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SCSL-03-01-T
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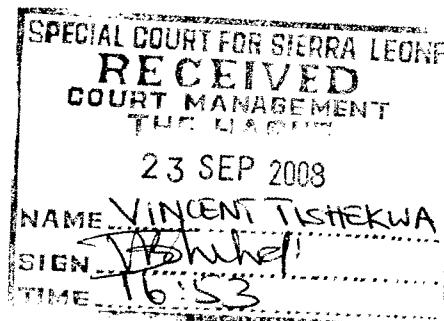
20269

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone
APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice Emmanuel Ayoola
Justice Raja Fernando
Justice Jon M. Kamanda
Justice George Gelaga King

Registrar: Herman von Hebel

Date filed: 23 September 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC WITH CONFIDENTIAL AUTHORITIES

**PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION
CONCERNING PROTECTIVE MEASURES FOR
WITNESS TF1-215**

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Leigh Lawrie
Ms. Ula Nathai-Lutchman

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. TITLE AND DATE OF FILING OF APPEALED DECISION

1. The Prosecution files this Notice of Appeal pursuant to Rules 73(B) and 108(C),¹ of Trial Chamber II's oral decision of 6 May 2008 finding that TF1-215 did not have protective measures and ordering that the witness testify in open court.²

II. SUMMARY OF PROCEEDINGS RELATING TO APPEALED DECISION

2. On 2 August 2005, witness TF1-215 testified in the RUF Trial³ subject to protective measures which included *inter alia* use of a pseudonym and screen.⁴ The Defence in the current proceedings were initially notified by letter of these existing measures pursuant to Rule 75(F)(ii) on 3 October 2006. On 31 March 2008 notice was given to the Court and the Defence of the existing protective measures applicable to this witness.⁵ On 6 May 2008, prior to witness TF1-215 taking the stand, the Prosecution again informed the Trial Chamber and the Defence of the applicable protective measures.
3. During proceedings on 6 May 2008, the Trial Chamber requested that the Prosecution provide it with a copy of the list of witnesses to which the RUF Decision applied. Accordingly, the Chamber and the Defence were provided with copies of the Prosecution filings related to the RUF Decision.⁶ Subsequently, the Defence orally applied to have the protective measures rescinded.
4. The Trial Chamber questioned the wording of the Renewed Motion and whether the RUF Decision applied to TF1-215. During the discussion on the application of the RUF Decision to TF1-215, the Prosecution advised that the "witness ... did testify

¹ Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended ("**Rules**").

² *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008 ("**Transcript**"), page 9122, line 8 to page 9123, line 2 ("**Decision**").

³ *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-T ("**RUF Trial**").

⁴ The witness testified subject to protective measures pursuant to the decision: *Prosecutor v Sesay et al*, SCSL-2004-15-T-180 "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses", 5 July 2004 ("**RUF Decision**").

⁵ See Confidential Annex B, page 16433 of *Prosecutor v. Taylor*, SCSL-03-01-T-444, "Public with Confidential Annex B Prosecution Witness List for Week 14 – 18 April 2008", 31 March 2008.

⁶ Including: *Prosecutor v Sesay et al*, SCSL-04-15-PT-102, "Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for renewed Motion for Protective measures dated 2 April 2004", 4 May 2004 ("**Renewed Motion**") and "Material Filed pursuant to order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004", 26 April 2004 ("**Witness List of 26 April**"), which included the pseudonyms of 266 witnesses.

with a pseudonym in the previous trial.”⁷ But no further information was sought on this point.⁸

5. Having heard argument by each Party and having reviewed the pertinent filings provided by the Prosecution, the Trial Chamber held that the RUF Decision did not provide TF1-215 with protective measures:

After careful consideration of that decision and the submissions of counsel we find nothing in the decision which would entitle witness TF1-215 to any protective measures. In our view the decision relates solely to those witnesses listed in annexes A and B of the renewed Prosecution motion for protective measures. Witness TF1-215 is not among those witnesses listed in the annexes. Accordingly the witness will testify in open court and the Defence application to rescind the protective measures of this witness is now moot.⁹

6. On 9 May 2008, the Prosecution filed the ‘Public with Confidential Annexes B and E, Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures For Witness TF1-215 or in the alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures For Witness TF1-215’.¹⁰ On 12 May 2008, the Prosecution filed a corrigendum to its application.¹¹ The Application sought two alternative forms of relief. First, the Prosecution requested that the Chamber exercise its discretion and reconsider its Decision.¹² In the alternative, the Prosecution requested that the Chamber grant leave to appeal the Decision.¹³
7. On 22 May 2008, the Defence filed the “Public Defence Response to Urgent

⁷ Transcript, page 9114, lines 14 – 15.

⁸ In response to the information volunteered by the Prosecution, one of the judges advised that she was “not concerned ... with what this witness did or didn’t do in another court or by what means” (see Transcript, page 9114, lines 16 – 18).

⁹ Transcript, page 9122, line 23 to page 9123, line 2.

¹⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-501, “Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008 (“**Application**”). While the document was dated 8 May 2008, it was filed on 9 May 2008.

¹¹ *Prosecutor v. Taylor*, SCSL-03-01-T-502 ‘Prosecution Corrigendum To Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures For Witness TF1-215 or in the alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures For Witness TF1-215’, 12 May 2008.

¹² See *Prosecutor v. Taylor*, SCSL-03-01-T-501, “Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008, para. 33.

¹³ *Ibid*, para. 34.

Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures For Witness TF1-215 or in the alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures For Witness TF1-215 and its Corrigendum”.¹⁴ The Prosecution filed its Reply on 27 May 2008.¹⁵

8. On 15 September 2008, the Trial Chamber issued its decision on the Application, denying the request to reconsider the Decision, but granting the Prosecution leave to appeal the Decision.¹⁶

III. GROUNDS OF APPEAL

Ground 1: In the Decision, the Trial Chamber erred as a matter of law by finding that TF1-215 was not subject to protective measures and so ordering that the witness testify in open court without protective measures.

Ground 2: The Trial Chamber erred in law and fact in finding on the facts before it that TF1-215, a witness who had testified previously with protective measures, did not have such measures and so ordering that the witness testify in open court without protective measures.

IV. RELIEF SOUGHT

9. The Decision should be set aside. The Trial Chamber should be ordered to hear the evidence of TF1-215 subject to the protective measures which were in place for the

¹⁴ *Prosecutor v Taylor*, SCSL-03-01-T-512, “Public Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum”, 22 May 2008 (“**Response**”).

¹⁵ *Prosecutor v Taylor*, SCSL-03-01-T-522, “Public Reply to Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 27 May 2008 (“**Reply**”).

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-595, “Decision on Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215”, 15 September 2008 (“**Decision Granting Leave**”).

witness during his testimony in the RUF Trial.¹⁷

SUBMISSIONS ON THE GROUNDS OF APPEAL

PART A. STATEMENT OF FACTS

10. As stated in paragraph 2 above, witness TF1-215 testified in the RUF Trial with the basic in-court protective measures ordered by Trial Chamber I.¹⁸ TF1-215's protective measures were granted pursuant to a number of decisions issued in the RUF Trial; pre-trial protective measures being augmented by the RUF Decision concerning trial protective measures.¹⁹
11. In relation to the RUF Decision (which augmented the existing pre-trial measures by granting certain witnesses protective measures appropriate for the trial stage of proceedings), it is necessary to understand the underlying filings to which the RUF Decision relates.
12. The Renewed Motion, upon which the RUF Decision is based, sought protective measures for 266 witnesses included on a witness list filed with other materials on 26 April 2004 under Cover Sheet 1.²⁰ It is to be noted at the outset that this list of 266 witnesses was *not* included as part of the Renewed Motion but instead was incorporated by reference. TF1-215 was included as one of the 266 witnesses on this Witness List of 26 April.²¹ In the Renewed Motion, these 266 witnesses were divided into two groups: i) witnesses of fact (Group I); and ii) expert witnesses and witnesses who have waived their right to protection (Group II).²² Sub categories were created for those Group I witnesses (A, B, C) with special needs.²³ It was those Group I

¹⁷ These measures include use of a pseudonym and behind a screen.

¹⁸ See footnote 4 above.

¹⁹ Pre-trial protective measures for witnesses were granted pursuant to the following decisions see: *Prosecutor v. Sesay*, SCSL-03-05-PT-38, "Decision on the Prosecutor's Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure," 23 May 2003; *Prosecutor v. Kallon*, SCSL-03-05-PT-33, "Decision on the Prosecutor's Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure," 23 May 2003; *Prosecutor v. Gbao*, SCSL-03-05-PT-48, "Decision on the Prosecutor's Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure," 10 October 2003.

²⁰ Renewed Motion, paras. 1 & 2.

²¹ Witness List of 26 April, page 2053.

²² Renewed Motion, para. 3 and RUF Decision, para. 1.

²³ Renewed Motion, para. 3 and RUF Decision paras. 1, 6, 30.

witnesses listed in Annex A of the Renewed Motion who required trial measures in addition to pseudonym and screen.

13. Based on the request set out in the Renewed Motion, Trial Chamber I ordered that all witnesses in Group I testify subject to the additional measures of pseudonym and testimony behind a screen and further ordered that only those Group I witnesses that were listed under categories A, B and C be made subject to further additional protective measures.²⁴
14. Thus, the RUF Decision involved a two tier process: consideration of protective measures for all witnesses of fact in Group I and additional protective measures for those Group I witnesses who fell within categories A-C.²⁵
15. In respect of Group I (witnesses of fact), the RUF Decision provides for this category of protected witness as follows:
 - a. That all witnesses shall be referred to by pseudonyms at all times during the course of proceedings whether during the hearing or in documents, including the transcript of the proceedings;
 - b. That the names, addresses, whereabouts and any other identifying information of witnesses shall be sealed and not included in any of the public records of the Special Court;
 - c. That to the extent that the names addresses, whereabouts and any other identifying data concerning witnesses are contained in existing public documents of the Special Court, that information shall be expunged from those documents;
 - d. That documents of the Special Court identifying witnesses shall not be disclosed to the media or public;
 - e. That all witnesses testify with the use of a screening device from the public;
 - f. That photographing, video-recording, sketching and recording or reproducing in any other manner of images of any witness of Group I (witnesses of fact) are prohibited while he or she is in the precincts of the Special Court.²⁶
16. TF1-215 testified subject to the above protections in the RUF Trial on 2 August 2005. In this regard, it is to be noted that no subsequent application for protective measures was made for this witness prior to his testimony, nor was there any argument regarding protective measures before he began his testimony.

²⁴ RUF Decision, Disposition.

²⁵ RUF Decision, paras. 5 – 6

²⁶ *Ibid.* page 15-16

17. Notwithstanding the foregoing, Trial Chamber II determined that TF1-215 was not entitled to protective measures. As a result of the Decision, TF1-215 did not testify in the current proceedings.

PART B. STANDARD OF REVIEW

Error of Law

18. For the reasons given below, the oral decision erred in law by failing to implement the binding provisions of Rule 75(F), i.e. failing to accord the witness the protective measures which had been afforded to him by the RUF Decision and during his testimony in the RUF Trial and thereby ordering him to testify in open court without protective measures. To the extent this error of law was committed in the exercise of the discretion of the Trial Chamber, the Trial Chamber erred in such exercise as it “misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion...”²⁷ Further, the exercise of the discretion was one that was not “reasonably open” to the Trial Chamber,²⁸ and the Trial Chamber “abused its discretion”,²⁹ or “erred and exceeded its discretion”,³⁰ and committed a “discernible error” in the exercise of its discretion.³¹

²⁷ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-688, “Decision on Interlocutory Appeals on Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone,” 11 September 2006, para. 6; *Prosecutor v. Milosević*, IT-99-37-AR73, “Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder”, Appeals Chamber, 18 April 2002, para. 5. See also *Prosecutor v. Milosević*, IT-02-54-AR73.6, “Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case”, 20 January 2004, para. 7; *Prosecutor v. Bizimungu*, ICTR-99-50-AR50, “Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment”, 12 February 2004, para. 11; *Prosecutor v. Karemera*, ICTR-98-44-AR73, “Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment”, 19 December 2003, para. 9.

²⁸ *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, “Judgement”, 20 February 2001, paras. 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was “open” to the Trial Chamber).

²⁹ *Ibid.*, para. 533 (“... the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it”), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

³⁰ *Ibid.*, para. 533.

³¹ *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, “Judgement,” 3 May 2006, paras. 257-259; *Prosecutor v. Mejković et al.*, IT-02-65-AR11bis.1, “Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis,” 7 April 2006 (“**Mejković Rule 11bis Appeal Decision**”), para. 10.

Error of Fact and Law

19. To the extent the Decision was a matter of fact and law, the Trial Chamber erred in law and fact by failing to properly apply the law to the facts before them, and thereby failing to implement the binding provisions of Rule 75 (F), i.e. failing to accord the witness the protective measures which had been afforded to him by the RUF Decision and during his testimony in the RUF Trial and by ordering him to testify in open court without protective measures. Further, to the extent the error was in the exercise of its discretion, the Trial Chamber erred in that it "...has failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion".³² The exercise of the discretion was one that was not "reasonably open" to the Trial Chamber,³³ and the Trial Chamber "abused its discretion",³⁴ or "erred and exceeded its discretion",³⁵ and committed a "discernible error" in the exercise of its discretion.³⁶

PART C. GROUNDS OF APPEAL AND SUBMISSIONS

20. The Trial Chamber erred in law, or alternatively in law and fact, in finding on the facts before it that TF1-215 did not have protective measures and ordering that the witness testify in open court without protective measures.

Ground 1: In the Decision, the Trial Chamber erred as a matter of law by finding that TF1-215 was not subject to protective measures and so ordering that the witness testify in open court without protective measures.

21. The Trial Chamber erred by virtue of its erroneous interpretation of the RUF Decision, which granted protective measures to Group I witnesses (witnesses of fact) including TF1-215, and also by failing to comply with Rule 75(F) which states that,

³² See footnote 28.

³³ See footnote 29.

³⁴ See footnote 30.

³⁵ *Ibid*, para. 533.

³⁶ *Ibid*.

once granted, protective measures apply in all subsequent proceedings until rescinded or varied by application of the correct test and in accordance with the Rules.

