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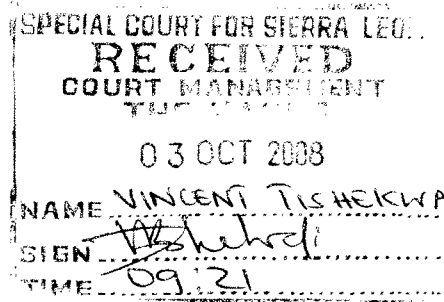
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**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone**

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: 3 October 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION RESPONSE TO “CONFIDENTIAL DEFENCE APPLICATION FOR LEAVE TO APPEAL AN ORAL AND MAJORITY DECISION OF THE TRIAL CHAMBER RESCINDING PROTECTIVE MEASURES PURPORTEDLY GRANTED TO WITNESS TF1-065” & RELATED ADDENDUM

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for the Accused:

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

I. INTRODUCTION

1. The Prosecution files this Response to the “*Confidential Defence Application for Leave to Appeal an Oral and Majority Decision of the Trial Chamber Rescinding Protective Measures Purportedly Granted to Witness TF1-065*”¹ as supplemented by the related addendum.²
2. In relation to the issues raised in the Application, the Prosecution responds as follows.

II. ARGUMENTS

3. The Application does not concern a justiciable issue which may properly be the subject of an appeal. What the Application requests, in effect, is an advisory opinion. The Impugned Decision³ concerns a request for the rescission of protective measures made by the Prosecution. This request was not opposed by the Defence save to argue that the witness had never been the subject of protective measures. The result was that witness TF1-065 testified without protective measures. On this basis and as further argued below, the Defence has suffered no prejudice as a result of the Impugned Decision. Further, the Impugned Decision does not give rise to exceptional circumstances. As the Defence, fail to satisfy both limbs of the test set out in Rule 73(B), the Application should be dismissed.

Failure to establish Exceptional Circumstances

4. The single argument made by the Defence that the Impugned Decision gives rise to exceptional circumstances should be dismissed as it fails to satisfy the high threshold established by the jurisprudence of this Court.⁴ In relation to the possibility of recurrence, the recurrence cited by the Defence concerning TF1-459, also concerned an application for rescission.⁵ Therefore, the effect of the recurrence of the issue has, as noted below, not resulted in any prejudice being suffered by the Defence. Indeed, it has resulted in

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-609, “Confidential Defence Application for Leave to Appeal an Oral and Majority Decision of the Trial Chamber Rescinding Protective Measures Purportedly Granted to Witness TF1-065”, 26 September 2008 (“**Application**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-612, “Confidential Addendum to Defence Application for Leave to Appeal an Oral and Majority Decision of the Trial Chamber Rescinding Protective Measures Purportedly Granted to Witness TF1-065”, 30 September 2008.

³ See definition in Application, para. 2.

⁴ Application, para. 13.

⁵ Application, para. 13.

witnesses testifying without protective measures.

5. The submissions made by the Defence in paragraphs 14 to 17 of the Application under the heading “Exceptional Circumstances” all relate to the merits of the Impugned Decision. As noted by the Defence in previous filings,⁶ this Court has condemned the practice of re-litigating the decision at issue. These submissions assist the Court in clearly identifying the alleged error but are of no assistance in determining whether the Impugned Decision gives rise to exceptional circumstances, as required by the first limb of the test specified in Rule 73(B).
6. As regards the concern held by the Defence that the Impugned Decision “has opened the floodgates for all future witnesses wishing to testify with protective measures”,⁷ this should also be dismissed as unfounded and irrelevant to the matter at issue – whether the purported error gives rise to exceptional circumstances. First, the concern is unfounded as the Impugned Decision concerns the *rescission* rather than the *imposition* of protective measures. Further, pursuant to Rule 75(F), the Defence have been notified of the various existing protective measures applicable to all witnesses on the Prosecution witness list and the decisions from which these measures stem, including the 2003 protective measures decisions.⁸ Therefore, the existence of such measures is not a new matter nor does their existence stem from the Impugned Decision. Rather, the Impugned Decision simply recognises existing protective measures orders. Also, persons do not just come off the street into the courtroom and become a witness. The Prosecution has identified its witnesses in this case; any new witnesses would require the approval of the Trial Chamber upon a showing of good cause. On these bases, there is no valid floodgates argument. As the concern is unfounded it cannot give rise to exceptional circumstances.

Failure to establish Irreparable Prejudice

7. The arguments made by the Defence in support of their claim that the Impugned Decision

⁶ See *Prosecutor v. Taylor*, SCSL-03-01-T-548, “Confidential Defence Response to ‘Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168’”, 30 June 2008, para. 12, referring to *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005, para. 15.

⁷ Application, para. 17.

⁸ Application, para. 19.

