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SCSL-04-16-T
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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Lovemore G. Munlo, SC
Date:	13 September 2006

PROSECUTOR	Against	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-T)

DECISION ON JOINT DEFENCE APPLICATION FOR PROTECTIVE MEASURES FOR DEFENCE WITNESSES APPEARING FROM 4 SEPTEMBER 2006 ONWARDS

Office of the Prosecutor:
James C. Johnson
Karim Agha
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Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
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Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

SPECIAL COURT
13 SEP 2006
NAME MAUREEN EDMONDS
SIGN
TIME 14-10

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Richard Lussick, Presiding Judge, Justice Teresa Doherty and Justice Julia Sebutinde;

SEISED of the Urgent Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 Onwards, filed on 21 August 2006 ("Motion"), in which the Defence seeks that protective measures granted by the Trial Chamber in its Decision on the Joint Defence Application for Protective Measures for Defence Witnesses dated 9 May 2006 ("Protective Measures Decision") be equally applied to witnesses mentioned on the witness lists filed by the Defence on 21 August 2006.[1]

NOTING the Prosecution Response to Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 Onwards, filed on 31 August 2006 ("Response"), in which the Prosecution submits that the Defence failed to provide evidence of a specific threat to the witnesses' security and urges the Trial Chamber to revise the 21 day time limit for rolling disclosure of the identifying data of the witnesses so that the identities of all future witnesses are disclosed to the Prosecution immediately;

NOTING the Joint Defence Reply to Prosecution Response, filed on 5 September 2006 ("Reply");

NOTING the Trial Chamber's previous Protective Measures Decision dated 9 May 2006 and reiterating its findings, in particular "that protective measures can be ordered on the basis of a current security situation even where the existence of threats or fears as regards specific witnesses has not been demonstrated";

BEING SATISFIED that the security situation has not considerably changed since the Protective Measures Decision and that there remains a reasonable apprehension of risk or danger to witnesses as expressed in the supporting material submitted by the Defence in their initial Joint Defence Application for Protective Measures for Defence Witnesses filed on 25 April 2006;

COGNISANT of the provisions of the Statute of the Special Court for Sierra Leone ("the Statute") and in particular Articles 16(4) and 17(2) and (4) thereof and Rules 53, 54, 69 and 75 of the Rules of Procedure and Evidence of the Special Court ("the Rules"), concerning the protection of witnesses and victims as well as the rights of the Accused;

HEREBY GRANTS THE MOTION

and

ORDERS that the protective measures ordered by the Trial Chamber in its Decision on Joint Defence Application for Protective Measures for Defence Witnesses dated 9 May 2006 shall also apply to the witnesses listed in the Defence documents "Kanu – Defence Filing of Witness List Pursuant to Trial Chamber Order of 17 May 2006" and "Confidential Joint Defence Disclosure of Individual Witnesses for the 1st and 2nd Accused Pursuant to the Order of the Trial Chamber II", both filed on 21 August 2006, with the exception of the expert witnesses.

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[1] Kanu - Defence Filing of Witness List Pursuant to Trial Chamber Order of 17 May 2006, 21 August 2006; Confidential Joint Defence Disclosure of Individual Witnesses for the first and second Accused pursuant to the order of the Trial Chamber, 21 August 2006.

Justice Doherty appends a separate and dissenting opinion.

Done at Freetown, Sierra Leone, this 13th day of September 2006.

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

DISSENTING OPINION OF JUSTICE DOHERTY ON JOINT DEFENCE APPLICATION FOR PROTECTIVE MEASURES FOR DEFENCE WITNESSES APPEARING FROM 4 SEPTEMBER 2006 ONWARDS

I have read the majority decision of my learned colleagues and regret I must dissent therefrom.

The Defence Motion asks the Trial Chamber to apply, *mutatis mutandis*, the protective measures granted in its decision of 9 May 2006[1] to additional defence witnesses on lists filed by the Defence on 21 August 2006, except expert witnesses, on the basis that "[C]ircumstances have not changed in the meantime."[2]

The Prosecution oppose the application submitting that the Defence fail to provide evidence of a specific threat to the witness's security and fail to show if the proposed witnesses are in any of the categories specified in the Defence Motion of 25 April 2006. Alternatively, the Prosecution asks the Trial Chamber to revise the 21 day time limit of rolling disclosure by ordering the immediate disclosure of the full identities of the new witnesses.

Article 17(2) of the Statute of the Special Court of Sierra Leone ("the Statute") provides that "the accused shall be entitled to a fair and public hearing" (emphasis added). Article 16 (4) of the Statute and Rules 53, 54 and 69 of the Rules of Procedure and Evidence ("the Rules") provide *inter alia* for the protection of witnesses and victims. In particular Rule 53(A) enables the Trial Chamber in "exceptional circumstances" to order non-disclosure of the identity of a victim or of a witness who may be in danger or at risk.

As noted in the *Prosecutor v. Tharcisse Muvunyi*[3], citing *Prosecutor v. Bagosora*[4], the testimony of the witness must be relevant and important to the party's case, there must be a real fear for the safety of the witness and an objective basis underscoring that fear and any measure should be strictly necessary. This criteria was approved and adopted by both Chambers of this Court. *Muvunyi* went further and evaluated "the fear for the safety of witnesses in light of the general security situation ..."[5] which this Chamber found applicable in Sierra Leone and adopted in its Decision of 9 May 2006.[6]

However, both the decision of this Trial Chamber on 9 May 2006 and in *Prosecutor v. Muvunyi* (supra) were made in the light of evidence presented on the safety situation in the country, of the background of the proposed witnesses and how the safety situation impacted on the potential witnesses, thereby enabling the Trial Chamber to make findings and conclude that protective measures should be granted to Defence witnesses.

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[1] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T, Decision on the Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006.

[2] Joint Defence Application for Protective Measures for Defence Witnesses, filed on 25 April 2006, para. 5.

[3] *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on the Tharcisse Muvinyi's Motion for Protection of Defence Witnesses, 20 October 2005.

[4] *Prosecutor v. Bagosora*, Case No. ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for the Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para. 28.

[5] Supra note 3, para. 10.

[6] Supra note 1.

No such evidence of either the security situation or its impact on these different witnesses has been adduced in the instant case. The joint defence merely make a bald statement that the circumstances have not changed but give no facts nor evidence to substantiate this submission. If anything, the Secretary-General's report to the Security Council for the period 28 April 2006 – 29 August 2006 which "expressed satisfaction with the status of progress in the peace consolidation process ..." and noted progress in "reform of the security sector" belies the unsubstantiated Defence claim.[7]

As no evidence was presented to substantiate the Defence submission and hence no evidence that any proposed witness may be in danger or at risk if her/his identity is disclosed, I am unable to grant the Defence Motion.

A party must not assume that the Trial Chamber will accede to an application on such flimsy material for reasons of expediency.

Accordingly, I would have denied the Motion but granted the Defence Liberty to Apply.

Done at Freetown, Sierra Leone, this 13 September 2006.

Doherty J.

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

[7] Second Report of the Secretary-General on the United Nations Integrated Office in Sierra Leone, UN Doc. S/2006/695, 29 August 2006.