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SCSL-04-16-T

(19034-19038)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 11 September 2006

THE PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL-04-16-T

PUBLIC

REPLY TO BRIMA AND KAMARA – DEFENCE RESPONSE TO URGENT PROSECUTION MOTION FOR RELIEF IN RESPECT OF VIOLATIONS OF THE TRIAL CHAMBER'S ORDER OF 26 APRIL 2006

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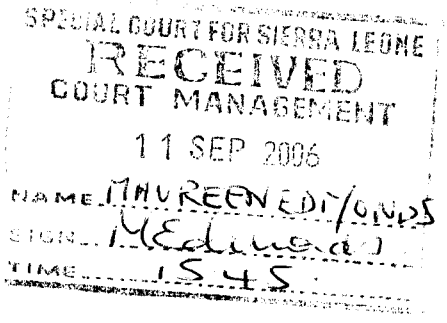

I. INTRODUCTION

1. The Prosecution files this Reply to the Response on behalf of the Accused Brima and Kamara of 8 September 2006 ("**Brima-Kamara Response**")[1] to the Prosecution's Motion for relief of 29 August 2006 ("**Motion**").[2]
2. In its Motion, the Prosecution sought relief in respect of violations by the Defence of the Court's disclosure Order of 26 April 2006. The Defence for the Third Accused filed an individual response on 1 September 2006 ("**Kanu Response**"),[3] to which the Prosecution replied on 6 September 2006.[4]

II. ARGUMENT

Original 49 Witness Order

3. The Prosecution notes as a preliminary point that the Defence fails to clarify whether the remaining witnesses from the original, provisional list of 49 witnesses that do not appear in the list of the first twenty witnesses to be called during the trial session which commenced on 4 September, have been dropped from the witness list. In the Kanu Response, the Defence indicated that it was not intended for any of the 49 common witnesses on the provisional list that did not appear on the final list to be called to testify, and that good cause must be shown to reinstate them. In the absence of any clarification to this effect in the Brima-Kamara Response, the Prosecution continues to assume that this is the position of all three Accused.
4. In relation to the statement in paragraph 4 of the Brima-Kamara Response that "The Prosecution has not shown how not calling the last 15 witnesses on the original list has affected or will prejudice their case", the Prosecution submits, first, that it has already been prejudiced by expending its investigative resources on inquiries into a large number

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[1] *Prosecutor v Brima, Kamara, Kanu*, SCSL-2004-16-T-547, "Brima and Kamara – Defence Response to 'Urgent Prosecution Motion for Relief in Respect of Violations of the Trial Chamber's Order of 26 April 2006' and Prosecution Violation of Rule 46(C)", 8 September 2006 ("**Brima-Kamara Response**").
[2] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-539, "Public Urgent Prosecution Motion for Relief in respect of Violations of the Trial Chamber's Order of 26 April 2006", 29 August 2006 ("**Motion**").
[3] *Prosecutor v Brima, Kamara, Kanu*, SCSL-2004-16-T-543, "Public Kanu – Defence Response to 'Urgent Prosecution Motion for Relief in Respect of Violations of the Trial Chamber's Order of 26 April 2006' and Prosecution Violation of Rule 46(C)", 1 September 2006 ("**Kanu Response**").
[4] *Prosecutor v Brima, Kamara, Kanu*, SCSL-2004-16-T-546, "Reply to Kanu – Defence Response to Urgent Prosecution Motion for Relief in respect of Violations of the Trial Chamber's Order of 26 April 2006", 6 September 2006.

of witnesses who will no longer be appearing, and second, that the Defence had committed itself to a call order that was changed completely at a late stage. Notwithstanding this actual and potential prejudice, the Prosecution simply seeks an order that to the extent that any witnesses from the provisional list of 49 still appear on the final witness lists, but do not appear in the call order for the next twenty witnesses, these witness should be dropped from the witness list and only reinstated upon a showing of good cause.

