

437)

SCSL-03-01-T
(15775-15781)

15775



SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 13 March 2008

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
13 MAR 2008	
NAME	VINCENT TUSAERWA
SIGN	V. Hebel
TIME	16:50

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON CONFIDENTIAL PROSECUTION MOTION
FOR ADDITIONAL PROTECTIVE MEASURES FOR THE TRIAL PROCEEDINGS OF
WITNESSES TF1-515, 516, 385, 539, 567, 388, AND 390

Office of the Prosecutor:

Brenda J. Hollis
Kirsten Keith

Defence Counsel for Charles G. Taylor:

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

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

SEISED of the “Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388, and 390”, filed on 29 January 2008 (“Motion”),¹ wherein the Prosecution requests:

- (a) that Witnesses TF1-515, TF1-516, TF1-385, TF1-539 and TF1-388 be granted additional protective measures as set out in Annex A to the Motion (“Annex A”)²; and
- (b) that Witnesses TF1-567 and TF1-390 be permitted to testify entirely in closed session;³

RECALLING the oral ruling on the Motion, handed down in court on 3 March 2008, the Trial Chamber now delivers its written reasons;

NOTING in particular the Prosecution submissions that:

- (i) the pre-trial protective measures to which each of the witnesses is subject, including the use of a pseudonym and delayed disclosure to the Defence, are not sufficient to protect the identity of the witnesses during the trial phase;⁴
- (ii) due to the unique roles and responsibilities that Witnesses TF1-567 and TF1-390 performed prior to, during and after the relevant Indictment period, the content of their testimonies if given in open court, would reveal their identities to the public, resulting in serious implications for their safety and security and that of their family members;⁵
- (iii) Witnesses TF1-567 and TF1-390, each of whom has been classified as a “Predominantly Linkage Witness”, continue to face “objective and subjective threats” including attempts by certain members of the public to identify and interfere with persons perceived to be Prosecution witnesses, are particularly vulnerable to acts of retaliation;⁶
- (iv) the Prosecution has assessed whether other less restrictive techniques might be effective and is of the view that in the circumstances, closed session is the only appropriate method of protecting the identity of these witnesses;⁷

NOTING the “Public, with Confidential Annex, Defence Response to the Public Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388, and 390”, filed on 8 February 2008 (“Response”)⁸, wherein the Defence submits:

¹ SCSL03-01-T404.

² In Annex A the Prosecution requests that witnesses TF1-515, TF1-385, TF1-539 be granted the additional protective measures of testifying behind a screen shielding the witness from the public view and with the use of a facial and voice distortion device; and that witnesses TF1-516 and TF1-388 be permitted to testify behind a screen and with the use of a voice distortion device.

³ Motion, para. 24.

⁴ Motion, paras. 4, 5, 10, 13-16 and Annex A.

⁵ Motion, paras. 7, 11, 14.

⁶ Motion, paras. 15-27 and Annex B.

⁷ Motion, paras. 14, 15

⁸ SCSL03-01-T413.

- (a) that it does not oppose the requested additional protective measures for Witnesses TF1-515, TF1-516, TF1-385, TF1-539 and TF1-388 as set out in Annex A;⁹
- (b) that it opposes the request for Witnesses TF1-567 and TF1-390 to testify entirely in closed session, but that instead less restrictive measures consistent with the rights of the Accused under Article 17(2) of the Statute should be applied to address the witnesses' safety concerns;¹⁰ and
- (c) that it does not object to Witnesses TF1-567 and TF1-390 testifying in closed session for a limited duration only;¹¹

NOTING the Prosecution Reply, filed on 14 February 2008 ("Reply");¹²

RECALLING the various decisions of the Trial Chamber granting the above witnesses various pre-trial protective measures;¹³

MINDFUL of the provisions of Article 17(2) of the Statute of the Special Court ("Statute") which provides:

The 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;

MINDFUL ALSO of the provisions of Rule 26bis of the Rules of Procedure and Evidence (Rules") which provides:

The Trial Chamber and the Appeals Chamber shall 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;

MINDFUL ALSO of the provisions of Rule 78 which provides:

⁹ Response, paras. 2, 23

¹⁰ Response, paras. 3-22, 24 and Confidential Annex

¹¹ Response, paras. 11, 12, 21, 24 and Confidential Annex.

