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

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 28 July 2003

THE PROSECUTOR

Against

MORRIS KALLON also known as (aka) BILAI KARIM

CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE DEFENCE APPLICATION FOR LEAVE TO APPEAL *"DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES"*

Office of the Prosecutor:

Mr James C. Johnson, Acting Chief of Prosecutions
Ms Sharan Parmar, Assistant Trial Counsel

Defence Counsel:

Mr James Oury
Mr Steven Powles

SPECIAL COURT FOR SIERRA LEONE
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CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE DEFENCE APPLICATION FOR OR LEAVE TO APPEAL *"DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE"*

INTRODUCTION

The arguments raised in the submission filed by Defence should be rejected. The arguments raised by the Defence in support of their application for leave do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Further, an immediate resolution by the Appeals Chamber would not materially advance the proceedings.

ARGUMENT

I. Procedural matters

1. On 23 May 2003 His Honour Judge Bankole Thompson, Presiding Judge of the Trial Chamber and Designated Judge, rendered his "Decision on the Prosecutor's Motion for immediate protective measures for witnesses and victims and for non-public disclosure" (the "**Decision**", "**Impugned Decision**"). The Decision is based upon the "Prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure" dated 7 April 2003 (the "**Prosecution Motion**"), the Response of the Defence Office to this motion dated 23 April 2003 (the "**Defence Response**") and the Prosecution's Reply to the Defence Response dated 29 April 2003 (the "**Prosecution Reply**"). With the Application of 18 July 2003 the Defence brings an "Application for leave to appeal the 'Decision on the Prosecutor's Motion for immediate protective measures'" (the "**Application**").

II. Leave to Appeal

2. Pursuant to Rule 73 (B), decisions on preliminary motions are not subject to interlocutory appeal, except "on the grounds that a decision would be in the interest of a fair and expeditious trial"(Rule 73 (B)).

3. The Prosecution submits that the Defence has failed to demonstrate how an appeal of the Decision of the learned Judge has the significant effect of ensuring a fair and expeditious trial. The Defence alleges that in the Decision, the designated Judge erred in four respects.

Defence comment on the four attachments to the Prosecution Reply

4. First, it is argued that the designated Judge erred in not allowing the Defence to address and comment on the Four Attachments. The Prosecution notes that this argument, in effect, involves a challenge to the Order on the Defence Objection rather than the Impugned Decision itself. Defence Counsel filed a Defence Objection objecting to the Admission of the Four Attachments, where their same arguments were rejected by the Designated Judge. The Prosecution submits that the Accused can not be given unlimited opportunities to respond to the Prosecution Motion where

such a response is not in the interests of a fair and expeditious trial, nor would materially advance the proceedings.

5. The Defence Application for Leave to Appeal begins by arguing that the designated Judge "correctly took this new and additional material [the Four Attachments] into consideration in reaching his decision in this case", and that the designated Judge "was right to admit and take into consideration all relevant evidence in the making of his decision".[1] The Prosecution notes that this argument directly contradicts the argument made in the Defence Objection, which was that the Four Attachments should not be admitted. The Defence Application for Leave to Appeal thus now concedes that the designated Judge was correct in rejecting the Defence Objection to the extent that it sought to have the Four Attachments excluded. It seeks to challenge only the designated Judge's decision not to allow the Defence to file a response to the Four Attachments.

6. The Prosecution submits that if the Order on the Defence Objection and the Impugned Decision are read together, it is evident that although the designated Judge did not exclude the Four Attachments, they were not considered by the designated Judge to have any effect at all on his decision. The Order on the Defence Objection stated that the Four Attachments "cannot be considered as fresh evidence, but may only be considered as evidence of a rebutting character, as the [Four Attachments] only add and strengthen the line of argument in the [Original Prosecution] Motion, and ... the [Four Attachments] do not initiate an entire new line of argument". At paragraph 11 of the Impugned Decision, the designated Judge refers to and relies on two documents attached to the Original Prosecution Motion, but makes no reference at all to the Four Attachments. Because the Four Attachments had no effect on the designated Judge in rendering the Impugned Decision, the inability of the Defence to comment on them cannot have caused any prejudice to the Defence. In the absence of any prejudice to the Defence, it cannot be said that an appeal against the Impugned Decision would not materially advance the proceedings and subsequently would not be "in the interest of a fair and expeditious trial" within the meaning of Rule 73(B).

