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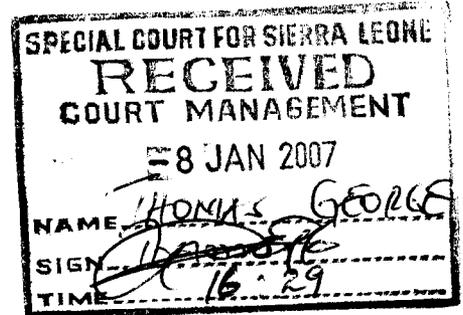
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SPECIAL COURT FOR SIERRA LEONE

IN TRIAL CHAMBER II

Case No: SCSL-03-01-PT
Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde
Registrar: Mr. Lovemore G. Munlo, SC
Date filed: 08 January 2007



THE PROSECUTOR
-v-
CHARLES TAYLOR

DEFENCE RESPONSE TO "CONFIDENTIAL PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND FOR NON-PUBLIC DISCLOSURE WITH FOUR ANNEXES, ONE OF WHICH FILED EX PARTE"

Office of the Prosecutor

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I INTRODUCTION

1. This is the Defence Response to the *Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which filed Ex Parte*, filed on 8 December 2006 (“Prosecution Motion”). The Defence oppose the Prosecution request to extend the protective measures ordered by the Trial Chamber in its *Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures and on Confidential Prosecution Motion for Leave to Substitute*, dated 5 May 2006 (“Protective Measures Decision”) to 14 additional witnesses listed under pseudonyms in Annex A(3) of the Prosecution Motion. The Defence would not object, however, if the Trial Chamber’s protective measures order, set out in its Decision, be extended, but vary to the extent necessary in respect of the 14 additional witnesses listed under pseudonyms, so as to ensure disclosure of those witnesses’ identities and identifying information to the Defence only.
2. For the reasons advanced in Sections IV, V, VI and VII below, the Defence submit that (i) the requested extension of protective measures does not meet the threshold of “exceptional circumstances” necessary to withhold the identity of victims and witnesses; (ii) Confidential Annex C has been filed *ex parte* without good cause and (iii) the designation of the Motion as Confidential is unjustified as there is no need to withhold the information therein from the public.

II PROCEDURAL HISTORY

3. The instant Motion is the fourth Confidential Prosecution Protective Measures Motion applying for the non-disclosure of the identities of witnesses who, according to the Prosecution, face potential threats to their safety. The previous Motions filed on 04 April 2006,¹ 25 April 2006² and 04 September 2006,³ were all granted by the Trial Chamber.
4. With regard to the grant of protective measures the Defence set out their position in their *Confidential Defence Response to “Urgent Prosecution Motion for Immediate Protective*

¹ *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-86, Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 04 April 2006.

² *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-93, Confidential Prosecution Motion for Leave to Substitute a Corrected and Supplemented Witness List as Annex A of the Confidential Motion of 4 April 2006, 25 April 2006.

³ *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-119, Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, 04 September 2006.

Measures for Witnesses and for Non-Public Disclosure” of 15 September 2006. The Defence did not oppose the protective measures sought “providing that such measures can be reviewed by the parties and, if necessary, the Trial Chamber, as the Defence’s preparations for trial advance, in order to vary such measures as are necessary for the fair and effective preparation of the defence of Mr. Taylor in accordance with Article 17 of the Statute of the Special Court” (para. 3). The Defence further clarified that “Be that as it may, the Defence gives notice of its intention to file such motions as are necessary to enable it to effectively prepare for trial, at a later stage. The identity of witnesses who constitute crime base evidence that may not be in dispute may not be required. In relation to these, there may be no need for any, or any extensive litigation between the parties. The identity of certain insider or “nexus” witnesses almost certainly will be required, however” (para. 6).

5. The Defence also gave notice that “absent specific evidence of the risk that particular witnesses will be interfered with by this Accused, the extraordinary measures provided for by Rule 69 cannot be justified....it will be argued, in due course, that the burden on the Prosecution to be put to proof on a witness by witness basis where identity is sought to be withheld is an essential requirement of a fair trial” (para. 7).

