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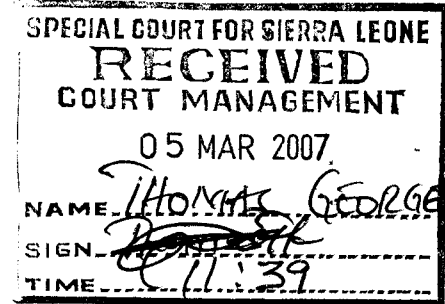
THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

Before: Justice Bankole Thompson, Presiding Judge  
Justice Pierre Boutet  
Justice Benjamin Mutanga Itoe

Registrar: Mr Lovemore G. Munlo, SC

Date filed: 5 March 2007



The Prosecutor

-v-

Issa Hassan Sesay  
Morris Kallon  
Augustine Gbao

Case No. SCSL-2004-15-T

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PUBLIC

SESAY DEFENCE MOTION FOR IMMEDIATE  
PROTECTIVE MEASURES FOR WITNESSES

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SCSL-2004-15-T

## I. INTRODUCTION

1. The defence for the First Accused Issa Sesay (the “Defence”) hereby submits its motion for immediate protective measures and for non-disclosure for all witnesses resident or working outside of West Africa (the “Motion”) with respect to the identities of (i) certain officers of national Armed Forces (the “Armed Forces Witnesses”) who have agreed to testify on behalf of Mr Sesay but have yet to receive the necessary clearance from their Ministry of Defence (the “MoD”) and (ii) other prominent international witnesses (the “International Witnesses”) who have expressed their interest in testifying on behalf of Mr Sesay but have articulated concerns regarding their privacy and/or confidentiality and/or security due to both the political sensitivity of these international proceedings and the stigmatisation of the RUF.
2. Under the Rules of Procedure and Evidence (the “Rules”) and this Chamber’s jurisprudence, the imposition of objectively reasonable conditions for the release of a witness by an employer may necessitate the implementation of certain protective measures. With respect to the Armed Forces Witnesses, the particular MoD has indicated that it may impose such conditions, and the Defence therefore has been obliged to agree to treat the information received from the witnesses as well as their identities as confidential until any reasonable conditions are articulated and satisfied.
3. Additionally, genuine privacy concerns are clearly contemplated by the Rules as a legitimate justification for the application of protective measures. It is submitted that “privacy” contemplates a very wide range of personal and professional concerns which potentially impact upon the integrity of the process and the ability of a party to secure evidence in support of its case. As to the remaining International Witnesses, the Defence has been obliged, when seeking their cooperation, to undertake to address and alleviate such privacy concerns to the fullest extent possible under the Rules.
4. Finally, all of the witnesses (both the Armed Forces and the International Witnesses) have articulated concerns about confidentiality. This suggests to the Defence that the integrity of the proceedings may be damaged by the loss of evidence *unless* reassurance

and protection are provided by the implementation of appropriate protective measures to safeguard privacy and/or confidentiality and/or security.

5. Accordingly, the Defence hereby seeks the imposition of certain temporary protective measures in order to facilitate the successful release of the Armed Forces Witnesses by the MoD, to assuage the privacy concerns of all the International Witnesses, and to alleviate the confidentiality concerns of all the witnesses arising from the disclosure of their desire to testify on behalf of Mr Sesay. Such measures are crucial to affecting the voluntary attendance of these individuals, none of whom are necessarily subject to this Court's compulsory jurisdiction.

## II. SUBMISSIONS

### A. Applicable Law

3. Rule 69(A) provides that “[i]n exceptional circumstances, either of the parties may apply to [...] the Trial Chamber to order the non-disclosure of the identity of a [...] witness who may be in danger or at risk, until the Judge or Trial Chamber decides otherwise.” Additionally, Rule 75(A) empowers the Trial Chamber to “order appropriate measures to safeguard the privacy and security of [...] witnesses, provided that the measures are consistent with the rights of the accused. The range of such appropriate measures is subsequently set out in Rule 75(B).
4. This Chamber has repeatedly held that a decision on an application made pursuant to these provisions “requires a balance to be struck between full respect for the rights of the Accused and the protection and needs of [...] witnesses within the legal framework of the Statute and Rules within the context of a fair trial.”<sup>1</sup> As with any such application, the “main issue for determination is whether the Defence has established a *prima facie* showing for protective measures for its witnesses.”<sup>2</sup>