[1] Defence Application, para. 10.

Withholding of identifying data 42 days prior to testimony

7. Second, the Defence Application for Leave to Appeal argues that the designated Judge erred in ordering that the Prosecution may withhold data of the persons the Prosecution is seeking to protect until 42 days before the witness is to testify at trial. In relation to this argument, the Defence Application for Leave to Appeal relies on the decision of the Trial Chamber of the International Criminal Tribunal for Yugoslavia in *Brdjanin and Talic*.[2] However, it is submitted that the order made in the Decision was not inconsistent with certain case of the ICTY and the general practice of the ICTR.[3] In any event, as the Impugned Decision expressly found, the precedents of the ICTY and ICTR in matters of witness protection cannot be applied in the Special Court without regard to the different socio-cultural and juridical dynamics prevailing in the locus of the Special Court.[4]

8. The Prosecution submits that the existence of exceptional circumstances and a real fear for the safety of potential witnesses is set forth in the supporting materials, especially the Confidential Investigator's Statement of Thomas Lahun, dated 10 June 2003 and the Declaration of Dr. Alan White provides information which establish 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.[5]

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[2] Defence Application, paras. 6 – 9. The Defence Application also relies upon *Talic* later at para. 12 of the Defence Application.

[3] See *Prosecutor v. Kordic and Cerkez,* IT-95-14/2-PT, 19 March 1999 (permitting the Prosecution to delay disclosure of the name and statements of the relevant witnesses until 10 days before the witness was due to testify in the case). See also *Prosecutor v. Kunarac,* IT-96-23-PT, 20 November 1998. See also the authorities cited in para. 4 and 5 of the Prosecution Reply.

[4] Impugned Decision, para. 12.

[5] See para. 11 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.

9. 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, which are applicable to all witnesses and victims, such as those requested by the Prosecution. Furthermore, these 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.

10. Furthermore, the Defence' claim that the impugned measure prevents the Defence from full knowledge of the Prosecution's case 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 (See para. 10, Defence Application). Since the Defence will be in possession of the substance of anticipated testimonies, the Prosecution submits that 42 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.[6]

11. 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. Moreover, the Decision orders the provision of identifying data in 42 days, which is double the general practice at the ICTR.

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[6] 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. See also the authorities cited in para. 4 and 5 of the Prosecution Reply.

12. The Impugned Decision is well grounded upon the prevailing jurisprudence of the International Tribunals concerning witness protection and strikes 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 trial. It is not to be expected that the Appeal Chamber would render a decision contrary to such. Therefore, the Prosecution submits that the leave to appeal raises no grounds as to how it could significantly affect the conduct of the proceedings. There is no reason for which an immediate resolution by the Appeals Chamber of the Application could materially advance the proceedings.

Defence Log

13. Third, the Defence objects the orders sought in para. 23 (g) and (h) of the Prosecution Motion. The said orders are not being suggested to control the identity of the Defence team members. 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. Since the requirements sought-after also provides 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, the Prosecution submits that a reconsideration of this particular aspect of the said order would not be "in the interest of a fair and expeditious trial" within the meaning of Rule 73(B).

CONCLUSION

The Court should reject the Defence's request for leave to appeal.

Freetown, 28 July 2003

For the Prosecution,

James C. Johnson
Acting Chief of Prosecutions

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Kordic and Cerkez,* IT-95-14/2-PT, 19 March 1999
2. *Prosecutor v. Kunarac,* IT-96-23-PT, 20 November 1998

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Kordic and Cerkez,* IT-95-14/2-PT, 19 March 1999

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
19 March 1999

PROSECUTOR

v.

