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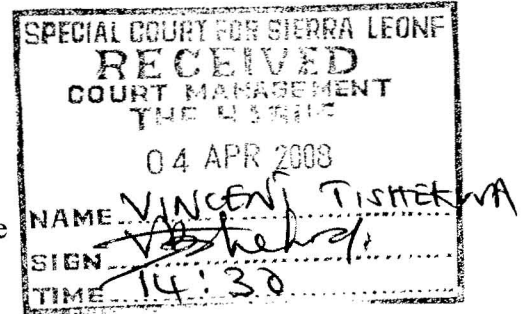
16563

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: 4 April 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

**PROSECUTION REPLY TO "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
Ms. Leigh Lawrie

Counsel for the Accused:
Mr. Courtenay Griffiths
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Reply to the “Defence Response to ‘Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion’”.¹
2. As the Defence do not oppose the Prosecution’s request to substitute the original motion² with an amended version,³ the Response is concerned with the Prosecution’s request for additional protective measures for the witnesses, TF1-375, TF1-401, TF1-521, TF1-542, TF1-555, TF1-585 and TF1-590.
3. In their Response, the Defence make a number of assertions and arguments which are without merit and to which the Prosecution will specifically Reply below.

II. REPLY

Witnesses already protected

4. The Defence’s assertion that the “witnesses are already adequately protected”⁴ fails to address the central point at issue which is that the existing protective measures were ordered and were sufficient to protect the witnesses’ identities from being revealed to the public during the pre-trial phase of the proceedings. However, such measures are insufficient to deal with the trial phase of the proceedings where a witness will testify *viva voce* in Court, with face, voice and testimony open to public view both from the gallery and on the Internet.
5. Indeed, not only are the additional requested measures required to ensure the witnesses’ *continued* protection, they are required to prevent any breach of the existing measures. The existing measures provide *inter alia* that the “names of protected witnesses and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of such witnesses, shall not under any circumstances be disclosed to the public or the media and this order shall remain in effect after the

¹ *Prosecutor v. Taylor*, SCSL-01-03-T-440, “Defence Response to ‘Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion’”, 31 March 2008 (“**Response**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-435, “Confidential and Urgent Prosecution Motion for Additional Protective Measures for Witnesses TF1-375, TF1-401, TF1-521, TF1-542, TF1-555, TF1-567, TF1-585 & TF1-590”, 12 March 2008.

³ See *Prosecutor v. Taylor*, SCSL-03-01-T-440, “Public with Confidential Annex Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion”, 14 March 2008 which seeks to remove TF1-567 from the motion filed on 12 March 2008. The amended motion attached as an annex to this filing shall be referred to in this Reply as the “**Amended Motion**”.

⁴ Response para. 4.

termination of the proceedings in this case.”⁵ Therefore, unless and until the existing protective measures are rescinded or varied in accordance with the Rules, a process which requires a waiver of the protection by the witness or a finding that there has been a diminution in the threat level faced by witnesses, the additional measures are required to preserve the protection currently granted to the witnesses. As is evident from the declaration provided with the motion, there is no basis to suggest there has been a diminution in threat.

6. The issue of the grant of additional protective measures was addressed in the RUF trial where it was found that there had been no “substantial change in the circumstances regarding the security of witnesses that would justify any modification to the protective measures decisions that were previously issued at the pre-trial phase save and except those changes required to make the necessary adjustments for the trial phase.”⁶

Prosecution’s affidavit is inadequate and insufficient to establish objective foundation

7. The “ordinary volatile circumstances existing in Sierra Leone”⁷ and indeed in the region as a whole, are easily dismissed from the vantage point of the Hague, where policing and law enforcement are performed with the support of established infrastructure and not in a post-conflict society and countries. However, these “ordinary volatile circumstances” should not be discounted from the vantage point of Sierra Leone, as these are the circumstances in which threats will be reported and investigated.
8. The thrust of the Defence’s arguments is that the information provided in the declaration does not provide witness specific information such as information on specific events or threats made and relies on information from unsubstantiated sources.⁸ However, this Court has held that “protective measures *can* be ordered on the basis of a current security situation even where the existence of threats or fears as regards specific witnesses has not

⁵ See Order 1(g) of *Prosecutor v. Taylor*, 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 a Corrected and 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.

