1134)

SCSL-03-01-T
(31120-31145)

31120

THE SPECIAL COURT FOR SIERRA LEONE

Appeals Chamber

Before: Justice Jon M. Kamanda, President
Justice Emmanuel Ayoola
Justice Renate Winter
Justice George Gelaga King
Justice Shireen Avis Fisher

Registrar: Ms. Binta Mansaray

Date: 10 December 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION ON THE DEFENCE MOTION REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT BY THE OFFICE OF THE PROSECUTOR AND ITS INVESTIGATORS

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick, Legal Assistant

NOTICE OF APEAL

I. INTRODUCTION

1. This is a Notice of Appeal and legal submissions (the "Appeal") against the Trial Chamber's *Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators.*[1]

2. The Appeal follows the Trial Chamber's *Decision on Defence Motion seeking leave to Appeal the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators*, granting the Defence leave to appeal the above-mentioned decision.

II. SUMMARY OF THE PROCEEDINGS REGARDING THE APPEALED DECISION

3. On the 24th September 2010, the Defence filed a Motion requesting an investigation into contempt of Court by the Office of the Prosecutor and its Investigators (the "Defence Motion" or "Motion").[2] On the 27th September 2010, realizing that the Motion contained a number of errors that needed correction, the Defence filed a *Corrigendum to [the] Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators.*[3] The Prosecution filed its Response to the Motion on the 4th October 2010;[4] where after the Defence filed a Reply to the Response.[5]

---

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 November 2010.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-1089, Public with Confidential Annexes A-J and Public Annexes K-O, Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 24 September 2010.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O, *Corrigendum to* Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 27 September 2010.
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-1097, Public with Confidential Annexes Prosecution Response to "Public with Confidential Annexes A-J and Public Annexes K-O, Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators," 4 October 2010.
[5] *Prosecutor v. Taylor*, SCSL-03-01-T-1102, Public with Confidential Annex One, Defence Reply to Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 October 2010.

4. On the 22nd October 2010, the Trial Chamber issued an oral decision dismissing the Defence Motion in its entirety, and on the 11th November 2010, issued a reasoned written decision thereof (the "impugned decision" or "Decision").

5. Following the Trial Chamber's decision, the Defence filed a motion for leave to appeal the Decision.[6] The Prosecution filed its Response on the 23rd November 2010,[7] and the Defence filed a Reply on the 26th November 2010.[8]

6. On the 3rd December 2010, the Trial Chamber issued a decision granting the Defence leave to appeal,[9] in consequence of which this Appeal is filed.

7. In the impugned decision, the Trial Chamber dismissed the Defence Motion for an investigation into the conduct of the Prosecution under Rule 77 on three principal grounds. Firstly, on a preliminary point that the requested investigation was overly broad and non-specific; it amounted to a request for an audit of the office of the Prosecutor from its inception. Rule 77, the Trial Chamber opined, being criminal in nature, is not concerned with the general operations of an office or a party, but rather the conduct of individuals who have allegedly committed contempt. Secondly, on another preliminary point that the Defence was time-barred in that it had failed to bring to court the allegations of contempt within a reasonable time. The Trial Chamber also went on to make a fairly comprehensive, *albeit* one-sided, assessment of the credibility of the allegations of contempt by the Defence and also dismissed the Motion on the merits. The Defence submits that the Trial Chamber erred, in law

---

[6] *Prosecutor v. Taylor*, SCSL-03-01-T-1121, Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 15 November 2010.

[7] *Prosecutor v. Taylor*, SCSL-03-01-T-1126, Public with Confidential Annexes 2 & 3 Prosecution Response to Public Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 23 November 2010.

[8] *Prosecutor v. Taylor*, SCSL-03-01-T-1129, Defence Reply to Prosecution Response to Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 26 November 2010.

[9] *Prosecutor v. Taylor*, SCSL-03-01-T-1130, Decision on Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 3 December 2010.

and/or fact and/or procedure, in dismissing the Defence Motion for contempt on the grounds given below.

III. GROUNDS OF APPEAL

8. The Trial Chamber erred in law and/or fact and/or procedure in making a preliminary and dispositive finding that the Defence Motion amounts to a request for a general audit of the Prosecution's operations since the inception of the court in 2002, in that it does not sufficiently identify the persons subject of the contempt allegations and their corresponding contemptuous acts;

9. Likewise, the Trial Chamber erred in holding that the Defence Motion fell outside the personal jurisdiction of Rule 77;

10. The Trial Chamber erred in law and/or fact and/or procedure in making a preliminary and dispositive finding that the Defence Motion was time-barred because the Defence had delayed in bringing the alleged acts of contempt to court;

11. The Trial Chamber also erred in law and/or fact and/or procedure in its determination of the Defence Motion on the merits, as will more fully appear in the legal submission herein. The Trial Chamber, *inter alia*, erred in that, in assessing the facts, it failed to apply established rules of procedure on the admission and evaluation of evidence, including the rules of natural justice; its determination of the case left the impression of partiality.

12. On the merits, the Trial Chamber erred in law and/or fact and/or made a procedural errors in finding that the Defence Motion did not contain <u>any</u> credible allegations of contempt that satisfy the very low "reason to believe" evidentiary threshold under Rule 77. The Trial Chamber applied a higher standard of scrutiny than was required at that stage.

