

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

SEIZED of the Oral Motion made by Ms. Quincy Whitaker, Standby Counsel for the Accused Sam Hinga Norman ("First Accused"),¹ during trial on the 17th of September, 2004;

NOTING the Oral Response given by the Prosecution to the Oral Motion during trial on the 17th of September, 2004 and the Oral Reply from Ms. Whitaker on the same day;

SEIZED of the *Norman and Fofana Joint Request for Variation of Protective Measures of Prosecution Witnesses Pursuant to Rule 75(G-I)*, filed by the Defence for the First and Second Accused on the 27th of September, 2004 ("Request");

NOTING the *Confidential Prosecution Response to "Norman and Fofana Joint Request for Variation of Protective Measures of Prosecution Witnesses Pursuant to Rule 75(G-I)"*, filed by the Prosecution on the 7th of October, 2004 ("Response");

NOTING the *Samuel Hinga Norman and Moinina Fofana Reply to Prosecution Response to Request for Variation of Protective Measures*, filed by the Defence for the First and Second Accused on the 12th of October, 2004 ("Reply");

RECALLING the Trial Chamber's *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses*, dated the 8th of June, 2004 ("Decision");

RECALLING the Trial Chamber's Oral Ruling on this Request rendered in court on the 2nd of November, 2004, where it stated that the written reasoning to this Ruling would follow;

ISSUES THE FOLLOWING RULING:

I. ORAL MOTION

Defence Motion

I. On the 17th of September, 2004, Ms. Quincy Whitaker, Standby Counsel on behalf of the First Accused during the trial of the CDF group of indictees orally applied for the protective measures accorded to Witness TF2-082 to be withdrawn and his identity made public following his testimony on the grounds that (1) there was no evidence that he genuinely feared reprisals and that he simply had an apprehension of being in a "strange place"; (2) the said witness told Defence Counsel for the Second Accused in an interview prior to him testifying, that he was happy to testify publicly on behalf of the Defence and had no genuine fear requiring his identity to remain secret; (3) since the 13th century in the United Kingdom trials have been conducted in public so that persons from the public may come forward with contradicting and exculpatory evidence; (4) inroads in the public nature of a trial should not be made unless absolutely necessary and that purposely locating the Court in Sierra Leone is to inform the Sierra Leonean population of the evidence and how a verdict is reached.

¹ By Oral Order of the 21st of September, 2004, Standby Counsel for the Accused, Sam Hinga Norman were appointed as Court Appointed Counsel by the Trial Chamber. This was confirmed by a subsequent Written Order of the Trial Chamber, *Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings*, dated the 1st of October, 2004.

2. Ms. Whitaker cited three authorities from the International Criminal Tribunal for the former Yugoslavia ("ICTY")² in support of her arguments.³

3. Mr. Yada Williams, Counsel for the Third Accused, associating himself with the submissions of Ms. Whitaker, submitted that the Court transcripts could be reviewed following a witness's testimony in closed session to ascertain whether it discloses the identity of the witnesses, and if not, the transcript could be made available to the public.

Prosecution Response

4. In its response, the Prosecution contended that the Trial Chamber should not retrospectively remove protective measures for witnesses as this would raise concerns from the witnesses about the guarantees they had been given prior to giving testimony and may deter future witnesses from coming forward for fear of not being protected. The Prosecution submitted that this action would be dishonest. The Prosecution further submitted that the decisions cited by the Defence were made prior to the witness testifying, and are distinguishable because of the difficult circumstances of Sierra Leone.

5. The Prosecution also stated that the evaluation of necessary protective measures for witnesses is a question for the Victims and Witnesses Unit of the Special Court ("VWU"), to assess objectively, and that the questions that Defence Counsel were asking witnesses in terms of their protection needs, such as "are you brave?" are rhetorical, and not the best way to determine the fears of the witness. The Prosecution submitted that holding a *voir dire* to assess the protection needs of each witness prior to their testimony could offend the concept of timeliness.

Defence Reply

6. In her reply to the Prosecution Response, Ms. Whitaker for the First Accused submitted that the Trial Chamber has the responsibility of making a decision on an application for protective measures for witnesses and that this is not a decision for the VWU. She submitted that the Trial Chamber is charged with ensuring a fair trial and a public hearing.