DARIO KORDIC
MARIO CERKEZ

DECISION ON PROSECUTOR'S MOTION ON TRIAL PROCEDURE

The Office of the Prosecutor

Mr. Geoffrey Nice
Ms. Susan Somers
Mr. Patrick Lopez-Terres
Mr. Kenneth Scott

Defence Counsel

Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. David F. Geneson, Mr. Turner T. Smith, Jr., and Ms. Ksenija Turkovic, for Dario Kordic
Mr. Bozidar Kovacic, for Mario Cerkez

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"),

NOTING the "Prosecutor's Motion on Trial Procedure" ("Motion"), filed by the Office of the Prosecutor ("the Prosecution") on 9 March 1999,

NOTING the oral arguments of the Parties heard during the Pre-Trial Conference on 11 March 1999,

NOTING that the Prosecution requests the Trial Chamber to order that witnesses should not be permitted to have any further contact with the Prosecution or the Defence once they have commenced their testimony;

NOTING the argument of Defence counsel ("the Defence") that such an order is unnecessary, particularly in the case of expert witnesses, and inappropriate in relation to the accused if they should choose to testify,

NOTING such an order as requested by the Prosecution has been issued in two other cases: *Prosecutor v. Jelesic (IT-95-10-T)* and *Prosecutor v. Kupreskic et al. (IT-95-16-T)*,

NOTING that although there is nothing in the Statute or the Rules of Procedure and Evidence ("the Rules") to address this matter specifically, Rule 90 (G) states that the Trial Chamber "shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; S . . . C",

NOTING further that Rule 89 (B) provides that "SiCn cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law",

CONSIDERING that a witness, either for the Prosecution or Defence, once he or she has taken the Solemn Declaration pursuant to Rule 90 (B) of the Rules, is a witness of truth before the International Tribunal and, inasmuch as he or she is required to contribute to the establishment of the truth, not strictly a witness for either Party,

CONSIDERING that permitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence or affect the witness's further testimony in ways which are not consonant with the spirit of the Statute and Rules of the International Tribunal,

CONSIDERING that the Victims and Witness Section, established pursuant to Article 22 of the Statute and Rule 34 of the Rules of Procedure and Evidence, is mandated to assist and accompany witnesses during their stay in The Hague, and to manage the practical aspects of their appearance before the International Tribunal, and this fact obviates the need for the Prosecution or the Defence to be in communication with a witness during his or her testimony in order, among other things, to provide him or her with psychological or moral support,

CONSIDERING that this Order shall also be applicable to any accused who chooses to testify,

CONSIDERING if a Party wishes to communicate with a witness on the content of their testimony, it should either seek leave of the Trial Chamber, or inform the other Party, who could raise an objection before the Trial Chamber,

CONSIDERING that there may be situations in which a witness wishes *proprio motu* to communicate certain information to the Prosecution or the Defence once the witness has begun testifying,

CONSIDERING that in such a case, the witness should contact the Victim and Witnesses Section, who will notify the relevant Party; that Party must then either seek the leave of the Trial Chamber to communicate with the witness, or inform the other Party, who could raise an objection before the Trial Chamber,

NOTING that the Prosecution also requests the Trial Chamber to order that where an accused is to give evidence, he must do so at the commencement of the Defence case, unless ordered otherwise by the Trial Chamber,

NOTING that the Prosecution argues that this procedure would save time and "eradicate the opportunity for the accused to tailor his evidence in accordance with the evidence of other Defence witnesses", and that this rule is applied in several civil as well as common law jurisdictions,

NOTING the Defence submission that the accused should be allowed to make an informed decision on whether and when to testify, in the light of the evidence presented at trial,

NOTING that although Article 21, paragraph 4 (g), protects an accused from being compelled to testify, the Statute and the Rules of the International Tribunal are silent on when during the proceedings the accused is to testify, should he choose to do so,

CONSIDERING however, that it has been the practice of the International Tribunal to allow those accused who choose to testify to determine when to do so,

NOTING that the Prosecution further requests a ruling for cross-examination of witnesses to focus on matters in dispute, and that matters not challenged in cross-examination should be regarded as not in dispute, and that all matters which a Party seeks to rely on in support of its case must be raised during cross-examination of witnesses who can then deal with these matters,

NOTING that the Defence submits that the conduct of cross-examination should not be guided by such a rule but by the discretion of the Trial Chamber,

NOTING Rule 90 (H), which provides that "ScCross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness. The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters as if on direct examination",

CONSIDERING that Rule 90 (H) does not provide for such a rule in relation to cross-examination as requested by the Prosecution,

