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SCSL-04-15-T

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(25928 - 25937)

CASE No.SCSL-2004-15-T

**SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER 1**

Before:

Hon Justice Bankole Thompson, Presiding Judge
Hon Justice Pierre Boutet
Hon Justice Benjamin Mutanga Itoe

Registrar:

Mr. Lovemore G. Munlo SC

Date: 31 January 2007

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

PUBLIC

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

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INTRODUCTION

1. The Defence for Morris Kallon (the “Kallon Defence”) files this Reply to the “Public Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure” (the “Motion”¹) and the Prosecution Response to the Motion (the “Response”²). The Defence submits that the Motion is sound and has merit and that all the requested orders should be granted.

ARGUMENTS

Material Supporting Factual Assertions in the Motion

2. Despite the Prosecution’s misplaced arguments, the Kallon Defence agrees that there must be an objective basis for concluding the existence of security risks and threats to victims and witnesses and has so argued in its Motion. However, the Prosecution asserts that there is a lack of objective evidence to show that witnesses for the Kallon Defence are in danger or risk.³
3. This Chamber has recently found that a prima facie case was established concerning protection of witnesses testifying in defence of the first accused.⁴ The Kallon Defence have argued that this is sufficient objective basis and that these principles apply by implication to the second accused.⁵ In further substantiation of these arguments, the Kallon Defence has relied on a number of materials which are before the record of the Court which were relied upon by the Prosecution and by the first accused in providing protective measures for their witnesses.⁶ There is no requirement for the Kallon Defence to provide separate or additional objective evidence in order to meet the Rule 69 test of “exceptional circumstances”.

¹ *Prosecutor v Sesay et al.* SCSL-04-15-T-682, Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 January 2007.

² *Prosecutor v Sesay et al.* SCSL-04-15-T-694, Prosecution Response to Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 26 January 2007.

³ *Response*, para 8.

⁴ *Prosecutor v Sesay et al.* SCSL-04-15-T-668, Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (the “Sesay Decision”), 30 November 2006.

⁵ *Motion*, para 8.

⁶ *Motion*, para 11.

4. The Prosecution asserts there is a clear distinction between Prosecution witnesses, who the Prosecution say are at risk from elements within the RUF, and witnesses who are called by accused persons. The Prosecution question what objective evidence exists to show that defence witnesses are in danger or at risk, which type of witness is at risk and from whom are they at risk. They state that protective measures should be tailored to the dangers and risks for particular witnesses.⁷
5. Reiterating the arguments laid out in the Motion⁸, the Kallon Defence stress that this Chamber has already found good cause as to the dangers and risks facing defence witnesses for the first accused before the Special Court.⁹ It is obvious that these considerations apply by extension to defence witnesses for the second accused. The Prosecution itself does not dispute that the current assessment of the level of objective fear remains high and unchanged.¹⁰ Trial Chamber II has held that protective measures may be ordered “on the basis of a current security situation even where the existence of threats or fears as regards specific witnesses has not been determined.”¹¹
6. The Kallon Defence relies on the affidavit evidence of Mr Morie Lengor¹² and Mr Alan White¹³ and argues that, save for a few sentences, the assertions laid out apply to all witnesses testifying before the Special Court and are not limited to Prosecution witnesses alone. The Chamber has recognised that insider witnesses, testifying on behalf of either the Prosecution or Defence, are particularly vulnerable.¹⁴ As argued, many insider witnesses fear reprisals from fellow ex-combatants who bear various grudges against Mr.

⁷ *Response*, para 10.

⁸ *Motion*, para 9 and 11.

⁹ *Sesay Decision*, para 24.

¹⁰ *Response*, para 8.

¹¹ *Prosecutor v Brima et al.*, SCSL-04-16-T-488, Decision on Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006. See further, *Prosecutor v Muvuyini and Others*, ICTR-2000-55-1, Decision on the Prosecutor’s Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 25 April 2001, paras 21 – 22.

¹² *Prosecutor v Sesay*, SCSL-03-05-I-15, Attachment A to Prosecution Motion for Immediate Protective Measures for Witnesses and Non-Public Disclosure, 7 April 2003. See in particular paras 6 – 10.

¹³ *Prosecutor v Sesay*, SCSL-03-05-I-15, Attachment B to Prosecution Motion for Immediate Protective Measures for Witnesses and Non-Public Disclosure, 7 April 2003. See in particular from para 7, line 3.

