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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 8 June, 2004

PROSECUTOR **Against** Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-T)

DECISION ON PROSECUTION MOTION FOR MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

Office of the Prosecutor:

Luc Côté
Robert Petit

Defence Counsel for Sam Hinga Norman:

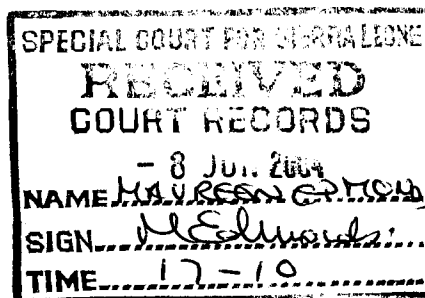
James Jenkins-Johnston

Defence Counsel for Moinina Fofana:

Michiel Pestman

Defence Counsel for Allieu Kondewa:

Charles Margai



THE TRIAL CHAMBER (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Judge Benjamin Mutanga Itoe, Presiding Judge, Judge Bankole Thompson and Judge Pierre Boutet;

SEIZED of the Motion for Modification of Protective Measures for Witnesses (“Motion”) filed on 4 May 2004 by the Office of the Prosecutor (“Prosecution”);

NOTING the Order to the Prosecution for Renewed Motion for Protective Measures of 2 May 2004 (“Order”);

NOTING the Response¹ to the Motion filed by Defence Counsel for Moinina Fofana on 14 May 2004 (“Fofana Response”);

NOTING the Response² to the Motion filed by Defence Counsel for Sam Hinga Norman on 14 May 2004 (“Norman Response”);

NOTING also the Order for Filing of a Consolidated Reply of 13 May 2004;

NOTING further that no Response was filed on behalf of the Accused Allieu Kondewa within prescribed time limits;

NOTING the Consolidated Reply to the responses filed by the Prosecution on 18 May 2004 (“Consolidated Reply”);

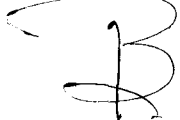
CONSIDERING Articles 16 and 17 of the Statute of the Special Court (“Statute”) and Rules 53, 69 and 75 of the Rules of Procedure and Evidence (“Rules”);

MINDFUL of the need to guarantee the utmost protection and respect for the rights of the victims and witnesses, while ensuring the respect of the rights of the Accused to a fair and public hearing, and seeking to balance those rights with the competing interests of the public in the administration of justice;

¹ Response to Prosecution Motion for Modification of Protective Measures and Request for Permission to Contact Protected Witnesses, 14 May 2004.

² Defence Response to Prosecution Motion for Modification of Protective Measures, 14 May 2004.

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I. BACKGROUND

1. Initially, the three Accused were separately indicted.³ Following motions from the Prosecution with respect to each Accused, this Court granted several protective measures for witnesses and victims,⁴ including, for the Accused Norman and Fofana, a 42 days period for the full disclosure to the Defence of any identifying data of each of the Prosecution witnesses prior to the date of their testimony at trial.⁵
2. Subsequently, pursuant to an application by the Prosecution, the three cases were joined together as "CDF Case" by an order of the Trial Chamber issued on 28 January 2004.⁶ A Status Conference was held on 4 March 2004 during which the Prosecution submitted that certain categories of its witnesses, including victim-witnesses or "insider" witnesses, will require greater levels or forms of protection than some other categories of witnesses.
3. On 2 May 2004 the Trial Chamber issued the Order requiring, *inter alia*, the Prosecution to file a renewed⁷ motion for protective measures, specifying, to the extent possible, the form of protection being sought for each of its witness including delayed disclosure, pseudonym, face distortion or closed

³ The indictment against the Accused Sam Hinga Norman was approved on 7 March 2003, while each of the indictments against the Accused Moinina Fofana and Allieu Kondewa were approved on 28 June 2003.

⁴ *Prosecutor v. Samuel Hinga Norman*, SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003 ("*Norman Decision*"); *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 16 October 2003 ("*Fofana Decision*"); *Prosecutor v. Allieu Kondewa*, SCSL-03-12-PT, Ruling on 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, 10 October 2003 ("*Kondewa Decision*"). All these three decisions cumulatively are herein referred to as "Decisions on Protective Measures".

