660) SCSL-03-01-T (22061-22071) 22061

THE SPECIAL COURT FOR SIERRA LEONE

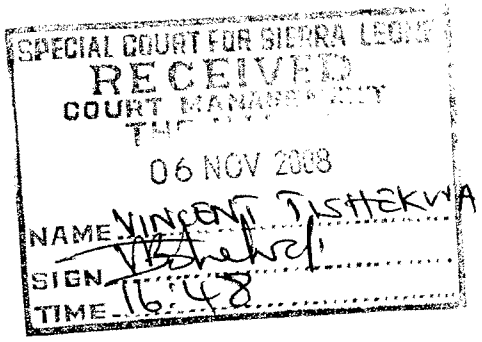
In the Appeals Chamber

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

Registrar: Mr. Herman von Hebel

Date: 6 November 2008

Case No.: SCSL-2003-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION CONCERNING PROTECTIVE MEASURES FOR WITNESS TF1-062

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I. Introduction and Opposition

1. The Defence files this Response to the Prosecution's 30 October 2008 *Notice of Appeal and Submissions Regarding the Decision Concerning Protective Measures for Witness TF1-062* ("Appeal").[1] In its Appeal, the Prosecution summarizes the circumstances giving rise to the appeal[2] and requests the Appeals Chamber to order Trial Chamber II to hear the evidence of prosecution witness TF1-062 subject to protective measures including use of a pseudonym and a screen (instead of in open court).[3]

2. The Prosecution's appeal is based on two grounds. Firstly, that Trial Chamber II erred in law in finding that TF1-062 was not subject to protective measures. Secondly, that the Trial Chamber erred in law and fact in finding on the facts before it that TF1-062 did not have protective measures.[4]

3. The Defence opposes the Appeal and submits that the Trial Chamber did not err in law or in law and fact by ordering that TF1-062 should testify in open court without protective measures. The protective measures which were in place for TF1-062 during his testimony in the AFRC[5] and CDF[6] Trials do not apply *mutatis mutandis* to his testimony in the Taylor Trial.[7] Trial Chamber II appropriately exercised its discretion and reached a reasoned decision in finding that TF1-062 is not subject to any order for protective measures from a previous trial and thus should not enjoy protective measures again.[8]

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-651, Prosecution Notice of Appeal and Submissions Regarding the Decision Concerning Protective Measures for Witness TF1-062, 30 October 2008.
[2] Appeal, paras. 2 – 11.
[3] Appeal, para. 12.
[4] Appeal, pg. 5, Section III.
[5] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T ("AFRC Trial").
[6] *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-T ("CDF Trial").
[7] *Prosecutor v. Taylor*, SCSL-03-01-T ("Taylor Trial").
[8] *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 23 September 2008, pg. 17036, lns. 13–19 and pg. 17043, lns. 10-15.

II. Factual and Procedural History

4. In assuming that trial-related protective measures were in place for TF1-062's testimony in the Taylor Trial, the Prosecution sought to rely on a decision that was reached by Trial Chamber I in the RUF Trial.[9] In accordance with the Prosecution's Renewed Motion,[10] the RUF Decision delineated three categories of witnesses (A, B, and C) that were to be subject to protective measures at trial. In the Renewed Motion, despite the Trial Chamber's clear instructions for the Prosecution to "file a renewed motion for protective measures...for **each witness** who appears on the Prosecution Witness List...",[11] Witness TF1-062 was not listed as a protected witness.

5. The Prosecution now maintains that Trial Chamber I intended to include TF1-062 as a Group I witness of fact, from which sub-categories A, B and C were drawn.[12] However, since there was no comprehensive list of Group I witnesses listed in the Renewed Motion or RUF Decision, the protective measures ordered in regard to TF1-062 are not clear, if at all. For Trial Chamber II to then accept that TF1-062 was definitely covered under a pre-existing protective measures order required it to rely heavily on inference. This remained largely a matter of discretion. It was within the Chamber's discretion to find that TF1-062 was not subject to any order of protective measures.

III. Submissions

Standard of Review

6. In finding that TF1-062 did not enjoy protective measures, Trial Chamber II did not "misdirect itself either as to the principle to be applied, or as to the law which is relevant to

[9] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-T-180, 'Decision on Prosecution Motion for Modification of Protective Measures for Witnesses', 5 July 2004 ("RUF Decision").
[10] *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 ("Renewed Motion").
[11] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-PT-72, Order to the Prosecution for Renewed Motion for Protective Measures, 2 April 2004, pg. 4 (emphasis added).
[12] Appeal, paras. 19-22.

the exercise of the discretion" as the Prosecution alleges.[13] Nor did Trial Chamber II abuse its discretion.

