SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

Court Management Support – Court Records

CMS7 - NOTICE OF DEFICIENT FILING FORM

Date:	06 October 2008	Case No: SCSL-03-01-T	The Prosecutor v Charles Taylor
To:	**PROSECUTION: X** **DEFENCE: X** **APPEALS CHAMBER:** **OTHER:** **Defence Office**		
From	Court Management Section		
CC:			
Subject	**Rule 107 of the RPE and Article 12 of the Practice Direction for Certain Appeals Before the Special Court for Sierra Leone (Late Filing)**		

Document: **PUBLIC – DEFENCE RESPONSE TO "PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION CONCERNING PROTECTIVE MEASURES OF TF1-215"**

Document Dated: **06 October 2008** Received by Court Management at **15:37** on the **06 October 2008.**

☐ **Reasons: This Document# SCSL-03-01-T-617 was supposed to be filed on the 30th September 2008 but it has been filed on 06th October 2008. Accordingly this Document has been filed out of time.**

Signed:

Vincent Tishekwa *Dated: 06 October 2008*

No. of pages transmitted including this cover sheet:
In case of transmission difficulties, please contact: Fax Room:
Tel: _____ **Fax:** _____ **Email:** _____

CMS7 FORM

617)

SCSL-03-01-T
21056 — 21071)

21056

THE SPECIAL COURT FOR SIERRA LEONE
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: Mr. Herman von Hebel

Date: 06 October 2008

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
THE HAGUE
06 OCT 2008
NAME VINCENT TSHEKWA
SIGN
TIME 15:37

THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO "PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION CONCERNING PROTECTIVE MEASURES FOR WITNESS TF1-215"

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

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 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]

2. The Defence opposes the Appeal on the basis that the Prosecution fails to establish an error in law or in fact in the Trial Chamber's decision.[3] The Appeal must therefore fail on that basis.

3. The Defence notes that this Response is out of time. The Defence accepts all responsibility for this late filing and seeks leave of the court.

II. SUMMARY OF PROCEEDINGS RELATING TO APPEALED DECISION

4. The Defence agrees with the Prosecution's version of events as set out in paragraphs 2-8 of the Appeal with following exceptions set out below.

5. Any reference in the Appeal to the use of a pseudonym and a screen in the RUF Trial[4] should not be conflated with the actual grant of protective measures by Trial Chamber I in the Decision of 5 July 2004 (the "RUF Decision").[5] This presumes what must be proved in the Appeal.

6. As noted in the Appeal, Trial Chamber II was provided with documents relating to the RUF Decision only after the Defence applied orally to have protective measures rescinded.[6] Before considering the Defence application for rescission,

---

[1] Rules of Procedure and Evidence of the Special Court of Sierra Leone, as amended 27 May 2008, (the "**Rules**").
[2] *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 6 May 2008 ("**Transcript**"), p.9122 ln.8 – p.9123 ln.2 ("**Taylor Decision**").
[3] *Prosecutor v Taylor*, SCSL-03-01-T, "Prosecution Notice of Appeal and Submission Regarding the Decision Concerning Protective Measures for Witness TF1-215", 23 September 2008 (the "**Appeal**").
[4] *Prosecutor v Sesay, Kallon & Gbao*, SCSL-04-15-T ("**RUF Trial**").
[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**").
[6] The application can be found at Transcript, p.9103 ln.24 – p. 9106 ln.18. The documents were provided to the bench in the adjournment that followed ibid p.9108 lns.13-15. These documents included the RUF Decision, *Prosecutor v Sesay et al*, SCSL-04-15-PT-86, "Material Filed pursuant to Order 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 (the " **Witness List of 26th April**"), SCSL-

the Chamber first sought to establish whether protective measures had been granted.