III LEGAL FRAMEWORK

6. According to Article 17(2) of the SCSL Statute, “[t]he accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses” [emphasis added].
7. This statutory right of the Accused is key to all the rules and principles of evidence and procedure including the disclosure procedure. The leading principle of disclosure, as set out in Rule 66 of the SCSL RPE, is that the Prosecutor shall, “[w]ithin 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial”. Only in exceptional circumstances may the Prosecutor provide these statements in redacted format, obliterating any information that could reveal the identity of victims and witnesses who may be in danger or at risk, until the Judge or Chamber decides otherwise (Rule 69(A); 53(A)).
8. Rule 75 permits a Judge or a Chamber to “order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused” (emphasis added).

9. Rule 26*bis* further imposes an obligation on the Trial Chamber and Appeals Chamber to ensure that “a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses” (emphasis added).⁴
10. The Defence submits that when considering whether to grant protective measures for victims and witnesses at the pre-trial stage, the Trial Chamber must balance the need to fully respect the rights of the Accused and to guarantee the safety of victims and witnesses “within the legal framework of the Statute and Rules within the context of a fair trial”.⁵ The outcome of this balancing exercise is to be determined on a case-by-case basis consistent with internationally recognised standards of due process.⁶

IV EXCEPTIONAL CIRCUMSTANCES

11. With regard to the instant motion the Defence take issue with the proposed extension of protective measures as the Prosecution have not met the threshold of “exceptional circumstances” necessary to withhold the identity of victims and witnesses. To date the Prosecution have invoked exceptional circumstances pursuant to Rule 69(A) in respect of 59 witnesses. However on 22 September 2006 the Prosecution served the Defence for the first time with a Provisional Witness List which stated that they intended to rely on between a minimum of 268 and a maximum of 273 witnesses at trial, comprising 133 core witnesses,

⁴ This principle has also been acknowledged by various Trial Chambers. See, for example, *Prosecutor v. Norman et al*, Case No. SCSL-04-14-T-126, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, para. 27; *Prosecutor v. Gbao*, Case No. SCSL-2003-09-PT-48, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, para. 47.

⁵ *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-68, Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006, para. 17; *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001, paras. 68-69.

⁶ *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT-38, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 9. Judge Dolenc’s reasoning in his Separate and Dissenting Opinion in the ICTR case of *Bagosora et al* is important here: “The minimal guarantees under Article 21(4) are “non-negotiable and cannot be balanced against other interests. The use of the word “minimum” demonstrates that these enumerated rights are an essential component of every trial.” See *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Separate and Dissenting Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 07 December, 2001, paras. 11 and 14; also see *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protected Measures, 3 July, 2000, para. 31, where the Trial Chamber acknowledged that “the need to carry any balancing exercise which limits the rights of the accused necessarily results in a less than perfect trial”.

- 121 back up witnesses and between 14 to 19 expert witnesses⁷. Until now, the Prosecution have only identified six of these witnesses – the remainder have all presumably asked to remain anonymous.⁸ The Defence therefore anticipate that the Prosecution will in due course file many additional requests for protective measures.
12. The Defence therefore submits that, to date, the Prosecution have adopted the procedure of non-disclosure of witness identities and identifying information to the public and the Defence as a general rule. In respect of non-disclosure to the Defence, the Defence object in principle to the excessive and improper use of this procedure as it contravenes the plain and clear language of Rule 69(A) and completely reverses the aim of Rule 69(A) to serve as an exceptional procedure. The request for the non-disclosure to the Defence of 14 additional new witnesses is pervasive and cannot reasonably be said to be necessary and proportionate to the aim of witness protection.⁹
13. To qualify as “exceptional” under Rule 69(A) the circumstances of each of the witnesses in respect of whom protective measures are being sought must be such as to trigger genuine grounds to fear for their safety or the safety of their families. Subjective fears of the witness in question are not sufficient to justify the application of Rule 69; there needs to be an objective foundation for those fears to justify interference with the right of the Accused to know the identity of his accusers.¹⁰ The onus of establishing exceptional circumstances lies upon the party seeking the protective measures.¹¹
14. At the ICTY, where a very similar provision to SCSL Rule 69(A) was adopted in a period when the former Yugoslavia was still heavily burdened by ethnic and political enmities a Trial Chamber held that “the use by those judges of the adjective ‘exceptional’ in Rule 69(A) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule—or the prevailing (or

⁷ The witnesses who feature in the instant Motion do not feature on this list.