7. Rule 75(F)(i) of the Special Court Rules of Procedure and Evidence provides that "once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court...such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court...". Trial Chamber II was aware of this Rule,[14] or the principle to be applied, when making its decision that the RUF Decision did not include TF1-062.

8. It is not an abuse of discretion for one trial chamber to interpret the decision of another trial chamber and reach a different conclusion, especially where the circumstances underlying the initial decision are so ambiguous. To the extent that the Prosecution alleges that Trial Chamber II erred in fact,[15] the Appeals Chamber should give a wide margin of deference to the Trial Chamber's factual findings. Only where the evidence relied on by Trial Chamber II could not have reasonably been accepted by any reasonable person would the Appeals Chamber substitute its own finding for that of Trial Chamber II. This is due to the established principle that two judges (or Trial Chambers), both acting reasonably, could come to different conclusions based on the same facts.[16]

9. Even if the Appeals Chamber does not agree with the Trial Chamber II's decision, the decision to not allow TF1-062 to enjoy protective measures should stand unless it was "so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously".[17]

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[13] Appeal, para. 27.
[14] See, ex. *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, 23 September 2008, pg. 17038, ln. 20 – pg. 17043, ln. 24.
[15] Appeal, para. 28.
[16] *Prosecutor v. Tadic*, IT-94-1-A, Judgement, 15 July 1999, para. 64.
[17] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-T, Decision on Prosecution Motion Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371, 13 December 2007, para. 10.

The Trial Chamber Correctly Interpreted and Applied Rule 75(F)

10. Trial Chamber II correctly interpreted and applied Rule 75(F) when determining that TF1-062 should testify openly.

11. Rule 75(F) only requires the Trial Chamber to apply **orders** of protective measures from another Trial Chamber *mutatis mutandis* to the Taylor Trial. It does not, however, require the Trial Chamber to follow the improper implementation of an alleged order from previous trials. The Trial Chambers in the CDF Trial and the AFRC Trial improperly implemented what they assumed to be a proper order, based on either the CDF Decision[18] or the RUF Decision when allowing TF1-062 to testify using a pseudonym and a screen. As Judge Lussick stated, when Trial Chamber II heard testimony from TF1-062 in the AFRC Trial, the judges "simply assumed that the protective measures applied".[19] In other words, it was "simply recognition of the fact (albeit erroneous) that protective measures were actually in existence as ordered by Trial Chamber I".[20]

12. However, in the Taylor Trial, Trial Chamber II looked more closely at the RUF Decision and determined that TF1-062 had never been subject to an order for protective measures. The Trial Chamber did not, as the Prosecution asserts, take any action to nullify protective measures granted in another proceeding or use its inherent authority to rescind protective measures.[21] The reality is that TF1-062 never had protective measures. As such no protective measures order attached to the witness in subsequent proceedings per Rule 75(F)(i).

Inapplicability of CDF Decision & Testimony in the CDF Trial

13. When the Prosecution filed a Notice under Rule 92*bis* notifying the Court of its intention to *inter alia* request that TF1-062's prior testimony in the AFRC Trial be admitted into evidence in the Taylor Trial, the Prosecution only advised that TF1-062 was a witness

[18] *Prosecutor v. Fofana, Kondewa,* SCSL-04-14-T-126, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004 ("CDF Decision").
[19] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, 23 September 2008, pg. 17038, lns. 17-18.
[20] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, 23 September 2008, pg. 17041, lns. 16-20.
[21] Appeal, para. 49.

protected by measures ordered by the RUF Decision.[22] The Notice did not list the CDF Decision, nor did the Prosecution rely on the CDF Decision when stating the basis of his purported protective measures prior to his testimony in the Taylor Trial.[23] Yet now the Prosecution seeks to rely on the CDF Decision (which also purportedly granted TF1-062 protective measures of a pseudonym and use of a screen) as an alternative source of protection.