III. RESPONSE TO SUBMISSIONS ON THE GROUNDS OF APPEAL

PART A. STATEMENT OF FACTS

7. The Prosecution in their statement of facts assert an erroneous version of events.[7] The Renewed Motion sought protective measures for only 87 witnesses detailed in Annex A. Neither TF1-215 nor the other remaining 172 witnesses were included in Annex A. The dispute is whether TF1-215, as member of a separate list of witnesses, was covered by the RUF Decision, which did not explicitly identify him nor the specific measures to be granted to him nor justify these protective measures.

8. The Renewed Motion divided the witnesses on the List into Groups I and II. Group I was sub-divided into Categories A, B and C. No other categories were referred to. These witnesses were then identified by pseudonym in a list Annexed to the Motion. It is important to cite the Renewed Motion in full:

> "Annexed to this motion and marked Annex A are the pseudonyms of Group I witnesses divided in the 3 categories mentioned above."[8]

The List of Group I witnesses annexed to the Renewed Motion did not include TF1-215.

9. The Renewed Motion emphasized that the list annexed to the Renewed Motion was based on the Witness List of 26th April, which was "not final" and whose "actual number of witnesses could be less".[9] The Renewed Motion affirmed that the actual number of witnesses to whom the measures would be granted "[would]

0415-PT-72, "Order to the Prosecution for Renewed Motion for Protective Measures", 2 April 2004 (the "**Order**"), and, SCSL-2004-15-PT-102, "Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures", 4 May 2004 (the "**Renewed Motion**").

[7] Appeal, paras 10-17.

[8] Renewed Motion, para. 4.

[9] Ibid para. 5.

be less than 266". It is therefore simply not true for the Prosecution to suggest that the Renewed Motion sought protective measures for all 266 witnesses.[10]

10. It follows that protective measures such as use of a screen and a pseudonym applied to the 84 witnesses itemised in the Annex A of the Renewed Motion, and, protective measures such as voice distortion and closed circuit television, applied to the relevant categories allocated in Annex A of the Renewed Motion.

11. Importantly, the Prosecution's Statement of Facts also omits the exchange between Trial Chamber II and its Counsel on 6 May 2008[11]. First, Trial Chamber II requested the relevant list of witnesses in order to ascertain whether TF1-215 was subject to protective measures from a previous trial.[12] Trial Chamber II was then provided with the RUF Decision, the Witness List of 26th April, the Order and the Renewed Motion.[13]

12. After considering the documents, the Presiding Judge observed that the Witness List of 26th April had been reduced in new list in the annexes attached to the Renewed Motion and that TF1-215 was not part of this reduced list.[14] In response, the Prosecution contended that TF1-215 was included by virtue of the wording of paragraph 20, which requested protective measures for "all witnesses of fact".[15]

13. Early in the exchange a crucial question was put by the bench: "Where in this renewed motion do you define group 1 witnesses? That is really where this matter turns".[16] The Prosecution sought to define Group I by referring to paragraph 2 of the Renewed Motion, which referred to all 266 witnesses. This ignored the fact that the 266 witnesses were divided into Groups I and II. This problem recurred as the bench tried to find a clear reference to TF1-215, which would have included him in the RUF Decision.[17] Consequently, the exchange centred around two

[10] Appeal, para. 12.
[11] Appeal, paras 10-17
[12] Transcript p.9102 ln.4 and p.9103 lns.12-15: "we need in order to do our work, a copy of this list, a comprehensive list, so that we know what we're dealing with".
[13] These included the RUF Decision, the Renewed Motion, the Order and the Witness List of 26th April. See Transcript p.9108 ln.26 – p.9109 ln.15.
[14] Transcript, p.9109 lns.18-19.
[15] Ibid, p.9110 lns.11-12.
[16] Ibid, p.9110 lns.25-26
[17] Ibid, p.9112 lns.10-11, and lns.26-27.

interrelated problems. Firstly, how each group referred to in the RUF Decision, was defined and specifically how Group I was defined. Secondly, which witnesses the RUF Decision refer to in total? As Justice Sebutinde observed:

> "That is precisely the crux of the matter. It all turns on the definition of these groups. The order [the RUF Decision] is not in the air. The order [RUF Decision] is made in relation to the renewed motion and as to the renewed motion, along with these annexes; these measures in our view appear to be directed at the witnesses in the annex"[18]

14. The Prosecution sought to address the first part of the problem by contending that despite not being in Annex A, TF1-215 was a member of Group I.[19] The Prosecution however could not provide any convincing reasons as to why. For example, when pressed to identify all 266 witnesses as members of Group I Prosecution Counsel admitted: "I can't answer that question".[20]

15. The Defence's position in the exchange was simple: the Renewed Motion was not properly drafted.[21] As a result, Trial Chamber II could only accept what was on the face of the papers. They could not assume, without specific evidence, that Trial Chamber I was implicitly referring to another group of witnesses as well.

PART B. STANDARD OF REVIEW

16. The standard of appeal after final judgment is the same standard applicable to interlocutory appeals. Under Article 20(1) of the Statute of the Special Court ("the Statute") and Rule 106 of the Rules, the Appeals Chamber shall hear appeals on grounds of an error on a question of law which invalidates the decision and/or an error of fact which occasions a miscarriage of justice.[22] Concerning the former:

> "The Appeals Chamber recalls that for such a ground of appeal to succeed, although an appellant must discharge an initial burden of raising arguments in support of an alleged

[18] Ibid, p.9115 lns.24-26.
[19] Ibid, p.9117 ln.28 – p.9118 ln.3.
[20] Ibid, p.9112 ln.11.
[21] Ibid, p.9119 ln.26.
[22] *Prosecutor v Sesay et al*, SCSL-04-15-T-956, "Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case", 24 January 2008. *See* also *Prosecutor v Furundjija*, IT-95-17/1-A, Appeals Chamber, "Judgment", 21 July 2000

error of law with the Appeals Chamber, the Appeals Chamber may proceed to examine whether or not the alleged error is such that it invalidates the former".[23]

17. Where the Decision appealed concerns an exercise of discretion, as the Prosecution rightly submits, the Appellant must establish a discernible error involving a misdirection as to the principle or law which is relevant to the exercise of the discretion, or a failure to give weight or sufficient weight to relevant considerations, or an error as to the facts upon which the Chamber has exercised its discretion.[24]

18. Where the exercise of discretion relates to a question of fact, the Appeals Chamber will not likely interfere with the decision of the Trial Chamber as the primary trier of fact. The mere fact that the Appeals Chamber could have exercised its discretion differently will not suffice. The Trial Chamber's decision must be so grossly unreasonable that no reasonable trier of fact could have reached that decision on the available facts. Further, the error must occasion a miscarriage of justice.[25]

PART C. GROUNDS OF APPEAL AND SUBMISSIONS

Ground 1

Response to Ground 1: the Chamber did not err in 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

19. The Trial Chamber did not err in its interpretation of the RUF Decision and did not fail to comply with Rule 75(F). Instead, 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.[26]

---

[23] *Prosecution v Delalic et al*, IT-96-21-A, Appeals Chamber, "Judgment", 20 February 2001, paras.532

[24] Prosecution Notice of Appeal paras 18-19.

[25] *Prosecutor v Oric*, IT.03-68-A, p. 6, para.10; *Prosecutor v Muvunyi*, ICTR-00-55A-0353 para. 10.

[26] These included the RUF Decision, the Renewed Motion, the Order and the Witness List or 26th April. See Transcript, p.9108 ln.26 – p.9109 ln.15.

Prosecution's flawed interpretation of the RUF Decision

20. Firstly, the Prosecution's interpretation of the RUF Decision is flawed. During proceedings the Prosecution claimed that:

> "MS BALY: What we are saying is that there are some [witnesses] in group I that don't fall into [categories] A, B and C...
> JUDGE LUSSICK [in reply]: ...you are saying to me they're [the witnesses] not all in annex A, but they are still members of group I.
> MS BALY: Yes, that is what we are saying. That is the way the Prosecution reads the motion and the order."[27]

In the Appeal the Prosecution now argues that all 266 witnesses on the List, including TF1-215, were "incorporated by reference".[28] Whether this means TF1-215 is a member of Group I within the Renewed Motion and annexed witness list or is covered by the RUF Decision as a member of the Witness List of 26th April is unclear. In either case, the Prosecution has failed to explain why 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 TF1-215 as granted with specific protective measures. Hence, the Prosecution is unable to provide any specific evidence to show that TF1-215 was granted protective measures by the RUF Decision or subsequently.