⁸ Protective measures have also been ordered in respect of an unknown number of witnesses or victims in earlier proceedings before this court and those orders apply *mutatis mutandis* to these proceedings. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-99, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures and on Confidential Prosecution Motion for Leave to Substitute, 5 May 2006.

⁹ In *Prosecutor v. Gbao*, Case No. SCSL-2003-09-PT-48, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, para. 47, it was held that protective measures should be necessary and proportionate to their aim.

¹⁰ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T-488, Decision on the Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006. See also, *inter alia*, the ICTR case of: *Prosecutor v Mpambara*, No. ICTR-2001-65-I, Decision on Protection of Defence Witnesses, 4 May 2005, para. 2.

¹¹ *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July, 2000, paras. 13, 16–18, and 22–28; *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.

normal) circumstances—in the former Yugoslavia”.¹² The same argument can be made in relation to Sierra Leone.¹³ The situation in Sierra Leone was volatile when the SCSL was established and the Rules of Procedure and Evidence adopted. Nevertheless, the word “exceptional” in Rule 69(A) was adopted and has not been deleted since. Thus, the parties at the SCSL, when applying for the identities of witnesses to be withheld pursuant to Rule 69(A), need to demonstrate that the circumstances of the witnesses go beyond the ordinary volatile circumstances existing in Sierra Leone and the surrounding environs.

15. Protective measures are granted on a case-by-case basis, and the Prosecution should make out a reasonable case for each witness whose protection they seek¹⁴ although the SCSL Judges have accepted that it is “perhaps, unrealistic to expect, at the pre-trial phase, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation”.¹⁵ The Defence submit however that this does not provide a basis for blanket protective measures.
16. In *Brima et al*, the SCSL Trial Chamber relied on the ICTR case of *Muvunyi* in finding that an evaluation of the fear for the safety of witnesses must be made “in light of the general security situation.”¹⁶ In both these cases, evidence was presented of the security situation, the background of the proposed witnesses and how the safety situation impacted on the potential witnesses, before the Trial Chamber made its final determination on the need for protective measures. The Defence therefore submits, in line with Judge Doherty’s interpretation of the

¹² *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protected Measures, 3 July, 2000, para. 11.

¹³ The Defence is cognisant of the limitations of comparisons with the practice at other Tribunals, given “the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court” (*Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT-38, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 11). However, the same Trial Chamber acknowledged that “sound and logically correct principles of law enunciated by ICTR and ICTY [may], with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain logical consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of international criminal tribunals” (*Ibid*).

¹⁴ *Prosecutor v. Brima* Case No. SCSL-2003-06-PT-36, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras. 9, 14; *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT-38, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras. 9, 14; *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT-33, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras. 10, 15; *Prosecutor v. Brima Bazy Kamara*, Case No. SCSL-2003-10-PT-40, Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003, paras. 10, 18.

¹⁵ *Ibid*.

¹⁶ *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on the Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses, 20 October 2005, para. 10. This was relied on in *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T-488, Decision on the Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006.

cited jurisprudence, that evidence needs to be presented to substantiate the submission that proposed witnesses may be in danger or at risk if their identity is disclosed.¹⁷

V BASIS FOR ALLEGED FEAR IN PRESENT PROCEEDINGS

17. The principles adumbrated above have been violated in the Prosecution Motion. The Prosecution primarily rely on general statements of Prosecution Investigators to demonstrate the alleged need for witness protection without reference to the fears, subjective or objective, of any individual witnesses. These statements make unsubstantiated claims of witness interference by Mr. Taylor's supporters, whoever they may be, or even Mr. Taylor himself. It is submitted that these allegations, which are also highly prejudicial and strongly contested by the Defence, are not supported by any evidence and cannot serve as an objective basis to demonstrate fear on the part of any of the witnesses.¹⁸
18. The Prosecution go on to contend that prosecution witnesses, who presumably reside in Liberia, require protection because Mr. Taylor still "enjoys a degree of active support in Liberia".¹⁹ The Prosecution cite a short newspaper article in a Liberian newspaper reporting on Mr. Taylor's trial as evidence in support of this assertion. The Prosecution fail to demonstrate how Mr. Taylor's popularity has any bearing on the safety of any of the 14 proposed witnesses.
19. Liberia is not Sierra Leone. The reason why SCSL Trial Chambers have, compared with the Trial Chambers at the sister Tribunals, 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".²⁰ The Prosecution cannot simply cut and paste arguments

¹⁷ *Prosecutor v. Brima et al*, Case No. SCSL-04-16-T-551, Dissenting Opinion of Justice Doherty on Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 onwards, 13 September 2006.

