

SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding Judge
Justice Richard Lussick
Justice Teresa Doherty

Acting Registrar: Herman von Hebel

Date: 21 March 2007

PROSECUTOR

Against

Charles Ghankay Taylor
(Case No.SCSL-03-1-PT)

DECISION ON DEFENCE MOTION TO LIFT THE REDACTIONS OF
IDENTIFYING INFORMATION OF FIFTEEN CORE WITNESSES

Office of the Prosecutor:

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TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Justice Julia Sebutinde, Presiding Judge, Justice Richard Lussick and Justice Teresa Doherty;

SEISED of the “Public Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses”, incorporating Confidential Annex A, filed on 7 February 2007 (“Motion”);

NOTING the “Confidential Prosecution Response to Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses”, filed on 19 February 2007, (“Response”) and the separate “Annex C to Prosecution Response to Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses”, filed ex-parte on the same date (“Annex C”);

NOTING the “Public Defence Reply to ‘Confidential Prosecution Response to Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses’”, a late filing filed on 27 February 2007 (“Reply”);

RECALLING that protective measures have previously been ordered in respect of witnesses or victims in earlier decisions of this Court, including the following: Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, dated 5 July 2004 (“**July 2004 Decision**”); Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-PT, Decision on Confidential 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, dated 5 May 2006 (“**May 2006 Decision**”); Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-PT, Decision on Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure, dated 15 September 2006 (“**September 2006 Decision**”); Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-PT, 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 5 October 2006 (“**October 2006 Decision**”); Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-PT, 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, dated 22 January 2007 (“**January 2007 Decision**”);

MINDFUL of the provisions of Articles 16(4), 17(2) and 17(4) of the Statute of the Special Court for Sierra Leone (“Statute”), and of Rules 26bis, 53, 54, 69, 73 and 75 of the Rules of Procedure and Evidence (“Rules”);

DECIDES as follows, based solely on the written submissions of the parties.

I. INTRODUCTION

1. The Motion seeks an order that the protective measures for 15 core Prosecution witnesses whose pseudonyms are provided in Confidential Annex A to the Motion be varied so as to disclose to

the Defence the un-redacted statements and names of those witnesses “as soon as practicable”, rather than 42 days prior to their testimonies in court.¹

2. According to the Defence, the existing orders for protective measures are provided for in the May 2006 Decision, September 2006 Decision (which was confirmed in the October 2006 Decision), and the January 2007 Decision.

3. The Prosecution, however, claim that 5 of the 15 core witnesses are protected by the protective measures ordered in the July 2004 Decision, (the “first proceedings” – see Rule 75 (F) to (J) *infra*), while the other 10 are protected under the May 2006 Decision (the “second proceedings” – see Rule 75(F) to (J) *infra*), the provisions of which are identical to those of the July 2004 Decision.²

4. The Prosecution is correct in respect of 14 of the said witnesses, but we were unable to find any reference to the remaining witness, TFI-366³, in any of the decisions mentioned by either the Prosecution or the Defence. It may be that this witness is shown in one of the said decisions under a different pseudonym which has since been changed. Nevertheless, the Prosecution should ensure that this witness is in fact protected by a current protective measures order.

II. PRELIMINARY MATTER

5. The Reply was filed out of time. Under Rule 7(C), a reply must be filed within five days of service of the response, unless otherwise ordered. The Response in this case was filed on 19 February 2007, so that the Reply should have been filed by 26 February 2007 at the latest (allowing for the intervening weekend), instead of which it was filed on 27 February 2007.

6. The reason for the late filing was given by the Defence as follows: “...Unfortunately because Lead Counsel was in Pakistan and because of the slow e-mail server resulting in several hours delay, his Legal Assistant who was in Freetown did not receive the final approved version of the Reply until after the filing deadline. We ask that the Trial Chamber accepts this late filing in the interest of justice, given the importance of the matters addressed, especially since there is no prejudice to the Prosecution.”⁴

7. Whilst the Trial Chamber does not view non-compliance with the Rules lightly, problems with a slow e-mail server have also been felt by the Trial Chamber on several recent occasions. We are therefore prepared on this occasion to admit the Reply notwithstanding the late filing, on the basis that the Reply probably would have been filed in time had it not been for the delay caused by the slow e-mail server.