21. This deficiency in the RUF Decision cannot be rectified by relying on footnote 6 in that decision. The footnote does not identify the remaining witnesses from the Witness List of 26th April, beyond those identified in Categories A, B and C, as specifically included in Group I. That explains why, even though the footnote was brought to the attention of Trial Chamber II by Defence Counsel as a way of clarifying the debate, the bench was not swayed.[29]

No separate category created in list annexed to the Renewed Motion

22. In the RUF Trial, the Prosecution was specifically ordered to identify protective measures "for each witness who appears on the Prosecution Witness List".[30] It is reasonable, as Trial Chamber II argued, that had the Prosecution in the RUF Trial

[27] Ibid p.9117 ln.17 – p.9118 ln.3.
[28] Appeal para. 12.
[29] Transcript, p.9119 lns.24-25.
[30] Order p.4.

intended to include further the witnesses outside Categories A, B and C then they would have created a fourth category of witnesses in the Annexes[31]. The fact that TF1-215 was not included in any fourth 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 TF1-215 could have been granted the measures.

Omission due to an incomplete List

23. Returning to the Order, the Prosecution offers no explanation as to why when requested to file a Renewed Motion to identify protective measures "for each witness who appears on the Prosecution Witness List" 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, that Witness List of 26th April was "not final and the actual number of witnesses called could be less".[33] In fact, as the Defence stated during proceedings, the Prosecution deliberately left vague the identity of the 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 26th April.

List cannot be "incorporated by reference" because it was incomplete

24. The Prosecution completely misrepresents the central issue in the Appeal. For example, the Renewed Motion states "the actual number of witnesses who will be subjected to the protective measures... will be less than 266".[35] This is contrary to what is asserted in the Appeal that the Renewed Motion "sought protective measures for 266 witnesses".[36] As a result, the Appeal fails to explain how the RUF Decision could have granted protective measures to a list of witnesses that was incomplete and could have been added to at a later stage.

---

[31] A fourth witness list was suggested by Judge Sebutinde, Transcript p.9115 lns 8-10.
[32] The Prosecution in the instant proceedings recognised this omission when asked why there was no fourth category of witnesses not included in Categories A, B and C. Transcript, p.9115 lns.6-11.
[33] Order, p.4.
[34] Transcript, p. 9210 lns.24-26.
[35] Renewed Motion, para. 5.
[36] Appeal, para. 12.

Purpose of the List was to disclose witnesses who may be called

25. Furthermore, the Appeal ignores the fact, as the bench pointed out during proceedings, that the Witness List of 26th April was intended to inform the defence of the potential witnesses that the RUF Prosecution intended to call.[37] The reason it was created was not to provide a list of witnesses who required protective measures nor, was it to specify and differentiate which measures were required by which witnesses, as done by Categories A, B and C in the Renewed Motion. Therefore, it cannot meet the requirements of Rule 75.

No protective measures identified for TF1-215

26. Not only did the Order require the Prosecution to refer to "each witness" on the List; it also required the respective forms of protection to be identified in respect of each witness.[38] If this were not complied with it would be very hard for Trial Chamber II to abide by Rule 75(F) and decide whether "protective measures ha[d] been ordered *in respect of a witness* [emphasis added]" and what those protective measures were.[39] Instead Trial Chamber II was faced with a Renewed Motion and the RUF Decision which both failed to specifically identify TF1-215 and, the measures applicable to him. Without evidence of either, the Trial Chamber II was essentially being asked to assume or imagine, in the words of Justice Sebutinde that the witness was included and covered by the measures proposed.[40] This completely defies the requirements of Rule 75 and the principles of legal certainty.

