

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 Defence Motion to Set Aside and/or Reconsider Trial Chamber's "Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure" Dated 15 September 2006 and Confidential Defence Annexures, filed on 18 September 2006 ("Motion");

NOTING the Confidential Prosecution Response to Defence Motion to Set Aside and/or Reconsider Trial Chamber's "Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure" Dated 15 September 2006, filed on 19 September 2006 ("Response");

NOTING that the Defence has not filed a reply to the Response;

RECALLING the Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, filed on 4 September 2006 ("Prosecution Motion");

RECALLING the Trial Chamber's Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, dated 15 September 2006 ("Second Protective Measures Decision");

COGNISANT of the provisions of Rule 7 of the Rules of Procedure and Evidence ("Rules") and Article 9 of the Practice Direction on Filing of Documents Before the Special Court of Sierra Leone ("Practice Direction");

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court ("Rules").

I. BACKGROUND

1. On 4 September 2006 the Prosecution Motion was filed seeking orders for protective measures for witnesses listed in Annex A (2) thereto. Copies were subsequently delivered to the Trial Chamber bearing the stamp "Received Court Management [...] 04 Sep 2006 [...] Time 4.04pm."

2. The Prosecution Motion was served on the Defence on 5 September 2006 under cover of an email from Court Management Section ("CMS") which stated that it was "filed on the 05/09/2006 at 09:12".¹ The same email contained a receipt from CMS stating the filing date to be "05th September 2006".²

3. On 15 September 2006, the Trial Chamber, noting that the Prosecution had described the Prosecution Motion as "Urgent" and that no response had been filed by the Defence, issued its Second Protective Measures Decision granting the Prosecution Motion. The Trial Chamber had

¹ See Annexure C to the Motion.

² See Annexure D to the Motion.

calculated the 10 days allowed for filing the Defence Response from 4 September 2006, believing that this was the date on which the Prosecution Motion had been served on the Defence.

4. Later on 15 September 2006, the Defence attempted to file its Response but it was rejected by CMS as being out of time. CMS advised the Defence by email that: "The Motion was filed on the 4 September 2006 at 16:04, it was served the following day the 5 September 2006 which counts as the first day of the 10 days allowed to file your Response. Therefore your Response was due yesterday the 14 September 2006."³

II. SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Motion is based on two arguments.

6. The first is that, notwithstanding the provisions of Article 9(c) of the Practice Direction, the email accompanying the transmission of the Prosecution Motion stated unequivocally that it was "filed on 05/09/2006 at 09:12"⁴ and therefore, given the clear conflict in information conveyed by CMS, the time for filing a response should have been calculated from the purported filing date, namely 5 September.⁵

7. The second is that time does not run from the date CMS purportedly receive a document but from the time that the document is transmitted to the parties.⁶

8. The Defence prays that the Trial Chamber:

- (i) Order CMS to accept the Defence Response⁷ filed on 15 September as being in time and process it in the normal way;
- (ii) Vacate the Second Protective Measures Decision as made *per incuriam* or otherwise in error, and reach a further decision taking into account the Defence Response;
- (iii) Alternatively, exercise its residual discretion to reconsider and amend the Second Protective Measures Decision taking cognizance of the Defence Response.

Defence Response to Prosecution Motion

9. Annexure A to the Motion is the Defence Response which it attempted to file on 15 September 2006. The following is a brief summary of the Defence submissions contained in the Defence Response.

³ Annexure B to the Motion.

⁴ Motion, para. 8.

⁵ Motion, para. 10.

⁶ Motion, paras. 11-13.

⁷ Defence Response to "Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure" ("Defence Response"); see Annexure A to the Motion.

3. 

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10. The Defence, at this stage, does not oppose the main protective measures for Prosecution witnesses sought in the Prosecution Motion, subject to such measures being reviewed at a later stage of the Defence's preparation for trial if necessary "for the fair and effective preparation of the defence of Mr. Taylor in accordance with Article 17 of the Statute of the Special Court ('the accused...shall...have adequate time and facilities for the preparation of his defence'.)"⁸

11. The Defence also gives notice of its intention to file such motions at a later stage as may be necessary to enable it to effectively prepare for trial.⁹

Prosecution Response to Defence Motion

12. The Prosecution agrees with the Defence's interpretation of the rules relating to time limits and that the time for filing a response was the close of business on 15 September 2006. Therefore, the Prosecution does not oppose the relief sought by the Defence.¹⁰

13. To expedite matters, the Prosecution also presents a reply to the Defence Response.

Prosecution Reply to Defence Response

14. The Prosecution notes that the Prosecution Motion "is largely unopposed at this stage, with the caveat that the Defence intends to file such motions as may become necessary in the future to enable it to prepare effectively for trial." Further, the Prosecution agrees that protective measures ordered by the Trial Chamber can be subsequently varied if the Trial Chamber sees fit.¹¹

15. In conclusion, the Prosecution submits that there is nothing in the Defence Response which would affect the protective measures granted by the Trial Chamber in its Second Protective Measures Decision.¹²

III. DELIBERATIONS

16. CMS was obviously incorrect in informing the Defence that the Prosecution Motion had been filed on 5 September 2006. The Prosecution Motion had been received by CMS on 4 September 2006 and so this was the date on which the document was filed. Article 9(C) of the Practice Direction provides that "[t]he date of filing is the date that the document was received by the Court Management Section."

