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SCSL-03-01-T
(14796 - 14802)

14796



SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 26 February 2008

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
26 FEB 2008	
NAME	VINCENT, TASHKWA
SIGN	<i>[Signature]</i>
TIME	14:30

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON CONFIDENTIAL PROSECUTION MOTIONS SCSL-03-01-T-372 AND SCSL-03-01-T-385 FOR THE TESTIMONIES OF WITNESSES TO BE HELD IN CLOSED SESSION

Office of the Prosecutor:

Brenda Hollis
Nicholas Koumjian
Leigh Lawrie
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

- (i) the "Confidential Prosecution Motion for the Testimony of Witnesses TF1-548, TF1-555 & TF1-561 to be Held in Closed Session", filed on 13 December 2007 ("First Motion");¹ and
- (ii) the "Confidential Prosecution Motion for the Testimonies of Witnesses TF1-532, TF1-399, TF1-338 and TF1-542 to be Held in Closed Session", filed on 14 January 2008 ("Second Motion");²

NOTING

- (i) the "Confidential Defence Reply (sic) to the Prosecution Motion for the Testimony of Witnesses TF1-548, TF1-555 & TF1-561 to be Held in Closed Session", filed on 14 January 2007 ("First Response");³
- (ii) the "Prosecution Reply to Defence Reply to Prosecution Motion for the Testimony of Witnesses TF1-548, TF1-555 & TF1-561 to be Held in Closed Session", filed on 18 January 2008 ("First Reply");⁴
- (iii) the "Confidential Defence Response to Prosecution Motion for the Testimony of Witnesses TF1-532, TF1-399 & TF1-338 and TF1-542 to be Held in Closed Session", filed on 24 January 2008 ("Second Response");⁵
- (iv) the "Confidential Prosecution Reply to Defence Response to Prosecution Motion for the Testimonies of Witnesses TF1-532, TF1-399, TF1-338 and TF1-542 to be Held in Closed Session", filed on 29 January 2008 ("Second Reply");⁶

RECALLING the "Decision on Motion for Extension of Time Pursuant to Rule 7bis in respect of Two Prosecution Motions: SCSL-03-01-372 and SCSL-03-01-375", dated 16 January 2008, wherein the Trial Chamber *inter alia*, extended the time limits for filing the First Response and First Reply;⁷

NOTING the Prosecution request in the First Motion that Witnesses TF1-548, TF1-555 and TF1-561, be permitted to testify entirely in closed session, on the grounds that:

- (i) the existing protective measures to which the witnesses are subject, including non-disclosure of identity to the public and delayed disclosure to the Defence until 42 days

¹ Document SCSL-03-01-T-372.

² Document SCSL-03-01-T-385.

³ Document SCSL-03-01-T-389.

⁴ Document SCSL-03-01-T-394.

⁵ Document SCSL-03-01-T-397. On 25 January 2008 the Defence filed the "Confidential Corrigendum to Defence Response to Prosecution Motion for the Testimony of Witnesses TF1-532, TF1-399 & TF1-338 and TF1-542 to be Held in Closed Session," Document SCSL-03-01-T-398, correcting an error in the title of the Second Response.

⁶ Document SCSL-03-01-T-403.

⁷ Document SCSL-03-01-T-392.

before the witness is due to testify, are not sufficient to protect the identity of the witnesses during the trial phase;⁸

- (ii) due to the unique roles and responsibilities these witnesses performed prior to, during and after the relevant Indictment period, the content of their testimonies if given in open court, would reveal their identities to the public, resulting in serious implications for their safety and security and that of their family members;⁹
- (iii) the witnesses, all of whom have been classified as "Predominantly Linkage witnesses", continue to face "objective and subjective threats" including attempts by certain members of the public to identify and interfere with persons perceived to be Prosecution witnesses, are particularly vulnerable to acts of retaliation;¹⁰
- (iv) the Prosecution has assessed whether other less restrictive techniques might be effective and is of the view that in the circumstances, closed session is the only appropriate method of protecting the identity of these witnesses;¹¹

NOTING that the Defence, in the First Response opposes the First Motion and submits that:

- (i) whilst the court has a duty to protect victims and witnesses against threat to their privacy and security, the "rights" of victims and witnesses are circumscribed by the rights of the Accused to a fair and public trial as specified in Article 17(2) and (4) of the Statute and Rules 75 and 79 of the Rules;¹²
- (ii) the closed session sought is extremely restrictive and, "absent a demonstration of correlative risks of threat on the part of the Prosecution, would not strike the proper balance between the right of the Accused to a fair and public hearing which requires a testimony in open court";¹³
- (iii) the security situation in which the witnesses will be expected to testify remains essentially the same as that considered by the Trial Chamber in its decisions granting protective measures to these witnesses, and the Prosecution has not demonstrated a substantial change of circumstances justifying the revisiting of the existing protective measures;¹⁴ and
- (iv) the character and scope of Rule 79 must be interpreted restrictively, consistent with the requirement of a public trial;¹⁵

NOTING that the Prosecution, in the First Reply, submits that the existing protective measure were sought and obtained to protect the witnesses' identities during the pre-trial phase of the proceedings, notably during disclosures, and that such orders were not intended to preclude *additional* protective measures for the trial phase of proceedings. The Prosecution need not demonstrate a substantial

⁸ First Motion, para. 4

⁹ First Motion, paras. 4, 7-8

¹⁰ First Motion, paras. 9-15.

¹¹ First Motion, para. 14

¹² First Response, paras. 3-5

¹³ First Response, para. 6.

¹⁴ First Response, paras. 7-13.

¹⁵ First Reponse, para. 10.

change in circumstances since its request for closed session testimony is an additional protective measure pursuant to Rules 75(B)(ii) and 79(A)(ii) and is not a request to modify existing protective measures;

NOTING that the Prosecution requests in the Second Motion that Witnesses TF1-532, TF1-399, TF1-338 and TF1-542, be permitted to testify entirely in closed session, on the grounds that:

- (i) the existing protective measures to which the witnesses are subject, including non-disclosure of identity to the public and delayed disclosure to the Defence until 42 days before the witness is due to testify, are not sufficient to protect the identity of the witnesses during the trial phase¹⁶;
- (ii) due to the unique roles and responsibilities these witnesses performed prior to, during and after the relevant Indictment period, the content of their testimonies if given in open court, would reveal their identities to the public, resulting in serious implications for their safety and security and that of their family members¹⁷;
- (iii) the witnesses, all of whom have been classified as "Core Predominantly Linkage witnesses", continue to face "objective and subjective threats" including attempts by certain members of the public to identify and interfere with persons perceived to be Prosecution witnesses, are particularly vulnerable to acts of retaliation¹⁸;

NOTING that in the Second Response the Defence opposes the Second Motion and submits that:

- (i) whilst the court has a duty to protect victims and witnesses against threats to their privacy and security, this must be balanced with the rights of the Accused to a fair and public trial "within the legal framework of the Statute and the Rules" and consistent with internationally recognised standards of due process;¹⁹
- (ii) the Trial Chamber should consider that the security situation in West Africa has changed since protective measures were assessed during 2004 in the case of *Prosecutor v. Sesay et al.*, when the court took into consideration the fact that the witnesses would be testifying in the very same country where the crimes were allegedly committed, and also that the trial has since been transferred from Sierra Leone, the location of the crimes, to The Hague in The Netherlands²⁰;
- (iii) the Prosecution has failed to substantiate the basis for the alleged potential threats to its witnesses or to demonstrate that the existing protective measures are insufficient to protect the security and privacy of those witnesses;²¹ and
- (iv) the Trial Chamber should consider moving to closed session for specific portions of the testimony only;²²

¹⁶ Second Motion, para. 4

¹⁷ Second Motion, para. 5

¹⁸ Second Motion, paras. 12-24

¹⁹ Second Response, paras. 5-8.

²⁰ Second Response, paras 9-12.

²¹ Second Response, paras 13-18.

²² Second Response, para. 24.