No justification for protective measures for TF1-215

27. Additionally, the Renewed Motion failed to justify why the circumstances of TF1-215 merited any protective measures. This is essential to fulfilling the test under Rule 75(A). It also facilitates any consideration of a change of circumstances under Rule 75(G). A similar practice exists in the ICTY where the Court has consistently required the party seeking protective measures to present justification in reference to each individual witness identified by the applicant in their

---

[37] Transcript, p.9116 lns.15-16. It is worth noting that the List was produced as a result of the order of 1 April 2004, which required the Prosecution to file "a witness list for all the witnesses the Prosecution *intends to call at trial* [emphasis added]", "Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial", SCSL-04-15-70, p.6.
[38] Order, p.4.
[39] Rules of Procedure, Rule 75(F).
[40] Transcript, p.9115 lns.12-13.

Motion.[41] This is based on the principle of the Accused's right to a fair trial as explicitly recognised in the Rules of Procedure of both Courts. For example:

> "CONSIDERING that the requirement that the accused be granted a fair trial dictates that the Trial Chamber should only grant protective measure where it is properly shown, *in the circumstances of each individual witness*, that the protective measures sought meet the requirements of the Rules, as elaborated in the jurisprudence of the Tribunal [emphasis added]". [42]

Prosecution failed to satisfy their burden

28. It is beyond dispute that Trial Chamber II was faced with *prima facie* ambiguous documents on which to make a ruling. It follows that the Prosecution failed in its duty pursuant to both the Order and Rule 75 to "actually identify who these witnesses were that they were seeking measures for and to justify the measures sought for each category".[43] In that context Trial Chamber II could only rule on the documents placed before it, which failed to show that first, protective measures were requested for TF1-215 and secondly, if at all, which protective measures were granted TF1-215.

Practice of the SCSL in granting protective measures

29. The practice of the Court is to grant protective measures only in response to a written application that includes a specified list of witnesses by pseudonym. It is instructive to note that when the Prosecution in the Taylor Trial applied for protective measures, it attached a full Annex identifying all its witnesses by pseudonym.[44] When the Prosecution sought to add witnesses to this list, it duly

---

[41] This is most clearly stated in *Prosecution v Mrksic and others*: "the requirement that the accused be granted a fair trial dictates that the Trial Chamber should only grant protective measures where it is properly shown, in the circumstances of each witness, that the protective measures sought meet the standards set out in the Statute and the Rules", IT-95-13/1-PT, "Decision on Confidential Prosecution Motions for Protective Measures and Nondisclosure and Confidential Annex A", 9 March 2005, p.3.

[42] *Prosecutor v Perisic*, IT-04-81-PT, "Decision on Prosecution Motion for Protective Measures for Witnesses", 27 May 2005, p.4. See also SCSL Rules of Procedure, Rule 75(A), and ICTY Rules of Procedure, Rule 75(A), 28 February 2008, and, *Prosecutor v Milosevic* p.2: "considering the relief requested by the Prosecution is appropriate for the privacy and protection of the Protected Witnesses but is still consistent with the rights of the accused", IT-02-54, "Decision Granting Protective Measures for Individual Witnesses", 19 February 2002, p.2.

[43] See also *Prosecutor v Mrdja*: "the burden rests on the party seeking protective measures to justify in each case why the measures requested should be granted and that the burden does not rest upon the other party to justify disclosure", IT-02-59-PT, "Order on Prosecution's Motion for Protective Measures", 8 July 2002, p.2.

[44] *Prosecutor v Taylor,* SCSL-03-01-086, "Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures", 4 April 2006.

applied for leave of the Court and specifically identified those witnesses by pseudonym in an Annex.[45]

Response to other points

30. Finally, it is misleading for the Prosecution to try and establish that protective measures were granted "in some other way".[46] The only way protective measures can be granted by the Court is under Rule 75. Further, the only power granted to the Court to apply protective measures granted by another Trial Chamber is under Rule 75. Both considerations refer to the granting of protective measures not the way in which a witness may have given evidence. Therefore, any additional reference to TF1-101 is similarly misleading.

