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SCSL-04-15-T  
(24795-24806)

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

**TRIAL CHAMBER I**

Before: Hon. Justice Bankole Thompson, Presiding  
Hon. Justice Pierre Boutet  
Hon. Justice Benjamin Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 28 July 2006

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay  
Morris Kallon  
Augustine Gbao**

Case No. SCSL-04-15-T

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**PUBLIC**

**PROSECUTION RESPONSE TO SESAY DEFENCE MOTION FOR IMMEDIATE  
PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-  
PUBLIC DISCLOSURE**

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SPECIAL COURT FOR SIERRA LEONE  
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## I. INTRODUCTION

1. The Prosecution files this Response to the “Public Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure” (“**Motion**”).<sup>1</sup> Subject to the comments below, 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.<sup>2</sup>

3. The Prosecution accepts that in principle protective measures apply equally to Defence as to Prosecution witnesses by virtue of Rules 69 and 75, but the granting of protective measures is not an automatic exercise<sup>3</sup> and 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 establish sufficient facts supporting the *subjective* fears of witnesses, but must also provide evidence from other sources indicating an *objective* basis for assessing whether a threat to the witnesses’ security exists.<sup>4</sup> The

<sup>1</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-608, “Public Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure” 27 July 2006.

<sup>2</sup> *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; the *Separate Opinion of Judge Hunt*, paras. 7-9.

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

<sup>4</sup> *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”).

subjective feelings of the witnesses are not the only factor to be taken into account,<sup>5</sup> and the subjective feeling of a witness is not in itself conclusive.<sup>6</sup>

The request for measures affecting disclosure to the Prosecution

*Paragraph 23(d) of the Motion*

4. 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. The concern of Defence witnesses alleged in the Motion is "...a fear of possible social and economic consequences from giving evidence on behalf of any of the RUF accused."<sup>7</sup> 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. Further, although unsubstantiated allegations are made against the Government of Sierra Leone, it is clear that the Office of the Prosecutor is entirely distinct from the Government of Sierra Leone.

5. Accordingly, this measure should not be granted. There is no reason why the identities of Defence witnesses should not all be disclosed to the Prosecution prior to the beginning of the Defence case.

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 21-day time period.<sup>8</sup> A period of 21 days would be insufficient to allow the Prosecution to conduct proper investigations. Where such rolling disclosure is provided for, a more realistic timeframe would be **42** days.<sup>9</sup> Accordingly, even if the Trial Chamber were

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<sup>5</sup> Id., para. 38

<sup>6</sup> Id., para. 40.

<sup>7</sup> Motion, paras. 9 and 12.

<sup>8</sup> Motion para. 23(d).

<sup>9</sup> It is acknowledged that in the AFRC case, a 21 day period was also ordered for disclosure by the Defence to the Prosecution of identifying information for protected Defence witnesses: *Prosecutor v. Brima et al.*, SCSL-04-16-T, 'Decision on Joint Defence Application for Protective Measures for Defence Witnesses', Trial Chamber, 9 May 2006, Order (d). However, the Trial Chamber did not indicate the reasons for this. Previously, a 42 day period has been the norm. 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. 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

to grant the Defence's request for an order that the identifying data of Defence witnesses not be disclosed to the Prosecution until a given period before each witness testifies, which for the reasons above it should not, it is submitted that the disclosure period should be 42 days. That was the time period imposed on the Prosecution and there is no principled reason why it should be shorter for the Defence.

*Paragraph 23(h) 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 Victims and Witnesses Unit ("VWU") to set the timing of disclosure. To make the timing of disclosure subject to whether VWU has taken certain measures would put 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 23(h) of the Motion, if granted, would make disclosure subject to the taking of "measures determined as necessary by the Victim and Witness Unit." The decision as to protective measures rests with the Court and not the VWU. The Trial Chamber cannot delegate to VWU the responsibility for determining which protection measures are necessary for witnesses. In any event, there is nothing in the Motion to suggest that VWU believes that any witness protection measures should be taken.