<sup>1</sup> *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-668, Trial Chamber I, ‘Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 30 November 2006, ¶ 17 (quoting *Ibid.*, ‘Order on Protective Measures for Additional Witnesses’, 24 November 2004, p.3) (citing *Ibid.*, ‘Decision on Prosecution Motion for Modification of Protective Measures for Witnesses’, 5 July 2004; *Ibid.*, ‘Decision on Prosecution Motion to Vary Protective Measures for Group 1 Witnesses TF1-042 and TF1-044’, 23 May 2006; and *Prosecutor v. Musema*, ICTR-96-13-A, Appeals Chamber, ‘Judgment’, 16 November 2001, ¶¶ 68-69).

<sup>2</sup> *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-668, Trial Chamber I, ‘Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure’, 30 November 2006, ¶ 21.

5. In two of its previous rulings in the CDF case and one in the instant case—each on motions for protective measures pursuant to Rules 69 and 75 filed by the Office of the Prosecutor (the “Prosecution”)—this Chamber has accommodated the requests of international organisations in order to facilitate the testimony of Prosecution witnesses. In each case, the witness’s employer made the release of the witness contingent upon the granting of certain protective measures:
- a. This Chamber twice endorsed the use of a pseudonym as well as closed-session testimony for the Prosecution’s child soldier expert based on, *inter alia*, the strong assertions by the witness’s current and former employers—both international organisations—that disclosure of the witness’s identity could have resulted in threats to the witness’s personal safety and/or compromised the witness’s future employment functions.<sup>3</sup> The former employer made witness anonymity a condition to the release of the witness’s testimony.<sup>4</sup>
  - b. This Chamber held that the testimony of Prosecution witness TF2-218—who had previously been granted the use of pseudonym—could be heard in closed session considering, *inter alia*, “that his former employer has waived [his] immunity from legal process on the condition that he be allowed to testify in closed session in view of the nature of his evidence.”<sup>5</sup>
6. Accordingly, the Defence submits that—pursuant to this Chamber’s established jurisprudence—the assertion by a party of objectively reasonable conditions for the release of a witness by his or her employer amounts to “a *prima facie* showing for protective measures.”<sup>6</sup> It is further submitted that such a condition should be considered objectively reasonable so long as it does not preference the protection and needs of the witness over the rights of the Accused “within the legal framework of the

<sup>3</sup> See *Prosecutor v. Norman et al.*, SCSL-2004-14-T-405, Trial Chamber I, ‘Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures’, 24 May 2005, p.3 and *Prosecutor v. Sesay et al.*, SCSL-2004-15-T, Trial Transcript, 11 July 2006, pp. 68-69.

<sup>4</sup> See *Prosecutor v. Norman et al.*, SCSL-2004-14-T-339, ‘Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures Pursuant to Rules 69 and 73bis(E)’, 15 February 2005, Confidential Annex A, ¶¶ 4-5 and *Prosecutor v. Sesay et al.*, SCSL-2004-15-T, Trial Transcript, 11 July 2006, pp. 68-69.

<sup>5</sup> See *Prosecutor v. Norman et al.*, SCSL-2004-14-T-432, Trial Chamber I, ‘Decision on Prosecution Application for Closed Session for Witness TF2-218’, 15 June 2005, p. 2.

<sup>6</sup> See n.2, *supra*.

Statute and Rules within the context of a fair trial.”<sup>7</sup> Finally, the genuine privacy concerns of a potential witness fall squarely within the plain-meaning of Rule 75.

## **B. Factual Basis**

7. The Motion is supported by the Affirmation of Mr Andrew Ianuzzi, attached hereto as Annex A, which substantiates the following factual assertions.

