SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 18 May 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY

MORRIS KALLON

AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – PT

PROSECUTION CONSOLIDATED REPLY TO DEFENCE RESPONSE TO PROSECUTION RENEWED MOTION FOR PROTECTIVE MEASURES

Office of the Prosecutor:
Luc Côté
Robert Petit
Paul Flynn
Abdul Tejan-Cole
Leslie Taylor
Boi-Tia Stevens
Christopher Santora
Sharan Parmar
Sigall Horovitz
Xavier Cormier-Lassonde

Defence Counsel for Issa Sesay
Timothy Clayson
Wayne Jordash
Serry Kamal

Defence Counsel for Morris Kallon
Sheku Touray
Raymond Brown
Melron Nicol-Wilson
Wanda Akin
Wilfred Bola Carrol

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I. INTRODUCTION

The Prosecution files this consolidated reply to the response to the Prosecution's renewed motion for protective measures filed by the Defence for Sesay and the Defence for Kallon respectively on 14 May 2004.

II. SUMMARY OF DEFENCE SUBMISSIONS

1. In the response filed by Sesay, the Defence argues for the dismissal of the Motion on the grounds that the Prosecution failed to provide a proper evidential basis for the requested protective measures.

2. In the response filed by Kallon, the Defence argues for the dismissal of the Motion mainly on the grounds that the measures sought adversely affect the rights of the accused.

III. PROSECUTION ARGUMENTS

There is sufficient evidentiary basis for the motion

3. Contrary to the submissions by the Kallon Defence but as conceded by the Defence for Sesay in paragraph 7 of its Motion, the Prosecution does not have to show the existence of threats or fear for each specific witness for which it seeks protection, as the security situation can provide sufficient basis.[1]

4. The attempt by the Sesay Defence to distinguish the Muvunyi case from the instant case is not compelling. In *Muvunyi*, the threat to witnesses was assessed against the backdrop of attacks on Rwanda by infiltrators. But the lack of similar attacks in Sierra Leone is no indication that the lives of witnesses are not endangered by the security situation in the country. The peculiarities of the conflict in Sierra Leone and the concomitant establishment of the Court in Sierra Leone provide its own unique set of circumstances which could affect witnesses. These circumstances, such as the co-existence of ex-combatants and witnesses in the same communities, the lack of sufficient police presence in many parts of the country, etc. are sufficiently detailed in the affidavits in support of the Motion.

5. Moreover, and contrary to the assertion of both the Defence for Sesay and Kallon, the affidavit of Dr. Alan White and Mr. Brima Acha Kamara contain specific references to witnesses being threatened and efforts undertaken to undermine the work of the Special Court. The impact of such threats on witnesses before this Court is even more direct than the level of threats to witnesses in the Muvunyi case based on attacks on Rwanda in general by infiltrators.

6. The attempt by the Kallon Defence to discount the relevance of the information about efforts to disrupt the operations of the Special Court and to intimidate witnesses by resigning them to measures taken by a faction other than the RUF is specious. It must be emphasised that even if one single witness is targeted as a result of his or her affiliation

[1] *See Prosecutor Against Muvunyi* cited for the same proposition in the Prosecution's Motion

with the Special Court, this would have a detrimental impact on the willingness of other witnesses to testify before the Special Court.

The Defence case for disproportionate measures is not met

7. The submission by the Kallon Defence in paragraphs 19-20 of their response that some of the measures sought by the Prosecution do not pass the test of proportionality is baseless. In paragraph 20, the Defence assert that only "some" - therefore not all - of the measures sought by the Prosecution fail to meet the proportionality test. But the Defence fails not only to indicate the affected measures but also to show why or how these measures fall short of meeting the test.

Delayed disclosure does not adversely infringe on the rights of the accused

8. Delayed disclosure of the identity of witnesses will not prejudice the rights of the accused persons in the preparation of their defence. As stated in paragraph 13 of the Prosecution's Motion, the delayed disclosure will only affect remaining issues such as credibility of the witnesses. Such remaining investigations will be conducted in Sierra Leone as most of the Prosecution witnesses are from Sierra Leone. Given the presence of the Special Court in Sierra Leone, the locus of the conflict, Defence counsels at the Special Court are not faced with the logistical problems and disruption to work caused by a situation such as that which exists at the ICTR and the ICTY where investigations into the background of most Prosecution witnesses require trips to Rwanda and Bosnia, etc. away from the seat of the Tribunals.