II. WRITTEN MOTION

Defence Request

7. In their written Motion, the Defence submit that it is the burden of the Prosecution to establish that the protective measures sought are the least restrictive measure required for each witness brought forward⁴ and that the circumstances surrounding evidence in support of the current protective measures granted for witnesses have changed dramatically and should be reviewed and in some cases varied.⁵

² For purposes of this decision the International Criminal Tribunal for Rwanda is referred to as "ICTR".

³ *Prosecutor v. Kunarac*, Order on Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial, 5 October 1998; *Prosecutor v. Tadic*, Order for Protective Measures in the Matter of Allegations Against Prior Counsel, 12 October 1999; *Prosecutor v. Simic*, Order for Protective Measures in the Matter of Contempt Allegations Against an Accused and His Counsel, 30 September 1999.

⁴ Request, para. 7.

⁵ *Ibid.*, para. 8.

8. The Defence submit further that every witness who has testified has had his or her identity disclosed to the Accused and argues that this shows that the Prosecution objections to disclosure of the identity of witnesses are unfounded. It also contends that the initial concerns of the Prosecution had been proven to be unfounded as no retaliation or retribution had occurred to the witnesses and the identity of witnesses and long been known to the Accused and their defence teams, this being a changed circumstance.⁶

9. In addition, the Defence submit that the question of whether a danger or risk exists for a witness should be examined again on an individual, case-by-case basis according to an objective test and that "exceptional circumstances", within the meaning of Rule 75(A) of the Rules of Procedure and Evidence of the Special Court ("Rules"), require circumstances that go beyond the prevailing situation in Sierra Leone when the Special Court was established and the Rules drafted. It is also submitted by the Defence that the Prosecution bears the responsibility for showing such exceptional circumstances, and that exceptional circumstances cannot be established for entire categories of witnesses.⁷

10. With respect to specific witnesses who testified before the Court, the Defence submit that the identities of witnesses TF2-159, TF2-151, TF2-032, TF2-033 and TF2-040 should be revealed as they have testified that they did not request protective measures, nor were they afraid that their identities would be known.⁸

11. With respect to Witness TF2-082, the Defence reiterate their submission made in their Oral Motion,⁹ and that the exculpatory evidence of Witness TF2-082 and of insiders generally, should be made available publicly, with appropriate redactions, if necessary.¹⁰

12. Furthermore, the Defence state that the trials held in Sierra Leone is an important way for the people of the country to heal the wounds of the civil war and must therefore be given in public hearings, and that a trial before an international criminal tribunal is different from that of a Sierra Leone criminal court, as the elements of war crimes are vastly different and therefore the public should be educated of this difference.¹¹

13. The Defence submit that there should be a continuing obligation for the Trial Chamber to satisfy itself that the "minimum interference with the statutory principle of a public trial is occurring at every stage of the trial process", and that for this reason, the Trial Chamber should permit a short *voir dire* prior to each witness giving evidence.¹²

14. According to the Defence, some witnesses had already testified that they did not request protective measures but that these were suggested by the Prosecution. They state that while this factor may not be decisive, a failure to ask for these measures is a cogent indication of whether the witnesses have genuine fears or whether this measure has been imposed routinely thereby departing from the principle of a fair and public trial.¹³ In addition, the Defence argue that there is a cumulative, prejudicial effect on the Accused's right to a fair trial, through the provision of protective measures

⁶ *Ibid.*, para. 9.
⁷ *Ibid.*, paras 10-11.
⁸ *Ibid.*, paras 12-16.
⁹ *Ibid.*, paras 17-21; see *supra* para. 1.
¹⁰ *Ibid.*, para. 23.
¹¹ *Ibid.*, para. 22.
¹² *Ibid.*, para. 24.
¹³ *Ibid.*, para. 25.

and the non-disclosure to the public, because witness testimony when made public provides an incentive to that witness to tell the truth since it may be publicly contradicted, and the public may then come forward to the Defence to provide relevant information to either support or contradict previous testimonies.¹⁴

15. The Defence further submit that the protective measures given to witnesses should continually be subject to review, and that Rule 75(G) of the Rules contemplates later changes to protective measures provided to witnesses, a practice prevailing at ICTY and ICTR.¹⁵ The Defence maintain that while the Trial Chamber may appropriately consult with the VWU, the final decision regarding the provision of protective measures to witnesses rests with the Trial Chamber and not the VWU, noting that it is the Trial Chamber that is statutorily charged with ensuring a fair trial.¹⁶

Prosecution Response

16. In its Response, the Prosecution indicates that the Defence violated their obligation under the Trial Chamber's "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses" of the 8th of June, 2004 ("Decision on Protective Measures") by identifying data of a protected witness and information provided in closed session.

