

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Renate Winter, Presiding Judge, Justice Jon Kamanda, Justice George Gelaga King, and Justice Emmanuel Ayoola;

SEIZED of the "Prosecution Notice of Appeal and Submissions Regarding the Decision Concerning Protective Measures for Witness TF1-062," dated 30 October 2008 ("Prosecution Appeal");¹

CONSIDERING the "Defence Response to Prosecution Notice of Appeal and Submissions Regarding the Decision Concerning Protective Measures for Witness TF1-062," filed on 7 November 2008 ("Defence Response");²

HEREBY DECIDES the Motion based on the written submissions of the Parties.

I. INTRODUCTION

1. On 29 February 2008, the Prosecution applied to introduce in written form the prior testimony of Witness TF1-062 pursuant to Rule 92*bis*. The Prosecution submitted that Witness TF1-062 was subject to protections ordered by Trial Chamber I in its 5 July 2004 Decision on Prosecution Motion for Modification of Protective Measures for Witnesses ("RUF Protective Measures Decision").³ On 15 July 2008, the Trial Chamber issued its decision on the Prosecution's request, stating that

the prior trial transcripts and related exhibits relating to the testimony of . . . TF1-062 . . . be admitted into evidence pursuant to Rule 92*bis* provide that the Prosecution . . . make [Witness TF1-062] available for cross-examination by the Defence.⁴

2. Following the Trial Chamber's 15 July 2008 decision, the Prosecution notified the Trial Chamber of the witness's availability for cross-examination on 23 September 2008 and renewed its notification that the witness was subject to the protective measures ordered in the RUF Protective

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-651, Prosecution Notice of Appeal and Submissions Regarding the Decision to Concerning Protective Measures for Witness TF1-062, 30 October 2008 ("Prosecution Appeal").

² *Prosecutor v. Taylor*, SCSL-03-01-T-660, Defence Response to Prosecution Notice of Appeal and Submissions Regarding the Decision Concerning Protective Measures for Witness TF1-062, 7 November 2008 ("Defence Response").

³ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004 ("RUF Protective Measures Decision"). The Prosecution acknowledges that it did not state then what it asserts now on appeal that the witness was also subject to protections ordered in the CDF Decision. See Prosecution Appeal, para. 5.

⁴ *Prosecution v. Taylor*, SCSL-03-01-T-556, Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, p. 6.

Measures Decision.⁵ On 23 September 2008, before the witness took the stand, the Prosecution again notified the Trial Chamber that the witness was subject to protective measures that had been applied in two previous proceedings at the Special Court. The Prosecution stated that the applicable protective measures were those ordered in the RUF Protective Measures Decision.⁶

3. However, after hearing from the Parties, the Trial Chamber held by oral decision (the "Impugned Decision") that the RUF Protective Measures Decision did not provide Witness TF1-062 with protective measures, stating:

This is a ruling on a submission concerning the protective measures of witness TF1-062. Having considered the decision of Trial Chamber I of 5 July 2004 fully, we have rendered our decision that witnesses not in categories A, B and C are not subject to the protective measures and this applies to the current witness TF1-062. Accordingly, we hold that he does not enjoy protective measures.

On the question of the protective measures accorded to him in the AFRC trial, we note that on that particular occasion the issue and the question of his protective measures was not raised by the Defence and the decision of this Trial Chamber in regard to that witness was then premised on an assumption that the protective measures existed. However after a more recent and more close examination of the decision we are of the view, as I have already noted, that he does not enjoy those protective measures.⁷

4. As the Trial Chamber noted, it had previously interpreted the RUF Protective Measures Decision not to provide protective measures to so-called "Group I" witnesses (fact witnesses) who were not included in Sub-Category A, B or C.⁸ Accordingly, the Trial Chamber found that no previous protections applied and required the witness to testify without protection. The witness re used.

