

025

SCSL-2003-11-PT-

786

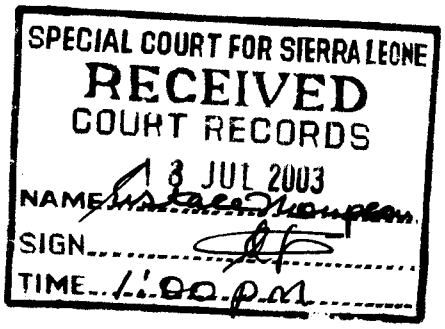
(786-795)

THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge  
Judge Pierre Boutet  
Judge Mutanga Itoe

Registrar: Mr. Robin Vincent

Date: 18 July 2003



THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

---

**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**

---

**Office of the Prosecutor:**  
Mr. Luc Côté, Chief of Prosecutions

**Defence Office:**  
Mr. Syvain Roy, Acting Chief  
Mr. Ibrahim Yillah

**Defence Counsel:**  
Mr. Michiel Pestman

1. Despite the opening line of the prosecutor's motion, which refers to Articles 16 and 17 of the Statute for the Special Court and Rules 53, 54, 69, 73 and 75 of the Rules of Procedure and Evidence, the motion appears to be founded on Rule 69(A) of the Rules only<sup>1</sup>.
2. Exceptional circumstances and objective fear are the two necessary conditions for an order under Rule 69(A). The prosecution has failed to show the existence of any exceptional circumstance justifying the measures sought. It has also failed to demonstrate that the disclosure of the identity of the witnesses to the defence would put these witnesses in danger or at risk. As both the necessary conditions for the orders sought are absent, such an order must be refused. The defence therefore asks the Trial Chamber to dismiss all requested protective measures.
3. The defence has a number of additional, specific objections to ten of the eleven orders asked for, which would alone justify the dismissal by the Court of the individual requests.

### **The law**

4. Article 17 of the Statute states, among other things, that:

"2. The accused shall be entitled to a fair and public hearing, subject to the measures ordered by the Special Court for the protection of victims and witnesses."

And:

"4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

...

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing:

...

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;"

5. The idea that potential witnesses and victims should, under specific conditions, be entitled to special protection is further elaborated in the Rules. Rule 69 determines the following:

"(A) 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.

...

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence."

Rule 69 is an exception to Rule 66 (A)i, which requires the prosecution to disclose to the accused (unedited) copies of the statements of all witnesses whom it intends to call to testify at trial.

6. The right to a public hearing is recalled in Rule 78, which states:

---

<sup>1</sup> See: pars. 17-18, "Legal Bases for the Motion".

“All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”

- 7. It is important to note that neither the Statute nor the Rules provide for a “right” to protective measures, as stated or implied incorrectly by the prosecution in paragraph 19 of its motion. Witnesses can not “waive” a right they do not have. Witnesses can choose whether or not to come forward, but having chosen to do so, they have no “right” to be protected against danger or risk which may possibly result from their testimony in trial. Protective measures are ordered at the discretion of the Court.
- 8. The careful wording of the Article 17.2 of the Statute clearly illustrates that the rights of the accused are made the first consideration, and that the need to protect victims and witnesses is a secondary one<sup>2</sup>.
- 9. The obligation placed upon the prosecution by Rule 66(A)i to disclose supporting material to the accused is thus more important than the possibility provided by Rule 69(A) to provide victims and witnesses special protections. Rule 66(A)i and Rule 69(A) do not have the same weight or importance within the structure of rights and obligations envisaged by the Rules of Procedure and Evidence and the Statute.

**General objections**

*Exceptional circumstances*

- 10. The Trial Chamber can, according to Rule 69(A), only order protective measures for a witness or victim in exceptional circumstances.
- 11. It is not up to the defence to prove or show that these exceptional circumstances do not exist in the current case. The prosecution always bears the onus of establishing them<sup>3</sup>. Whether these exceptional circumstances exist must, in addition, be determined on a *witness by witness basis*, like the assessment of risk or danger<sup>4</sup>.
- 12. It is, therefore, not possible to establish the necessary exceptional circumstances for entire *categories* of witnesses, as proposed by the prosecution. On the basis of one or two general reports on the safety situation in a particular region, one cannot simply conclude that exceptional circumstances exist with regard to every potential witnesses living in that area.
- 13. It is important to stress that the prevailing circumstances within Sierra Leone cannot by themselves amount to the exceptional circumstances mentioned in Rule 69(A). The current situation in the country is in no way more exceptional than the situation which existed when the Statute and the Rules were drafted for the Special Court. The exceptional circumstances, mentioned in Rule 69(A), must be interpreted within that context. To be

<sup>2</sup> ICTY, Trial Chamber II, Brdanin & Talic, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, par. 20.