17. The Prosecution also objects to the Defence claim that "a dramatic change" in the security issues of witnesses has occurred and opposes the variation of the order on non-disclosure of witnesses' identities to the public.¹⁷ It further submits that the fact that the names of the witnesses who have already testified, were long ago known to the First Accused and his Defence and that no retaliation or retribution towards these witnesses has occurred, does in no way constitute "a change in circumstances".¹⁸ These witnesses, it is submitted by the Prosecution, are free from acts of interference and retaliation, precisely because there is a system in place that protects the non-disclosure of their identity to the public. The Prosecution indicates that the Decision on Protective Measures imposes strict obligations on Defence Counsel and other officers of the Special Court not to disclose the identity of witnesses to the public. Therefore, the Accused is personally subject to the terms of the Decision on Protective Measures, as argued by the Prosecution, and any violation thereof is a serious matter.¹⁹

18. The Prosecution further reiterates its submission as was presented in its Motion for protective measures,²⁰ i.e. that "exceptional circumstances exist in the present case" because "the security threats and risk of interference are real, generalized and extend to all witnesses and persons who are suspected or perceived to testify against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa".²¹

¹⁴ *Ibid.*, para. 27.

¹⁵ *Ibid.*, para. 29 referring to *Baraguiza* case [sic!] in ICTR jurisprudence and to ICTY decisions in *Prosecutor v. Kunarac*, Order on Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial, 5 October 1998, para. 9; *Prosecutor v. Tadic*, Order for Protective Measures in the Matter of Allegations Against Prior Counsel, 12 October 1999, para. 2; *Prosecutor v. Simic*, Order for Protective Measures in the Matter of Contempt Allegations Against an Accused and His Counsel, 30 September 1999, para. 2.

¹⁶ Request, para. 30.

¹⁷ Response, para. 5.

¹⁸ *Ibid.*, para. 6.

¹⁹ *Ibid.*, para. 7.

²⁰ Prosecution Motion for Modification of Protective Measures, 4 May 2004.

²¹ Response, para. 8 (emphasis in original).

19. The Prosecution further submits that the Defence has not substantiated its claim, by presenting any independent factual evidence that the security situation has changed and thus warrants a variation of the Trial Chamber's ruling on protective measures.²² In light of this failure by the Defence, the Prosecution finds it unnecessary to present any additional evidence of existence of exceptional circumstances, and notes that the Trial Chamber can consult the VWU if necessary.²³

20. Furthermore, the Prosecution refutes the Defence argument that it failed to provide an objective justification for each individual witness.²⁴ The Prosecution further argues that several factors when added together result in an objective and accurate determination of the potential threat faced by the witnesses. These include concerns expressed by the VWU and the OTP investigators; fears expressed by witnesses themselves; numerous sources indicating the recent Kamajors' activities attempting to identify witnesses and their intention to interfere with the latter and disrupt the mission of the Special Court; declarations of the Sierra Leone Police, underlining its inability to provide security to witnesses, especially in remote areas etc.²⁵

21. Another Prosecution submission is that "the subjective feelings of witnesses do not constitute in and on themselves an objective assessment of whether a risk exists as to their personal security".²⁶ Additionally, as argued by the Prosecution, the security situation affecting the concerned witnesses should be taken into account by the Trial Chamber when deciding the appropriateness of protective measures,²⁷ as well as fears expressed by persons other than the witness, for example, their family, the Prosecutor or the VWU.²⁸

22. According to the Prosecution, the fact that a witness may reply that he or she is not afraid to testify when testifying under protection is not conclusive or determinative of the necessity of the protective measures for this witness and that such witnesses' answers must be appreciated within the context in which they were given.²⁹ Additionally, the Prosecution points out that several witnesses have expressed concerns about their security.³⁰

23. In its final submission, the Prosecution notes that the Court is discharged of its positive duty to provide protection to a witness, only after the witness has been informed of the potential threat and he or she waives the right to protection. As submitted by the Prosecution, this has not yet been the case, and should a witness waive his or her right to be protected the Prosecution will apply to the Trial Chamber accordingly.³¹

24. As to the Defence request for a case-by-case assessment of protective measures for witnesses, the Prosecution submits that the Special Court has repeatedly denied requests to this effect for this approach would be inappropriate and unrealistic taking into account the volatile security situation in

²² *Ibid.*, para. 9.