⁵ See *Norman Decision* and *Fofana Decision*, order (a):

"The Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 16 of the Motion and any other information which could lead to the identity of such a person to the Defence, until 42 (forty-two) days before the witness is to testify at trial; and may not disclose any materials provided to the Defence in a redacted form until 42 (forty-two) days before the witness is to testify at trial, unless otherwise ordered."

⁶ *Prosecutor v. Samuel Hinga Norman*, SCSL-03-08-PT, *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, *Prosecutor v. Allieu Kondewa*, SCSL-03-12-PT, Decision and Order on Prosecution Motions for Joinder, 28 January 2004.

⁷ The three Decisions on Protective Measures specified that the protective measures when granted were applicable at that stage of the proceedings, namely at the beginning of the pre-trial phase. See *Norman Decision*, paras 14 and 15 ("a reasonable case has been made for the prosecution witnesses herein to be granted at this preliminary stage a measure of anonymity and confidentiality" and "justify, at this point in time, delaying the disclosure of the identities of the witnesses during the *pre-trial phase*"), *Fofana Decision*, para 16. ("justify, at this point in time, delaying the disclosure of the identities of the witnesses during the *pre-trial phase*"); *Kondewa Decision*, para. 29 ("at this pre-trial stage").

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session. The said motion should further provide an overview of the reasons for the protective measures sought for witnesses whose names appear on the witness list.

II. THE SUBMISSIONS

A. The Motion:

4. The Motion is twofold and the Prosecution seeks the following:

(a) Reduction of the 42 days period for the unredacted disclosure of witness statements for the Accused Norman and Fofana;

(b) Additional Protective Measures to be adopted during the testimony of protected witnesses at trial;

(a) *Reduction of Disclosure Period for the Accused Fofana and Norman*

5. The Prosecution seeks the reduction of the disclosure period of the unredacted witness statements to the Defence for the Accused Norman and Fofana from 42 to 21 days prior to testimony at trial to bring it in line with the one for the Accused Kondewa. The Prosecution argues that the risk has increased since the issuing of the Decisions on Protective Measures.⁸

6. The Prosecution submits that most witnesses will testify with respect to all three accused. As they and their families live in small communities often next to ex-combatants and strong sympathizers of the Accused and investigations by the Prosecution have taken place or will take place there, hence all of them may be exposed to the same dangers.⁹ The Prosecution annexed 7 witnesses statements in support of their Motion to prove the increase in risk of potential harm to witnesses.¹⁰

⁸ Motion, para. 3.

⁹ *Id.*, para. 5.

¹⁰ *Id.*, para. 11. These statements were filed confidential and ex-parte, as annexes 1-7 to the Motion, in order to protect the identity of the witnesses. In addition, the Prosecution filed for this purpose declarations from its Chief of Investigation, from the Inspector General of the Sierra Leone Police, and from the Chief of the Victims and Witness Unit of the Special Court, respectively as annexes 8, 9 and 10 of the Motion. The Prosecution also filed various newspaper reports as annexes 26 to 34 of the Motion.

7. It is further submitted that the 21 days period for disclosure has been regarded as sufficient in many cases at the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).¹¹

8. The Prosecution submits that it is concerned about witnesses not testifying out of fear and intimidation by former CDF members. Moreover, the Prosecution submits that the long absence from their jobs or farms would keep many witnesses from testifying.¹²

9. In addition, the Prosecution argues that once investigators for the Defence begin to enquire about the witnesses whose identities have been disclosed within the above-mentioned communities, persons contacted for inquiries by the Defence in this process could further disclose the identities of the witnesses.¹³

(b) Additional Protective Measures for Witnesses During Testimony at Trial

10. The Prosecution divides its witnesses into two groups, based on its revised witness list filed on 4 May 2004¹⁴:

I. Witnesses of Fact

Sub-Categories within this group:

- A. Witnesses who are victims of sexual assault and gender crimes;¹⁵
- B. Child witnesses;
- C. Insider witnesses.¹⁶

II. Expert Witnesses and witnesses who have waived their right to protection¹⁷

¹¹ *Id.*, para. 9.

¹² *Id.*, paras 12-13.

¹³ *Id.*, paras 14-15.

¹⁴ Supplemental Materials filed pursuant to Order from the Bench during Pre-Trial Conference held 28 April 2004 and Order to the Prosecution to File Disclosure Materials and other Materials in Preparation for the Commencement of Trial of 1 April 2004, 5 May 2004.

