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SCSL-03-01-T
(14672-14684)

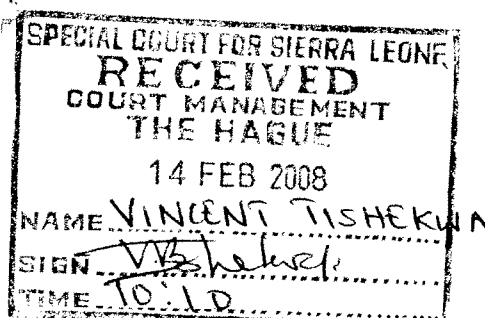
14672

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 14 February 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC WITH CONFIDENTIAL ANNEX

**REPLY TO DEFENCE RESPONSE TO
PROSECUTION MOTION FOR ADDITIONAL PROTECTIVE MEASURES FOR THE TRIAL
PROCEEDINGS OF
WITNESSES TF1-515, 516, 385, 539, 567, 388 AND 390**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Kirsten Keith

Counsel for the Accused:

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

I. INTRODUCTION

1. The Prosecution files this Reply to the “Defence Response to the Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388 and 390”, dated 8 February 2008.
2. In its Response, the Defence does not object to the request for the additional protective measures that entail the use of voice distortion and/or facial distortion and use of a screen for witnesses TF1-515, 516, 385, 539 and 337. However the Defence objects to the request for Closed Session testimony for witnesses TF1-567 and TF1-390 on the basis that Closed session testimony is not necessary to protect the identity of the two witnesses; that the use of Closed Session unfairly limits the ability of the Defence to effectively investigate and cross-examine the witnesses and that the use of closed session impacts on the Accused’s right to a fair and public hearing.¹
3. In their response, the Defence make a number of assertions, to which the Prosecution will Reply, specifically:
 - i) That insiders are not witnesses who are particularly vulnerable to acts of retaliation and potential harm if their identities are known;
 - ii) Preference is for Public Hearings;
 - iii) The rights of the Accused will be violated by Closed Session testimony as he will not receive a fair and public hearing and will not be able to examine witnesses against him; and
 - iv) That in relation to the threats made against TF1-406, the Defence have not been able to locate any independent police record or report of the incident.

II REPLY

Insiders are witnesses who are particularly vulnerable to acts of retaliation and potential harm.

4. The Defence suggest two examples of witnesses who may be especially vulnerable and deserve hearing in closed session testimony. They propose that these examples serve as a

¹ Response, para. 3

guideline to the Chamber in assessing applications for Closed Session. However, to do so is to read restrictions into the Rules that are not provided for. Rule 79 does not list categories of witnesses to whom closed session may be afforded. Instead it grants the Trial Chambers a wide discretion to determine applications on a case-by-case basis, provided the applications are based on one of three grounds set out in the Rule. If the drafters of the Rules had intended such a restrictive reading of the Rule, specific categories of witnesses to whom the rule was envisaged to apply to would have been included.

5. The Defence disagree with findings by Trial Chambers of this Court that insider witnesses are particularly vulnerable to acts of retaliation.² However they provide no argument to support their contention. It is not for the Defence to make unsupported, blanket assertions that insider witnesses do not fall into a similar vulnerability category. The circumstances faced by a witness must be considered on a case by case basis, consistent with the approach taken by this court. Any witness, but particularly an insider, may find themselves particularly vulnerable by virtue of the unique circumstances surrounding their living situation and their giving of testimony. Further, in the circumstances of cases such as this, against a former president, where reliance is placed upon “insider” or “linkage” witnesses, it is even more likely that such witnesses would in fact be subject to acts of retaliation, a reality supported by the subjective and objective security assessments provided to this Trial Chamber relating to this case.

Preference is for Public Hearings

6. The jurisprudence of this Court and the International Tribunals expresses a preference for public hearings and open session testimony. However, the plain language of Article 17 (2) of the Statute makes it abundantly clear that the right of the Accused to a public hearing is *subject* to any protective measures ordered by the Court. Thus, the Statute, which is the legal framework for the application of the Rules, does provide that the protection of witnesses is an acceptable reason to limit the Accused’s right to a public trial and Rules 75 and 79 provide the mechanisms for qualifying this right.

² *Prosecutor v Sesay et al*, SCSL-2004-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures,” 5 July 2004, para. 33; *Prosecutor v Sesay et al*, SCSL-2004-15-T-577, “Decision on Prosecution Motion for the testimony of Witness TF1-367, TF1-369 and Tf1-371 to be Held in Closed Session and for Other Relief for Witness TF1-369”, 14 June 2006, p.4.