8. Another preliminary matters concerns the length of the Motion and the Response. In our view, both documents offend against Article 6 of the Practice Direction on Filing Documents before the Special Court for Sierra Leone (“Practice Direction”). Article 6(C) provides (*inter alia*) that motions, and responses to such motions, “shall not exceed 10 pages or 3,000 words, whichever is the

¹ Motion, paras. 1,2,7,26.

² Response, para. 8.

³ Listed as Witness No. 6 in Confidential Annex A to the Motion.

⁴ See Court Management Support – Court Records CS7 – Notice of Deficient Filing Form, dated 27 February 2007.

greater.” The Motion contains 10 pages but includes Confidential Annex A, which is another 5 pages in length. The Response is 10 pages long, but is accompanied by Ex-Parte Annex C, which is more than 2 pages in length.

9. In our opinion, neither “annex” can correctly be called by that name. Both documents contain not merely additional information, but substantial additional submissions in support of the respective arguments of the Defence and the Prosecution. Documentation of that nature does not, in our view, fall within the meaning of “annex” or “appendix” and properly belongs in the main document. Article 6(F) of the Practice Direction - which provides that “appendices or authorities do not count towards the page limit” - does not apply in such a case.

10. However, in view of the importance of the issues raised, and in the interests of justice, the Trial Chamber is prepared to overlook the oversized filing on this occasion. Nevertheless, we caution the parties that, in future, an oversized filing will be ruled inadmissible unless prior authorization has been obtained in accordance with Article 6(G) of the Practice Direction.

III. SUBMISSIONS

Motion

11. The Defence submits that disclosure of the requested materials cannot be delayed until 42 days prior to the testimonies of the 15 witnesses.⁵ The Defence argues that “protective measures do not pre-empt the right of the accused to have adequate time and facilities for the preparation of his defence”. This argument relies on Article 17(4)(b), which provides that the accused is entitled to have adequate time and facilities to prepare his defence, and on Rule 69(C), which provides that “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.”⁶

12. The Defence maintains that a modification of the order for protective measures made in the May 2006 Decision is justified owing to a change in circumstances. The Defence says that, faced with more than 260 redacted witness statements and no Pre-Trial brief detailing witness priority, it is “encumbered with seemingly insurmountable difficulties in adequately preparing the defence.” With respect to the said 15 witnesses, effective investigations can only be carried out once their identities and the full contents of their statements are known.⁷

13. The Defence submits that in evaluating whether a change in circumstances justifies modification of protective measures, the Trial Chamber has the “twin obligation” to respect the rights of the accused and give due regard to the protection of the witnesses concerned. However, the Defence argues that where the proposed disclosure concerns the Defence only, and not the public or the media, there is an onus upon the Prosecution to demonstrate that such disclosure will increase the threat to witnesses. The Defence says that unless there is evidence to this effect, “it must be assumed that the Defence will abide by their obligations of confidentiality”. The Defence submits

⁵ Motion, para. 7.

⁶ Motion, para. 8.

⁷ Motion, para. 14.

that “[u]nsubstantiated claims of witness interference cannot justify an infringement of the right of the Accused to have adequate preparation time”⁸.

