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SCSL-03-01-T
(16460-16471)

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THE SPECIAL COURT FOR SIERRA LEONE

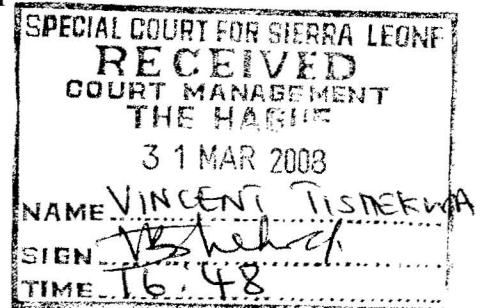
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 31 March 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

—v—

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO “PROSECUTION MOTION FOR LEAVE TO
SUBSTITUTE CONFIDENTIAL URGENT PROSECUTION MOTION SCSL-03-
01-T-435 WITH AMENDED MOTION”**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

Counsel for Charles G. Taylor

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

I. Introduction

1. This is the Defence's Response to the *Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion* dated 14 March 2008¹.
2. In its Motion, the Prosecution seeks an urgent order granting voice distortion and /or use of facial distortion and partial closed session², with a protective screen, as additional protective measures to be used during the testimonies of witnesses TF1-375, TF1-401, TF1-521, TF1-542, TF1-555, TF1-585 and TF1-590.
3. The Defence does not oppose the application to substitute the *Prosecution Motion SCSL-03-01-T-435* dated 14 March 2008 and hereby responds to the substance of the substitute Motion.
4. The Defence opposes the Prosecution's request to extend the protective measures ordered by this Chamber in these proceedings on the basis that the above witnesses are already adequately protected in accordance with decisions on protective measures.³ The Defence emphasises that these protective measures, which included non-disclosure of the identity of the witnesses to the public and delayed disclosure of the identity of the witness to the Defence, continue to have effect in any proceedings before this Court.
5. The Defence submits that when considering whether to grant protective measures for victims and witnesses, the Trial Chamber must balance the need to fully respect the

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-372, Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion ("Motion").

² The Defence understands closed session during the course of testimony for variable length of which vary depending on the individual circumstances. See Motion, para 6

³ TF1-374, TF1-375, TF1-395 and TF1-401 are subject to the measures ordered in *Prosecutor v. Taylor*, SCSL-03-1-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 a Corrected and Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witness and for Non-Public Disclosure and Urgent Request for Interim Measures" 5 May 2006. TF1-542 and TF1-555 are subject to the measures ordered in *Prosecutor v. Taylor*, SCSL-03-1-PT-163, "Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, One of which Filed *Ex Parte*" 22 January 2007. Finally, TF1-585 is subject to measures ordered in *Prosecutor v. Taylor*, SCSL-03-T-383, "Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure", 10 January 2008

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”.⁴ The outcome of this balancing exercise is to be determined on a case-by-case basis.⁵

6. The Defence submits that absent specific evidence of the risks that particular witnesses will be interfered with by this Accused or his alleged supporters, the order sought is not justified.

II. Applicable Legal Principles

7. 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].
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,

⁴ *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 30 November 2006, para. 17; Order on Protective Measures for Additional Witnesses, 24 November 2004, p. 3; Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; Decision on Prosecution Motion to Vary Protective Measures for Group I Witnesses TFI-042 and TFI-044, 23 May 2006; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001, paras. 68-69.

⁵ *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT, 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, 05 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”.

with full respect for the rights of the accused and due regard for the protection of victims and witnesses” [emphasis added].⁶

III. Argument

A) The Prosecution’s affidavit is inadequate and insufficient

10. The Prosecution submits that they are not required to present specific evidence to demonstrate the existence of a risk to the security or welfare of each witness for whom it is seeking facial and/or voice distortion. According to the Prosecution, they need only to establish a general security risk, without evidence detailing the threat or fear expressed by any of the 7 witnesses for whom it is seeking additional protection⁷.
11. In line with Judge Doherty’s interpretation of the jurisprudence, there is a need for evidence to substantiate the allegations that the proposed witnesses may be in danger or at risk if their identity is disclosed.⁸
12. The burden of justifying the protection of witnesses lies on the party seeking such protection.⁹ Thus, for any protective measures to be granted, the applicant must show that, should it become publicly known that he/she testified, there is a real risk to

⁶ This principle has also been acknowledged by various Trial Chambers. See, for example, *Prosecutor v. Norman et al*, Case No. SCSL-04-14-T, 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, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, para. 47.

⁷ The Prosecution relies on *Prosecutor v. Brima et al.* SCSL-04-16-T-488, “Decision on Join Defence Application for Protective Measures for Defence Witnesses”, 9 May 2006, p. 2. In this case the Trial Chamber relied on the ICTR case of *Muvunyi* (*Prosecutor v. Muvunyi*, ICTR-2000-55A-T, “Decision on the Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses, 20 October 2005, para 10, 15) in finding that an evaluation of the fear for the safety of witnesses must be made “in light of the general security situation”. In both cases, evidence was presented on the security situation but also on the background of each witnesses and how the safety situation impacted on the witnesses before the Trial Chamber made its final determination on the need for protective measures. Contrarily to the case at hand, evidence was presented to substantiate the submission that the witnesses may be in danger or at risk.

