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SCSL-03-07-PT
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THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow

SPECIAL COURT FOR SIERRA LEONE	
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14 MAY 2007	
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Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 14 May 2007

Case No.: SCSL-2003-01-PT

THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO "CONFIDENTIAL PROSECUTION MOTION
TO RESCIND AND AUGMENT PROTECTIVE MEASURES FOR WITNESSES"**

Office of the Prosecution

Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

Counsel for Charles Taylor

Mr. Karim A. A. Khan
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7729

I INTRODUCTION

1. This is the Defence Response to “Confidential Prosecution Motion to Rescind and Augment Protective Measures for Witnesses”, dated 3 May 2007 (“Prosecution Motion”).¹ The Prosecution request the “rescission” of the protective measures currently in place for TF1-114, TF1-358 and TF1-235 and the “augmentation” of the protective measures currently in place for TF1-406, TF1-546 and TF1-548.
2. The requested rescission consists of lifting all protective measures in place for TF1-114 and TFI-358; and the hearing of the testimony of TF1-235 in open session instead of closed session as was the arrangement when TF1-235 testified in the RUF case.² The requested augmentation consists of hearing the entire testimonies of TF1-406, TF1-546 and TF1-548 in closed session. The Defence does not object to the requested rescission. However, at this moment in time and in the absence of more detailed information, the Defence cannot accept the requested augmentation for the reasons set out in this Defence Response.
3. Whilst endeavouring to safeguard the legitimate rights of witnesses, the Defence emphasise that the presumption in favour of a public trial is an essential pillar of a fair trial. This is apparent from Article 17(2) of the Statute of the Special Court for Sierra Leone (“SCSL Statute”) pursuant to which an accused is entitled to “a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses” (emphasis added).
4. The public nature of international criminal proceedings is not only important to safeguard the fair trial rights of an Accused but also for the public at large. It is of fundamental importance that those who will follow proceedings today as well as those that will critique them in years to come have access, to the widest extent possible, to the testimony heard by the Trial Chamber. This will enable them to critically review the fairness of the judgments that have been issued at the international criminal tribunals. It is equally important for the

¹ *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-233, Confidential Prosecution Motion to Rescind and Augment Protective Measures for Witnesses, 3 May 2007 (“Confidential Prosecution Motion”).

² *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-04-15, Transcript of 29 July 2004.

people of Sierra Leone that there is transparency of the proceedings. The Special Court for Sierra Leone (SCSL) was, of course, not set up simply to convict. A principal objective was to help foster peace and reconciliation amongst all the people of Sierra Leone. To this end, it is important for them to hear the evidence given so as to comprehend the conflict and to properly understand the roles played by different protagonists.

5. As Honourable Justice Thompson pointed out:³

I am judicially convinced that both the Sierra Leonean community, in particular, and the international community, in general, do have an interest in having the testimony of the kind proffered being given in public both for their enlightenment on the importance of international criminal justice as an effective response to the culture of impunity, and for enhancing the visibility of the Court as a UN-supported international justice forum.

II LEGAL PRINCIPLES OF CLOSED SESSION TESTIMONY

6. The Defence accept that Rules 75(B)(ii) and 79 allow for testimonies to be heard in closed sessions. However, given the necessity of transparency of criminal proceedings and the statutory right of the Accused to “a fair and public hearing” pursuant to Article 17(2) of the SCSL Statute, closed session testimony must be treated as the exception to the rule that proceedings are public. A request for the entirety of a testimony to be heard in closed session should be granted only if there is no other option available to protect the safety and security of victims and witnesses. Granting such a request has to be exceptional and in the interests of justice.⁴
7. In the International Criminal Tribunals for Rwanda and the former Yugoslavia (“ICTR” and “ICTY”) it has been established that special protective measures, including closed session testimony, require a showing by the moving party that (1) the testimony is relevant

³ *Prosecutor v Norman et al*, SCSL-04-14-T-433, Dissenting Reasoned Written Ruling of Hon. Justice Bankole Thompson from Majority Ruling on Prosecution’s Application for Closed Session Hearing of Testimony of Witness TF2-218, 15 June 2005, para. 7.