22. The Trial Chamber erred in deciding that TF1-215 was not afforded protective measures by the RUF Decision. As described in Part A (Statement of Facts) above, the RUF Decision, when read in conjunction with the prior Prosecution filings upon which the RUF Decision is based, establishes that TF1-215 was included within the protections granted, as were all Group I witnesses, i.e. witnesses of fact, listed in the 26 April 2004 witness list.
23. As noted above, although the Prosecution did not attach the 26 April list to the Renewed Motion, paragraph 2 of the Renewed Motion clearly states that:

“... on 26 April the Prosecution filed a Prosecution Witness List of 266 witnesses. This Motion provides an overview of the reasons for the protective measures sought **for those witnesses.**”³⁷

A plain and literal interpretation of this paragraph makes it clear that the term “those witnesses” encompasses those fact witnesses included in the 26 April list and not just the 87 witnesses who had special needs requiring additional protective measures. Furthermore, the RUF Decision notes that the Prosecution divided its witnesses into 2 groups based on that witness list.

24. The Prosecution again refers to 266 witnesses in paragraph 3 of the Renewed Motion, stating that it has divided the 266 witnesses into 2 groups: i) of fact and ii) experts / those who have waived their right to protection. The additional language in this paragraph, wherein the Prosecution sets forth 3 sub-categories of fact witnesses, totalling 87 witnesses as set out in Annex A, is admittedly not as clear as it could be. However, in paragraph 5 of its Renewed Motion, the Prosecution states that the actual number of witnesses called and subject to protective measures could be less than the 266 provided in the 26 April list. If the Prosecution intended that only the 87 witnesses listed in Annex A be granted the protective measures requested, there would be no need for this paragraph.
25. Paragraph 20 of the Renewed Motion then requests that all witnesses of fact testify in court using a pseudonym and screen. The fact that this request applies to all fact

³⁷ Emphasis added.

witnesses is reinforced by subsequent paragraphs 21-32, which request additional measures only for those 87 fact witnesses that fall within the categories A-C in Annex A.

26. The language and intent of paragraphs 2, 3, 5 and 20 make clear that the basic in-court protections sought for fact witnesses – the use of pseudonym and screen - related to all fact witnesses.
27. It is clear that Trial Chamber I interpreted the Renewed Motion in this way and granted protective measures accordingly. In footnote 6 of the RUF Decision, the Chamber noted that “Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, **this is obviously not the case**, as the number of A, B & C witnesses amounts to 87 [...], there are only 7 expert witnesses [...], and no witness has so far waived his/her right.”³⁸ Thus, Trial Chamber I concluded that the Renewed Motion included all fact witnesses.
28. That the RUF Decision granted basic in-court protections to all fact witnesses listed in the 26 April list, including TF1-215, is also clear in light of the implementation of that Decision by both Trial Chambers during the testimonies of fact witnesses in the RUF and AFRC³⁹ Trials. During these Trials, multiple fact witnesses not listed in sub-categories A-C testified with the basic in-court protective measures granted in that Decision.⁴⁰ As stated above, this includes TF1-215, who testified with these basic protections in the RUF Trial.
29. Thus, the Trial Chamber erred in its reasoning in deciding that TF1-215 was not protected by the RUF Decision.
30. Further, the Trial Chamber erred by failing to give effect to and apply the protective measures under which this witness testified in the RUF Trial. As discussed above, it is clear that the RUF Decision granted this witness the protective measures applicable

³⁸ RUF Decision, footnote 6 (emphasis added).

³⁹ *Prosecutor v. Brima et al.*, SCSL-04-16-T, (“AFRC Trial”)

⁴⁰ See **Annex C** of the Application for the list of TF numbers of witnesses who testified as general Group I witnesses with protective measures in the RUF and AFRC Trials. See also AFRC Trial Transcript, 8 April 2005, pp.6-11 regarding protective measures applicable to TF1-320 who was not listed in categories A-C where this Trial Chamber was confronted with the same issue and held that the witness was a group one witness and protected by general protective measures under the RUF Decision. See also **Annex D** of the Application - “List of Protective Measures received from Trial Chamber I and other Information filed Pursuant to Scheduling Order of 28 January 2005”, in particular paragraph 12.

to all witness of fact. However, assuming, *arguendo*, that the witness was granted protective measures in some other way, the fact remains that the witness was subject to protective measures used during his prior testimony in the RUF Trial. Rule 75(F) makes clear that, once granted, protective measures apply in all subsequent proceedings unless rescinded or otherwise varied. Contrary to the statement from the bench⁴¹, Rule 75(F) specifically mandates that the Trial Chamber be concerned with protective measures granted in other proceedings before this Court, as such measures apply *mutatis mutandis* to all subsequent proceedings. Therefore, regardless of any issues of interpretation regarding the RUF Decision, this Trial Chamber had an obligation to recognise and implement the protective measures under which this witness previously testified in the RUF Trial, until such time as they were rescinded or varied by application of the proper test and in accordance with the Rules.

31. Further indication of the error of law in regard to this witness is that the Decision is at variance with the Trial Chamber's prior actions in the instant case. This Trial Chamber granted the Prosecution request to rescind the basic in-court protections previously granted to TF1-101.⁴² TF1-101, a fact witness not listed in sub-categories A-C, testified in the RUF trial in accordance with the protective measures granted by the RUF Decision.⁴³

Ground 2: The Trial Chamber erred in law and fact in finding on the facts before it that TF1-215, a witness who had testified previously with protective measures, did not have such measures and so ordering that the witness testify in open court without protective measures.

32. To the extent the Trial Chamber finding is interpreted to be a mixed finding of fact and law, the Trial Chamber erred as a matter of law and fact in interpreting the provisions of Rule 75(F) to the facts before them. These facts, including that the witness had previously testified with protective measures, clearly required that the

⁴¹ Transcript, page 9114, lines 16 – 18: "I really am not concerned, Ms Baly, with what this witness did or did not do in another Court or by what means."

⁴² Taylor Trial Transcript, 14 February 2008, pp. 3896-3897.

⁴³ TF1-101 in testified the RUF on 28 November 2005.

Trial Chamber continue those protective measures until such time as they were varied in accordance with the proper test and the Rules.

33. In erroneously finding that there were no existing protective measures, this Trial Chamber essentially determined that Trial Chamber I in the RUF Trial erroneously allowed the witness to testify with protective measures. Rule 75(F)(i) is silent as to any discretion and states:

(F) Once protective measures have been ordered in respect of a witness of 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;

34. The procedure referred to in Rule 75(F)(i) is set out in Rule 75(G), which states:

(G) 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.

35. A plain and literal reading of this Rule makes it clear that the Rule contemplates a party to the second proceedings applying to rescind the protective measures. There is no reference to the Trial Chamber itself exercising its discretion to nullify the protective measures granted in another proceeding. Nor is there any reference to the Trial Chamber itself exercising its discretion to rescind the protective measures under either sub-rule (F) or (G). To the extent a Trial Chamber has inherent authority to take action to rescind protective measures, that action must be subject to the same standard applicable to a party seeking such a change in protective measures; that is, the action must be based on evidence that is “capable of establishing on a preponderance of probabilities that the witness is no longer in need of such a protection. The Trial Chamber must be satisfied based on such evidence that there is a change in the security situation facing the witness such as a diminution in the threat level faced by the witness that justifies a variation of protective measures orders.”⁴⁴

⁴⁴ *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1146, Appeals Chamber, “Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 23 May 2008, para. 37. (“*Sesay Appeal Decision*”)

36. Therefore, the Decision also led the Trial Chamber to fail to require the Defence to make the proper showing before lessening or rescinding protective measures.⁴⁵ Had the Trial Chamber applied this test, the Defence would have failed to meet its burden, as the Defence did not satisfy its obligation to present independent factual evidence that the security situation facing TF1-215 had changed so as to warrant a variation which rescinded or lessened the protective measures provided.
37. The Trial Chamber erred in that it did not properly apply the law to the facts before it. Further, to the extent the error was in the exercise of its discretion, the Trial Chamber erred in that it failed to give weight or sufficient weight to the facts before it that the witness had previously testified with protective measures in the RUF case, and/or made an error as to the facts upon which it has exercised its discretion. The majority thus made an error as to the facts upon which it exercised its discretion. The error was discernable and one which abused or exceeded the discretion of the majority.

PART D. PREJUDICE

38. As a result of the Decision, the Prosecution was unable to call TF1-215 to testify, as the witness stated he would not testify without the protective measures which had been in place for his prior testimony because of his fears for his safety and the safety of his family. The witness maintains that position and has provided a statement to this effect in Annex B of the Application, which was filed confidentially. The Prosecution is therefore deprived of the right to call this key witness to provide evidence relevant to many of the elements the Prosecution must prove beyond reasonable doubt.⁴⁶
39. Depriving the Prosecution of such highly relevant evidence on the basis of an erroneous decision causes irreparable prejudice which cannot be cured or resolved by final appeal against judgment.⁴⁷

⁴⁵ Appeals Chamber Decision, para. 37 (emphasis added).

⁴⁶ Application, para.27; a proffer of TF1-215's evidence is attached in Annex E.

⁴⁷ See for instance *Prosecutor v Brima et al*, SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being compelled to Answer questions on Grounds of Confidentially", 12 October 2005, p. 3 wherein this Trial Chamber found the fact that the Prosecution was unable to call TF1-150 due to the impugned decision may be capable of causing irreparable prejudice.

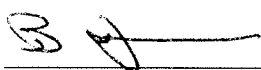
PART E. RELIEF SOUGHT

40. The Decision should be set aside. The Trial Chamber should be ordered to hear the testimony of TF1-215 subject to the protective measures which were in place for the witness during his testimony in the RUF Trial.⁴⁸

Filed in The Hague,

23 September 2008

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

⁴⁸ These measures include use of a pseudonym and behind a screen.

ANNEX
RECORD ON APPEAL

1. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008, page 9122, line 8 to page 9123, line 2
2. *Prosecutor v Taylor*, SCSL-03-01-T-501, “Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008
3. *Prosecutor v Taylor*, SCSL-03-01-T-502, “Prosecution Corrigendum to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 12 May 2008
4. *Prosecutor v Taylor*, SCSL-03-01-T-512, “Public Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum”, 22 May 2008
5. *Prosecutor v Taylor*, SCSL-03-01-T-522, “Public Reply to Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 27 May 2008
6. *Prosecutor v Taylor*, SCSL-03-01-T-595, “Decision on Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215”, 15 September 2008

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGEMENTS

Prosecutor v. Sesay, SCSL-03-05-PT

1. *Prosecutor v. Sesay*, SCSL-03-05-PT-38, “Decision on the Prosecutor’s Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 23 May 2003

Prosecutor v. Kallon, SCSL-03-05-PT

2. *Prosecutor v. Kallon*, SCSL-03-05-PT-33, “Decision on the Prosecutor’s Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 23 May 2003

Prosecutor v. Gbao, SCSL-03-05-PT

3. *Prosecutor v. Gbao*, SCSL-03-05-PT-48, “Decision on the Prosecutor’s Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure,” 10 October 2003

Prosecutor v. Sesay et al., SCSL-04-15-T

4. *Prosecutor v Sesay et al*, SCSL-2004-15-PT-86, “Material Filed pursuant to order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004”, 26 April 2004
5. *Prosecutor v Sesay et al*, SCSL-2004-15-PT-102, “Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for renewed Motion for Protective measures dated 2 April 2004”, 4 May 2004
6. *Prosecutor v. Sesay et al*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses,” 5 July 2004
7. *Prosecutor v. Sesay et al*, SCSL-04-15-T, Trial Transcript, 28 November 2005

8. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1146, Appeals Chamber, “Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses”, 23 May 2008

Prosecutor v Brima et al, SCSL-04-16-T

9. *Prosecutor v Brima et al*, SCSL-04-16-T-414, “Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being compelled to Answer questions on Grounds of Confidentially”, 12 October 2005

Prosecutor v. Taylor, SCSL-03-1-T

10. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 14 February 2008
11. *Prosecutor v. Taylor*, SCSL-03-01-T-444, “Public with Confidential Annex B Prosecution Witness List for Week 14 – 18 April 2008”, 31 March 2008
12. *Prosecutor v Taylor*, SCSL-03-01-T-501, “Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008
13. *Prosecutor v Taylor*, SCSL-03-01-T-502, “Prosecution Corrigendum to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 12 May 2008
14. *Prosecutor v Taylor*, SCSL-03-01-T-512, “Public Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum”, 22 May 2008
15. *Prosecutor v Taylor*, SCSL-03-01-T-522, “Public Reply to Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding

Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 27 May 2008

16. *Prosecutor v. Taylor*, SCSL-03-01-T-595, “Decision on Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215”, 15 September 2008
17. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008

Prosecutor v. Norman et al, SCSL-04-14

18. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-274, “Ruling on Motion for Modification of Protective Measures for Witnesses”, 18 November 2004
19. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-688, “Decision on Interlocutory Appeals on Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone,” 11 September 2006

ICTY Cases

20. *Prosecutor v. Delalić et al*, IT-96-21-A, Appeals Chamber, “Judgement”, 20 February 2001
<http://www.un.org/icty/celebici/appeal/judgement/index.htm>
21. *Prosecutor v. Milosević*, IT-99-37-AR73, “Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder”, Appeals Chamber, 18 April 2002
<http://www.un.org/icty/milosevic/appeal/decision-e/020418.htm>
22. *Prosecutor v. Milosević*, IT-02-54-AR73.6, “Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case”, 20 January 2004
<http://www.un.org/icty/milosevic/appeal/decision-e/040120.htm>

23. *Prosecutor v. Mejačić et al.*, IT-02-65-AR11bis.1, “Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11BIS,” 7 April 2006
<http://www.un.org/icty/mejakic/appeal/decision-e/060407.htm>
24. *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, “Judgement,” 3 May 2006
<http://www.un.org/icty/naletilic/appeal/judgement/index.htm>

ICTR cases

25. *Prosecutor v. Karemera*, ICTR-98-44-AR73, “Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment”, 19 December 2003
<http://69.94.11.53/ENGLISH/cases/Karemera/decisions/191203.htm>
26. *Prosecutor v. Bizimungu*, ICTR-99-50-AR50, “Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment”, 12 February 2004
<http://69.94.11.53/ENGLISH/cases/Bizimungu/decisions/120204.htm>

B. RULES OF PROCEDURE AND EVIDENCE AND PRACTICE DIRECTIONS

1. Rules of Procedure and Evidence of the Special Court, Rules 66, 68, 73(B), 75(H), 108(C), as amended.
2. Practice Direction for Certain Appeals Before the Special Court of 20 September 2004.

PROVISION OF AUTHORITIES REFERRED TO IN RECORD ON APPEAL

1. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008, page 9122, line 8 to page 9123, line 2

1 PRESIDING JUDGE: We will give at least five to ten minutes
2 notice of the intention to resume Court when we reach a decision.