¹⁸ The Prosecution rely on their present, as well as their previous Motions, including the annexed Investigators Statements thereto. The statements express witnesses' fears of revenge by Mr. Taylor's supporters, including his son, who is not in a position to harm anyone, given that he is in prison in the United States. There is also speculation about Mr. Taylor's influence with "significant financial and personnel resources at his disposal" (*Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-86, Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 04 April 2006, para. 15), although the SCSL accepted his indigent status. As well, there are unjustified and challenged allegations of Mr. Taylor's involvement in the assassination of Sam Bockarie. The Defence further note that a source of information used by the Prosecution in their Protective Measures Motion of 04 April 2006 (footnote 21) to back up their position that Mr. Taylor's supporters constitute a threat to any potential witness against Mr. Taylor, is Hassan Bility, whose credibility and objectivity is seriously in question, given that he is a witness against Mr. Taylor himself.

¹⁹ *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-138, Confidential Prosecution Motion for Immediate Protective measures for Witnesses and for Non-Public Disclosure with Four Annexes, One of Which Filed *Ex-Parte*, 8 December 2006, para. 13.

²⁰ *Prosecutor v. Gbao*, Case No. SCSL-2003-09-PT-48, Decision on the Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 10 October 2003, paras. 21-25;

pleading for protection of witnesses in Sierra Leone to Liberian witnesses. At the very minimum, the Prosecution need to demonstrate that the security situation in Liberia is volatile and how that impacts on the proposed witnesses. A newspaper article does not suffice.

20. Furthermore, having been transferred to The Hague, purportedly for security reasons, Mr. Taylor's contact with the outside world is limited and all non-privileged phone calls are monitored. All non-legally related visits are also subject to severe restrictions. All correspondence is vetted. Mr. Taylor's isolation is such that the Prosecution themselves concede that the allegedly precarious security situation in Liberia "may not be the result of direct acts or instructions of the Accused"²¹. In this context, the Prosecution fail to demonstrate any real likelihood that the disclosure of the identities of the 14 proposed witnesses to the Accused, whose time in detention has been devoid of any disciplinary breaches or official complaints about his conduct, and who is incarcerated under a rigorous security regime, would nonetheless jeopardise the safety of any Prosecution witnesses.
21. The Prosecution also fail to demonstrate how the disclosure of the identities of the 14 proposed witnesses, not to the public but only to Mr. Taylor and his Defence Team, despite the obligations imposed upon the Defence in relation to disclosure by them to the public, may threaten the security of the witnesses.

VI EX PARTE ANNEX C

22. Despite the fact that in their previous Motions the Prosecution did not file any of the Confidential Annexes *ex parte*, Annex C (which contains an investigator's statement) to the present motion has been filed *ex parte*.
23. *Ex parte* proceedings violate due process principles and should be used only as a last resort. In *Simic et al*, the Trial Chamber stated as follows:

The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to everyone concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact [of] the application itself, would be likely to

Prosecutor v. Norman et al, Case No. SCSL-2004-14-T-126, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, para. 29.

²¹ *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-138, Confidential Prosecution Motion for Immediate Protective measures for Witnesses and for Non-Public Disclosure with Four Annexes, One of Which Filed *Ex-Parte*, 8 December 2006, para. 13.

prejudice unfairly either the party making the application or some person or persons involved in or related to that application.²²

24. In the instant case the Prosecution have failed to provide any reasons why Annex C should be filed *ex parte*. In the absence of any evidence to the contrary or allegations of bad faith, the Prosecution must assume that the Defence will abide by their obligation not to disclose any information that may identify protected witnesses.²³ In any event the Defence submit there is no reason to proceed *ex parte* as the names of witnesses and other information that may identify them can be redacted.