NOTING the Second Reply, wherein the Prosecution submits that:

- (i) the fact that the trial has been transferred to The Hague does not improve the security situation for the witnesses, as the proceedings in this trial are being broadcast to the whole world;²³
- (ii) security updates have indeed been regularly provided to the Trial Chamber by the Prosecution in previous Motions, which attest to the current security situation in West Africa, and are incorporated by reference in the current application;²⁴
- (iii) closed session testimony would not impact upon the rights of the Accused;²⁵
- (iv) no other measures short of testimony entirely in closed session would be appropriate to protect the identity of these witnesses, as it is the content of the testimony itself that would, if heard in open court, reveal their identity;²⁶

RECALLING the Trial Chamber's previous Orders on protective measures for Witnesses TF1-548, TF1-555, TF1-532 and TF1-542,²⁷ Witnesses TF1-338, TF1-390 and TF1-399,²⁸ and Witness TF1-561;²⁹

RECALLING that Witness TF1-548 elected to testify in open court rather than rely on the existing protective measures or pursue the current request for closed session testimony;³⁰

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

The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses;

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

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and

²³ Second Reply, para. 12.

²⁴ Second Reply, paras. 13-14.

²⁵ Second Reply, paras. 17-18.

²⁶ Second Reply, paras. 5, 19.

²⁷ *Prosecutor v. Taylor*, SCSL-03-01-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*, 22 January 2007.

²⁸ *Prosecutor v. Taylor*, SCSL-03-01-PT, 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.

²⁹ *Prosecutor v. Taylor*, SCSL-03-01-PT-215, Decision on Confidential Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and on Public Urgent Prosecution Motion for Leave to Substitute a Supplemented Witness Lists as Annex A94) of the Confidential urgent Prosecution Motion for Immediate Protective measures for Witnesses and for Non-Public Disclosure Filed on 8 March 2007 and on Public Urgent Prosecution Request for Interim Measures, 26 March 2007;

³⁰ Transcript, 7 February 2008, p.3412, ln.23- p.3413, ln.29.

the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses;

MINDFUL ALSO of the provisions of Rule 78 which provides:

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

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

A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused;

CONSIDERING that in granting protective measures to witnesses and victims, the Trial Chamber has a duty to balance the protection of those victims and witnesses with the rights of the Accused to a fair and public trial and that the extraordinary protective measure of closed session testimony will only be granted where it is clearly demonstrated (a) that there is a real and specific risk to the witness and/or his family, (b) that the right of the Accused to a fair and public trial is not violated and (c) that no less restrictive protective measures can adequately deal with the witness's legitimate concerns;³¹

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

FINDING with regard to the submissions that "the Prosecution has assessed whether other techniques, short of closed sessions, might be effective for the protection of Witnesses TF1-548, TF1-555 and TF1-561,³² and of Witnesses TF1-532, TF1-399, TF1-338 and TF1-542³³ but due to the unique nature of the positions held by each witness and the specific information they possess, as well as ongoing security concerns (both objective and subjective), no other method would protect the identity of these persons", that the Prosecution has not detailed those other techniques nor specified the reasons why those techniques would not adequately ensure the safety and security of the said witnesses;

HOLDING that Trial Chamber is not satisfied that the Prosecution has given full and exhaustive consideration to the use of the less restrictive witness protection measures available under Rule 75(B)(i) and that a basis for the extraordinary protective measure of entirely closed session testimony has not been made out in respect of any of the abovementioned witnesses in this instance;

³¹ See *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Order to Hear the Evidence of Witness TF1-235 in Closed Session, 8 November 2004; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Decision on Prosecution Motion for the Testimony of Witnesses TF1-367, TF1-369 and TF1-371 to be held in Closed Session and for Relief for Witness TF1-369, 14 June 2006; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Closed Session Testimony for Witness B-1804, 23 January 2004.


³² First Motion para. 14


³³ Second Motion, paras. 23-24

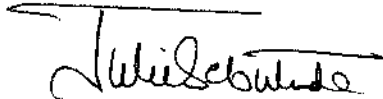
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HEREBY DENIES the FIRST AND SECOND MOTIONS.

Done at The Hague, the Netherlands, this 26th day of February 2008.


Justice Richard Lussick


Justice Teresa Doherty,
Presiding Judge


Justice Julia Sebutinde