3 MR MUNYARD: I am grateful.

4 PRESIDING JUDGE: Thank you. Please adjourn Court to a
13:32:24 5 time to be fixed.

6 [Lunch break taken at 1.32 p.m.]

7 [Upon resuming at 3.28 p.m.]

8 PRESIDING JUDGE: This is a ruling on an application. The
9 Defence have opposed and applied to rescind the purported
10 protective measures for witness TF1-215. The Prosecution submit
15:29:20 11 that the witness is protected by an order of Trial Chamber I of 5
12 July 2004, entitled "Decision on Prosecution motion for
13 modification of protective measures for witnesses", which the
14 Prosecution submits applies to 266 witnesses of fact including
15:29:53 15 witness TF1-215.

16 The decision of 5 July 2004 ruled on a 5 May motion filed
17 by the Prosecution and entitled "Renewed Prosecution motion for
18 protective measures pursuant to order to the Prosecution for
19 renewed motion for protective measures", dated 2 April 2004. It
15:30:20 20 was filed pursuant to an order of the Trial Chamber on 2 April
21 2004; the order being entitled "Order to the Prosecution for
22 renewed motion for protective measures".

23 After careful consideration of that decision and the
24 submissions of counsel, we find nothing in the decision which
15:30:42 25 would entitle witness TF1-215 to any protective measures. In our
26 view, the decision relates solely to those witnesses listed in
27 annexes A and B of the renewed Prosecution motion for protective
28 measures. Witness TF1-215 is not among those witnesses listed in
29 the annexes. Accordingly, the witness will testify in open court

1 and the Defence application to rescind the protective measures of
2 this witness is now moot.

3 Ms Baly?

4 MS BALY: Your Honour, the Prosecution does not intend to
15:31:19 5 call witness TF1-215. The next witness will be witness TF1-028,
6 to be led by my colleague Ms Alagendra.

7 PRESIDING JUDGE: Thank you, Ms Baly. What language will
8 the witness speak?

9 MS ALAGENDRA: Your Honours, the witness will testify in
15:31:42 10 Krio. Also, your Honour, this witness is again subject to
11 protective measures granted by Trial Chamber I and it's the same
12 decision that your Honours were looking at today. This witness,
13 your Honour, is a group 1, category A witness, and the protective
14 measures afforded to this witness previously were for her to
15:32:06 15 testify using a pseudonym, behind a screen and with voice
16 distortion, your Honour.

17 PRESIDING JUDGE: Thank you, Ms Alagendra. In that case -
18 sorry, I'm just having a look at category A. Yes, I see it in
19 front of me.

15:32:49 20 MS ALAGENDRA: Your Honours, if I can assist you further,
21 this particular witness is listed as number 16 in the annexure A,
22 under the category A, your Honour.

23 PRESIDING JUDGE: Thank you, Ms Alagendra. It will be
24 necessary to have the screens completely closed in order to allow
15:33:20 25 the witness to be brought into court, so the court will appear to
26 be closed for a few moments while the witness is moving in the
27 courtroom.

28 MS MUZIGO-MORRISON: May it please the Court, your Honour
29 it would require 30 minutes to enable the technical people to set

2. *Prosecutor v Taylor*, SCSL-03-01-T-501, “Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008

501)

SCSL-03-01-T
(17014-17061)

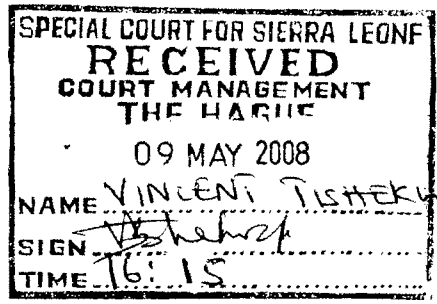
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**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone**

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

Registrar: Mr. Herman von Hebel

Date filed: 8 May 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC WITH CONFIDENTIAL ANNEXES B AND E

**URGENT PROSECUTION APPLICATION FOR RECONSIDERATION OF ORAL DECISION REGARDING
PROTECTIVE MEASURES FOR WITNESS TF1-215 OR IN THE ALTERNATIVE APPLICATION FOR
LEAVE TO APPEAL ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-
215**

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Julia Baly
Ms. Kirsten Keith

Counsel for the Accused:
Mr. Courtenay Griffiths
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. The Prosecution files this Application pursuant to Rules 54, 73 (A) and 73(B) of the Rules of Procedure and Evidence (“Rules”) seeking:
 - i) urgent reconsideration of the Decision made on 6 May 2008, which held that witness TF1-215 was not protected by protective measures previously ordered by the Court;¹ or in the alternative
 - ii) urgent application for leave to appeal the above mentioned decision.
2. The Prosecution requests the above relief on the basis that the Trial Chamber erred in deciding that the witness had no protective measures in place.

II. Background

3. Witness TF1-215 testified in the RUF case with the basic in-court protective measures ordered by Trial Chamber I.² On 31 March 2008 the Defence and the Trial Chamber were notified of the existing protective measures applicable to this witness. On 6 May 2008, prior to the witness taking the stand, the Prosecution again informed the Trial Chamber and the Defence of the protective measures applicable to TF1-215.
4. The Trial Chamber requested the Prosecution to provide a copy of the list of witnesses to which the RUF Decision applied. Subsequently the Defence orally applied to have the protective measures rescinded. Before ruling on the Defence application, the Trial Chamber and Defence were provided copies of other Prosecution filings related to the RUF decision.³
5. The Trial Chamber questioned the wording of the Renewed Motion and whether the RUF Decision applied to TF1-215. Having heard the arguments by each Party and having reviewed the pertinent filings provided by the Prosecution, the Trial Chamber held that the RUF Decision did not provide TF1-215 protective measures:

After careful consideration of that decision and the submissions of counsel we find nothing in the decision which would entitle witness TF1-215 to any protective

¹ Taylor Trial Transcript, 6 May 2008, p. 9122– Impugned Decision is **Annex A**.

² The witness testified on 2 August 2005 in the RUF trial with use of a pseudonym and screen pursuant to: *Prosecutor v Sesay et al*, SCSL-2004-15-T-180 “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004 (“**RUF Decision**”). The practice at the SCSL is that witnesses who testify using a pseudonym also use a screen.

³ Including: *Prosecutor v Sesay et al*, SCSL-2004-15-PT-102, “Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for renewed Motion for Protective measures dated 2 April 2004”, 4 May 2004 (“**Renewed Motion**”) and “Material Filed pursuant to order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004”, 26 April 2004 (“**Witness List of 26 April**”)

measures. In our view the decision relates solely to those witnesses listed in annexes A and B of the renewed Prosecution motion for protective measures. Witness TF1-215 is not among those witnesses listed in the annexes. Accordingly the witness will testify in open court and the Defence application to rescind the protective measures of this witness is now moot.⁴

6. As a result of this Trial Chamber's Decision, the Prosecution was unable to call TF1-215 to testify, as the witness stated he would not testify without the protective measures which had been in place for his prior testimony because of his fears for his safety and the safety of his family. The witness maintains that position and has provided a statement to this effect in **Annex B**, which is filed confidentially.

III. Applicable Law

Reconsideration of Decision

7. The silence of the Statute and the Rules regarding reconsideration of decisions is not in itself determinative of the issue and is "not necessarily inconsistent with a judicial body's inherent jurisdiction to exercise this power in exceptional circumstances."⁵ A Chamber has an inherent jurisdiction to reconsider its own decisions.⁶ The issue is thus the circumstances which may occasion reconsideration of a Trial Chamber decision.
8. The Appeals Chamber has considered such inherent jurisdiction: "A power to reconsider would arise in the event of a *clear error of reasoning*."⁷ Trial Chamber I has also held that a Trial Chamber has inherent power to reconsider decisions where a *clear error of reasoning* in a previous decision has been demonstrated and the Decision sought to be reconsidered *has led to an injustice*.⁸ It has further adopted the views taken by ICTR Trial Chamber II, that

⁴ Taylor Trial Transcript, 06.05.08, p.9122-9123

⁵ *Prosecutor v Norman et al*, SCSL-04-14-T-507, "Decision on Urgent motion for Reconsideration of the Orders for Compliance with the order Concerning the preparation and Presentation of the Defence Case", 7 December 2005, para. 10

⁶ *Prosecutor v Norman et al*, "Decision on Prosecution Appeal against the Trial Chamber's decision of 2 August 2004 refusing Leave to File an Interlocutory Appeal", 17 January 2005, paras. 31, 32, 35 and 40 ("**CDF Appeals Decision**"); *Prosecutor v Taylor*, SCSL-03-01-PT-125, "Decision on Defence Motion to Set Aside and / or Reconsider Trial Chamber's "Decision On Urgent Prosecution Motion For Immediate Protective Measures For Witnesses And For Non-Public Disclosure" dated 13 September 2006", 5 October 2006, para. 24 and supra note 6, Norman Decision 7 December 2005, para. 11.

⁷ CDF Appeals Decision, para. 35 (emphasis added)

⁸ *Prosecutor v Sesay et al*, SCSL-04-15-T-1033, "Decision on Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing sanctions", 6 March 2008, p.1 (emphasis added)

circumstances justifying reconsideration include but are not limited to circumstances where the impugned decision was erroneous in law or an abuse of discretion when decided.⁹

9. This Trial Chamber also considered the circumstances justifying reconsideration of decisions and referred to a change of circumstances that removes or alters the basis for the original order, consistent with the Separate and Concurring Opinion of Justice Robertson in an AFRC Appeals Chamber Decision.¹⁰ This Opinion also recognised that "...the Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, *for example, if a clear error of reasoning has been demonstrated or it is necessary to do so in order to prevent an injustice.*"¹¹
10. The Appeals Chamber's observations regarding reconsideration are consistent with established ICTY and ICTR jurisprudence. The ICTY Appeals Chamber stated:
- "The Appeals Chamber has an inherent power to reconsider any decision including a judgment *where it is necessary to do so in order to prevent an injustice.* The Appeals Chamber has previously held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, *where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice.* Whether or not a Chamber does reconsider its decision is itself a discretionary decision."¹²
11. This jurisprudence establishes that the bases for exercising the discretionary power to reconsider are non-exhaustive, and include where the decision was erroneous;¹³ an abuse of discretion when decided;¹⁴ or where an injustice has been occasioned.¹⁵

⁹ Supra note 7, Norman Decision, 7 December 2005, para. 14.

¹⁰ *Prosecutor v Taylor*, SCL-03-01-PT-226, "Decision on Defence Motion requesting Reconsideration of 'Joint Decision on defence Motions on Adequate Facilities and Adequate time for the Preparation of Mr. Taylor's Defence'", dated 23 January 2007," 25 April 2007, p.3

¹¹ *Prosecutor v Brima et al*, SCSL-04-16-T-441, "Separate and concurring Opinion of Justice Robertson on Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely urgent Confidential Joint Motion For The Re-Appointment Of Keven Metzger And Wilbert Harris As Lead Counsel For Alex Tamba Brima And Brima Bazzy Kamara", 8th August 2005, para. 50

¹² *Prosecutor v Delic et al*, Case No. IT-96-21-Abis, "Judgement on Sentence Appeal", Appeals Chamber, 8 April 2003, para. 48 (emphasis added). The ICTR Appeals Chamber has held: "The Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, for example, if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice." *Prosecutor v Nahimana et al*, ICTR-99-52-A "Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005", 4 February 2005.

¹³ The ICTY Appeals Chamber held: "A Trial Chamber may nevertheless always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice.", *Prosecutor v Galic*, IT-98-29-AR73, "Decision on Application for Leave to Appeal", 14 December 2001, para. 13.

¹⁴ *Prosecutor v Bagosora et al*, ICTR-98-41-T, "Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's 'Decision on prosecutor's Motion for Leave to vary the Witness List pursuant to Rule 73 bis (E)'", 15 June 2004, para. 9

¹⁵ *Prosecutor v Karemera et al*, ICTR-98-44-PT, "Decision of the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses", 29 August 2005, para. 8. See also *Prosecutor v Muvunyi*, Case No. ICTR-2000-

Alternative request for relief, application for Leave to Appeal

12. Rule 73(B) provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. As noted by this Chamber:

“the overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant’s case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.”¹⁶

However, as recognised by the Appeals Chamber, “the underlying rationale for permitting such appeals is *that certain matters cannot be cured or resolved by final appeal against judgement*”¹⁷ (emphasis added).

13. The two limbs to Rule 73(B) – exceptional circumstances and irreparable prejudice – are conjunctive and both must be satisfied if an application for leave to appeal is to succeed. There is no comprehensive or exhaustive definition of “exceptional circumstances”; what constitutes exceptional circumstances “must necessarily depend on, and vary with, the circumstances of each case.”¹⁸ As Trial Chamber I has observed “exceptional circumstances” may exist where the question is one of general principle to be decided for the first time, where further decision is conducive to the interests of justice, where the interests of justice might be interfered with or the question raises serious issues of fundamental legal importance.¹⁹

55A-T, Decision on Motion to Strike or Exclude Portions of Prosecutor’s Exhibit No. 34, Alternatively Defence Objections to Prosecutor’s Exhibit No. 34, Tr. Ch. II, 30 May 2006, para.8 which states that a Chamber may reconsider a decision “if there is a reason to believe that a previous decision was erroneous and therefore prejudicial to either party.”

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, App. Ch., 16 May 2002, para. 17: “It must be emphasised that a Trial Chamber may always reconsider a decision it has previously made, and not only because of unforeseen circumstances.”

¹⁶ *Prosecutor v. Brima et al*, SCSL-04-16-T-483, “Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal pursuant to Rule 98 of 31 March 2006”, 4 May 2006 p2.

¹⁷ Supra note 7, Norman Decision 17 January 2005, para. 29; see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005, para. 21.

¹⁸ *Ibid.* Sesay decision, 28 April 2005, para. 25; *Prosecutor v. Brima et al*, SCSL-04-16-T-588, “Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to call Evidence in Rebuttal”, 23 November 2006.

¹⁹ *Ibid.* Sesay Decision, 28 April 2005, para 26.