CONSIDERING therefore, that the request must be refused, but that the matter remains within the discretion of the Trial Chamber,

NOTING that the Prosecution finally requests the Trial Chamber to order that examination-in-chief should be conducted with questions that do not lead the witness or suggest an answer, except in respect of background and non-contested matters,

CONSIDERING that it is the practice of the International Tribunal not to allow leading questions on matters in dispute, and that there is no need for a further order,

PURSUANT to Rules 54, 89 (B), 90 (G) and (H) of the Rules of Procedure and Evidence,

HEREBY

(1) ORDERS that

a. Once a witness, including an accused, has made the Solemn Declaration provided for in

Rule 90 (B) and commenced testifying, the Prosecution and Defence must not communicate with the witness on the content of the witness's testimony except with leave of the Trial Chamber, or by informing the other Party, who could raise an objection before the Trial Chamber.

b. If a witness wishes to contact the Party who called him or her, he or she shall either inform the staff of the Victims and Witnesses Section who will then report the matter to the relevant Party, or contact the Party directly. That Party may then apply to the Trial Chamber for leave to communicate with the witness, or inform the other Party, who could raise an objection before the Trial Chamber.

(2) DISMISSES the remainder of the Motion.

Done in English and French, the English text being authoritative.

Richard May
Presiding Judge

Dated this nineteenth day of March 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

PROSECUTION INDEX OF AUTHORITIES

2. *Prosecutor v. Kunarac,* IT-96-23-PT, 20 November 1998

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IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding

Judge Antonio Cassese

Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 20 November 1998

PROSECUTOR

v.

DRAGOLJUB KUNARAC

DECISION GRANTING PROTECTIVE MEASURES FOR WITNESS FWS-191

The Office of the Prosecutor:

Mr. Franck Terrier
Ms. Peggy Kuo
Ms. Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr. Slavisa Prodanovic

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"),

NOTING the "Order On Prosecution Motion Requesting Protective Measures for Witnesses At Trial" issued by the Trial Chamber on 5 October 1998 ("the Protective Measures Order"),

NOTING ALSO the oral presentations made by the parties to the Trial Chamber in relation to witness FWS-191 in *ex parte* hearings on 11 November 1998, and

REMAINING SEISED of the request for protective measures in respect of witness FWS-191 in the confidential "Motion Requesting Protective Measures for Witnesses at Trial" together with the "Prosecutor's Document of Witness Information" annexed thereto, filed by the Office of the Prosecutor ("the Prosecution") on 4 September 1998 ("the Request"),

CONSIDERING Articles 20, 21 and 22 of the Statute of the International Tribunal and Rules 75 and 79 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"),

CONSIDERING that the relief requested by the Prosecution in the Motion is appropriate for the privacy and protection of the witness but is still consistent with the rights of the accused,

PURSUANT to Rules 69, 75 and 79,

HEREBY GRANTS the Request, and **ORDERS** as follows:

1. The Prosecution shall be released from the obligation to disclose the name and unredacted statement of witness FWS-191 until such time as the arrangements currently being made by the Victims and Witnesses Unit of the International Tribunal have been fully implemented;
2. The Prosecution shall inform the Trial Chamber and the Defence when those measures have been fully implemented and shall disclose the unredacted statement of witness FWS-191 to the Defence within seven days thereof and, in any event, not less than 30 days before the date set for trial;
3. All provisions of the Protective Measures Order relating to pseudonymed witnesses shall apply also to witness FWS-191;
4. The Defence counsel, the accused and their representatives who are acting pursuant to their instructions or requests, shall notify the Prosecutor of any requested contact with witness FWS-191 or the relatives of this witness. The Prosecutor shall make arrangements for such contact as may be determined necessary and may allow contact by the Defence counsel only;
5. The testimony of witness FWS-191 shall be heard in closed session; however, edited recordings and transcripts of the sessions shall be released to the public and to the media after review by the Prosecution in consultation with the Victims and Witnesses Unit.

Any breach of this Order shall be dealt with in terms of Rule 77 of the Rules.

Done in both English and French, the English version being authoritative.

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Florence
Ndepele
Mwachande
Mumba
Presiding

Dated this twentieth day of November 1998

At The Hague

The Netherlands

[Seal
of

the
Tribunal]