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

TRIAL CHAMBER II

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 2 August 2006

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

Case No. SCSL – 2004 – 16 – T

PUBLIC

PROSECUTION MOTION FOR RELIEF IN RESPECT OF VIOLATIONS OF THE TRIAL CHAMBER'S DECISION OF 9 MAY 2006

Office of the Prosecutor
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Mr. Karim Agha

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Mr. Kojo Graham
Ms. Glenna Thompson

Defence Counsel for Kamara
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Defence Counsel for Kanu
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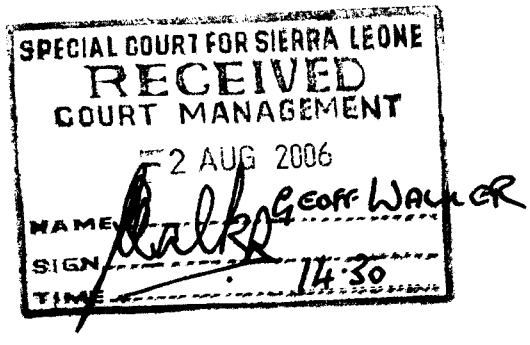

1. The Prosecution hereby moves the Trial Chamber for relief in respect of violations by the Defence of the Trial Chamber's "Decision on Joint Defence Application for Protective Measures for Defence Witnesses" of 9 May 2006 (the "**Decision**").[1]
2. The Trial Chamber ordered, in Order (d) of the Decision, "That the Defence may withhold identifying data of a witness for whom the Defence is seeking protection ... or any other information which could reveal the identity of such witness until 21 days before the witness is due to testify at trial".
3. It is necessarily implicit in this order that the Defence is required, at the latest by 21 days before each witness testifies, to disclose to the Prosecution the identifying data of each Defence witness.
4. The Defence has failed to comply with this order in ways that have materially affected the ability of the Prosecution to prepare adequately for the cross-examination of Defence witnesses, and thereby have affected the ability of the Prosecution to test the credibility and reliability of their evidence..
5. On 11 July 2006, the Prosecution was provided by the Defence with the identifying data of the next 14 witnesses mainly relating to the Koinadugu area. The first of these witnesses was called 8 days later and most of the others followed shortly thereafter. All of these witnesses have now been called, none of whom had their identifying data disclosed to the Prosecution by the Defence within the 21 day period ordered by the Trial Chamber. The Prosecution, notwithstanding the breach of the Decision, endeavoured to cross examine these witnesses without seeking an adjournment. These witnesses were largely so-called "crimebase witnesses". In the short period in which disclosure of the identifying data was made, it was not possible for the Prosecution to organise any missions to conduct investigations into these witnesses in order to prepare for their cross-examination.
6. On 21 July 2006, the Prosecution was provided by the Defence with the identifying data of a further set of 18 witnesses. Most of these witnesses are so-called "insider" witnesses The first of these witnesses was called 7 days later. The next witness (DAB 023) was called 11 days later. Due to the nature of his evidence, the insufficiency of his summary,

[1] *Prosecutor v. Brima et al.*, "*Decision on Joint Defence Application for Protective Measures for Defence Witnesses*", SCSL-04-16-T-488, 9 May 2006.

and the inadequacy of the time to prepare to test the witness's evidence in chief, the Prosecution was compelled to seek an adjournment in order to prepare for cross-examination. The Trial Chamber saw fit to grant the adjournment. It is anticipated that more of these 18 witnesses will give evidence before the recess, again well before the 21 days required for the disclosure of their identifying data pursuant to the Decision. Such a scenario may once again compel the Prosecution to again seek adjournments to prepare to cross-examine the witness and thereby delay the trial proceedings.

7. The period of disclosure actually given by the Defence in practice has therefore been as little as 7 days in the case of one witness, which is a mere one third of the period ordered by the Trial Chamber in the Decision.

8. The reason why the Prosecution is entitled to have the identifying data of Defence witnesses disclosed to it in advance of the witnesses testifying is to enable the Prosecution to undertake relevant investigations and research into the witness in order to prepare for cross-examination. In view of the late disclosure of the identifying data of the witnesses referred to above, the Prosecution's ability to undertake investigations into these witnesses for purposes of preparation of cross-examination has been extremely limited.