²³ *Ibid.*, para. 10.

²⁴ *Ibid.*, para. 11.

²⁵ *Ibid.*, para. 12.

²⁶ *Ibid.*, para. 13 referring to *Prosecutor v. Alphonse Nteziriyayo*, Decision on the defence motion for protective measures for witnesses, 18 September 2001, para. 7.

²⁷ *Ibid.*, para. 13 referring to *Prosecutor v. Musema*, Decision on Prosecutor's Motion for Witness protection, 20 November 1998, para. 11.

²⁸ *Ibid.*, para. 13 referring to, *inter alia*, *Prosecutor v. Tadic*, Decision on the prosecutor's motion requesting protective measures for victims and witnesses, 10 August 1995, para. 62.

²⁹ *Ibid.*

³⁰ *Ibid.* referring to witnesses TF2-152, T. 38 (23 September 2004), TF2-032, T. 11 (14 September 2004), TF2-082, T. 77 (14 September 2004).

³¹ *Ibid.*, para. 15.

Sierra Leone towards witnesses and protective measures of pseudonym and non-disclosure of identities being of a general nature.³² This, as submitted by the Prosecution, also follows from the jurisprudence of ICTR and ICTY.³³ For these reasons, the Prosecution submits, the request to hold a *voir dire* for each witness as to their security threats should be rejected.³⁴

25. The Prosecution further refutes the Defence argument that the use of a pseudonym and screen during testimony violates the right of the Accused to a fair and public trial, since this right is not absolute and can be limited when the security of witnesses so requires. It further stresses that, in light of the sensitivity of this trial, considering the serious threats and hostility expressed against witnesses and given the locus of the alleged crimes and the seat of the Special Court in Freetown, these protective measures represent the least restrictive measures available to provide the necessary protection.³⁵ Moreover, these basic measures are consistent with the standard practice and conditions at the ICTR.³⁶

26. The Prosecution submits that, contrary to Defence allegations, the use of protective measures do not prevent the public and the media from attending the trial, hearing, understanding and reporting all the evidence presented by witnesses, both, inculpatory or exculpatory, and to observe that the trial process is fair, and that the only information that is withheld from the public is the witness's identity for purposes of personal security. The Prosecution submits that the Defence argument, that the witnesses' testimonies may not be publicly contradicted by other witnesses or that the non-disclosure of witnesses' identities prevents unknown witnesses to come forward with relevant testimony is unfounded.³⁷

27. The Prosecution strongly objects to the Defence request for *post-facto* disclosure to the public of the identity of witnesses TF2-033, TF2-040 and TF2-082, who have already testified before this Trial Chamber,³⁸ and contends that it would be utterly unfair and contrary to the interests of justice to have the protective guarantees given to a witness retroactively lifted, practice not contemplated in the Rules and defies the scope of Rule 75 (I) of the Rules. The Prosecution submits that protective measures can be varied or modified as to witnesses who will testify in future.³⁹ The Prosecution reiterates that this applies also to the witnesses whose identity is kept confidential from the public.

28. The Prosecution argues that the release to the public and media of edited transcripts of testimonies given in closed session, as was done in the *Kunarac*, *Tadic* and *Simic* cases referred to by the Defence,⁴⁰ does not amount to a retroactive alteration of protective measures for the following reasons:

³² *Ibid.* para. 16 referring to, *inter alia*, *Prosecutor v. Gbao*, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, paras 54, 53.

³³ *Ibid.* para. 17 referring to, *inter alia*, *Prosecutor v. Muwunyi*, 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. 22.

³⁴ *Ibid.* para. 18.