¹⁵ It has to be noted that, in para. 20 of the Motion, the Prosecution wrongly refers to sub-category A as “Child witnesses” and B “Witnesses who are victims of sexual assault and gender crimes”. This is obviously a *lapsus calami*, since on p. 15-17, where details regarding the categories are given, it is changed to A “Witnesses who are victims of sexual assault and gender crimes” and B “Child witnesses”.

¹⁶ The pseudonyms indicating each of the protected witnesses belonging to Sub-Categories A, B and C for which the Prosecution is seeking additional protective measures during testimony are contained within Annexes 37, 38 and 39 of the Motion, respectively.

¹⁷ Motion, paras 20-21. Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, this is obviously not the case, as the total number of these witnesses is 51 –see

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11. The Prosecution seeks for all its witnesses that orders b-k of the current orders contained in the Decisions on Protective Measures should be kept in force to the extent they apply to the trial and post-trial stage. These orders provide as follows:

- (b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;
- (c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons;
- (d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;
- (e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;
- (f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;
- (g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;
- (h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above (reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;
- (i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;
- (j) That the Defence 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;

Annexes 37-39 to the Motion, there are only a few expert witnesses and no witness has so far waived his/her right. Counsel for Fofana properly pointed out this lack in clarity; see Fofana Response, para. 3.

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(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.¹⁸

12. Moreover, the Prosecution seeks some additional protective measures for all witnesses, namely that they be allowed to testify with use of screening devices from the public and that photography, video-recording, and sketching or any other manner of recording or reproducing images of any witness be prohibited while he or she is in the precincts of the Special Court.¹⁹

13. Finally, the Prosecution asks for additional protective measures for certain groups of witnesses. Witnesses in Sub-Category A above, namely witnesses who are victims of sexual assault and gender crimes, should testify with voice distortion, to avoid recognition by the public.²⁰ Witnesses in Sub-Category B above, namely child witnesses, should be allowed to testify with closed circuit television to avoid as far as possible serious emotional distress by facing the Accused, while the image appearing on the public's monitors is being distorted. Finally, witnesses in Sub-Category C, namely insider witnesses, should be allowed to testify with voice distortion, as witnesses in Sub-Category A.²¹

14. As some insiders in Sub-Category C could be easily recognised by the public by the content of their testimony, the Prosecution submits that it will make applications, should the need arise, that their evidence be given in closed session.²²

B. The Responses:

15. In its Response, Counsel for Fofana opposes the reduction of the disclosure period of unredacted witness statements to 21 days as the statements disclosed so far are so heavily redacted that they are of little use to the Defence in carrying out their investigations.²³ Moreover, it submits that unredacted witness statements of Category II witnesses should be disclosed immediately, as the

¹⁸ See *Norman Decision*. The wording of the orders differs slightly between each of the Decisions on Protective Measures.

¹⁹ *Id.*, para. 38.

²⁰ *Id.*, para. 25.

²¹ *Id.*, paras 30-33.

²² *Id.*, para. 35.

²³ Fofana Response, paras 6-7.

order sought applies only to witnesses in Category I.²⁴ It further submits that the Defence is obliged not to disclose any protected identity of witnesses and therefore un-redacted statements to the Defence will not endanger any witness. Protective measures should be restricted to sub-categories A, B, C, as category D²⁵ is ill-defined and the Prosecution has failed to show the high risk justifying protective measures for this group.²⁶

16. Finally, the Defence for Fofana asks for the permission to contact all category C witnesses before their testimony at trial.²⁷

17. Counsel for Norman submits that any reduction of the disclosure period will substantially interfere with the effective planning of the case for the Defence and that all the evidence in support of the Motion is speculative and subjective and would normally not be admitted as evidence in adversarial proceedings.²⁸ It is further submitted that voice-distortion equipment and testifying behind screens will have a serious negative effect on the rights of the accused. The Defence strongly opposes the “over-protection” of the A, B, C witnesses groups, which would be the result of the granting of the Motion.²⁹

C. The Consolidated Reply:

18. In its Consolidated Reply the Prosecution concurs that the names and un-redacted statements of witnesses in category II can be disclosed, but so far no one has waived his/her right to protection as granted by the court.³⁰ Regarding the reduction of the disclosure period the Prosecution reiterates that 21 days period is not oppressive to the rights of the Accused and it is an adequate measure given the exceptional circumstances regarding the security of the witnesses.³¹

19. The Prosecution clarifies that in its Motion it seeks that all witnesses be allowed to testify behind a screen in order to protect their identity from the public, but not from the Accused and

²⁴ *Id.*, para. 4.

