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SCSL-03-01-T  
(17104-17114)

17104



**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:** 16 May 2008

**Case No.:** SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE	
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**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

PUBLIC

**DEFENCE MOTION PURSUANT TO RULE 75(G) TO RESCIND  
CLOSED SESSION PROTECTIVE MEASURES GRANTED ORALLY  
IN OTHER PROCEEDINGS FOR WITNESS TF1-366**

**Office of the Prosecutor**

Ms. Brenda J. Hollis  
Ms. Leigh Lawrie

**Counsel for Charles G. Taylor**

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

## I. Introduction and Procedural History

1. The Defence files this Motion pursuant to Rule 75 of the Rules of Procedure and Evidence (“Rules”) to request in a timely manner<sup>1</sup> that the closed session protective measures orally granted to witness TF1-366 (“the witness”) in a prior proceeding be rescinded on the ground that the Prosecution has not met the standard set forth in the three-prong test devised by this Trial Chamber when evaluating whether the extraordinary measure of closed session testimony should be used for a witness.
2. As part of the RUF case, Trial Chamber I initially granted TF1-366 protective measures for trial purposes consisting of the use of a screen and a pseudonym.<sup>2</sup> Trial Chamber I later granted the witness additional protective measures, including the use of closed session.<sup>3</sup>
3. In the Amended Witness List filed by the Prosecution on 7 February 2008,<sup>4</sup> the witness is listed as a “Predominately Linkage Witnesses”. At that time, the Prosecution indicated that the evidence of TF1-366 would be admitted through a combination of Rule 92*bis* and live testimony.
4. However, in a more recently filed Weekly Witness List,<sup>5</sup> the Prosecution indicated that the estimated time for direct examination of this witness is 16 hours. Furthermore, there has been no Rule 92*bis* filing regarding TF1-366, thus the Defence anticipates that the

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<sup>1</sup> The Presiding Judge recently commented that the testimony of TF1-362 would have to proceed in closed session because the Defence had not made a “timely application” to vary or rescind orders previously made by Trial Chamber I in regard of that witness’s testimony. Thus the Presiding Judge was “reluctantly” bound to proceed in closed session. See Taylor Trial Transcript, 27 February 2008, pg. 4797, Ins. 6-10.

<sup>2</sup> *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, paras. 7, 44 (“RUF Protective Measures Decision”).

<sup>3</sup> Witness TF1-366 was orally granted closed session protective measures by Trial Chamber I on 7 November 2005, at pages 49-69 of the Trial Transcript. However, the actual application for closed session and any response by the Defence was heard in closed session. Therefore the Defence cannot access or comment on those arguments.

<sup>4</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-410, Prosecution’s Amended Witness List, 7 February 2008, Annex (“Amended Witness List”).

<sup>5</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-491, Public with Confidential Annexes A and C Prosecution Witness List for Week 12 – 16 May 2008, 28 April 2008 (“Weekly Witness List”).

Prosecution is now intending to call the witness completely live.<sup>6</sup> Either way, the Defence files this motion in order to ensure that whatever portion of the witness' testimony that is heard live is conducted in open session.

5. Pursuant to Rule 75(F)(i), those protective measures continue to have effect in any proceedings before this Court unless and until a new order is granted.

## II. Legal Basis

6. Pursuant to Rule 78 of the Special Court Rules of Procedure and Evidence preference should be given to public proceedings: "All proceedings before a Trial Chamber (...) shall be held in public, unless otherwise provided".
7. Article 17(2) of the Special Court Statute guarantees the Accused a "fair and public" trial, subject only to measures ordered for the protection of victims and witnesses. Additionally, Article 17(4)(e) grants the Accused the right to "examine, or have examined, the witnesses against him".
8. The Defence recognises that pursuant to Rule 75(F)(i), once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the "first proceedings"), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court (the "second proceedings") unless and until they are rescind, varied or augmented in accordance with the procedure set out in Rule 75(F).
9. Thus, the Defence make this application for variation before this Chamber because, according to Rule 75(G), "A party to the second proceedings [the Taylor case] seeking to rescind, vary or augment protective measures ordered in the first proceedings [the RUF case] shall apply to the Chamber seized of the second proceedings".

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<sup>6</sup> If this is not the case, the Prosecution will surely indicate so in its Response.