### **1. The Armed Forces Witnesses**

8. As of the date of filing, the Armed Forces Witnesses have agreed to testify on behalf of Mr Sesay. However, clearance has yet to be obtained from the MoD, although an official request was submitted on 2 March 2007. During interviews with the Armed Forces Witnesses it was verbally communicated to the Defence that such release may be contingent upon the satisfaction of certain unnamed conditions, and the interviews proceeded upon the understanding that all information including the identity of the Armed Forces Witnesses would remain confidential until such release was sought and granted.
9. While the Defence acknowledges that it is impossible to assess the objective reasonableness of as-yet-unnamed conditions, the assertion by the MoD of the possibility of conditions should be sufficient at this juncture. It indicates the real possibility of internal and external concerns regarding the release of witnesses on behalf of the Defence. Indeed, another Defence team has already encountered such a situation in connection with its attempts to interview members of another national armed force, whereby its ministry of defence indicated that a political decision had been taken to cooperate *only* with the Prosecution.
10. The Defence is concerned that a failure to honour its undertaking of confidentiality may result in the subsequent denial of the requested clearance by the relevant military authorities. Naturally, the Defence is loath to precipitate any such negative reaction.

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<sup>7</sup> See n.1, *supra*.

<sup>10</sup> Rule 8(A) provides: “An order issued by a Chamber or by a Judge shall have the same force or effect as if issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court.” It is unclear to the Defence from the plain meaning of this Rule what effect, if any, such an order would have on an individual outside the jurisdiction of the aforementioned Sierra Leonean judicial officers.

given the rather unfortunate stance of the aforementioned government as well as the fact that the Armed Forces Witnesses are potentially beyond the reach of this Chamber's subpoena power.<sup>10</sup>

## **2. The International Witnesses**

11. The remaining International Witnesses include three sitting senior officials in foreign governments, the current chairman of an international organisation, and a high-ranking military officer in various locations throughout African and Asia. Each witness has been contacted by the Defence, either directly or through his official representatives, and each has agreed to consider testifying on behalf of Mr Sesay. However, the witnesses have also articulated concerns of privacy and protocol given their prominent positions and the political sensitivity, not to say stigma, associated with the RUF trial. All have asked that such concerns be addressed before making final commitments to travel to Freetown.
12. Of course, the Defence has agreed to accommodate any reasonable request for privacy to the extent possible under the Rules, and in the case of each witness discussions are ongoing. As with the Armed Forces Witnesses, the Defence is anxious not to offend its pledge of sensitivity to the expressed concerns of the International Witnesses. Failure to proceed with extreme discretion could very well result in the loss of valuable evidence on behalf of Mr Sesay, evidence which this Chamber may not be in a position to compel.<sup>11</sup> The loss of any witness would impact greatly upon the integrity of the proceedings and the fair trial rights of the accused.

### **C. Relief Sought**

13. Accordingly, out of an abundance of caution and with a view to preserving what are currently several delicate situations, the Defence submits that the imposition of protective measures would be prudent until such time as (i) the MoD has articulated its conditions, if any, the Defence has had time to consider them, and any necessary further motions are filed on behalf of the Armed Forces Witnesses; (ii) the Defence finalises its negotiations with the International Witnesses; and (iii) each witness has agreed to the disclosure of his identity.

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<sup>11</sup> *Ibid.*

14. The Defence submits that the assertions made to date by the MoD and the International Witnesses amount to “a *prima facie* showing for protective measures,”<sup>12</sup> and the proposals listed below are objectively reasonable. Granting the Motion will in no way negatively impact the rights of Mr Sesay or the other accused persons, nor will the Prosecution suffer any prejudice. The relief sought is clearly “within the legal framework of the Statute and Rules within the context of a fair trial.”<sup>13</sup>
15. The Defence therefore requests that this Chamber issue the following Orders:
- a. An Order allowing the Defence to withhold identifying data of the relevant witnesses or any other information which could lead to the disclosure of their identities until official clearance is received from the MoD and/or the Defence finalises its negotiations with the remaining International Witnesses and/or each witness consents to the disclosure of his identity.
  - b. An Order permitting the Defence to designate a pseudonym for each witness which will be used to refer to the witness until official clearance is received from the MoD and/or the Defence finalises its negotiations with the remaining International Witnesses and/or each witness consents to the disclosure of his identity.
  - c. An Order forbidding the Prosecution, the Witness and Victim Section, and the defence teams for Messrs Kallon and Gbao from making an independent determination of the identity of the witnesses or encouraging or otherwise aiding any person to attempt to determine the identity of any such person until official clearance is received from the MoD and/or the Defence finalises its negotiations with the remaining International Witnesses and/or each witness consents to the public disclosure of his identity. (It is submitted that this requirement is essential given the sensitive nature of all the witnesses involved. Any attempts, official or otherwise, to determine the identity of any such person could precipitate the complete withdrawal of the witness from the delicate negotiations and discussions which are in progress concerning his attendance at the Court. The Defence emphasises the substantial work and careful negotiation which have been