9. Further, investigation is usually an on-going process during trials therefore inquiries relating to the background of witnesses will only be part of the investigative process. Defence teams at this Court are equipped with investigators who can focus on investigative work allowing counsels sufficient time to carry on with their work. It is submitted that whatever supervisory role will be played by counsel(s) in relation to such investigation will not be overly burdensome given the limit of such investigations, i.e. the antecedents of the witnesses as opposed to the merits of the case.

The use of screens is an appropriate measure

10. In response to paragraph 16 of the Sesay Response, the Prosecution submits that the requested measure to shield the witnesses from public view during their testimony strikes an appropriate balance between any right to a public hearing and the need to protect victims and witnesses.[2]

11. The use of the screen places a limited restriction and only on the public's view of the witnesses; the public is not deprived of following the proceedings. This limited restriction is justified in light of the dangers which witnesses known to the public could face as a result of testifying.

12. The submission by the Sesay Defence that the Muvunyi, Musabyimana and Kamuhanda cases do not in any way support the Prosecution's proposition is untenable[3]. In the said cases, there were orders for protective measures identical to the measures sought in the instant case: delayed disclosure to the defence of the identity of witnesses, use of pseudonyms by the witnesses, a prohibition on the public against filming or taking photos of witnesses in Court.

13. Further, although these cases do not contain an order that expressly provides that witnesses are to be shielded from the public view during their testimony via a screen, the Prosecution submits that the said measure is implicitly provided for by the orders which prohibit the disclosure of the identity of the witnesses to the public, the use of pseudonym by and for witnesses and the sealing or deletion of witness identifying information from court records. The invisibility of witnesses to the public is but a logical means of effectuating the orders targeted at protecting the identity of the witness from the public; how else would an order permitting witnesses to testify under a pseudonym, for instance, make sense? The practice at the ICTR shows that protected witnesses are automatically

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[2] This is without prejudice to the Prosecution's position on whether or not in international law the public has a right to public proceedings.

[3] In paragraph 20 of its Motion, the Prosecution requested the following protective measures for its witnesses: non-disclosure of the identity of the witnesses to the public; delayed disclosure of the identity of the witnesses up until 42 days before they testify in court; the use of pseudonyms by the witnesses in court; a bar against filming or taking photos of the witnesses and the use of a screen during the testimony of witnesses to shield them from public view. The Prosecution then relied on the Muvunyi, Musabyimana and Kamuhanda cases to show that the requested protective measures are minimal measures under which protected witnesses at ICTR testify.

shielded from the public view while testifying, and this is so absent an express order to that effect.

14. It is worth noting that while the Defence for Sesay objects to the measure of shielding Prosecution witnesses from the public by having them testify behind screens, it does not object to the measures sought in Orders (b), (c), (d) and (j) of the Prosecution Motion which have the same purpose of shielding the witnesses from the public. More particularly, the measures sought in Orders (b), (c), (d) and (j) require non-disclosure to the public of the names and other witness identifying data as well as the sealing of all such information from the Court records. The protection offered by theses measures would indeed come to naught if in the final analysis witnesses, while testifying, were displayed for the public to see.

The use of voice distortion does not amount to a non-public trial

15. The Prosecution submits that the distortion of the voice of a witness whilst testifying does not, by any stretch of the imagination, amount to a denial of the right of the accused to a public trial nor deprive the public from observing and hearing the witness, as contended in the Sesay response. The technique simply changes the (sound of the) voice of the witness while testifying but the accused as well as the public *can still hear* the witness.

16. Contrary to the assertion by the Defence for Sesay that there is no jurisprudence in support of the Prosecution's request for the use of voice distortion, the Prosecution submits that the measure is expressly provided for in Rule 75 (c) of the Rules of Procedure and Evidence for the Special Court. Further, in the ICTY case of *Krstic,* face or voice distortion were used by 58 witnesses who testified in open session[4].

17. In response to the submission by the Defence for Kallon in paragraph 27 of their response that the use of voice distortion devices will impede the ability of the accused to identify some witnesses, the Prosecution reaffirms that the aim of the requested measure is to conceal the voice and appearance of the witness from the public and the media, and not from the Accused. The concerns of the accused could be accommodated by means of a

[4] International Criminal Evidence by Judge Richard May and Mariek Wierda, p. 188, footnote 133.

delayed broadcast to the public of the distorted voice, but instant hearing of the actual voice of the witnesses by the parties and judges.

