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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: 22 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 RESPONSE TO URGENT PROSECUTION APPLICATION FOR RECONSIDERATION OF ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215 OR IN THE ALTERNATIVE APPLICATION FOR LEAVE TO APPEAL ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215 AND ITS CORRIGENDUM

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I. Introduction

1. The Defence files this Response to the Prosecution's *Urgent Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or In the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215*, which was filed on 9 May 2008,[1] ("Application"), having taken into consideration the Prosecution *Corrigendum* to the same Application, dated 12 May 2008.[2]

2. The Prosecution filed the Application in response to an oral decision ("Oral Decision") made on 6 May 2008 wherein the Trial Chamber, having considered the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses*[3] ("RUF Decision"), the *Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for Renewed Motion for Protective Measures* dated 2 April 2004,[4] ("Renewed Motion") and oral submissions from both the Prosecution and the Defence, ruled that it finds "nothing in [the RUF Decision] which would entitle witness TF1-215 to any protective measures".[5]

3. The Prosecution requests that the Trial Chamber reconsider its Oral Decision. In the alternative, the Prosecution seeks leave to appeal the Oral Decision.

4. The Defence notes that by simultaneously seeking the two measures described above within the same Application, the Prosecution have effectively incorporated into one motion pleadings that should properly have been the subject of two separate motions.

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-501, Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or In The Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215, 8 May 2008.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-502, Prosecution Corrigendum to Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or In The Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215, 12 May 2008.
[3] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004.
[4] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-102, Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, 4 May 2004.
[5] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008, p. 9122.

However, with the aim of dealing with the issue expeditiously, the Defence will address both matters raised, as well as the Corrigendum, simultaneously.

5. The Defence does not oppose the corrections to the Application which are the subject of the Corrigendum.[6] However, the Defence opposes the Prosecution's substantive Application and submits that the Prosecution's requests for reconsideration of the Decision and leave to appeal are flawed and without merit, and as such, should not be granted.

II. Factual and Procedural History

6. In assuming that protective measures were in place for witness TF1-215 ("TF1-215"), namely a pseudonym and a screen, for use during impending testimony in the Taylor trial, the Prosecution sought to rely on a decision that they believe was reached by Trial Chamber I in the RUF Trial.

7. The RUF Decision was made pursuant to a motion that had been filed and renewed by the Prosecution,[7] which was in turn filed in response to an Order made by Trial Chamber I.[8] This Order instructed the Prosecution to "file a renewed motion for protective measures...for *each witness* who appears on the Prosecution Witness List..." (emphasis added).[9]

8. At paragraph 3 of the Renewed Motion, the Prosecution stated: "[T]he Prosecution has divided the 266 witnesses into 2 groups: (I) witnesses of fact and (II) experts/those who have waived their right to protection. Within group I, the witnesses are further divided into 3 categories, namely: (A) victims of sexual assault and gender crimes; (B) child witnesses and (C) insider witnesses."

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[6] Corrigendum, paras. 4.
[7] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-PT-102, Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, 4 May 2004.
[8] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-PT-72, Order to the Prosecution for Renewed Motion for Protective Measures, 2 April 2004 ("Order").
[9] Order, pg. 4.

9. The Prosecution then continued at paragraph 4: "Annexed to this motion and marked Annex A are the pseudonyms of Group I witnesses divided in the 3 categories mentioned above", and further at paragraph 5: "The Prosecution wishes to emphasize that the categorization of witnesses is based on the witness list filed on 26 April 2004." TF1-215 does not appear in Annex A, and the witness list as filed on 26 April 2004 was not attached to the Renewed Motion.