13. The Trial Chamber also erred in law and/or fact and/or made a procedural error in finding that the Defence Motion could not have brought issues of improper payments to witnesses under Rule 77, but only under Rule 39(ii).

SUBMISSIONS BASED ON GROUNDS OF APPEAL

IV. APPLICABLE STANDARDS OF REVIEW ON APPEAL

14. The SCSL Statute and the Rules do not appear to directly provide for a standard of review on interlocutory appeals. Article 20(1) of the Statute and Rule 106 of the Rules, which deal with appeals against a conviction, provide that the Appeals Chamber shall hear such appeals on the following grounds: (a) a procedural error; (b) an error on a question of law invalidating the decision; and (c) an error of fact which has occasioned a miscarriage of justice. The SCSL Appeals Chamber has adopted this same standard to appeals of an interlocutory nature.[10]

15. It is established in the Rules, in practice and in the jurisprudence of international tribunals that the Trial Chamber is the primary arbiter of fact. The Trial Chambers has discretion with respect to the evaluation and admission of evidence at trial. The Appeals Chamber generally defers to the Trial Chamber and will not readily interfere with this discretion.[11]

16. The Appeals Chamber will however interfere with the Trial Chamber's discretion where a challenge against the exercise of such discretion is based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[12] The scope of appellate review of discretion is in this instance

---

[10] *Prosecutor v. Taylor,* SCSL-03-01-AR73-799, Decision on "Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 23 June 2009, para. 4 ("**Taylor Defence Case Appeal Decision**").
[11] Taylor Defence Case Appeal Decision, para. 13, citing *Prosecutor v. Norman et al,* SCSL-04-14-AR73-688, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 5 ("**Norman Subpoena Appeal Decision**").
[12] Norman Subpoena Appeal Decision, para. 6 and *Prosecutor v. Milosevic,* IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5.

limited. Even if the Appeals Chamber does not agree with the impugned decision, the decision will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously, in that the Trial Chamber made a discernible error in the exercise of discretion.[13] A discernible error occurs where the Trial Chamber misdirected itself as to the legal principle to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[14] Where the Trial Chamber has made a discernible error in the exercise of its discretion, the Appeals Chamber may intervene, correct the error, and exercise and substitute its own discretion.[15]

17. The burden is on the appellant to show that the Trial Chamber committed an error of law which invalidates the decision or an error of fact which resulted in an unreasonable conclusion.[16]

V. FIRST GROUND OF APPEAL – LACK OF SPECIFICITY

18. With respect to this issue, the Trial Chamber found that the Defence Motion was *ultra vires* the subject matter, and personal jurisdiction of Rule 77, in that the Motion amounted to a request for a general audit of the Prosecution's operations since its inception in 2002, in that the Motion did not sufficiently identify the persons subject of the contempt allegations and their corresponding contemptuous acts. Further, that Rule 77 is not concerned with the general operations of an office or a party but rather with the conduct of individuals who have allegedly committed contempt.[17] The Trial Chamber erred in law and/or fact and/or on a point of procedure in making this finding in that, *inter alia*:

a. First, with respect to its ambit, Rule 77 does not prevent, at least at the preliminary investigative phase, a "general audit" of the Prosecution's operations

[13] Taylor Defence Case Appeal Decision, para. 13, citing Norman Subpoena Appeal Decision, para. 5.
[14] Taylor Defence Case Appeal Decision, para. 13, citing Norman Subpoena Appeal Decision, para. 6.
[15] Norman Subpoena Appeal Decision, para. 5.
[16] Norman Subpoena Appeal Decision, para. 7.
[17] The Decision, paras 27 and 28 (Emphasis added).

where the conduct complained of, being contemptuous in nature, pervades the entire system and has been going on for a long time. Secondly, with respect to the *ratione personae*, there is nothing to stop a Trial Chamber from ordering an investigation into the Office of the Prosecutor (OTP), as a *legal persona* constituted under Article 15 of the Statute and Rule 37 of the Rules, apart and separate from the natural persons employed in the Prosecution. It is trite law (and there is nothing to the contrary in Rule 77) that criminal proceedings can be instituted against statutory persons (in this instance, the Prosecutor) as against natural persons.

b. The Trial Chamber therefore erred in law finding that it could not order a general investigation of the office of the Prosecutor as an organ of the court. This error arises from the Trial Chamber's failure to distinguish the different stages involved in Rule 77 contempt proceedings and apply the relevant disparate standards. Rule 77, as considered in more detail in paragraph (d) below, envisages two main stages: first, the preliminary investigative stage, where the complainant must only establish reason to believe that one may have committed an act of contempt, and the second stage, contingent on a positive disposition on the first, which involves the actual institution of criminal proceedings for contempt. The Trial Chamber made the error of conflating the two stages, resulting in it erroneously applying a very stringent and unwarranted standard at the preliminary investigative stage, which by its very nature is investigative and provisional, and consequently requires a measure of flexibility. That error on its own vitiates the Trial Chamber's finding on this issue.

c. With the above distinction in mind, the Defence submits that its Motion properly pled jurisdiction for purposes of a preliminary investigation under Rule 77. With respect to *ratione personae*, the Motion, in the first instance, clearly identified "the Prosecutor, David Crane and all his successors in title," as the principal culprit.[18] Other accomplices, to the extent that their identities could be

