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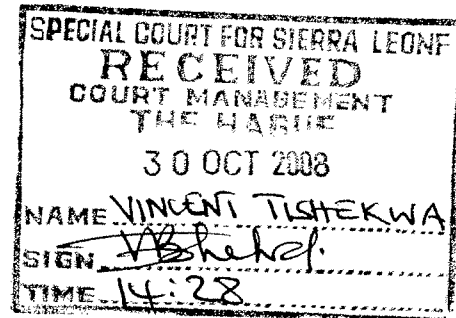
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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: 30 October 2008



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

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

Office of the Prosecutor:

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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 and the Practice Direction of 30 September 2004,² to appeal Trial Chamber II's oral decision of 23 September 2008 finding that TF1-062 did not have protective measures and ordering that the witness testify in open court.³

II. SUMMARY OF PROCEEDINGS RELATING TO APPEALED DECISION

2. Witness TF1-062 has testified before this Court in two previous proceedings and, on both occasions, subject to protective measures.
3. The witness first testified in the CDF Trial⁴ on 11 February 2005 using the pseudonym TF2-022 and from behind a screen. The witness testified subject to protective measures ordered by a decision issued in the CDF Trial.⁵ Indeed, the witness' testimony in the CDF Trial proceeded on the basis of the notification made to the Court that he was a witness entitled to "basic protection".⁶
4. The witness also testified in the AFRC Trial⁷ on 27 June 2005, again from behind a screen but on this occasion using the pseudonym TF1-062. The witness' testimony proceeded on the basis of the information previously notified to the Chamber, including that he was a witness falling within "Protective Category I".⁸ In the AFRC Trial, as the witness was now testifying pursuant to the pseudonym TF1-062, the applicable protective measures decision was the RUF Decision.⁹ However, the protective measures from the CDF Trial were still extant, having not been rescinded or varied in accordance with the Rules. In essence, the witness had protections from

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

² Practice Direction for Certain Appeals Before the Special Court, 30 September 2004.

³ *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 23 September 2008 ("**Transcript**"), page 17043, lines 8-24 ("**Decision**").

⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T ("**CDF Trial**").

⁵ *Prosecutor v. Norman et al.*, SCSL-04-14-T-126, "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses", 8 June 2004 ("**CDF Decision**").

⁶ See *Prosecutor v. Norman et al.*, SCSL-04-14-T-321, "Confidential Prosecution Order of Witnesses to be called in the Fourth Trial Session", 25 January 2005, page 11465.

⁷ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T ("**AFRC Trial**").

⁸ *Prosecutor v. Brima et al.*, SCSL-04-16-T-219, "Confidential Prosecution Proposed Order of Third 10 Witnesses to be called at Trial and their Statements", 12 April 2005, p. 7280.

⁹ *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**").

two decisions, the CDF and RUF Decisions. During proceedings in the AFRC Trial, TF1-062 confirmed that he had testified previously in the CDF Trial.¹⁰

5. On 29 February 2008, the Prosecution in the current proceedings 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.¹¹ In the Notice, the Prosecution advised that TF1-062 was a witness protected by measures ordered by the RUF Decision.¹² The Notice did not list the CDF Decision. On 15 July 2008, the Chamber issued its decision on *inter alia* the Notice and ordered that:

“the prior trial transcripts and related exhibits relating to the testimony of ... TF1-062 ... be admitted into evidence pursuant to Rule 92*bis* provided that the Prosecution ... make the said [Witness] available for cross-examination by the Defence;”¹³

6. In accordance with the above decision, the Prosecution sought to make TF1-062 available for cross-examination, notifying the Court of the witness' availability in the weekly filed witness list dated 8 September 2008.¹⁴ On this date, the Court was notified again of the existing protective measures applicable to TF1-062.¹⁵ On 23 September 2008, prior to the witness taking the stand, the Prosecution again informed the Trial Chamber and the Defence of the protective measures applicable to TF1-062. At that time, the Trial Chamber was informed that TF1-062 had testified before this Court in two previous proceedings, in the CDF Trial and the AFRC Trial and, on both occasions, subject to protective measures.¹⁶ The Prosecution advised that the

¹⁰ See AFRC Trial Transcript, 27 June 2005, page 4, line 24 to page 5, line 1, and pages 73-75 where the witness is cross examined about his prior testimony in the CDF Trial. See also the name given on the confidential witness list filing noted at footnote 8 above which also establishes that TF2-022 and TF1-062 are the same person.