14. However, even if the CDF Decision is considered, the order still does not specifically list TF1-062 (testifying in the CDF Trial as TF2-022) as a protected witness and thus his status is ambiguous. Although TF2-022 was not listed specifically as a Group I witness in the CDF Decision, the Prosecution apparently considered him part of an ambiguous and open category of witnesses containing "all witnesses residing in Sierra Leone who have not waived the right to protection" and thus he testified in the CDF Trial with protective measures.[24] Yet even the Prosecution implicitly recognized the possibility that he was not properly covered by an order for protective measures, because if they had believed that protective measures from the CDF Decision were still extant,[25] they would not have needed to, in essence, re-apply for protective measures for this witness in the RUF Trial.

15. Furthermore, the fact that TF1-062 testified in the CDF Trial as TF2-022 and benefited from the use of a pseudonym and screen does not cure the deficiency in the **order** of the CDF Decision, which did not list the witness. It simply means that Trial Chamber I made a mistake in allowing him the benefit of protective measures when testifying – they implemented something that was not ordered, and according to Rule 75(F), only **orders** of protective measures from another Trial Chamber must be applied *mutatis mutandis* to the Taylor Trial, not an improper implementation of an assumed order.

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[22] *Prosecutor v. Taylor,* SCSL-03-01-T-429, Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District, 29 February 2008; *Prosecutor v. Taylor,* SCSL-03-01-T-606, Confidential Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062, 25 September 2008, para. 6.
[23] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, 23 September 2008, pg. 17036, lns. 13-25.
[24] CDF Decision, para. 37.
[25] Appeal, paras. 4, 14, and 43.

Inapplicability of Testimony in the AFRC Trial

16. When the Prosecution filed a pre-trial list in the AFRC Trial of indicating which witnesses on the current Prosecution Witness List have or would be testifying in another Special Court trial and have protective measures already in place, the Prosecution listed TF1-062 as a general Group I witness with no specific sub-category.[26] When the witness came to testify, the Trial Chamber allowed him the benefit of protective measures, because there was no argument made to the contrary by defence counsel and the Trial Chamber assumed that the RUF Decision covered TF1-062. But as with the circumstances surrounding his testimony in the CDF Trial, Trial Chamber made a mistake in allowing him the benefit of protective measures when testifying – they implemented something that was not ordered. In the Taylor trial, the Chamber was therefore not bound by its previous error. As there was never an 'order' for protective measures for the witness, none continued to have effect *mutatis mutandis* to any other proceedings before the Special Court.

The Deficiencies of the RUF Decision

17. The Trial Chamber did not err in its interpretation of the RUF Decision. Rather, the Chamber provided a clear and finite interpretation of the RUF Decision in accordance with the documents placed before it and the submissions of the parties.[27]

18. It is the Prosecution's interpretation of the RUF Decision that is flawed. The Prosecution claims that the RUF Decision, when read in conjunction with the prior Prosecution filings upon which the RUF Decision was based, establishes that TF1-062 was included within the protections granted, as well all Group I witnesses, ie. witnesses of fact, listed in the 26 April 2004 witness list.[28]

19. However, whether TF1-062 is a member of Group I within the Renewed Motion and annexed witness list or is covered by the RUF Decision by virtue of being on the 26 April 2004 witness list is unclear. In either case, the Prosecution has failed to explain why

[26] Appeal, para. 23; *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-PT-122, List of Protective Measures Received from Trial Chamber I and Other Information filed pursuant to Scheduling Order of 29 January 2005, 1 February 2005, para. 12.
[27] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, 23 September 2008, pg. 17043, lns. 10-15.
[28] Appeal, para. 31.

neither the Renewed Motion nor the RUF Decision explicitly define Group I witnesses as including each of the remaining witnesses on the list, or identify TF1-062 as granted with specific protective measures. Hence, the Prosecution is unable to provide any specific evidence to show that TF1-062 was granted protective measures by the RUF Decision.

20. The deficiency in the RUF Decision cannot be rectified by relying on footnote 6 of the decision, as the Prosecution suggests.[29] The footnote does not identify the remaining witnesses from the 26 April 2004 list, beyond those identified in Categories A, B and C, as specifically forming Group I. This is despite the fact that the Prosecution had been specifically ordered to identify protective measures for "each witness who appears on the Prosecution Witness List".[30] It is reasonable, as Trial Chamber II determined, that had the Prosecution in the RUF Trial intended to include further those witnesses outside Categories A, B and C, then they would have created a fourth category of witnesses in the Annexes.[31] The fact that TF1-062 was not included in any fourth or residual category must mean that protective measures were not sought for him, or that the Prosecution failed to include a witness for whom it sought protective measures. On either count, the Appeal fails to explain how TF1-062 could have been granted the measures.