[18] Defence Motion, para. 11.

ascertained, were however also sufficiently identified in the pleadings and supporting documents as argued below at paragraph (l). With respect to the *ratione materiae*, the Defence Motion clearly specified that the cause of action arose from the individual acts of the Prosecutor, acts of Prosecution employees and acts of Prosecution agents, which were enumerated in the affidavits attached to the Motion.[19] The Motion therefore, at the very least, established sufficient basis for an investigation into the office of the Prosecutor as a legal persona established under the working documents of this court. With respect to the breath of the inquiry, such investigation into the office of the Prosecutor would naturally be wider in scope and span than that targeted at specific individuals. Nothing in Rule 77 restricts such inquiry in those circumstances.

d. Further/alternatively, the Trial Chamber's findings on this issue suffer yet another legal/procedural defect in that the degree of specificity the Trial Chamber imported at the preliminary investigative stage was not necessary at that stage. Rather, such specificity would only have been required at the indictment stage, which comes after, and is dependent on the findings at the investigative stage. In this regard, it is important to note that Rule 77(C) envisages at least two stages. The first stage is preliminary investigative stage where the Trial Chamber makes a preliminary finding whether there is reason to believe that a person may be in contempt of the Special Court. The second stage, should the Trial Chamber find reason to believe that one may be in contempt, involves the actual prosecution of the culprit. At this stage, the Trial Chamber has three options. The Chamber may opt to deal with the matter summarily itself;[20] it may refer the matter to the appropriate Sierra Leonean authorities;[21] or direct the Registrar to commission an independent investigation and report back to the court whether there are sufficient grounds for instigating contempt proceedings.[22] If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the

[19] Ibid.
[20] Rule 77(C)(i)
[21] Rule 77(C)(ii)
[22] Rule 77(C)(iii)

Chamber may then issue an order *in lieu* of an indictment and direct independent counsel to prosecute.[23]

e. Against this background, it is quite clear that the degree of specificity the Trial Chamber demanded at the preliminary '*reason to believe*' investigative stage in this case was premature and unnecessary as that was not the prosecution stage *stricto sensu*; but rather the precursor to a potential prosecution. Thus, while some degree of specificity would have been required to direct the investigation, such specificity needed not necessarily have the concreteness of an indictment. Indeed, much as such preliminary investigation could fail to establish a case for contempt, it could equally unravel a wider case than that originally anticipated. As such, as the Defence has always argued, an investigation of this nature must necessarily follow the evidence where it leads.[24] Such is the nature of an investigation.

f. A closer reading of Rule 77 itself lends support to this proposition in that the element of sanction envisaged in Rule 77(A) only comes into play at the second stage of the two stage process considered in paragraph (d) above. Rule 77(A), in part provides that, "[t]he Special Court, in the exercise of its inherent power, may *punish for contempt* any persons who knowingly and willfully interferes with its administration of justice...". Within the two stage process described above, the punishing stage i.e. prosecution, is the stage after the preliminary *reason to believe* investigative stage. Indeed at that stage, which involves the indictment of the culprit, there is need for concrete specificity. The Trial Chamber erred in conflating the two processes into one.

g. In any event, compared with the lack of specificity in the Indictment with respect to the mode of liability of joint criminal enterprise where the Prosecution alleges a joint criminal enterprise involving the accused and an indefinite number of

[23] Also see, *Prosecutor v. Brima et al*, SCSL-04-16-AR77-315, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005 ("**AFRC Contempt Appeals Decision**"), paras. 25-27.
[24] *Prosecutor v. Taylor,* SCSL-03-01-T-668, Confidential Defence Response to Prosecution Motion for an Investigation by Independent Counsel into Contempt of the Special Court for Sierra Leone and for Interim Measures, 13 November 2008, paras. 12, 13, 19 and 28.

unspecified accomplices,[25] the perceived lack of specificity in the Defence Motion could not legally be said to be fatal.

h. For any one or more of the foregoing reasons, the Defence submits that the Trial Chamber made [a] procedural error(s). Further/alternatively, the mistakes also amount to mistakes of law invalidating the Chamber's entire dispositive finding of undue delay. But for those legal errors, the Trial Chamber would not have found that the Defence was time-barred on account of undue delays in brining action for contempt of court.

i. Further/Alternatively, the Defence submits that its Motion considered as a whole, including the Affidavits attached thereto, was reasonably specific so as not to be fatally defective. The Motion sufficiently identified most of the persons subject of contempt and the corresponding contemptuous allegations. The allegation of contempt against Brenda Hollis, for instance, are contained in the affidavit of DCT-133 and relate, *inter alia*, to payment of inducements and discussions of a bribe with a potential witness; while allegations against David Crane are contained in the affidavit of DCT-102 and relate to, *inter alia*, allegations of threats and intimidation of a witness. Indeed the Trial Chamber conceded this point at paragraph 29 of the Decision despite its ruling to the contrary. The Defence therefore submits that to the extent that concrete specificity was required at the preliminary investigative stage, which is disputed, the Defence was in substantial compliance.

j. Further/Alternatively, on the Trial Chamber's own reasoning that contempt proceedings are criminal in nature and should therefore identify the alleged offenders with specificity;[26] for criminal purposes, that some of the persons might not have been identified with sufficient specificity does not detract from those who were clearly identified. An investigation could therefore still have been ordered with respect to the allegations against Brenda Hollis or David Crane.