¹⁴ *Prosecutor v Sesay et al.* SCSL-04-15-T-551, Decision on Prosecution Motion to Amend Protective Measures for Witnesses TF1-168 and TF1-041, 9 May 2006. See also the *Sesay Decision*, para 19, footnote 22.

Kallon particularly due to his support of the disarmament process. Further, defence witnesses for Mr Kallon fear relatives, friends and associates of other accused before the Special Court, members of other belligerent parties to the war, members of the communities where they live and work and also retribution from the State, the opposing party to the conflict. Substantiation for these assertions can be found in the above mentioned declarations. In particular, Dr White states that individuals loyal to the belligerent parties remain employed by the Sierra Leone police. The Prosecution has affirmed that it seeks the assistance of the Sierra Leone police to locate defence witnesses it wishes to interview, especially in rural areas, and to make facilities available for conducting interviews.¹⁵ This constitutes prima facie evidence that disclosure of identifying information to the Prosecution could create risks for Kallon Defence witnesses.

7. The affidavit evidence by Ms Chantal Refahi¹⁶, Senior Legal Assistant of the first accused, further lends credence to the subjective fears of many Kallon Defence witnesses outlined by the Kallon Defence in the Motion.¹⁷ Ms Refahi affirms that potential witnesses for the first accused have expressed fear of condemnation or reprisals should it be known they intend to testify on behalf of the RUF defence. In particular, these reprisals are feared to originate from state authorities, individuals in support of other factions in the war, community members and those who have given evidence for the Prosecution.¹⁸ By extension, it is reasonable to deduce that these same subjective fears would be faced by defence witnesses testifying for other RUF accused, many of whom may be common witnesses.¹⁹

¹⁵ *Prosecution v Norman et al.*, SCSL-04-14-T-629, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20 June 2006, para 9.

¹⁶ *Prosecutor v Sesay et al.* SCSL-04-15-T-608, Annex A to Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 25 July 2006.

¹⁷ *Motion*, para 10.

¹⁸ *Prosecutor v Sesay et al.* SCSL-04-15-T-608, Annex A to Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 25 July 2006, paras 5 – 6.

¹⁹ This Chamber recognised the existence of possible common witnesses in its Scheduling Order. See *Prosecutor v Sesay et al.* SCSL-04-15-T-659, Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 30 October 2006.

Orders Requested: Categories of Witnesses

8. The Motion requests protective measures for four categories of witnesses. The Prosecution takes issue with category (iv) witnesses who reside outside West Africa²⁰.
9. The Prosecution was granted protection for this category of witnesses on essentially the same evidentiary material as relied upon in the Motion.²¹ The Prosecution state that owing to changed circumstances in the security situation, particularly for witnesses residing outside West Africa, some of these measures were no longer considered necessary from March 2006 and following a Prosecution application these measures were rescinded for certain witnesses.²² However, in that decision a significant consideration must have been the Prosecution's statement that TF1-042 and TF1-044 had indicated they wished to testify publicly.²³ The Prosecution still asserted that protective measures were necessary for the remainder of Prosecution witnesses who were resident abroad.²⁴
10. The Kallon Defence request that the same level of protection provided to Prosecution witnesses residing outside West Africa who testified against Mr Kallon be extended to such witnesses testifying on his behalf in order that this not impact on their readiness to testify.

²⁰ Motion, para 13(d)

²¹ See *Prosecutor v Sesay*, SCSL-2003-05-PT-IP-038, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and For Non-Public Disclosure, 23 May 2003 and SCSL-2004-15-T-38, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004 at para 21.

²² Reply, para 13.

²³ *Prosecutor v Sesay et al.* SCSL-04-15-T-540, Confidential Prosecution Motion to Vary Protective Measures for Group I Witnesses, 3 May 2006 at para 4.

²⁴ *Prosecutor v Sesay et al.* SCSL-04-15-T-556, Decision on Prosecution Motion to vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006.

