

735.)

In Trial Chamber I

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

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 14th March 2007

SPECIAL COURT FOR SIERRA LEONE	
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The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-2004-15-T

PUBLIC
DEFENCE REPLY TO PROSECUTION RESPONSE TO MOTION FOR
IMMEDIATE PROTECTIVE
MEASURES FOR WITNESSES

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Introduction

1. The Defence files this Reply to the Prosecution Response (“The Response”)¹ to the “Sesay Defence Motion for Immediate Protective Measures for Witnesses” (“The Motion”).²

The Reply

2. The Prosecution in the Response fails to address the material aspects of the Motion. The Motion is predicated upon Rule 69 *and* Rule 75 of the Rules of Procedure and Evidence. The merits of the Motion, which the Prosecution has not addressed, rest substantially on Rule 75(A) insofar as it states:

*A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order appropriate measures to **safeguard the privacy and security of victims and witnesses, providing that the measures are consistent with the rights of the accused** (emphasis added).*

3. The Defence arguments concern “privacy and/or confidentiality and/or security due to the political sensitivity of these international proceedings and the stigmatisation of the RUF”.³ Every paragraph of the Motion deals exclusively or in part with arguments concerning privacy and/or confidentiality. It is instructive that not one single paragraph of the Prosecution Response deals with, or purports to deal with, these aspect of the Defence arguments. The Response, focusing exclusively upon Rule 69 (personal safety and security), is thus largely irrelevant.
4. The distinctions the Prosecution attempts to draw between the cases quoted at Paras. 5(a) and (b) of the Motion⁴ and the instant requests for Protective Measures are unconvincing. Both cases demonstrate that personal and professional considerations, apart from fears relating to security, can properly be accommodated to ensure the integrity of the proceedings and to enhance the truth finding process. The Chamber

¹ *Prosecutor v. Sesay*, SCSL-04-15-T-734, “Prosecution Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 12th March 2007.

² *Prosecutor v. Sesay*, SCSL-04-15-T-720, “Defence Motion for Immediate Protective Measures for Witnesses”, 5th March 2007.

³ Motion, Para. 1; *see also* Paras. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

⁴ *Prosecutor v. Norman et al.*, SCSL-04-14-T-405, “Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures”, 24th May 2005; and *Prosecutor v. Norman et al.*, SCSL-04-14-T-339, “Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures Pursuant to Rules 69 and 73bis(E)”, 15th February 2005.

enjoys a wide discretion. The exercise of this discretion in each case was clearly consistent with the object and purpose of Rule 75. The instant requests are indistinguishable in object and purpose.

“Willingness to Testify”

5. The Prosecution misunderstands the Affirmation provided by Mr. Ianuzzi.⁵ Whilst it is correct that Mr. Ianuzzi states at Para. 5, that “Each witness agreed to consider testifying on behalf of Issa Sesay” this is not (as argued by the Prosecution) distinguishable from “indicating their willingness to testify”. As Mr. Ianuzzi makes plain in the forgoing and subsequent paragraphs, the witnesses have indicated their willingness to testify but final consent (or final agreement) is dependent upon the reassurances and guarantees that are the substance of the Order sought. These reassurances and guarantees are those which professional witnesses, in sensitive cases, routinely require. The Prosecution ought to understand these legitimate caveats and concerns. It is not in the interests of justice to engage in unnecessary partisanship and semantics on issues relating to the integrity of the proceedings and the truth finding process.

Reply to Paragraphs 13-16 of the Prosecution Response

Paragraph 13

6. The Prosecution’s Response that “withholding identifying information until official clearance is received from a Ministry of Defence, or the Defence finalises negotiations, or the witness consents ... could have the potential consequence of varying the 42 day disclosure period to some lesser, but unknown period” is illogical. Unless the Trial Chamber varies the 42 day period it remains extant and can be asserted and relied upon by either party.
7. This would appear to be the only prejudice asserted by the Prosecution in relation to the Motion.⁶ It is clearly misconceived.

⁵ *Prosecutor v. Sesay et al.*, SCSL-04-15-T-608, “Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non-Disclosure”, 25th July 2006, Para. 12.

⁶ *See also, Id.*, Paras. 8 and 9.

Paragraph 14

8. A pseudonym has already been given in order not to jeopardize the witnesses' privacy and/or confidentiality and thereby lose valuable evidence. The Order sought is designed to allow the pseudonyms to remain until the conditions indicated are fulfilled.⁷

Paragraphs 15-16

9. The Prosecution purports to deal with the Defence request for a specific form of protection – namely 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 each witness consents to the public disclosure of his identity”.⁸ The Prosecution’s Response, that “there is no evidence to justify reviewing the existing Order” is neither an argument nor an adequate response to a *reasoned* request. It is assertion without substance.

10. It is not sufficient to argue that a similar Order was sought and refused in previous instances⁹ when the circumstances and arguments advanced were different. The Prosecution fails to deal with the object of the request, namely whether the Order is required in this instance to protect the privacy and/or confidentiality and/or security of *these* witnesses. At no stage have either the Sesay team or the Gbao team made an application concerning *these* witnesses, witnesses occupying similar posts, or witnesses with similar reservations or fears.

11. It is submitted that the evidence is clear. The witnesses occupy sensitive posts in Government, the Armed forces, or International Organisations. It requires little, if any, foresight to appreciate the very real occupational and personal consequences of it becoming known within those organisations that the persons concerned were intending to give evidence on behalf of Mr. Sesay, latterly the Interim Leader of a hugely demonised and stigmatised organisation. More importantly, in the event that

⁷ Motion, Para. 15(b).
⁸ *Id.*, Para. 15(c).
⁹ See Prosecution Response, Para. 15.


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information that *these* witnesses were to testify circulated – internally or externally – before *these* witnesses were fully committed to giving evidence, valuable exculpatory evidence will be lost and an injustice may result. In these circumstances this request is necessary and proportionate.

Conclusion

12. The Defence requests the Chamber to grant the Motion and issue the requested Orders.

14th March 2007



Wayne Jordash
Sareta Ashraph

BOOK OF AUTHORITIES

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Decisions and Orders

Prosecutor v. Norman et al., SCSL-04-14-T-405, “Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures”, 24th May 2005.

Motions

Prosecutor v. Sesay, SCSL-04-15-T-734, “Prosecution Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 12th March 2007.

Prosecutor v. Sesay, SCSL-04-15-T-720, “Defence Motion for Immediate Protective Measures for Witnesses”, 5th March 2007.

Prosecutor v. Sesay et al., SCSL-04-15-T-608, “Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non-Disclosure”, 25th July 2006.

Prosecutor v. Norman et al., SCSL-04-14-T-339, “Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures Pursuant to Rules 69 and 73bis(E)”, 15th February 2005.