⁶ *Prosecutor v. Sesay et al*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004, para. 21.

⁷ Response, para. 15.

⁸ Response, para. 14.

been demonstrated.”⁹ [emphasis added]. Further, the argument ignores the fact that similar declarations have supported the grant of additional protective measures in this trial.¹⁰ These measures were granted, not simply because the Defence did not oppose such grant, but because the Chamber concluded that evidence had been provided demonstrating that witnesses in this trial and their families face objective threats to their privacy and security.

9. In addition, contrary to the Defence’s claims, the declaration does provide specific information regarding:
 - (a) the contact made in February and March this year with witnesses by individuals identifying themselves as supporters of the Accused or working on behalf of the Defence team and that such individuals identified the witnesses as Prosecution witnesses and either tried to convince them not to testify against the Accused or warned them against so testifying;¹¹
 - (b) the contact made and threats issued by the three AFRC prisoners to a witness;¹² and
 - (c) the identities of some of those alleged to be involved in conduct threatening witnesses.¹³
10. The declaration does not provide details of the sources of its information in order to protect such sources who will often only provide information on the condition that their identity is not disclosed to the Accused or the Defence. However, the Prosecution only places reliance on such sources and the information they provide on the basis of its own subsequent investigations and experience.

Prosecution has provided insufficient information concerning the subjective fears of witnesses

11. As noted above in paragraph 8, the jurisprudence of this Court is that protective measures *can* be ordered on the basis of a current security situation alone. In their Response, the

⁹ *Prosecutor v Brima et al*, SCSL-04-16-T-488, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses”, 9 May 2006, p.2.

¹⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-437, “Decision on Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, TF1-516, TF1-385, TF1-539, TF1-567, TF1-388 and TF1-390”, 13 March 2008.

¹¹ Amended Motion, Annex, para. 5.

¹² *Ibid*, para. 15.

¹³ *Ibid*, paras. 6, 11 and 15.

Defence state that this Chamber's decision making such a determination was based on an ICTR decision issued in the *Muyunyi* case on 20 October 2005.¹⁴ This is wrong. This Chamber's decision was based on the decision issued in *Muyunyi* on 25 April 2001.¹⁵ Notwithstanding this error, it should be noted that the October 2005 decision was made on the basis of an affidavit made by a defence investigator on the general prevailing security situation and the testimony of a one Prosecution witness relating to his security concerns.¹⁶ Accordingly, the Chamber evaluated and granted measures on the basis of "the fear for the safety of witnesses in light of the general security situation".¹⁷ In relation to the April 2005 decision, the ICTR Chamber in this decision states that "[t]he Chamber is convinced, on the basis of [two affidavits], that a volatile security situation exists in Rwanda and neighbouring countries, which could endanger the lives of the witnesses who may be called to testify at trial."¹⁸ The affidavit evidence, therefore, was considered sufficient to justify protective measures.

12. The approach taken by this Chamber conforms to the fact that protective measures are prospective in nature and so must protect witnesses against general security threats rather than wait for such witness specific threats to arise. Further, the arguments raised by the Defence on this point are not supported by their interpretation of the jurisprudence of this Court or the ICTR.
13. Notwithstanding the foregoing, the Prosecution does provide information in the motion that each of the witnesses has expressed fear that they or their family members will suffer harm and retribution if they testify openly.¹⁹

Measures requested affect the public nature of the trial.

14. The essence of the Defence argument is that anything other than open session is a violation of both the Accused's fair trial rights and the public's interest in access to trial proceedings. It is acknowledged that the public nature of the proceedings is impacted by

¹⁴ *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, "Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", 20 October 2005.