<sup>3</sup> *ibidem*, par. 16.

<sup>4</sup> See: Archbold, International Criminal Courts: Practice, Procedure and Evidence, Chap. 8, Sect. III, par. 8-64a.

exceptional, in other words, these circumstances must go beyond the prevailing situation in Sierra Leone when the Special Court was established<sup>5</sup>.

14. The prosecution has made no effort to show that the prevailing situation in Sierra Leone, or in the surrounding states, is in any way *more* exceptional than the situation which existed in the region when the Special Court was established.
15. As the prosecution has failed to show the necessary exceptional circumstances, all requests for protective measures must be dismissed.

*Danger or risk*

16. In addition to the exceptional circumstances, the prosecution must demonstrate the elements of danger and risk. In support of an application for protective measures requiring the non-disclosure of the identity of a witness to the defence and the accused, the prosecution must show that such disclosure may put the particular witness in danger or at risk<sup>6</sup>.
17. The question of whether such danger or risk exists should, again, be examined on an individual basis<sup>7</sup>. And the fear of a potential witness that he or she may be in danger is in itself not sufficient to establish that he or she actually is; what is required is an *objective* foundation for those fears<sup>8</sup>.
18. The prosecution has again failed to establish for any potential witness, on an individual basis, that such objective fear exists. In fact, there is no reference at all in the three categories of witnesses mentioned by the prosecution in paragraph 19 of the motion to any fear felt by them that disclosure of their identity to the defence might put them in danger or risk. The only distinguishing factors of the categories are country of residence and whether the witnesses have waived their "right" or asked for protective measures. The Court is given no insight into their motives for doing so.
19. As mentioned above, the danger or risk to a particular witness must be related to the disclosure of his or her identity *to the defence*. As far as the defence can distil from the motion, the prosecutor has failed to investigate this particular but crucial issue. There is no evidence at all suggesting that the disclosure at this stage of the identity of the witnesses *to the accused or his defence team* may put them in danger or at risk<sup>9</sup>.
20. It may be that the witnesses concerned do have objectively well-founded fears, although this is a matter, the defence submits, that the Court cannot decide on the material before it. However, even in this case, the prosecution should consider whether other, less far-reaching protective measures would achieve the desired result. According to Rule 53(A),

<sup>5</sup> ICTY, Trial Chamber II, Brdanin & Talic, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, par. 11.

<sup>6</sup> ICTY, Trial Chamber II, Brdanin & Talic, Decision on Third Motion by Prosecution for Protective Measures, IT-99036-PT, 8 November 2000, par. 13.

<sup>7</sup> *Ibidem* & Archbold, International Criminal Courts: Practice, Procedure and Evidence, Chap. 8, Sect. III, par. 8-64a-c.

<sup>8</sup> ICTR, Trial Chamber II, Rwamakuba, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, ICTR-98-44-T, 22 September 2000, par. 10.

<sup>9</sup> ICTY, Trial Chamber II, Brdanin & Talic, Decision on Second Motion by Prosecution for Protective Measures, IT-99036-PT, 27 October 2000, par. 22.

for example, the Trial Chamber can also order protective measures preventing the disclosure of the identity of witnesses *to the public*. The prosecution has not examined let alone demonstrated, that this “lesser evil” would be insufficient to deal with the safety problems, whether well-founded or not, described in their motion.

- 21. According to the general legal principles of subsidiarity and proportionality, the prosecution should not request (nor the Court impose) an extreme measure when a measure less prejudicial to the rights of the defence would suffice.
- 22. For the reasons listed above the defence opposes all protective measures requested by the prosecution.

**Specific objections**

- 23. In addition to the general arguments above, the defence will add specific objections to ten of the eleven requested orders in turn.

(a)

- 24. The prosecution is proposing to reveal the identity of the protected witnesses only twenty-one days before the witness is to testify in trial.
- 25. This proposal, if accepted by the Trial Chamber, would seriously affect the defence’s ability to investigate and challenge the reliability of the witnesses and their statements. For those protected witnesses called to testify twenty-one or more days after the beginning of the trial, it would be virtually impossible for the defence to properly prepare for cross-examination, as it is not feasible to attend trial and prepare cross-examination at the same time.
- 26. Article 17.4(b) of the Statute and Rule 69(C) of the Rules provide that the accused shall be afforded adequate time for preparation of his defence. In the submission of the defence, this means all identifying information about all protected witnesses should be disclosed to the defence well before the beginning of the actual trial.
- 27. Support for this position can be found in the rich jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *Brdanin & Talic* case, for example, Trial Chamber II stated the following:

“36. The prosecution has suggested that a disclosure of its witnesses’ identity thirty days before the trial would be sufficient to allow the accused to be ready for trial.