*Paragraph 23(j) of the Motion*

9. This measure is excessively broad and vague. Prohibiting the Prosecution from "sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in such documents..." goes far beyond simply protecting the identity of witnesses. A document may contain information, entirely irrelevant to a witness' identity, which can only be verified by discussing the contents with a third party.

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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.

The purpose of the measure is unclear and the breadth of its scope would prevent appropriate inquiries, which would not put in jeopardy the identity of any witness, from being made. The Prosecution opposes the granting of this measure.

*Paragraph 23 (k) and (l) of the Motion*

10. There is no evidence whatsoever of the Prosecution posing any kind of a threat to the Accused and there is no factual basis to justify orders that the Prosecution maintain a log of the persons who receive witness documents or non-public documents, or an Order requiring the Prosecution to return all disclosed materials to the Registry. It is suggested that a more appropriate Order would be that the Prosecutor shall not reveal to third parties identifying information concerning witnesses.

*Paragraph 23 (m) of the Motion*

11. 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. Moreover, there is no basis to exclude the Prosecution from contacting “any relative” of a protected witness, and to the extent that any protective measures are ordered they should apply to the protected witness and not to any relatives of the witness. In the event the Trial Chamber determines that it is appropriate for the prosecution to apply to the Trial Chamber to contact a protected witness and the Trial Chamber allows such contact, the VWU should be required to contact the witness and not the Sesay Defence.

The request for measures to withhold the identity of witnesses from the public (paragraphs 23(a), (b), (e), (f), and (i) of the Motion)

12. The Motion says that the Sesay Defence is seeking protection for four categories of witnesses, but then lists only three: witnesses residing in Sierra Leone; witnesses residing in West Africa but outside Sierra Leone or who have relatives residing in Sierra Leone (the scope of this category is unclear); and witnesses residing outside West Africa. The Prosecution accepts that the declaration attached to the Motion<sup>10</sup> provides some evidence of subjective fears held by the first category of witnesses. However, as argued above, a

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<sup>10</sup> Declaration of Chantal Refahi (Legal Assistant to the Sesay Defence team) (the “Refahi Declaration”).

motion for protective measure must also provide evidence indicating an *objective* basis for protective measures. The Prosecution submits that the declaration annexed to the Motion does 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 below, the Prosecution submits that the request for these measures should also be rejected.

13. No evidence regarding the second and third categories of witnesses was advanced by the Defence, either of subjective fear or showing an objective basis for protective measures, and the request for protective measures cannot be sustained for these two categories of witnesses.

14. In addition to what is said below, the Prosecution objects to the relief sought in the final sentence of paragraph 23(f), which states that the Prosecution “shall not make an independent determination of the identity of any protected witness or encourage or otherwise aide any person to attempt to determine the identity of any such person.” In reviewing defence information members of the Prosecution must assess the information in the context of all of the other information that they have reviewed and are reviewing. In carrying out that process they may be able to determine the identity of a witness based upon the nature of the information disclosed. If the fact to which a witness is alluding is notorious, discrete and known to very few people, then a deduction would follow and this should not be subject to punishment for breach of a court order. The Prosecution member has done nothing wrong; all they have done is referred to their knowledge in assessing the information provided by the witness. The Prosecution does accept that it must not encourage or aide a third party to attempt to identify a witness.