---

[25] See Leave to Appeal, para. 7(b), FN 11 and the Second Amended Indictment.
[26] Decision, para. 23.

Furthermore, there was nothing to stop the Trial Chamber, pursuant its inherent powers under Rule 77 and generally, from limiting the scope of the investigation as it might have deemed fit given its position that the scope of the Defence's request was unmanageably wide. The Trial Chamber's finding in this instance reflects a narrow focus on technical rules of pleading at the expense of the Accused's fair trial rights and the inherent power and responsibility of the Court to do justice. The Defence submits that this also constitutes an error of law invalidating the decision for reasons already argued above. Alternatively, it amounts to an abuse of discretion and constitutes a discernible error.

k. The Defence submits that independent of Rule 77, the Court also retains contempt powers that are inherent in nature, which could also have been invoked to address the alleged misconduct. Indeed, the Appeals Chamber of the ICTY has confirmed the existence of such an inherent power of contempt in trial chambers, to be distinguished from that which is specified in ICTY Rule 77[27] – the counterpart of our Rule 77:

> The remedies available to the International Tribunal range from a general power to hold individuals in contempt of the International Tribunal (utilising the inherent contempt power rightly mentioned by the Trial Chamber…) to the specific contempt power provided for in Rule 77.[28]

l. In the recent *Haradinaj* decision, the ICTY Appeals Chamber also recognized the Trial Chamber's inherent duty to investigate any serious allegations of misconduct by either party in relation to witnesses, which vitiates a fair trial. In that case, the Appeals Chamber ordered a re-trial on the basis of the Trial Chamber's failure to take seriously allegations of witness intimidation. The Appeals Chamber stated that where the Trial Chamber was on notice of an atmosphere of "widespread and serious witness intimidation" it was "incumbent"

---

[27] *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997 ("Croatia Subpoena Appeals Decision"), para. 59. See, also, *Rules of Procedure and Evidence*, IT/32/Rev. 44, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, as amended on 10 December 2009, Rule 77.

[28] Croatia Subpoena Appeals Decision, para. 59.

upon the Trial Chamber to "ensure that a fair trial [was] possible" and to take all measures which are "reasonably open to them" to counter witness intimidation.[29]

m. Indeed, the hallmark of the Defence complaint in the contempt Motion was the pervasively corrupt nature of the Prosecution's investigative tactics relative to its wide discretionary powers and its duty of utmost good faith, and how the Prosecution's abuse of such authority; first, threatened the integrity of the proceedings and the entire judicial system, and secondly, affected the Accused's fair trial rights in terms of the Defence's ability to access witnesses who had not been compromised by the Prosecution.[30] Indeed, the Trial Chamber committed the same error the ICTY Appeals Chamber observed of the ICTY Trial Chamber in that the Chamber emphasized procedure over substantive justice. In this case, once such serious allegations had been brought forward, and indeed the Trial Chamber admits to the gravity of the allegations,[31] it was incumbent upon the Chamber, pursuant to Rule 77, or in the exercise of its inherent powers as the guarantor of a fair trial, to institute an investigation into the allegations of contempt. Rather, the Trial Chamber chose to emphasize form over substance. The Defence submits that in so doing, the Trial Chamber made a discernable error in that it misdirected itself as to the legal principle to be applied and/or took irrelevant factors into consideration and/or failed to consider relevant factors and/or or failed to give them sufficient weight and/or made an error as to the facts upon which it has exercised its discretion.

19. In any event, the Trial Chamber's preliminary dispositive finding that the Defence Motion should fail for lack of specificity contradicts its subsequent approach on the Merits whereby the Chamber went on to consider the specific allegations in the Motion and Annexes with respect to the persons named therein.[32] That the Trial Chamber should issue a decision whose reasoning is internally contradictory of itself amounts to an error of law invalidating the decision.

---

[29] *Haradinaj* Appeal, paras. 34-35.
[30] Defence Motion, paras 13 and 14. Also see para. 29.
[31] Decision para. 22. See also para. 12.
[32] Decision, paras. 32 – 149.

VI. SECOND GROUND OF APPEAL – UNDUE DELAY

20. The Trial Chamber's other preliminary and general dispositive finding that the Defence Motion is time-barred because the Defence delayed in bringing the alleged acts of contempt to court[33] also amounts to an error of law and/or fact, and/or procedure in that, in finding delay, the Trial Chamber solely and erroneously focused on the time at which the contemptuous conduct occurred,[34] and not the time at which the Defence learned of the contemptuous conduct such that it was in a position to raise the matter with the court.

