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SCSL-03-01-T
(16736-16740)

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SPECIAL COURT FOR SIERRA LEONE

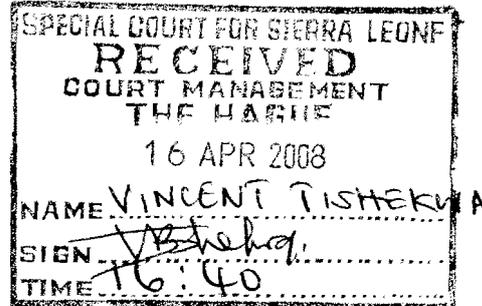
TRIAL CHAMBER II

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: 16 April 2008



PROSECUTOR

v.

Charles Ghankay TAYLOR

PUBLIC

DECISION ON CONFIDENTIAL URGENT MOTION TO MARK AS "CONFIDENTIAL" MATERIAL
INTRODUCED THROUGH ANY WITNESS TESTIFYING IN CLOSED SESSION,
AND IN PARTICULAR MATERIAL INTRODUCED THROUGH TF1-371

AND

DECISION ON CONFIDENTIAL URGENT PROSECUTION MOTION
TO MARK AS 'CONFIDENTIAL' MATERIAL INTRODUCED THROUGH TF1-371

Office of the Prosecutor:

Brenda J. Hollis
Leigh Lawrie

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 "Confidential Urgent Prosecution Motion to Mark as 'Confidential' Material Introduced Through Any Witness Testifying in Closed Session, and in Particular Material Introduced Through TF1-371", filed on 25 February 2008 ("Motion"),¹ wherein the Prosecution requests the Chamber to order that:

- 1) "in the current proceedings the procedure for all material introduced during closed session testimony of TF1-371 and all other witnesses testifying in closed session be that such material is marked and treated as "confidential" unless and until the Trial Chamber orders otherwise";² or
- 2) in the alternative, that the exhibits listed in the annex to the Motion be immediately marked as "confidential" and removed from the public record of the Special Court;³

RECALLING the Trial Chamber's "Confidential Order for Expedited Filing in Relation to Confidential Urgent Prosecution Motion SCSL-03-01-T-425," dated 28 February 2008, in which the Trial Chamber ordered that any Response to the Motion be filed not later Monday, 3 March 2008, and any Reply to the Response be filed not later than Wednesday, 5 March 2008;⁴

NOTING the "Confidential Defence Response to 'Urgent Prosecution Motion to Mark as Confidential Material Introduced Through Any Witness Testifying in Closed Session, and in Particular Material Introduced Through TF1-371'", filed on 3 March 2008 ("Response"),⁵ wherein it opposes the Motion and requests that the Trial Chamber:

- 1) reject the Motion to change the current procedure for classifying material introduced during closed session testimony; or
- 2) "in the alternative, reject the request for the mentioned exhibits to be marked entirely 'confidential'".⁶ The Defence contends that less restrictive measures, such as redaction of identifying details, would accomplish the purpose of addressing the witnesses' purported safety concerns while ensuring that Mr. Taylor's rights to a fair and public trial are not infringed. However, any request for redaction or the marking of documents as confidential should not take effect without the prior leave of the Court;⁷

NOTING the "Confidential Prosecution Reply to Defence Response to 'Urgent Prosecution Motion to Mark as Confidential Material Introduced Through any Witness Testifying in Closed Session, and in Particular Material Introduced Through TF1-371'", filed on 5 March 2008 ("Reply"),⁸ wherein the Prosecution submits that the *default* procedural position should be that documents entered into evidence during closed session should be confidential,⁹ that this would not deprive the Defence of

¹ SCSL03-01-T-425 ("Motion").

² Motion, para. 16.

³ Motion, para. 16.

⁴ SCSL03-01-T-428.

⁵ SCSL03-01-T-420 ("Response").

⁶ Response, Conclusion (i) and (ii).

⁷ Response, para. 27.

⁸ SCSL03-01-T-433 ("Reply").