VII CONFIDENTIAL FILINGS

25. All the Prosecution Motions dealing with protective measures to date have been filed confidentially. The Defence do not accept that there are any grounds to withhold the contents of any of Prosecution Motions from the public as none of the Protective Measures Motions have included any information that could lead to the identification of witnesses. This is in clear violation of Article 17(2) as disclosure of any witness's identity can easily be avoided by enclosing confidential annexes without undermining the public nature of the proceedings.
26. So far, out of an abundance of caution, the Defence have filed their Responses confidentially. However, as of now, in accordance with Article 17(2), the Defence give notice that they will file public motions in response to any prosecution requests for protective measures in order to ensure the public nature of the trial while taking the utmost care not to disclose any information that could reveal the identity of any witnesses.

²² *Prosecutor v. Simic et al*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 41; *Prosecutor v. Brdjanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 11; *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000, para. 7; *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-A, Order to Prosecution to Refile its *ex parte* Filing in Response to Motion by Kordic for Disclosure in Relation to Witness "AT", 31 March 2003, para. 4.

²³ This was the main ground on which the Trial Chamber reconsidered the Protective Measures that were in place in *Bagosora et al*. See *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003, para. 21.

VIII CONCLUSION

27. Accordingly, for the reasons adumbrated above the Defence respectfully urges the Chamber to: (i) reject the Prosecution's request for the extension of protective measures; (ii) order the disclosure of Annex C to the Defence; (iii) order the Prosecution Motion to be re-submitted as a public filing.

Respectfully Submitted,



Karim A. A. Khan
Counsel for Mr. Charles Taylor

Dated this 8th Day of January 2007

Index of Authorities

Procedural history in Taylor proceedings

1. *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-86, Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 04 April 2006.
2. *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-93, Confidential Prosecution Motion for Leave to Substitute a Corrected and Supplemented Witness List as Annex A of the Confidential Motion of 4 April 2006, 25 April 2006.
3. *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-PT-99, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures and on Confidential Prosecution Motion for Leave to Substitute, 5 May 2006.
4. *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-119, Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, 04 September 2006.
5. *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-120, Confidential Defence Response to “Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure,” 15 September 2006.
6. *Prosecutor v. Taylor*, Case No. SCSL-2003-01-PT-138, Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which filed Ex Parte, 8 December 2006.

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7. *Prosecutor v. Norman et al*, Case No. SCSL-04-14-T-126, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, paras. 27, 29. Online: <http://www.sc-sl.org/Documents/SCSL-04-14-T-126.pdf>
8. *Prosecutor v. Gbao*, Case No. SCSL-2003-09-PT-48, Decision on the Prosecution Motion for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure, 10 October 2003, paras. 21-25, 47. Online: <http://www.sc-sl.org/Documents/SCSL-03-09-PT-048.pdf>
9. *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT-38, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras. 9, 11, 14. Online: <http://www.sc-sl.org/Documents/SCSL-03-05-PT-038.pdf>
10. *Prosecutor v. Sesay at al*, Case No. SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004. Online: <http://www.sc-sl.org/Documents/SCSL-04-15-PT-180.pdf>
11. *Prosecutor v. Sesay at al*, Case No. SCSL-04-15-T-68, Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006, para. 17. Online: <http://www.sc-sl.org/Documents/SCSL-04-15-T-668.pdf>
12. *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT-38, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras. 10, 15. Online: <http://www.sc-sl.org/Documents/SCSL-03-07-PT-033.pdf>

13. *Prosecutor v. Brima*, Case No. SCSL-2003-06-PT-36, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, paras. 9, 14. Online: <http://www.sc-sl.org/Documents/SCSL-03-06-PT-036.pdf>
14. *Prosecutor v. Brima Bazy Kamara*, Case No. SCSL-03-10-PT-40, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003, paras. 10, 18. Online: <http://www.sc-sl.org/Documents/SCSL-03-10-PT-040.pdf>
15. *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T-488, Decision on the Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006. Online: <http://www.sc-sl.org/Documents/SCSL-04-16-T-488.pdf>
16. *Prosecutor v. Brima et al*, Case No. SCSL-04-16-T-551, Dissenting Opinion of Justice Doherty on Joint Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 onwards, 13 September 2006. Online: <http://www.sc-sl.org/Documents/SCSL-04-16-T-551.pdf>

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17. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Separate and Dissenting Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 07 December, 2001, paras. 11 and 14. Online: <http://69.94.11.53/default.htm>
18. *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003, para. 21. Online: <http://69.94.11.53/default.htm>