²⁵ Defence for Fofana refers to this residuum-group as sub-category “D”, see also supra note 14.

²⁶ Fofana Response, para. 13.

²⁷ *Id.*, para. 14.

²⁸ Norman Response, para. 2.

²⁹ *Id.*, para. 3.

³⁰ Reply, para. 11.

³¹ *Id.*, paras 13-15.

stresses that it has submitted reliable and sufficient evidence establishing the existence of imminent risk of harm to the witnesses; moreover, this measure is standard practice at the ICTR.³²

20. Regarding the request of Defence Counsel for Fofana for permission to contact protected witnesses the Prosecution submits that so far no witness has agreed to be interviewed by the Defence.³³

II. DELIBERATION

A. Introduction

21. For reasons of clarity, the structure of this Decision will separately address the two reliefs sought by the Prosecution, namely the reduction of the period of full disclosure of witness statements prior to the date of testimony and the additional protective measures during testimony at trial.

B. Applicable Law

22. Pursuant to Article 16 of the Statute, the Special Court is authorized to provide in its Rules for the protection of victims and witnesses. Article 16 (4) provides as follows:

“[Witnesses and Victims Unit] shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses”.

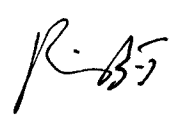
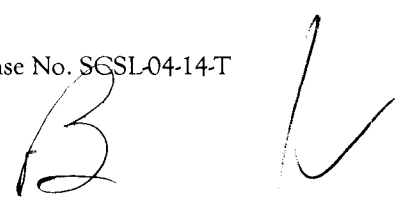
23. Article 17 of the Statute, paragraph (2), provides that:

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

24. Such protective measures shall include, without being limited to, the protection of a witness’s identity. Rule 75 (A) and (B) of the Rules state in particular that:

“(A) A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order

³² *Id.*, paras 6, 9, 19-20.



appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Judge or a Chamber may hold an *in camera* proceeding to determine whether to order:

- (i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:
 - (a) Expunging names and identifying information from the Special Court's public records;
 - (b) Non-disclosure to the public of any records identifying the victim or witness;
 - (c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and
 - (d) Assignment of a pseudonym;
- (ii) Closed sessions, in accordance with Rule 79;
- (iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.”

25. Rule 53 of the the Rules provides in paragraph (A) that:

“In exceptional circumstances, a Judge designated pursuant to Rule 28 may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.”

and in paragraph (C) that:

“A Judge may, on the application of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice”.

25. Rule 69 of the Rules provides that:

³³ *Id.*, para. 22.

(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.

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Witnesses and Victims Section.

(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.

C. Reduction of Disclosure Period for the Accused Norman and Fofana

27. Previous jurisprudence of this Chamber established that the process of granting protection to witnesses entails in each specific circumstances a balance between the “full respect” for the rights of the Accused and “due regard” for the protection of victims and witnesses.³⁴ New Rule 26bis of the Rules recently adopted during the continuation of the 5th Plenary Meeting of the Special Court now directly enshrines this principle in the Rules as follows:

“The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

28. In order to achieve such a balance, the Trial Chamber rules that, together with other measures, that the adoption of the rolling disclosure system of unredacted witness statement is fair, the restriction imposed on the right of the Accused to a fair trial in this respect being both necessary and proportionate to the aim of the witness and victim protection.³⁵

29. One of the factors which this Chamber has to take into consideration in the evaluation of this balance is, in particular, the specific feature of this Court that of being located in Sierra Leone. The

³⁴ *Prosecutor v. Augustine Gbao*, SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003 (“Gbao Decision”), para. 47. See also para. 42. See also *Kondewa* Decision, para 21. See also *Prosecutor v. Tadic*, IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 (“Tadic Decision”), para. 57.

