

I. INTRODUCTION

1. The Prosecution files this Response to the “Sesay Defence Motion for Immediate Protective Measures for Witnesses” (“**The Motion**”).¹
2. Orders 24(i) and (ii) from the “Decision on Sesay Defence Motion for Immediate Protective Measures For Witnesses and Victims and for Non-Public Disclosure” appear to be relevant to the application, and those orders state as follows:
 - (i) That the Defence has established a *prima facie* case for the issuing of proposed protective measures (a), (b), (i), (j), (k), (l) and the first part of (f) as acceptable and minimally intrusive methods of protecting the safety and privacy of witnesses resident in Sierra Leone and other parts of West Africa, and those living outside West Africa who have indicated their willingness to testify.
 - (ii) That no *prima facie* showing has been made by the Defence for the issuing of protective measures in respect of potential witnesses resident outside West Africa.²
3. The persons referred to in the Motion appear to be persons who reside outside of West Africa.³ The Prosecution says the Motion should be dismissed.

II. SUBMISSIONS

a) Requirements of witness protection motions

4. Under Rule 69 of the Rules of Procedure and Evidence (“**Rules**”), “*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.*” Further, Rule 75(A) empowers the Trial Chamber to, “*order appropriate measures to safeguard the privacy and security of [...] witnesses...*”
5. The ICTR reviewed the law on this issue in *Nteziryayo*⁴ and said:

¹ *Prosecutor v Sesay et al*, SCSL-2004-15-T-720, “Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 5 March 2007.

² *Prosecutor v Sesay et al*, SCSL-2004-15-T-668, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 30 November 2006 (“November 2006 Protective Measures Decision”), para. 24.

³ Motion, Annex A, the Affirmation of Andrew Ianuzi, states at para. 1 that the Ministry of Defence referred to in the Affirmation and the Motion is that of a non-West African country, and para. 4 refers to potential witnesses in locations throughout Africa and Asia.

⁴ *Prosecutor v Nteziryayo*, ICTR-1997-29-T, “Decision on the Defence Motion for Protective Measures for Witnesses”, 18 September 2001, para. 6.

6. The Chamber recalls that the determination of the need to order protective measures for witnesses cannot be made purely on the *subjective* basis of either fear expressed by witnesses or their willingness to testify at trial if their security is guaranteed. Rather, the Chamber must be satisfied that an *objective* situation exists whereby the security of the said witnesses is or may be at stake, which accounts for such a fear. Only in this case would protective measures be warranted (See, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-I-T, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995: "[F]or a witness to qualify for protection [...], there must be a *real* fear for the safety of the witness or her or his family, and that there must always be an *objective* basis to underscore this fear [...]" (Emphasis ours), a Decision referred to in the "Decision on the Prosecutor's Motion for Witness Protection", *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A1-I, Trial Chamber I of the Tribunal, 17 September 1999; See also ICTY, *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36, "Decision on Motion by Prosecution for Protective Measures", 3 July 2000, at para. 26: "Any fears expressed by potential witnesses themselves that they may be in danger or at risk are not in themselves sufficient to establish any real likelihood that they may be in danger or at risk. Something more than that must be demonstrated [...]").⁵
6. An application for protective measures must be supported by sufficient evidence to permit the Court to make a reasonable and objective assessment of the appropriateness of the measures requested.⁶ Granting protective measures is not an automatic exercise⁷ and unsupported claims of fears expressed by witnesses, without more, do 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.⁸

b) The Evidence Before the Trial Chamber

7. The evidence referred to in the Motion falls short of the requirement established by Rule 69: that the proposed witness "...may be in danger or at risk." The concerns of Defence

⁵ *Ibid.*

⁶ *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.

⁷ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, Transcript, 27 October 2005, p. 19, lines 20-23; p. 23, lines 15-21.

⁸ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, "Ruling on Motion for Modification of Protective Measures for Witnesses" ("Ruling on Modification of Protective Measures"), 18 November 2004, para. 38 & 40.

witnesses, that are alleged in paragraph 5 of the Declaration of Andrew Ianuzi are that, "...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 requested that their names not be disclosed to any party pending final agreement."⁹

8. The Motion does not identify **any** possible threat that might arise from disclosure of a witness' identity pending the witness' final agreement to testify, and the purpose of protective measures law is to grant protection to persons in need of protection, not to people who simply want anonymity.
9. The two cases cited at paragraph 5 of the Motion do not apply to the current application. As is stated in paragraph 5. a. of the Motion, which refers to protective measures for a child soldier expert, the evidence regarding that witness demonstrated 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**"¹⁰ [emphasis added] The identity of this witness was disclosed long before the expiration of 42 days prior to testimony as required by the Trial Chamber.
10. The second case referred to at para. 5. b. of the Motion, regarding TF2-218, is different from the present application. Ordinary protective measures were granted to TF2-218, and the person was permitted to testify in closed session because of the particular role and position held by the individual, which is an ongoing one in areas of conflict, and there was concern for the safety of the individual and the ability of others in that role and position to carry out their work. Although the witness testified in closed session, no attempt was made to vary the 42 day notice period for disclosing identities of witnesses.

c) The Existing Sesay Protective Measures Decision

11. The Prosecution assumes that the individuals referred to in the Motion are listed in the Sesay Defence Witness Chart.¹¹ If they are not then an application should be made to have them added to the witness list. By reason of the November 2006 Protective

⁹ Motion, Annex A, para. 5.