21. Nor does the Prosecution explain why when requested to file a Renewed Motion to identify protective measures for "each witness", the Prosecution omitted the majority of those witnesses.[32] It is submitted that the reason for this omission was that, by the Prosecution's own admission, the 26 April 2004 witness list was "not final and the actual number of witnesses called could be less".[33] In fact, as the Defence stated during proceedings in relation to similarly-situated TF1-215, the Prosecution deliberately left vague the identify of witnesses beyond categories A, B, and C.[34] This is the only available explanation as to why the Renewed Motion failed to annex the full witness list of 26 April 2004.

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[29] Appeal, para. 36.
[30] Order, pg. 4.
[31] See Judge Sebutinde's suggestion regarding a fourth witness list in relation to TF1-215, who was similarly situated to TF1-062. *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, pg. 9115, lns. 8-10.
[32] The Prosecution has acknowledged such an omission. *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, pg. 9115, lns. 6-11.
[33] Order, pg. 4.
[34] *Prosecutor v. Taylor,* SCSL-03-01-T, Transcript, pg. 9210, lns. 24-26.

22. As the RUF Decision was deficient in clearly showing which witnesses were to be covered by its protective measures order, Trial Chamber II did not err in determining that TF1-062 was not among those witnesses included.

23. In the alternative to all of the foregoing, the Defence submits that the Prosecution's appeal to the extent that it relies on the RUF Decision, which rescinded, varied or augmented the protective measures ordered in the CDF Decision, is ill-conceived and misplaced by virtue of Rule 75(J). The protective measures in the RUF Decision only related to that case and did not carry over to subsequent proceedings.

Trial Chamber II's Decision Does Not Prejudice the Prosecution

24. The standard of review on appeal does not include a consideration of prejudice, yet the Prosecution attempts to make it relevant.[35] Where an error of law is alleged, it must be established that the error is of such gravity that it invalidates the decision and where an error of fact is alleged, that error must be such as to occasion a miscarriage of justice. The Prosecution fails to show how the alleged prejudice relates to the applicable standard on appeal but should the Appeals Chamber care to consider it, the Defence argument is below.

25. The Prosecution states that they are unable to call TF1-062 without the use of protective measures, and that this prejudices their case. However, Trial Chamber II never said that TF1-062 could not have protective measures at trial if the Prosecution applied for protective measures on his behalf. Trial Chamber II simply said that TF1-062 is not covered by a pre-existing protective measures order that must be applied *mutatis mutandis* in the Taylor Trial. There is no "irreparable prejudice" as the Prosecution case is still on-going and the Prosecution has the opportunity to request protective measures on behalf of TF1-062, which could cure the alleged prejudice.

[35] Appeal, paras. 53-54.

26. The Prosecution also states that TF1-062 (a crime-base, 92*bis* witness) is a "key witness"[36] that is necessary to provide evidence especially relevant to crimes committed in Kenema during the Indictment period, specifically evidence of unlawful killings, forced labor, and the use of child soldiers by the RUF/AFRC. However, the Prosecution has already elicited similar evidence through other witnesses.[37] Thus the lack of his testimony would not be significantly detrimental to the Prosecution case.

IV. Conclusion

27. The Prosecution has failed to establish any error of law invalidating the Trial Chamber's decision. The Prosecution has also failed to demonstrate any error of fact occasioning a miscarriage of justice.

28. The Defence submits while a different arbiter might have come to a different decision, the Trial Chamber's decision was reasonable in the circumstances.

29. On the basis of all of the foregoing, the Defence respectfully requests the Appeals Chamber to dismiss the Prosecution's appeal and allow the decision of Trial Chamber II to stand.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 6th Day of November 2008
The Hague, The Netherlands.

[36] Appeal, para. 54.
[37] See ex, *Prosecutor v. Taylor,* SCSL-03-01-T-429, Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District, 29 February 2008.

Table of Authorities

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Other Special Court Cases

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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

Prosecutor v. Sesay, Kallon, Gbao, SCSL-2004-15-T-180, 'Decision on Prosecution Motion for Modification of Protective Measures for Witnesses', 5 July 2004

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