19. *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001, paras. 68-69. Online: <http://69.94.11.53/default.htm>
20. *Prosecutor v Mpambara*, No. ICTR-2001-65-I, Decision on Protection of Defence Witnesses, 4 May 2005, para. 2. Online: <http://69.94.11.53/default.htm>
21. *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. Online: <http://69.94.11.53/default.htm>
22. *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on the Tharcisse Muvunyi's Motion for Protection of Defence Witnesses, 20 October 2005, para. 10. Online: <http://69.94.11.53/default.htm>

ICTY Jurisprudence

23. *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protected Measures, 3 July, 2000, paras. 11, 13, 16-18, 22-28, 31. Online: <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm>
24. *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 11. Online: <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm>
25. *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000, para. 7. Online: <http://www.un.org/icty/brdjanin/trialc/decision-e/01108PM213938.htm>
26. *Prosecutor v. Simic et al*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-

Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 41.

Online: <http://www.un.org/icty/simic/trialc3/decision-e/00228PN511785.htm>

27. *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-A, Order to Prosecution to Refile its *ex parte* Filing in Response to Motion by Kordic for Disclosure in Relation to Witness “AT”, 31 March 2003, para. 4. See enclosed.

3851

Case: IT-95-14/2-A

IN THE APPEALS CHAMBER

Before:

Judge David Hunt, Pre-Appeal Judge

Registrar:

Mr Hans Holthuis

Decision of:

31 March 2003

PROSECUTOR

v

Dario KORDIC & Mario CERKEZ

**ORDER TO PROSECUTION TO REFILE ITS *EX PARTE* FILING IN RESPONSE TO
MOTION BY KORDIC FOR DISCLOSURE IN RELATION TO WITNESS "AT"**

Counsel for the Prosecutor:

Mr Norman Farrell

Counsel for the Defence:

**Mr Mitko Naumovski, Mr Turner T Smith Jnr and Mr Stephen M Sayers for Dario Kordic
Mr Bozidar Kovacic and Mr Goran Mikulicic for Mario Cerkez**

1. The appellant Dario Kordic ("Kordic") has sought an order directing the prosecution to disclose, in unredacted form, the transcript of an interview conducted over four days with Witness AT, after the judgment was given. Witness AT had been called by the prosecution as a witness at the trial. Kordic claims that the lack of corroboration of this witness's evidence at the trial¹, and the contradictions within that evidence, are crucial issues raised in his appeal, and that a full disclosure of the contents of this interview would constitute exculpatory material within the meaning of Rule 68 of the Rules of Procedure and Evidence ("Rules").²

2. The prosecution has responded by denying that it has failed to comply with Rule 68,³ and stating that, since the Motion was filed, it had provided the interview "with less redactions",⁴ and that it had agreed to provide Kordic with yet further excerpts from the interview.⁵ The prosecution also stated that, in order to be completely transparent, it would file an *ex parte* document for the Appeals Chamber "setting out the remaining redactions and the reasons for such redactions",⁶ and that it will comply with any

3852

order of the Appeals Chamber in relation to the redactions made.⁷ The redactions are said to have been necessary in relation to "material which is not exculpatory" for "confidentiality, investigative or safety/security concerns",⁸ and that the redacted areas "contain sensitive material".⁹ The prosecution filed its *ex parte* document the following day.¹⁰ It identifies the purpose of that document as being "to inform the Appeals Chamber of those portions which have remained redacted, the reasons for the redactions and to place the redacted portions of the Interviews before the Chamber if the Chamber feels it is necessary to review this matter".¹¹

3. In his Reply,¹² Kordic has rejected the prosecution's right to make submissions regarding Witness AT on an *ex parte* basis, and he has argued that such submissions "should at least be made *inter partes*, to the extent that they do not raise specific, articulable [*sic*] witness protection or witness security concerns".¹³

4. The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in circumstances where, for example, the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact of the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.¹⁴ The party seeking relief on an *ex parte* basis in such a case must identify with some care why the disclosure of the fact of the application, or of its detail, to the other party to the proceedings would cause such unfair prejudice.¹⁵ In the present case, the prosecution has not identified the basis upon which it claims to be entitled to file its application to the Appeals Chamber upon a wholly *ex parte* basis, although (as already stated) the prosecution has disclosed to Kordic the fact of the application itself.