The use of closed circuit television for the category of child witnesses is appropriate

18. The Prosecution submits that the use of closed circuit television is neither excessive nor over protective of child witnesses; rather, it is essential to safeguarding their testimony based upon their specific needs. By permitting the accused to directly observe the demeanour of the child witness during testimony over monitors, the measure balances maintaining the integrity of the accused' right to a fair trial while ensuring that the testimony of child witnesses is presented in a manner that facilitates the judicial process.

19. The Prosecution also wishes to emphasize that the Chamber's Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004 indicated that the application for protective measures can be based on the categorization of witnesses.

Insider witnesses are also deserving of protection

20. In response to the submissions by both Defence for Sesay and Kallon that insider witnesses should not be protected, the Prosecution submits that the risk of reprisal attacks against this category of witnesses for testifying against former superiors and/or collaborators is particularly high, thus warranting some level of protection for them. The measures sought are minimal and give due regard to safety concerns for these witnesses as well as the rights of the accused and the concerns of the public vis à vis these witnesses.

21. It is worthy of mention that insiders testifying before the ICTR have been given some

measure of protection, such as the use of pseudonyms and the concomitant shielding of these witnesses from the public view during their testimony in court.[6]

22. The Prosecution refutes the argument made by the Defence for Kallon obligating the Prosecution to provide a report containing prima facie evidence of the reliability of insider witnesses. The Defence provides no authority in international criminal law in support of this proposition. The Prosecution submits that Rule 68 (B) already provides for the Prosecution to disclose to the Defence any evidence which may affect the credibility of prosecution witnesses and the Prosecution will endeavor at all times to comply with such obligation.

Defence log indicating details of persons or entities receiving non-public material is appropriate

23. The Defence for Kallon objects to maintaining a log indicating the identification details of persons or entities receiving non-public material from the Defence, on the grounds that it is an oppressive measure. The Prosecution submits that this measure is consistent with the notion of ensuring that non-public material is not unnecessarily exposed to the public and it does not in any way affect the preparation of the Defence case.

Returning to the Registry all disclosed materials which have not become public

24. The objection by the Kallon Defence to "return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record" on the grounds that such material may be necessary for appellate or other post trial proceedings is without merit. It is a widely accepted legal principle that the 'conclusion of the proceedings' in law includes the conclusion of any appellate, or other post-trial, proceedings. Retention of the materials after this stage is not warranted.

The presumption of consent to closed session

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[6] *See for example, Prosecutor v. Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000, where pseudonyms – Y, Z and AA – are used to refer to "insider witnesses" who participated in events in Rwanda during the genocide.

25. In paragraph 28 of its response, the Defence for Kallon objects but "is prepared to accept" the use of closed sessions. The Prosecution is confused by the wording of this phrase and presumes this means that this measure is accepted by the Defence.

IV. CONCLUSION

26. For the foregoing reasons, the Trial Chamber should dismiss the respective Responses filed by the Defence for Sesay and Kallon and grant the Prosecution's Motion and the orders sought therein in their entirety.

Freetown, 18 May 2004.

For the Prosecution,

Luc Cote

Robert Petit

PROSECUTION BOOK OF AUTHORITIES

PROSECUTION INDEX OF AUTHORITIES

1. International Criminal Evidence by Judge Richard May and Mariek Wierda, p. 188, footnote 133.

2. *Prosecutor v Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000

PROSECUTION AUTHORITIES

1. International Criminal Evidence by Judge Richard May and Mariek Wierda, p. 188, footnote 133.

3.6 Protective Measures and the Right to a Public Trial

6.53 A significant contribution has been made by the ad hoc tribunals in developing the practice of witness protection. The general trend has been for a liberal application of protective measures within an established procedure that includes the following features: (a) applications must be made on a case-by-case basis; (b) closed sessions should be a last resort and should be avoided where possible (for instance, a Trial Chamber may go into closed session to hear identifying information only); (c) anonymous witnesses, according to the practice of the ad hoc tribunals, have not generally been allowed (with one notable exception).[132]

6.54 However, measures of witness protection have given rise to tension in respect of the accused's right to a public trial. For instance, in how far can a court rely on pseudonyms and other protective devices and still give an adequately reasoned judgment? In this regard, the ad hoc tribunals have issued a number of judgments where pseudonyms were widely used. Recently, Trial Chambers have exhibited increased awareness of this problem and are more sparing in granting protective measures.[133] These challenges will continue to exercise the international criminal courts of the future, including the ICC.