³⁵ *Ibid.* paras 19-20 referring to, *inter alia*, *Prosecutor v. Tadic*, *supra* note 28, paras 55, 41, 38.

³⁶ *Ibid.* para. 21 referring to, *inter alia*, *Prosecutor v. Rutuganda*, Judgement and Sentence, 6 December 1999, para. 13.

³⁷ *Ibid.* para. 22 referring to, *inter alia*, *Prosecutor v. Krnojelac*, Order on protective measures for witnesses at trial, 26 October 2000.

³⁸ *Ibid.* para. 23.

³⁹ *Ibid.* para. 24 referring to *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion to Withdraw Protective Measures for Witness K, 12 November 1996.

⁴⁰ See *supra* footnote 3.

(a) “[...] the order for closed session was from the start subject to the release of the edited transcripts to the public.”

(b) “[...] the transcripts taken in closed session were disclosed to the public after editing by the Prosecution and the [VWU] of all identifying witness information. Thus, the protection of the identity of the witness which was the object of the closed session hearing was never subsequently lifted.”⁴¹

29. Alternatively, the Prosecution argues that the Defence request in relation to witnesses TF2-033, TF2-040 and TF2-082 be dismissed since there has been no change in the risk faced by these witnesses and that they have not waived their right to be protected.⁴²

Defence Reply

30. In its Reply, the Defence contend that the Prosecution presentation that witnesses have a “right” to protective measures and that they can therefore “waive” such a “right” is erroneous since neither the Statute nor the Rules provide for such a “right”. The Defence submit that witnesses can choose to come to testify and once they have made such a choice, they have no “right” to be protected against danger or risk, which may result from their testimony in trial. Further, the Defence argue that it is in the discretion of the Court to order protective measures and that this discretion is exercised subject to statutory limitations in order to ensure a fair trial for the Accused.⁴³

31. The Defence refute the Prosecution submission that the Special Court can exercise discretion to order protective measures even where the witness expressly states that he or she does not desire or need protection.⁴⁴ The Defence stress that the opinion of the witness should be the decisive factor when evaluating the necessity for granting the protective measures, whereas other evidence of risk or danger to that witness is relevant, but only when it supports the fears expressed by the witness. Further, as submitted by Defence, the Court must determine if these fears are justified and if application of protective measures would not jeopardize the fairness of the Accused’s trial.⁴⁵

32. Regarding the witnesses who, according to the Defence, declared that they were not afraid of testifying in public, the Defence reiterate their previous submission, that their protective measures should be lifted retroactively.⁴⁶

III. APPLICABLE LAW

33. The governing statutory provisions on the issue of protective measures are embodied in both the Statute and Rules of the Special Court. Article 16, paragraph (4) of the Statute is pre-eminent. It provides as follows:

[Witnesses and Victims Unit] shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.

⁴¹ Response, para. 25.

⁴² *Ibid.*, para. 26.

⁴³ Reply, para. 3.

⁴⁴ *Ibid.*, para. 4 referring to Response paras 12-14.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

34. The next relevant statutory provision is Article 17, paragraph (2), which is ⁱⁿ ~~is~~ these terms:

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.

35. Specifically, Rule 75 of the Rules provides, *inter alia*, as follows:

(A) 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.

(B) A Judge or a Chamber may hold an *in camera* proceeding to determine whether to order:

(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) Expunging names and identifying information from the Special Court's public records;

(b) Non-disclosure to the public of any records identifying the victim or witness;

(c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and

(d) Assignment of a pseudonym;

(ii) Closed sessions, in accordance with Rule 79;

(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television."

(C) A Judge or a Chamber shall control the manner of questioning to avoid any harassment or intimidation.

[...]

(F) Once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but;

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seized of the first proceedings;
or

(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

(H) Before determining an application under Sub-Rule (G) (ii) above, the Chamber seized of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Special Court.

(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

36. Significantly, also, Rule 69 of the Rules provides that:

(A) In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Witnesses and Victims Section.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.