21. The Trial Chamber, for instance, cited the case of DCT-192 as illustrating the most inordinate delay in bringing the matter to court,[35] oblivious of its own finding at paragraph 42 that based on the declaration of a member of the Defence team, Logan Hambrick, the allegations relating to DCT-192 arose during a proofing session with the witness in 2010. Indeed, according to Ms. Hambrick's declaration, the issue arose during a proofing session on the 30th August 2010, barely a month before the Defence's contempt motion was filed. Similarly, at paragraph 127 of the Decision, the Trial Chamber queried why the Defence in January 2008, did not cross-examine Abu Keita in relation to a newspaper article, Exhibit D-468, oblivious of the fact that that newspaper article was dated 29 September 2009, some 20 months or so after the Defence's cross-examination.[36] Had the Trial Chamber evaluated the question of delay from the time the Defence became aware of the contemptuous conduct, it could not have made findings of undue delay. For instance, in a prior separate but related

---

[33] Decision, paras. 25 and 26.
[34] For ex., Decision, paras. 24, 45 (the Trial Chamber notes that the alleged assault occurred 8 years ago but does not consider that the Defence was only told about it in August 2010), 50, 56, 89, 98, 104, 110 (the Trial Chamber notes that DCT-097 was paid by the Prosecution in 2005 and 2006, but knows that the Defence only received disclosure of these amounts in September 2010), 116, 117, 121, 127 (the Trial Chamber erroneously queries why the Defence did not cross-examine Abu Keita in January 2008 in relation to information about promises of relocation found in a newspaper article (Exhibit D-468) which is dated 29 September 2009, some 20 months after he testified), and 145.
[35] Decision, para. 24.
[36] Decision, paras. 24 and 45. See also Leave to Appeal, para. 8(a), FN 15.

Motion relating to DCT-032, Justice Sebutinde, dissenting, found that the Defence had acted diligently in bringing the complaint in relation to that witness.[37]

22. Indeed the Trial Chamber's fixation with the time of the occurrence of the alleged acts of contempt blinded the court from other self-evident factors that could have guided its decision. The Trial Chamber's ruling proceeded on a number of false and/or unfounded assumptions. The Trial Chamber's finding on delay for instance assumed that acts of contempt come to light as soon they are committed. Secondly, the Trial Chamber assumed the existence of a ready complaint mechanism through which acts of contempt could be brought to light. Thirdly, that the Defence is one such complaint mechanism. To adopt the Trial Chamber's most egregious example of a perceived delay, that of DCT-192; the Defence was not even in existence when the offending act of contempt was committed.

23. Furthermore, the Trial Chamber failed to appreciate the axiomatic reality that victims of criminal misconduct by a prosecutor's office would be unlikely to come forward with their allegations "without undue delay". Indeed, the power that reposes in the Office of the Prosecutor of this Court is of no small measure, juxtaposed especially in the geographical theatre of its operations in Sierra Leone and Liberia, where ordinary folks are concerned with daily survival in the recent aftermath of destabilising and bloody civil conflicts, and are not prone to challenging authority. Such reluctance by victims is understandable and should have been considered by the Court in the Decision. Had the Trial Chamber been open to the totality of all the information before it, including the *voir dire* proceedings in the RUF[38] which were alluded to in the Defence Motion,[39] the Trial Chamber would have been instructed not only on the difficulties that victims of prosecution malfeasance have in bringing such [mis]conduct to light, but also of the Prosecution's habit of abusing its powers during its investigations. The Trial Chamber thus made a discernible error in that it

[37] *Prosecutor v. Taylor,* SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010, Separate Concurring Opinion of Justice Julia Sebutinde, para. 3.
[38] *Prosecutor v. Sesay et al,* SCSL-04-15-T-188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008.
[39] Fotenote 10.

misdirected itself as to the legal principle to be applied and/or took irrelevant factors into consideration and/or failed to consider relevant factors and/or failed to give them sufficient weight and/or made an error as to the facts upon which it has exercised its discretion.

24. The Trial Chamber's reasoning regarding "undue delay", by contradistinction, becomes manifestly unjust when viewed against the Prosecution's case against the Accused, which implicates crimes that are alleged to have occurred between 1996 and 2002.[40] The crimes which are alleged in the Indictment pre-date virtually all of the alleged criminal misconduct the Motion complains about, in many instances by several years. If the Court is competent to address and redress criminal allegations by the Prosecution that date back fourteen years to 1996, questions of fairness clearly arise when the Court finds that the Defence has not acted with due diligence in bringing criminal conduct that occurred only two to eight years ago to its attention. The same rationale which undergirds the preference for bringing criminal allegations before a court without undue delay must apply with equal force to the Prosecution and the Defence, alike.

25. Further/alternatively, if Rule 77, is strictly speaking a criminal provision as the Trial Chamber opined, there is nothing in that rule or anywhere else in the Rules to suggest a statute of limitation regarding contempt of court. Thus, while the question of delay might impact on the credibility of the contempt allegations, it could not operate as a legal bar. The Trial Chamber therefore also misdirected itself on a point of law.

26. Secondly, the Defence submits that the Trial Chamber erred in law in dismissing its argument on "undue delay"; that the Motion did not arise from separate isolated events but rather a consistent pattern of conduct and the culmination of separate

---

[40] *Prosecutor v. Taylor*, SCSL-03-01-PT-263, *Prosecution's Second Amended Indictment*, 29 May 2007 (hereinafter, "**Indictment**"). Indeed, and despite the fact that the temporal jurisdiction of the Court commences on 30 November 1996 per Article 1(1) of the Statute, the allegations against the Accused at bar include an alleged joint criminal enterprise that began in Libya as far back as 1988, some twenty-two (22) years ago. See, e.g., *Prosecutor v. Taylor*, SCSL-03-01-T-327, *Prosecution Notification of Filing of Amended Case Summary* with "Case Summary Accompanying the Second Amended Indictment," as Annex, 3 August 2007, paras. 1 and 42 through 44.4 ("**Amended Case Summary**").