6.55 Finally, concern for the safety of witnesses may require not only protective measures during trial but also additional protection after trial, including witness protection programs and resettlement where necessary. The ad hoc tribunals may negotiate confidential resettlement agreements with States and it is expected that the ICC will do the same.[134]

4 PRIVILEGE, COMPELLABILITY, AND IMMUNITY

6.56 This section deals with three related topics concerned with a Trial Chamber's powers to compel witnesses to give evidence. The first topic is the extent of the privilege of self-incrimination in the international tribunals. Other topics dealt with concern the scope of the tribunals the powers of compulsion and immunity from them.

132. *See* Ch. VIII (*The Right to a Public Trial*).

133. Thus in *Krstić*, only 9 out of 118 witnesses testified in closed session, whereas face or voice distortion were used by 58 witnesses who testified in open session: *Krstić*, Judgment, Aug. 2, 2001 (Procedural History—Annex I) at ¶ 60.

134. ICC Rule 16 (4) states: "Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential."

4.1 The Privilege Against Self-Incrimination

6.57 *Privilege is recognized in international criminal trials.* The privilege against self-incrimination (*i.e.*, the right of a witness not to answer a question that might lead to his being incriminated of an offense) is well established in the common law. The historical tribunals also recognized the right.[135] Thus, in the *High Command* case two German Field Marshals did not appear as defense witnesses after they had been informed by the tribunal that they were not obliged to give self-incriminating evidence.[136]

6.58 *Privilege is not absolute.* The privilege appears in the modern tribunals in an attenuated form. The rules provide that a witness may object to making any statement that may tend to incriminate him or her.[137] Contrary to the practice in many common law jurisdictions, this is not an absolute privilege since the witness can still be compelled to answer the question. However, the compelled testimony may not be used as evidence in a subsequent prosecution of the witness except for false testimony.[138] What the justification was for watering down the privilege is not clear, but the existence of the rule in its current form led one Trial Chamber to say that no general testimonial immunity is recognized before the tribunal.[139] Indeed, Trial Chambers have the power to punish those who refuse to answer: contumacious refusal or failure to answer a question may lead to contempt proceedings and a prison sentence or fine.[140]

6.59 The ICC will recognize a more absolute form of privilege in that witnesses who are about to give self-incriminating evidence must be given assurances that (a) their statement will be kept confidential from the public or any State, and (b) it will not be used directly or indirectly against them in any subsequent prosecution by the Court. If it is not

135. *See, for instance,* the *Hostage* case, Transcript, Aug. 11, 1947, XV NMT, at 709.

136. XV NMT, at 686.

137. Rule 90 (E) of the ICTY/R Rules.

138. *Id.*

139. *Tadić*, Decision on Motion to Protect Defense Witnesses, Aug. 16, 1996 at ¶ 19: "The wording of this Rule does not allow the Trial Chamber to grant blanket testimonial immunity for witnesses."

140. ICTY/R Rule 77(A).

PROSECUTION AUTHORITIES

2. *Prosecutor v Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

OR: ENG

Before:
Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Decision of: 8 June 2000

THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

DECISION ON THE REQUEST OF THE DEFENCE FOR AN ORDER FOR DISCLOSURE BY THE PROSECUTOR OF THE ADMISSIONS OF GUILT OF WITNESSES Y, Z, AND AA

The Office of the Prosecutor:

Ms Anywar Adong
Mr. Charles Adeogun Phillips
Mr.Wallace Kapaya

Counsel for the accused:

Mr. François Roux
Mr. Maroufa Diabira

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber I, composed of Judge Erik Møse, Presiding, Judge Asoka de Z. Gunawardana and Judge Mehmet Güney;

BEING SEIZED of a motion filed by the Defence on 20 April 2000, requesting that the Trial Chamber order the Prosecutor to disclose the admissions of guilt of witnesses Y, Z and AA, all of whom have

testified in the present case;

HAVING RECEIVED on 10 May 2000 the response of the Prosecutor to the said motion;