⁸ *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Dissenting opinion of Justice Doherty on Join Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 onward, 13 September 2006.

⁹ *Prosecutor v. Bizimunga et al.*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Protection of Defense Witnesses, 2 February 2005, para 13.

his/her security or that of his family. In other words, the Trial Chamber must be satisfied that the fear expressed has an objective foundation.

13. As the sole evidence to demonstrate the existence of such an objective foundation for fear, the Prosecution relies on the affidavit in which the OTP's investigation commander, Mr. John Vernon Berry ("Mr. Berry"), provides his personal assessment of the security situation in Sierra Leone.
14. The Defence submits that the affidavit in question is blatantly deficient, both in terms of the type and specificity of the evidence presented. In fact, the affidavit (1) does not refer to explicit fears or concerns, whether subjective or objective, of any individual witnesses¹⁰ (2) does not refer to specific events or provide examples of threat made to any specific witnesses (3) mostly relies on information from identified sources¹¹, leaving the assessment of their credibility and reliability to the Prosecution, not the Chambers. The Defence submits that this affidavit cannot serve as a basis for the Chamber to make a determination on whether or not an objective foundation for fear exists and which justifies additional protective measures.
15. It is noteworthy that while the Prosecution makes a claim that "all the witnesses and their families continue to express real concerns for their safety and privacy and for that of their family"¹² it fails to provide any declaration from any of the 7 witnesses themselves to that effect. The Defence submits that Mr. Berry's assessment of the security situation alone fails to offer appropriate and sufficient evidence to sustain that claim. Indeed, it is the Defence's position that when applying for protective measures, there is a need to demonstrate that the circumstances of the witnesses go beyond the ordinary volatile circumstances existing in Sierra Leone.
16. Additionally, the Defence draws attention to the fact that the Prosecution once again makes unsubstantiated claims of witness interference by Mr. Taylor's supporters, whoever they may be, in their affidavit. These allegations, which are also highly

¹⁰ Motion, Annex A, paragraph 18 makes a brief reference to TF1-590 only to say that he still resides in the region and is seeking additional protective measures.

¹¹ Motion Annex A, see for e.g. para 11-12: "The OTP has received information it believes to be credible that (...)" and "The OTP has also received reliable confidential information that (...)"

¹² Motion, para. 6

prejudicial and strongly contested by the Defence, are not supported by evidence and cannot serve as an objective basis to demonstrate fear on the part of any of the witnesses.¹³ The Defence submits that the multiple allegations made by the Prosecution are not only libellous but they fall short of providing an objective basis to demonstrate a risk to the security of the 7 witnesses.

B) Determination must be made on a case by case basis

17. The Defence acknowledges 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”¹⁴.
18. However, the Defence maintains its previously advanced position that this ruling does not grant the Prosecution *carte blanche* to request additional protective measures without providing any witness specific justifications¹⁵, let alone measures as restrictive as closed session for such a large group of witnesses already under protective measures.
19. This Chamber has ruled that the applicant should make out a reasonable case for each witness whose protection they seek¹⁶. As previously accepted by the Prosecution in the context of evaluating the vulnerability and need for protective measure of

¹³ The Prosecution relies 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. There is also speculation about Mr. Taylor’s influence with “significant financial and personnel resources at his disposal” (Motion, Annex A, paragraph 9), 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 sources of information used by the Prosecution in their Motion to back up their position that Mr. Taylor’s supporters constitute a threat to any potential witness against Mr. Taylor, are unidentified. (Motion Annex A, see for e.g. paras 11-12)

¹⁴ *Prosecutor v. Brima* Case No. SCSL-2003-06-PT; *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT, Decisions 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, 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, 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 *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-86, “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*” 8 January 2007

¹⁶ See note 14

witnesses, “the circumstances faced by a witness must be considered on a case by case basis”¹⁷. The unique role and responsibilities of each witnesses as well as the content of the testimonies, particularly if given in open court, must be evaluated separately and afforded individual attention.

20. Consistent with this line of reasoning, the Defence submits that greater specificity should reasonably be expected of the evidence adduced by the Prosecution in support of its Motion. The Defence’s position is that the Prosecution cannot simply make a claim to the effect that there are, “direct threats to persons” without details in more specific terms of the nature of the alleged threat or fear and link those fear to specific witness. Absent its last paragraph, the affidavit submitted did not include any evidence that had not already been previously considered by the Trial Chamber in its previous order. It is not for the Prosecution to make use of blanket affidavits in order to avoid its obligation to provide explicit, and thus assessable evidence, to justify the order it seeks.
21. The Prosecution rightly noted that in a previous Motion regarding a request for similar protective measures, the Defence conceded that “in extraordinary circumstances, the willingness of a witness to testify is dependent on the party’s ability to guarantee his or her anonymity and safety”¹⁸. Consistent with its case-by-case basis approach to protective measures, the Defence’s previous concession to the use of voice or facial distortion does not amount to the acceptance of the use of such protective measures under different circumstances, i.e. when different witnesses and facts are involved.