³⁵ *Gbao* Decision, para. 47.

physical location of the Special Court, in itself, had in this Chamber previous decisions³⁶ and has indeed in considering the merits of this further Motion a substantial impact on security considerations for witnesses and victims.

30. As stated in the *Kondewa* Decision, witnesses and their families might particularly be endangered by threats arising in the specific milieu of their local community:

“The Republic of Sierra Leone is a relatively small community where people are bound to and in fact know and identify themselves very easily thereby increasing the danger of risk of a recruitment of hostilities against potential witnesses and victims and their families if they are identified by the indictees of their sympathisers as those whose testimony would incriminate them, or in due course and more still, the indictees who they support out there”³⁷

31. In order to satisfy the general requirement of exceptional circumstances envisaged in Rule 69(A) of the Rules,³⁸ the Prosecution has accompanied the Motion with various confidential statements from its witnesses alleging serious threats made to them or their families in different occasions, aiming at discouraging their testimonies against the Accused. Pursuant to Rule 89(C) of the Rules the Chambers accepts this evidence submitted by the Prosecutor.³⁹

32. In addition, in a signed declaration dated 3 May 2004, the Prosecution’s Chief of Investigation reports of information as of several threats made against witnesses for the Prosecution in this case as well as various attempts from what is described as CDF hardliners to disrupt the investigative activity of the Prosecution.⁴⁰ In particular, the Declaration submits that

“Potential witnesses have also expressed fear of reprisals from relatives and friends of the accused, associates of the accused, and those who support the causes or faction the accused represents ... Potential witnesses have also expressed fears for their own family members if it became known that the potential witnesses was co-operating with the Special Court ... The fears expressed by potential

³⁶ *Norman* Decision, para. 10; *Fofana* Decision, paras 10 and 12; *Kondewa* Decision, para. 15; *Gbao* Decision, paras 21-25.

³⁷ *Kondewa* Decision, para. 24.

³⁸ *Kondewa* Decision, paras 16-20; *Gbao* Decision, para. 25. See also *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecution Motion for Witness Protection, 20 November 1998, para. 15-17; *Tadic* Decision, para. 62.

³⁹ Rule 89(C) of the Rules provides that “A Chamber may admit any relevant evidence”.

witnesses and by sources have increased dramatically over the period of time that I have been supervising the investigations ... indeed almost every individual with whom we come into contact to obtain information regarding the activities of the CDF/Kamajors are at first instance terrified at the thought of testifying in public and are fully convinced that doing so will bring reprisal against themselves and their families ... In addition to the fears expressed by sources and potential witnesses, there have been numerous instances of direct threats against such persons.”⁴¹

33. Finally, the Chief of Investigations concludes the Declaration as follows:

“I firmly believe that witnesses, sources, and/or their family or associates risk their lives on a daily basis through their cooperation with the Special Court. It is essential for the safety and security of these potential witnesses be provided with the greatest possible protection under the law that this Court can provide.”⁴²

34. This Chamber expresses grave concerns about the seriousness of the increased threats made against the Prosecution witnesses at this stage of the proceedings as such has been described in the evidence adduced by the Prosecution. It emerges also from the review of the evidence in support of this application by the Prosecution that the CDF holds a structure actively organized within the country and still capable of substantial intimidations to witnesses.⁴³

35. Furthermore, the Chamber also recalls the contents of the Twenty-First Report of the Secretary General on the United Nations Mission in Sierra Leone, dated 19 March 2004, in which it is stated:

“Some elements of the former Civil Defence Forces (CDF) who are opposed to the indictment of Sam Hinga Norman, the Former Internal Affairs Minister and National Coordinator of the CDF, could seek to disrupt the work of the [Special] Court through violent activities. Although the group was disarmed, it is believed that its command and control structures remain intact, especially in the east. For this reason, some observers believe that CDF could be capable of mobilizing a credible force.”⁴⁴

⁴⁰ Motion, Annex 8 (“Declaration”). The contents of the Declaration are corroborated by the Declaration of the Inspector General of the Sierra Leone Police. See also the Declaration from the Chief of the Victims and Witnesses Unit. It is worth to observe that no evidence to rebut the Prosecution’s submissions has been produced by the Defence.

⁴¹ Declaration, paras 6-9. See also paras 15, 17 and 20.

⁴² *Id.*, para. 39.