*Witnesses residing in Sierra Leone*

15. The Refahi Declaration does not specify which category of witness is being addressed in the declaration, but it seems apparent from the content that it applies only to witnesses residing in Sierra Leone. The Refahi Declaration refers to “potential defence witnesses” who have expressed fear and concern for their safety and of those close to them. No information is provided on whether these persons were combatants, non-combatants, family members of the accused, or otherwise.<sup>11</sup> The Refahi Declaration relies on reports made by

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<sup>11</sup> Refahi Declaration, para. 4.

other investigators who say that witnesses have expressed “fear of condemnation and/or reprisals should it be known that they intend to testify”.<sup>12</sup> No attempt is made to specify what the declarant means by condemnation, and there is nothing to suggest that there is any objective reason for a Sierra Leonean to fear reprisal by “state authorities” should they testify before the Special Court on behalf of the Defence. The Refahi Declaration also says that witnesses fear condemnation and reprisals by “individuals in support of other factions in the war who might object to what may be seen as an action in support of the RUF.”<sup>13</sup> These factions are not named, and no evidence is adduced of such factions taking any steps in furtherance of the allegation made. In the absence of any factual information it is impossible to assess whether these reports are reliable.

16. The Refahi Declaration states that there have been “attempts to dissuade witnesses from testifying for Mr. Sesay”,<sup>14</sup> however, no facts are listed in the declaration or the Motion to substantiate this assertion. The same paragraph goes on to claim that “Witnesses fear pressure by community members”. The nature of the pressure is unspecified and cannot justify the granting of protective measures. The paragraph then advises that witnesses fear “harassment by both ex-combatants who stand in opposition to Mr. Sesay and agents of the Government of Sierra Leone”.<sup>15</sup> The nature of the harassment is not specified and no facts are cited to support an inference that such harassment has occurred or will occur, if witnesses are not granted protective measures.

17. The Refahi Declaration repeats, in paragraph 7, the vague and uncertain claim that witnesses “encountered pressure from their community”.<sup>16</sup> The nature of the pressure is unspecified as is the term community, which could of course include close family members, who would probably know if their son, or wife was going to testify regardless of whether there were protective measures.

18. The declaration refers to one example of a witness receiving threats. However, the allegation is that an employer threatened to dismiss the person if the witness was “seen to speak further with our team.” The declaration is worded to beg the question of whether or

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<sup>12</sup> Refahi Declaration, para. 5.

<sup>13</sup> *Ibid.*

<sup>14</sup> Refahi Declaration, para. 6 (c).

<sup>15</sup> *Ibid.*

<sup>16</sup> Refahi Declaration, para. 7.

not the employer was simply annoyed at an employee for spending time away from work talking to strangers, or whether the employer was opposed to the person testifying before the court. There is no further subjective or objective information contained in the declaration to support any protective measures. Paragraph 8 concludes with the sentence: “The Sesay Defence team is concerned that more reports will emerge as the Defence case approaches.”<sup>17</sup> That is statement of speculation, nothing more.

19. Paragraph 10 of the Motion asserts, without any confirmation in the Refahi Declaration, that “Many RUF ex-combatants went from being respected or feared as combatants to being amongst the most destitute unemployed of Sierra Leone: a change in status and quality of life for which they hold Mr. Sesay personally responsible. As a result, RUF insiders and civilians who wish to testify on behalf of Mr. Sesay face the prospect of reprisals from ex-combatants who wish to sabotage the judicial process and the defence in particular.” There is no evidence before the Trial Chamber that: (a) ex-RUF combatants hold Sesay personally responsible for their change in status and quality of life; (b) RUF insiders or civilians who wish to testify on behalf of Sesay face reprisals from ex-combatants; or (c) ex-combatants wish to sabotage the judicial process and the defence in particular. The Motion further asserts the existence of a stigmatisation of RUF members and those associated with them, however, there is no evidence before the Trial Chamber by any RUF member who says that he or she feels stigmatised.<sup>18</sup>

20. Paragraph 12 of the Motion further states that the fears of witnesses include fear of “arrest, assault and even death.” This statement finds no support in the Refahi Declaration. In the absence of factual confirmation of these assertions, the objective basis for the fears of the witnesses cannot be assessed.