C) Rights of the Accused and the public

22. Article 17(2) of the Statute of the Special Court guarantees the Accused a right “to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses” [emphasise added].

¹⁷ *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-86 “Reply to Defence Response to Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witness TF1-515, TF1-516, TF1-385, TF1-539, TF1-388, TF1-390”, 8 February 2008, para 5

¹⁸ *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT-86, “Public with Confidential Annex Defence Response to the Public Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, TF1-516, TF1-385, TF1-539, TF1-388, TF1-390”, 8 February 2008, para 2.

23. The Defence recognises that the preference for a public hearing must be balanced with other mandated interests, among other, protective measures for witnesses. However, Consistent with the wording of the SCSL Rules and with the jurisprudence of this court, closed session orders are extremely restrictive and, absent a demonstration of correlative risks of threat on, strike the proper balance between the right of the Accused to a fair and public hearing.¹⁹ The Defence submits that partial closed has drastic effects on the rights of the Accused and of the public.
24. While it acknowledges that facial and/or voice distortion involves that the Accused and the Defence know or will know the identity of each witness who testifies, the Defence submits that such measures affects the rights of the Accused in that it affects the public nature of the trial. Indeed, facial and voice distortion impacts on the possibility of the public's ability to follow and observe all the proceedings as it involves the use of a screen behind the witness so that members of the public gallery cannot see the face of the witness.²⁰
25. The Defence submits that the use of facial and voice distortion will result in an impression of "in camera" justice for the Accused. This position is in line with the jurisprudence of international tribunals and national courts that preference should be given to a public hearing. Although the Defence recognises that this preference should be balanced with protective measures for witnesses, it submits that the use of facial or voice distortion, let alone applied simultaneously, is neither a reasonable or appropriate way to settle this balancing exercise in the circumstances.

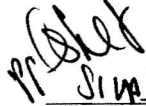
IV. Conclusion

26. For all of the foregoing reasons, the Defence opposes the request for witness TF1-TF1-375, TF1-401, TF1-521, TF1-542, TF1-555, TF1-585 and TF1-590 to testify with voice and or facial distortion. The Defence also opposes the use of closed session during the course of the above mentioned witnesses' testimony.

¹⁹ Prosecuotr v. Sesay et al., SCSL-04-15-T-577, "Decision on Prosecution Motion forhte Testimony of Witnesses FT1-367, TF1-369 and TF1-371 to be Held in Closed Session and for other Relief for Witness TF1-369, 14 June 2006.

²⁰ See note 1, para 6

Respectfully Submitted,


P. SIMS CHIKWA
For Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor

Dated this 31st Day of March 2008,
The Hague, The Netherlands

List of Authorities

A. Special Court for Sierra Leone

I. SCSL -- Instruments

Statute of the Special Court for Sierra Leone, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002; See, also, <http://www.sc-sl.org/statute.html>.

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 19 November 2007; See, also, <http://www.sc-sl.org/rulesofprocedureandevidence.pdf>.

II. SCSL -- *Prosecutor v. Taylor*, SCSL-03-01-T

Prosecutor v. Taylor, SCSL-03-01-T-372, Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion

Prosecutor v. Taylor, SCSL-03-1-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 a Corrected and Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witness and for Non-Public Disclosure and Urgent Request for Iterim Measures" 5 May 2006

Prosecutor v. Taylor, SCSL-03-1-PT-163, "Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, One of which Filed *Ex Parte*" 22 January 2007

Prosecutor v. Taylor, SCSL-03-T-383, "Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure", 10 January 2008

Prosecutor v. Taylor, Case No. SCSL-03-01-PT-86, "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*" 8 January 2007

Prosecutor v. Taylor, Case No. SCSL-03-01-PT-86 "Reply to Defence Response to Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witness TF1-515, TF1-516, TF1-385, TF1-539, TF1-388, TF1-390", 8 February 2008

III. SCSL -- Jurisprudence

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006

Prosecutor v. Sesay et al., SCSL-04-15-T-577, "Decision on Prosecution Motion for the Testimony of Witnesses FT1-367, TF1-369 and TF1-371 to be Held in Closed Session and for other Relief for Witness TF1-369, 14 June 2006.

Prosecutor v. Sesay, Case No. SCSL-2003-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003,

Prosecutor v. Norman et al., Case No. SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004

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

Prosecutor v. Brima et al. SCSL-04-16-T-488, "Decision on Join Defence Application for Protective Measures for Defence Witnesses", 9 May 2006

Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Dissenting opinion of Justice Doherty on Join Defence Application for Protective Measures for Defence Witnesses Appearing from 4 September 2006 onward, 13 September 2006

Prosecutor v. Brima Bazzy Kamara, Case No. SCSL-2003-10-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003

Prosecutor v. Kallon, Case No. SCSL-2003-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003

B. ICTY

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

C. ICTR

Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001

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, 05 December, 2001

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Prosecutor v. Bizimunga et al., No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defense Witnesses, 2 February 2005