¹¹ *Prosecutor v. Taylor*, SCSL-03-01-T-429, “Public with Confidential Annexes - Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Kenema District”, 29 February 2008 (“**Notice**”).

¹² Notice, page 14831.

¹³ *Prosecutor 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.

¹⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-578, “Public with Confidential Annexes B & D – Amended Prosecution Witness List for Week 15 – 19 September 2008 & Prosecution Witness List for Week 22 – 26 September 2008”, 8 September 2008, para. 2.

¹⁵ *Ibid*, Annex B.

¹⁶ Transcript, p. 17036, lines 20 – 25.

applicable protective measures decision was the RUF Decision.¹⁷

7. During proceedings on 23 September 2008, the issue of the interpretation of the RUF Decision was again addressed. Having heard argument by each Party, the Trial Chamber held that the RUF Decision did not provide TF1-062 with protective measures, the Chamber ruling as follows:

Having considered the decision of Trial Chamber I of 5 July 2004 fully, ... 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.¹⁸

In relation to the witness' prior testimony in the AFRC Trial, the Chamber found that:

... 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.¹⁹

8. As a result of the above Decision, the Prosecution was unable to call TF1-062 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 fears for his safety and that of his family.
9. The Decision is based on the same reasoning as the decision which was then under appeal in respect of TF1-215.²⁰ Therefore, on 25 September 2008, the Prosecution filed the "Confidential Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062"²¹, relying on in part therein the submissions made in its application for leave to appeal the decision

¹⁷ *Ibid.*, p. 17036, lines 13 – 19.

¹⁸ *Ibid.*, p. 17043, lines 10 - 15.

¹⁹ *Ibid.*, at lines 17 - 24.

²⁰ The appeal concerning the protective measures for TF1-215 has been withdrawn due to a change in the witness' requirements but it proceeded on the basis of the application seeking leave - *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 ("**TF1-215 Application**").

²¹ *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 ("**TF1-062 Application**").

concerning TF1-215.²²

10. On 6 October 2008, the Defence filed the “Public Defence Response to Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062”.²³ The Prosecution filed its Reply on 13 October 2008.²⁴
11. On 24 October 2008, the Trial Chamber issued its decision on the TF1-062 Application, granting the Prosecution leave to appeal the Decision.²⁵

III. GROUNDS OF APPEAL

Ground 1: In the Decision, the Trial Chamber erred as a matter of law by finding that TF1-062 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 TF1-062, 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

12. The Decision should be set aside. The Trial Chamber should be ordered to hear the evidence of TF1-062 subject to the protective measures which were in place for the witness during his testimony in the AFRC and the CDF Trials.²⁶

²² TF1-062 Application, para. 12.

²³ *Prosecutor v Taylor*, SCSL-03-01-T-620, “Public Defence Response to Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062”, 6 October 2008.

²⁴ *Prosecutor v Taylor*, SCSL-03-01-T-630, “Public Reply to Defence Response to Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062”, 13 October 2008 (“Reply”).

²⁵ *Prosecutor v Taylor*, SCSL-03-01-T-645, “Decision on Public with Confidential Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062”, 24 October 2008.

²⁶ These measures include use of a pseudonym and a screen.

SUBMISSIONS ON THE GROUNDS OF APPEAL

PART A. STATEMENT OF FACTS

13. As stated in paragraph 2 above, witness TF1-062 has testified in proceedings before the Special Court in two previous proceedings and, on both occasions, subject to protective measures.

