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SCSL-04-15-T
(25944-25953)

25944

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: Mr. Lovemore Green Munlo, SC

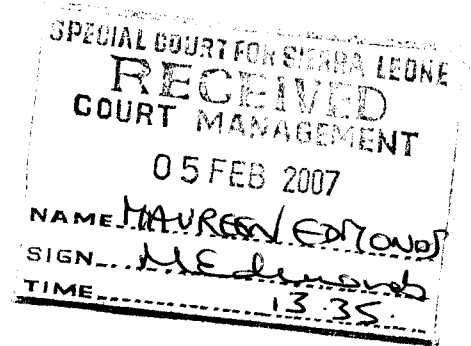
Date filed: 5th February 2007

The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL-04-15-T



**Reply to the Prosecution's Response to Defence Motion Requesting the Lifting
Of Protective Measures in respect of Requested Witnesses**

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1. The Defence files this Reply to the Prosecution's Response¹ to the "Sesay Defence Motion requesting the Lifting of Protective Measures in Respect of Requested Witnesses".²

Submissions

2. The Motion is an application, pursuant to Rule 75 (A), (F) and (G) of the Rules of Procedure and Evidence,³ to vary both the 6th July 2004 Decision⁴ of Trial Chamber I and the 5th May 2006 Decision⁵ of Trial Chamber II. Additionally the leave of the Court is sought in relation to all the witnesses referred to therein to allow contact to be initiated. If there was any lack of clarity concerning the nature of the applications the Defence apologise. The variations sought are (i) to allow the disclosure of the witnesses' identities (and complete statements) to the Sesay Defence team *only* and (ii) as regards the ex-RUF witnesses,⁶ to allow contact with the witnesses by seeking their consent through the auspices of the Witness and Victims Unit (and not through the Prosecution). As regards the Taylor witnesses⁷, there is no requirement in the Protective Measures Order, contained in the 5th May 2006 Decision, to seek the consent of the witness through the Prosecution⁸ and thus no variation in this regard is sought or required.

¹ *Prosecutor v. Sesay et al*, SCSL-04-15-T-700, "Prosecution Response to Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Requested Witnesses", 29th January 2007 (the "Response").

² *Prosecutor v. Sesay et al*, SCSL-04-15-T-687, 19th January 2007 (the "Motion").

³ The "Rules".

⁴ *Prosecutor v. Sesay et al*, SCSL-2004-15-T-180, "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses", 6th July 2004, (the "6th July 2004 Decision").

⁵ *Prosecutor v. Taylor*, SCSL-03-01-PT-3313, "Decision inter alia: on Confidential Prosecution Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures", 5th May 2006 (the "5th May Decision").

⁶ The Prosecution list the following witnesses as non-Taylor witnesses: TF1-511, TF1-079 and TF1-273 (see Para. 23 of the Response). Whilst TF1-079 and TF1-273 are witnesses in the RUF trial the Defence are unclear about the categorisation of TF1-511. This does not appear to be an RUF witness. The Defence are unclear hence which protective measures order is applicable.

⁷ TF1-033, TF1-354, TF1-416, TF1-408, TF1-516, TF1-376, TF1-424, TF1-338, TF1-153, TF1-275, TF1-319, TF1-325, TF1-347, TF1-352, and TF1-356.

⁸ Order 1(m) of 5th May 2006 Decision states that "the Defence Counsel shall not directly or indirectly contact any protected Prosecution witness except with the written consent of the Prosecution or leave of Court".

3. For the avoidance of any doubt none of the requests involve lifting the “veil of anonymity from the public”.⁹ It is submitted that the variations sought are proportionate and minimal; if granted they do not involve any, or any real, reduction in the protective measures since the proposed witnesses would remain protected from the public *per se* and from any potentially hostile party.

4. In these circumstances it is respectfully submitted that the principle of law, confirmed in *Norman*¹⁰ (that a Party should present “supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection”¹¹ is inapposite. The Defence do not seek to persuade the Trial Chamber that the witnesses are no longer in need of protection. The witnesses, both those who were expected to give evidence in the RUF trial (“RUF witnesses”) and the “Taylor witnesses”, will remain protected. If the limited variations are granted, there would be little or no effective lessening of the protective measures or the security arrangements for the protected persons. They would, however, provide the first Accused with effective (rather than “paper”) rights pursuant to Rule 68 of the Rules and Article 17 of the Statute and a real opportunity to obtain evidence of his innocence.