10. The Defence in that case filed a response[10] to the Renewed Motion ("The Defence Response"), expressly stating at paragraph 4 that:

> The Renewed Motion, has under Annex A, the pseudonyms of Group I Witnesses divided into the three categories mentioned and in Annex B, the list of Group II Witnesses, both summing up to 94 Witnesses. The Defence finds the difference between the statements of the Prosecution that 266 Witnesses will testify and the sum total of 94 Witnesses in both Annex A and B attached to the Motion confusing. **Accordingly, the Defence does not actually know which number of Witneses** [sic] **the Protective Measures is intended to cover.**[11]

11. Trial Chamber I made a passing reference to this ambiguity in a footnote to its decision, wherein it stated:

> Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, this is obviously not the case, as the number of A, B & C witnesses amounts to 87.[12]

12. Trial Chamber I then went on to consider and grant the sought protective measures to the witnesses in Groups I and II.

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[10] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-PT, Kallon – Defence Response to Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004, 14 May 2004 ("Defence Response").
[11] Defence Response, para. 4 (emphasis added).
[12] Order, footnote 6.

13. The Prosecution now maintains that in the RUF Decision, Trial Chamber I intended to include TF1-215 in Group I; the Defence submits that it is reasonable for Trial Chamber II to have determined that there is nothing in the RUF Decision to clearly indicate that TF1-215 was included in Group I and subsequently that TF1-215 was not entitled to protective measures. Thus, Trial Chamber II properly exercised its discretion in determining, on the basis of an ambiguously drafted paragraph in the Renewed Motion and a vague RUF Decision relying heavily on inference, that TF1-215 was not ever entitled to protective measures in a prior proceeding and thus should not be automatically entitled to them when testifying in the Taylor trial.

II. Applicable Legal Principles

Reconsideration of Decisions is Left to the Trial Chamber's Discretion

14. In its Application, the Prosecution cites ample jurisprudence to support its submission that the Trial Chamber has an inherent power to reconsider its own decisions. While it is not disputed that the Trial Chamber does indeed possess this inherent power, the Defence emphasises the fact that it is a *discretionary* one.[13] As duly acknowledged by the Prosecution itself at paragraph 10 of its Application, "Whether or not a Chamber does reconsider its decision is itself a discretionary decision".[14]

15. It has been held that "a party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a 'discernible error' resulting in prejudice to that party".[15]

16. As a general principal of law, trial chambers have wide discretion in making various decisions that impact the day-to-day proceedings of a case. For instance, it has been held in an Appeals Judgment of the ICTY that: "Deference is afforded to the Trial Chamber's discretion in these decisions because they 'draw on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case,

[13] *Prosecutor v. Milosevic,* IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para 3.
[14] *Prosecutor v. Delic et al,* IT-96-21-A*bis,* Judgment on Sentence Appeal, 8 April 2003, para 48.
[15] *Prosecutor v. Šešelj,* IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006.

and requireSC [sic] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings'".[16]

17. Thus, this Trial Chamber should only exercise its discretion to reconsider its Oral Decision if it finds that it has committed a discernable error resulting in prejudice to the Prosecution.

Leave to Appeal Requires Exceptional Circumstances and Irreparable Prejudice

18. The Defence reiterates that the test for leave to appeal is a two-pronged conjunctive test and accordingly, the party seeking this form of relief must satisfy *both* limbs; that is to say, it must be shown firstly that there are "exceptional circumstances" which would form the basis of an appeal, and secondly that an appeal is necessary in order to avoid "irreparable prejudice" to the party.[17]

IV. Submissions

Reconsideration: The Prosecution Have Failed to Show a "Clear Error of Reasoning" or an "Irreparable Prejudice"

19. The Defence submits that the Prosecution have not successfully demonstrated that the Trial Chamber's decision was based on a clear error of reasoning or a discernible error which resulted in prejudice to the Prosecution.

20. Trial Chamber I's Order, dated 2 April 2004, instructed the Prosecution to "file a renewed motion for protective measures....for *each* witness who appears on the Prosecution Witness List, which will be filed on 26 April 2004...".[18] It is absolutely clear from this part of the Order that Trial Chamber I anticipated the Witness List of 26 April 2004 being drawn up, and that it expressly wanted the Prosecution to specify *from that*

[16] *Prosecutor v. Pandurevic & Trbic,* Case No. IT-05-86-AR73.1, 'Decision on Vinko Pandurevic's Interlocutory Appeal +Against the Trial Chamber's Decision on Joinder of Accused', 24 January 2006, para. 4, citing *Prosecutor v. Milosevic,* Case No. IT-02-54-AR73.7, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004

[17] Application, paras. 12 and 13.