incidents.[41] The Defence stands by those averments and submits that the Court could have read and relied on them differently to this extent: the Defence was not suggesting that the disparate and separate incidents could not in their individual respects sustain a charge of contempt of court or that their characteristics changed over time; instead those averments stand for the self-evident propositions (i) that several criminal acts by employees and/ or agents of the same legal entity (the Office of the Prosecutor in this instance), while constituting acts of contempt in and of themselves, can reflect a shared organizational culture and institutionalized investigative *modus operandi* which is corruptive of the judicial process and infringes on an Accused's right to a fair trial; and significantly, (ii) that the totality of the circumstances which impel a motion for contempt may not become manifest until such period of time when the separate and distinct individual acts – which when considered separately and individually, though criminal, may be overlooked[42] – become so evident as to disclose systemic and widespread misconduct by the offending party, especially one with a large number of employees and/ or agents, operating with the *de jure* cloak of secrecy and almost unfettered authority and discretion.

27. From the foregoing submissions, the Defence submits that the Trial Chamber made a number of procedural errors, which also amounted to errors of law invalidating the decision. Alternatively, the Trial Chamber made errors of fact with resulted in unreasonable conclusions of law and fact. Further/Alternatively the Trial Chamber misdirected itself as to the legal principle to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.

VII. THIRD GROUND OF APPEAL – MERITS

28. The Trial Chamber's deliberations and findings on the Merits also contain a number of errors of fact and/or law and/or procedure in that, *inter alia*:

[41] Decision, para. 25; See, also, Reply, para. 9.
[42] Reply, para. 10 and FN 10.

Procedural errors in determining the merits

29. First, the Trial Chamber erred in law/procedure by applying a much higher standard to the otherwise very low "reason to believe" preliminary investigations threshold under Rule 77. The Chamber's credibility analysis went beyond what was necessary and contradicts the Appeals Chamber's finding that this stage should not be a summary trial concerned with the veracity of the allegations.[43] In the AFRC Contempt Decision, the Appeals Chamber, holding that the standard of "reason to believe", is different and lower than that of a *prima facie* case, found that the former standard had been met where the Trial Chamber relied on two statements that were "not on oath and cried out for cross-examination" because "at this initiating stage, the court is not concerned with their veracity." (Emphasis added). This contrasts with the thorough, albeit one-sided, analysis the Trial Chamber undertook of the Defence evidence in this case.

30. Second, in conducting a summary trial, albeit erroneously, the Trial Chamber, contrary to established principles of procedure, erred in law by allowing the Prosecution, a party to the proceedings and subject of the Defence Motion, to put forward bald and self-serving assertions of fact as legal submissions,[44] and proceeded to rely on such assertions as gospel truth without evaluating them,[45] as the court did with the Defence evidence.

31. The Decision, simply put, is unfair insofar as the manner in which evidence put forth by the Defence to support the allegations was evaluated by the Court vis-à-vis how prosecution evidence in rebuttal was assessed by the Court. Illustrative of this is the reliance by the Court on confidential Annex 4 of the Response which contained unsworn, unsubscribed or signed factual assertions by the Prosecution under the heading "Note of Inaccuracies."[46] The Trial Chamber relied on Annex 4 of the Response extensively in disregarding the serious allegations that were in all but one

[43] AFRC Contempt Appeals Decision, paras. 16-17.
[44] For example, Decision, paras. 54, 69, 87, 94, 102, and 120.
[45] For example, Decision, paras. 56, 72, 77, 89, 98, 104, 110, and 121.
[46] See Response, Annex 4.

instance, conveyed through sworn affidavits by Defence witnesses who have either testified before the Court or had been considered to give testimonial evidence.[47]

32. It is an established rule of procedure that a party cannot lead evidence from the bar especially on the facts at issue. The same principle also prohibits the leading of evidence in written legal submissions. While, admittedly, there are exceptional instances when the court may take counsel's word – as an officer of the court – on a particular issue,[48] the present case is not one of those instances as it raised a dispute of fact. The Prosecution's assertions, to the extent that such assertions disputed or contradicted the Defence's sworn written evidence, raised disputes of fact which could only be resolved in accordance with established rules of procedure on the leading and evaluation of evidence, including the omnipotent principles of natural justice. Such dispute of fact could not simply be resolved by a rote preference of the Prosecution's account. Indeed, there is no rule of law that where there is a dispute of fact, the evidence of an officer the court is *ipso facto* credible and trumps that of a lay witness. If that were the case, all lawyers would be witnesses in their own cases. Indeed paragraph 71 of the Decision heightens the Trial Chamber's level of duplicity. At paragraph 71 of the Decision, the Trial Chamber, while all the while accepting and adopting unsworn statements and factual submissions from the Prosecution, took issue with the fact that the declaration of DCT-097 was neither sworn nor witnessed.

33. The Trial Chamber therefore erred in law and/or fact and/or on a point of procedure by: (i) only evaluating the Defence evidence; (ii) accepting the Prosecution's submission as evidence; and (iii) accepting that evidence without evaluation. The Trial Chamber, apart from accepting the Prosecution's 'evidence from the bar' also erred in law in that it applied different standards for the Defence and the Prosecution regarding the assessment and credibility of the evidence.