7. This Court has recognised the above qualification with the statement that “even though the Court must, in such matters, seek to balance the right of the Accused to a fair and public trial with the interest of the witness in being given protection such a right is subject to derogating exceptional circumstances (Article 17 (2) of the Statute)”.³ Similar reasoning has been applied by this Trial Chamber, citing the acknowledgement by the ICTY that:

“Preference for public hearings must be balanced with other mandated interests, such as the duty to protect victims and witnesses. This balance is expressly required in Rule 79, [...] As such, in certain circumstances, *the right to a public hearing may be qualified* to take into account these other interest.”⁴ (emphasis added)

The ICTY Trial Chamber continued to state:

“What is essential to recognize, however, is that the Statute of the International Tribunal, which is the legal framework for the application of the Rules, does provide that the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial.”⁵

8. Reliance by the Defence on ECHR caselaw is not entirely on point. It overlooks the distinction that the ECHR limits the right to a public trial “in the interests of morals, public order or national security”⁶ whereas the SCSL Statute limits the right to a public trial to protect the victims and witnesses, in accordance with the Court’s affirmative obligation to do so. Indeed, the *ad hoc* tribunals and this Court, dealing with groups of perpetrators who have carried out horrific crimes against scores of victims over a long period of time, have properly responded to this resort to violence by providing protective measures for those who have the courage to come forward and testify despite the reality that most of the perpetrators remain at large and are capable of harming those who come forward. Such measures are allowed when the requisite showing has been made, as the Prosecution has done in this instance.

³ *Prosecutor v Sesay et al*, SCSL-2004-15-T-277, “Order to hear the Evidence of Witness TF1-235 in Closed Session”, 8 November 2004, para. 10

⁴ *Prosecutor v. Tadić*, IT-94-1, “Decision on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995, para. 33, cited by this Trial Chamber in *Prosecutor v Brima et al*, SCSL-04-16-T-309, “Confidential decision on Prosecution Motion for Protective Measures for Witness TF10272”, 15 June 2005.

⁵ *Prosecutor v. Tadić*, IT-94-1, “Decision on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995, para. 36

⁶ Article 6 (1), ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms at: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

That the rights of the Accused will be violated by Closed Session testimony

9. The Prosecution re-iterates that the rights of the Accused are not prejudiced by the use of closed session testimony.⁷ The Accused still has the unfettered right to cross-examine the witness. He is also free to investigate any aspect of the witness's evidence, albeit in a manner that is consistent with the protective measures in place for the witness.
10. In relation to the Accused's right to a fair and public hearing under Article 17 (2) of the Statute, the Prosecution refers to submissions made above in paragraphs 6 -9.
11. Regarding the right of the Accused to "examine or have examined, the witnesses against him", the Prosecution submits that this right is not negated by the giving of closed session testimony. The Defence assertion at paragraph 14 that the public will never know the witness's identity or content of their testimony; that in essence the witness is able to present largely untested and unchallenged evidence is an incorrect assertion. The evidence is tested and challenged by the Accused and his right to do so is unaffected by the absence of the public in court or the fact that the public will not know the identity of the witness or what the witness said. The lack of a public hearing for the testimonies of a number of witnesses does not therefore affect this process of challenging evidence.
12. The Defence argument that they lose a "critical component of information gathering and is unable to effectively cross-examine witnesses"⁸, when a witness is heard in closed session is without merit. The fact that cross examination takes place in closed session does not render cross-examination ineffective. Nor does it preclude the Defence from pursuing other avenues of investigation, subject to the protective measures in place. It would be inappropriate to deny closed session testimony on the basis of an unsubstantiated hope that a member of the public will be following the proceedings and will come forward with leads for defence. It would be equally inappropriate to deny such relief based on the belief that

⁷ See for instance. *Prosecutor v Brima et al*, SCSL-04-16-T, "Confidential Decision on prosecution Motion for Protective Measures for Witness TF1-272", 15 June 2005, para. 34 and *Prosecutor v Sesay et al*, SCSL-04-15-T-277, "Order to Hear the Evidence of Witness TF1-235 in Closed Session", 8 November 2004, at para. 15: "[...] **the right of the accused to a fair and public hearing**, having regard to the provisions of Article 17 (2), **will not be prejudiced** by permitting the witness to testify in closed session.[...]" (emphasis added).