Change in Circumstances/ New Information

Ex-RUF witnesses

5. Notwithstanding the submissions set out above, an application for a review (leading to variation) can be requested on the basis of new information, notably in regards to a change in the circumstances¹² surrounding the initial Decision(s). It is submitted that there has been a clear change of circumstances sufficient to justify the limited variations requested. First,

⁹ The term “public” specifically includes, without limitation, family members, friends of the Accused, the Co-Accused in the RUF case and in other cases before the Special Court, the media and journalists (See for an example of this comprehensive and wide ranging definition: *Prosecutor v. Limaj*, SCSL – IT-03-66-T, “Decision on Motion of Assigned Counsel in Milosevic for Variation of Protective Measures Pursuant to Rule 75”, 14th April 2005).

¹⁰ *Prosecutor v. Norman et al*, SCSL-2004-14-T-274, “Ruling on Motion for Modification of Protective Measures for Witnesses”, 18 November 2004, Para. 43.

¹¹ Response Para. 9.

¹² *Prosecutor v. Niramashuhuko et al*, ICTR-97-21-T, “Decision on the Prosecutor’s Motion for, *inter alia*, Modification of the Decision of 8th June 2001”, quoted in Jones and Powles, International.

concerning the 6th July 2004 Decision, this was carefully drafted with one aim in mind, to protect the security and privacy of witnesses who were expected to testify in the RUF trial. None of the witnesses who are the subject of this Motion will now do so.¹³ The fact that none of these witnesses are witnesses against the first Accused and their evidence is of material assistance for the Accused’s defence amounts to a change of circumstances (since the 6th July 2004 Decision) to justify the disclosure of their identities to the Defence for the first Accused. Moreover since they are, *de facto*, no longer Prosecution witnesses the witnesses fall *exclusively* within the jurisdiction of the Witness and Victim’s Unit and thus it is appropriate that contact be initiated by them, and not the Prosecution.

Taylor Witnesses

- 6. Second, as regards the Taylor witnesses, the Prosecution and Defence are agreed that these witnesses are of material assistance to the Defence case. This information (not known at the time of the 5th May 2006 Decision) can properly form the basis for the minimal variation of the protective measures.

Merits of the Motion

- 7. The variations sought are proportionate and would provide the Accused with real (and not illusory) rights pursuant to Rule 68. As the Prosecution correctly points out the “Prosecution’s disclosure obligation pursuant to Rule 68, and the exculpatory character of confidential documents, take precedence over their confidential nature insofar as the protection of witnesses is maintained or increased”.¹⁴

- 8. It is submitted that the Prosecution’s suggestion that the variation sought would endanger the security of the witness or in any way diminish the individual’s protection is absurd. It can not sensibly be argued that disclosing the identities of witnesses (and their complete statements) to a party wishing to assess the full extent of the utility of this exculpatory material and/or

¹³ See Paras. 11 and 17 of the Response.

¹⁴ The Response Para. 9, referring to *Prosecutor v. Blaskic*, “Confidential Decision on the Prosecution and Defence Motions Dated 25th January 1999 and 25th March 1999 Respectively”, 22nd April 1999, p4.

seeking consent to contact them through the Witness and Victims Unit would increase the security risks to the witness.

9. The Accused and his Defence team would naturally continue to comply with and respect all remaining protective measures. This assurance is explicitly and implicitly reinforced by criminal sanction. There must be some trust in this regard, especially when the “paramount due process rights of the Accused to a fair trial” are at stake¹⁵ and where there has been nothing to suggest that trust is misplaced.

10. The Prosecution suggestion that if “unredacted statements are disclosed the Accused will immediately learn the identity and location of statement maker, which may put the statement maker in a position that he or she never expected or wanted”¹⁶ reflects an error of law on the part of the Prosecution. The Prosecution should not have told the witness that, “in conformity with the Rules, their identities will not be divulged unless the person gives his or her consent to become a witness, or to having the statement disclosed...”.¹⁷ This so-called commitment runs counter to the legislative intent underpinning Rule 75(D). This provision places a mandatory obligation on the part of the Witness and Victims Unit to ensure that all witnesses have “been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case pursuant to Rule 75(F)”. In other words it is expected that each witness must be prepared to accept that their identity might well be disclosed in other cases and that such disclosure is not within the Prosecution’s control.