IV Arguments

Application for Reconsideration - Decision was Erroneous and Caused Prejudice:

14. The Trial Chamber erred in deciding that TF1-215 is not subject to protective measures. Its decision is based on an erroneous interpretation of the RUF Decision, which granted protective measures to witnesses under Group I (witnesses of fact), and also on a failure to consider the fact that this witness previously testified with protective measures.
15. The RUF Decision, read in conjunction with prior Prosecution filings upon which the RUF Decision is based, show that TF1-215 was included within the protections granted, as were all 266 witnesses of fact listed in the 26 April 2004 witness list.
16. The RUF Decision makes patent the following:
 - i) The Renewed Motion, upon which the RUF Decision is based, divides Prosecution witnesses into two groups: i) witnesses of fact and ii) expert witnesses and witnesses who have waived their right to protection.²⁰
 - ii) The Prosecution seeks protective measures for all witnesses in Group I²¹ and that it seeks additional special protective measures for certain categories of witnesses, who are general fact witnesses and thus come within Group I but who are further divided into 3 sub-categories (A, B, C) according to their special needs.²² These are the witnesses listed in Annex A of the Renewed Motion.
 - iii) The Trial Chamber ordered for all witnesses in Group I the use of pseudonym and testimony behind a screen and further ordered for those witnesses that were listed under categories A, B and C additional special measures.²³
17. Thus the RUF Decision involved a two tier process: consideration of protective measures for all witnesses of fact in Group I and additional protective measures for those fact witnesses that fall within categories A-C.²⁴ All fact witnesses refer to the 266 witnesses in the 26 April list.
18. Although the Prosecution did not attach the 26 April list to the Renewed Motion, the RUF Decision notes that the Prosecution divided its witnesses into 2 groups based on that witness list. In addition, paragraph 2 of the Renewed Motion clearly states that:

²⁰ RUF Decision, Para. 1

²¹ *Ibid.* Paras. 5, 2,

²² *Ibid.* paras. 1, 6, 30

²³ *Ibid.* Disposition

²⁴ RUF Decision, paras. 5 – 6

“on 26 April the Prosecution filed a Prosecution Witness List of 266 witnesses. This Motion provides an overview of the reasons for the protective measures sought for those witnesses.”

A plain and literal construction of this paragraph makes it is clear that the term “those witnesses” encompasses all 266 witnesses in the 26 April list.

19. The Prosecution again refers to 266 witnesses in paragraph 3 of the Renewed Motion, stating that it has divided the 266 witnesses into 2 groups: i) of fact and ii) experts / those who have waived their right to protection. The additional language in this paragraph, wherein the Prosecution sets forth 3 sub-categories of fact witnesses, totalling 87 witnesses as set out in Annex A, is admittedly not as clear as it could be. However, in paragraph 5 of its Renewed Motion, the Prosecution states that the actual number of witnesses called and subject to protective measures could be less than the 266 provided in the 26 April list. If the Prosecution intended that only the 87 witnesses listed in Annex A be granted the protective measures requested, there would be no need for this paragraph. The paragraph was included to indicate that, although the basic protective measures were being requested for all 266 fact witnesses, it was anticipated that not all 266 would testify.
20. Paragraph 20 of the Renewed Motion then requests that all witnesses of fact testify in court using a pseudonym and screen. The fact that this request applies to all fact witnesses is reinforced by subsequent paragraphs 21-32, which request additional measures only for those 87 fact witnesses that fall within the categories A-C in Annex A.
21. The language and intent of paragraphs 2, 3 5 and 20 make clear that the basic in-court protections sought for fact witnesses – the use of pseudonym and screen - related to all 266 fact witnesses.
22. Trial Chamber I interpreted the Renewed Motion in this way in reaching its decision. In footnote 6 of the RUF Decision, the Chamber noted that “Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, **this is obviously not the case**, as the number of A, B & C witnesses amounts to 87 [...], there are only 7 expert witnesses [...], and no witness has so far waived his/her right.” Thus, Trial Chamber I concluded that the Renewed Motion included all 266 fact witnesses.
23. That the RUF Decision granted basic in-court protections to all 266 fact witnesses listed in the 26 April list, including TF1-215, is clear in light of the implementation of that decision by both Trials Chamber during the testimonies of fact witnesses in the *RUF* and *AFRC* cases.

During those cases, multiple fact witnesses not listed in sub-categories A-C testified with the basic in-court protective measures granted in that Decision.²⁵ This includes TF1-215, who testified with these basic protections in the *RUF* case. No subsequent application for protective measures was made for this witness prior to his testimony, nor was there any argument regarding protective measures before he began his testimony.

24. Further, in this trial, this Trial Chamber granted the Prosecution request to rescind the basic in-court protections previously granted to TF1-101.²⁶ TF1-101, a fact witness not listed in sub-categories A-C, testified in the *RUF* trial in accordance with the protective measures granted by the *RUF* Decision.²⁷
25. Thus, this Trial Chamber erred in its reasoning in deciding that TF1-215 was not protected by the *RUF* Decision.
26. Further the Trial Chamber erred by failing to consider that TF1-215 testified with protective measures in the *RUF* case. As discussed above, it is clear that the *RUF* Decision granted this witness the protective measures applicable to all witness of fact. However, assuming, *arguendo*, that the witness was granted protective measures in some other way, the fact remains the witness was subject to protective measures during his prior testimony. Rule 75 (F) makes clear that, once granted protective measures, those protections apply in all subsequent proceedings unless rescinded or varied. Contrary to the statement from the bench²⁸, Rule 75 (F) specifically mandates that the Trial Chamber be concerned with protective measures granted in other proceedings before this Court, as such measures apply *mutatis mutandis* to all subsequent proceedings. Therefore, regardless of any issues of interpretation regarding the *RUF* Decision, this Trial Chamber has an obligation to implement the protective measures under which this witness testified in the *RUF* case, until such time as they are rescinded or varied.

²⁵ Refer to **Annex C** for the list of TF numbers of witnesses who testified as general Group I witnesses with protective measures in the *RUF* and *AFRC* cases. See also *AFRC* Trial Transcript, 8 April 2005, pp.6-11 regarding protective measures applicable to TF1-320 who was not listed in categories A-C where this Trial Chamber was confronted with the same issue and held that the witness was a group one witness and protected by general protective measures under the *RUF* Decision. See also "List of Protective Measures received from Trial Chamber I and other Information filed Pursuant to Scheduling Order of 28 January 2005, in particular paragraph 12 (**Annex D**).

²⁶ Taylor Trial Transcript, 14.02.08, pp. 3896-3897

²⁷ TF1-101 in testified the *RUF* on 28 November 2005

²⁸ Taylor Trial Transcript, 6 May 2008, p. 9114, "I really am not concerned Ms Baly with what this witness did or did not do in another Court or by what means."

Prejudice

27. TF1-215 is unwilling to testify without the protective measures previously granted to him. As a consequence of this Trial Chamber's Decision, the Prosecution was unable to call him. The decision, therefore, deprives the Prosecution of the right to call evidence relevant to prove its case, including proof of the contextual, or chapeau, elements of crimes against humanity, the forms of liability alleged and a pattern of conduct pursuant to Rule 93, which is relevant to prove forms of liability and the crimes alleged, in particular the campaign of terror.²⁹ This is clearly prejudicial to the Prosecution.³⁰

Alternative Request For Relief, Application For Leave To Appeal The Decision

Exceptional Circumstances

28. An issue of fundamental legal importance arises when a Trial Chamber determines that a previous Decision, issued by a different Trial Chamber, granting protective measures to a witness, does not actually confer such protective measures. This is particularly so, when the other Trial Chamber has already heard evidence from the witness in accordance with the protective measures granted by the Decision. The extent to which the subsequent Trial Chamber can then interpret the decision and hold that the witness is not a protected witness, despite the mandatory obligations under Rule 75 (F), is thus of fundamental importance.
29. Failure to implement those protections in accordance with Rule 75 (F), whatever the origin of the protections, also raises serious issues of fundamental legal importance.
30. For the reasons discussed in paragraphs 28 and 29 above, the Trial Chamber's determination that TF1-215 had no protective measures and its failure to consider the fact that TF1-215 actually testified with protective measures in another case also raises issues for which further argument or decision at the appellate level would be conducive to the interests of justice, particularly as issues concerning the interpretation of the RUF Decision are likely to arise with future witnesses.
31. In addition, failure to implement the provisions of Rule 75 (F), resulting in a witness with relevant evidence being unable to testify due to security concerns, interferes with the course

²⁹ A proffer of TF1-215's evidence is attached in **Annex E**.

³⁰ See for instance *Prosecutor v Brima et al*, SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being Compelled to Answer questions on Grounds of Confidentiality", 12 October 2005, p.3 wherein this Trial Chamber found the fact that the Prosecution was unable to call TF1-150 due to the impugned decision may be capable of causing irreparable prejudice.

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of justice. It deprives the witness of protections previously afforded to him and the Prosecution of relevant evidence, without any finding that a sufficient basis has been established to justify rescinding or modifying the existing protections. It is not in the interests of justice that the Prosecution be denied the evidence of this witness, where there has been no rescission of existing protective measures and the witness is about to take the stand.

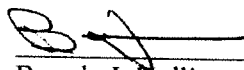
Irreparable prejudice

32. As discussed in paragraph 27 above, the Prosecution may suffer irreparable prejudice as a result of this Trial Chamber's Decision. Depriving the Prosecution of this evidence is a matter that cannot be cured on final appeal.

V. Conclusion

33. The Prosecution requests that the Trial Chamber urgently exercise its discretion and reconsider its decision, reverse its finding that TF1-215 had no protective measures, and order that the witness testify with existing protections - use of a pseudonym and behind a screen.
34. In the alternative, the Prosecution requests that the Trial Chamber urgently grant the Prosecution leave to appeal the Trial Chamber decision.

Filed in The Hague,
8 May 2008
For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

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Annex A

Extracts of Transcripts 6 May 2008 with Impugned Decisions Highlighted

1 PRESIDING JUDGE: We will give at least five to ten minutes
2 notice of the intention to resume Court when we reach a decision.

3 MR MUNYARD: I am grateful.

13:32:24

4 PRESIDING JUDGE: Thank you. Please adjourn Court to a
5 time to be fixed.

6 [Lunch break taken at 1.32 p.m.]

7 [Upon resuming at 3.28 p.m.]

15:29:20

8 PRESIDING JUDGE: This is a ruling on an application. The
9 Defence have opposed and applied to rescind the purported
10 protective measures for witness TF1-215. The Prosecution submit
11 that the witness is protected by an order of Trial Chamber I of 5
12 July 2004, entitled "Decision on Prosecution motion for
13 modification of protective measures for witnesses", which the
14 Prosecution submits applies to 266 witnesses of fact including
15 witness TF1-215.

15:29:53

16 The decision of 5 July 2004 ruled on a 5 May motion filed
17 by the Prosecution and entitled "Renewed Prosecution motion for
18 protective measures pursuant to order to the Prosecution for
19 renewed motion for protective measures", dated 2 April 2004. It
20 was filed pursuant to an order of the Trial Chamber on 2 April
21 2004; the order being entitled "Order to the Prosecution for
22 renewed motion for protective measures".

15:30:20

23 After careful consideration of that decision and the
24 submissions of counsel, we find nothing in the decision which
25 would entitle witness TF1-215 to any protective measures. In our
26 view, the decision relates solely to those witnesses listed in
27 annexes A and B of the renewed Prosecution motion for protective
28 measures. Witness TF1-215 is not among those witnesses listed in
29 the annexes. Accordingly, the witness will testify in open court

15:30:42

1 and the Defence application to rescind the protective measures of
2 this witness is now moot. ||

3 Ms Baly?

15:31:19

4 MS BALY: Your Honour, the Prosecution does not intend to
5 call witness TF1-215. The next witness will be witness TF1-028,
6 to be led by my colleague Ms Alagendra.

7 PRESIDING JUDGE: Thank you, Ms Baly. What language will
8 the witness speak?

15:31:42

9 MS ALAGENDRA: Your Honours, the witness will testify in
10 Krio. Also, your Honour, this witness is again subject to
11 protective measures granted by Trial Chamber I and it's the same
12 decision that your Honours were looking at today. This witness,
13 your Honour, is a group 1, category A witness, and the protective
14 measures afforded to this witness previously were for her to
15 testify using a pseudonym, behind a screen and with voice
16 distortion, your Honour.

15:32:06

17 PRESIDING JUDGE: Thank you, Ms Alagendra. In that case -
18 sorry, I'm just having a look at category A. Yes, I see it in
19 front of me.

15:32:49

20 MS ALAGENDRA: Your Honours, if I can assist you further,
21 this particular witness is listed as number 16 in the annexure A,
22 under the category A, your Honour.

15:33:20

23 PRESIDING JUDGE: Thank you, Ms Alagendra. It will be
24 necessary to have the screens completely closed in order to allow
25 the witness to be brought into court, so the court will appear to
26 be closed for a few moments while the witness is moving in the
27 courtroom.

28 MS MUZIGO-MORRISON: May it please the Court, your Honour
29 it would require 30 minutes to enable the technical people to set

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Annex C

Examples of Witnesses falling under general Group I – not categories A-C - who testified in the RUF case with basic in-court Protective Measures ordered pursuant to the RUF Decision

TF1	Date of Testimony
TF1-074	12/07/04
TF1-214	13/07/04-15/7/04
TF1-021	15/7/04
TF1-077	20/7/04-21/7/04
TF1-217	22/7/04
TF1-331	22/7/04
TF1-305 ¹	27/7/04
TF1-253	28/07/04-29/07/04
TF1-197	21/10/04-22/10/04
TF1-078	22/10/04-27/10/04

Examples of Witnesses falling under general Group I – not categories A-C - who testified in the AFRC case with basic in-court Protective Measures ordered pursuant to the RUF Decision

TF1	Date of Testimony
TF1-277	08/03/05-09/03/05
TF1-098	05/04/05
TF1-278	05/04/05-06/04/05
TF1-084	06/04/05
TF1-320	08/04/05

¹ Witness TF1-305 was originally granted use of screen and pseudonym under the RUF Decision. However the Prosecution applied for the witness to be treated as a Category A witness – victim of sexual violence – and the witness was then granted voice distortion as per order G of the RUF Decision on page 16.

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Annex D

Extracts from transcript dated 8 April 2005, pp.6-11, *The Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*

The Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL – 2004 – 16 PT. List of Protective Measures Received from Trial Chamber I and Other Information Filed Pursuant to Scheduling Order of 28 January 2005, 1 February 2005.

1 I will particularly draw Your Honours' attention to annex A of that
2 document. Annex A. Witness 320. TF1-320, which is found at page 11.

3 JUDGE LUSSICK: We have not have the document before us, so if you
4 could read out what you are referring to it would be helpful.

09:35:25 5 MR FOFANAH: As Your Honour pleases. I am referring to page 1619 of
6 that document and then at least protective measures received from Trial
7 Chamber I by category, protective measures.

8 PRESIDING JUDGE: Before you go any further, Mr Fofanah, are you
9 seeking to vary a protective measure granted by Trial Chamber number one?

09:35:47 10 MR FOFANAH: No, I am seeking to indicate to this Court that no
11 protective measure was granted to this witness by virtue of this annexe.