17. CMS was also wrong to reject the Defence Response as being out of time. CMS had erroneously informed the Defence that the Prosecution Motion had been filed on 5 September 2006.

⁸ Defence Response, para. 3.

⁹ Defence Response, para. 6.

¹⁰ Response, para. 2.

¹¹ Response, para. 5.

¹² Response, para. 8.

Even if CMS believed that the time for filing a response ran from the date of filing of the Prosecution Motion, it should have, in all fairness to the Defence, calculated the time from 5 September 2006.

18. Instead, contrary to its earlier advice to the Defence, CMS correctly acknowledged that the Prosecution Motion had been filed on 4 September 2006. CMS also correctly informed the Defence that since the document had been filed at 16:04 that day, it was served on the following day, 5 September 2006. Article 9(B) of the Practice Direction provides that "*documents filed after 16.00 hours shall be served the next working day.*"

19. However, CMS then fell into error in its interpretation of Rule 7 by informing the Defence that 5 September 2006 should be counted as the first day of the 10 days allowed to file the response and that therefore the Response was due on 14 September 2006.¹³

20. The relevant part of Rule 7 is in the following terms:

- (A) *Unless otherwise ordered by a Chamber or by a Designated Judge, or otherwise provided by the Rules, the time prescribed by or under the Rules for the doing of any act shall run from the day after the notice of the occurrence of the event has been received in the normal course of transmission by the Registry, counsel for the Accused or the Prosecutor as the case may be.*
- (B) [...]
- (C) *Unless otherwise ordered by a Chamber or a Designated Judge, any response to a motion shall be filed within 10 days. Any reply to the response shall be filed within five days.*

21. Therefore, in accordance with Rule 7(A), in respect of a motion served on 5 September 2006 the first day of the allowable 10 days for filing a response would be the following day, i.e. 6 September 2006, so that the last day for filing a response would be 15 September 2006.

22. Furthermore, the Trial Chamber should not have assumed that because the Prosecution Motion had been filed on 4 September it had also been served on that day. It had overlooked the fact that the document had been filed at 4.04 pm on that day.

23. There can be no question that the Defence Response was filed in time. The Trial Chamber was therefore not correct in delivering its Second Protective Measures Decision without first considering the Defence Response.

24. Accordingly, we find that the Defence has established that this is an appropriate case for the Trial Chamber to exercise its inherent jurisdiction¹⁴ to reconsider its Second Protective Measures Decision. We now do so, taking into account the Defence Response and the Prosecution Reply to the Defence Response.

¹³ Annexure B to the Motion.

¹⁴ See *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-2004-16-AR73, Decision on Brima - Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, dated 8 December 2005, Separate and Concurring Opinion of Justice Robertson, paras. 49, 50; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-T, Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005, para. 17.

25. We note the matters raised by the Defence in its Response. In particular, we note that while the Defence does not at present oppose the main protective measures sought by the Prosecution, it may at a later stage of the Defence pre-trial preparations apply to the Trial Chamber for orders varying the protective measures where necessary to ensure the Article 17 rights of the Accused. We also take into account the notice given by the Defence of its intention to file such motions as are necessary to enable it to effectively prepare for trial.

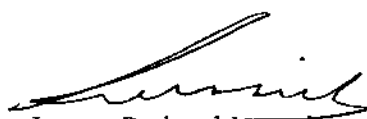
26. Having said that, we remain satisfied that the Prosecution Motion has established that the potential threats to the security of witnesses have not diminished since the Trial Chamber's Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, dated 25 April 2006.

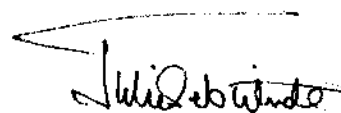
**FOR THE ABOVE REASONS, THE TRIAL CHAMBER
GRANTS THE MOTION AND ORDERS AS FOLLOWS:**

1. The Court Management Section is directed to accept the Defence Response filed on 15 September 2006 as being filed in time and process it in the normal way.
2. The Second Protective Measures Decision is reconsidered by the Trial Chamber taking cognisance of the Defence Response and the Prosecution Reply.
3. The Second Protective Measures Decision is confirmed in that:
 - (i) The Prosecution Motion is granted; and
 - (ii) The protective measures ordered in the Trial Chamber's "Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures" dated 25 April 2006 shall also apply to the witnesses referred to in Annex A(2) of the Prosecution Motion.

Done at Freetown, Sierra Leone, this 5th day of October 2006.


Justice Teresa Doherty


Justice Richard Lussick
Presiding Judge


Justice Julia Sebutinde