11. Moreover the Prosecution’s statement is an oxymoron since “in conformity with the Rules” must refer to the many different routes by which the identity of a witness could be “divulged” without any consent emanating from the witness. The Prosecution’s approach thus may have misled its own witnesses since any non disclosure is always (and necessarily) contingent upon a

¹⁵ *Prosecutor v. Sesay et al*, SCSL-2003-05-PT-038, “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and for Non – Public Disclosure”, 23 May 2003, Para. 9.

¹⁶ Para. 11 of the Response .

¹⁷ Para. 14 of the Response.

multitude of legal criteria, not least of which is the detail of any future Protective Measures Order, the Prosecution's Rule 68 disclosure obligations, or any grant of orders, summonses, or subpoenas pursuant to Rule 54. The Prosecution's commitment to its witnesses is thus equated to promising its witnesses that their identities will not be divulged unless they are.

Rule 68 and Protective Measures

12. Protective measures (and their variation) are never within the gift of a witness but are within the sole province of the Trial Chamber based upon objective security risks and the rights of the Accused. They are not based upon the convenience of the witness or the mistaken commitments made by the Prosecution. The operative rules – Rules 69 and 75 - are predicated on the irreducible fair trial guarantee that any measures “are consistent with the rights of the Accused”.¹⁸

13. It is trite law that access to confidential material is granted where a Trial Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case.¹⁹ This is not in dispute in this instance and the Prosecution accepts that each witness provides evidence that is of material assistance to the Defence. It is submitted therefore that any protective measures in place must be interpreted, or varied to provide the Defence with real access to the evidence.

Consent – through the Witness and Victim's Unit.

¹⁸ For example Rule 75(A) states that “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, provided that the measures are *consistent with the rights of the Accused*. (Emphasis added).

¹⁹ For example: *Prosecutor v. Oric*, Case No. IT-03-68-T, “Decision on the Defence Motion on behalf of Drago Nikolic seeking access to all confidential Material in the Oric Case”, 8th November 2005, *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Cerkez for access to confidential supporting material, 10 October 2001, para. 10; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on appellants Dario Kordic and Mario Cerkez's request for assistance of the Appeals Chamber in gaining access to appellate briefs and non-public post-appeal pleadings and hearing transcripts filed in the *Prosecutor v. Blaskic*, 16 May 2002, para. 14.

14. The 6th July 2004 Decision²⁰ envisaged that the Prosecution, if leave was granted by the Trial Chamber or Judge thereof, would contact the protected person and ask for their consent and undertake the necessary arrangements to facilitate such contact. The 5th May 2006 Decision²¹ is silent on the means by which consent would be sought from the protected person. It is submitted that if leave is granted by the Trial Chamber, consent should be sought to contact the protected persons (both RUF and Taylor witnesses) through the auspices of the Witness and Victims Unit.
15. First, this would be consistent with the Prosecution's own stated position which has previously referred to the Witness and Victim's Unit as the "guardian of the needs of witnesses... (protecting)... the rights of a witness to refuse an interview".²² It is noteworthy that the Prosecution stated, "It is inconceivable why the WVS, which the Trial Chamber has put in charge for establishing contact and which is a separate, neutral entity not aligned with either the Prosecution or the Defence and whose sole and statutory purpose is to best protect the interests of the witnesses of the Court, should not be able to *best* reassure the witness that no contact will be made without their consent and their rights be respected"²³ (emphasis added).
16. More importantly the seeking of consent through the WVS would be consistent with the most recent Trial Chamber I Decision on the issue, which states inter alia that the Witness and Victim's Unit, "rather than the Defence or the Prosecutor is in the best position, to determine how to contact a protected witness, who may otherwise feel intimidated, explain to a witness his right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained from the witness".²⁴

²⁰ 6th July 2004 Decision, p.17, Para. (o).

