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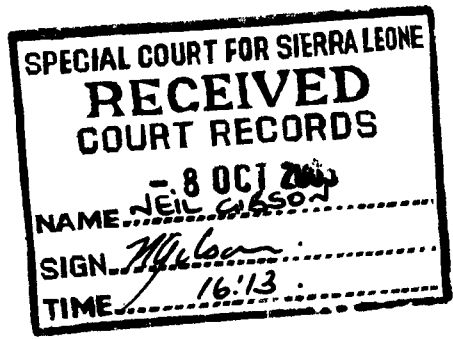
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Special Court for Sierra Leone

Before: Judge Benjamin Itoe,
Designated Judge.

Registrar: Mr. Robin Vincent

Date filed: 8 October 2003



THE PROSECUTOR

Against

**SANTIGIE BORBOR KANU, also known as
 Five-Five also known as Santigie Khanu also known as Santigie Kanu also Known as
 S.B. Khanu also know as S.B. Kanu also known as Santigie Bobson Kanu also known as
 Borbor Santigie Kanu**

*Defense response to Prosecution Motion for Immediate Protective Measures for Witnesses
 and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until
 Appropriate Protective Measures are in Place*

Counsel for the Prosecutor:
 Luc Côté, Chief of Prosecutions
 Robert Petit, Senior Trial Counsel
 Boi-Tia Stevens, Assistant Trial Counsel

Counsel for the Accused:
 Sylvain Roy, Acting Chief of Defence Office
 Geert-Jan Knoops, Defense Counsel
 Ibrahim Yillah, Defense Associate

In response to the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place of 29 September 2003, filed on 30 September 2003, the Defense herewith respectfully submits its response:

I. Introduction

1. The Prosecution Motion seeks relief for eleven protective measures for both witnesses and victims as well as for non-public disclosure.¹ From paragraph 19 of the Prosecution Motion, it may be derived that these protective orders are sought **for all** witnesses in this case, without distinction, in the event they fall under the mentioned three categories and that with respect to all these witnesses, non-disclosure of “identifying information” until 21 days before the witness is to testify at trial is required.
2. At first sight, an order as requested pertaining to all witnesses in a particular case seems not in compliance with the principle as set forth by, inter alia, Article 17 (4) (b) of the Statute for the SCSL.² The ensuing paragraph II will delve deeper into the issue compliance with the Statute and Rules of the SCSL, whereas paragraph III will address the factual basis of the prosecution motion.

II. Non-compliance with Article 17 (4) (b) of the SCSL Statute and Rule 69(A) of RPE-SCSL

Article 17 (4) (b) of the SCSL Statute

1. Article 17 (4) (b) of the SCSL Statute secures the minimum guarantee of the accused to, inter alia, have adequate time and facilities for the preparation of his or her defense. As observed in the introduction of this Response Motion, the protective orders sought relate to virtually all (prosecution) witnesses in this case.

¹ See para. 25 of the Prosecution Motion.

² I.e. to have adequate time and facilities for the preparation of his defense.

The nature of this non-disclosure, as requested for all witnesses, is that it seriously detrimental to the rights of the accused under Article 17 (4) (b). The fact that protective measures generally should comply with the fair trial rights of the accused, is also expressed by the drafters of the SCSL RPE, namely in Rule 75 (A) which states that measures to safeguard the privacy and security of victims and witnesses should be consistent with the rights of the accused.

2. The proposed unrestricted non-disclosure of identity of all witnesses in the case against the accused forms, without any exceptional justification, a serious infringement of these fair trial rights.

Rule 69(A) of RPE-SCSL

1. A second argument emerges which merits this conclusion. Rule 69 (A) of the SCSL-RPE provides that “*In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber (...) to order the non-disclosure of the identity of a victim or witness (...) (emphasis added; defense counsel)*”.
2. This text of Rule 69 (A), specifically the use of the adjective “*a witness*”, merits the conclusion that the drafters of the SCSL-RPE held the opinion that non-disclosure of identity is to be assessed on an individual and case-by-case basis and not as much on the premise of excluding all (potential) material witnesses or several categories of them from disclosure of identity beforehand.
3. This view is also followed by scholarly opinion. In its Commentary of the ICTR Decisions on the Motions for the Protection of Defense witnesses in *Prosecutor v. Kayishema and Ruzindana*,³ Michael Scharf remarks that the principle of conducting criminal trial proceedings which are open to the public and press, should be respected “*(...) in the absence of clear and overwhelming particularized grounds for closing the proceedings with respect to each witness (emphasis added; Defense Counsel).*”⁴

³ Case No. ICTR-95-1-T, 6 October 1997.

⁴ See Michael Scharf, Commentary, in *Annotated Leading Cases of International Criminal Tribunals, the ICTR 1994-1999* at 250 (André Klip and Goran Sluiter, eds., 2001).

4. The defense holds therefore the opinion that, as the Prosecution Motion seeks to obtain a general exclusion of all its witnesses from its disclosure obligation under Rule 66 (A)(i) or seeks to extend the application of Rule 69 (A) to a virtually unlimited scope of witnesses, the Motion, in its present form, should be found inadmissible. In this sense, the protective measures sought by the Prosecution are not considered to be consistent with the system as envisioned by Rules 66, 67 and 69 of the SCSL RPE.