5. The Defence places undue emphasis throughout its Reply on what it describes as the "21 day rule".[5] Thus, the Defence seems to assume that it may breach the Order of 26 April 2006 and the Order of 17 May 2006 as long as it provides disclosure to the Prosecution at least 21 days before a witness is due to testify. This represents a complete misunderstanding of the purpose of the Court's orders. The Defence cannot unilaterally re-write the Court's orders in its own terms so as to present itself as being in compliance with those orders. The Order of 26 April 2006 required the filing of a list of witnesses, a call order, a summary of the proposed testimony and the name and other identifying information for unprotected witnesses, among other things. These requirements still pertained with respect to the extension of time granted by the Order of 17 May 2006. The Court's Decision on Protective Measures provided that the identifying data for protected witnesses should be revealed to the Prosecution 21 days prior to the witness's testimony.[6] This Decision did not put in place a "21 day rule" regarding call order and summaries.
6. The Prosecution finds it pertinent to note that despite seeking refuge under the cover of the invented "21 day rule", upon which everything is deemed to hinge, the Defence has repeatedly failed to comply with the rule laid down in the Decision on Protective Measures with respect to advance disclosure of the identifying data of witnesses.
7. In this respect, the statement of the Defence in paragraph 5 of the Brima-Kamara Response that it "reserves the right to call its witnesses at such time it deems fit in so far as it is within the 21 day disclosure period" is simply misconceived. The Prosecution is on no account attempting to determine when a Defence witness should be called to

[5] Brima-Kamara Response, para. 9.
[6] *Prosecutor v Brima, Kamara, Kanu*, SCSL-2004-16-T-488, "Decision on Joint Defence Application for Protective Measures for Defence Witnesses", 9 May 2006.

testify. However, the Prosecution *is* requesting that the Defence comply with the Court's orders so as to ensure the smooth functioning of the proceedings.

8. The Prosecution notes the clarification of the Trial Chamber of 8 September 2006 that with respect to witnesses for whom the identifying data is not provided at least 21 days before their testimony, the Prosecution may seek an adjournment up to the balance of the 21 day disclosure period, and that the examination-in-chief of further witnesses may continue in the interim.[7] The Prosecution also notes and appreciates that the Defence is endeavoring to provide the identifying data of all remaining witnesses. However, these efforts by the Defence should not be permitted to detract from what has been an ongoing breach of its obligations. In particular, the call order remains of great significance and the Order of 26 April 2006 required the witness list to include the order in which the Defence intended to call the witnesses. The Prosecution submits that the frequency of changes at a late stage and the uncertainty generated by a call order that is in a constant state of flux is causing prejudice to the Prosecution in terms of its investigations and preparations.[8]

Individual Witness Summaries

9. In paragraph 6 of the Brima-Kamara Response, the Defence states that "some of the witnesses are yet to be interviewed in detail or at all, whilst some have been backtracking on their earlier commitment to assist the Defence". The Prosecution notes that the Order of 26 April 2006 required summaries to be filed as early as 10 May 2006. This period was then extended to 21 August 2006. The Defence has now had an additional four months to provide summaries. With respect to those witnesses who have not been interviewed at all, it is questionable whether they should be appearing on a final witness list. A final witness list is not intended to be a "wish list". With respect to those who have not been interviewed in detail or who may be backtracking on an earlier commitment, it should be possible to provide some form of summary.
10. The Prosecution submits that the Defence has not shown good cause in paragraphs 7 and 8 of the Brima-Kamara Response as to why summaries are not available and the Defence

[7] *Prosecutor v Brima, Kamara, Kanu*, Trial Transcript, 8 September 2006 (draft version), pp. 90-91.
[8] *Prosecutor v Brima, Kamara, Kanu*, Trial Transcript, 8 September 2006 (draft version), p. 90.

should be expected to have conducted its interviews by this stage.

11. The Prosecution re-emphasizes its position that there is no "21 day rule" as it concerns summaries. These were to be provided on 21 August in accordance with the Orders of 26 April and 17 May 2006. The argument of the Defence appears to be that the Prosecution will not be prejudiced by the late disclosure of summaries provided they are available at least 21 days prior to the witness's testimony, but this argument is contradicted by the purpose of the Court's orders which was, in part, to allow the Prosecution adequate time to prepare for the Defence case.

12. While the Prosecution welcomes the commitment of the Defence for the First and Second Accused to start filing individual witness summaries by 11 September 2006 and to ensure that this is done no later than 21 days before witnesses are required to testify, this cannot excuse the breaches of the Court's orders and the ongoing irregularity in the manner of presentation of Defence witnesses. The Prosecution does not wish to see the proceedings punctuated repeatedly by adjournments of cross-examinations which could potentially cause even greater difficulties in terms of the availability of witnesses. The relief sought by the Prosecution in its Motion is not "curable by the 21 day rule" and the Prosecution submits that the Trial Chamber's urgent consideration of the matter is required to ensure the integrity of the proceedings.

III. CONCLUSION

13. For these reasons the Prosecution asks that the requested relief, as it pertains to the First and Second Accused, be granted.

Filed in Freetown,
11 September 2006

For the Prosecution,

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