- will give rise to irreparable prejudice do not withstand scrutiny.⁹
8. First, it is the Impugned Decision which must cause irreparable prejudice for the purposes of Rule 73(B). However, the submissions made by the Defence concern the scope of the 2003 protective measures decisions.¹⁰ The Impugned Decision itself *rescinded* protective measures.
 9. Second, the Defence claim that they are “potentially restricted from contacting anyone living in Sierra Leone or West Africa” and so are “impeded in conducting any investigation in Sierra Leone and in interviewing potential witnesses for their case”.¹¹ This claim is notable in its failure to provide any specific incidence of the Defence being unable to contact a person because of a concern that the person might be a Prosecution witness. This is the case assuming even a very broad interpretation of the Decision. Notwithstanding the foregoing, irreparable prejudice is also avoided by the following measures and practices. Where the Defence do wish to contact a person they believe might be a witness, the original 2003 *Sesay* Decision provides a means to do this. Following a request by the Defence, the decision provides that contact may be made by the Prosecution pursuant to an order of a Trial Chamber or Judge. The Prosecution then establishes whether or not the person agrees to such contact.¹² However, the Defence has not shown that they have been prejudiced by such procedure. The Defence could also avoid any issue by asking a simple question of the person, i.e., have you been contacted by anyone from the Special Court? If the answer is yes, the Defence could then follow the procedure outlined above. But this is all theoretical; the Defence has shown no instance in which they have been prejudiced.
 10. In addition, the Defence assertions fail to appreciate the limiting language of the 2003 decision. That decision refers to “witnesses”, and notes that the orders contained therein will take effect once the particulars and locations of the witnesses are given to the Court’s Witnesses and Victims Section.¹³ Until such time, the orders contained in the decision are

⁹ Application, paras. 18 to 22.

¹⁰ *Prosecutor v Sesay*, SCSL-2003-05-PT-038, “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 23 May 2003 (“**Sesay Decision**”); *Prosecutor v Kallon*, SCSL-2003-07-PT-033, “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 23 May 2003 (“**Kallon Decision**”); *Prosecutor v Gbao*, SCSL-2003-09-PT-048, “Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 10 October 2003.

¹¹ Application, para. 19.

¹² *Sesay* Decision, Annex, page 3, para. (k).

¹³ *Sesay* Decision, Annex, page 2, para. (d).

not in effect.

11. In relation to other trials before the Special Court, , the Prosecution notes that there may be some witnesses covered by the 2003 decisions who are not also witnesses in this trial. Thus, the Defence may not be aware of their status as such. However, such a situation does not arise because of the Impugned Decision but rather because witnesses in other trials do not lose their protected status by virtue of Rule 75(F)(i). As discussed in paragraph 9 above, any potential prejudice faced by the Defence in this situation is not irreparable. And, as also noted above, this is all hypothetical as the Defence has made no showing of prejudice.
12. In considering the claims made by the Defence, it is important to bear in mind that protected witnesses are restricted to a small group of people, most of whom in this case are known to the Defence. In these proceedings, the Prosecution has provided the Defence with its witness list and any additions thereto at this time must be made in compliance with Rules 66(A)(ii) and 73bis(E). In addition, the Prosecution has made unredacted disclosure of the great majority of its witnesses. In all the other cases before the Special Court, Prosecution witnesses have been identified at least by TF number; all those trials are now complete. Therefore, the protective measures decisions at issue cannot apply to “anyone living in West Africa or Sierra Leone” or “the whole world” as the Defence try to argue. Further, there is a procedure in place for making contact with individuals the Defence believe may be a protected witness.
13. On the basis of the foregoing, it is clear that the Impugned Decision does not result in irreparable prejudice being suffered by the Defence and that the Defence’s concerns are unfounded and speculative.

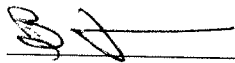
III. CONCLUSION

14. As the Defence has failed to satisfy the threshold required by Rule 73(B) in order for leave to appeal to be granted, the Prosecution respectfully requests that the Trial Chamber dismiss the Application.

Filed in The Hague,

3 October 2008

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

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

Prosecutor v. Taylor, SCSL-03-01-T-548, “Confidential Defence Response to ‘Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168’”, 30 June 2008

Prosecutor v. Taylor, SCSL-03-01-T-609, “Confidential Defence Application for Leave to Appeal an Oral and Majority Decision of the Trial Chamber Rescinding Protective Measures Purportedly Granted to Witness TF1-065”, 26 September 2008

Prosecutor v. Taylor, SCSL-03-01-T-612, “Confidential Addendum to Defence Application for Leave to Appeal an Oral and Majority Decision of the Trial Chamber Rescinding Protective Measures Purportedly Granted to Witness TF1-065”, 30 September 2008

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T

Pre-joinder

Prosecutor v Sesay, SCSL-2003-05-PT-038, “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 23 May 2003

Prosecutor v Kallon, SCSL-2003-07-PT-033, “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 23 May 2003

Prosecutor v Gbao, SCSL-2003-09-PT-048, “Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 10 October 2003

Post-joinder

Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005