⁹ Reply, para. 6.

the right to challenge those measures¹⁰ but would reduce the risk of inadvertent violations of the Witness Protection Orders,¹¹ and that, whilst the Prosecution does not object to redacted copies being made available to the public, any redaction of the original document would severely compromise the integrity of the document;¹²

SEISED OF the “Confidential Urgent Prosecution Motion to Mark as ‘Confidential’ Material Introduced Through TF1-371”, filed on 8 April 2008 (“Second Motion”),¹³ wherein the Prosecution states that it has “grave concerns that the protective measures applicable to TF1-371 are currently being breached by the public classification of the exhibits tendered through this witness”¹⁴ and renews its request that the exhibits listed in the annex attached to the Second Motion are immediately marked as confidential and removed from the public records of the Special Court;¹⁵

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 54 of the Rules of Procedure and Evidence (“Rules”) which provides:

At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

MINDFUL ALSO of the provisions of Rule 69(A) which provides:

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.

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 Rules 75(A) and (F) which provide:

(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;

[...]

¹⁰ Reply, paras 3, 4, 10.

¹¹ Reply, para. 9.

¹² Reply, paras 11-2.

¹³ SCSL03-01-T-460 (“Second Motion”).

¹⁴ Second Motion, para. 7.

¹⁵ Second Motion, para. 11.

(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; [...]

MINDFUL ALSO of the provisions of Rule 79(A)(ii) which provides:

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

[...]

(ii) protecting the privacy, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; [...]

NOTING the protective measures, ordered by Trial Chamber I, in place for Witness TF1-371, which, *inter alia*, permit the witness to testify entirely in closed session;¹⁶

NOTING that an Order for a closed session testimony pursuant to Rules 75 and 79 of the Rules of Procedure and Evidence ("Rules") is an express exception to the principle of a public trial, made after a cautious and balanced consideration of the rights of the Accused and the protection of victims and witnesses pursuant to Article 17(2) of the Statute of the Special Court ("Statute");¹⁷

CONSIDERING that exhibits admitted in evidence during the testimony of a witness in closed session will not be automatically classified as "confidential" if the information contained therein does not identify or otherwise reveal the identity of the protected witness;

FINDING that the procedure before this Trial Chamber is that exhibits will be classified as public unless a specific application to mark such exhibits as "confidential" is granted. It is the obligation of counsel tendering such documents to make an appropriate application if confidential classification is desired and in the instant case the Prosecution failed to exercise such due diligence;

NOTING the alternative request by the Prosecution to mark the documents in the Annex to the Motion as "confidential" and to have them removed from the public records of the Special Court;

CONSIDERING HOWEVER that having examined the exhibits in question, the Trial Chamber is of the opinion that only exhibits P-68A to P-68J, D-5 (A and B), D6 and D-10 are capable of revealing the identity of the witness to an informed observer of the proceedings;

¹⁶ *Prosecutor v. Sesay et al.*, SCSL04-15-T-537, Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order of Protective Measures, 6 April 2006, which extends to Witness TF1-371 the measures contained in *Prosecutor v. Sesay et al.*, SCSL04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004; Also, *Prosecutor v. Sesay et al.*, SCSL04-15-T-577, Decision on Prosecution Motion for the Testimony of Witnesses TF1-367, TF1-369 and TF1-371 to be held in Closed Session and for Other Relief for Witness TF1-369, 14 June 2006.

¹⁷ *Prosecution v. Taylor*, SCSL03-01-T-427, Decision on Confidential Prosecution Motions SCSL03-01-T-372 and SCSL03-01-T-385 for the Testimonies of Witnesses to Be Held in Closed Session, 26 February 2008.

FINDING that the complaint of the Defence that they were not timely served with the Motion is without foundation;¹⁸

NOTING that this Decision will not reveal the identity of any witness and that therefore this decision should be filed as public;

FOR THE FORGOING REASONS

PARTIALLY GRANTS the Motion in the following terms:

ORDERS Court Management Section to mark Exhibits P-68A to P-68J, D-5(A and B), D6 and D-10 as confidential and remove them from the public record of the Special Court;

DENIES the remainder of the Motion;

DISMISSES the Second Motion as moot.

Done at The Hague, The Netherlands, this 16th day of April 2008.


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]



¹⁸ Response, para. 3; see "Court Service - Form 3 - Proof of Service in The Hague" stating that a hard copy was served on the Defence Case Manager on 26 February 2008, at 9:45am.