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

SEIZED of the Motion for Immediate Protective Measures for Witnesses, filed publicly by Counsel for the First Accused, Issa Sesay (“Defence”) on the 5th of March 2007 (“Motion”);

RECALLING its Order for Expedited Filing, issued on the 7th of March 2007, in which the Trial Chamber requested that any Response by the Prosecution to the Motion be filed by the 12th of March 2007 and that any Reply thereto be filed by the 16th of March 2007;

NOTING the Response filed by the Office of the Prosecutor (“Prosecution”) on the 12th of March 2007 (“Response”) and the Reply thereto filed by the Defence on the 14th of March 2007 (“Reply”);

NOTING certain clarifications regarding this Motion provided by the Defence in response to questions posed by the Trial Chamber during the Status Conference held on the 2nd of May 2007;

MINDFUL of the Chamber’s Decision on the Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 30th of November 2006 (“First Sesay Decision”) and its Decision on the Sesay Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 1st of March 2007;

MINDFUL of the Decisions of this Trial Chamber concerning protective measures for other Defence witnesses, including the Decision on Gbao Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses (“Gbao Decision”), filed on the 1st of March 2007 and the Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 19th of March 2007;

PURSUANT to Articles 16 and 17 of the Statute of the Special Court (“Statute”) and Rules 26bis, 34, 53, 69 and 75 of the Rules of Procedure and Evidence (“Rules”);

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

A. *The Motion*

1. The Defence seeks immediate protective measures and non-disclosure of the identities of the following witnesses who are resident or working outside of West Africa:

- i) Certain officers of national Armed Forces (the "Armed Forces Witnesses") who have agreed to testify on behalf of the Accused Sesay but have yet to receive the necessary clearance from their Ministry of Defence (the "MoD");
- ii) Other prominent international witnesses (the "International Witnesses") who have expressed their interest in testifying on behalf of the Accused Sesay but have articulated concerns regarding their privacy and/or confidentiality and/or security due to both the political sensitivity of the international proceedings and the stigmatization of the RUF. These witnesses include three sitting senior officials in foreign governments, the current chairman of an international organisation and a high-ranking military officer in various locations throughout Africa and Asia.¹

2. The Defence submits that the Armed Forces Witnesses have agreed to testify on behalf of the accused, but that the MoD has communicated that clearance for this testimony might be contingent on certain, as yet unknown, conditions being satisfied. Defence interviews with these witnesses proceeded upon the understanding that all information including the identity of the witnesses would remain confidential until this clearance was obtained. The International Witnesses have also articulated concerns about confidentiality, and have asked that these concerns be addressed before they make a final commitment to testify. These factual allegations are substantiated by an affirmation by Mr Andrew Ianuzzi, a legal assistant for the Sesay Defence Team.²

3. It is the Defence's submission that genuine privacy and confidentiality concerns are clearly contemplated by the Rules and the Chamber's jurisprudence as legitimate justifications for the imposition of protective measures. Moreover, the imposition of objectively reasonable conditions for the release of a witness by an employer may necessitate such measures.³

¹ Motion, paras 1, 8 and 11.

² Motion, paras 7-12, and Annex A, Affirmation of Mr Andrew Ianuzzi, Legal Assistant, Sesay Defence Team.

³ Referring to *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures, 24 May 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Application for Closed Session for Witness TF2-218, 15 June 2005 and *Prosecutor*

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4. If these protective measures are not implemented, the Defence contends that this may result in the denial of the requested clearance by the MoD, and that without such assurances of confidentiality, the International Witnesses may also refuse to testify. The Defence submits that these witnesses are potentially beyond the reach of the Court's subpoena powers, and that the loss of their testimony would impact greatly on the integrity of the proceedings and the fair trial rights of the accused.⁴

5. Consequently, the Defence requests that the Chamber issue the following Orders:

- a) The Defence shall be allowed to withhold identifying data of the relevant witnesses or any other information which could lead to the disclosure of their identities;
- b) The Defence shall designate a pseudonym for each witness which will be used to refer to the witness;
- c) The Prosecution, the Witnesses and Victims Section and the Defence Teams for the Second Accused, Morris Kallon and the Third Accused, Augustine Gbao, shall be prohibited from making an independent determination of the identity of the witnesses or encouraging or otherwise aiding any person to attempt to determine the identity of any such person.⁵