...

The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person’s defence. Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

...

38. The Trial Chamber does not believe that it is possible to lay down in advance any particular period which would be applicable to all cases. Everything will depend upon the number of witnesses to be investigated, and the circumstances under which that investigation will have to take place. Some accused may have better resources of their own than others, depending upon their position prior to their

arrest. That period can only be determined after the protective measures are in place. However, from evidence given in other cases, the Trial Chamber accepts that the pretrial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial.”<sup>10</sup>

28. If the Trial Chamber decides to order protective measures, in spite of the general objections raised above, the defence submits that the identity of the witnesses must be disclosed to the defence a minimum of thirty days before the beginning of the trial to allow for a proper defence<sup>11</sup>.

29. The Chamber should, in any case, deny the prosecution’s request for protection of witnesses not living in Sierra Leone due to complete lack of sufficient grounds<sup>12</sup>.

(b)

30. With this order the prosecution aims at erasing all identifying information concerning *all* witnesses from existing and future records of the Court. No distinction is made between witnesses for whom protective measures are requested and witnesses for whom such measures are apparently not required. If the identity of all witnesses is to be kept secret forever, this will no longer be a public trial. One of the main functions of having a public trial is to subject the testimony to a wider scrutiny. Witnesses have to stand up in front of a community and give a truthful account of their experiences. As such a public trial is an important safeguard against perjury and false testimony.

31. The requested order is therefore contrary to the basic right of every accused to a public trial, as guaranteed in Article 17 of the Statute and Rule 78 of the Rules. This constitutes an additional reason to refuse the order.

(c)

32. In addition to the order discussed above, the prosecution is requesting permission to use a pseudonym for *each* witness. Again, no distinction is made between witnesses who do and witnesses who do not require special protection. For the same reasons explained under (b), above, this request should be dismissed.

33. The defence notes that the second part of this requested order is unclear. The defence strongly opposes any request that its legitimate investigations into the background and credibility of protected witnesses be curtailed *after* the disclosure of their identity to the defence.

(d)

34. The wording of this order requested by the prosecution is unclear, as it obviously refers to the wrong paragraph. In any case, the defence opposes this request as well for the same reasons given under (b). Again, no distinction is made between the various categories of witnesses.

<sup>10</sup> ICTY, Trial Chamber II, Brdanin & Talic, Decision on Motion by Prosecution for Protective Measures, IT-99036-PT, 3 July 2000, pars. 36-38.

<sup>11</sup> See also: ICTY, Trial Chamber, Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, Order (10).

<sup>12</sup> Cf. ICTR, Trial Chamber III, Rukundo, Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses, ICTR-2001-70-I, 24 October 2002, par. 16.

(e)

35. The defence opposes this requested order for the reasons given under (b). In addition, the defence would like to point out that victims can only be given protective measures in a case, if the prosecution intends to call them as witness. Victims who do not play any role in a trial, cannot be granted protection under Rule 69(A), for the simple reason that they do not need it.

(f)

36. As a preliminary point, the defence does not understand what the prosecution is referring to when it speaks of “non-public materials” and “any such documents” in this requested order.

37. The prosecution has requested protection for *names* and *identifying data*; if, contrary to the submissions of the defence, the prosecutor’s requests are granted, this will constitute the “non-public material”. It is therefore hard to imagine what “information”, other than the identifying data itself, could be “contained in any such documents”.

38. Assuming then that this order seeks to prohibit the defence from disclosing protected names and identifying data, the defence submits that this has already been requested with order (e).

39. If, however, the prosecution is seeking a blanket non-disclosure order for other material *it* will designate as “non-public”, as might be suggested by heading B on page seven of the motion: “Non-Public Material (Including witness statements, interview reports and summaries)”, then the defence would point out that it is not up to the prosecution, but to the Judge or Trial Chamber, to determine whether certain documents or information should not be disclosed to the public (Rule 53(A) of the Rules of Procedure and Evidence). The Court cannot issue an order prohibiting the defence from disclosing any information or material that the prosecution may decide is confidential, and the prosecution should not seek to arrogate to themselves the power vested in the Judge or Trial Chamber.