---

[47] See Decision, for example, paras. 89 ("the search was not carried out by members of the Prosecution; rather there were present as observers"); 98 (observing that Prosecution records show that DCT-130's younger brother was present for a meeting between the witness and the Prosecution and noting that that "fact" was "unchallenged by the Defence"); 121 ("the Prosecution has denied the allegation that it bought a house for Varmuyan Sherif in Kenema).

[48] Prosecutor v. Aleksovski, IT-95-14/I-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, Separate Opinion of Judge Patrick Robinson, para. 2.

34. Thirdly, in conducting a summary trial, albeit erroneously, the Trial Chamber also erred in law and/or fact and/or on a point of procedure by reading into the record evidence that was not adduced by either party with respect to findings relating to DCT-102,[49] Abu Keita,[50] and DCT-192.[51] At paragraph 60, the Trial Chamber noted "that the so-called "offer" of $90.000 [to DCT-102] was part of the costs of relocation" and found that the Defence had not demonstrated that this was excessive". This finding absolutely has no basis on the facts that were before the Chamber. Nor could it reasonably be inferred from the facts that were before the Chamber. The Chamber therefore erred in reading facts onto the record.

35. The Trial Chamber made a similar error when it noted at paragraph 127, that the fact that Abu Keita testified openly as an indication that he was not concerned about his security was "consistent with the Prosecution position that it did not promise him relocation". The Prosecution never made that factual allegation. Nor could that factual finding be reasonably inferred from the Prosecution's submissions.

36. Similarly, at paragraph 47, contrary to the witness' assertion in his affidavit, the Trial Chamber erroneously found that DCT-102 "was later interviewed by David Crane...". Quite to the contrary, DCT-102 never said that he was interviewed by David Crane. Rather his evidence was that when he was brought to the Prosecution's offices, he was taken into a room where he was made to sit in the middle of a circle of Prosecution personnel unknown to him, one of whom introduced himself as David Crane and proceeded to intimidate him before directing him into the next room where

[49] Decision, para. 60 ("... the Trial Chamber notes that the so-called "offer" of $90,000 [to DCT-102] was part of the costs of relocation and finds that the Defence have not demonstrated that this was excessive". This factual finding absolutely has no basis on the facts, nor could it be inferred from the facts that were before the Chamber.); also para. 47 (the Trial Chamber erroneously found that DCT-102 stated that he was "later interviewed by David Crane" which is contrary to the witness' assertion in his affidavit. This tainted the Chamber's understanding of his entire evidence).

[50] Decision, para. 127 (the Trial Chamber noted that the fact that Abu Keita testified openly was an indication that he was not concerned about his security and was "consistent with the Prosecution position that it did not promise him relocation". However, in its Response, the Prosecution never said that they did not promise him relocation, nor could that factual finding be reasonably inferred from the Prosecution's glaring silence on that point.

[51] Decision, para. 45 (the Trial Chamber finds that DCT-192 was never a potential witness in this trial, where in fact it is clear that DCT-192 was a potential Defence witness in this trial and a potential Prosecution witness in the CDF Trial when the assault occurred. Rule 77(A)(iv) encompasses acts of contempt against potential witness without limitation of when the contempt occurred).

he was interviewed proper.[52] The Defence submits that the Trial Chamber's distortion of the witness' evidence tainted its understanding his entire evidence resulting in an erroneous disposition of fact. Furthermore, it directly affected the court's estimation of the witness' credibility, which ultimately resulted in the court rejecting his evidence.

37. The Defence submits that the Trial Chamber's 'judicial activism' in making factual findings favorable to the Prosecution contrasted with the Trial Chamber's close scrutiny of the perceived factual inadequacies of the Defence Motion.[53] The Trial Chamber's show of double standards leaves an impression of partiality and that in and of itself constitutes an error of law and/or on a point of procedure.

38. Fourth, at paragraphs 51, 60, 64, 89, 98, 104, 111, 117, and 12, the Trial Chamber made an error of law and/or procedure by importing into Rule 77, a further requirement that there must be a link between the alleged act of contempt and a witness' unwillingness to testify when assessing a witness' credibility and/or prejudice to the Defence. This erroneously narrows the definition of what could constitute "interference with the administration of justice" under Rule 77. The Defence submits that while not exhaustive, Rule 77(A) enumerates individual acts that in and of themselves are constitutive of interference with the administration of justice.

39. Fifth, with respect to the question of improper inducements generally,[54] the Trial Chamber erred in law and/or fact in that it misconstrued the Defence arguments and the reading of Rule 77 and Rule 39. The Trial Chamber's finding at paragraph 40 that the question of the alleged improper payments to witnesses was not a question of contempt of court under Rule 77 but rather a question of abuse of discretion under Rule 39(ii) has no basis either in the rules or in reason. The finding is fundamentally flawed in law in that it suggests that Rule 77 and Rule 39 are mutually exclusive.

---

[52] See Declaration of Sam Kolley, Defence Motion Annex F, paras 11-16.
[53] See, for ex, Decision, paras. 72 and 110.
[54] Decision, paras 37-40.

Quite to the contrary, the two rules are complementary in that certain acts which amount to abuse of discretion could also elevate to the level of criminality sanctioned under Rule 77. The Defence submit that the Trial Chamber's error of law on this point invalidates its findings on that issue.