6. The Defence submits that in order to preserve delicate ongoing negotiations, these protective measures should remain in place until:

- i) The MoD has articulated its conditions, if any, the Defence has had time to consider them, and any necessary further motions are filed on behalf of the Armed Forces Witnesses and/or;
- ii) The Defence finalises its negotiations with the International Witnesses and/or;
- iii) Each witness has agreed to the disclosure of his identity.⁶

B. The Prosecution Response

7. In its Response, the Prosecution contends that the Defence has not established that there is any possible threat that might arise from disclosure of the proposed witnesses's identity pending their final agreement to testify, and therefore has not satisfied the requirements of Rule 69 that the

v. Sesay, Kallon and Gbao, SCSL-04-15-T, Transcript of 11 July 2006, pp. 68-69. The Defence points to several rulings of this Chamber in which the Chamber accommodated the requests of international organisations in cases in which the witness's employer made the release of the witness contingent on the satisfaction of certain conditions (Motion, paras 3-6).

⁴ Motion, paras 10 and 12.

⁵ Motion, para 15.

⁶ Motion, para 13.



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proposed witness “may be in danger or at risk”. The Prosecution distinguishes the cases relied on by the Defence on the basis that in those cases, risks to the safety of the potential witness had also been shown.⁷

8. The Prosecution indicates that the Defence has not specified whether the witnesses that are the subject of the Motion were listed in the *Sesay* Defence Witness List,⁸ filed on the 5th of March 2007 in compliance with this Chamber’s Scheduling Order.⁹ The Prosecution submits that it assumes that these witnesses are listed, but that if they are not, an application should be made to have them added to the witness list.¹⁰

9. The Prosecution asserts that Mr. Ianuzzi’s affirmation states only that “each witness has agreed to consider testifying”, which falls short of the requirement imposed by para 24(i) of the First *Sesay* Decision that only those *Sesay* witnesses residing outside of West Africa who have “indicated their willingness to testify” are covered by the protective measures.¹¹ The Prosecution therefore submits that the witnesses that are the subject of this motion are not covered by existing protective measures.¹²

10. With respect to the specific relief sought, the Prosecution submits that the measure sought at paragraph 5(a) above could have the potential consequence of varying the 42-day disclosure requirement to some lesser, but unknown period.¹³ With respect to proposed measure at paragraph 5(b) above, the Prosecution submits that if the witnesses that are the subject of the present Motion are already listed in the *Sesay* Defence Witness Chart, then it appears that a pseudonym has already been given, but that if they are not listed, the application is premature as an application to show cause why they should be listed as witnesses must be made.¹⁴ Finally, the Prosecution submits that Orders similar to those requested in paragraph 5(c) above were rejected in the First *Sesay* Decision as

⁷ Response, paras 7-10.

⁸ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Public Sesay – Filing of Documents in Compliance with Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, Annex A, *Sesay* Defence Witness Chart, 5 March 2007 (“*Sesay* Defence Witness Chart”).

⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Scheduling Order Concerning the Preparation and the Commencement of the Defence Case, 30 October 2006 (“Scheduling Order”) and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision and Order on Defence Applications for an Adjournment of 16th of February Deadline for Filing of Defence Material, 7 February 2007.

¹⁰ Response, para 11.

¹¹ First Decision, para 24(i).

¹² Response, para 12.

¹³ Response, para 13.

¹⁴ Response, para 14.

well as in the *Gbao* Decision,¹⁵ and that the Defence has shown no evidence to justify a review of the existing Order with respect to these witnesses.¹⁶

C. *The Defence Reply*

11. In its Reply, the Defence submits that the Prosecution does not address the substance of the Motion, which was based primarily on concerns regarding privacy and confidentiality under Rule 75, rather than concerns regarding the safety and security of witnesses under Rule 69. The Defence also contends that the cases it relied on concerned situations in which personal and professional concerns, rather than simply fears relating to personal security, were sufficient for the court to consider granting protective measures.¹⁷

12. The Defence asserts that the witnesses do fall within the terms of the original *First Sesay* Decision granting protective measures, in that they are witnesses who have “indicated their willingness to testify”. It claims that the Prosecution is engaging in semantics in asserting that the affirmation that the witnesses “have agreed to consider testifying” is distinguishable.