12 PRESIDING JUDGE: In that case we are having a copy made.

13 MR FOFANAH: As Your Honour pleases.

14 PRESIDING JUDGE: Read out the protective measure relating to this
09:36:07 15 witness, please.

16 MR FOFANAH: There is nothing. There is nothing. I mean, the
17 witness was not categorised as requiring any form of protection. There are
18 various witnesses grouped as group one, under which you have sub-categories
19 A, B and C protection, and then witness group two, which basically deals
09:36:28 20 with experts I guess. Witness TF1-320 has nothing against his name. So I
21 take it that there is no protective measure granted to him. We are kind of
22 flustered that we see him in a protective enclosure. We seek clarification
23 from Your Honours.

24 MS TAYLOR: Your Honour, if I may first deal with the issue of
09:37:08 25 disclosure. The Defence has been in possession of the redacted versions of
26 this witness's statement, in relation to the first statement, for 18 months
27 and in relation to the two paragraph confirmation statement since February
28 of last year; in excess of 12 months. They have been in possession of the
29 unredacted versions of those statements since 21st February of this year.

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1 Other than the statement dated yesterday, the last statement is dated 25th
2 March 2004. That was the last occasion on which anyone from the Office of
3 the Prosecutor saw this witness. The witness was seen yesterday by
4 prosecuting counsel in preparation for giving evidence today and I might
09:38:03 5 say, Your Honours, that the reason that the Prosecution has sought to call
6 this witness higher up the order than originally indicated is that this
7 witness is 69 years of age. He is ill and he requires surgery and that
8 surgery cannot take place until his evidence before this Court has been
9 completed. The facts about which this witness will testify are quite
09:38:28 10 discrete. The original statement -- pardon me, Your Honours, I will just
11 turn up the page. The original statement is three typed pages. The
12 confirmation statement from March 2004 is one typed page. The Prosecution
13 has a continuing obligation of disclosure imposed upon it pursuant to Rule
14 66. The material that was disclosed this morning that was obtained by the
09:39:14 15 Office of the Prosecutor yesterday, does not amount to any new allegation
16 whatsoever. There is nothing in the document that was disclosed to the
17 Defence this morning that will take them by surprise. What is in that
18 document is an amplification of the material that has been previously
19 disclosed to the Defence. The only thing that can possibly be said to be
09:39:37 20 new in that document is that the witness says in the document dated 7th
21 April 2005 that men were killed in the village. That men were killed in
22 the village.

23 MR FOFANAH: Sorry, Your Honour, I don't want to interrupt my
24 colleague at this stage, but I --

09:40:00 25 PRESIDING JUDGE: well, don't; let her finish her --

26 MR FOFANAH: Is she trying to go into the content of that document?

27 PRESIDING JUDGE: she has only pointed out one word.

28 MS TAYLOR: Thank you, Your Honour. The witness from the original
29 statement runs right through to the statement yesterday gives evidence

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1 about the killing of women in a house. Yesterday he said that the
2 remaining men were killed -- most of the remaining men were killed as well.
3 Now, in the context where this witness's statement deals with the killing
4 of people in a village that he said in the original statement, on page
09:40:49 5 6513, "Those of us who were not killed were taken along as captured
6 civilians". The Prosecution would submit that there is nothing that can
7 possibly be described as ambush or surprise in this document. The document
8 is two pages and one paragraph long. There is nothing in that document
9 that the Defence have not known about. As I said, in fairness to the
09:41:11 10 witness it was disclosed because the witness provided amplification and
11 amplification only and in those circumstances, given the difficulties, the
12 personal difficulties that this witness faces, the discrete nature of the
13 evidence which he will give and the very short amplification that he gave
14 yesterday, the Prosecution would submit that there is no unfairness in
09:41:44 15 proceeding to the Defence in proceeding with the evidence of this witness
16 this morning. In relation to the protective measure issue that was raised
17 by my learned friend Mr Fofanah, I don't have the documents before me in
18 court, Your Honour, but I do recall that after the status hearing in which
19 the protective measures were discussed Your Honour raised with me certain
09:42:11 20 issues about certain witnesses in the document that was filed and the
21 Prosecution did file a clarification document very shortly thereafter. I
22 am not sure if it was the same day or the day after. And from memory, I
23 think this witness was included in that clarification document in the sense
24 that the protective measures issued by Trial Chamber one on 5th July 2004
09:42:43 25 were highlighted for this Trial Chamber. If my recollection of that is
26 incorrect, Your Honours, and there is in fact no protective measure in
27 place for this witness, I would make an oral application, pursuant to Rule
28 75, that this witness be granted the protective measures accorded to all
29 witnesses before the Special Court both in this Chamber and in Trial

1 Chamber one, other than expert witnesses, which are the minimum protections
2 of testifying behind a screen and the use of a pseudonym and the other
3 measures that deal with not being photographed coming in and out of the
4 court. AS I said, Your Honours, I am not in a position to help you because
09:43:26 5 I don't have those documents in front of me, but those will be my
6 alternative submissions.

7 PRESIDING JUDGE: Ms Taylor, I recall the sequence of appearances
8 that you refer to, but I too do not have the precise document. I will
9 therefore ask our legal officer to produce that document for us and we will
09:43:45 10 adjourn briefly to both consider that document, the other order that has
11 been filed and the various submissions made by counsel for both the Defence
12 and the Prosecution.

13 JUDGE SEBUTINDE: Could I just ask -- Mr Fofanah, I realise that you
14 do have a right of reply.

09:44:20 15 MR FOFANAH: Yes.

16 JUDGE SEBUTINDE: And while you are replying, I just wanted to really
17 seek your views on the Defence team. Supposing the Bench were inclined to
18 actually hear only the examination-in-chief of this witness in view of his
19 health, also in view of the time, of saving time. Supposing we were
09:44:45 20 inclined today only to hear the evidence-in-chief, would you still object?
21 So in your reply if you could kindly, you know, respond to that in addition
22 to what Ms Taylor has submitted and then we will retire and consider.

23 MR FOFANAH: In the last bit certainly we will not object, Your
24 Honour, because we all seek speedy trial in this case, especially
09:45:13 25 considering the health of the witness. Then if Your Honour can adjourn to
26 such reasonable time that will enable us to cross-examine him it will be
27 fine with us. Especially as I wish to draw two important things. My
28 learned colleague in her response stated that nothing new has been raised
29 except for one thing which she indicated.

1 I wish to particularly draw Your Honours' attention to two things in
2 the additional information which were never contained in the previous.

3 The first is the mention of a village called Dothombo which with
4 respect, I mean, is very vital for the case of the Defence, because if
09:45:52 5 Dothombo has been mentioned we probably may need to send somebody around to
6 find out where that village is and what exactly happened in that village.
7 Then it will be crucial. Dothombo is coming up only for the very first
8 time. There is also the mention of the name of a commander who was never
9 mentioned. No commander was ever mentioned in the previous statement. I
09:46:25 10 don't know if mentioning that commander now would jeopardize his protective
11 state.

12 Then if you look at the second page of that additional information at
13 paragraph three, there is a mention of a colonel. I don't know if Your
14 Honours have seen it. There is mention of a colonel. So that again is
09:46:50 15 crucial for our cross-examination.

16 And then on the second point on protective measure, I would
17 particularly, now that Your Honours have the document that I referred to, I
18 will refer you to.

19 JUDGE LUSSICK: Well, I still don't have that document, I have
09:47:08 20 just got --

21 MR FOFANAH: The one that was just printed.

22 JUDGE LUSSICK: I see. I have not been shown that.

23 MR FOFANAH: The one that I refer to which was just printed. That is
24 page 1609 which is page one of that document. If you look at clause three
09:47:51 25 or paragraph three. It says that, "This document was prepared pursuant to
26 an order by Her Honour Judge Doherty". So it is not like it is coming to
27 this Court for the first time. It was prepared pursuant to an order made
28 on the 28th day of January 2005. That is all, Your Honours.

29 PRESIDING JUDGE: If there are no other matters, the Court will

1 adjourn to consider this. We will also ask for a copy of the later order
2 referred to by counsel for the Prosecution. Which order for protective
3 measures has this Court to consider? Is it the order of 1st February 2005
4 or the subsequent clarifying document filed by you, Ms Taylor?

09:48:58 5 MS TAYLOR: I believe it is the subsequent clarifying document, Your
6 Honour.

7 PRESIDING JUDGE: You are aware of this, Mr Fofanah, I think you were
8 in court when that was dealt with, if I remember correctly.

9 MR FOFANAH: Yes, but I clearly cannot recall the date.

09:49:07 10 PRESIDING JUDGE: Very well. Obviously you require a copy as well.
11 Please assist counsel for the defence with a copy of that document.

12 [Break taken at at 9.52 a.m.]

13 [On resuming at 10.35 a.m.]

14 PRESIDING JUDGE: This is a ruling of the Trial Chamber on an
10:32:10 15 objection by defence counsel concerning the service of a document.

16 [Ruling]

17 PRESIDING JUDGE: The Trial Chamber considers that serving a document
18 on the morning of the hearing is insufficient notice to the Defence of the
19 document entitled "Additional information provided by witness T F1-320".
10:32:31 20 Therefore, the Trial Chamber orders that this statement cannot be used
21 today. In relation to the protective measures as raised by defence
22 counsel, the protective measures, as varied by Trial Chamber number one, in
23 relation to the protective measures witness T F1-320 is listed as a group
24 one witness and the general protective measures apply to him in accordance
10:33:05 25 with paragraph 12 of the order of 1st February 2005 and the protective
26 orders as recited on page 6772 of the order of 5th July 2004 in the case of
27 The Prosecutor v. Sesay, Kallon and Gbao. Those are the two rulings of
28 this Court. Yes.

29 MS TAYLOR: Your Honour, the Prosecution is content to still lead

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN - SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 1 February 2005

THE PROSECUTOR**Against**

**ALEX TAMBA BRIMA
 BRIMA BAZZY KAMARA
 SANTIGIE BORBOR KANU**

Case No. SCSL - 2004 - 16 - PT

**LIST OF PROTECTIVE MEASURES RECEIVED FROM TRIAL CHAMBER I AND
 OTHER INFORMATION FILED PURSUANT TO SCHEDULING ORDER OF 28
 JANUARY 2005**

Office of the Prosecutor

Luc Côté
 Lesley Taylor
 Karen Abugaber
 Christopher Dunn

Defence Counsel for Alex Tamba Brima

Kevin Metzger
 Glenna Thompson
 Kojo Graham

Defence Counsel for Brima Bazy Kamara

Wilber Harris
 Pa Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:

Geert-Jan Alexander Knoops, Lead Counsel
 Carry J. Knoops, Co-Counsel
 A.E. Manly-Spain, Co-Counsel

SPECIAL COURT FOR SIERRA LEONE	
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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN-SIERRA LEONE

THE PROSECUTOR

Against

**ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU**

Case No. SCSL – 2004 – 16 – PT

**LIST OF PROTECTIVE MEASURES RECEIVED FROM TRIAL CHAMBER I AND
OTHER INFORMATION FILED PURSUANT TO SCHEDULING ORDER OF 28
JANUARY 2005**

The Prosecution files these materials in accordance with the Scheduling Order issued on 28 January 2005.

I. Introduction

1. On 26 April 2004, the Prosecution filed “Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004.” These materials included a Prosecution Witness List of 266 witnesses.
2. On 11 May 2004, the Prosecution filed an “Updated Compliance Report Filed Pursuant to Undertaking by the Prosecution in Pretrial Conference Held 30 April 2004(AFRC).” The compliance report revised the Prosecution Witness List, removing witnesses TF1-103, TF1-106, TF1-146, TF1-189, TF1-274 and TF1-276.
3. On 28 January 2005, Her Honour Judge Doherty ordered the Prosecution to provide the Trial Chamber with a list indicating which witnesses on the current Prosecution Witness List have or will be testifying in other Special Court proceedings, and what protective

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measures are already in place for these witnesses from Trial Chamber I. For those witnesses who have already testified before Trial Chamber I, the Scheduling Order also further ordered the Prosecution to indicate the date(s) of such testimony.

4. Pursuant to the Scheduling Order, the Prosecution now submits a Prosecution Witness List (Annex A) indicating the protective measures granted by Trial Chamber I for each of the Prosecution's witnesses. Where applicable, the Witness List also indicates the date(s) on which a witness testified before Trial Chamber I. The Witness List makes specific reference to categories A, B and C protective measures, which are explained below.
5. The Prosecution notes that it intends to file a reduced Witness List following receipt of the outstanding Defence Pretrial Briefs and after considering the import of any decision on its "Motion for Judicial Notice and Admission of Evidence", filed 2 April 2004.

II. Protective Measures Received From Trial Chamber I

6. On 4 May 2004, the Prosecution, in both the RUF trial and the AFRC trial, filed a "Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004" in identical terms.
7. In each of those motions, the Prosecution divided the witnesses into two groups. Group I, which included witnesses of fact, was sub-divided in three categories (A) victims of sexual assault and gender crimes, (B) child witnesses and (C) insider witnesses. Group II was made up of expert witnesses.
8. Relying on the Statute of the Special Court as well as the Rules of Procedure and Evidence for the Special Court, the Prosecution sought to protect the witnesses through (a) non-disclosure of the identity of witnesses of fact to the public; (b) delayed disclosure of the identity of witnesses to the Defence until 42 days before they testify in court; (c) the use of voice alteration device during the testimony of some witnesses and (d) the use of closed circuit television through which some witnesses will give their testimony.
9. On 5 July 2004, Trial Chamber I gave its decision with respect to the RUF indictees. For all witnesses in Group I (witnesses of fact), Trial Chamber I ordered as follows:

- a. That all witnesses shall be referred to by pseudonyms at all times during the course of proceedings, whether during the hearing or in documents, including the transcript of the proceedings;
 - b. That the names, addresses, whereabouts and any other identifying information of witnesses shall be sealed and not included in any of the public records of the Special Court;
 - c. That to the extent that the names, addresses, whereabouts or other identifying data concerning witnesses are contained in existing public documents of the Special Court, that information shall be expunged from those documents;
 - d. That documents of the Special Court identifying witnesses shall not be disclosed to the public or media;
 - e. That all witnesses testify with the use of a screening device from the public;
 - f. That photographing, video-recording, sketching and recording or producing in any other manner of images of any witness of Group I (witnesses of fact) are prohibited while he or she is in the precincts of the Special Court;
10. The Trial Chamber also ordered the following:
- a. That the voice of witnesses in Category A (victims of sexual violence) during their testimony in trial be distorted in the speakers for the public;
 - b. That witnesses in Category B (children) testify with the use of a closed-circuit television, with the image appearing on the public's monitors being distorted;
 - c. That the voice of witnesses in Category C (insider witnesses) during their testimony in trial be distorted in the speakers for the public;
 - d. The Defence shall refrain from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;
 - e. The Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

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- f. The Defence shall provide to the Registrar and to the Defence Office a designation of all persons working on the Defence team who have access to any information referred to in paragraphs 7(a) through 7(d) above, and requiring the Defence to advise the Registrar and the Defence Office in writing of any changes in the composition of the Defence team;
 - g. The Defence shall ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;
 - h. The Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;
 - i. The Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any Prosecution witness who is a protected witness or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parent's or guardian's consent if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.
 - j. That the unredacted witness statements are to be disclosed to Defence 42 days prior to the testimony at trial of these witnesses.
11. The Prosecution notes that the Witness List filed with Trial Chamber I with respect to the RUF indictees has been subsequently reduced on two occasions. In doing so, the Prosecution has filed "core" and "backup" witnesses. The protective measures granted by Trial Chamber I apply notwithstanding this division.