¹⁰ Motion, para. 5.

¹¹ *Prosecutor v. Sesay et al*, SCSL-04-15-T-726, "Sesay – Filing of Documents in Compliance with Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, Dated 30 October 2006" ("Sesay Defence Witness Chart"), 5 March 2007, Annex A.

Measures Decision, those witnesses who have “indicated their willingness to testify” are entitled to the protective measures referred to in that Decision. Witnesses residing outside of West Africa who have not given such an indication have no such entitlement.

12. The Affirmation of Andrew Ianuzi states at para. 5, that “Each witness agreed to consider testifying on behalf of Issa Sesay.”¹² That is not the same as, and falls short of, an indication of willingness to testify, and that is the requirement imposed by para. 24 (i) of the November 2006 Protective Measures Decision. Nor is there any other evidence before the Trial Chamber. The only evidence before the Trial Chamber is that the persons referred to in the Motion have not “indicated their willingness to testify.” If that is the case, and if they are persons who fall within the scope of para. 24(ii), namely witnesses residing outside of West Africa, then they are not entitled to protective measures, including those measures sought in the Motion.

d) The Relief Sought

13. The relief sought asks for protective measures already granted combined with expanded measures. Paragraph 15 a., seeks an Order withholding identifying information until official clearance is received from a Ministry of Defence, or the Defence finalises negotiations, or the witness consents. This could have the potential consequence of varying the 42 day disclosure period to some lesser, but unknown period.
14. Paragraph 15 b., seeks an Order permitting the Defence to designate a pseudonym to the witness. If the person is on the Sesay Defence Witness Chart, then it appears that a pseudonym has already been given. If the person is not listed then this application is premature because an application to show cause why the person should be listed as a witness must be made.
15. An Order similar to the relief sought in paragraph 15. c, was sought by the Sesay Defence in its original motion for protective measures filed on 25 July 2006 (the “July 2006 Motion”)¹³ and by the Gbao Defence in its application for protective measures. In both instances it was dismissed. In deciding the Gbao application the Trial Chamber said:

¹² Motion, Annex A, para. 5.

¹³ *Prosecutor v. Sesay et al*, SCSL-04-15-T-608, “Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 25 July 2006, para. 23 (f).

36. The Defence requests an order that the parties not make an independent determination of the identity of the witnesses, although suggests in its Reply that this might instead be worded to prohibit parties from “deliberately independently verifying the identities”. The Chamber notes that a similar order was denied in the Sesay Decision on the basis that it was too restrictive in scope and not justified in the circumstances. No evidence having been adduced by the Defence to justify a review of this order in the context of the witnesses for the Accused Gbao, the Chamber finds that the request lacks merit.¹⁴

16. There is no evidence to justify reviewing the existing Order.

III. CONCLUSION

17. For the reasons given above the Motion should be dismissed.

Done in Freetown, 12 March 2007

For the Prosecution,



Pete Harrison

¹⁴ *Prosecutor v. Sesay et al*, SCSL-04-15-T-608, “Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses,” 1 March 2007, para. 36.

INDEX OF AUTHORITIES

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ORDERS, DECISIONS AND JUDGMENTS

1. *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.
<http://www.un.org/icty/celebici/appeal/decision-e/90422EV37228.htm>
<http://www.un.org/icty/celebici/appeal/decision-e/90422EV37230.htm>
2. *Prosecutor v Nteziryayo*, ICTR-1997-29-T, “Decision on the Defence Motion for Protective Measures for Witnesses”, 18 September 2001.
<http://69.94.11.53/ENGLISH/cases/Nteziryayo/decisions/180901.htm>
3. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, "Ruling on Motion for Modification of Protective Measures for Witnesses", 18 November 2004.
4. *Prosecutor v Sesay et al*, SCSL-2004-15-T-720, “Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 5 March 2007.
5. *Prosecutor v Sesay et al*, SCSL-2004-15-T-668, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 30 November 2006.
6. *Prosecutor v. Sesay et al*, SCSL-04-15-T-608, “Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 25 July 2006.
7. *Prosecutor v. Sesay et al*, SCSL-04-15-T-608, “Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses,” 1 March 2007.
8. *Prosecutor v. Sesay et al*, SCSL-04-15-T-726, “Sesay – Filing of Documents in Compliance with Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, Dated 30 October 2006,” 5 March 2007, Annex A.

TRIAL TRANSCRIPTS

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