13. With respect to the order requested in paragraph 5(c) above, the Defence submits that although similar Orders were dismissed by the Chamber in the *First Sesay* Decision and in the *Gbao* Decision, it is now making an application with respect to these *specific* witnesses, and that the evidence is clear that given their particular circumstances, in which they occupy sensitive posts in government, the armed forces or international organizations, they face very real occupational and personal consequences if it becomes known within these organizations that they intend to give testimony in support of a member of the RUF. Moreover, if it becomes known that they intend to testify, they may refuse to do so, and valuable exculpatory evidence will be lost.¹⁸

D. *Clarifications Provided at Status Conference*

14. At the Status Conference held on the 2nd of May 2007, the Defence clarified certain issues with respect to this Motion. In particular, the Defence stated that the witnesses that are the subject of this Motion are included, with pseudonyms, in the current *Sesay* Defence Witness List.¹⁹ The Defence

¹⁵ *First Sesay* Decision, para 24(vii); *Gbao* Decision, paras 36 and 42(iii).

¹⁶ Response, para 15.

¹⁷ Reply, paras 2-4.

¹⁸ Reply, paras 9-11.

¹⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Public *Sesay* Filing of Documents in Compliance with Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 16 April 2007. In its Reply, the

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also stated that the witnesses had indicated their willingness to testify, on the condition that they receive authorization from their various institutions and are granted ongoing protective measures.²⁰

II. APPLICABLE LAW

15. This Chamber has stated in its prior decisions that the issue of witness and victim protection in the jurisdiction of the Special Court is governed by Article 16 of the Court's Statute. Accordingly, Article 16(4) provides, *inter alia*, thus:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This 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. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

16. Furthermore, Rule 26bis of the Rules empowers the Trial Chamber and the Appeals Chamber to "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."

17. The Chamber emphasizes that the overriding principle that has consistently guided its Decisions based on Articles 16(4) and 17(2) of the Statute and specifically on Rules 75(A) and (B), 53(A), 69, and 26bis relating to protective measures for witnesses is that "a decision on protective measures requires a balance to be struck between full respect for the rights of the Accused and the protection needs of victims and witnesses within the legal framework of the Statute and Rules within the context of a fair trial."²¹

III. DELIBERATION

18. The Chamber notes that in the First *Sesay* Decision, it found that a *prima facie* case had been shown for issuing protective measures to witnesses residing in Sierra Leone and West Africa, and for

Defence had noted that pseudonyms had already been given to these witnesses, and that the order it was requesting was designed to allow the pseudonyms to remain until the conditions indicated were satisfied (Reply, para 8).

²⁰ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript, 2 May 2007, p. 52.

²¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Order on Protective Measures for Additional Witnesses, 24 November 2004, p. 3. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TF1-042 and TF1-044, 23 May 2006. See also *Prosecutor v. Musema*, ICTR-96-13-A, Judgement (AC), 16 November 2001, paras 68-69.

witnesses residing outside West Africa who have “indicated their willingness to testify”.²² However, the Chamber found that no *prima facie* case had been shown for “potential” witnesses residing outside of West Africa.²³

19. The Defence has now clarified that the witnesses that are the subject of this Motion have “indicated their willingness to testify”, subject to receiving authorization from their respective organizations, and to being granted the protective measures sought in this Motion. In the Chamber’s view, whether or not they receive such clearance is a matter outside of the control of the witnesses, and is to some extent contingent on whether the Chamber grants the protective measures requested.

20. It is therefore the opinion of this Chamber, that the witnesses at issue in the present Motion fall within the category of “witnesses who have indicated their willingness to testify”, and are covered by the blanket protective measures already granted in the First *Sesay* Decision.

21. The witnesses are therefore already entitled to be designated by pseudonyms, as requested by the Defence in paragraph 5(b) above.²⁴ The Chamber finds therefore that the Motion is moot with respect to this measure.

22. The First *Sesay* Decision also entitles the Defence to withhold the names and identifying information of these witnesses until 42 days prior to their testimony.²⁵ The Defence, as indicated in paragraphs 5(a) and 6 above, requests that the Chamber order that this information be withheld until official clearance is received from the MoD and/or the Defence finalises its negotiations with the remaining International Witnesses and/or each witness consents to the public disclosure of his identity. This might, as the Prosecution suggests, arguably have the effect of shortening the disclosure period to a period shorter than 42 days.²⁶

23. In the Chamber’s opinion, the witnesses remain subject to the 42-day disclosure requirement set out in the First *Sesay* Decision. In the event that clearance from the respective organizations is not

²² First *Sesay* Decision, para 24(i).