10. In the course of evaluating the merits of this request, which would serve to decrease the protective measures granted to the victims or witnesses by Trial Chamber I in the first proceedings, the Defence understand that in accordance with Rule 75(H), Trial Chamber II will “obtain all relevant information” from Trial Chamber I and may “consult” with any Judge from Trial Chamber I or the Chamber itself.
11. The Defence are informed by the Special Court practice as stated in Rule 75(D), that the Witness and Victims Section shall ensure that a witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75(F).
12. Finally, 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 (but not limited to) closed sessions. However, the Defence emphasises that in accordance with Rule 79, closed session may only be authorised for reasons of national security, protecting the privacy or security of a victim or witness, or protecting the interests of justice.

### III. Submissions

#### *A) The Prosecution Has Not Satisfied the Test for Granting Closed Session*

13. Only if and when absolutely necessary should proceedings be held in closed session. For instance, 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”.<sup>7</sup> (emphasis added)

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<sup>7</sup> *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*, ICTR-98-41-AR73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19.

14. Significantly, this Chamber has recently reaffirmed this principle, and set forth a clear three-prong test, stating:

“...[I]n granting protective measures to witnesses and victims, the Trial Chamber has a duty to balance the protection of those victims and witnesses with the rights of the Accused to a fair and public trial and that the **extraordinary measure** of closed session testimony will only be granted where it is clearly demonstrated (a) that there is a real and specific risk to the witness and/or his family, (b) that the right of the Accused to a fair and public trial is not violated, and (c) that no less restrictive measures can adequately deal with the witness’ legitimate concerns”.<sup>8</sup>

### **B) The Three Prong Test**

#### **1) The Prosecution Has Failed to Show that There Exists a Real and Specific Risk to Witness TF1-366 and/or His Family**

15. The burden of justifying the protection of witnesses lies on the party seeking such protection.<sup>9</sup> As Justice Doherty suggests, there is a need to substantiate the allegations that a witness may be in danger or at risk if his identity is disclosed.<sup>10</sup> Additionally, the subjective fear of a witness is insufficient to justify special protective measures without any objective considerations.<sup>11</sup> The Prosecution must show a real and specific risk to the witness TF1-366 and his/her family. The Defence submits, as a practical matter, that this real and specific risk must be current.
16. In this instance, the operative grant for closed session testimony for this witness is more than two and a half years old. Thus, it is a matter of common sense that the context in which the witness will testify now has undoubtedly changed over the course of time. Even assuming, *arguendo*, that the risks once faced by TF1-366 were real and specific, the

<sup>8</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-427, Decision on Confidential Prosecution Motions SCSL-03-01-T-372 and SCSL-03-01-T-385 for the Testimonies of Witnesses to be Held in Closed Session, 26 February 2008, pg. 6 (“Closed Session Decision”).

<sup>9</sup> *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Protection of Defence Witnesses, 2 February 2005, para. 13.

<sup>10</sup> *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T, Dissenting Opinion of Justice Doherty on Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 onward, 13 September 2006.

<sup>11</sup> *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.

Prosecution has not submitted any recent material to prove that there are currently any real or specific risks to the witness or his/her family.

17. Consequently, the reasons underpinning the initial grant must, at a minimum, be re-evaluated. The Defence requests that as a result of this re-evaluation, the protective measures be rescinded.
18. In fact, the reason why SCSL Trial Chambers have, contrary to the ICTR and ICTY Trial Chambers, often been persuaded that witnesses needed protection was “the unique feature of the Special Court being located in Sierra Leone, the locus of the alleged offences”.<sup>12</sup> This consideration therefore cannot hold with equal force in the instance of a trial held in The Hague. Accordingly, orders granting closed session orders to witnesses testifying in Sierra Leone should not be automatically applied to witnesses testifying in The Hague.
19. The Defence therefore submits that the Prosecution has not shown a current real and substantial risk to witness TF1-366, scheduled to testify in The Hague, and has accordingly failed to meet the first prong of the test.