⁴³ *Id.*, paras 16, 20, 22, 24-25, and 30-34. See also Annex 9 to the Motion, paras 4-13.

⁴⁴ S/2004/228, Twenty-First Report of the Secretary General on the United Nations Mission in Sierra Leone, 19 March 2004, para. 50.

36. Based on the overwhelming weight of un-contradicted affidavit evidence before us it is therefore in the considered opinion of this Trial Chamber that a reasonable case has been made for the Prosecution witnesses to be granted, now, at this further stage of the trial of the Accused, a modification to the current measures of rolling disclosure of the Prosecution witness statements for the accused Norman and Fofana from a 42 days period to a 21 days period, in line with the same time period provided for in the *Kondewa* Decision. This measure provides now and in these circumstances for a proportionate balance of the interests of the witnesses for protection and the Accused right to a fair trial.

D. Additional Protective Measures During Testimony at Trial

Screen from Public and Prohibition of Photography

37. The Prosecution seeks additional measures for the protection of all witnesses residing in Sierra Leone who have not waived their right to protection. They request that all these witnesses be allowed to testify with the use of screening from the public. Moreover, it is requested that the public and the media shall not be allowed to photograph, video-record, sketch or in any other manner record or reproduce images of any witness while he or she is in the precincts of the Special Court.

38. Article 17(2) of the Statute entitles the Accused to a right “to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses” (emphasis added). As has been clarified in the Prosecution Reply, the use of a screen during the testimony of a witness is intended to protect witnesses’ identity from the public and not from the Accused.⁴⁵ Thus, the “veil of anonymity” is lifted in favour of the Accused, and the right of the Accused to a fair hearing is not infringed.

39. A screen to protect the identity of the witness from the public does -to a minor extent- negatively affect the public nature of the trial and the possibility of the public to fully follow the proceedings, and, consequently the right of the Accused to a public hearing. It is established by jurisprudence of other international criminal tribunals and courts⁴⁶ that, generally, preference should be given to a public hearing to avoid the impression of “*in camera*” justice for the Accused, as well as to give the

⁴⁵ Consolidated Reply, para. 9.

public the possibility to follow the trial. However, it is also established that “this preference has to be balanced with other mandated interests”⁴⁷, among them protective measures for victims and witnesses, as laid down in Article 17(2) of the Statute.

40. As stated above, the location of the Special Court in the very country where the crimes were allegedly committed increases considerably the risks to witnesses. Based upon the information provided and the statements submitted, the Prosecution has demonstrated that there exist legitimate fears on the side of the witnesses, making it necessary to give considerable weight to security risks that could be encountered.

41. Concluding, it is our opinion that the use of a screen to protect all witnesses in court, who have not waived their right to protection, is a reasonable, appropriate and sensible way of balancing the right of the Accused to a public hearing and the right of the public to be properly informed about the proceedings before the Special Court on the one side, with the security interests of the witnesses on the other.

42. The Defence did not raise any objection regarding the measure sought by the Prosecution not to allow photographs, video-recording, sketching or in any other manner recording or reproducing images of any witness while he or she is in the precincts of the Special Court. We would like to observe that, in the case against *Andre Rwamakuba*, the ICTR found that such a measure was a “normal” protective measure which does “not affect the rights of the Accused.”⁴⁸

Special Protective Measures for Sub-Categories A, B, C – Voice Distortion and Closed-Circuit-Television

43. The Prosecution also seeks additional protective measures for certain groups of witnesses:

- (i) Voice distortion for the public for witnesses in Sub-Category A and C, namely victims of sexual violence and insider witnesses; and

⁴⁶ See *Tadic* Decision, para. 32.

⁴⁷ *Id.* para. 33.

⁴⁸ *Prosecutor v Andre Rwamakuba*, ICTR-98-44-T, Decision on the Prosecuotr’s Motion for Protective Measures for Witnesses, 22 September 2000, para. 14.

(ii) closed circuit television for child witnesses in Sub-Category B, while the image appearing on the public's monitors is distorted.

It is noted that the Fofana Defence did not oppose these additional measures in its Response.

44. Contrary to the understanding of Counsel for the Accused Norman of the Prosecution Motion these protective measures sought apply only with regards to the public. Thus, these measures will not preclude an accused to see and observe the demeanour of these witnesses.