III. Submissions

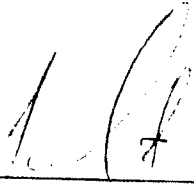
12. In light of the foregoing, the Prosecution submits a Prosecution Witness List (Annex A) indicating the protective measures received from Trial Chamber I for each of the Prosecution's witnesses. Where no specific category (i.e. A, B, or C) is indicated, the basic measures applied to all Group I witnesses (witnesses of fact) are applicable. The

Witness List also indicates the date(s) on which a witness testified before Trial Chamber

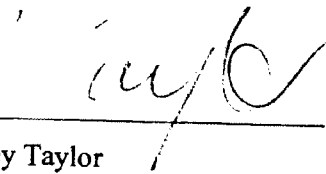
I.

Filed at Freetown

This 1st day of February 2005



Luc Côté
Chief of Prosecutions



Lesley Taylor
Senior Trial Attorney

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ANNEX A
Prosecution Witness List with Protective Measures

Pseudonym (TF1 #)	Protective Measures Received from Trial Chamber I by Category	Date of Testimony before Trial Chamber I
001		
002		
003		
004		
005		
006		
007		
008		
009		
010		
011		
012		
013	B	
014		
015		27/01/05-31/1/05
016	A	21/10/04
017	A	
018		
019		
020	B	
021		15/07/04
022		
023	A	
024	B	
026	A & B	
027	A	
028	A	
029	A	
030	C	
031		
033	C	
034		
035		
036	C	
037		
039		
040		
041		
042		

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043		
044		
045	C	
046	C	
047		
049		
050		
051		
052		
053		
054		
055		
056		
057	B	
058		
059		
060		
061		
062		
064	A	19/07/04 – 20/07/04
066		
067		
068		
071	C	18/01/05 – 27/01/05
072		
074		12/07/04
076	A	
077		21/07/04 – 22/07/04
078		25/10/04 – 27/10/04
081		
082		
083		
084		
085	A	
086		
087		
088		
092	A	
093	A & C	
094	A	
096		
098		
099		
101		
102		

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104		
105		
107		
108		
110	B	
111		
112		
113		
114		
115		
117	B	
119	A	
120		
121		
122		
123		
124		
125		
126		
127		
128		
129		
130	B	
131	B	
132	A	
133		
134		
135		
136		
138	A & C	
139	Waived all protective measures except disclosure of current address	04/10/04-13/10/04
140	B	
141	B	
142	B	
143	B	
147		
149		
150	Group II Witness	
151	C	
152		
153	C	
155	A	
156		

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157	B	
158	B	
159		
160		
165		
167	Waived certain protective measures and testified without voice distortion or a screen. All other protective measures remain in place	14/10/04-20/10/04
168	C	
169		
172		
174		
176		
177		
179		
180	B	
182	C	
183		
184	C	
186		
187	C	
188		
192		
195	A	1/2/05
196	A	13/07/04
197		21/10/04 – 22/10/04
198	A	
199	B	20/07/04 & 27/7/04
200		
202		
204		
205	A	
206		
207		
209	A	
210		
211	B	
212		
213	A	
214		13/07/04 – 15/07/04
215		
216		
217		22/7/04

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218	A	
219		
222		
223	B	
225	B	
226		
227		
232		
233		
234		
235	Testified in closed session	29/07/04
240		
243		
246		
247		
250		
251	B	
252		
253		28/07/04 – 29/07/04
254		
255		
256		
257		
259		
261		
263		
264	A	
265		
266		
267	A	
269	A	
270	A	
271	B	
272	Group II Witness	
275	C	
277		
278		
279		
280		
281	A	
282	A	
286		
287		
288		
289		

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290		
294		
296	Group II Witness	
297		
299		
301	Group II Witness	
302	A	
303	A	
304		12/01/05 – 18/01/05
305	A	27/07/04
306		
307		
308	A	
309	B	
310		
311		
312		
313		
317	B	
320		
323	B	
325	C	
327		
328	B	
329		
330		
331		22/07/04 – 27/07/04
332		
334	C	
337	C	
339		
343		
344		
345		
346		
347	C	
348	Group II Witness	
349		
350		
351		
352	C	
353		
354	C	
355	Waived all protective measures except for the	28/10/04 – 29/10/04

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	disclosure of his current address	
356	C	
357	B	



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SPECIAL COURT FOR SIERRA LEONE
BINCKHORSTLAAN 400 • 2516 BL DEN HAAG • THE NETHERLANDS
PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
Case Number: **SCSL-03-01-T**
Document Index Number: **501**
Document Date **09 May 2008**
Filing Date: **09 May 2008**
Document Type: - **Confidential Annexes B and E**
Number of Pages **11** Page Numbers from: **17030-17031 & 17053-17061**

- Application
- Order
- Indictment
- Motion
- Application**
- Correspondence

Document Title:

**PUBLIC WITH CONFIDENTIAL ANNEXES B AND E – URGENT PROSECUTION
APPLICATION FOR RECONSIDERATION OF ORAL DECISION REGARDING
PROTECTIVE MEASURES FOR WITNESS tf1-215 OR IN THE ALTERNATIVE
APPLICATION FOR LEAVE TO APPEAL ORAL DECISION REGARDING PROTECTIVE
MEASURES FOR WITNESS TF1-215**

Name of Officer:

Vincent Tishekwa

Signed: 



SPECIAL COURT FOR SIERRA LEONE
BINCKHORSTLAAN 400 • 2516 BL DEN HAAG • THE NETHERLANDS
PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**

Case Number: **SCSL-03-01-T**

Document Index Number: **605**

Document Date **23 September 2008**

Filing Date: **23 September 2008**

Document Type: - **Confidential Authorities**

Number of Pages **2** Numbers from: **20330-20340**

Application

Order

Indictment

Motion

Notice of Appeal

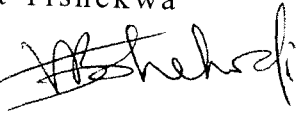
Correspondence

Document Title:

**PUBLIC WITH CONFIDENTIAL AUTHORITIES – PROSECUTION NOTICE
APPEAL AND SUBMISSIONS REGARDING THE DECISION CONCERNING
PROTECTIVE MEASURES FOR WITNESS TF1-215**

Name of Officer:

Vincent Tishekwa

Signed: 

3. *Prosecutor v Taylor*, SCSL-03-01-T-502, “Prosecution Corrigendum to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 12 May 2008

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SCSL-03-01-T
(17062-17066)

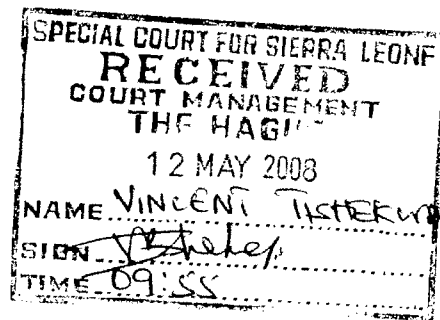
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 12 May 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION CORRIGENDUM TO URGENT PROSECUTION APPLICATION FOR RECONSIDERATION OF ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215 OR IN THE ALTERNATIVE APPLICATION FOR LEAVE TO APPEAL ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Kirsten Keith

Defence Counsel for Charles Ghankay Taylor
Mr. Courtenay Griffiths
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. On 9 May 2008, the Prosecution filed “*Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures For Witness TF1-215 or in the alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures For Witness TF1-215.*”¹
2. The Prosecution files this corrigendum to correct portions of the Application relating to the number of Group I witnesses covered by the RUF Decision dated 5 July 2004.
3. The Prosecution also seeks leave to substitute corrected pages for those pages of the PTC Materials which are the subject of the corrigendum. The corrected pages are set out in the attached four annexes.

II. CORRIGENDUM

4. The Prosecution corrects the Application as follows, with changes highlighted by bold underscore and errors indicated by bold strikethrough:

Paragraph 15 reads:

The RUF Decision, read in conjunction with prior Prosecution filings upon which the RUF Decision is based, show that TF1-215 was included within the protections granted, as were all ~~266~~ witnesses of fact listed in the 26 April 2004 witness list.

Paragraph 15 should read:

The RUF Decision, read in conjunction with prior Prosecution filings upon which the RUF Decision is based, show that TF1-215 was included within the protections granted, as were all **259**² **Group I witnesses i.e.:** witnesses of fact, listed in the 26 April 2004 witness list

¹ *Prosecutor v Taylor*, SCSL-03-01-T-501, “Public with Confidential Annexes B and E - Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures For Witness TF1-215 or in the alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures For Witness TF1-215”, 8 May 2008 (**Application**)”

² 266 witnesses in total were listed in the Witness List filed on 26 April 2004. Annex B of the Renewed Motion lists 7 experts witnesses, leaving a total of 259 fact witnesses.

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Paragraph 17, sentence at lines 3-4 reads:

All fact witnesses refer to the **266** witnesses in the 26 April list.

Paragraph 17, sentence at lines 3-4 should read:

All fact witnesses refers to the **259** witnesses in the 26 April list **who are not listed as experts in Annex B of the Renewed Motion.**

Paragraph 19, sentence at lines 9 -11 reads:

The paragraph was included to indicate that, although the basic protective measures were being requested for all 266 ~~fact~~ witnesses, it was anticipated that not all 266 would testify.

Paragraph 19, sentence at lines 9 -11 should read:

The paragraph was included to indicate that, although the basic protective measures were being requested for all 266 witnesses, it was anticipated that not all 266 would testify.

Paragraph 21 reads

The language and intent of paragraphs 2, 3 5 and 20 make clear that the basic in-court protections sought for fact witnesses – the use of pseudonym and screen - related to all **266** fact witnesses.

Paragraph 21 should read:

The language and intent of paragraphs 2, 3 5 and 20 make clear that the basic in-court protections sought for fact witnesses – the use of pseudonym and screen - related to all **259** fact witnesses **in Group I.**

Paragraph 22, sentence at line 6 reads:

Thus, Trial Chamber I concluded that the Renewed Motion included all **266** fact witnesses.

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Paragraph 22, sentence at line 6, should read

Thus, Trial Chamber I concluded that the Renewed Motion included all 259 fact witnesses:

Paragraph 23, sentence at line 1-3, reads:

That the RUF Decision granted basic in-court protections to all **266** fact witnesses listed in the 26 April list, including TF1-215, is clear in light of the implementation of that decision by both Trial Chambers during the testimonies of fact witnesses in the *RUF* and *AFRC* cases.

Paragraph 23, sentence at line 1-3, should read:

That the RUF Decision granted basic in-court protections to all 259 fact witnesses listed in the 26 April list, including TF1-215, is clear in light of the implementation of that decision by both Trial Chambers during the testimonies of fact witnesses in the *RUF* and *AFRC* cases.

IV. CONCLUSION

- 5) The Prosecution respectfully requests that this corrigendum be considered in conjunction with it's Application.

Filed in the Hague,

12 May 2008

For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

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~~17066~~

List of Authorities

Prosecutor v Taylor, SCSL-03-01-T

Prosecutor v Taylor, SCSL-03-01-T-501, "Public with Confidential Annexes B and E - Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures For Witness TF1-215 or in the alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures For Witness TF1-215", 8 May 2008

4. *Prosecutor v Taylor*, SCSL-03-01-T-512, “Public Defence Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum”, 22 May 2008

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SCSL-03-01-T
(17225-17237)

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THE SPECIAL COURT FOR SIERRA LEONE

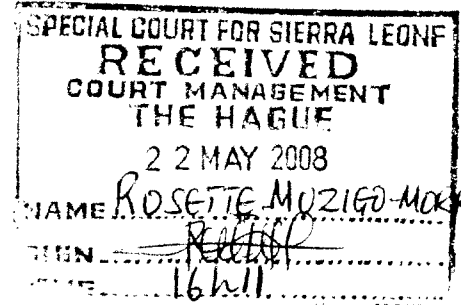
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 22 May 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO URGENT PROSECUTION APPLICATION
FOR RECONSIDERATION OF ORAL DECISION REGARDING PROTECTIVE
MEASURES FOR WITNESS TF1-215 OR IN THE ALTERNATIVE
APPLICATION FOR LEAVE TO APPEAL ORAL DECISION REGARDING
PROTECTIVE MEASURES FOR WITNESS TF1-215
AND ITS CORRIGENDUM**

Office of the Prosecutor
Ms. Brenda J. Hollis
Ms. Julia Baly
Ms. Kirsten Keith

Counsel for Charles G. Taylor
Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. The Defence files this Response to the Prosecution's *Urgent Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or In the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215*, which was filed on 9 May 2008,¹ ("Application"), having taken into consideration the Prosecution *Corrigendum* to the same Application, dated 12 May 2008.²
2. The Prosecution filed the Application in response to an oral decision ("Oral Decision") made on 6 May 2008 wherein the Trial Chamber, having considered the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses*³ ("RUF Decision"), the *Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for Renewed Motion for Protective Measures* dated 2 April 2004,⁴ ("Renewed Motion") and oral submissions from both the Prosecution and the Defence, ruled that it finds "nothing in [the RUF Decision] which would entitle witness TF1-215 to any protective measures".⁵
3. The Prosecution requests that the Trial Chamber reconsider its Oral Decision. In the alternative, the Prosecution seeks leave to appeal the Oral Decision.
4. The Defence notes that by simultaneously seeking the two measures described above within the same Application, the Prosecution have effectively incorporated into one motion pleadings that should properly have been the subject of two separate motions.

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-501, Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or In The Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215, 8 May 2008.