14. The Defence goes on to mention difficulties that could be caused to its investigations by “the geographical disjunction between the location of the trial and those of the investigations”⁹ and the need to cross-reference the anticipated testimonies of the said witnesses and compare their individual versions of similar events.¹⁰

15. The Defence claims that, since the proposed modification of the protective measures ordered in the May 2006 Decision is limited to disclosure to the Defence only, none of the witness would be put in danger.¹¹

16. The Defence also criticizes as excessive the Prosecution’s use of exceptional circumstances in justification of its redactions. As an example, the Defence cites the Prosecution’s redaction of public, open-session transcripts of witnesses in other trials, before serving the transcripts on the Defence. The Defence describes this behaviour as “capricious and without obvious sense” and “an example of over-zealousness on the part of the Prosecution, as well as an unjustifiable lack of courtesy to fellow officers of the court.”¹²

Response

17. The Prosecution submits that the Motion should be dismissed in relation to 13 of the witnesses and that with regard to the remaining 2 witnesses (TFI-387 and TFI-391), who have waived their right to protective measures relating to the disclosure of their identities, the Trial Chamber order that the protective measures be amended to allow the Prosecution to provide disclosure.¹³

18. The remaining Prosecution submissions may be summarized as follows:

(i) The Defence has not met its burden of establishing that it is necessary to change the existing balance between the rights of the Accused to a fair trial and the rights of the witnesses to the utmost protection. There must be a change of circumstances which shows that the 15 witnesses no longer need the granted protection and that the Accused has been denied his right to have adequate time to prepare his defence¹⁴.

(ii) The right of the Accused to have adequate time to prepare his defence is protected by the existing protective measures¹⁵.

(iii) There are no changed circumstances to warrant rescinding or varying the existing orders¹⁶.

⁸ Motion, para. 12.

⁹ Motion, para. 16.

¹⁰ Motion, para. 17.

¹¹ Motion, para. 19 – 25.

¹² Motion, para. 16.

¹³ Response, paras. 3, 34.

¹⁴ Response, paras. 12, 13.

¹⁵ Response, para. 12.

¹⁶ Response, para. 12.

(iv) Granting the Motion would increase the security risk to the 13 witnesses who have not waived their right to delayed disclosure.¹⁷

(v) Even if the Defence were to show that disclosure 42 days before the testimony of a particular witness is insufficient time for investigations, the appropriate remedy would be to provide for disclosure at a longer period before such testimony, for example 60 days, rather than many months before testimony¹⁸.

(vi) With regard to serving on the Defence redacted public, open-session transcripts, the Prosecution felt it necessary to redact portions of transcripts which had erroneously been placed in the public domain¹⁹. The said transcripts contained information tending to identify the witness, so the Prosecution redacted this information, notified the Registry of the redactions and requested it to “remove the transcripts from the public domain and resubmit versions which omitted this identifying data.” This was “to ensure compliance with a Court order for non-disclosure of identifying data.”²⁰

(vii) Since the Defence has not met its onus, the protective measures should not be varied²¹.

Reply

19. The Defence submits that it has met its burden in demonstrating that the present protective measures have to be varied. The Defence says that the identities of the subject witnesses can be safely disclosed to the Defence given that protective measures would remain in place were the Motion to be granted, since the Defence would remain bound by the terms of the protective measures orders and by undertakings made to the Prosecution, as well as by codes of professional conduct and internal protocols.²²

20. The Defence does not accept that a change of circumstances must be shown before the requested relief is granted,²³ but, in any event, sets out factors detailed in paragraphs 11 - 17 of the Reply which “individually and cumulatively” constitute a change of circumstances justifying a reconsideration of the subject protective measures²⁴. These “factors” are as follows:

(i) The Accused has been transferred to The Hague since the Protective Measures Order was made²⁵.

(ii) The trial date of 4 June 2007 had not been set at the time the Protective Measures Order was made²⁶.

¹⁷ Response, para. 12.

¹⁸ Response, paras. 12, 32.

¹⁹ Response, para. 30.

²⁰ Response, para. 26.

²¹ Response, para. 13.

²² Reply, para. 6.

²³ Reply, para. 2.

²⁴ Reply, paras. 3, 11-17.

²⁵ Reply, para. 11.

²⁶ Reply, para. 12.