The CDF Decision & Testimony in the CDF Trial

14. The CDF Decision augmented existing pre-trial measures by granting certain witnesses protective measure's appropriate for the trial stage of the proceedings. The CDF Decision involved a two tier process: consideration of protective measures for all witnesses of fact (Group I witnesses) and additional protective measures for sub-categories within that group, namely sub-categories A, B and C. Notably, the Trial Chamber clearly interpreted witnesses of fact as "all witnesses residing in Sierra Leone who have not waived the right to protection",²⁷ and interpreted sub-categories A, B, and C as "subcategories within this group".²⁸

15. The CDF Decision provided as follows:

2) That orders b-k of the Decisions on Protective Measures remain in full force and application, as shall read as follows:

(b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;

(c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons;

3) That all witness, who have not waived their right to protection testify with

²⁷ CDF Decision, paragraph 37.

²⁸ See, CDF Decision, paragraph 10, where Trial Chamber I specifically acknowledges that "The Prosecution divides its witnesses into two groups, based on its revised witness list filed on 4 May 2004: Witnesses of Fact Sub-Categories within this group: I. Witnesses who are victims of sexual assault and gender crimes; B. Child Witnesses; C. Insider Witnesses. II. Expert Witnesses who have waived their right to protection" [Footnotes omitted]. See, also paragraph 12, reference to "all witnesses", followed by paragraph 13, stating that "the Prosecution asks for additional protective measures for certain groups of witnesses" and then refers to "Witnesses in Sub-Category A", "Sub-Category B" and "Sub-Category C" in the remainder of that paragraph. See, further paragraphs 43 and 46.

use of screening a device from the public;

4) That photography, video-recording, sketching or any other manner of recording or reproducing images of any witness are prohibited while he or she is in the precincts of the Special Court;

5) That the voice of witnesses in Sub-Category A and C during their testimony in trial be distorted in the speakers for the public;

6) That witnesses in Sub-Category B testify with the use of a closed circuit television; the image appearing on the public's monitors being distorted;²⁹

16. The witness' testimony in the CDF Trial proceeded on the basis of the notification made to the Court that he was a witness entitled to "basic protection".³⁰

The RUF Decision

17. The witness also testified in the AFRC Trial on 27 June 2005 with the basic in-court protective measures ordered by Trial Chamber I.³¹ TF1-062'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.³²

18. 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.

19. 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 1.³³ 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

²⁹ CDF Decision, Disposition, p. 17 (footnote omitted).

³⁰ See *Prosecutor v. Norman et al.*, SCSL-04-14-T-321, "Confidential Prosecution Order of Witnesses to be called in the Fourth Trial Session", 25 January 2005, page 11465.

³¹ See paragraph 4 above.

³² 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.

³³ *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**"), paras. 1 & 2.

incorporated by reference. TF1-062 was included as one of the 266 witnesses on this Witness List of 26 April.³⁴ 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).³⁵ Sub categories were created for those Group I witnesses (A, B, C) with special needs.³⁶ It was those Group I witnesses listed in Annex A of the Renewed Motion who required trial measures in addition to pseudonym and screen.

20. 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.³⁷
21. 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.³⁸
22. 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;

³⁴ *Prosecutor v Sesay et al*, SCSL-04-15-PT, “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**”), page 2051.

³⁵ Renewed Motion, para. 3 and RUF Decision, para. 1.

³⁶ Renewed Motion, para. 3 and RUF Decision paras. 1, 6, 30.

³⁷ RUF Decision, Disposition.

³⁸ RUF Decision, paras. 5 – 6.

- 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.³⁹

Testimony in the AFRC Trial

23. The effect of protective measures granted in other trials at the Special Court was considered during the pre-trial phase of the AFRC Trial. In this regard, a list was filed in response to an order that the Prosecution provide a list indicating which witnesses on the current Prosecution Witness List have or will be testifying in other Special Court proceedings, and what protective measures are already in place for these witnesses from Trial Chamber I.⁴⁰ In this filing, the Prosecution stated:

““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, C) is indicated, the basic measures applicable to all Group I witnesses (witnesses of fact) are applicable.”⁴¹

TF1-062 is listed in Annex A of this filing with no specific category indicated.⁴²

24. On 3 February 2005, Justice Doherty issued a decision in which she noted the Prosecution’s 1 February 2005 filing and noted further that “all the witnesses which the Prosecution indicates may be called are *already* subject to protective measures.”⁴³ Further, Justice Doherty noted that her ruling “confirms that the order of the Court in the matter of the *Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-2004-15* in its Decision on Prosecution Motion for Modification of Protective Measures for Witnesses of 5 July 2004 ... extends to all witnesses in this case, that is, the case of *Prosecutor v. Brima, Kamara and Kanu.*”⁴⁴

³⁹ *Ibid*, page 15-16.