[18] Order.

list, which of the witnesses contained therein (whether that be all or just some of that number) they sought protective measures for, and the reasons why.

21. Therefore, it is not enough for the Prosecution to simply state that the Renewed Motion was "based" on the Witness List, and that this somehow implies that all 259 witnesses were thereby included within the scope of Group I.[19] The Prosecution states at paragraph 18 of its Application that, "Although the Prosecution did not attach the 26 April list to the Renewed Motion, the RUF Decision notes that the Prosecution divided its witnesses into 2 groups *based* on that witness list"(emphasis added). The Prosecution is referring to paragraph 5 of the Renewed Motion in which it states that, "the categorization of witnesses is *based* on the witness list filed on 26 April 2004".

22. However, the Defence contends that the language of these statements is not sufficiently precise to give rise to a definitive conclusion that TF1-215 was included within the Group I witnesses to whom protective measures were afforded in the RUF Decision. To say that List X is based on List Y does not necessarily, nor literally, mean that every component of List X is again included in List Y, but simply that List Y has been drawn from List X. That is to say, just because paragraph 5 of the Renewed Motion states that "the categorization of witnesses is *based* on the witness list filed on 26 April 2004" does not mean, and cannot be interpreted as meaning from pure inference, that Groups I and II as defined in the Renewed Motion automatically and clearly include all of the witnesses in the original Witness List. Counsel for the Prosecution admitted as much during court proceedings on 6 May 2008.[20]

23. While it may have been the Prosecution's intention to have all 259 witnesses included in Group I, with a residual category of witnesses that belonged neither in categories A, B, or C, this was not made sufficiently clear nor explicit by the wording of the Renewed Motion. If the Prosecution wished to make it clear that there was a residual category of witnesses in Group I in respect of which it sought protective measures, then it ought to

[19] Application, para. 18.
[20] *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 6 May 2008, p. 9118.

have made this clear with words such as, "[t]he balance of the witnesses is in the original witness list".[21]

24. Although Trial Chamber I did indeed acknowledge the Prosecution's unclear drafting in footnote 6 of its Order, wherein it stated that:

> "Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, this is obviously not the case, as the number of A, B & C witnesses amounts to 87...".

the Chamber did not then go on to clarify what *was* the case in its opinion or upon its understanding. Moreover, in the above excerpt, the Chamber then went on to acknowledge the Defence's confusion. Given that the Defence, in its Response to the Renewed Motion, had highlighted the fact that it was not clear as to exactly which of the witnesses on the Witness List were intended to be the subject of protective measures, it was incumbent upon either the Prosecution in its Reply or Trial Chamber I in its Decision, to have expressly clarified its intention.

25. However, the Prosecution failed to clarify their intention and now seeks to rely upon an ambiguous inference. Thus it can not be said that this Trial Chamber has made a clear error of reasoning by coming to a different interpretation of the Renewed Motion and RUF Decision.

26. The principle of *in dubio pro reo* in international law states that where ambiguity exists, the matter in question must be interpreted, resolved and applied in favour of the accused.[22] The Defence submits therefore that given the unclear wording of both the Renewed Motion and the RUF Decision, the latter must be interpreted in favour of the Accused and accordingly, the Trial Chamber II committed no clear error in reasoning when determining that TF1-215 was not included as a protected witness in Group I.

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[21] As per the suggestion of the Trial Chamber made during oral deliberations, *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 6 May 2008.