5. On 25 September 2008, the Prosecution applied for leave to appeal the Impugned Decision.⁹ In granting the Prosecution's application for leave to appeal, the Trial Chamber stated that it was satisfied that the Prosecution had met the conjunctive conditions of exceptional character of the issue as it relates to witness protection, and that irreparable prejudice resulted as a key witness for the Prosecution became unwilling to testify as a result of the rescinded protective measures.¹⁰

⁵ *Prosecution v Taylor*, SCSL-03-01-T-568, Public with Confidential Annexes B & D – Amended Prosecution Witness List for the Week of 15-19 September 2008 & Prosecution Witness List for Week of 22-28 September 2008, 8 September 2008, para. 2, Annex B.

⁶ Transcript, 23 September 2008, p. 17036.

⁷ Transcript, 23 September 2008, p. 17043.

⁸ Transcript, 6 May 2008, pp. 9101-9123.

⁹ *See Prosecutor v Sesay et al.*, SCSL-04-15-T, 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.

¹⁰ *Prosecution v Taylor*, SCSL-03-01-T-645, Decision on Confidential Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062, 24 October 2008, p. 3.

II. SUBMISSIONS OF THE PARTIES

A. The Prosecution Appeal

6. The Prosecution's submissions organized nominally in two grounds of appeal are essentially three-fold: first, that the Trial Chamber erred in law in erroneously interpreting the RUF Protective Measures Decision; second, that it erred in law and in fact in failing to find on the facts before it that Witness TF1-062 was subject to protective measures¹¹ and; third, that it failed to correctly interpret and apply Rule 75(F) of the Rules.

7. The Prosecution first contends that the Trial Chamber erred in deciding that Witness TF1-062 was not afforded protective measures by the RUF Protective Measures Decision. In this respect, the Prosecution notes that although the list of witnesses included in the 26 April 2004 Prosecution Disclosure Materials, which included Witness TF1-062 as one of the 266 witnesses, was not attached to the 4 May 2004 Prosecution Renewed Motion, it was incorporated by reference.¹² According to the Prosecution, the 4 May 2004 Prosecution Renewed Motion, read together with the 26 April 2004 Prosecution Disclosure Materials made it clear that sought protective measures encompassed those fact witnesses included in the 26 April 2004 Prosecution Disclosure Materials and not only those witnesses requiring additional protective measures.¹³

8. The Prosecution recalls that the 266 witnesses included in the 26 April 2004 Prosecution Disclosure Materials were divided into two categories: i) Witnesses of fact (Group I) and ii) Expert witnesses and witnesses who have waived their right to protection (Group II).¹⁴ Sub-categories were created for those Group I Witnesses who required additional protective measures, namely, A) victims of sexual assault and gender crimes; B) Child witnesses and; C) Insider witnesses.¹⁵ Sub-categories A, B and C of Group I amounted to 87 witnesses.¹⁶ According to the Prosecution, it is clear that it requested protective measures for all witnesses of fact and not only those 87 witnesses requiring additional protective measures.¹⁷ The Prosecution further points out Trial Chamber's I

¹¹ *Ibid.*, para. 52.

¹² Prosecution Appeal, para. 19.

¹³ *Ibid.*, para. 32, citing 4 May 2004 Prosecution Renewed Motion, para. 2.

¹⁴ *Ibid.*, para. 19.

¹⁵ *Ibid.*, para. 33, citing 4 May 2004 Prosecution Renewed Motion, para. 3.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, paras 33-35. The Prosecution specifically relies on its observation contained the Renewed Motion that "the actual number of witnesses who will be subject to the protective measure . . . will be less than 266," which would have been needless, had it required protective measures for only the 87 witnesses listed in categories A, B and C.

own understanding, expressed in the RUF Protective Measures Decision that under the Renewed Motion, Group 1 (witnesses of fact) did not solely consist of Sub-Categories A, B, and C.¹⁸