⁴⁰ *Ibid*, para. 3.

⁴¹ *Prosecutor v. Brima et al.*, SCSL-04-16-PT-122, “List of Protective Measures Received from Trial Chamber I and Other Information filed pursuant to Scheduling Order of 28 January 2005”, 1 February 2005, para. 12. This list was filed as **Annex D** of the TF1-215 Application.

⁴² *Ibid*, Annex A, CMS page 6015.

⁴³ *Prosecutor v. Brima et al.*, SCSL-04-16-PT-125, “Oral Decision on Prosecution’s Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004”, 3 February 2005, para. 2 (emphasis added).

⁴⁴ *Ibid*, para. 5.

25. TF1-062 testified subject to the above protections granted by the RUF Decision in the AFRC Trial on 27 June 2005. Notably, 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.

The current proceedings

26. Notwithstanding the foregoing, in the current proceedings Trial Chamber II determined in its Decision that TF1-062 was not entitled to protective measures. As a result of the Decision, TF1-062 did not testify in the current proceedings.

PART B. STANDARD OF REVIEW

Error of Law

27. For the reasons given below, the oral decision erred in law in its interpretation of the RUF Decision and 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 CDF and AFRC Trials 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...”⁴⁵ Further, the exercise of the discretion was one that was not “reasonably open” to the Trial Chamber,⁴⁶ and the

⁴⁵ *Prosecutor v. Norman et al*, 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.

⁴⁶ *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

Trial Chamber “abused its discretion”,⁴⁷ or “erred and exceeded its discretion”,⁴⁸ and committed a “discernible error” in the exercise of its discretion.⁴⁹

Error of Fact and Law

28. 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 correctly interpret the RUF Decision and 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 CDF and AFRC Trials 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”.⁵⁰ The exercise of the discretion was one that was not “reasonably open” to the Trial Chamber,⁵¹ and the Trial Chamber “abused its discretion”,⁵² or “erred and exceeded its discretion”,⁵³ and committed a “discernible error” in the exercise of its discretion.⁵⁴

an application was “open” to the Trial Chamber).

⁴⁷ *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).

⁴⁸ *Ibid.*, para. 533.

⁴⁹ *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeals Chamber, “Judgement,” 3 May 2006, paras. 257-259; *Prosecutor v. Međaković et al.*, IT-02-65-AR11bis.1, “Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis,” 7 April 2006, para. 10.

⁵⁰ *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.

⁵¹ See footnote 47.

⁵² See footnote 48.

⁵³ See footnote 49.

⁵⁴ See footnote 50.

PART C. GROUND OF APPEAL AND SUBMISSIONS

29. The Trial Chamber erred in law, or alternatively in law and fact, in finding on the facts before it that TF1-062 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 TF1-062 was not subject to protective measures and so ordering that the witness testify in open court without protective measures.

Erroneous Interpretation of the RUF Decision

30. 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 TF1-062, and also by failing to comply with Rule 75(F) which states that, 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. For the reasons discussed below, to the extent this error of law was committed in the exercise of the discretion of the Trial Chamber, the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion; nor was this exercise of discretion “reasonably open” to the Trial Chamber. The Trial committed a “discernible error” in the exercise of its discretion.
31. The Trial Chamber erred in deciding that TF1-062 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 TF1-062 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.
32. As noted above, although the Prosecution did not attach the Witness List of 26 April 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.**”⁵⁵

⁵⁵ Emphasis added.

A plain and literal interpretation of this paragraph makes it clear that the term “those witnesses” encompasses those fact witnesses included in the Witness List of 26 April 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.