¹² SCSL03-01-T-418.

¹³ TF1-539 is subject to measures ordered in the *Prosecutor v. Taylor*, SCSL03-1-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. TF1-390, TF1-388 and TF1-385 are subject to measures ordered in the *Prosecutor v. Taylor*, SCSL03-1-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 Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 5 May 2006. TF1-515, TF1-516 and TF1-567 are subject to protective measures ordered in the *Prosecutor v. Taylor*, SCSL03-1-PT-120, Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, 15 September 2006. TF1-567 is subject to protective measures ordered in the *Prosecutor v. Taylor*, SCSL03-1-PT-215, Decision on Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure And on Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness List As Annex A(4) of the Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non Public Disclosure Filed on 8 March 2007 And on Public Urgent Prosecution Request for Interim Measures, 26 March 2007.

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided;

MINDFUL ALSO of the provisions of Rule 75(A) which provides:

A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, 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”;

MINDFUL ALSO of the provisions of Rule 79(A) which provides:

- (A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:
- (i) national security; or
 - (ii) protecting the privacy, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
 - (iii) protecting the interests of justice;

CONSIDERING that the Defence does not oppose the additional protective measures for Witnesses TF1-515, TF1-516, TF1-385, TF1-539 and TF1-388 as set out in Annex A and is not opposed to Witnesses TF1-567 and TF1-390 testifying in closed session for a limited duration only;

RECALLING the Trial Chamber’s “Decision on Prosecution Motions for Additional Protective Measures for Witnesses” dated 26 February 2008, wherein it stated that in granting protective measures to witnesses and victims, the Trial Chamber has a duty to balance the protection of those victims and witnesses with the rights of the Accused to a fair and public trial and that the extraordinary protective measure of closed session testimony will only be granted where it is clearly demonstrated (a) that there is a real and specific risk to the witness and/or his family, (b) that the right of the Accused to a fair and public trial is not violated and (c) that no less restrictive protective measures can adequately deal with the witness’s legitimate concerns;¹⁴

RECALLING also the Trial Chamber’s observation that the provisions of Rule 75(B) are not exhaustive of the regime of potential protective measures available for the protection of victims or witnesses and that before a witness resorts to testifying entirely closed session as a means of protecting his or her identity, full and exhaustive consideration should be given to the use of the less restrictive witness protection measures available under Rule 75(B)(i);

HOLDING that the Trial Chamber by a majority (Justice Teresa Doherty partly dissenting) is not satisfied that the Prosecution has given full and exhaustive consideration to the use of the less restrictive witness protection measures available under Rule 75(B)(i) and that a basis for the extraordinary protective measure of entirely closed session testimony has not been made out in respect of Witnesses TF1-567 and TF1-390 in this instance;

FOR THE ABOVE REASONS

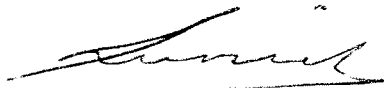
¹⁴ SCSL03-01-T427, Decision on Confidential Prosecution Motions SCSL03-01-T-372 and SCSL03-01-T-385 for the Testimonies of Witnesses to be held in Closed Session, 26 February 2008.


PATIALLY GRANTS THE MOTION AND ORDERS

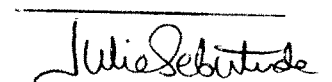
- (i) that Witnesses TF1-515, TF1-385, TF1-539 are granted the additional protective measures of testifying behind a screen shielding the witness from the public view and with the use of an image and voice distortion device;
- (ii) that Witnesses TF1-516 and TF1-388 are granted the additional protective measures of testifying behind a screen and with the use of a voice distortion device; and
- (iii) that Witnesses TF1-567 and TF1-390 are granted the additional protective measures of testifying behind a screen shielding the witness from the public view and with the use of an image and voice distortion device and may where necessary testify in closed session for a limited duration only.