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<sup>12</sup> See n.2, *supra*.

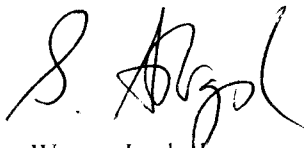
<sup>13</sup> See n.1, *supra*.

necessary to achieve the present degree of cooperation and understanding between the witnesses and the Defence. These efforts could easily be undone if any person or party *attempted* to determine their identity and this attempt became known.)

### III. CONCLUSION

16. For the reasons stated above, the Defence requests the Chamber to grant the Motion and issue the requested Orders.

Freetown, Sierra Leone  
5 March 2007



Wayne Jordash  
Sareta Ashraph



## BOOK OF AUTHORITIES

1. Rules of Procedure and Evidence: Rules 69(A), 75(A), 75(B)
2. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T, Trial Transcript, 11 July 2006, pp. 68-69
3. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-668, Trial Chamber I, 'Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure', 30 November 2006
4. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-432, Trial Chamber I, 'Decision on Prosecution Application for Closed Session for Witness TF2-218', 15 June 2005
5. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-405, Trial Chamber I, 'Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures', 24 May 2005
6. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-339, 'Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures Pursuant to Rules 69 and 73bis(E)', 15 February 2005, Confidential Annex A

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**ANNEX A**

**Affirmation of Mr Andrew Ianuzzi, Legal Assistant, Sesay Defence Team**

SCSL-2004-15-T

**AFFIRMATION**

I, Andrew Ianuzzi, Legal Assistant for the Sesay Defence Team, hereby affirm the following:

1. After receiving permission from the ministry of defence (the "MoD") of a certain non-West African national armed force, I conducted interviews with several officers of that organisation with a view toward gaining their cooperation as witnesses on behalf of Mr Sesay.
2. Prior to my first interview, I was verbally informed by a legal affairs officer for the MoD, that although permission had been granted to conduct the interviews, the MoD had not yet agreed to release any officers to act as witnesses. The legal affairs officer further indicated that such release would only follow from a further formal request subject to any conditions the MoD might choose to impose. It was agreed that the information obtained during the interviews, including the names of the potential witnesses, would be kept confidential pending the MoD's release. The interviews proceeded on this understanding.
3. Upon my return to Freetown, I submitted a formal request to the MoD to release certain officers as witnesses on 2 March 2007. To date, no reply from the MoD has been received.
4. Since January 2007, I have made contact with several potential witnesses and/or their official representatives outside the jurisdiction of the Special Court. These include three sitting senior officials in foreign governments, the current chairman of an international organisation, and a high-ranking military officer in various locations throughout Africa and Asia.
5. Each witness agreed to consider testifying on behalf of Mr Sesay. However, the witnesses and/or their representatives voiced certain privacy concerns as well as certain conditions of protocol and matters of state given their prominent positions. Some mentioned the political sensitivity of appearing to be associated with the RUF, and all requested that their names not be disclosed to any party pending final agreement. I assured the witnesses that our team would endeavour to accommodate their reasonable requests for privacy and confidentiality to the extent possible under the Rules. In the case of each witness, discussions are ongoing. To date, no agreements have been finalised.

Freetown, Sierra Leone  
5 March 2007



Andrew Ianuzzi