33. In paragraph 3 of the Renewed Motion, the Prosecution again refers to 266 witnesses, 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, sets forth 3 sub-categories of fact witnesses “within group I”, totalling 87 witnesses as set out in Annex A. Further, in paragraph 5 of the 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 Witness List of 26 April. 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.
34. 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.
35. The language and intent of paragraphs 2, 3, 5 and 20 of the Renewed Motion make clear that the basic in-court protections sought for fact witnesses – the use of pseudonym and screen - relate to all fact witnesses.
36. It is clear that Trial Chamber I interpreted the Renewed Motion in this way and granted protective measures accordingly. As regards interpretation, in footnote 6 of the RUF Decision, the Chamber notes 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.”⁵⁶ Thus, Trial Chamber I concluded that the Renewed Motion included all fact witnesses.

⁵⁶ RUF Decision, footnote 6 (emphasis added).

37. That the RUF Decision granted basic in-court protections to all fact witnesses listed on the Witness List of 26 April, including TF1-062, 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 AFRC 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.⁵⁷ As stated above, this includes TF1-062, who testified with these basic protections in the AFRC Trial.
38. Further, in the RUF Trial witness TF1-305, a victim of sexual violence who should have been a Category A witness, was inadvertently omitted from the annex to the Renewed Motion. Accordingly, an application for the **additional measure** of voice distortion was granted by Trial Chamber I;⁵⁸ the clear implication from the Trial Chamber's reasoning was that TF1-305 benefited from the basic protection accorded to all witnesses, including giving evidence behind a screen, despite the fact that she was not a witness listed in the annex to the Renewed Motion.
39. 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. In the current proceedings, the Trial Chamber granted the Prosecution's request to rescind the basic in-court protections previously granted to TF1-101 in the RUF Trial in order that he could testify in open session in the current proceedings.⁵⁹ TF1-101, a fact witness not listed in sub-categories A-C, testified in the RUF Trial in accordance with the basic

⁵⁷ See **Annex C** of the TF1-215 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 TF1-215 Application – regarding the above referred to “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.

⁵⁸ RUF Trial Transcript, 27 July 2004, page 48 lines 18 – 32 and page 49 line 10: Ms. Taylor: “The first is that this witness would be, had the appropriate pseudonym been included in the prosecution application for renewed protective measures, be a Category A witness; that is, a witness who has been subjected to sexual violence. Through inadvertence, the pseudonym of this witness was not included in the annex of Category A, and so I now make an oral application that this witness be treated as a Category A witness, that is a witness to whom the voice distortion protective measure applies”. Judge Boutet: “So, in addition to—pardon me—giving evidence behind the screen, you would like the voice of that witness to be distorted?”. Ms. Taylor: “That is correct. Your Honour”...Mr. President: “Your application is granted”.

⁵⁹ Taylor Trial Transcript, 14 February 2008, pp. 3896-3897.

protective measures granted by the RUF Decision, i.e. behind a screen and using the pseudonym TF1-101.⁶⁰

40. It is in the context of the above facts that the Trial Chamber's ruling that the application of protective measures to TF1-062 in the AFRC Trial was "premised on an assumption that protective measures existed" must be considered. By virtue of their subsequent ruling in this case that TF1-062 "does not enjoy those protective measures", the Trial Chamber effectively ruled that its "assumption" in the AFRC proceedings was mistaken. However, in thus rendering their previous assumption, the Trial Chamber erred; any "assumption", far from being mistaken, was, as set out above, perfectly proper in the circumstances.
41. Indeed, when finding that the RUF Decision did not grant protective measures to Group I witnesses (witnesses of fact) including TF1-062, Trial Chamber II also erred in that it overruled and/or limited the decision of another Trial Chamber.