IV. DELIBERATION

1. Whether Protective Measures may be Rescinded, Varied or Augmented

(a) The Trial Chamber's Decision on Protective Measures

37. The Trial Chamber recalls that in its Decision on Protective Measures, it ordered that the names and any other identifying information concerning all witnesses be sealed and not disclosed to the public or the media.⁴⁷ Furthermore, the Trial Chamber ordered that all witnesses who had not waived their right to protection should testify with the use of a screening device from the public. We allowed additional protective measures to be granted to three sub-categories of witnesses, namely, sub-categories A and C, victims of sexual violence and insider witnesses - voice distortion, and sub-category B, child witnesses - use of a closed circuit television and the image distortion, leaving open the possibility of insider witnesses being permitted to testify in closed session, on the application of the Prosecution.

38. In granting these measures the Trial Chamber made a balanced evaluation of the rights of the Accused to a fair and public trial and measures to safeguard the privacy and security of the witnesses and victims. The subjective feelings of the witnesses were not the only factor, which was taken into account by the Trial Chamber when making an objective assessment of whether a risk to their personal security existed. The protective measures were granted based on numerous factors, prominent among which was the unique nature of this Court being located in Sierra Leone, the locus where the offences were allegedly committed. It remains our considered view that the physical

⁴⁷ Decision on Protective Measures, Disposition paras 2(b) and 2(e).

location of the Court has a substantial impact on security considerations for witnesses and victims. The Trial Chamber, therefore, reiterates that "witnesses and their families might particularly be endangered by threats arising in the specific milieu of their local community".⁴⁸ In that Decision we held that the requirement of "exceptional circumstances" within the meaning of Rule 69 (A) was met and we reiterate this finding in the present decision.⁴⁹

39. We, therefore, restate with emphasis the factors to be taken into account in confirming the validity of protective measures. They are: (1) fears expressed by the witnesses in Court; (2) concerns expressed by the VWS and by the investigators of the Office of the Prosecutor; (3) various confidential statements from the witnesses alleging serious threats made to them and their families; (4) declarations from numerous sources on the recent Kamajor activities attempting to disrupt the activities of the Court.

(b) The objective test

40. As indicated above, the subjective feeling of a witness is not in itself conclusive for granting the protective measures, although it is one of the factors to be considered in the protective measures equation. Therefore, the admission by a witness in the course of the trial of lack of fear for disclosure of his or her identity cannot be decisive of the issue. In fact, the Trial Chamber notes that replies of witnesses on this matter should be taken into consideration within the context of their entire testimonies. To this effect, the Trial Chamber has gone through the portions of the transcripts capturing the accurate answers given by the witnesses TF2-159, TF2-151, TF2-032, TF2-033, TF2-040, TF2-082 and concludes that the answers of the witnesses given under awareness of protective measures being in place, are not conclusive of the actual necessity or otherwise of protective measures for these witnesses.

(c) Removal of protective measures

41. We note that while vesting the Court with authority to grant protective measures to victims and witnesses, the Statute and the Rules do not specify the duration of these protective measures or the circumstances when such measures cease to have legal force in the "first proceedings"⁵⁰. A reasonable interpretation, in the view of the Trial Chamber, is that once protective measures are granted, they cannot be revoked or varied in the "first proceedings". Therefore, the Trial Chamber must emphasize that, if protective measures granted during the "first proceedings" are to have any efficacy, the Court must guarantee that witnesses who have come forward to testify relying on such a guarantee do in reality enjoy the veil of anonymity from the public. To withdraw such a guarantee *ex post-facto* would indeed undermine the integrity of the proceedings of the Court. Contrastingly, it is noteworthy that the Rules do confer authority on the Court to rescind, vary or augment in the "second proceedings"⁵¹ protective measures granted during the "first proceedings".

42. Drawing some persuasive guidance from the ICTY decision in *Tadic* on the issue of withdrawal of protective measures for Prosecution witness L in the "first proceedings",⁵² it is significant to note that the Trial Chamber in that case indicated that "if a less restrictive measure can

⁴⁸ *Ibid.*, para. 30.

⁴⁹ See *Ibid.*, paras 31-35.

⁵⁰ As defined in Rule 75 (F) of the Rules.

⁵¹ As defined in Rule 75 (F) (i) of the Rules.