9. The Prosecution submission that the RUF Protective Measures Decision granted protective measures to all witnesses of fact, including TF1-062, is further based on the implementation of that Decision in both the RUF and AFRC Trials, where the witness testified under basic protective measures.¹⁹ With respect to the AFRC Trial, the Prosecution contends that the Trial Chamber erred in ruling that the application of protective measures in the AFRC Trial, which was “premised on an assumption that protective measures existed,”²⁰ was mistaken.²¹ With respect to the RUF Trial, the Prosecution argues that the Trial Chamber “erred in that it overruled and/or limited the decision of another Trial Chamber in finding that the witness was not covered by protective measures under the RUF Protective Measures Decision.”²²

10. Secondly, the Prosecution contends that the Trial Chamber erred in law in failing to give effect to existing protective measures. Assuming *arguendo* that the RUF Decision did not grant protective measures to Witness TF1-062, the Prosecution contends that the witness was afforded protection in the CDF Decision. Accordingly, regardless of any interpretation of the RUF Decision, Trial Chamber II was obliged under Rule 75(F) to recognize and implement the protective measures afforded to the witness in both the CDF and AFRC Trials, until rescinded or varied.²³

11. Thirdly, the Prosecution contends that the Trial Chamber erred in law in failing to correctly interpret and apply Rule 75(F), and committed a discernable error in the exercise of its discretion. According to the Prosecution, Rule 75(F) contemplates a variation or rescission of protective measures granted in a first proceeding at a request of a party to the second proceeding, not at the discretion of the Trial Chamber.²⁴ Further and as a consequence, because a rescission of protective measures must be based on a showing that the witness is no longer in need of protective measures,²⁵

¹⁸ *Ibid.*, para. 36, citing RUF Protective Measures Decision, n. 6 (stating that “Even though the wording and structure of the Motion gives the impression that Group 1 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”).

¹⁹ *Ibid.*, para. 37.

²⁰ *Ibid.*, para. 40.

²¹ Prosecution Appeal, para. 40.

²² *Ibid.*, para. 41.

²³ *Ibid.*, paras 43-45.

²⁴ *Ibid.*, paras 48-49.

²⁵ *Ibid.*, para. 49.

the Trial Chamber's Decision led the Chamber to fail to require the Defence to make the proper showing before lessening or rescinding protective measures.²⁶

B. The Defence Response

13. In response, the Defence considers that the Trial Chamber did not err in law or in fact in ordering Witness TF1-062 to testify in open session and contends that protective measures which were in place during testimony in the AFRC and CDF Trials do not apply *mutatis mutandis* to his testimony in the Taylor Trial.²⁷

14. First, the Defence considers that the Trial Chamber correctly interpreted and applied Rule 75(F). While Rule 75(F) requires a Trial Chamber to apply orders of protective measures from another trial, it does not require it to follow an improper implementation of an alleged order from previous trials.²⁸

15. Second, the Defence asserts the inapplicability of the CDF Decision on protective measures, in view of the fact that when the Prosecution notified the Court, in the Taylor Trial of its intention to rely on TF1-062 testimony in the AFRC Trial, it referred to the RUF Protective Measures Decision, not the CDF Decision. Furthermore, the CDF Decision does not specifically list the witness as a protected witness.²⁹ The fact that the witness testified in the CDF Trial under protective measures does not cure the deficiency in the CDF Decision but simply means that Trial Chamber I had been mistaken in allowing him the benefit of protective measures.³⁰

16. Similarly, the Defence considers that Trial Chamber II in the AFRC case made a mistake in allowing the witness protective measures, on the assumption from the Chamber that the RUF Protective Measures Decision covered Witness TF1-062 based on the fact that no argument was made to the contrary by the Defence counsel.

17. The Defence further asserts that the Trial Chamber did not err in its interpretation of the RUF Protective Measures Decision and contends that the Prosecution is unable to provide any specific evidence to show that Witness TF1-062 was granted protective measures under the

²⁶ *Ibid.*, para. 50.

²⁷ Defence Response, para. 3.

²⁸ *Ibid.*, para. 11.