Failure to give effect to and apply existing protective measures

42. The Trial Chamber also erred by failing to give effect to and apply the protective measures subject to which the witness had testified in two previous proceedings before this Court.
43. As argued above, TF1-062 was granted protective measures by virtue of the RUF Decision. However, even assuming *arguendo*, that this was not the case, TF1-062 had previously been granted the same basic protection by Trial Chamber I in the CDF Decision and, thus, testified in the CDF Trial subject to these basic measures. The grant of basic protection in the CDF Trial pre-dated the grant of protective measures in the RUF Decision and the witness' testimony in the CDF Trial pre-dated the witness' testimony in the AFRC Trial. Further, the transcript of TF1-062's testimony makes plain that the Trial Chamber were made aware that TF1-062 was a witness who had testified previously in the CDF Trial.⁶¹
44. Rule 75(F)(i) specifically mandates that "once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the

⁶⁰ TF1-101 testified in the RUF Trial on 28 November 2005.

⁶¹ See footnote 10 above.

“first proceedings”) such protective measures 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”. Therefore, any assumption made by the Trial Chamber in the AFRC Trial was correct because the witness’ CDF protective measures were still, in effect, properly applied in the AFRC Trial by virtue of Rule 75(F). On this additional basis, the Trial Chamber erred in effectively determining that it made a mistaken “assumption” in the AFRC Trial and in failing to apply Rule 75(F).

45. Furthermore, assuming, *arguendo*, that the witness was granted protective measures in some way other than as stated above, the fact remains that the witness was subject to protective measures used during his prior testimony in the CDF and AFRC Trials. As discussed in paragraph 44 above, regardless of any issues of interpretation regarding the RUF Decision, the Trial Chamber in these proceedings had an obligation under Rule 75(F) to recognise and implement the protective measures under which this witness previously testified in the AFRC and the CDF Trials, until such time as they were rescinded or varied by application of the proper test and in accordance with the Rules.

Failure to correctly interpret and apply Rule 75(F)

46. As stated above, to the extent the error of law was committed in the exercise of the Trial Chamber’s discretion, the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion; nor was this exercise of discretion “reasonably open” to the Trial Chamber. The Trial committed a “discernible error” in the exercise of its discretion.
47. As noted in paragraph 44 above, Rule 75(F)(i) provides that the rescission of protective measures must be performed “in accordance with the procedure set out in this Rule [75]”.
48. 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.

49. 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; whether those proceedings were before the same Trial Chamber or another. Nor is there any reference to the Trial Chamber itself exercising its discretion to rescind the protective measures under sub-rule (F). 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.”⁶² Moreover, the Trial Chamber must be guided by the strong presumption that witness protection measures found to be necessary for the protection of witnesses before the Special Court in one set of proceedings will be maintained for witnesses in additional proceedings.⁶³
50. 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.⁶⁴ 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 TF1-062 had changed so as to warrant a variation which rescinded or lessened the protective measures provided.
51. It is clear, therefore, that in arriving at the Decision, the Chamber exercised its discretion in a manner which was not “reasonably open” to it and so committed a “discernible error” in the exercise of its discretion.

⁶² *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**”)

⁶³ *Prosecutor v. Taylor*, SCSL-03-01-T-636, “Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168”, 17 October 2008, para 20.

⁶⁴ *Sesay Appeal Decision*, para. 37.

Ground 2: The Trial Chamber erred in law and fact in finding on the facts before it that TF1-062, 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.

52. 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 both the RUF Decision and the provisions of Rule 75(F) to the facts before them. 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 relevant considerations including the facts before it. The facts, as set out above, include that the witness previously testified with protective measures, and so clearly required that the Trial Chamber continue those protective measures until such time as they were varied in accordance with the proper test and the Rules. No reasonable fact finder could have concluded on those facts that this witness was not protected by the RUF and/or the CDF decisions, nor have concluded that a witness who had testified in two previous proceedings did not have the protections with which he had testified in both.

PART D. PREJUDICE

53. As a result of the Decision, the Prosecution was unable to call TF1-062 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.

54. TF1-062 would provide evidence relevant to several of the Counts specified in the Second Amended Indictment and also provide proof of the contextual, or chapeau, elements of the crimes charged, 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.⁶⁵ This evidence includes crimes committed in Kenema during the Indictment period, specifically evidence of unlawful killings, forced labour, and the use of child soldiers by the AFRC/RUF. The Prosecution is, therefore, deprived of the right to

⁶⁵ A summary of the relevant facts to which Witness TF1-062 will testify was included as part of the Pre-Trial Conference Materials (see *Prosecutor v. Taylor*, SCSL-03-01-PT-218, Public Rule 73bis Pre-Trial Conference Materials, 4 April 2007).

call this key witness to provide evidence relevant to many of the elements the Prosecution must prove beyond reasonable doubt.