HAVING HEARD the parties on 25 May 2000;

The Submissions of Parties

1. In the said motion of 20 April 2000, and supplemented by oral submissions during the hearing of 25 May 2000, the Defence is requesting the Chamber to order the Prosecutor to disclose to the Defence the confessions of three witnesses, Y, Z and AA, who testified for the Prosecution in this case. During their respective testimonies, each of these witnesses stated that they had confessed to the Rwandan authorities about their participation in events in Rwanda. According to the Defence, prior to the admission of guilt, Witness AA had written a letter to the State Prosecutor of Kibuye in which he directly implicated the accused Ignace Bagilishema.

2. Although the witnesses testified that they had put their admissions of guilt in writing, the Prosecutor did not present any such written confessions as evidence during their testimonies. The Defence contends that the Prosecutor must, obviously, either be in possession of the confessions, or must be in a position to obtain them. Reference is made to the Rwandan Organic Law of 30 August 1996, according to which confessions shall be recorded and signed by the person concerned (Article 6 (d)). Consequently, the Defence seeks an order, pursuant to Rule 68 of the Rules of Procedure and Evidence (the "Rules"), from the Chamber for the disclosure by the Prosecutor of such written confessions. The Defence deems such confessions to be necessary for the manifestation of the truth and for evaluating the credibility of the witnesses.

3. The Prosecutor in response argues that the motion should be dismissed. She is not in possession of the above written confessions. It is for the Defence to use the resources available to it to conduct its investigations. The Defence has failed to show how these confessions may suggest the innocence or mitigate the guilt of the accused. Moreover, the Prosecutor, by reference to transcripts of the testimonies of these witnesses, stated that the confessions of the witnesses were not exculpatory of the accused, and were merely limited to their personal involvement in the Rwandan massacres of 1994.

The Chamber

4. The legal basis of the Defence request is Rule 68 of the Rules:

" The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. "

5. This Rule carries two main elements. Firstly, the evidence must be known to the Prosecutor, and, secondly, it must in some way be exculpatory. The Chamber will first establish the meaning of the term 'known' ('dont il a connaissance').

6. The disclosure obligation under Rule 68 relates to "the existence of evidence known" to the Prosecutor. A literal interpretation might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the

moving party considered were 'known' to the Prosecutor. This would not be in conformity with Article 15 of the Statute. Under that provision, the Prosecutor is responsible for investigations. She shall act independently and not receive instructions from any source.

7. The Chamber is inclined to equate 'known' to 'custody and control' or 'possession'. This wording is used in Rules 66 (B) and 67 (C) of the Rules, which pertain to the inspection by one party of documents, books, photographs and tangible objects of the other party. Thus the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have.

8. This approach was favoured by the International Criminal Tribunal for the Former Yugoslavia, in its Decision on the Production of Discovery Materials in the case "The Prosecutor v. Thomir Blaškic" (Case No. IT-95-14-T), rendered on 27 January 1997, see in particular paragraphs 47 and 50.

9. In the present case, the Prosecutor has stated categorically that she is not in possession of the written confessions of witnesses Y, Z and AA, and the Defence has brought no evidence to the contrary. Thus the Chamber must dismiss the Rule 68 motion of the Defence.

Rule 98 Request by the Trial Chamber

10. Under Rule 98 the Chamber may, propriu motu, order either party to produce additional evidence. Having considered the facts and circumstances of this case, the Chamber is of the view that, for a better determination of the matters before it, the Prosecution is ordered to produce the written confessions of Prosecution witnesses Y, Z and AA. The Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses.

11. The Chamber hereby decides that the Prosecution should take the necessary steps to obtain the written confessions of witnesses Y, Z and AA. The Prosecution is directed to take such steps by 23 June 2000, and to forward the said written confessions to the Chamber.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

DISMISSES the Rule 68 motion of the Defence for disclosure by the Prosecutor of the admissions of guilt of witnesses Y, Z, and AA.

ORDERS the Prosecutor, pursuant to Rule 98, to take the necessary steps, by 23 June 2000, to obtain the written confessions of witnesses Y, Z and AA, and to forward them to this Trial Chamber.

Signed in Arusha on 8 June 2000.

Erik Møse	Asoka de Z. Gunawardana	Mehmet Güney
Presiding Judge	Judge	Judge