²¹ 5th May 2006 Decision, Order 1(m) states "That the Defence Counsel shall not directly or indirectly contact any protected Prosecution Witness except with the consent of the Prosecution or leave of Court".

²² *Prosecutor v Sesay et al*, SCSL-04-15-T-671, Prosecution Response to Application for Leave to Appeal the Decision on Sesay Defence Motion for Protective Measures, 14th December 2006, Para. 24 and Para. 29.

²³ *Ibid* at Para 29.

²⁴ *Prosecutor v. Sesay et al*, SCSL-04-15-T-668, Decision on Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non- Public Disclosure, 30th November 2006, pp. 11, Order

17. There is no reason to depart from this line of judicial reasoning. It is submitted that any departure would be a fundamental breach of the statutory right of the Accused, pursuant to Article 17(4)(e) of the Statute, to “obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him”.

Request

18. The Defence respectfully requests that the Orders contained in the 6th July 2004 and 5th May 2006 Decisions be varied to the extent indicated, in order to allow the first Accused meaningful access to the Rule 68 material disclosed by the Prosecution. It is submitted that the First Accused is (i) entitled to know the identities of the protected persons who are able to provide material assistance to his defence, (ii) entitled to a comprehensive disclosure of their statements to allow a proper assessment thereof (iii) entitled to leave to contact them and (iv) entitled to seek their consent through the Witness and Victims Unit. It is submitted that these entitlements are consistent with the rights of the Accused to obtain material consistent with his innocence *and* consistent with the rights of the protected persons to the protection of the Court.

Dated 5th February 2007



Wayne Jordash
Sareta Ashraph

24(viii). See also *Prosecutor v. Norman at al*, SCSL-04-14-T-629, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20th June 2006, Para. 23.

Book of Authorities

Prosecutor v. Sesay et al, SCSL-04-15-T-700, Prosecution Response to Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Requested Witnesses, 29th January 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-687, Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Requested Witnesses, 19th January 2007.

Prosecutor v. Sesay et al, SCSL-2004-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 6th July 2004.

Prosecutor v. Taylor, SCSL-03-01-PT-3313, Decision inter alia: on Confidential Prosecution Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 5th May 2006.

Prosecutor v. Limaj, SCSL – IT-03-66-T, Decision on Motion of Assigned Counsel in Milosevic for Variation of Protective Measures Pursuant to Rule 75, 14th April 2005.

Prosecutor v. Norman et al, SCSL-2004-14-T-274, Ruling on Motion for Modification of Protective Measures for Witnesses, 18th November 2004.

Prosecutor v. Niramashuhuko et al, ICTR-97-21-T, Decision on the Prosecutor's Motion for, *inter alia*, Modification of the Decision of 8th June 2001, quoted in Jones and Powles, International.

Prosecutor v. Blaskic, Confidential Decision on the Prosecution and Defence Motions Dated 25th January 1999 and 25th March 1999 Respectively, 22nd April 1999.

Prosecutor v. Sesay et al, SCSL-2003-05-PT-038, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, 23rd May 2003.

Prosecutor v. Oric, Case No. IT-03-68-T, Decision on the Defence Motion on behalf of Drago Nikolic seeking access to all Confidential Material in the Oric Case, 8th November 2005.

Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-PT, Decision on Motion by Mario Cerkez for access to confidential supporting material, 10th October 2001.

Prosecutor v. Blaskic, Case No. IT-95-14-A, Decision on appellants Dario Kordic and Mario Cerkez's request for assistance of the Appeals Chamber in gaining access to appellate briefs and non-public post-appeal pleadings and hearing transcripts filed in the *Prosecutor v. Blaskic*, 16th May 2002.

Prosecutor v Sesay et al, SCSL-04-15-T-671, Prosecution Response to Application for Leave to Appeal the Decision on Sesay Defence Motion for Protective Measures, 14th December 2006.

Prosecutor v. Sesay, Kallon & Gbao, SCSL-04-15-T

Prosecutor v. Sesay et al, SCSL-04-15-T-668, Decision on Defence Motion for Immediate Protective Measures for Witnesses and Victims for Non- Public Disclosure, 30th November 2006.

Prosecutor v. Norman at al, SCSL-04-14-T-629, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20th June 2006.