⁵² *Prosecutor v. Dusko Tadic a/k/a "Dule"*, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996.

satisfy the requested protection, that lesser measure should be applied". The Trial Chamber further observed that "if at any time, [protective] measures are no longer required, they shall cease to apply". In that case, the Trial Chamber did order the withdrawal of the protective measures on the premises of its "preference to limit protective measures to those that are truly necessary, and the fact that the Motion [was] unopposed".⁵³

43. Based on the above considerations, this Trial Chamber concludes that where a Party in a case seeks to rescind, vary or augment protective measures granted to the witness, it should present supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection. The Trial Chamber holds that the Defence have failed to adduce any evidence capable of showing, on a preponderance of probabilities, the dramatically changed circumstance justifying a radical variation of the protective measures. The contention that no retaliation or retribution has occurred to any witnesses whose identity has long been known to the Defence and who has so far testified before this Court does not constitute such changed circumstance. We, therefore, find such a submission both logically and legally unsustainable. On the contrary, there seems to be some plausibility in the Prosecution's contention that it may well be that witnesses have been free from retaliation due to the mechanism of protective measures.

44. For the foregoing reasons, the Trial Chamber denies the Defence Request to have disclosed the identities of witnesses TF2-159, TF2-151, TF2-032, TF2-033 and TF2-040 and opines that the records of the witnesses, who testified in closed sessions, should not be disclosed to the public, since it would result in *ex post-facto* removal of protective measures evidencing *mala fides* on the part of the Court.

45. We also find uninformative the ICTR decisions. Those decisions clearly referred to disclosure of the transcripts of closed sessions to the Defence in the "second proceedings".⁵⁴ The ICTY decisions are likewise unhelpful for the reason that the orders in those cases were issued before the witnesses came to testify in court and from the moment of issuance were subject to the release of the edited transcripts.⁵⁵

46. Accordingly, the Trial Chamber denies the Defence Request for the unsealing and disclosing to the public and the media the testimony of the witness TF2-082.

2. The issue of a *voir dire* assessment

47. We recall our previous rulings denying requests for a *voir dire* assessment of each witness' fears prior to his or her testimony, and accordingly reiterate our observation to the extent that "it would be unrealistic to expect either the Prosecution or the Defence, 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

⁵³ *Ibid.*, paras 5-6.

⁵⁴ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003, para. (c); *See also* Decision on the Jerome Bicamumpaka and Prosper Mugiraneza Urgent Motion for Disclosure of Closed Session Testimony and Exhibits for Witness LAG, 15 March 2004 and Decision on Disclosure of Transcripts and Exhibits of Witness EB, 6 May 2004.

⁵⁵ *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, Order for Protective Measures in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 September 1999, para. 2; *Prosecutor v. Dusko Tadic*, Order for Protective Measures in the Matter of Allegations Against Prior Counsel, 12 October 1999, para. 2; *Prosecutor v. Dragoljub Kunarac*, Order on Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial, 5 October 1998, para. 9.

to the actual or anticipated threats or intimidation"⁵⁶ in the context of the general security situation in Sierra Leone towards the witnesses. The Trial Chamber is satisfied that the Prosecution has clearly established that the security threats and risk of interference are real, generalized and extend to all witnesses and persons who are suspected or perceived to be prepared to testify against the Accused.

3. The issue of possible violation of the rights of the Accused

48. As an initial observation we recall our Decision on Protective Measures where we stated:

It is established by jurisprudence of other international criminal tribunals and courts that, generally, preference should be given to a public hearing to avoid the impression of "in camera" justice for the Accused, as well as to give the public the possibility to follow the trial. However, it is also established that "this preference has to be balanced with other mandated interests", among them protective measures for victims and witnesses, as laid down in Article 17(2) of the Statute.⁵⁷

The Trial Chamber emphasizes that the existing protective measures, i.e. use of a screen from public and use of a pseudonym, do not jeopardize the right of the Accused to a fair and public trial. These protective measures are designed to protect the witnesses' identity from the public. They do not prevent the Accused from exercising freely his rights to a fair trial, i.e. those envisaged in Article 17 (4) of the Statute and specifically in Article 17(4)(b) and 17(4)(e). As for the public nature of the trial, the Trial Chamber concludes that the minimum protective measures in no way prevent the public and the media from attending and following this trial. The Trial Chamber agrees with the Defence submission that through the public trial the people of Sierra Leone have a right to be informed about what happened during the civil war as one step towards reconciliation. But, there is clearly no authority from the jurisprudence to support the theory, as canvassed by learned Counsel for the First Accused, that there is an obligation, in the criminal adjudicative process, on the public to participate in the ascertainment of the truth by bringing forward evidence of a rebutting or exculpatory nature in response to the Prosecution's case.

