, 9 May 2006.
6. *Prosecutor v Brima, Kanu, Kamara*, Transcript, 19 July 2006, p. 32.
7. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004, Order (p).
8. *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-478, “Order for Disclosure pursuant to Rule 73ter and the Start of the Defence Case”, 26 April 2006.