¹⁵ *Prosecutor v. Muvunyi & Ors.*, ICTR-2000-55-I, "Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", 25 April 2001.

¹⁶ *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, "Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", 20 October 2005, para. 2.

¹⁷ *Ibid*, para. 10.

¹⁸ *Prosecutor v. Muvunyi & Ors.*, ICTR-2000-55-I, "Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", 25 April 2001, para. 21.

¹⁹ See Amended Motion, para. 14.


the imposition of protective measures such as those requested. However, the Statute of the Special Court for Sierra Leone (“Statute”) and the Rules accept and provide for the fact that witnesses may need protective measures and, accordingly, makes the right of the Accused to a public trial subject to such measures. Indeed, it is generally noted that the practice of the Special Court permits the imposition of protective measures such as those requested.²⁰ As demonstrated by this practice, it is not a violation of the Accused’s rights to prevent the public from knowing the identity of a witness, just as it is not a violation of the Accused’s rights to hold private or closed sessions.

15. Accordingly, on the basis of Articles 16(4), 17(2) of the Statute, Rules 75 and 79, which allow for measures such as those requested here and for closed sessions, and the jurisprudence of both the *ad hoc* tribunals and this Court, it is clear that “in camera” justice is justice nonetheless, and that justice must be afforded to witnesses as well as the Accused.

III CONCLUSION

16. The requested protective measures for witnesses TF1-375, TF1-401, TF1-521, TF1-542, TF1-555, TF1-585 and TF1-590 make the necessary adjustments to their existing measures for the trial phase of these proceedings. These adjustments ensure that these witnesses are able to come forward to provide relevant information to this Court without compromising their security and privacy and that of their families, and that their existing measures are not breached. Further, the information before the Court demonstrates that witnesses and their families in these proceedings continue to face real risks to their security and privacy should they testify without the requested protective measures. Accordingly, the Prosecution requests that the Response be dismissed and the additional requested protective measures granted.

Filed in The Hague,
4 April 2008
For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

²⁰ *Prosecutor v Brima et al*, SCSL-04-16-T-488, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses”, 9 May 2006, p.2.

LIST OF AUTHORITIES

SCSL Cases

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

Prosecutor v. Taylor, 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 a Corrected and 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

Prosecutor v. Taylor, SCSL-03-01-T-435, “Confidential and Urgent Prosecution Motion for Additional Protective Measures for Witnesses TF1-375, TF1-401, TF1-521, TF1-542, TF1-555, TF1-567, TF1-585 & TF1-590”, 12 March 2008

Prosecutor v. Taylor, SCSL-03-01-T-437, “Decision on Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, TF1-516, TF1-385, TF1-539, TF1-567, TF1-388 and TF1-390”, 13 March 2008

Prosecutor v. Taylor, SCSL-01-03-T-440, “Defence Response to ‘Prosecution Motion for Leave to Substitute Confidential Urgent Prosecution Motion SCSL-03-01-T-435 with Amended Motion”, 31 March 2008

Prosecutor v Brima et al, SCSL-04-16-T

Prosecutor v Brima et al, SCSL-04-16-T-488, “Decision on Joint Defence Application for Protective Measures for Defence Witnesses”, 9 May 2006

Prosecutor v Sesay et al, SCSL-04-15-T

Prosecutor v Sesay et al, SCSL-2004-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures,” 5 July 2004

ICTR Cases

Prosecutor v. Muvunyi & Ors., ICTR-2000-55-I, “Decision on the Prosecutor’s Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment”, 25 April 2001
<http://69.94.11.53/ENGLISH/cases/Muvunyi/decisions/250401.htm>

Prosecutor v. Muvunyi, ICTR-2000-55A-T, “Decision on Tharcisse Muvunyi’s Motion for Protection of Defence Witnesses”, 20 October 2005
<http://69.94.11.53/ENGLISH/cases/Muvunyi/decisions/201005.htm>