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SCSL-03-01-T
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THE SPECIAL COURT FOR SIERRA LEONE

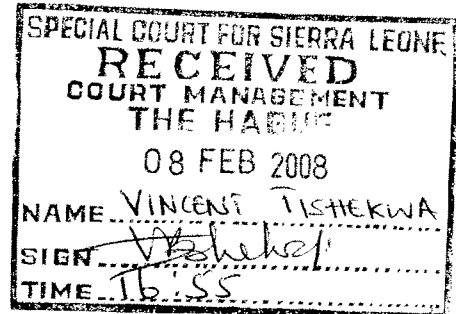
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 8 February 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX

**DEFENCE RESPONSE TO THE PUBLIC PROSECUTION MOTION FOR
ADDITIONAL PROTECTIVE MEASURES FOR THE TRIAL PROCEEDINGS
OF WITNESSES TF1-515, 516, 385, 539, 567, AND 390**

Office of the Prosecutor

Ms. Brenda J. Hollis
Ms. Kirsten Keith

Counsel for Charles G. Taylor

Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. On 29 January 2008, the Prosecution filed a *Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388 and 390*.¹ In this Motion, the Prosecution seeks an order granting additional protective measures to the witnesses listed, all of whom are already subject to pre-trial protective measures granted by this Trial Chamber.²
2. The Defence does not oppose the additional protective measures sought for witnesses TF1-515, 516, 385, 539, and 338 as set out in Annex A, which includes the use of a screen, facial distortion and/or voice distortion.³ The Defence appreciates that in extraordinary circumstances, the willingness of a witness to testify is dependent on the party's ability to guarantee his or her anonymity and safety, and the Defence agrees that on the balance, these requested measures are appropriate.
3. However, the Defence opposes the additional protective measures sought for witnesses TF1-567 and TF1-390 to be held in closed session. The Defence believes that the use of complete closed session is not necessary to protect the identity of these two witnesses. Additionally, the use of closed session testimony unfairly limits the Defence's ability to effectively investigate and cross-examine not just the witnesses themselves, but the content of the witnesses' testimonies. This is in violation of the Mr. Taylor's unqualified right to "examine, or have examined, the witnesses against him" as provided by Article 17(4)(e) of the Statute of the Special Court for Sierra Leone. Additionally, the Defence maintains its previously stated position that the use of closed session testimony impacts on Mr. Taylor's right to a "fair and public hearing" according to Article 17(2) of the Statute, and that this right should only be qualified when absolutely necessary for the protection of witnesses and victims.⁴

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-404, Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388 and 390, 28 January 2008 ("Additional Protective Measures Motion").

² Additional Protective Measures Motion, paras. 3 and 4.

³ Additional Protective Measures Motion, para. 5.

⁴ See, ex, *Prosecutor v. Taylor*, SCSL-03-01-T-397, Confidential Defence Response to Prosecution Motion for the Testimony of Witnesses TF1-548, TF1-555 & TF1-561 to Be Held in Closed Session, 14 January 2008, paras. 5-8.

II. Legal Basis

4. The Defence is aware that it has become standard practice for witnesses to be heard in closed session in trials before the Special Court, based on purported concerns of witness safety and security. However, a fresh look at the Rules of Procedure and Evidence pertaining to the use of closed session is instructive.
5. Rule 75(B)(ii) allows for a Judge or the Trial Chamber to order measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, through means including closed sessions. However, closed sessions may only be authorized in accordance with Rule 79.
6. Rule 79 only allows for the use of closed session in three distinct scenarios, for reasons of:
 1. national security,
 2. protecting the privacy of persons, as in cases of sexual offences or cases involving minors, (emphasis added) or
 3. protecting the interest of justice from prejudicial publicity.

The examples given in number two as to what types of cases deserve hearing only in closed session should serve as a guideline to the Chamber when assessing applications for closed session for different reasons. While cases of sexual offences or cases involving minors are not exclusive categories, they do suggest that only those witnesses who are especially vulnerable and are in comparable situations should be granted this extreme measure. The Defence submits that the witnesses on whose behalf the Prosecution makes the current application do not fall into a similarly vulnerable category. The Defence simply does not agree with findings before other Chambers at the Special Court that “insider” by analogy, “linkage” witnesses are particularly vulnerable to acts of retaliation and potential harm if their identities are made known to the public.⁵

⁵ See Additional Protective Measures Motion, para. 18.