DENIES the remainder of the Motion.

Done at The Hague, The Netherlands, this 13th day of March 2008.


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]



**Partially Dissenting Opinion – In the Matter of the Confidential
Prosecution Motion to Additional Protective Measures**

1. I regret that I must dissent from my learned colleagues in that part of the Decision denying the application for an entirely closed session for Witnesses 567 and 390. I concur with the decision in relation to witnesses TF1-515, 516, 385, 539 and 388.

2. I am of the view that the Prosecution in their motion has considered other measures to protect witnesses TF1-567 and 390. Paragraphs 10 and 14 of the Motion clearly indicate that the use of facial distortion and voice distortion has been explored in the consideration of the needs of all the witnesses, including TF1 567 and 390. Further the Prosecution has adduced evidence by way of a declaration dated the 28 January 2008 giving current information to the Trial Chamber of the security situation, the attitudes of certain persons in Monrovia and the impact these have had and may have on the witnesses generally. The evidence includes threats and attack on a house of a witness. I find that this is objective evidence that supports the witness's expressed fear for themselves and their families.¹

3. The Defence submits that “the practical realities of hearing witness testimony in closed session severely restrict the Defence’s ability to effectively investigate the witness him or herself as well as the contents of the witness testimony. Thus, it will not be able to properly cross-examine the witness ...”². The Defence further submits that the public will never know the witness’s identity or the contents of his testimony and “in a sense, then, the witness is able to present largely untested and unchallenged evidence.”³ The Defence does not explain how the hearing of evidence in the absence of the public prevents testing and challenging of the witness’s evidence. Counsel and the Accused will see the witness, hear him or her speak and be able to challenge in cross examination.

4. The Defence relies, *inter alia*, on the case of *Kostovski v. The Netherlands*⁴ where it was held “[I]n principle, all the evidence must be produced in the presence of the accused at a public hearing in a view to adversarial argument”⁵. Whilst I concur with this principle, it is important to bear in mind that the case of *Kostovski v. The Netherlands* dealt with the hearing of evidence of two “anonymous” witnesses who were not heard in court and were not seen or questioned by the accused or counsel. Having stated the foregoing principle, the European Court of Human Rights stated

“This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court.⁶ [...] [A]s a rule, these rights require that an accused should be given an adequate and proper opportunity to

¹ Motion, para. 13.

² Response, paras 3, 13.

³ Response, para 14.

⁴ *Kostovski v. The Netherlands*, ECHR Series A, Vol. 166, 23 May 1989.

⁵ *Ibid.*, para. 41, cited at Defence Response, para. 8.

⁶ *Ibid.*, para. 41.

challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings”.⁷

5. I do not find any merit in the Defence submission that one of the benefits of a public hearing is that it allows members of the public to come forward with evidence and the Defence will lose “this critical component of the information gathering”.

6. Whilst I endorse and uphold the preference of the public hearings and open sessions, I also bear in mind the provisions of Article 17(2) of the Statute that “The 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”.

7. Furthermore, Rule 26bis obliges the Trial Chamber to have both respect for the rights of the accused and due regard for the protection of victims and witnesses.

8. The Trial Chamber is obliged to balance the interests of society, the accused and witnesses. I balance those obligations in the light of the evidence and submissions before me. Having found that the Prosecution evidence shows a real and specific risk to the witnesses and that the Accused is not disadvantaged in challenging evidence against him, I would therefore have allowed the motion in its entirety.

Done at The Hague, The Netherlands, this 13th day of March 2008.



⁷ *Ibid.*, para. 42.