Ground 2

Response to Ground 2: the Chamber did not err in law or fact by finding on the facts before it that TF1-215 was not subject to protective measures and so ordering that the witness testify in open court without protective measures

No Error of Law

31. The Prosecution's assertion that the fact that the witness had testified with protective measures before should lead to an assumption or in their words, clear requirement that Trial Chamber II should have continued to apply them, is ill-conceived.[47] The issue here is whether or not the Prosecution can show that they were granted protective measures in accordance with Rule 75(A), which continued to apply *mutatis mutandis* in accordance with 75 (F) and if so, what those particular measures were?

32. The Prosecution claims that Trial Chamber II reached conclusions about Trial Chamber I's finding that were not open for it to make.[48] The Defence disagrees. It is erroneous to assume that the finding made by Trial Chamber I referred to

[45] *Prosecutor v Taylor,* SCSL-03-01-093, "Motion for Leave to Substitute a Corrected and Supplemented Witness List", 25 April 2006 and *Prosecutor v Taylor,* SCSL-03-01-119, "Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure", 4 September 2006.
[46] Appeal, para. 30.
[47] Appeal, para. 32.
[48] Appeal, para. 33.

anything other than the matter before it, which was the issue of whether the Prosecution could show that witness TF1-215 had protective measures. The issue is not whether Trial Chamber I had erred in reaching its finding. According to the Prosecution, Trial Chamber II 'essentially determined that Trial Chamber I in the RUF Trial erroneously allowed the witness to testify with protective measures'.[49] This is unsubstantiated and irrelevant to the pertinent issue, which is whether an error was made in Trial Chamber II's consideration of the protective measures of this witness based on the evidence before it at the time.

33. The Prosecution argues that Trial Chamber II exercised its discretion to nullify the protective measures granted to witness TF1-215, and that a decision of this kind is outside the remit of Rules 75(F)(i) and 75(G).[50] This is plainly a misinterpretation of the RUF Decision.[51] The Taylor Decision made it clear that nothing entitled the witness to protective measures,[52] therefore there were no measures that could be nullified and there was no possibility that the Trial Chamber could have made an error in the exercise of their discretion on this matter.[53] Accordingly, contrary to the Prosecution's assertion that the Defence failed to make the proper showing in order to *change* the protective measures,[54] the onus was on the Prosecution to make the proper showing that the measures *existed* in the first place. The Prosecution failed to make this demonstration.[55] Further, the submissions by the Prosecution that the Defence had to meet an evidential burden in relation to this witness[56] is therefore misguided and could be seen as an attempt at directing attention away from the issue at hand.

No Error of Fact

34. The assertion that the Trial Chamber did not give sufficient weight to the facts before it, in particular the fact that the witness had testified previously with

---

[49] Appeal, para. 33.
[50] Appeal, para. 34-35.
[51] Transcript, page 9122, ln. 8 to page 9123, ln. 2.
[52] Transcript, page 9122, lns. 24-25.
[53] See Transcript, page 9123, lns. 1-2 where the Justices make it very clear that the Defence application seeking to rescind or in the alternative nullify the protective measures is moot as none were established as having been granted.
[54] Appeal, para. 36.
[55] Transcript, page 9122, ln. 8 to page 9123, ln. 2.
[56] Appeal, para. 36.

protective measures is erroneous.[57] In considering whether witness TF1-215 was entitled to protective measures, it was not sufficient justification to look simply to another trial and assume that the same measures applied.[58] Any Trial Chamber's decision is always based on a consideration of the evidence before it and the applicable law. It is not for the chamber to make an inference from the decision of another Trial Chamber. Therefore, to argue that the Trial Chamber should have considered anything other than the documents before it is flawed.