²⁹ *Ibid.*, para. 14.

³⁰ *Ibid.*, para. 15.

Decision. According to the Defence, had the Prosecution intended to include further witnesses in Group I outside categories A, B, and C, it would have created a fourth category.³¹

17. The Defence finally alleges that the Trial Chamber's Decision does not prejudice the Prosecution and that the Chamber did not commit an error of such gravity that it invalidates the Decision.³² It considers that the Trial Chamber's Decision that Witness TF1-062 was not covered by pre-existing protective measures under the RUF Protective Measures Decision does not prevent the Prosecution from requesting protective measures on behalf of the witness.³³

III. DELIBERATIONS

18. Pursuant to Rule 75(F) and Rule 75(G) of the Rules, a witness in a second proceeding at the Special Court retains protective measures ordered in the first proceeding unless the Chamber of the second proceeding, at the request of a party, determines there are changed circumstances such that the witness no longer needs the extant protective measures.³⁴ It is therefore presumed that a witness granted protections in a proceeding at the Court will benefit from those protections in all subsequent proceedings.³⁵ These protective measures, which are the consequence of a Court order, cannot be waived by a witness him/herself. Rather, they can only be varied or rescinded by a subsequent order. Even when an existing protective measure is varied, rescinded, or augmented, these changes apply only with regard to the second proceeding.³⁶

19. With regard to Witness TF1-062, the Prosecution provided timely notice to the Trial Chamber advising that the witness was subject to protections ordered in the RUF Protective Measures Decision. The Prosecution also provided notice, albeit inconsistently, that the witness was subject to protections in the CDF Decision. The Trial Chamber, applying a construction of the RUF Protective Measures Decision it adopted in its decision of 6 May 2008 with regard to Witness TF1-215, considered that Witness TF1-062, like all so-called "Group I" witnesses (witnesses of fact) who were not listed in Sub-Category A, B or C, was not subject to protection pursuant to the

³¹ *Id.* paras 17-19.

³² *Id.* paras 24-25.

³³ *Id.*

³⁴ This is also consistent with the Appeals Chamber's recent jurisprudence. See e.g., *Prosecutor v. Taylor*, SCSL-2003-01-T, Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168, 17 October 2008.

³⁵ See *Prosecutor v. Taylor*, SCSL-2003-01-T, Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168, 17 October 2008, para. 20 (noting there is a "strong presumption that witness protection measures that were found to be necessary for the protection of a witness before the Special Court in one proceeding will be maintained for that witness in additional proceedings).

³⁶ Rule 75(J) states in full: "If the Chamber seized of the second proceedings rescinds, varies or augments the protective measures ordered in the first proceedings, these changes shall apply only with regard to the second proceedings."

22214

RUF Protective Measures Decision and therefore required the witness to testify without protective measures.

20 The question on appeal is whether the Trial Chamber erred in law or in fact in concluding that the witness was not granted protective measures in a previous proceeding.

21 Witness TF1-062 has testified in two previous proceedings at the Special Court. In the CDF Trial,³⁷ the witness testified on 11 February 2005 using the pseudonym Witness TF2-022 and from behind a screen. The protections applied in the CDF Trial were pursuant to protective measures ordered by Trial Chamber I in the CDF Trial.³⁸

22 The witness then testified in the AFRC Trial³⁹ on 27 June 2005, again from behind a screen and using a pseudonym. In the AFRC Trial, however, Trial Chamber II—comprised of the same judges as the bench in the Taylor Trial—applied protective measures that were ordered in the RUF Trial. Because the AFRC Trial was applying the protective measures ordered in the RUF Trial, the witness testified as Witness TF1-062.⁴⁰ In the AFRC Trial, the witness was presented as a “Protective Group I” witness.⁴¹ The protective measures were not rescinded or varied during or between the two proceedings.