45. The arguments used to demonstrate the necessity of a balancing of public hearing and witness security also apply to these additional measures. Moreover, the need for special consideration to victims of sexual violence or children during their testimonials in court has been widely recognised in both domestic laws of states and in international courts.⁴⁹

46. Specifically, for Sub-Categories A and C, (victims of sexual violence and insider witnesses) voice distortion for the public speakers were sought. Regarding Sub-Category A, victims of sexual violence, the Prosecution pointed out the risk for re-traumatisation and rejection by the victim's family and community and the possibility to recognise the voice of the witness. For insider witnesses in Category C, the Prosecution underlined the vulnerability of this group to acts of retaliation and potential harm, given the strict laws of the Kamajors not to share information with outsiders. In the opinion of the Trial Chamber these submissions demonstrate convincingly again the risks for the security of witnesses of both categories.

47. For Sub-Category B, child witnesses, the Prosecution seeks the possibility for testimony by way of closed-circuit-television. While the witness testifies in a back room in the court building, this would allow the Accused and the Defence, as well as the Trial Chamber and the Prosecution, to see the witness on a television-screen and observe his/her demeanour. The image on the screen for the public at that time would be distorted. As stated by Psychologist An Michels, especially children⁵⁰ are vulnerable witnesses, the risk of re-traumatisation and the possibility of stigmatisation and rejection is real and high. On this issue the U.S. Supreme Court held in *Maryland v. Craig* held that the use of

⁴⁹ See *Tadic* Decision, para. 47.

⁵⁰ Motion, Annex 11.

closed circuit television does not violate the constitutional right of an Accused to confrontation if it is necessary in the opinion of the Court to protect a child witness from psychological harm.⁵¹

48. Based upon these information and the evidence submitted the Chamber finds that such risks as described would exist, and, therefore, deems it necessary in the interest of justice for children to be allowed to testify in the way the Prosecution asks for, in accordance with Rule 75(B)(i)(a).

III. DISPOSITION

HEREBY grants the Motion and **ORDERS** as follows:

- 1.) That the unredacted witness statements for the Accused Norman and Fofana are to be disclosed to the Defence 21 days prior to the testimony in trial of the witnesses;
- 2.) That orders b-k of the Decisions on Protective Measures⁵² remain in full force and application, as shall read as follows:
 - (b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;
 - (c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons;
 - (d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel

⁵¹ See *Maryland v Craig*, 497 U.S. 836 (1990).

⁵² *Prosecutor v. Samuel Hinga Norman*, SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 16 October 2003; *Prosecutor v. Allieu Kondewa*, SCSL-03-12-PT, Ruling on 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, 10 October 2003. See supra note 4.

by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;

(f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

(h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above (reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) That the Defence 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;

(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

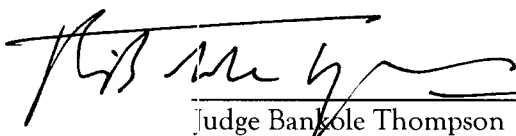
3.) That all witnesses, who have not waived their right to protection testify with use of screening a device from the public;

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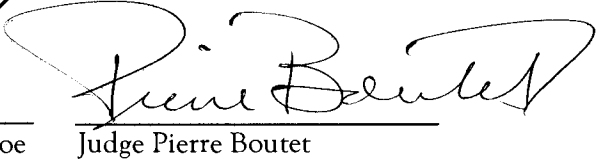
- 4.) That photography, video-recording, sketching or in any other manner of recording or reproducing images of any witness are prohibited while he or she is in the precincts of the Special Court;
- 5.) That the voice of witnesses in Sub-Category A and C during their testimony in trial be distorted in the speakers for the public;
- 6.) That witnesses in Sub-Category B testify with the use of a closed circuit television; the image appearing on the public's monitors being distorted;

And **FURTHER ORDERS** that the Prosecution shall contact the protected witnesses in Sub-Category C above, namely insider witnesses, and ask for his or her consent, or the parents or guardian of that witness if under the age of 18, for an interview by the Defence Counsel for the Accused Fofana, and shall undertake the necessary arrangements to facilitate such contact.

Done at Freetown this 8th day of June 2004


 Judge Bankole Thompson


 Judge Benjamin Mutanga Itoe


 Judge Pierre Boutet

Presiding Judge,
 Trial Chamber