²³ *Ibid.*, para 24 (ii). See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 1 March 2007, para 15.

²⁴ First *Sesay* Decision, para 25(e).

²⁵ *Ibid.*, para 25(c).

²⁶ The Defence claims that the Prosecution’s submission with respect to this measure is illogical, claiming that the 42-day period remains extant unless the Chamber varies it (Reply, para 6). However, it does appear that the Defence is requesting a variation of this measure insofar as its request could have the consequence that this time period will not be respected insofar as the conditions outlined by the Defence are not met within this timeframe.

obtained, or that the negotiations with the final International Witnesses do not occur such that the 42-day period can be respected, an application can then be made by the Defence to vary this time period. The Chamber will consider its position, which might include a postponement of the witness's testimony, at that time, if necessary.

24. The Chamber notes that the measure requested by the Defence in paragraph 5(c) above, that the parties do not make an independent determination of the identity of the witnesses, was specifically denied in the First *Sesay* Decision on the basis that it was too restrictive in scope and not necessary in the circumstances.²⁷ The Chamber also notes that in the *Gbao* Decision, where a similar measure was requested, the Chamber found that no evidence had been presented by the *Gbao* Defence to consider reviewing this order in the context of the *Gbao* witnesses.²⁸

25. However, the Chamber has previously indicated that "the denial of blanket protective measures does not irrevocably impede the effective granting of protective measures to certain witnesses. The Defence is still at liberty to seek specific protective measures for individual witnesses, provided that such request is supported by sufficient evidence, if it feels that the current applicable measures regime will unduly prejudice them".²⁹ The Chamber is satisfied that the evidence indicates that given the particularly sensitive positions occupied by these witnesses as a consequence of the nature of their employment, the measure requested in paragraph 5(c) above is warranted in their particular circumstances.

26. For reasons of clarity, the Chamber is also of the view that it would be appropriate for the Defence to file a list of the pseudonyms of the witnesses at issue in this Motion with the Court and the parties.

²⁷ First *Sesay* Decision, para 24 (vii).

²⁸ *Gbao* Decision, para 36.

²⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on *Sesay* Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 1 March 2007, para 22.



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IV. DISPOSITION

THE TRIAL CHAMBER

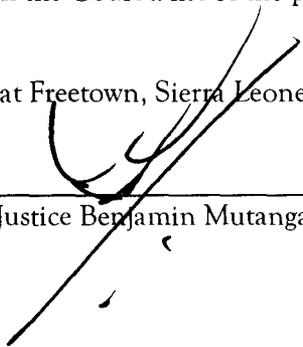
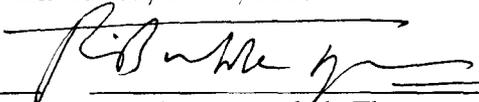
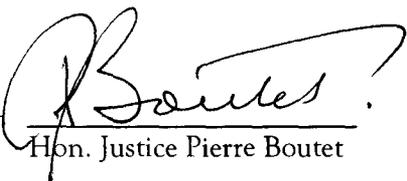
DECLARES that the witnesses that are the subject of this Motion are already covered by the protective measures granted in the First Sesay Decision, and in particular, the measures set out in paragraphs 25(c) and (e) thereof;

GRANTS the Defence request with respect to the measure set out in paragraph 5(c) of this Decision, and ORDERS as follows with respect to these witnesses:

The Prosecution, the Witnesses and Victims Section and the Defence Teams for the Second Accused, Morris Kallon and the Third Accused, Augustine Gbao, shall be prohibited from making an independent determination of the identity of the witnesses or encouraging or otherwise aiding any person to attempt to determine the identity of any such person.

AND FURTHER ORDERS the Defence, within 3 days of the service of the present Decision, to file with the Court a list of the pseudonyms of the witnesses that are the subject of the Motion.

Done at Freetown, Sierra Leone, this 16th day of May 2007

		
_____ Hon. Justice Benjamin Mutanga Itoe	_____ Hon. Justice Bankole Thompson Presiding Judge Trial Chamber I	_____ Hon. Justice Pierre Boutet