² *Prosecutor v. Taylor*, SCSL-03-01-T-502, Prosecution Corrigendum to Urgent Prosecution Application For Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or In The Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215, 12 May 2008.

³ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004.

⁴ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-102, Renewed Prosecution Motion for Protective Measures pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, 4 May 2004.

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008, p. 9122.

However, with the aim of dealing with the issue expeditiously, the Defence will address both matters raised, as well as the Corrigendum, simultaneously.

5. The Defence does not oppose the corrections to the Application which are the subject of the Corrigendum.⁶ However, the Defence opposes the Prosecution's substantive Application and submits that the Prosecution's requests for reconsideration of the Decision and leave to appeal are flawed and without merit, and as such, should not be granted.

II. Factual and Procedural History

6. In assuming that protective measures were in place for witness TF1-215 ("TF1-215"), namely a pseudonym and a screen, for use during impending testimony in the Taylor trial, the Prosecution sought to rely on a decision that they believe was reached by Trial Chamber I in the RUF Trial.
7. The RUF Decision was made pursuant to a motion that had been filed and renewed by the Prosecution,⁷ which was in turn filed in response to an Order made by Trial Chamber I.⁸ This Order instructed the Prosecution to "file a renewed motion for protective measures...for *each witness* who appears on the Prosecution Witness List..." (emphasis added).⁹
8. At paragraph 3 of the Renewed Motion, the Prosecution stated: "[T]he Prosecution has divided the 266 witnesses into 2 groups: (I) witnesses of fact and (II) experts/those who have waived their right to protection. Within group I, the witnesses are further divided into 3 categories, namely: (A) victims of sexual assault and gender crimes; (B) child witnesses and (C) insider witnesses."

⁶ Corrigendum, paras. 4.

⁷ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-102, Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004, 4 May 2004.

⁸ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-72, Order to the Prosecution for Renewed Motion for Protective Measures, 2 April 2004 ("Order").

⁹ Order, pg. 4.

9. The Prosecution then continued at paragraph 4: “Annexed to this motion and marked Annex A are the pseudonyms of Group I witnesses divided in the 3 categories mentioned above”, and further at paragraph 5: “The Prosecution wishes to emphasize that the categorization of witnesses is based on the witness list filed on 26 April 2004.” TF1-215 does not appear in Annex A, and the witness list as filed on 26 April 2004 was not attached to the Renewed Motion.
10. The Defence in that case filed a response¹⁰ to the Renewed Motion (“The Defence Response”), expressly stating at paragraph 4 that:

The Renewed Motion, has under Annex A, the pseudonyms of Group I Witnesses divided into the three categories mentioned and in Annex B, the list of Group II Witnesses, both summing up to 94 Witnesses. The Defence finds the difference between the statements of the Prosecution that 266 Witnesses will testify and the sum total of 94 Witnesses in both Annex A and B attached to the Motion confusing. **Accordingly, the Defence does not actually know which number of Witnesses [sic] the Protective Measures is intended to cover.**¹¹

11. Trial Chamber I made a passing reference to this ambiguity in a footnote to its decision, wherein it stated:

Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, this is obviously not the case, as the number of A, B & C witnesses amounts to 87.¹²

12. Trial Chamber I then went on to consider and grant the sought protective measures to the witnesses in Groups I and II.

¹⁰ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT, Kallon – Defence Response to Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004, 14 May 2004 (“Defence Response”).

¹¹ Defence Response, para. 4 (emphasis added).

¹² Order, footnote 6.

13. The Prosecution now maintains that in the RUF Decision, Trial Chamber I intended to include TF1-215 in Group I; the Defence submits that it is reasonable for Trial Chamber II to have determined that there is nothing in the RUF Decision to clearly indicate that TF1-215 was included in Group I and subsequently that TF1-215 was not entitled to protective measures. Thus, Trial Chamber II properly exercised its discretion in determining, on the basis of an ambiguously drafted paragraph in the Renewed Motion and a vague RUF Decision relying heavily on inference, that TF1-215 was not ever entitled to protective measures in a prior proceeding and thus should not be automatically entitled to them when testifying in the Taylor trial.

II. Applicable Legal Principles

Reconsideration of Decisions is Left to the Trial Chamber's Discretion

14. In its Application, the Prosecution cites ample jurisprudence to support its submission that the Trial Chamber has an inherent power to reconsider its own decisions. While it is not disputed that the Trial Chamber does indeed possess this inherent power, the Defence emphasises the fact that it is a *discretionary* one.¹³ As duly acknowledged by the Prosecution itself at paragraph 10 of its Application, “Whether or not a Chamber does reconsider its decision is itself a discretionary decision”.¹⁴
15. It has been held that “a party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a ‘discernible error’ resulting in prejudice to that party”.¹⁵
16. As a general principal of law, trial chambers have wide discretion in making various decisions that impact the day-to-day proceedings of a case. For instance, it has been held in an Appeals Judgment of the ICTY that: “Deference is afforded to the Trial Chamber’s discretion in these decisions because they ‘draw on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case,

¹³ *Prosecutor v. Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para 3.

¹⁴ *Prosecutor v. Delic et al*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, para 48.

¹⁵ *Prosecutor v. Šešelj*, IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006.

and require SC [sic] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings”.¹⁶

17. Thus, this Trial Chamber should only exercise its discretion to reconsider its Oral Decision if it finds that it has committed a discernable error resulting in prejudice to the Prosecution.

Leave to Appeal Requires Exceptional Circumstances and Irreparable Prejudice

18. The Defence reiterates that the test for leave to appeal is a two-pronged conjunctive test and accordingly, the party seeking this form of relief must satisfy *both* limbs; that is to say, it must be shown firstly that there are “exceptional circumstances” which would form the basis of an appeal, and secondly that an appeal is necessary in order to avoid “irreparable prejudice” to the party.¹⁷

IV. Submissions

Reconsideration: The Prosecution Have Failed to Show a “Clear Error of Reasoning” or an “Irreparable Prejudice”

19. The Defence submits that the Prosecution have not successfully demonstrated that the Trial Chamber’s decision was based on a clear error of reasoning or a discernible error which resulted in prejudice to the Prosecution.
20. Trial Chamber I’s Order, dated 2 April 2004, instructed the Prosecution to “file a renewed motion for protective measures....for *each* witness who appears on the Prosecution Witness List, which will be filed on 26 April 2004...”.¹⁸ It is absolutely clear from this part of the Order that Trial Chamber I anticipated the Witness List of 26 April 2004 being drawn up, and that it expressly wanted the Prosecution to specify *from that*

¹⁶ *Prosecutor v. Pandurevic & Trbic*, Case No. IT-05-86-AR73.1, ‘Decision on Vinko Pandurevic’s Interlocutory Appeal + Against the Trial Chamber’s Decision on Joinder of Accused’, 24 January 2006, para. 4, citing *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, ‘Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Counsel’, 1 November 2004

¹⁷ Application, paras. 12 and 13.

¹⁸ Order.

list, which of the witnesses contained therein (whether that be all or just some of that number) they sought protective measures for, and the reasons why.

21. Therefore, it is not enough for the Prosecution to simply state that the Renewed Motion was “based” on the Witness List, and that this somehow implies that all 259 witnesses were thereby included within the scope of Group I.¹⁹ The Prosecution states at paragraph 18 of its Application that, “Although the Prosecution did not attach the 26 April list to the Renewed Motion, the RUF Decision notes that the Prosecution divided its witnesses into 2 groups *based* on that witness list”(emphasis added). The Prosecution is referring to paragraph 5 of the Renewed Motion in which it states that, “the categorization of witnesses is *based* on the witness list filed on 26 April 2004”.
22. However, the Defence contends that the language of these statements is not sufficiently precise to give rise to a definitive conclusion that TF1-215 was included within the Group I witnesses to whom protective measures were afforded in the RUF Decision. To say that List X is based on List Y does not necessarily, nor literally, mean that every component of List X is again included in List Y, but simply that List Y has been drawn from List X. That is to say, just because paragraph 5 of the Renewed Motion states that “the categorization of witnesses is *based* on the witness list filed on 26 April 2004” does not mean, and cannot be interpreted as meaning from pure inference, that Groups I and II as defined in the Renewed Motion automatically and clearly include all of the witnesses in the original Witness List. Counsel for the Prosecution admitted as much during court proceedings on 6 May 2008.²⁰
23. While it may have been the Prosecution’s intention to have all 259 witnesses included in Group I, with a residual category of witnesses that belonged neither in categories A, B, or C, this was not made sufficiently clear nor explicit by the wording of the Renewed Motion. If the Prosecution wished to make it clear that there was a residual category of witnesses in Group I in respect of which it sought protective measures, then it ought to

¹⁹ Application, para. 18.

²⁰ *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008, p. 9118.

have made this clear with words such as, “[t]he balance of the witnesses is in the original witness list”.²¹

24. Although Trial Chamber I did indeed acknowledge the Prosecution’s unclear drafting in footnote 6 of its Order, wherein it stated that:

“Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, this is obviously not the case, as the number of A, B & C witnesses amounts to 87...”.

the Chamber did not then go on to clarify what *was* the case in its opinion or upon its understanding. Moreover, in the above excerpt, the Chamber then went on to acknowledge the Defence’s confusion. Given that the Defence, in its Response to the Renewed Motion, had highlighted the fact that it was not clear as to exactly which of the witnesses on the Witness List were intended to be the subject of protective measures, it was incumbent upon either the Prosecution in its Reply or Trial Chamber I in its Decision, to have expressly clarified its intention.

25. However, the Prosecution failed to clarify their intention and now seeks to rely upon an ambiguous inference. Thus it can not be said that this Trial Chamber has made a clear error of reasoning by coming to a different interpretation of the Renewed Motion and RUF Decision.
26. The principle of *in dubio pro reo* in international law states that where ambiguity exists, the matter in question must be interpreted, resolved and applied in favour of the accused.²² The Defence submits therefore that given the unclear wording of both the Renewed Motion and the RUF Decision, the latter must be interpreted in favour of the Accused and accordingly, the Trial Chamber II committed no clear error in reasoning when determining that TF1-215 was not included as a protected witness in Group I.

²¹ As per the suggestion of the Trial Chamber made during oral deliberations, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008.

²² *Prosecutor v. Kordic & Cerkez*, IT-65-14/2-A, Judgement, 17 December 2004, para. 691; *Prosecutor v. Blagojevic & Jokic*, IT-02-60-T, Judgement, 17 January 2005, para. 18; *Prosecutor v. Halilovic*, IT-01-48-T, Judgement, 16 November 2005, para. 12.

27. The Prosecution submits that the Trial Chamber failed to take into account the fact that TF1-215 actually testified with protective measures in the RUF case and that as such, the Trial Chamber has failed to take notice of Rule 75(F), which provides that any protective measures ordered in respect of a witness in proceedings before this Court shall continue to have effect *mutatis mutandis* in any other proceedings before the Court.²³ However, the Defence submits that if TF1-215 was never determined to be entitled to protective measures, Trial Chamber II should not repeat a mistake made by Trial Chamber I in allowing TF1-215 to testify with protective measures.
28. Even assuming, *arguendo*, that Trial Chamber I intended to properly grant TF1-215 protective measures, the Defence submits that it is within Trial Chamber's II discretion under Rule 75(F)(i) to have, in effect, orally rescinded those measures for purposes of the Taylor trial. This can not be considered a clear error of reasoning.
29. The Prosecution also attempts to argue that it has been prejudiced by the Trial Chamber's Oral Decision, since TF1-215 is unwilling to testify absent protective measures.²⁴ However, there is nothing to prevent the Prosecution from reapplying for protective measures on behalf of TF1-215. Based on the numbers in the Prosecution's Amended Witness List,²⁵ there are approximately 40 more witnesses scheduled to testify before the close of the Prosecution case, leaving ample time to recall this witness.
30. Even if TF1-215 is unable to testify, the Prosecution is still not prejudiced. TF1-215 was expected to provide evidence in relation to some or all of the following: atrocities that were committed against civilians by RUF rebels in the Koinadugu District, 'Operation Pay Yourself', the post-Junta period, the fact that certain villages that were attacked by the RUF during the post-Junta period, and the time period of around May 1998, in which

²³ Order, para. 26.

²⁴ Application, para. 27, Confidential Annex B.

²⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Prosecution Amended Witness List, SCSL-03-01-T, 7 February 2008.

civilians were killed by the RUF.²⁶ The Defence submits that there are other witnesses who are able to testify to similar events and allegations.

Leave to Appeal: The Prosecution Have Failed to Show Exceptional Circumstances or Avoidable Irreparable Prejudice

31. The Defence submissions in paragraphs 29 and 30 above have shown that no irreparable prejudice exists in relation to the Trial Chamber's Oral Decision, as there is not necessarily any deprivation of evidence.²⁷
32. Additionally, and contrary to the Prosecution submission, it is not an issue of fundamental legal importance for two different Trial Chambers to interpret an ambiguous decision in two different ways.²⁸
33. As the Prosecution have not met either portion of the conjunctive test required for granting leave to appeal, the Trial Chamber should deny this component of the Prosecution Application.

V. Conclusion

34. On the basis of all of the foregoing, the Defence respectfully requests that the Prosecution's Applications for Reconsideration and, alternatively, Leave to Appeal be denied in their entirety.

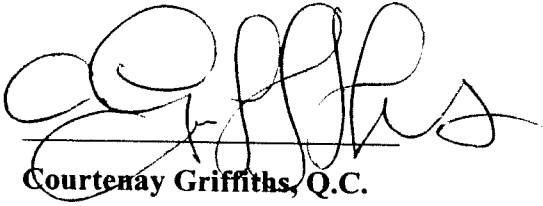
²⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-218, Pre-Trial Conference Materials Pre-Trial Brief, 4 April 2007.

²⁷ See Application, para. 32.

²⁸ Consider, for example, how different districts and even Appeals Courts in the US can come to different interpretations of a single US Supreme Court Decision.

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Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Griffiths', written over a horizontal line.

Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 22nd Day of May 2008

The Hague, The Netherlands.

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Table of Authorities

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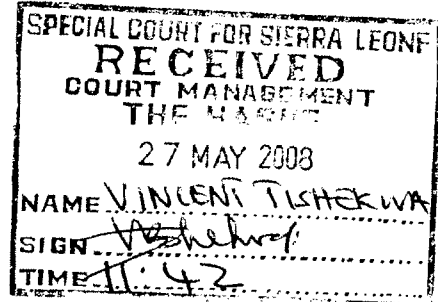
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 27 May 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

**REPLY TO DEFENCE RESPONSE TO URGENT PROSECUTION APPLICATION FOR
RECONSIDERATION OF ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS
TF1-215 OR IN THE ALTERNATIVE APPLICATION FOR LEAVE TO APPEAL ORAL DECISION
REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-215**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Kirsten Keith

Counsel for the Accused:

Mr. Courtenay Griffiths
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. The Prosecution files this Reply to the Defence “*Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum*”, dated 22 May 2008.¹
2. The Response is without merit for the reasons considered below.