⁸ Response, para. 16

open session testimony is the only way the Defence can find such leads. After all, it cannot be forgotten that the Defence has the benefit of the Accused's knowledge of many of the insiders witnesses in this case, and, as indicated from some of the *Taylor* Defence pleadings⁹, the apparent assistance of the *Sesay* Defence team in the *RUF* case. In addition, the Defence has the other modes of investigation, including an apparently very active support group in Liberia and a full cadre of personnel, those paid by the Court and others, who may pursue and develop leads.

Comments regarding threats against family members of Witness TF1-406

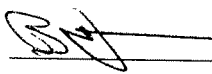
13. The Prosecution provided detailed information regarding threats made against TF1-406's family in its Motion and this incident was also reported in the declaration in Annex B of the Motion. At the time of filing the Motion, the Prosecution did not have a copy of any police or investigations report pertaining to this incident. Since then, the Prosecution has received an information report detailing the status of the investigation into the threats made against family members of TF1-406. This report is attached as **Annex A**.
14. The Defence speculates that witness TF1-406 is seeking asylum and that the newspaper article detailing threats against his family will be a "convenient addition to his application." Such speculation is inconsistent with the threat assessments provided to the Trial Chamber and should not be a factor in determining this important issue.

⁹ For instance: *Prosecutor v Taylor*, SCSL-03-01-T-377, "Public Defence Motion Pursuant To Rule 75 (G) To Modify Sesay Defence Protective Measures Decision Of 30 November 2006 Or Access To Closed Session Defence Witness Testimony And Limited Disclosure Of Defence Witness Names And Related Exculpatory Material", 14 December 2007

III CONCLUSION

15. The Prosecution has provided both detailed information regarding the general current security situation in its Motion and information regarding the security situation specific to witnesses TF1-567 and TF1-390. The information provided establishes that there exists a real threat to the witnesses, based on an objective standard, and that there is a basis for granting closed session testimony. Allowing closed session testimony of these two witnesses does not deny the Accused a fair trial but appropriately balances the security and privacy rights of the witnesses against the right to a public trial.
16. The Defence Response is unfounded and the Prosecution requests that the Trial Chamber order:
- (a) that Witnesses TF1-567 and TF1-390 be permitted to testify entirely enclosed session; and
 - (b) that Witnesses TF1-515, TF1-516, TF1-385, TF1-539 and TF1-388 be granted the additional protective measures sought in the Motion, as set out in Annex A of the Motion.

Filed in The Hague,
14 February 2008
For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

Prosecutor v. Taylor, Case No. SCSL-03-01-T

Prosecutor v Taylor, SCSL-03-01-T-413, “Defence Response to the Prosecution motion for additional protective measures for the trial proceedings of Witness TF1-515, 516, 385, 539, 567, 388 and 390”, dated 8 February 2008.

Prosecutor v Taylor, SCSL-03-01-T-404, Prosecution motion for additional protective measures for the trial proceedings of Witness TF1-515, 516, 385, 539, 567, 388 and 390”, dated “29 January 2008

Prosecutor v Taylor, SCSL-03-01-T-377, “Public Defence Motion Pursuant To Rule 75 (G) To Modify Sesay Defence Protective Measures Decision Of 30 November 2006 Or Access To Closed Session Defence Witness Testimony And Limited Disclosure Of Defence Witness Names And Related Exculpatory Material”, 14 December 2007

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Prosecutor v Brima et al, SCSL-04-16-T, “Confidential Decision on prosecution Motion for Protective Measures for Witness TF1-272”, 15 June 2005

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Prosecutor v Sesay et al, SCSL-2004-15-T-277, “Order to hear the Evidence of Witness TF1-235 in Closed Session”, 8 November 2004

ICTY Cases

Prosecutor v. Tadić, IT-94-1, “Decision on the Prosecution’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995 at:
<http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>

Statutes

ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms at:
<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

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

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Document Index Number: **418**
Document Date **14 February 2008**
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- Application
- Order
- Indictment
- Motion
- Reply**
- Correspondence

Document Title:

PUBLIC WITH CONFIDENTIAL ANNEX – REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR ADDITIONAL PROTECTIVE MEASURES FOR THE TRIAL PROCEEDINGS OF WITNESSES TF1-515, 516, 385, 539, 567, 388 AND 390

Name of Officer:

Vincent Tishekwa

Signed: 