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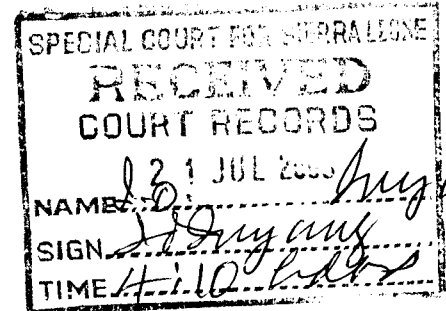
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

SCSL-2003-11-PD-
(796-805)

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

Registrar: Robin Vincent

Date filed: 21 July 2003



THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL – 2003 – 11 – PD

**PROSECUTION REPLY TO DEFENCE “RESPONSE TO THE PROSECUTION
MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES
AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE”**

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DISCLOSURE”**

INTRODUCTION

The arguments raised in the Response of Defence Counsel should be rejected as they are either incorrect or are not supported by the jurisprudence of the international ad hoc tribunals. The assertions fail to realize that it has been accepted by the International Criminal Tribunals for Yugoslavia and Rwanda and the Special Court that the rights of the Accused must be balanced with the need for protective measures for witnesses and victims. The Defence objections to the specific orders sought by the Prosecution fail to address the intended object and purpose of such measures and overlooks that they are routinely implemented by the International Tribunals. Finally, the Defence Response is clearly in excess of the word limitation of the Practice Direction on the filing of documents, which warrants a notice of defective filing.

ARGUMENT

1. On 18 July 2003, the Defence filed its response (the “**Defence Response**”) to the Prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure dated 2 July 2003 (the “**Prosecution Motion**”).
2. The Prosecution notes that the Defence Response exceeds the word limitation of 3,000 stipulated under Article 8 of the Practice Direction¹, as it is presented in smaller than 12 pt. font and single line spacing, and for which the Defence ought to have first sought leave to file an oversized response.

I. **Balance between rights of the Accused with need for protective measures**

3. The Prosecution submits that in its Response, the Defence clearly misconstrues the provisions of the Rules and this Court’s Statute, which in fact “seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection”.² Furthermore, the Defence assertions overlook the philosophy of the International Tribunals and this Court, which is “pre-eminently mindful of the need to guarantee the utmost protection and respect **for the rights of the victims and witnesses**”.³
4. The Prosecution fully recognises the rights of the Accused as they are stipulated in Article 17 of this Court’s statute.⁴ According to the prevailing practice of the ad hoc Tribunals, as stipulated in Article 17.2 of the Court’s statute and as held by the Designated Judge to the Trial Chamber⁵, the right of the Accused to a fair and public trial may be subject to derogation in exceptional circumstances, which include the interest of witness and victim protection.

¹ *Practice Direction on Filing Documents before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003.

² See para. 15 of “Decision on the Prosecutor’s Motion For Immediate Protective Measures For Witnesses and Victims and for Non-Public Disclosure”, dated 23 May 2003 in *Prosecutor Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, and *Samuel Hinga Norman*, SCSL-2003-08-PT.

³ *Ibid*, para. 9, 15. See also para 14, which refers to ICTY decision in *Blaskic*, IT-95-14, 5 November 1996.

⁴ Of note, the language of Article 17 of the Statute of the Special Court for Sierra Leone (“**the Statute**”) is almost identical to Article 20 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).

⁵ *Supra* note 2, para. 15.

Designated Judge to the Trial Chamber⁵, the right of the Accused to a fair and public trial may be subject to derogation in exceptional circumstances, which include the interest of witness and victim protection.

II. Demonstration of exceptional circumstances and objective fear

5. The Prosecution submits that the Defence incorrectly interprets the Rules and the Statute to imply that a party seeking protective measures for witnesses and victims must present evidence as to endangerment to the witness from the disclosure of their identity to the Defence. The jurisprudence of the International Tribunals and this Court clearly demonstrates that the party seeking protective measures must show the existence of a real fear for the safety of a witness or the witness' family, an objective basis for the fear. Furthermore, the plain language of Rule 69 establishes a requirement that there be a showing of exceptional circumstances to warrant the protective measures that are being sought. The Prosecution submits that the affidavit evidence clearly demonstrates exceptional circumstances and a real and objective fear for the safety of its witnesses and victims.
6. The Prosecution submits that the circumstances set forth in Attachments A through D, in particular the Confidential Investigator's Statement of Tamba Gbokie, dated 3 July 2003, and the Declaration of Dr. Alan White, the Chief of Investigations, dated 10 June 2003, provide a sufficient basis to find that exceptional circumstances exist to support the relief requested, including protective measures for categories of witnesses.
7. These circumstances include, as in Rwanda, the presence of perpetrators who actually carried out the crimes alleged in the indictment in the general population, the fact that potential witnesses live among these perpetrators, the fact that the Government of Sierra Leone is not actively prosecuting such perpetrators, and the fact that many potential witnesses live among these perpetrators in remote areas where there is no appreciable police presence or other security available. The Prosecution submits these circumstances are sufficient to reflect a security situation *vis à vis* potential witnesses