## **2) Closed Session Testimony Infringes on the Accused’s Right to a Fair and Public Trial**

20. According to Rule 78, the preference at the Special Court is for public hearings and open session testimony. This preference is also 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”.<sup>13</sup>
21. One component of a fair trial is the ability to investigate allegations against the Accused in an effective manner. As stated above, Article 17(4)(e) of the Statute affords Mr. Taylor the

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<sup>12</sup> *Prosecutor v. Gbao*, SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 10 October 2003, paras. 21-25; *Prosecutor v. Norman, Kondewa, Fofana*, SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, para. 29.

<sup>13</sup> *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.

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 himself, as well as the content of the witness’ testimony. Thus, counsel are not able to comprehensively obtain information with which to cross-examine the witnesses called to testify against Mr. Taylor.<sup>14</sup>

22. When a witness is granted closed session protective measures, that means that the witness’ name and the substance of his confidentially disclosed statements and transcripts should never be in the public domain as connected to the Taylor case. That puts investigators at a serious disadvantage in terms of collecting information regarding a witness’ character and credibility, in addition to hindering attempts to verify the substantive aspects of the witness’ statements and testimony.
23. The reality is that there is only one Defence Team investigator in Sierra Leone. After having worked for the Defence Team for over a year, most ex-combatants now know that he is employed by the Office of the Principal Defender as an Investigator on the Taylor Defence Team. Therefore, if he ever asks ex-combatants questions about a particular individual or event, even if he does not explicitly say that he wants to know because the individual is a Prosecution witness, these ex-combatants are clever enough to read between the lines, thus putting the investigator at risk of violating protective measures. This chilling effect has a significant negative implication on the Defence’s ability to collect evidence for purposes of cross-examination.
24. Additionally, and contrary to what the Prosecution insinuates,<sup>15</sup> the Accused himself does not know nor have knowledge of the majority of the linkage or crime base witnesses the

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<sup>14</sup> See *Prosecutor v. Taylor*, SCSL-03-01-T-413, 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, 8 February 2008, paras. 13-17; But see *Prosecutor v. Taylor*, SCSL-03-01-T-437, Decision on Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 6385, 539, 567, 388, and 390, Partially Dissenting Opinion of Justice Doherty, 13 March 2008, paras. 3 and 8.

<sup>15</sup> *Prosecution v. Taylor*, SCSL-03-01-T-418, 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, 14 February 2008, para. 12.

Prosecution is calling against him. Thus, his ability to contribute investigative leads to the Defence team is limited.

25. Thus, because of the impact on the Accused's rights to a fair and public hearing, which include the right to conduct comprehensive investigations, the use of close of closed session should remain an "extraordinary measure",<sup>16</sup> and should only be granted if less restrictive measures are not sufficient.
26. Absent a demonstration of current risks or threats to witness TF1-366, the use of closed session does not strike the proper balance between the rights of the Accused to a fair and public trial which tends toward hearing testimony in open court.

**3) The Prosecution Have Failed to Show that No Less Restrictive Measures Could Adequately Deal with the Witnesses' Legitimate Concerns, If Any**

27. The Prosecution have not demonstrated that they have given "full and exhaustive consideration" to less restrictive witness protection measures available under Rule 75(B)(i)(c).<sup>17</sup> The Prosecution has not detailed other techniques nor specified the reasons why those techniques would not adequately ensure the safety and security of the witness.
28. The Defence believe that it is possible to alleviate whatever real or perceived safety concerns of the witness may still have by relying on the pre-existing protective measures granted for trial purposes (pseudonym and screen). If additional protective measures are needed for trial, other than closed session, the Defence invite the Prosecution to make a fresh application, or to propose an alternative arrangement in their Response to this Motion, taking into consideration the intervening two and a half years since the initial applications were granted and the current mindset and circumstances of the witnesses.

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<sup>16</sup> *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.

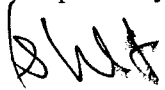
<sup>17</sup> Closed Session Decision, pg. 6.



**IV. Conclusion**

29. As the Prosecution have failed to satisfy the three-prong test set forth by this Trial Chamber regarding the use of Closed Session testimony, the Defence request the Trial Chamber to rescind the closed session protective measures previously granted to the witness.

Respectfully Submitted,



SILAS CHEKERA

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**for Courtenay Griffiths Q.C.**  
**Lead Counsel for Charles G. Taylor**  
Dated this 16<sup>th</sup> Day of May 2008  
The Hague, The Netherlands.

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*Prosecutor v. Norman, Kondewa, Fofana*, SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004

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