[22] *Prosecutor v. Kordic & Cerkez*, IT-65-14/2-A, Judgement, 17 December 2004, para. 691; *Prosecutor v. Blagojevic & Jokic*, IT-02-60-T, Judgement, 17 January 2005, para. 18; Prosecutor v. Halilovic, IT-01-48-T, Judgement, 16 November 2005, para. 12.

27. The Prosecution submits that the Trial Chamber failed to take into account the fact that TF1-215 actually testified with protective measures in the RUF case and that as such, the Trial Chamber has failed to take notice of Rule 75(F), which provides that any protective measures ordered in respect of a witness in proceedings before this Court shall continue to have effect *mutatis mutandis* in any other proceedings before the Court.[23] However, the Defence submits that if TF1-215 was never determined to be entitled to protective measures, Trial Chamber II should not repeat a mistake made by Trial Chamber I in allowing TF1-215 to testify with protective measures.

28. Even assuming, *arguendo*, that Trial Chamber I intended to properly grant TF1-215 protective measures, the Defence submits that it is within Trial Chamber's II discretion under Rule 75(F)(i) to have, in effect, orally rescinded those measures for purposes of the Taylor trial. This can not be considered a clear error of reasoning.

29. The Prosecution also attempts to argue that it has been prejudiced by the Trial Chamber's Oral Decision, since TF1-215 is unwilling to testify absent protective measures.[24] However, there is nothing to prevent the Prosecution from reapplying for protective measures on behalf of TF1-215. Based on the numbers in the Prosecution's Amended Witness List,[25] there are approximately 40 more witnesses scheduled to testify before the close of the Prosecution case, leaving ample time to recall this witness.

30. Even if TF1-215 is unable to testify, the Prosecution is still not prejudiced. TF1-215 was expected to provide evidence in relation to some or all of the following: atrocities that were committed against civilians by RUF rebels in the Koinadugu District, 'Operation Pay Yourself', the post-Junta period, the fact that certain villages that were attacked by the RUF during the post-Junta period, and the time period of around May 1998, in which

[23] Order, para. 26.
[24] Application, para. 27, Confidential Annex B.
[25] *Prosecutor v. Taylor,* SCSL-03-01-T, Prosecution Amended Witness List, SCSL-03-01-T, 7 February 2008.

civilians were killed by the RUF.[26] The Defence submits that there are other witnesses who are able to testify to similar events and allegations.

Leave to Appeal: The Prosecution Have Failed to Show Exceptional Circumstances or Avoidable Irreparable Prejudice

31. The Defence submissions in paragraphs 29 and 30 above have shown that no irreparable prejudice exists in relation to the Trial Chamber's Oral Decision, as there is not necessarily any deprivation of evidence.[27]

32. Additionally, and contrary to the Prosecution submission, it is not an issue of fundamental legal importance for two different Trial Chambers to interpret an ambiguous decision in two different ways.[28]

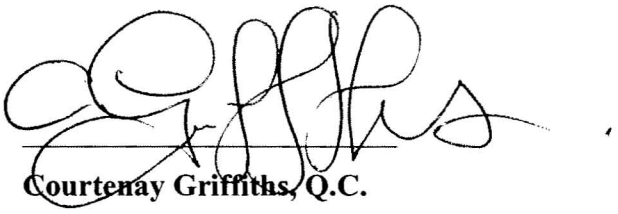
33. As the Prosecution have not met either portion of the conjunctive test required for granting leave to appeal, the Trial Chamber should deny this component of the Prosecution Application.

V. Conclusion

34. On the basis of all of the foregoing, the Defence respectfully requests that the Prosecution's Applications for Reconsideration and, alternatively, Leave to Appeal be denied in their entirety.

[26] *Prosecutor v. Taylor*, SCSL-03-01-T-218, Pre-Trial Conference Materials Pre-Trial Brief, 4 April 2007.
[27] See Application, para. 32.
[28] Consider, for example, how different districts and even Appeals Courts in the US can come to different interpretations of a single US Supreme Court Decision.

Respectfully Submitted,



Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 22nd Day of May 2008

The Hague, The Netherlands.

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