35. No error was made as to the facts upon which Trial Chamber II made the Taylor Decision.[59] The Prosecution's ill-formulated motion, covering as it did an open-ended number of additional measures, confused the matter and left no scope for the Trial Chamber to work out which witnesses the motion applied to. It was not stated clearly that the motion applied to all 266 witnesses instead of just A, B and C categories.[60] The Trial Chamber interpreted the documents before it as accurately as it could have done given that no proper, finite or in the Prosecutions own words 'final'[61] definition of which witnesses were within Group 1 was ever provided by the Prosecution. The decision that the Trial Chamber reached was therefore reasonable in the circumstances.

PART D PREJUDICE

36. The standard of review is set out above. Prejudice on its own is not a relevant consideration on appeal.[62] 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.

IV. CONCLUSION

---

[57] Appeal, para. 27.
[58] The Prosecution have tried unsuccessfully to argue this point once before in the discussions before Trial Chamber II on 6 May 2008, see Transcript, page 9114, lns. 14-20.
[59] Appeal, paras 12 and 37.
[60] See Transcript, page 9122, ln. 8 to page 9123, ln. 2, Transcript, page 9112 ln. 8 to page 9114 ln. 5, and Renewed motion, paras 2-3.
[61] Renewed Motion, para. 5.
[62] Appeal paras 38-39.

37. On the basis of the foregoing, the Defence submits that the Prosecution has failed to establish any error of law invalidating the Trial Chamber's decision. The Prosecution has also failed to demonstrate any an error of fact occasioning a miscarriage of justice.

38. The Defence submits while a different arbiter *might* have come to a different decision, the Trial Chamber's decision was reasonable in the circumstances of the case. Therefore, the Appeal should be dismissed.

Respectfully Submitted,

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

Table of Authorities

Special Court for Sierra Leone

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

Prosecutor v Taylor, SCSL-03-01-T, "Prosecution Notice of Appeal and Submission Regarding the Decision Concerning Protective Measures for Witness TF1-215", 23 September 2008.

Prosecutor v Taylor, SCSL-03-01-086, "Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures", 4 April 2006.

Prosecutor v Taylor, SCSL-03-01-093, "Motion for Leave to Substitute a Corrected and Supplemented Witness List", 25 April 2006.

Prosecutor v Taylor, SCSL-03-01-119, "Urgent Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure", 4 September 2006.

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

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

Prosecutor v Sesay et al, SCSL-04-15-PT-86, "Material Filed pursuant to Order 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.

Prosecutor v Sesay et al, SCSL-04-15-PT-72, "Order to the Prosecution for Renewed Motion for Protective Measures", 2 April 2004.

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", 4 May 2004.

Prosecutor v Sesay et al, SCSL-04-15-T-956, "Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case", 24 January 2008.

Prosecutor v Sesay et al, SCSL-04-15-70, "Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial", 1 April 2004.

International Criminal Tribunal for Former Yugoslavia

Prosecutor v Perisic, IT-04-81-PT, "Decision on Prosecution Motion for Protective Measures for Witnesses", 27 May 2005.

Prosecutor v Milosevic, IT-02-54, "Decision Granting Protective Measures for Individual Witnesses", 19 February 2002.

Prosecution v Mrksic et al, IT-95-13/1-PT, "Decision on Confidential Prosecution Motions for Protective Measures and Nondisclosure and Confidential Annex A", 9 March 2005.

Prosecutor v Mrdja, IT-02-59-PT, "Order on Prosecution's Motion for Protective Measures", 8 July 2002.

Prosecutor v Furundjija, IT-95-17/1-A, Appeals Chamber, "Judgment", 21 July 2000.

Prosecution v Delalic et al, IT-96-21-A, Appeals Chamber, "Judgment", 20 February 2001.

Prosecutor v Oric, IT.03-68-A, Appeals Chamber, 3 July 2008.

International Criminal Tribunal for Rwanda

Prosecutor v Muvunyi, ICTR-00-55A-0358, Appeals Chamber, 29 August 2008.