⁵ *Supra* note 2, para. 15.

which supports applying the requested protective measures to the categories listed in the Prosecution motion.⁶ In addition, the objective basis for the fears expressed is provided by the “horrendous nature and ruthless character of the alleged crimes”.⁷

- 8. The Prosecution submits that, where, as here, the security situation relative to witnesses in a country or region puts all witnesses in that country or region potentially at risk, based on real and objectively validated fears, exceptional circumstances exist to justify providing protective measures for categories of people, as has been done in the ICTR. In addition to the authorities cited in the Prosecution motion, see especially *Rwamakuba*, wherein the Trial Chamber found that the security situation could be of such a nature to put at risk the lives of victims and potential Prosecution witnesses, and granted the relief requested for categories of witnesses.

- 9. The Prosecution submits that the existence of real fear for the safety of potential witnesses is set forth in the Confidential Investigator’s Statement of Tamba Gbekie, dated 3 July 2003, while the Declaration of Dr. Alan White provides information which establishes both a real fear for the safety of witnesses and their families and an objective basis for these fears. Attachments A, B and D in particular demonstrate that these fears are genuine and well founded. Thus, as was held by the Judge Thompson:

the combined effect of these affirmations is to demonstrate ... the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses. It is significant to note that there is no affidavit in opposition.⁸

- 10. The Prosecution submits that there is much commonality between the situation in Sierra Leone and that in Rwanda: the victims, witnesses and the perpetrators live together in close knit communities; the situation in the region surrounding Sierra Leone is still volatile as reflected by recent events in Ivory Coast and Liberia, which involve members of the same factions which fought in the Sierra Leone conflict. This commonality supports the application of similar protective measures, such as those

⁶ See *Prosecutor v. Rwamakuba*, ICTR - 98 - 44- T, 22 September 2000; and the authorities cited in the Prosecution Motion.

⁷ See *Prosecutor v. Tadic*, IT- 94- 1-T, “Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995, para. 62.

⁸ *Samuel Hinga Norman*, SCSL-2003-08-PT at para. 11.

regional threats and instability warrant protective measure for witnesses who are outside the territory of Sierra Leone, which is especially demonstrated within the Declaration of the Chief of Investigations, Dr. Alan White (See para. 29, Defence Response).

III. Rule 69 (C)

11. The Prosecution submits that the Defence argument concerning Rule 69 (C) does not fully reflect the developments at the ad hoc tribunals and their objective of balancing the rights of the Accused with witness protection (See para. 24-7, Defence Response).
12. In para. 28 of its Response, the Defence seeks that the “identities of the witnesses be disclosed a minimum of 30 days before the beginning of the trial to allow for a proper defence.” Rule 69 (C) of the Court states that the triggering event for the disclosure of identifying data shall be the date on which the witness is to be called to testify. The Prosecution maintains that the provision of identifying data 21 days prior to witness testimony, which was established by the jurisprudence of the ICTR, as a general practice, is a sufficient balance between the rights of the Accused and the need for protective measures for witnesses.
13. The Defence’ claim that the right of the Accused to adequate time and facilities to prepare his defence mandates disclosure of identifying data “well before the beginning of trial” fails to consider that the substance of the witnesses’ testimony will have been previously disclosed to the Defence and that only the data that could lead to the identity of the witness will be withheld for a certain period prior to testimony. Since the Defence will be in possession of the substance of anticipated testimonies, the Prosecution submits that 21 days before testimony is sufficient time to allow the Defence to conduct any inquiries relating to remaining issues, such as the credibility of the identified witness.⁹
14. The Defence seeks the rejection of the Prosecution Motion and that the Prosecution proceed to identify on a case-by-case basis the specific justifications for witness

⁹ See *Prosecutor v. Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003, para. 17; *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 25 April 2001, para. 26; *Prosecutor v. Rwamakuba*, *supra*, para. 15 f.

protection and the extent of protective measures being sought (See para. 11, Defence Response). The Prosecution submits that it has made a reasonable case for measures of confidentiality through withholding identifying data during the pre-trial phase. In matters of such delicacy and sensitivity, as the Court stated in recent decisions, “it would be unrealistic to expect ... the Prosecution ... to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation”.¹⁰ Accordingly, the said request of the Defence should be rejected. Furthermore, individual measures may be sought in the future where warranted for individual witnesses.

IV. Objections to specific measures

15. The Prosecution submits that the Defence objections to the protective measures requested in the Prosecution Motion mistake the intended object and purpose of the requested measures and overlooks the fact that they are routinely implemented by the International Tribunals, and therefore should be rejected.

Right to a public trial

16. The Defence assertion that the right to a public trial demands that the identity of witnesses be made public is incorrect (See para. 30 – 35, Defence Response). The right to a public trial aims at ensuring that the accused is not disadvantaged through public knowledge and transparency. The practice of the International Tribunals has employed witness protection measures, such as the use of screens, without unduly compromising live testimony before the public or the rights of the Accused or the public right to information. The Prosecution submits that as demonstrated by Attachments A to G, there exists a real and objective fear to warranting non-disclosure of witness identities to the public in order to ensure their protection.