II. Argument

3. The Defence observation as to two forms of relief being sought in the Application² is of no assistance in deciding the issues before this Trial Chamber. There is no limitation in the Rules of Procedure and Evidence (“**Rules**”) restricting Motions to only one form of relief and the practice of seeking relief in the alternative is common before the Special Court for Sierra Leone (“**Court**”).³

Reconsideration

4. The Defence argument that there was no error of reasoning by this Trial Chamber⁴, ignores the fact that TF1-215 testified with protective measures in the *RUF* case before Trial Chamber I pursuant to the *RUF* Decision⁵, notwithstanding any issues of ambiguity regarding categories of witnesses. Furthermore, the Response ignores that fact that this Trial Chamber in the *AFRC* case also found that the *RUF* Decision applied to a witness who was a

¹ *Prosecutor v Taylor*, SCSL-03-01-T-512, “Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum”, 22 May 2008 (“**Response**”).

² *Prosecutor v Taylor*, SCSL-03-01-T-501, “Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008 (“**Application**”).

³ See for instance: *Prosecutor v Taylor*, SCSL-03-01-PT-125, “Decision on Defence Motion to Set Aside and / or Reconsider Trial Chamber’s “Decision on Urgent prosecution Motion for Immediate protective Measures for Witnesses and for Non-Public Disclosure”, dated 15 September 2006”, 5 October 2006.

⁴ Response, para. 19-25.

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

- general group one witness and was not listed in categories A-C.⁶
5. The Defence misstate the arguments in the Application by asserting that this Trial Chamber properly exercised its discretion in deciding that TF1-125 was not ever entitled to protective measures in a prior proceeding.⁷ The issue is not one of a discretionary decision made by the Trial Chamber but rather its obligation under Rule 75 (F) to apply protective measures previously granted in separate proceedings. Thus the arguments in the Response concerning challenges to discretionary decisions of Trial Chambers are of no assistance to this Trial Chamber⁸. Furthermore, the argument concerning the standard for reconsideration of discretionary decision, that is a “discernable error” as put forward by the Defence relying on the *Seselj* case, is not on point. The *Seselj* decision cited by the Defence concerns the *standard of review* by the Appeals Chamber in reviewing discretionary decisions by a Trial Chamber.⁹ It does not concern the issue of *reconsideration* by the Trial Chamber of its own decision. There are various standards applicable for reconsideration of a decision by a Trial Chamber, as indicated in the Application in paragraphs 8 – 11.
 6. The arguments based on the principle of *in dubio pro reo*¹⁰ are of no assistance to this Trial Chamber in deciding the matter at hand. In relying on this principle, the Defence overlook the fact that, absent the proper showing and findings by this Trial Chamber, the protective measures granted to TF1-215 in the *RUF* trial are binding on subsequent proceedings, notwithstanding any ambiguity. Furthermore, these protective measures that have been consistently applied by this Court, including this Trial Chamber in this trial,¹¹ and recognised as being consistent with the rights of the accused.¹²
 7. The assertion that this Trial Chamber should not repeat a mistake made by Trial Chamber I in allowing TF1-215 to testify with protective measures is without foundation.¹³ The plain language of Rule 75 (F) makes it patent that a decision granting protective measures by one

⁶ Application, paragraphs 23 and 24 and **Annex D** with reference to TF1-320 who testified in the AFRC case with the same protective measures granted to all group 1 witnesses pursuant to the RUF Decision.

⁷ Response, para. 13.

⁸ Response, paras. 13, 15 and 16.

⁹ *Prosecutor v Seselj*, IT-03-67-AR73.3, “Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel”, 20 October 2006, para. 7

¹⁰ Response, para. 26.

¹¹ See for instance: *Prosecutor v Taylor*, SCSL-03-01-T-515, “Decision on Confidential Urgent Prosecution Motion for Additional Protective Measures for Witnesses TF1-338 and TF1-579”, 22 May 2008

¹² *Prosecutor v Sesay et al.*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004, paras. 33-34; *Prosecutor v Norman et al.*, SCSL-04-14-T, “Ruling on Motion for Modification of Protective Measures for Witnesses”, 18 November 2004, p. 13

¹³ Response, para. 27

Trial Chamber is binding on all subsequent proceedings and must be applied by other Trial Chambers in subsequent proceedings, absent a sufficient showing to justify rescinding or varying protective measures. It is not for the subsequent Trial Chamber to revisit or reconsider the binding decision of the earlier Trial Chamber. In addition, the Defence have shown no basis for their unsubstantiated assertion that Trial Chamber I erred in granting the protective measures.¹⁴ Indeed, in a recent decision, this Trial Chamber again found that “the potential threats to the security of witnesses still exists.”¹⁵

8. Further the submission that the Trial Chamber has discretion under Rule 75 (F) (i) to, in effect, *proprio motu* rescind measures¹⁶ is both a misconstruction of the decision in question and also a misinterpretation of that Rule. First, the Trial Chamber did not seek to exercise such discretion, but erroneously found there were no existing protective measures and, in doing so, essentially determined that the Trial Chamber in the *RUF* case erroneously allowed the witness to testify with protective measures. Second, as to the Defence interpretation of the Rule, Rule 75 (F) (i) is silent as to any discretion and states:

Once protective measures have been ordered in respect of a witness of 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.

The procedure referred to in Rule 75 (F) (i) is set out in Rule 75 (G), which states:

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.

A plain and literal reading of this Rule makes it clear that the Rule contemplates a party to the second proceedings applying to rescind the protective measures. There is no reference to the Trial Chamber itself exercising its discretion to rescind the protective measures under either sub-rules (F) or (G). To the extent a Trial Chamber has inherent authority to take such action, that action must be subject to the same standard applicable to a party seeking such a

¹⁴ Response, para. 13.

¹⁵ *Prosecutor v Taylor*, SCSL-03-01-T-383, “Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure”, 10 January 2008.

¹⁶ Response, para. 28.

change in protective measures; that is, evidence must be presented that is “capable of establishing on a preponderance of probabilities that the witness is no longer in need of such a protection. The Trial Chamber must be satisfied based on such evidence that there is a change in the security situation facing the witness such as a diminution in the threat level faced by the witness that justifies a variation of protective measures orders.”¹⁷

Irreparable Prejudice

9. The assertion that the Prosecution is not prejudiced as there is nothing to prevent the Prosecution from reapplying for protective measures for TF1-215 is similar to the argument rejected by the Appeals Chamber in the *Sesay Appeals Decision*.¹⁸ The argument ignores the reality that this witness is protected by existing protective measures that were granted in an earlier proceeding. As noted in the paragraph above, absent the proper showing and the requisite finding by the Trial Chamber, those protections remain in effect. The assertion also overlooks the fact that the Prosecution lost a witness who was in The Hague ready to testify and presumes that a renewed request for protective measures would be granted. It is likely that the Defence would oppose any renewed request for protective measures and there can be no certainty that this Trial Chamber would grant the request. In addition, the Prosecution has other “general category” witnesses who were granted protections by the same order. Requiring the Prosecution to make applications for protective measures already granted to witnesses in other proceedings effectively renders Rule 75 (F) void of any meaning, and causes the Prosecution to unnecessarily use team resources to file motions for protections already in existence.
10. The Defence argument that there may be other witnesses who are able to testify to similar events and allegations is also similar to an argument rejected in the *Sesay Appeal Decision*.¹⁹ The argument does not mitigate the prejudice suffered by the Prosecution as a result of being unable to call TF1-215. While other witnesses may testify as to similar events, each witness offers unique testimony based on their own personal experiences of specific individual events. Therefore other witnesses would not cover the same specific areas of testimony of

¹⁷ *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1146, Appeals Chamber, “Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 23 May 2008, para. 37. (“*Sesay Appeal Decision*”)

¹⁸ *Sesay Appeal Decision*, para. 40

¹⁹ *Ibid.*

TF1-215 and the Prosecution is prejudiced by not calling this specific witness. Furthermore, the Prosecution has a right to present its case and made a determination to call TF1-215 in light of the other evidence that it has and will present at trial.

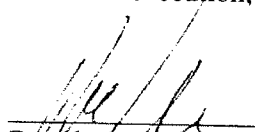
Exceptional Circumstances

11. The Response misinterprets the issues raised by the Prosecution in its motion. It is noted that Trial Chambers may interpret decisions differently where such decisions are not of a binding nature and in relation to binding protective measures decisions, upon a proper showing being made and the requisite finding by the Trial Chamber, existing protective measures may be rescinded or varied. However, the Prosecution challenges neither of those assertions here. Rather, this Application flows from the Prosecution's assertion that the Trial Chamber erred in its reasoning and failed to acknowledge and implement a decision of another Trial Chamber granting protective measures to this same witness in an earlier proceeding. It is this failure to adhere to obligations imposed by the Rule 75 (F) that raises issues of fundamental legal importance.

III. Conclusion

12. For the reasons given above, the Response is without merit. Accordingly, the Prosecution requests that the Trial Chamber reverse its finding that TF1-215 had no protective measures, and order that the witness testify with existing protections - use of a pseudonym and behind a screen.
13. In the alternative, the Prosecution requests that the Trial Chamber urgently grant the Prosecution leave to appeal the Trial Chamber decision.

Filed in The Hague,
27 May 2008
For the Prosecution,

for 
Brenda J. Hollis
Senior Trial Attorney

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LIST OF AUTHORITIES

SCSL Cases

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Prosecutor v Taylor, SCSL-03-01-T-383, “Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure”, 10 January 2008.

Prosecutor v Taylor, SCSL-03-01-T-501, “Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215”, 8 May 2008

Prosecutor v Taylor, SCSL-03-01-T-512, “Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum”, 22 May 2008”

Prosecutor v Taylor, SCSL-03-01-T-515, “Decision on Confidential Urgent Prosecution Motion for Additional Protective Measures for Witnesses TF1-338 and TF1-579”, 22 May 2008

Prosecutor v. Sesay et al., SCSL-04-15-T

Prosecutor v. Sesay et al., SCSL-04-15-T-1146, Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 23 May 2008

Prosecutor v. Sesay et al., SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses”, 5 July 2004

Prosecutor v Norman et al, SCSL-04-14-T

Prosecutor v Norman et al, SCSL-04-14-T, “Ruling on Motion for Modification of Protective Measures for Witnesses”, 18 November 2004

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Prosecutor v Seselj, IT-03-67-AR73.3, “Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel”, 20 October 2006 available at:
<http://www.un.org/icty/seselj/appeal/decision-e/061020.pd>

6. *Prosecutor v. Taylor*, SCSL-03-01-T-595, “Decision on Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215”, 15 September 2008

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SPECIAL COURT FOR SIERRA LEONE

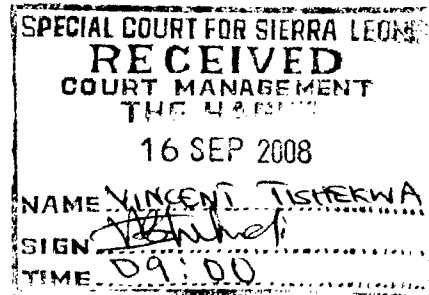
TRIAL CHAMBER II

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.: SCSL-03-1-T

Date: 15 September 2008



PROSECUTOR

v.

Charles Ghankay TAYLOR

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

Office of the Prosecutor:

Brenda J. Hollis
Julia Baly
Kirsten Keith

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");
SEISED of the "Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215" filed on 9 May 2008 ("Motion")¹ wherein the Prosecution seeks

- (i) reconsideration of the Trial Chamber's Oral Decision of 6 May 2008 ("Impugned Decision") on the ground that the Trial Chamber erred in deciding that Witness TF1-215 had no protective measures in place; or, in the alternative;
- (ii) leave to appeal the Impugned Decision on the grounds that (a) exceptional circumstances exist in that the failure to implement protective measures in accordance with Rule 75(F), whatever the origins of the protective measures, raises issues of fundamental legal importance² and (b) the Prosecution may suffer irreparable prejudice as a result of the Impugned Decision in that depriving the Prosecution of the evidence of Witness TF1-215 is a matter which cannot be cured on final appeal;³

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

NOTING ALSO the "Defence Response to the Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215 and Its Corrigendum" filed on 22 May 2008 ("Response")⁵ wherein the Defence opposes the Motion on the grounds that the Prosecution's applications for reconsideration of the Impugned Decision and leave to appeal are without merit⁶, in that (i) the Prosecution has not demonstrated that the Trial Chamber committed a discernible error resulting in prejudice to the Prosecution;⁷ (ii) it is not an issue of fundamental legal importance for two different Trial Chambers to interpret an ambiguous decision in two different ways;⁸ and (iii) the Prosecution has not suffered any irreparable prejudice since there are other witnesses who are able to testify to similar events and allegations;⁹

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

¹ SCSL-03-01-T-501 ("Application").

² Motion, para. 29.

³ Motion, para. 32.

⁴ SCSL-03-01-T-502 ("Corrigendum").

⁵ SCSL-03-01-T-512 ("Response").

⁶ Response, para 5.

⁷ Response, paras 14-17.

⁸ Response, para. 32.

⁹ Response, paras 30, 31.

¹⁰ SCSL-03-01-T-522 ("Reply").

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

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

RECALLING the Trial Chamber's Oral Decision of 6th May 2008, where the Trial Chamber held as follows:

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

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

¹¹ SCSL-04-15-T ("RUF trial").

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

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

¹⁴ Transcript, 6 May 2008, p. 9102, lns. 2-16.

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

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

¹⁷ Transcript 6 May 2008, pp. 9122 to 9123.

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CONSIDERING in relation to the request to reconsider the Impugned Decision that it is within the inherent jurisdiction of the Trial Chamber to reconsider one of its own decisions in circumstances of a clear error of reasoning¹⁸ and that the decision to reconsider is a discretionary one;¹⁹

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

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

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

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


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

RECALLING the Appeals Chamber's ruling that:

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

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

FOR THE ABOVE REASONS;



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

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

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

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

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









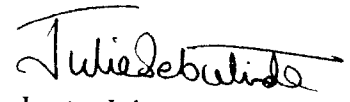
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GRANTS the request for leave to appeal the Impugned Decision;
DENIES the Motion in all other respects.

Done at The Hague, The Netherlands, this 15th day of September 2008.


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