23 The Prosecution rightly notes that the protective measures ordered in the CDF Trial are still in effect, if they apply to Witness TF1-062, because they had not been varied or rescinded.⁴² However, the protections ordered in the CDF Protective Measures Decision are the same as those the Prosecution submits were ordered in the RUF Protective Measures Decision. Further, the Prosecution submitted to the Trial Chamber that the applicable protective measures were those ordered in the RUF Protective Measures Decision, therefore the Appeals Chamber confines its analysis to that decision.

24 Turning to the scope of the RUF Protective Measures Decision, the Appeals Chamber notes that prior to joining the cases of Issa Hasan Sesay, Morris Kallon and Augustine Gbao, Trial

³⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T (“CDF Trial”).

³⁸ *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004 (“CDF Decision”).

³⁹ *Prosecutor v. Brima, Kamsara and Kanu*, SCSL-04-16-T (“AFRC Trial”).

⁴⁰ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Confidential Prosecution Proposed Order of Third 10 Witnesses to be Called at Trial and Their Statements, 12 April 2005, p. 7280.

⁴¹ *Ibid.*

⁴² Prosecution Appeal, para. 4. Witness TF1-062 confirmed his protections on the record before the Judges of Trial Chamber II in the AFRC Trial, stating (T. p. 17036, ¶ 20-25.)

Chamber I had issued protective measures in each of the cases at the pre-trial stage.⁴³ Because these protective measures were applicable at the pre-trial phase, and because the Prosecution sought additional protections for some witnesses (namely insider witnesses, child witnesses and victims of sexual violence), on 2 April 2004 Trial Chamber I ordered 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 in accordance with 'Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial,' of 1 April 2004. The motion shall specify the form of protection being sought for each witness including delayed disclosure, pseudonym, face distortion or closed session, to the extent that the Prosecution can provide such specification. This motion shall further provide an overview of the reasons for the protective measures sought for witnesses whose names appear on the witness list. In this regard, the Trial Chamber finds that the Prosecution's reference to specific categories of witnesses may facilitate the Prosecution's task⁴⁴

25 On 26 April 2004, the Prosecution filed the disclosure materials ordered by the Trial Chamber on 1 April 2004 (and referred to by the Chamber in its 2 April 2004 order, quoted above).⁴⁵ The 26 April 2004 Prosecution Disclosure Materials included among other things a list of the pseudonyms of each of the 266 witnesses the Prosecution intended to call at trial, and a summary for each witness appearing on that list. Witness TF1-062 was included on the list and a summary for the witness was provided.⁴⁶

26 On 4 May 2004, the Prosecution filed its renewed motion for protective measures pursuant to Trial Chamber I's order of 2 April 2004, quoted above.⁴⁷ The Prosecution stated that it "divided the 266 witnesses [listed in the 26 April 2004 Prosecution Disclosure Materials] into 2 groups: (I) witnesses of fact and (II) experts/those who have waived their right to protection."⁴⁸ The Prosecution continued that "[w]ithin 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

⁴³ *Prosecutor v. Sesay*, SCSL-03-05-PT, 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-03-07-PT, 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-03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 10 October 2003.

⁴⁴ *Prosecutor v. Sesay et al.*, SCSL-04-15-PT, Order to the Prosecution for Renewed Motion for Protective Measures, 2 April 2004, p. 4.

⁴⁵ *Prosecutor v. Sesay et al.*, SCSL-04-15-PT, Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial on 1 April 2004, 26 April 2004 ("26 April 2004 Prosecution Disclosure Materials").

⁴⁶ 26 April 2004 Prosecution Disclosure Materials, at pp. 2051, 2071.

⁴⁷ *Prosecutor v. Sesay et al.*, SCSL-04-15-PT, 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 ("4 May 2004 Prosecution Renewed Motion").