⁴ *Ibid*, para. 5.

and important to the party's case; (2) there must be a real, objective fear for the safety of the witness, and (3) only the least restrictive measure should be applied.⁵

8. The party applying for special protective measures has the onus of establishing the need for the measures sought.⁶ For this, the moving party must clearly delineate the dangers that its witnesses and potential witnesses face and the situation which warrants such protective measures.⁷
9. Consistent with the case law of the sister Tribunals as well as the SCSL itself, the Trial Chambers, in determining whether closed session hearings are justified, are mindful of the right of the Accused to a fair and public hearing and will grant a request for closed session testimony "only in very limited circumstances".⁸ In the CDF case, the Trial Chamber held:⁹

A measure of hearing the testimony in closed session is only granted to a certain category of witness and is based on the principle of protection of victims and witnesses where the interest of justice so dictate" and that it is "an extra ordinary protective measure that will only be granted where it is shown that there is a real risk to the witness and / or his or her family and that their privacy or security will be threatened

10. In relation to another application in the CDF case, the Trial Chamber found that a closed session hearing of the testimony of a particular witness was in the interests of justice where

⁵ *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, paras. 19-20; Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK, 15 June 2005, para. 15. See also *Prosecutor v. Bagosora et al*, No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19 where the Trial Chamber emphasized that it adopted the least restrictive measure necessary to provide for the protection of victims or witnesses and its order should be interpreted in that light.

⁶ *Prosecutor v. Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005, para. 13; *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK, 15 June 2005, para. 17; *Prosecutor v. Karemera et al*, No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 9.

⁷ *Prosecutor v. Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005, para. 13,

⁸ *Prosecutor v. Norman et al*, SCSL-04-14-T-432, Decision on Prosecution Application for Closed Session for Witness TF2-218, 15 June 2005.

⁹ *Prosecutor v. Norman et al*, SCSL-04-14-T-435, Decision on Prosecution Request for Leave to Call Additional Witness and for Orders for Protective Measures, 23 June 2005, p. 6 (footnotes omitted).

the witness was employed by an international organization, his testimony would reveal sensitive and confidential information, and his employer waived his immunity from being compelled to testify on the condition that the testimony be taken in closed session. The Trial Chamber further held that “no unfair prejudice to any of the Accused would result from such evidence being adduced in a closed session”.¹⁰

11. Where the moving party has established that there is a need to protect a witness’s identity from the public, that party must still justify the need for the testimony to be entirely given in closed session. In most cases, it is possible to organise the examination-in-chief in such a manner that at least a part of the testimony can be heard in open session without disclosing the witness’s identity. Identifying information, such as the witness’s name, address and work place can be referred to under pseudonyms and only the questions directly addressing the witness’s identity can be heard in closed session.
12. Hearing the entirety of a witness’s testimony in closed session may be justified only where it is impossible to separate the witness’s identity and the entirety of his anticipated testimony, which may be the case if “his testimony falls squarely within the ambit of his former position”, and it is “difficult to separate (his) testimony as it is likely interwoven with his basis of knowledge”.¹¹
13. In *Bagosora et al*, the Trial Chamber allowed the entire testimony of a particular witness to take place in closed session. It acknowledged that the witness was clearly identifiable and held that “even if we split this into closed session for parts of his testimony, experience with the previous witness shows that the closed and open segments were quite interwoven, closely linked and there could be a lot of shift between open and closed.”¹²
14. Hence, only if these stringent requirements are complied with can the Prosecution Application be granted.

¹⁰ *Prosecutor v Norman et al*, SCSL-04-14-T-432, Decision on Prosecution Application for Closed Session for Witness TF2-218, 15 June 2005.

¹¹ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Transcripts of 12 October 2005 (CS), p. 10.

¹² *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Transcripts of 28 April 2005 (CS), p. 49.

III LEGAL PRINCIPLES APPLIED TO THE PROSECUTION REQUEST

15. The Defence still contest the basis for the protective measures that have been adopted for the Prosecution witnesses in the first place. The Defence never received information justifying the subjective and objective element of the fear of each particular witness. The Defence still have no information to make an adequate risk assessment of the Prosecution witnesses. Thus, the Defence is not in a position to accept the present Prosecution application. The Prosecution failed to demonstrate that TF1-406, TF1-546 and TF1-548 have a real and objective fear for their safety if their identities will be disclosed to the public.
16. The Defence accept that the “[p]reference for public hearings must be balanced with other mandated interests, such as the duty to protect victims and witnesses”.¹³ However, for the balancing exercise to be properly conducted, it is essential to know what is in the scales. The Prosecution’s failure to provide any concrete details in support of their request for three entire testimonies to be heard in closed session hampers an adequate balancing exercise between the principles of fairness and transparency of international criminal proceedings on the one hand, and the need to safeguard the security and safety of witnesses on the other hand.
17. The Prosecution allege that TF1-406, TF1-546 and TF1-548 are insider witnesses and as such, they and their families “are particularly vulnerable to acts of retaliation and potential harm if their identities come to be known by the public”.¹⁴ The Defence observe that witnesses cannot be declared “particularly vulnerable” in the abstract or by dint of the unilateral designation either as “Core Predominantly Linkage” witnesses or as “insider” witnesses by the party seeking the protective measures. In order to make an assessment whether evidence is required and the Trial Chamber must be persuaded that additional

¹³ *Prosecutor v. Tadic*, IT-94-1, Decision on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 5. Quoted by the Prosecution in their Confidential Prosecution Motion, para. 11.