Use of pseudonyms

17. Similarly, the request for the use of pseudonyms under para. 25 (c) of the Prosecution Motion is also based upon the underlying affidavit evidence which demonstrates that

¹⁰ See e.g. *Prosecutor v. Sesay*, SCSL-2003-05-PT, 23 May 2003, para. 14; *Prosecutor v. Brima*, SCSL-2003-06-PT, 23 May 2003, para. 14; *Prosecutor v. Kallon*, SCSL-2003-07-PT, 23 May 2003, para. 15; *Prosecutor v. Norman*, SCSL-2003-08-PT, 23 May 2003, para. 14.

all witnesses in these exceptional circumstances require protective measures. The Prosecution submits that this measure does not derogate from the right of the Accused to prepare his defence as investigations may be conducted into the credibility of witnesses during the requested 21 day time period prior to testimony of each witness, the use of pseudonyms is intended to protect witnesses from existing threats from the public domain.

Non-public materials

18. In reply to the Defence objections to the measure sought under para. 25 (f) of the Prosecution Motion, the Prosecution notes the following (See para. 36 – 42, Defence Response): First, non-public materials are specified under para. 21 of the Prosecution Motion as any non public materials including witness statements, interview reports and summaries relevant to the case. Second, as argued under para. 21 of the Prosecution Motion, para. 25 (f) is intended to limit disclosure of non-public materials and any information therein except to the limited extent necessary for the Defence investigation of this case. Finally, the Prosecution submits that the Prosecution Motion duly requests the Chamber to order non-disclosure by the Defence to the public of all information in any disclosed non-public material in order to ensure the safety and security of witnesses both before and after these proceedings, and prevent any ongoing investigations, existing indictments and the integrity of the system from being compromised.
19. In reply to the Defence objection at para. 34 of the Defence Response, the Prosecution corrects the reference within para. 25 (d) of the Prosecution Motion, which in fact ought to refer to para. 25 (a), and not para. 23 (a). The Prosecution reiterates that the supporting affidavit evidence demonstrates that *all* witnesses require this requested protective measure in the circumstances before this proceeding.
20. The Prosecution also seeks to correct the reference in para. 25 (a) of the Prosecution Motion, which should refer to para. 19 and not para. 16.

List of Defence team members, Defence log, Return of disclosure materials

21. The Defence Response also objects to the orders outlined in the Prosecution Motion at para. 25 (g), (h) and (i). These measures are not suggested to control the identity or operations of the Defence team members, least of all by the Prosecution's Office. The Prosecution submits that it is in the legitimate interest of the Court and the Prosecution to have precise knowledge of those persons dealing with confidential and sensitive information, such as the identifying data of protected witnesses, as well as those in contact with such witnesses generally. These provisions also provide the Court with the most direct means to exercise oversight regarding the implementation of protective measures, including, if necessary, the means by which to pursue alleged violations of the protective orders.
22. The Prosecution submits that changes to Prosecution team simply are not relevant to the purpose of protective measures, nor is the Defence request that the Prosecution be also required to request permission from the Trial Chamber to contact any protected witness (See para. 48 and 53, Defence Response).
23. Furthermore, the Prosecution submits that the orders requested under para. 24 (i) and (j) are essential in that they serve to prevent protected identifying witness information from passing into the public realm should Defence team members leave the case or at the conclusion of the trials, as has occurred at the ICTR, following which dangers may still present themselves to the safety of witnesses and victims.

Reliance by the Defence upon the *Talic* case

24. The Prosecution notes that much of the Defence objections to the Prosecution Motion rely upon the decisions of the Trial Chamber II of the ICTY in the case of *Brdanin & Talic*, IT-99036-PT, 3 July 2000 and 27 October 2000. The Prosecution submits that the protective measures sought in the Prosecution Motion are based upon the general and recent practice of the International Tribunals.

CONCLUSION

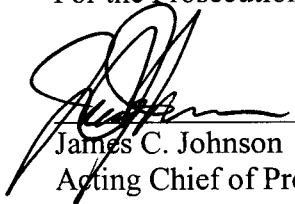
The Prosecution submits that the protective measures requested in the Prosecution Motion are well grounded upon the prevailing jurisprudence of the International Tribunals

concerning witness protection, and strike an appropriate balance between the interest of witness and victim protection and the eminent interest of effectively protecting the right of the Accused to a fair and expeditious trial. On this basis, the Court should grant the relief requested in the Prosecution Motion for protective measures.

The Prosecution reasserts its request for provisional transmittal to the Registry of disclosure materials within the period of disclosure, or alternatively a suspension of the Prosecution's disclosure obligation under Rule 66(A)(i), if the Designated Judge or Trial Chamber has not decided this motion by 31 July 2003 and issued the relevant orders.

Freetown, 21 July 2003

For the Prosecution,


James C. Johnson
Acting Chief of Prosecutions