*Witnesses Residing in West Africa or Who May Have Relatives Residing in Sierra Leone, and Witnesses Residing Outside of West Africa*

21. The Motion does not provide any information about the concerns of the witnesses who fall into these categories, nor does it give guidance on why the court should find that protective measures are necessary for these witnesses. Similarly, the Refahi Declaration is silent on these two categories of witness.

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<sup>17</sup> Refahi Declaration, para. 8.

<sup>18</sup> Motion, para. 11.



22. Faced with a total absence of evidence, the moving party cannot satisfy the Trial Chamber that any protective measures should be granted to these categories of witness.<sup>19</sup>

*Civilian witnesses living in rural communities*

23. Paragraph 10 of the Refahi Declaration advises that many of the potential witnesses live in rural areas and that they “fear the wrath of the state should their intention to testify for Mr. Sesay be made public.” The location of these witnesses is unknown, and the source of their fear is left to guesswork in spite of the colourful phrase “wrath of the state”. The location of the court in Sierra Leone has a substantial impact on security considerations for witnesses and victims, and witnesses and their families might be endangered by threats arising in their local community, however, from the extremely limited information provided in the Motion and declaration, it is not possible to assess 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 23(c) of the Motion*

24. 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.

*Paragraph 23(g) of the Motion*

25. Requesting that names and any other identifying information concerning witnesses be communicated to VWU no more than 21 days before the person testifies, and only then in order to implement protective measures for these individuals, is misconceived. VWU plays

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<sup>19</sup> The Prosecution applied to have protective measures deleted for two witnesses residing outside Sierra Leone, and the Trial Chamber so ordered: *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-556, “Decision On Prosecution Motion to Vary Protective Measures For Group I Witnesses TF1-041 and TF1-044”, 23 May 2006.

an important role in ensuring that witnesses are made available to testify in a timely manner. Depending on weather conditions, witness location, and other work demands it may be necessary for VWU to be informed more than 21 days in advance so that they can ensure that witnesses are brought to court as needed. There is no principled reason to withhold information from VWU, and this relief should not be granted.

### III. CONCLUSION

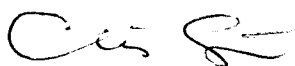
26. For the reasons given above the Prosecution submits that the request for the measures requested in paragraphs 23 (c), (d), (g), (h), (j), (k), (l) and (m) of the Motion should be rejected.

27. For the reasons given in paragraphs 13-23 above, the Prosecution submits that the Defence has failed to provide sufficient evidence of an *objective* basis for the fears held by the witnesses in question. For this reason, the request for the measures in paragraphs 23(a), (b), (e), (f) and (i) 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.

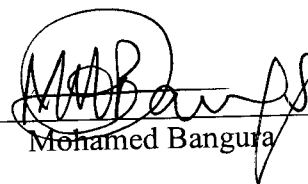
28. The Prosecution would also not oppose an interim order, applicable to the relevant Defence witnesses, in terms of the measures in paragraphs 23(a), (b), (e), (f) and (i) of the Motion (which withhold the identities of the witnesses from the public, but not the Prosecution), until the Trial Chamber rules on a re-filed Defence motion. After such ruling the confidentiality of the identities of the Defence witnesses could then be lifted, to the extent that the confidentiality is not required 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, 28 July 2006

For the Prosecution,



Christopher Staker



Mohamed Bangura

**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.
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.
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.
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.
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, Separate Opinion of Judge Hunt.

<http://www.un.org/icty/celebici/appeal/decision-e/90422EV37228.htm>

<http://www.un.org/icty/celebici/appeal/decision-e/90422EV37230.htm>

12. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-556, “Decision On Prosecution Motion to Vary Protective Measures For Group I Witnesses TF1-041 and TF1-044”, 23 May 2006.

**B. TRIAL TRANSCRIPTS**

13. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Transcript, 27 October 2005.

**C. DECLARATIONS**

1. Declaration of Chantal Refahi (Legal Assistant to the Sesay).