(iii) On 22 September 2006, the Prosecution provided the Defence with a Provisional Witness list of over 260 witnesses, most of whose identities have not been disclosed to the Defence²⁷.

(iv) Almost 200 witnesses are protected by protective measures ordered by other Trial Chambers. The Prosecution has closed its case in all of its trials except the present, so that all other Defence teams are in possession of the names of witnesses which the Prosecution now seek to withhold only from the Taylor Defence²⁸.

21. With regard to the public transcripts, the Defence contends that the Prosecution has no right to redact publicly available transcripts of public sessions in the absence of an order of the Trial Chamber. “If the Registry has improperly and inadvertently disclosed something that should not have been made public, the only proper course would have been for the Prosecution to request the Trial Chamber seized of the matter to make the necessary order.”²⁹

22. Finally, the Defence submits that there was no reason to file the Response confidentially.³⁰

IV. APPLICABLE LAW

23. The rights of the accused, as guaranteed by the Statute, are provided for in Article 17. In particular, Article 17(2) 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.

24. Pursuant to Article 17(4)(b), the accused has the right “to have adequate time and facilities for the preparation of his or her defence”.

25. Rule 26bis obliges the Trial Chamber to respect the rights of the accused while paying due regard to the protection of witnesses. Rule 26bis states:

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.

26. Under Rule 69(A), in exceptional circumstances, a party may apply for an order for non-disclosure of the identity of a witness who may be in danger or at risk. Nevertheless, Rule 69(C) provides that, subject to Rule 75, the identity of the witness must be disclosed in sufficient time before the witness is to be called in order to allow adequate time for preparation of the prosecution and the defence.

27. Rule 75(A) states:

²⁷ Reply, para. 13.

²⁸ Reply, para. 14.

²⁹ Reply, para. 25.

³⁰ Reply, para. 27.

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 Victims and Witnesses 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.

28. Under Rule 75(F), protective measures once ordered, continue to apply in any other proceedings before the Special Court. Rule 75(F) is in these terms:

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.*

29. Rule 75(G) provides that “[a] party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings shall apply to the Chamber seized of the second proceedings.”

30. If the effect of a change would be to lessen the protective measures, then, under Rule 75(H), the Chamber must observe a certain procedure before it decides the application. Rule 75(H) states:

Before determining an application under Sub-Rule (G) above, if the effect of the change serves to decrease the protective measures granted to the victim or witness by the Chamber in the first proceedings, the Chamber seized of the second proceedings shall obtain all relevant information from the first proceedings, and may consult with any Judge who ordered the protective measures in the first proceedings, or the relevant Chamber.

31. Rule 75(I) provides for the jurisdiction to hear applications to vary protective measures. Rule 75(I) states:

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.”

32. Rule 75(J), which deals with the effect of an order made in the second proceedings, provides as follows:

If the Chamber seized of the second proceedings rescinds, varies or augments the protective measures ordered in the first proceedings, these changes shall apply only with regard to the second proceedings.

V. DELIBERATIONS

33. The order which the Defence seeks to vary is Order (a) of the May 2006 Decision. It is in the following terms:

“(a) That the Prosecution may withhold identifying data of a witness for whom the Prosecution is seeking protection...or any other information which could reveal the identity of such witness until 42 days before the witness is due to testify at trial.”

34. In making that order, and the various other orders for protective measures in the May 2006 Decision, the Trial Chamber sought to “balance the need to safeguard the privacy and protection of witnesses and victims with the rights of the Accused to a fair trial in the context of the specific measures sought.” This approach was in keeping with the provisions of the Statute and Rules mentioned above and with the jurisprudence of the Special Court.³¹

35. We note that 2 of the Prosecution witnesses, TFI-387 and TFI-391, have waived their right to protective measures related to the release of their identities³². These two witnesses were granted protective measures in the “second proceedings” (i.e. the May 2006 Decision).