III. Lack of sufficient factual basis

1. In case the purported legal basis for the Prosecution Motion is to be accepted, the defense, alternatively, holds that this Motion fails to have sufficient and concrete substantive arguments required to acquire protective measures for virtually all witnesses in this case.
2. According to scholarly views, the application of Rule 69 (A) may be limited to the presence of two categories of individuals:
 - (i) those who are afraid to testify because they do not want to re-live the trauma they have experienced, and
 - (ii) Those who are afraid to testify because of possible retaliation.⁵

However, the defense holds the view that existence of both categories in a certain case must, at least to some extent, be particularized on the basis of concrete elements with respect to each individual witness.

3. In this context, mention is again made of the commentary of Scharf to the ICTR decision in *Prosecutor v. Kayishema and Ruzindana*, which author refers to the requirement of “(...) *clear and over-whelming particularized grounds for closing the proceedings with respect to each witness.*”⁶ This criterion follows from international standards such as the ICC PR.⁷

⁵ See, *inter alia*, Scharf, supra note 4 at 250.

⁶ *Ibid.*

⁷ *Ibid.*

4. Yet, according to the defense, the Prosecution Motion fails to delineate with concrete facts, other than in a general way and referring to the security situation in Sierra Leone and surrounding states in general,⁸ the existence of one of these two categories, mentioned under 2, with respect to the particular witness the prosecution is relying on in the case against the accused.

5. Close reading of the seven statements attached to the Prosecution Motion indeed envision merely a more general description of the security developments in Sierra Leone and neighbouring countries and their impact on witness protection generally.
 - (i) Statement of Dr. A White: describes general effects of the current security situation in Sierra Leone on witnesses.
 - (ii) Declaration A. Quee: *ibid*; in this declaration, it is mentioned that “we believe that Sierra Leoneans (...) are at some degree of risk (emphasis added; GJK).” Mr. Quee also remarks that, speaking about ex-combatants, these individuals “(...) are extremely concerned about witness protection with regard to the Special Court.” This observation could also be interpreted as an expression of insufficient trust in the efficiency of the protective measures system, and not so much the existence of concrete fear for particular accused.
 - (iii) In the declaration of Mr. S. Vahidy it is said that specific threats have been issued against “some of the witnesses to the extent” that one has tried to locate them “(...) probably with a view to carrying out reprisals (emphasis added; Defense Counsel).”⁹ It may be argued whether this observation warrants the extension of the requested protective measures to all witnesses whatsoever.
 - (iv) Letter of President Kabbah relating to a general review of progress with respect to Peace and security in Sierra Leone.

⁸ See the seven declarations attached to the Prosecution Motion.

⁹ See page 2 second alinea of this declaration.

- (v) The declaration of Mr. K. Biddle indicates the existence of, as mentioned, insufficient capacity of the local police system to guarantee the safety of witnesses without substantiating a threat to any particular witness.
 - (vi) Finally, the Statement of Mr. B. Kamara, which merely entails a repetition of the declaration of Mr. Biddle, ad (v).
6. A review of these documents merit the observation that no concrete and particular facts emerge to validate the conclusion that the particular witnesses in the present case, aimed at in the Prosecution Motion, fall within the Ambit of Rule 69 (A). Especially, these documents do not justify the conclusion that “*exceptional circumstances*” as enshrined by Rule 69 (A) are present in this case. Moreover, they do not validate the existence of such exceptional circumstances as may be required for the *de facto* infringement of fair trial rights as set forth in Chapter II of this Response Motion. In this context it should be mentioned that such protective measures, which lead to this *de facto* infringement, can only be imposed in accordance with the principles of proportionality and subsidiarity. To that end, one should bear in mind that Article 16 (4) of the SCSL Statute provides for a special Victims and Witnesses Unit within the Registry which Unit can provide for measures and security arrangements. This mechanism can be considered as an appropriate solution to protection risks also for individuals as envisioned by the Prosecution Motion. Hence, protective measures by means of non-disclosure of identities of all witnesses in a case can not be considered as a measure in accordance with the principle of subsidiarity; after all, the application of the mechanism of Article 16 (4) should be exhausted first before entering into the more rigorous non-disclosure measures.
7. The assumption of the prosecution that “*rolling disclosure*” will allow the defense adequate time for the preparation of the accused’s defense, can not counterbalance these deficiencies as this rolling disclosure actually violates the right of the defense to have an unrestricted ability to plan and develop its litigation strategy for this case. For instance, the order sought under paragraph 25 (k) of the Prosecution Motion forms such a violation of the right of the defense to develop its own litigation strategy without having to reveal it to the Prosecution at an early stage of the proceedings.

8. The Defense reserves its rights to challenge the jurisdiction of the SCSL by means of a separate defense motion.

Conclusion

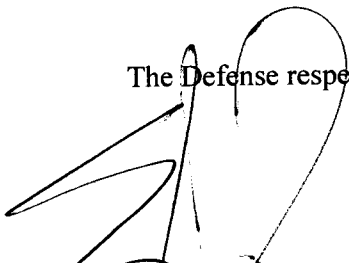
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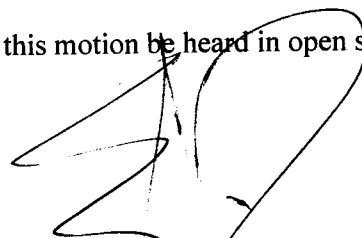
The Defense respectfully prays that the Prosecution Motion be denied and/or dismissed in its entirety.

Alternatively

The Defense respectfully prays that the Prosecution Motion be denied to the extent of its request not to disclose the identifying data and other information of the witness – as referred to in this Motion – until 21 days before the witness is to testify at trial, and to set, in this context, a disclosure limit of at least 42 days before witness testimony.¹⁰

The Defense respectfully request that this motion be heard in open session.


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¹⁰ See also *Prosecution v. Issa Sesay*, SCSL-2003-05-PT.