⁴⁸ *Ibid.*, para. 3.

witnesses.”⁴⁹ In Annex A, the Prosecution provided lists of the pseudonyms of the 33 Group I-A witnesses, 28 Group I-B witnesses and 26 Group I-C witnesses. In Annex B, the Prosecution provided the list of 7 Group II witnesses. The Prosecution stated that it “wished to emphasize that the categorization of witnesses is based on the witness list filed on 26 April 2004.”⁵⁰ “For all witnesses of fact or lay witnesses,” the Prosecution requested among other things “that the current orders authorizing non-disclosure of the identity of Prosecution witnesses to the public . . . remain in force. Accordingly the Prosecution request[ed] that witnesses of fact testify in court using pseudonyms and from behind a screen that will shield them from public view.”⁵¹

27. On 5 July 2004, Trial Chamber I issued the RUF Protective Measures Decision on the 4 May 2004 Prosecution Renewed Motion. In its discussion of the parties' submissions, Trial Chamber I noted that the Prosecution divided its witnesses into two groups, based on the witness list filed on 26 April 2004, as follows:

I. Witnesses of Fact

Categories within this group

- A. Witnesses who are victims of sexual assault and gender crimes
- B. Child witnesses
- C. Insider witnesses

II. Expert Witnesses and witnesses who have waived their right to protection.⁵²

28. In a footnote, the Trial Chamber explained that it understood Group I to include witnesses not listed in Sub-Categories A, B or C, (hereinafter “residual Group I witnesses”) stating:

Even though the wording and structure of the [4 May 2004 Prosecution Renewed 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, see Annex A of the [4 May 2004 Prosecution Renewed Motion], there are only 7 expert witnesses, see Annex B of the [4 May 2004 Prosecution Renewed Motion], and no witness has so far waived his/her right.⁵³

29. The Appeals Chamber finds that the Trial Chamber proceeded with the understanding that the scope of Group I included residual Group I witnesses that were not listed in Sub-Categories A, B or C (including Witness TPI-062), when it granted the 4 May 2004 Prosecution Renewed Motion.⁵⁴ With the understanding that Group I witnesses included residual Group I witnesses not

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, para. 5

⁵¹ *Ibid.*, para. 20

⁵² RUF Protective Measures Decision, para. 1.

⁵³ *Ibid.*, n. 6 (emphasis added).

⁵⁴ *Ibid.*, Disposition.

listed in the annexes to the 4 May 2004 Prosecution Renewed Motion, but which were listed in the witness list included in the 26 April 2004 Prosecution Disclosure Materials, the Trial Chamber ordered “for all witnesses in Group I (witnesses of fact)” . . . that all witnesses shall be referred to by pseudonyms at all times during the course of proceedings . . . [and t]hat all witnesses testify with the use of a screening device from the public.”⁵⁵

30 The Prosecution’s submissions in the RUF Trial should have explicitly stated those witnesses in Group I that were not in the named Sub-Categories. However, the RUF Protective Measures Decision—on its face and read in context—clearly provides protections to all of the 266 witnesses listed in the 26 April 2004 Prosecution Disclosure Materials and categorized in the 4 May 2004 Prosecution Renewed Motion. The Trial Chamber therefore erred in law in adopting an incorrect construction of the RUF Protective Measures Decision, and in failing to give effect *mutatis mutandis* to the protective measures ordered in a previous proceeding.

31 The Trial Chamber’s error is aggravated by the fact that it appears to have disregarded the possibility of consulting a Judge of Trial Chamber I regarding the scope of the protective measures Trial Chamber I ordered. This consultation is expressly provided in Rule 75(H) in order to ensure that necessary protections are maintained and to avoid the delays and errors that may result from misinterpretation of decisions in other proceedings. The Trial Chamber has previously considered itself “obligated” to consult with Trial Chamber I in the context of a decision regarding rescinding protective measures for another witness subject to protections for insider witnesses (Sub-Category C).⁵⁶ Although the consultation provided by Rule 75(H) is in fact precatory, use of the procedure would certainly have been prudent, and perhaps expected, when the Trial Chamber is adopting a construction of a protective measures decision which (i) contradicts the application of the decision by two preceding Trial Chambers and (ii) will deny protections to such a large number of potential witnesses. As a consequence of not consulting with Trial Chamber I, the Trial Chamber’s erroneous construction of the RUF Protective Measures Decision with respect to residual Group I witnesses, may have adversely affected the protective measures ordered for as many as 20 witnesses.⁵⁷

⁵⁵ *Id.*, Disposition.