40. As a practical matter, the defence also opposes this requested order on the grounds that it would deny the right of the defence to investigate and challenge all evidence put forward by the prosecutor, however “non-public material” is defined. It may well be necessary or even inevitable to involve other persons, not being members of the defence team, in such an investigation. Counsel have, in fact, the obligation to properly investigate all evidence available in the defence of the accused<sup>13</sup>.

41. This has been recognised, for example, by Trial Chamber II of the ICTY, which, faced with a similar request from the prosecution there, stated its position as follows:

“The Trial Chamber accepts that, once the defence commences (quite properly) to investigate the background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the defence has spoken may reveal to others the identity of those witnesses, with the consequential risk that the witnesses will be interfered with. But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will

<sup>13</sup> ICTY, Appeals Chamber, Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1-AR73, 16 February 1999, par. 18

eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.”<sup>14</sup>

42. Lastly, non-disclosure to the public should remain an exception to the rule that all evidence presented in trial is public. Rule 53(A) expressly states that such an order can only be given in exceptional circumstances. Whether these circumstances exist has to be decided in each specific case. Needless to say that the prosecution has not shown these exceptional circumstances exist as they have not addressed any specific case, nor explained what material they wish to remain “non-public”.

(g)

43. The prosecution also requests the Judge or Trial Chamber to order that the defence shall maintain a so-called log, identifying all persons, not being a member of the defence team, with access to non-public material.

44. The defence fails to understand this order requested by the prosecution, as it is clearly inconsistent with the request discussed above. Why should the defence maintain such a log if they are not allowed to reveal non-public material to third parties?

45. Although the request does not mention it, the purpose of the request is presumably to allow the Trial Chamber or even the prosecution to review the log in the event of a perceived violation of the non-disclosure order. The defence strongly opposes this idea, as it infringes the confidentiality of the defence team’s investigation by permitting both the Trial Chamber and the prosecution to know whom they are meeting to organise the defence of the accused.

46. In the *Brdanin & Talic* case, Trial Chamber II of the ICTY confirmed the privileged and confidential nature of the contacts between the defence team and the persons spoken to in the preparation of their case. A similar log-book request was refused in that case<sup>15</sup>.

47. The defence submits that this should be the fate of the current order requested. The details of the preparation of the defence case are confidential, and no grounds have been put forward by the prosecution to justify stripping this confidentiality away.

(h)

48. This order appears to complement the order requested by the prosecution under (g). For the reasons mentioned under that heading, the defence also opposes this request. The defence further observes that no reciprocal measures are suggested, and wonders whether the prosecution is proposing to inform the defence and Trial Chamber of all personnel changes in its team.

(i)

49. The defence opposes this request for lack of clarity. Once again, the defence is unsure of what is meant by “non-public materials” (see discussion of requested order (f), above).

---

<sup>14</sup> ICTY, Trial Chamber II, *Brdanin & Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99036-PT, 3 July 2000, par. 28.

<sup>15</sup> *Ibidem*, pars. 45-49.



(j)

50. The defence opposes this order requested by the prosecution for the reason given under (i), above.

51. In addition to this, the defence notes that non-public material is covered by the client-lawyer privilege as soon as it is disclosed to the defence. Only in extraordinary circumstances should the defence be required to return this privileged material. With Trial Chamber II of the ICTY, the defence is of the opinion that the inevitable risks which accompany any disclosure of sensitive material do not justify this particular infringement of the client-lawyer privilege:

“The Trial Chamber does not accept that the likely risk of either deliberate or unintentional disclosure after the conclusion of the case is of such significance as to justify the unwieldy and possibly unfair consequences of an order that the documents be returned in very case.”<sup>16</sup>

52. The requested order should therefore be refused.

(k)

53. The defence does not oppose this request, if the Trial Chamber decides to order protective measures in spite of the general objections raised in the introduction of this response. The order should, however, equally apply to the prosecution.

**Interim measures**

54. The defence does not object to the interim measures requested by the prosecution.

COUNSEL FOR THE ACCUSED

I.S. Yillal

for Mr. Michiel Pestman

<sup>16</sup> Ibidem, par. 43.

795



"Michiel Pestman"  
<MPestman@bfkw.nl>  
07/18/2003 12:18 PM

To: <Yillah@un.org>  
cc:  
Subject: Response to the Motion for protective measures

Dear Yillah,

Herewith my response to the prosecutor's motion for protective measures. I authorise you to sign and file it on my behalf.

Later today, I will send you my letter to Fofana. Could you, please, confirm receipt of the Response?

Thank your for you assistance,

Michiel



responseprotectivemeasures[1].18July03.doc