III. Submissions

Preference is for Public Hearings

7. As a starting point, it is important to remember that the preference is for public hearings and open session testimony. This is clear from the rights granted to the Accused in Article 17(2) of the Statute. The right to a public hearing may be only be infringed by the “need to guarantee the utmost protection and respect for victims and witnesses”.⁶
8. Case law from the European Court of Human Rights sets out this basic preference, explaining, “In principle, all the evidence must be introduced in the presence of the accused at a public hearing with a view to adversarial argument”.⁷ Case law from the ICTR also explains that the rights of the accused are the first consideration and that the need to protect victims and witnesses is a secondary one.⁸
9. Thus, the use of close of closed session should remain an “extraordinary measure”,⁹ and should only be granted if less restrictive measures are not sufficient.

Least Restrictive Protective Measures Should be Used

10. At the ICTY, the Trial Chamber in *Prosecutor v. Tadic* determined that:

“...[A]ny measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable”.¹⁰

⁶ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, paras. 33-34.

⁷ *Kostovski*, paragraph 42, ECHR series A, Vol. 166, 23 May 1989.

⁸ *Prosecutor v. Musema*, No. ICTR-96-13-A, 16 November 2001, para. 68.

⁹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-577, Decision on Prosecution Motion for the Testimony of Witnesses TF1-367, TF1-369, TF1-371 to be held in Closed Session and for other Relief of Witness TF1-369, 14 June 2006, pg. 5.

¹⁰ *Prosecutor v. Tadic*, IT-94-1, Decision on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 66. See also, *Prosecutor v. Bagosora*, No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19.

11. The Defence submits that it is possible to alleviate whatever real or perceived safety concerns witnesses TF1-567 and TF1-390 may have by using a combination of the screen, voice distortion, and facial distortion. Only if and when absolutely necessary, the proceedings could be moved from open to closed session.
12. The Defence recognizes the procedural hassle and the extra time it takes to move the proceedings in an out of open session,¹¹ but the Defence does not believe this should be a consideration when determining an issue that substantially impacts Mr. Taylor's rights to a fair and public hearing. The Defence also notes the risk involved in repeatedly moving in and out of closed session,¹² but they are confident that based on the Submissions of the Registrar, improved coordination between Court Management personnel of the ICC and the SCSL will ensure that this is not a problem.

Impacts of Closed Session on Cross-Examination and the Ability to Effectively Investigate

13. As stated above, Article 17(4)(e) of the Statute affords Mr. Taylor the right to "examine, or have examined, the witnesses against him". Yet the practical realities of hearing witness testimony in closed session severely restrict the Defence's ability to effectively investigate the witness him or herself as well as the content of the witness' testimony. Thus, counsel are not able to properly cross-examine the witnesses called to testify against Mr. Taylor.
14. When a witness is granted leave to testify in closed session, that means that the public will never know the witness' identity or the content of his testimony – not before trial, not during trial, and not after trial. In essence, then, the witness is able to present largely untested and unchallenged evidence.
15. It is difficult to investigate a protected witness without breaching protective measures. The ICTR in *Prosecutor v. Bagasora* held that a party may make use of the name of a protected

¹¹ See, ex., *Prosecutor v. Taylor*, SCSL-03-01-T-411, Confidential Submission by the Registrar Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Breach of Protective Measures Ordered by Trial Chamber II, 7 February 2008.

¹² See, Additional Protective Measures Motion, para. 26.

witness to make reasonable inquiries without breaching a protective order. However, in that case, the Appeal Chamber also indicated that a party is prohibited from doing so where the very nature of the inquiry would disclose that the person is a witness.¹³ Similarly, the ICTR has held that the inquiring party must “scrupulously avoid”, expressly or impliedly, suggesting that a person is a witness for or is associated with one side or the other. Consequently, if the third party demands explanations which would require revealing that information, then the inquiry must cease.¹⁴ This forces the Defence, out of an abundance of caution, to avoid making inquiries as to a specific witness or to the content of a witness’ statement or testimony where doing so would make it obvious that that person is a witness.