55. Depriving the Prosecution of such relevant evidence on the basis of an erroneous decision causes irreparable prejudice which cannot be cured or resolved by final appeal against judgment.⁶⁶

PART E. RELIEF SOUGHT

56. The Decision should be set aside. The Trial Chamber should be ordered to hear the testimony of TF1-062 subject to the protective measures which were in place for the witness during his testimony in the AFRC and CDF Trials.⁶⁷

Filed in The Hague,

30 October 2008

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

⁶⁶ 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.

⁶⁷ 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, 23 September 2008, page 17043, lines 10 – 15.
2. *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
3. *Prosecutor v Taylor*, SCSL-03-01-T-620, “Defence Response to Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062”, 6 October 2008
4. *Prosecutor v Taylor*, SCSL-03-01-T-630, “Prosecution Reply to Defence Response to Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062”, 13 October 2008
5. *Prosecutor 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

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- 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

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- 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

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- 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

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- 4. *Prosecutor v Sesay et al*, SCSL-04-15-PT, “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-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
- 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, 27 July 2004

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-PT-122, “List of Protective Measures Received from Trial Chamber I and Other Information filed pursuant to Scheduling Order of 28 January 2005”, 1 February 2005
10. *Prosecutor v. Brima et al.*, SCSL-04-16-PT-125, “Oral Decision on Prosecution’s Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures dated 2 April 2004”, 3 February 2005
11. *Prosecutor v. Brima et al.*, SCSL-04-16-T-219, “Confidential Prosecution Proposed Order of Third 10 Witnesses to be called at Trial and their Statements”, 12 April 2005
12. *Prosecutor v Brima et al*, SCSL-04-16-T, Trial Transcript, 27 June 2005
13. *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

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15. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 14 February 2008
16. *Prosecutor v. Taylor*, SCSL-03-01-T-429, “Public with Confidential Annexes - Prosecution Notice under Rule 92*bis* for the Admission of Evidence related to *inter alia* Kenema District”, 29 February 2008
17. *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
18. *Prosecutor v. Taylor*, SCSL-03-01-T-556, "Decision on Prosecution Notice under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence", 15 July 2008
 19. *Prosecutor v. Taylor*, SCSL-03-01-T-578, "Public with Confidential Annexes B & D – Amended Prosecution Witness List for Week 15 – 19 September 2008 & Prosecution Witness List for Week 22 – 26 September 2008", 8 September 2008
 20. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 23 September 2008
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 23. *Prosecutor v Taylor*, SCSL-03-01-T-630, "Prosecution Reply to Defence Response to Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-062", 13 October 2008
 24. *Prosecutor v. Taylor*, SCSL-03-01-T-636, "Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168", 17 October 2008
 25. *Prosecutor 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

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26. *Prosecutor v. Norman et al.*, SCSL-04-14-T-126, "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses", 8 June 2004
27. *Prosecutor v. Norman et al.*, SCSL-04-14-T-321, "Confidential Prosecution Order of Witnesses to be called in the Fourth Trial Session", 25 January 2005

28. *Prosecutor v. Norman et al*, SCSL-04-14-688, “Decision on Interlocutory Appeals on Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone,” 11 September 2006

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29. *Prosecutor v. Delalić et al*, IT-96-21-A, Appeals Chamber, “Judgement”, 20 February 2001
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30. *Prosecutor v. Milosević*, IT-99-37-AR73, “Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder”, Appeals Chamber, 18 April 2002
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31. *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
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<http://www.un.org/icty/naletilic/appeal/judgement/index.htm>

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34. *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
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35. *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 73(B), 75(F), 75(G), 108(C), as amended.
2. Practice Direction for Certain Appeals Before the Special Court of 20 September 2004.