Substantive errors on findings of fact

40. The Trial Chamber's findings on the question of improper inducements generally,[55] also contain a number of errors of law and/or fact, in that, *inter alia*: First, with respect to allegations of contempt in relation to DCT-133, the Trial Chamber's finding of fact that there is no evidence that DCT-133 and Brenda Hollis negotiated a fee for the witness' evidence[56] cannot be sustained against the totality of the evidence that was before the court. From the evidence of DCT-133, while Brenda Hollis indeed told him that the Prosecution did not pay for evidence, in part for fear that the Defence would find out,[57] the mere fact that Ms Hollis held two subsequent meetings with the witness at which the issue of a price was discussed, further and apart from the ongoing tacit and implicit assurances DCT-133 were getting from Prosecution investigators in the interim, clearly speaks to negotiations of a bribe. The Defence submits that if that doesn't, nothing does. In that context, the fact that a bribe was never paid and DCT-133 was never called to testify for the Prosecution, is immaterial. Rule 77(A)(iv) clearly punishes for contempt, any person who offers a bribe to a potential witness. There is no requirement that the bribe must have in fact been paid. Indeed under Rule 77(B), "[a]ny incitement or attempt to commit any of the acts punishable under Sub-Rule (A) is punishable as contempt of the Special Court with the same penalties." (Emphasis added)

41. On this point, the Defence also notes that despite the Prosecution's vehement protestations of innocence elsewhere in its submissions, it was silent on this point. The Defence allegations were therefore uncontested. The Trial Chamber thus clearly misdirected itself on the facts before it. Had the Trial Chamber collectively

[55] Decision, paras 37 - 40.
[56] Para. 83
[57] Motion, Confidential Annex D.

considered all the factors before it, it would not have come to the factual finding it reached. Similarly, the Trial Chamber would not have reached the same conclusion if it had not misdirected itself on the interpretation of Rule 77 regarding the constitutive elements of acts amounting to the offer of a bribe.

42. Second, the Trial Chamber committed an error of law and/or fact by misconstruing the Defence allegation with respect to *unsolicited offers* of security and/or relocation as inducement. The Trial Chamber could not properly find that this was a legitimate and appropriate exercise of the Prosecution's discretion under Rule 39(ii) without any information of any prior security risks, threat assessments, etc done by the Prosecution before making such offers.[58] The Defence submits that while relocation may be an appropriate measure to ensure the safety and security of a witness, and indeed while there is nothing wrong in a party appraising witnesses or potential witnesses of the potential security measures that could be available to them should it established that they are at risk; it is wrong and was indeed wrong for the Prosecution to entice witnesses or potential witnesses into cooperation through unsolicitated offers for relocation without any prior risk assessment.

43. On the basis of the foregoing submissions, the Trial Chamber made a number of discernible errors in that it misdirected itself as to the legal principle to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion. Such errors also amounted to errors of law invalidating the factual findings.

VIII. RELIEF REQUESTED

44. For all the foregoing reasons, or any one or more of them, the Defence requests that the Trial Chamber's impugned decision be set aside and that the Appeals Chamber orders an investigation into the alleged acts of contempt of court by the Prosecution as

[58] For example, Decision, paras. 78, 100/104, and 109/112.

requested in the Defence Motion, subject to such terms and condition, including any restrictions as the Appeals Chamber may deem necessary.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 10th Day of December 2010,
The Hague, The Netherlands

Index of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, 29 May 2007

Prosecutor v. Taylor, SCSL-03-01-T-327, Prosecution Notification of Filing of Amended Case Summary with "Case Summary Accompanying the Second Amended Indictment," as Annex, 3 August 2007.

Prosecutor v. Taylor, SCSL-03-01-T-668, Confidential Defence Response to Prosecution Motion for an Investigation by Independent Counsel into Contempt of the Special Court for Sierra Leone and for Interim Measures, 13 November 2008.

Prosecutor v. Taylor, SCSL-03-01-AR73-799, Decision on "Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009", 23 June 2009.

Prosecutor v. Taylor, SCSL-03-01-T-1089, Public with Confidential Annexes A-J and Public Annexes K-O, Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 24 September 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O, *Corrigendum to* Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 27 September 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1097, Public with Confidential Annexes Prosecution Response to "Public with Confidential Annexes A-J and Public Annexes K-O, Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators," 4 October 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1102, Public with Confidential Annex One, Defence Reply to Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 October 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010, Separate Concurring Opinion of Justice Julia Sebutinde.

Prosecutor v. Taylor, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1119, Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 11 November 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1121, Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 15 November 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1126, Public with Confidential Annexes 2 & 3 Prosecution Response to Public Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 23 November 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1129, Defence Reply to Prosecution Response to Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 26 November 2010.

Prosecutor v. Taylor, SCSL-03-01-T-1130, Decision on Defence Motion seeking leave to Appeal the decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 3 December 2010.

Other SCSL Cases

Prosecutor v. Brima et al, SCSL-04-16-AR77-315, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005.

Prosecutor v. Norman et al, SCSL-04-14-AR73-688, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006.

Prosecutor v. Sesay et al, SCSL-04-15-T-188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008.

Case Law of the International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Tihomir Blaskić, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997.

http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html

Prosecutor v. Aleksovski, IT-95-14/I-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, Separate Opinion of Judge Patrick Robinson.

http://www.icty.org/x/cases/contempt_nobilo/acjug/en/nob-aj010530e.pdf

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