16. One of the benefits of public hearings is that the public is able to follow what is being said by witnesses and can then come forward with evidence to either support or contradict what is being said. Members of the Defence team can personally attest that in instances during the first month of trial where Prosecution witnesses have been heard in open session, numerous members of the public have called or emailed with information to challenge the testimony currently being given. When a witness is heard in closed session, however, the Defence loses this critical component of information gathering and is unable to effectively cross-examine the witness.
17. The Defences realize that even if additional protective measures of use of a screen or facial and/or voice distortion are granted, it is still not possible to disclose the name or identifying information of a witness. However, if the content and general testimony of the witness is made public, it would go a long way toward allowing the Defence to conduct proper investigations.

¹³ *Prosecutor v. Bagosora et al*, No. ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, paras. 18 and 21.

¹⁴ *Prosecutor v. Bagosora et al*, No. ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 11.

Comments on the Factual Basis for Witnesses' Concerns

18. The burden of justifying the protection of witnesses lies on the party seeking such protection.¹⁵ Additionally, the subjective fear of a witness is insufficient to justify special protective measures without any objective considerations.¹⁶ The Prosecution submits that the risks facing TF1-567 and TF1-390 are both subjective and objective.¹⁷
19. When discussing the general security situation in Sierra Leone and Liberia the Prosecution make reference to a newspaper article from Liberia in which threats were allegedly made against witness TF1-406 after testifying in open session.¹⁸ From what the Defence understands, this article is from a paper called The New Democrat, which is managed by Mr. Tom Kamara, who has been a vocal anti-Taylor advocate for over 10 years. Furthermore, the Defence has not been able to locate any independent police record or report of the alleged incident. Consequently, it is not beyond the Defence's imagination that witness TF1-406 is looking to seek asylum in a Western country following his testimony in the Taylor case and that this newspaper article will be a convenient addition to his application.
20. The declaration in Annex B of the Motion details the current security situation that affects witnesses. Yet the Prosecution has still not disclosed the underlying facts and information upon which the declaration is based, such that the Defence can properly respond to or refute the allegations of misconduct on the part of both the Accused and the Accused's family or close supporters.
21. The Prosecution is concerned that because witnesses TF1-567 and TF1-390 held roles or had responsibilities during the conflict that were unique, it will be easy for persons closely

¹⁵ *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.

¹⁶ *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, para. 26.

¹⁷ Additional Protective Measures Motion, paras. 13-17.

¹⁸ Additional Protective Measures Motion, para. 15; *Prosecutor v. Taylor*, SCSL-03-01-T-394, Public Prosecution Reply to Defence Reply to Prosecution Motion for the Testimony of Witnesses TF1-548, TF1-555 & TF1-561 to be Held in Closed Session, 18 January 2008, Annex A.

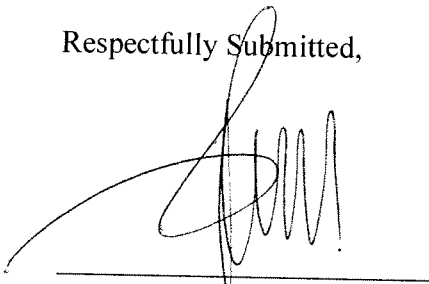
associated with the Accused, RUF and AFRC leadership to determine their identities. The Defence believes that this can adequately be handled by moving in and out of closed session.

22. Furthermore, the Defence refers to two paragraphs of argument in the Confidential Annex included in this Response in regard to the roles and responsibilities of the witnesses as summarized in the Prosecution Motion at paras. 19-23.

IV. Conclusion

23. The Defence does not oppose the requested additional protective measures for TF1-515, TF1-516, TF1-385, TF1-539 and TF1-388 as set out in Annex A of the motion.
24. The Defence opposes the request for witnesses TF1-567 and TF1-390 to testify entirely in closed session. Instead, the Defence suggests that less restrictive measures would accomplish the purpose of addressing the witnesses' purported safety concerns while ensuring that Mr. Taylor's rights to a fair and public hearing and to examine the witnesses against him are not unduly burdened.

Respectfully Submitted,



For Courtenay Griffiths Q.C.

Lead Counsel for Charles G. Taylor

Dated this 8th Day of February 2008

The Hague, The Netherlands.



SPECIAL COURT FOR SIERRA LEONE
BINCKHORSTLAAN 400 • 2516 BL DEN HAAG • THE NETHERLANDS
PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

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CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

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- Application
- Order
- Indictment
- Motion
- Response**
- Correspondence

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Name of Officer:

Vincent Tishekwa

Signed: 