49. As for the hearing in closed session, the Trial Chamber stresses that a measure of hearing the testimony in closed session is only granted to a certain category of the witnesses and is based on the principle of protection of victims and witnesses where the interests of justice so dictate. We have held on numerous occasions that this is "an extraordinary protective measure that will only be granted where it is shown that there is a real risk to the witness and / or his or her family and that their privacy or security will be threatened."⁵⁸

50. We, therefore, opine that the Defence submission that the trial conducted in closed session would prejudice the Accused by denying the possibility of witnesses who hear the testimony coming forward and being able to controvert it, is misconceived and without legal foundation. It is our considered view that though the conception of a fair trial may notionally include that of a public trial, in the circumstances of this application, the Trial Chamber does not agree with the Defence

⁵⁶ *Prosecutor v. Samuel Hinga Norman*, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 14 (emphasis omitted); See also *Prosecutor v. Gbao*, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, paras 53-54 and *Prosecutor v. Brima*, Decision on the Prosecutor's Motion on Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 14.

⁵⁷ Decision on Protective Measures, para. 39 (footnotes omitted).

⁵⁸ See, *inter alia*, *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Order on an Application by the Prosecution to Hold a Closed Session Hearing of Witness TF2-223, 27 October 2004.

contention that permitting a witness's testimony in closed session in the context of the application of protective measures, with all the necessary judicial guarantees for the protection of the due process rights of the accused persons, necessarily detracts from the fairness of the trial. The Defence position is mistakenly predicated upon some notion of a perfect trial.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

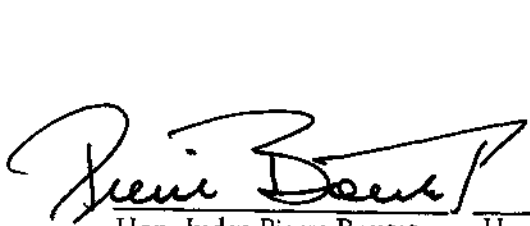
DENIES the Defence Request and **ORDERS** as follows:

- 1) That the testimony of the witness TF2-082 should remain sealed and not disclosed to the public and the media or posted on the Court's website;
- 2) That the identities of the witnesses TF2-159, TF2-151, TF2-032, TF2-033, TF2-040 and TF2-082 should remain sealed and their protective measures should remain in force;
- 3) That the protective measures granted to all Prosecution witnesses remain in force and that no *voir dire* assessment on protective measures is necessary before hearing testimony of each individual witness;

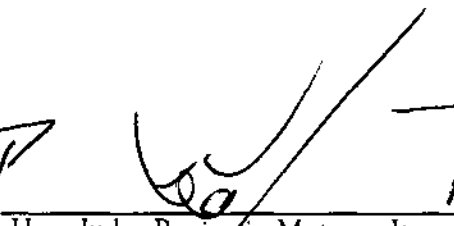
FINDS that the Defence have violated their obligation under the Trial Chamber's Decision on Protective Measures by identifying data of a protected witness and information provided in closed session and **ORDERS** that the Defence comply with Decision on Protective Measures and refrain from disclosing any information that discloses the identities of protected witnesses; and

ORDERS that both Parties should comply with their respective obligations under the Trial Chamber's Decision on Protective Measures and all Orders of the Trial Chamber regarding protective measures for witnesses and closed sessions.

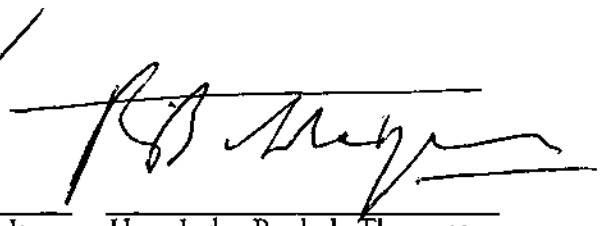
Done in Freetown, Sierra Leone, this 18th day of November, 2004



Hon. Judge Pierre Boutet



Hon. Judge Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber



Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