⁵⁶ Transcript, 16 June 2008, p. 11829 (The Presiding Judge stated “The Trial Chamber is obliged to consult with Trial Chamber I in accordance with Rule 75(H) and a decision cannot be made on that application until 75(H) is complied with. We bring this to the attention of the parties.”); Transcript, 17 June 2008, p. 12042 (Justice Sebutinde stated, “the Trial Chamber was now under an obligation, before deciding that motion [to rescind protective measures], to consult with the previous Chamber that had imposed this protective measure pursuant to Rule 75(H).”)

⁵⁷ The Trial Chamber first erroneously construed the RUF Protective Measures Decision on 6 May 2008 with respect to Witness TF1-215. See Transcript, 6 May 2008, pp. 9101-9123. In addition to Witness TF1-062 and Witness TF1-215, eighteen similarly-situated witnesses (e.g., residual Group I witnesses) have testified in the Taylor Trial. See

IV. DISPOSITION

BASED ON THE FOREGOING CONSIDERATIONS, THE APPEALS CHAMBER

FINDS that the Trial Chamber erred in law by failing to find that Witness TF1-062 is subject to protective measures ordered by Trial Chamber I in the RUF Protective Measures Decision;

GRANTS the Prosecution's appeal;

SETS ASIDE the Impugned Decision; and

ORDERS the Trial Chamber to hear testimony of Witness TF1-062 subject to the existing protective measures, unless and until they are varied or rescinded pursuant to Rule 75.

Done this 13th day of November 2008 at Freetown, Sierra Leone.



Justice Renate Winter,
Presiding



Justice Jon M. Kamanda



Justice George Gelaga King



Justice Emmanuel Ayoola

[Seal of the Special Court for Sierra Leone]

In transcript, pp. 17486-17491, 29 September 2008 (Witness TF1-060); Transcript, pp. 17875-17878, 6 October 2008 (Witness TF1-263); Transcript, 13 October 2008, pp. 18112-18113 (Witness TF1-087); Transcript, pp. 18143-18144, 13 October 2008 (Witness TF1-072); Transcript, p. 18187, 13 October 2008 (Witness TF1-074); Transcript, pp. 18229-18230, 13 October 2008 (Witness TF1-077); Transcript, pp. 18360-18361, 15 October 2008 (Witness TF1-304); Transcript, pp. 18441-18443, 15 October 2008 (Witness TF1-206); Transcript, pp. 18456-18457, 16 October 2008 (Witness TF1-197); Transcript, pp. 18555-18557, 16 October 2008 (Witness TF1-097); Transcript, p. 18983, 22 October 2008 (Witnesses TF1-331); Transcript, p. 19031, 22 October 2008 (Witness TF1-084); Transcript, p. 19114, 23 October 2008 (Witnesses TF1-098); Transcript, p. 19149, 23 October 2008 (Witness TF1-104); Transcript, p. 19284, 27 October 2008 (Witnesses TF1-227); Transcript, p. 19315, 27 October 2008 (Witness TF1-216); Transcript, p. 19366, 28 October 2008 (Witness TF1-217); and Transcript, p. 19571, 30 October 2008 (Witness TF1-210). All but two of these witnesses agreed to testify without protective measures, however, the protective measures ordered by Trial Chamber I in the RUF Protective Measures Decision remain in effect until they are varied or rescinded pursuant to the procedure provided in Rule 75(G) (J). It is clear from a review of the proceedings that the Trial Chamber erroneously considered the Rule 75 procedure "redundant" because it did not consider RUF Protective Measures Decision to have provided protection to the witnesses in question.