9. The timely disclosure of identifying data is essential if the Prosecution is to be able to undertake meaningful investigations and meaningful cross-examinations. Meaningful cross-examinations by the Prosecution are in turn an indispensable part of the adversarial trial process, which is aimed at the ascertainment of the truth.[2]

10. The Prosecution is as entitled as the Defence to expect the other parties to proceedings to comply with orders of the Trial Chamber. As the Appeals Chamber of the ICTY has observed:

> Article 21 of the Statute [= Statute of the Special Court, Article 17] provides that "all persons shall be equal before the International Tribunal". This Article has been interpreted in many Decisions of the Tribunal as having been based upon the well-known international law principle of "equality of arms". There has, however, been some difference of opinion expressed as to whether the principle relates only to the position of the accused – that is, that it provides merely that the accused is to be afforded the same rights as the Prosecution – or whether it relates to equality between both parties. ....

[2] "Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation ...": *Prosecutor v. Erdemović, Sentencing Judgement*, Case No. IT-96-22-Tbis, Trial Chamber, 5 March 1998, para. 21.

> The principle has been discussed in a number of judgements of the European Court of Human Rights. In these cases, the concept of a fair trial is described in terms of its application to both parties. In *Barberà v. Spain* [(1988) 11 EHRR 360 at para. 18] the court emphasised that the provisions of article 6(1) entail equal treatment of the Prosecution and Defence; and in *Brandsetter v. Austria* [(1991) 15 EHRR 213 at para. 67] the court said that both parties must be given equal opportunity in relation to the evidence tendered by the other. ....
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> This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law or Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.[3]

11. The failures by the Defence to comply with the time-limits imposed by the Trial Chamber for disclosure of identifying data of Defence witnesses has caused prejudice to the Prosecution. It has undermined the right of the Prosecution to conduct a meaningful examination of Defence witnesses, and has been an impediment to the ascertainment of the truth.
12. If this situation continues it is extremely likely to lead to the Prosecution applying for additional adjournments to enable it to have the period it is entitled to under the Trial Chamber's Decision to prepare for cross-examination. Such adjournments, if granted, would lead to delays in the case. In turn this would impinge upon the right of the Accused under Article 17(4)(c) of the Statute of the Special Court to be tried without undue delay.
13. The Prosecution submits that if the Defence is unable to comply with time-limits imposed by the Trial Chamber, it is incumbent upon the Defence to file a motion seeking an extension of those time limits, upon a showing of good cause. The Defence cannot simply assume the right to fail to comply with orders of the Trial Chamber whenever it

[3] *Prosecutor v. Aleksovski, "Decision on Prosecutor's Appeal on Admissibility of Evidence"*, Case No. IT-95-14/1-AR73, Appeals Chamber, 16 February 1999, paras. 22-25 (footnotes omitted).

decided that it is not capable of compliance in practice.

14. In order to ensure that the Prosecution has the period of notice of the identifying data of Defence witnesses to which it is entitled, and in order to avoid delays in the future, the Prosecution seeks as a remedy an order from the Trial Chamber for the immediate disclosure by the Defence of the identities of all remaining protected Defence witnesses, including any additional Defence witnesses to be included in the final Defence witness list that is required to be filed by 21 August 2006.[4]

15. It is acknowledged that this can be expected to result in the Prosecution having a longer period of notice in the case of most witnesses than the 21 days ordered in the Decision. However, it is submitted that this longer period of notice gives no "unfair advantage" to the Prosecution, and will not prejudice the Defence. It is submitted that this is a more practicable solution than adjourning proceedings as necessary whenever insufficient notice is given to the Prosecution which would be an inefficient use of judicial resources and prejudice the principle of a speedy trial.

Done in Freetown,

2 August 2006

For the Prosecution,

Christopher Staker
Acting Prosecutor

Kaim Agha
Senior Trial Attorney

[4] *Prosecutor v. Brima et al., "Decision on Confidential Joint Defence Motion as to Inability to Provide Details of Certain Witnesses on 10 May 2006 and Anticipation Subpoenas ad testificandum"*, , SCSL-04-16-T-494, 17 May 2006.

Index of Authorities

1. *Prosecutor v. Brima et al.*, "*Decision on Joint Defence Application for Protective Measures for Defence Witnesses*", SCSL-04-16-T-488, 9 May 2006.

2. *Prosecutor v. Erdemović, Sentencing Judgement*, Case No. IT-96-22-Tbis, Trial Chamber, 5 March 1998.
http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj980305e.htm

3. *Prosecutor v. Aleksovski, "Decision on Prosecutor's Appeal on Admissibility of Evidence"*, Case No. IT-95-14/1-AR73, Appeals Chamber, 16 February 1999.
http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm

4. *Prosecutor v. Brima et al., "Decision on Confidential Joint Defence Motion as to Inability to Provide Details of Certain Witnesses on 10 May 2006 and Anticipation Subpoenas ad testificandum"*, , SCSL-04-16-T-494, 17 May 2006.