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SCSL-03-01-T  
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SPECIAL COURT FOR SIERRA LEONE

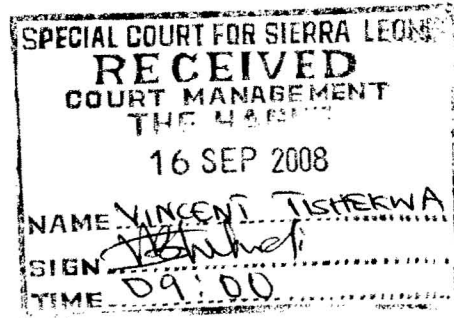
TRIAL CHAMBER II

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.: SCSL03-1-T

Date: 15 September 2008



PROSECUTOR

v.

Charles Ghankay TAYLOR

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DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES B AND E URGENT PROSECUTION APPLICATION FOR RECONSIDERATION OF ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215 OR IN THE ALTERNATIVE APPLICATION FOR LEAVE TO APPEAL ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215

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Office of the Prosecutor:

Brenda J. Hollis  
Julia Baly  
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 “Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215” filed on 9 May 2008 (“Motion”)<sup>1</sup> wherein the Prosecution seeks

- (i) reconsideration of the Trial Chamber’s Oral Decision of 6 May 2008 (“Impugned Decision”) on the ground that the Trial Chamber erred in deciding that Witness TF1-215 had no protective measures in place; or, in the alternative;
- (ii) leave to appeal the Impugned Decision on the grounds that (a) exceptional circumstances exist in that the failure to implement protective measures in accordance with Rule 75(F), whatever the origins of the protective measures, raises issues of fundamental legal importance<sup>2</sup> and (b) the Prosecution may suffer irreparable prejudice as a result of the Impugned Decision in that depriving the Prosecution of the evidence of Witness TF1-215 is a matter which cannot be cured on final appeal;<sup>3</sup>

NOTING the “Public Prosecution Corrigendum to Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215” filed by the Prosecution on 12 May 2008 (“Corrigendum”);<sup>4</sup>

NOTING ALSO the “Defence Response to the Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215 and Its Corrigendum” filed on 22 May 2008 (“Response”)<sup>5</sup> wherein the Defence opposes the Motion on the grounds that the Prosecution’s applications for reconsideration of the Impugned Decision and leave to appeal are without merit<sup>6</sup>, in that (i) the Prosecution has not demonstrated that the Trial Chamber committed a discernible error resulting in prejudice to the Prosecution;<sup>7</sup> (ii) it is not an issue of fundamental legal importance for two different Trial Chambers to interpret an ambiguous decision in two different ways;<sup>8</sup> and (iii) the Prosecution has not suffered any irreparable prejudice since there are other witnesses who are able to testify to similar events and allegations;<sup>9</sup>

NOTING ALSO the Prosecution “Reply to Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215”, filed on 27 May 2008 (“Reply”);<sup>10</sup>

<sup>1</sup> SCSL03-01-T-501 (“Application”).

<sup>2</sup> Motion, para. 29.

<sup>3</sup> Motion, para. 32.

<sup>4</sup> SCSL03-01-T-502 (“Corrigendum”).

<sup>5</sup> SCSL03-01-T-512 (“Response”).

<sup>6</sup> Response, para 5.

<sup>7</sup> Response, paras 14-17.

<sup>8</sup> Response, para. 32.

<sup>9</sup> Response, paras 30, 31.

<sup>10</sup> SCSL03-01-T-522 (“Reply”).

NOTING the “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses” rendered by Trial Chamber I in the case of the *Prosecutor v. Sesay, Kallon, Gbao* (“RUF trial”)<sup>11</sup> on 5 July 2004 (“RUF Decision”);<sup>12</sup>

RECALLING that on 6 May 2008, prior to the Witness TF1-215 testifying, the Prosecution notified the Trial Chamber and the Defence that the witness had been “granted protective measures by Trial Chamber I on 5 July 2004 ... [and that] the protective measures that he has been granted are the use of a pseudonym as well as a screen during his testimony.”<sup>13</sup> As the RUF Decision referred to did not list the witnesses covered by the protective measures ordered in that decision, the Trial Chamber requested that the Prosecution provide a complete list of witnesses to which the RUF Decision applied.<sup>14</sup> The Prosecution provided the Trial Chamber and the Defence with documents relating to the RUF Decision.<sup>15</sup> The Defence orally applied for a rescission of the protective measures.<sup>16</sup>

RECALLING the Trial Chamber’s Oral Decision of 6<sup>th</sup> May 2008, where the Trial Chamber held as follows:

The Defence have opposed and applied to rescind the purported protective measures for witness TF1-215. The Prosecution submit that the witness is protected by an order of Trial Chamber I of 5 July 2004, entitled “Decision on Prosecution motion for modification of protective measures for witnesses”, which the Prosecution submits applies to 266 witnesses of fact including witness TF1-215. The decision of 5 July 2004 ruled on a 5 May motion filed by the Prosecution and entitled “Renewed Prosecution motion for protective measures pursuant to order to the Prosecution for renewed motion for protective measures”, dated 2 April 2004. It was filed pursuant to an order of the Trial Chamber on 2 April 2004; the order being entitled “Order to the Prosecution for renewed motion for protective measures”. After careful consideration of that decision and the submissions of counsel, we find nothing in the decision which would entitle witness TF1-215 to any protective measures. In our view, the decision relates solely to those witnesses listed in annexes A and B of the renewed Prosecution motion for protective measures. Witness TF1-215 is not among those witnesses listed in the annexes. Accordingly, the witness will testify in open court and the Defence application to rescind the protective measures of this witness is now moot.<sup>17</sup>

MINDFUL of Rules 26bis, 54, 73 and 75 of the Rules of Procedure and Evidence (“Rules”);

<sup>11</sup> SCSL-04-15-T (“RUF trial”).

<sup>12</sup> *Prosecutor v. Sesay et al*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004 (“RUF Decision”).

<sup>13</sup> Transcript 6 May 2008, p. 9101, lns. 12-19 referring to *Prosecutor v. Sesay et al*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004 (“RUF Decision”).

<sup>14</sup> Transcript, 6 May 2008, p. 9102, lns. 2-16.

<sup>15</sup> Transcript 6 May 2008, p. 9108 ln. 24/9109 ln. 15; *Prosecutor v. Sesay et al*, SCSL-04-15-PT-102, “Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for renewed Motion for Protective measures dated 2 April 2004”, 4 May 2004 (“Renewed Motion”) and “Material Filed pursuant to order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004”, 26 April 2004 (“Witness List of 26 April”); “Order to the Prosecution for renewed motion for Protective Measures”, dated 2 April 2004; “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, dated 5 July 2004. It appears from Motion, para. 15 that there were “prior Prosecution filings upon which the RUF decision was based” which were not supplied to the Trial Chamber.

<sup>16</sup> Transcript 6 May 2008, p. 9104, lns. 3-4. The Defence’s argument for rescission of the protective measures begins at p. 9104, ln. 6 and continues through p. 9105, ln. 18.

<sup>17</sup> Transcript 6 May 2008, pp. 9122 to 9123.

**CONSIDERING** in relation to the request to reconsider the Impugned Decision that it is within the inherent jurisdiction of the Trial Chamber to reconsider one of its own decisions in circumstances of a clear error of reasoning<sup>18</sup> and that the decision to reconsider is a discretionary one;<sup>19</sup>

**FINDING HOWEVER** that in the instant case it is inappropriate for the Trial Chamber to exercise its discretionary power as it does not find that the Impugned Decision involves a clear error of reasoning; nonetheless, the Trial Chamber will consider the Prosecution's alternative application for leave to appeal;

**NOTING** that Rule 73(B) of the Rules provides that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

**NOTING** therefore that Rule 73(B) does not confer a general right of appeal, but rather that leave to appeal may be granted by the Trial Chamber only in cases where the conjunctive conditions of exceptional circumstances and irreparable prejudice to a party are both satisfied;

**CONSIDERING** that the overriding legal consideration in respect of an application of this nature is that the applicant's case must reach a level nothing short of exceptional circumstances and irreparable prejudice, having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals;<sup>20</sup>

**RECALLING** the Appeals Chamber's ruling that:

In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal;<sup>21</sup>

**SATISFIED** that the Prosecution has met the conjunctive conditions of exceptional circumstances, in that the issue at stake relates to witness protection, and irreparable prejudice, in that the Impugned Decision has resulted in a key witness for the Prosecution refusing to testify;<sup>22</sup>

**FOR THE ABOVE REASONS;**

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<sup>18</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-125, "Decision on Defence Motion to Set Aside and/or Reconsider Trial Chamber's 'Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure' dated 13 September 2006", 5 October 2006, para. 24. See also, *Prosecutor v. Norman et al.*, SCSL-04-14, "Decision on Prosecution Appeal against the Trial Chamber's decision of 2 August 2004 refusing Leave to File an Interlocutory Appeal", 17 January 2005, paras 31, 35 ("CDF Appeals Decision").

<sup>19</sup> *Prosecutor v. Delic et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, para. 48.

<sup>20</sup> See *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.


<sup>21</sup> See *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.


<sup>22</sup> See also SCSL-03-01-T-584, Decision on Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168, 10 September 2008.

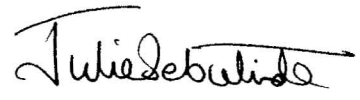
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GRANTS the request for leave to appeal the Impugned Decision;  
DENIES the Motion in all other respects.

Done at The Hague, The Netherlands, this 15<sup>th</sup> day of September 2008.

  
Justice Richard Lussick

  
Justice Teresa Donerty  
Presiding Judge

  
Justice Julia Sebutinde