5. Applications made by the prosecution under Rule 66(C) – seeking to be relieved of its obligation to disclose material where the disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State" – may not be filed on a wholly *ex parte* basis.¹⁶ Only a month before the *Ex Parte* Filing was filed by the prosecution in the present case, the prosecution had been ordered by the Appeals Chamber to refile a redacted version of such a motion.¹⁷ I see no distinction between that situation and the current situation, and the same order will therefore be made in this case as well.

6. Another problem which should be raised at this stage arises from the fact that it is anything but clear whether the material presently placed before the Appeals Chamber in Annex A to the prosecution's *Ex Parte* Filing is the same as the version of the interview *finally* provided to Kordic. A comparison between that document and Exhibit 2 to the Motion filed by Kordic suggests that the passages indicated in that document as having been redacted are *not* always the passages which have remained redacted in the material finally disclosed to Kordic. This final version must be provided by the prosecution.

Disposition

7. The prosecution is accordingly ordered:

- (1) to re-file *inter partes* a redacted version of the Prosecution *Ex Parte* Filing, other than the annexes, within five days of the date of this Order; and
- (2) to provide the Appeals Chamber with a copy of the final version of the interview

3853

disclosed to Kordic, as described in pars 8, 16 and 20 of the prosecution's Response, together with (upon an *ex parte* basis) an unredacted version of that document which indicates the passages which have remained redacted.

The Defence is reminded that, in accordance with par 10 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal,¹⁸ it has ten days after the redacted version of the Prosecution's *Ex Parte* Filing has been filed in which to file its response to the claims made by the prosecution in support of the remaining redactions which have been made.

Done in English and French, the English text being authoritative.

Dated this 31st day of March 2003,
At The Hague,
The Netherlands.

Judge David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]

- 1 - Appellant Dario Kordic's Motion for Access to Unredacted Portions of the Most Recent Prosecution Interviews of Witness "AT", conducted over a Four-Day Period in October 2002, and First Disclosed in Heavily-Redacted Form to Kordic on 28 February 2003, 7 Mar 2003 ("Motion").
- 2 - Motion, par 9. Associated with this Motion are complaints by Kordic that the prosecution has failed to comply with its obligations of disclosure pursuant to Rule 68: Notice of Prosecution's Non-Compliance with its Obligations under Rule 68 and Application for Permission to Submit Additional Arguments on the Effect of the Prosecution's Rule 68 Violations, Pursuant to the Pre-Appeal Judge's 11 May 2001 and 2 July 2001 Decisions, 7 Mar 2003; Supplemental Notice of Rule 68 Violation by the Prosecution, 13 Mar 2003. All three of these documents are stated to have been filed "Under Seal", but it seems from his subsequent filings that Kordic intended them to be filed on a confidential basis only.
- 3 - Prosecution's Response to the Appellant Dario Kordic's Motion for Access to Unredacted Portions of Interviews with Witness AT, 20 Mar 2003 ("Response"), pars 9, 11-12.
- 4 - Response, par 8.
- 5 - *Ibid*, pars 16, 20.
- 6 - *Ibid*, par 10.
- 7 - *Ibid*, pars 18, 21.
- 8 - *Ibid*, par 8.
- 9 - *Ibid*, par 16.
- 10 - Prosecution's Ex Parte Filing Regarding Motion by Kordic for Disclosure of Unredacted Interviews with Witness AT, 21 Mar 2003 ("Ex Parte Filing"), filed on a "Confidential Ex Parte" basis.
- 11 - *Ex Parte* Filing, par 3.
- 12 - Dario Kordic's Reply in Support of his Motion for Access to Unredacted Portions of the Most Recent Prosecution Interviews of Witness "AT", 25 Mar 2003 ("Reply").
- 13 - Reply, par 18.
- 14 - *Prosecutor v Simic et al*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000, pars 39-43; *Prosecutor v Brdjanin & Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measure, 27 Oct 2000, par 11.
- 15 - *Ibid*.
- 16 - *Prosecutor v Brdjanin & Talic*, IT-99-36-PT, Decision on Prosecution Application for Oral Hearing of Rule 66(C) Motion, 1 June 2001.
- 17 - *Prosecutor v Krstic*, IT-98-33-A, Order for the Prosecution to Refile its Motion, 21 Feb 2003, p 2.

3854

18 - IT/155/Rev 1, 7 Mar 2002.