Orders Requested: Contacting Protected Defence Witnesses

11. The Motion requests that the method for establishing contact with protected Kallon Defence witnesses by the Prosecution and the co-accused should be the same as the procedure ordered by this Trial Chamber to Prosecution witnesses who were granted protective measures.²⁵
12. The Prosecution states the circumstances of prosecution witnesses are different from defence witnesses. In service of this, the Prosecution alleges the accused committed crimes and were part of a joint criminal enterprise that committed crimes and that persons connected to the joint criminal enterprise are a danger to witnesses.²⁶
13. As argued above, and in the Motion, Kallon Defence witnesses have legitimate fear of being exposed to harassment by agents of the Prosecution amongst others. This Chamber accepted in the CDF case that it would have placed the same restrictions upon the Prosecution (as requested in the Motion at paragraph 15(j)) regarding contacting Defence witnesses through the Trial Chamber only if the “the Defence had made the necessary applications before The Chamber, and asserted that Defence witnesses expressed fear that “by placing their names on the defence witness list, they would expose themselves to harassment by agents of the Prosecution.”²⁷ This Chamber also noted in the CDF case that it is prudent and fair for the Prosecution to give notice to the Defence of their intention to interview their witness in order to avoid allegations of bad faith or improper interference with a witness.²⁸
14. The Prosecution further introduces extraneous arguments relating to the different obligations pertaining to prosecutors and defence counsel. It is argued that the Prosecution’s ethical responsibility is broader than that of defence counsel to act

²⁵ *Motion*, para 15(j) and 16.

²⁶ *Reply*, para 16.

²⁷ *Prosecution v Norman et al.*, SCSL-04-14-T-629, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20 June 2006, para 18.

²⁸ *Ibid.* para 20

impartially in seeking a fair trial.²⁹ The Prosecution cite and reference two lengthy cases from one jurisdiction, Canada³⁰. The Kallon Defence do not consider that this application concerning the safety and security of its defence witnesses is an appropriate forum to discuss the ethical duties of counsel before International Criminal Courts or across different jurisdictions. However, the Kallon Defence wish to draw attention to Article 5 of the Code of Professional Conduct for Counsel with Right of Audience before the Special Court for Sierra Leone which imposes an obligation on all counsel of competence, independence and integrity. Article 8(a) further provides that all counsel have an overriding duty to the Special Court to act with independence and in the interests of justice and must assist the Court in the administration of justice. Of note, Article 10(a)(iii) states that in dealing with victims and witnesses counsel should consider the views, legitimate interests and concerns of witnesses.³¹

REQUEST

15. The Kallon Defence is grateful that the Prosecution reasonably does not take issue with the orders sought in paragraphs 15(a) to (i) of the Motion as it recognises that the Sesay Decision provides basis for the Kallon Defence application³² and accordingly the Kallon Defence request that these measures be granted. However, the Kallon Defence considers that the overall Prosecution Response does not give adequate weight to issues of protection of witnesses, which should be of importance to all organs of the Court. In this regard countering arguments for the mere sake of prosecutorial advantage should be minimised. Testifying before the Special Court is often a difficult and painful exercise and without the testimony of defence witnesses the fair trial rights of the accused would be diminished.

16. The Kallon Defence respectfully argue that the issue is not whether Kallon Defence witnesses should be treated differently from Sesay Defence witnesses but rather that

²⁹ *Reply*, para 17.

³⁰ *R v Stinchcombe* (1991) 3 S.C.R. 326 and *R v Bain* (1992) 1 S.C.R. 91, attached to Reply.

³¹ Code of Professional Conduct for Counsel with Right of Audience before the Special Court for Sierra Leone, adopted 14 May 2005 and amended 13 May 2006.

³² *Reply*, para 18.

protective measures for defence witnesses should be as effective as those for Prosecution witnesses in order to ensure the principle of equality of arms³³. There is substantial case law to support this assertion.³⁴ Based on this important principle, the Kallon Defence submit that the Trial Chamber should grant the orders requested in paragraphs 13(d) and 15(j) of the Motion.

Dated 31 January 2007



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Lead Counsel 1

³³ Article 17(4)(e) Statute of the Special Court for Sierra Leone

³⁴ See for example: *Prosecutor v Rwamakuba*, ICTR-98-44C, Decision on Defence Motion for Protective Measures, 21 Sept 2005, 10; *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses, 27 June 2005; *Prosecutor v Jean Mpambara*, ICTR 2001-65-I, Decision on Protection of Defence Witnesses, 4 May 2005, para 2; *Prosecutor v Simba*, ICTR-2001-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004, para. 9; *Prosecutor v Muhimana*, ICTR-95-1B-T, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004, para 16; *Prosecutor v Bagasora*, ICTR-98-41-T, Decision on Bagasora Motion for Protection of Witnesses, 1 September 2003, para 4.

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Other

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C. OTHER DOCUMENTS

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