36. As to the onus of showing that there is a need to vary the existing protective measures, we do not agree with the Defence submission that “[w]here the request for disclosure concerns the Defence only, not the public and media, the Prosecution must demonstrate that such disclosure exclusively to the Defence increases the threat to witnesses”³³. We note that the Defence does not cite any jurisprudence in support of this proposition. The existing protective measures, which reflect a balance between the protection of the witnesses and the rights of the Accused to a fair trial, prohibit disclosure of the witnesses’ identities to the Defence. Since the Defence now claims that such a prohibition is no longer necessary for the protection of the witnesses, it follows that the burden of establishing that claim falls upon the Defence.

37. We are of the view that the law was correctly stated in *Prosecutor v. Norman*³⁴ 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.” In the present case, the burden therefore falls upon the Defence of establishing that circumstances have changed so that the current protective measures are no longer necessary.

38. The changes in circumstances alleged by the Defence in the Motion do not establish that the existing protective measures are no longer necessary. In the January 2007 Decision, the Trial Chamber was satisfied on the evidence presented that “the potential threats to the security of witnesses are genuine and have not diminished since the First Protective Measures Decision³⁵ and the Second Protective Measures Decision³⁶, and that the witnesses referred to in Annex A(3) to the Motion are subject to similar security threats.” The Defence has not demonstrated that the potential threats to the security of witnesses have diminished since that decision. On the contrary, on the basis

³¹ See *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, dated 23 May 2003, paras. 9, 15, 16; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, dated 5 July 2004, para. 32; *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Ruling on Motion for Modification of Protective Measures for Witnesses, dated 18 November 2004, para.38; *Prosecutor v. Taylor*, Case No. SCSL-03-1-PT, 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, dated 22 January 2007.

³² Response, para. 3.

³³ Motion, para. 12.

³⁴ *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, Ruling on Motion for Modification of Protective Measures for Witnesses, dated 18 November 2004, para. 43.

³⁵ i.e. May 2006 Order.

³⁶ i.e. September 2006 Decision.

of the Declaration attached to the Prosecution's Response, we are satisfied that there are no signs of improvement in the security situation in Liberia.

39. We also observe that, on the issue of a change in circumstances, the Defence raised new grounds in its Reply which should have been included in the Motion. The Prosecution Response was of course limited to those grounds stated in the Motion and it had no opportunity to respond to the new arguments. A reply is meant to answer issues raised in the response, not to adduce new submissions augmenting the motion which the opposing party cannot address. In previous decisions we have condemned this practice and ruled that submissions of that nature are inadmissible³⁷. Therefore, we will not consider the new grounds raised in the Reply.

40. On the question of the Prosecution's redaction of transcripts of open-session proceedings available to the public, we agree with the Defence that, in the absence of a specific court order, the Prosecution had no right to direct the Registry to redact those transcripts. The Trial Chamber hearing the case in open session apparently did not see any necessity to redact any of the evidence. A party does not have a right to interfere with the official court record by redacting evidence. If it necessary to redact a public transcript then the correct procedure is to apply to the Trial Chamber that heard the evidence. In this regard, we direct the attention of the Prosecution to Rule 75(B)(i)(a) which provides that a Judge or Chamber may order measures to prevent disclosure of the identity of a witness to the public or the media such as "[e]xpunging names and identifying information from the Special Court's public records."

41. As regards the Prosecution's filing of the Response as "Confidential", we are satisfied that this was the correct procedure given the nature of the contents thereof.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ALLOWS THE MOTION IN PART

AND ORDERS:

1. that the protective measure allowing the Prosecution to withhold the names and unredacted statements of witnesses TFI-387 and TFI-391 until 42 days before testimony is rescinded;
2. that in all other respects, the Motion is dismissed.

³⁷ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rule 66 and/or 68, dated 4 May 2005, para. 20; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Objection to Question Put by Defence in Cross-Examination of Witness TFI-227, dated 15 June 2005, para. 28; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, dated 26 July 2006, para. 3.

Done at Freetown, Sierra Leone, this 21st day of March 2007.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]