¹⁴ Confidential Prosecution Motion, para. 13.

protective measures are necessary. This is supported by Justice Thompson, who held that “the issue of confidentiality or sensitive nature of the subject matter upon which the testimony is predicated is certainly one for judicial determination, a unilateral claim in respect of which by the Prosecution cannot be conclusive and binding upon the tribunal.”¹⁵

18. Even if the Trial Chamber accepts that there is a need to withhold the identities of these three witnesses from the public, due to their alleged vulnerability, the Defence submit that the Prosecution request is disproportionate to the aim sought. The Prosecution have failed to establish that less invasive methods (for example, conducting the examination-in-chief partly in closed session and partly in public session) would be insufficient to achieve the aim sought (namely the non-disclosure of the witness identities from the public at large). This, of course, may require a little care from the parties in conducting the respective examinations-in-chief and cross-examinations. That, however, should not be beyond the collective wit of either the Prosecution or the Defence.
19. The Prosecution purports to give some grounds justifying the need for the entire testimonies to be heard in closed session. The Prosecution claim that “due to the unique nature of the positions held by each witness and the specific information they possess”, there is no alternative method available to protect those witnesses.¹⁶ It is respectfully submitted that the Prosecution has not properly explained why this is so. In particular, the Prosecution has failed to demonstrate why at least some parts of the anticipated testimonies of TF1-406, TF1-546 and TF1-548 cannot be heard in open session.
20. In the event that the Trial Chamber grants the Prosecution request, the Defence respectfully reserve the right to object during such a witness’s examination-in-chief if it appears that parts of their testimony can, in fact, be safely given in open sessions.

¹⁵ *Prosecutor v Norman et al*, SCSL-04-14-T-433, Dissenting Reasoned Written Ruling of Hon. Justice Bankole Thompson from Majority Ruling on Prosecution’s Application for Closed Session Hearing of Testimony of Witness TF2-218, 15 June 2005, para. 3.

¹⁶ Confidential Prosecution Motion, para. 17.

7785

III CONCLUSION

21. For these reasons, the Defence requests that the Trial Chamber rescind the protective measures currently applicable to TF1-114, TF1-358 and TF1-235 as requested by the Prosecution, but that the Trial Chamber does not augment the protective measures currently applicable to TF1-406, TF1-546 and TF1-548 unless and until the Prosecution provide further details accessible to the Defence in support of their application.

Respectfully Submitted,



Karim A. A. Khan

Counsel for Mr. Charles Ghankay Taylor

Dated this 14th Day of May 2007

Index of Authorities

7786

SCSL Jurisprudence

- *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-PT-233, Confidential Prosecution Motion to Rescind and Augment Protective Measures for Witnesses, 3 May 2007.
- *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15, Transcript of 29 July 2004.
- *Prosecutor v Norman et al*, SCSL-2004-14-T-432, Decision on Prosecution Application for Closed Session for Witness TF2-218, 15 June 2005.
- *Prosecutor v Norman et al*, SCSL-04-14-T-433, Dissenting Reasoned Written Ruling of Hon. Justice Bankole Thompson from Majority Ruling on Prosecution's Application for Closed Session Hearing of Testimony of Witness TF2-218, 15 June 2005.
- *Prosecutor v. Norman et al*, SCSL-04-14-T-435, Decision on Prosecution Request for Leave to Call Additional Witness and for Orders for Protective Measures, 21 June 2005.

ICTR Jurisprudence

- *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005. Available online: <http://69.94.11.53/default.htm>
- *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK, 15 June 2005. Available online: <http://69.94.11.53/default.htm>
- *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005. Available online: <http://69.94.11.53/default.htm>
- *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005. Available online: <http://69.94.11.53/default.htm>
- *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005. Available online: <http://69.94.11.53/default.htm>

ICTY Jurisprudence

- *Prosecutor v. Tadic*, IT-94-1, Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995. See Prosecution List of Authorities attached to: *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-PT-233, Confidential Prosecution Motion to Rescind and Augment Protective Measures for Witnesses, 3 May 2007.