1165)

SCSL-03-01-T
(32250-32284)

32250

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

APPEALS CHAMBER

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

Registrar: Ms. Binta Mansaray

Date filed: 10 January 2011

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC, WITH REDACTIONS

PROSECUTION RESPONSE TO PUBLIC DEFENCE 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
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

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

I. INTRODUCTION

1. The Prosecution opposes the "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".[1]
2. The three grounds of appeal raised by the Defence are without merit and should be dismissed. Consequently, the relief requested should be denied. The Trial Chamber did not err in fact, law, and/or procedure, and/or abuse its discretion in dismissing the Defence's request for an independent investigation into allegations of contempt as set out in the Motion.[2]
3. This Response is filed on a confidential basis as it refers to extracts from DCT-102's affidavit which was filed as a confidential annex to the Motion.[3] While DCT-102 subsequently rescinded his protective measures,[4] his affidavit was admitted as a confidential exhibit.[5]

II. STANDARD OF REVIEW ON APPEAL

4. Under the Statute of the Special Court and the Rules of Procedure and Evidence, an appeal may be allowed on the basis of an error on a question of law invalidating the decision, an error of fact which has occasioned a miscarriage of justice, and/or a procedural error.[6] The standard of review on appeal is different for each of these types of error.
5. With respect to errors of law, the Appeals Chamber, as the "final authority on the correct

---

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1134, "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", 10 December 2010 ("**Appeal**").
[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 Prosecution and its Investigators", 24 September 2010, as corrected by *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 Prosecution and its Investigators", 27 September 2010 (together referred to as the "**Motion**").
[3] Motion, Confidential Annex F.
[4] Trial Transcript, 1 November 2010, p. 48365.
[5] Confidential Exhibit P-612.
[6] Article 20 of the Statute of the Special Court ("**Statute**") & Rule 106 of the Rules of Procedure and Evidence ("**Rules**").

interpretation of the governing law",[7] should determine whether the alleged error of substantive or procedural law was in fact made. It is only an error of law *invalidating the decision* of the Trial Chamber that may lead to a reversal or revision of that decision by the Appeals Chamber.[8]

6. With respect to errors of fact, the Appeals Chamber must give a "margin of deference to a finding of fact reached by a Trial Chamber"[9] and "will not lightly overturn" such findings.[10] In order to succeed in its Appeal, the Defence must show that no reasonable Trial Chamber could have reached the conclusion that this Trial Chamber did on the material before it.

7. With respect to procedural errors, a distinction should be drawn between non-compliance with a mandatory procedural requirement, which will not necessarily invalidate the Trial Chamber's decision if there has been no prejudice to the Defence[11] and the alleged erroneous exercise by the Trial Chamber of its discretion. "It is well established that in reviewing the exercise of a discretionary power, an appellate tribunal does not necessarily have to agree with the Trial Chamber's decision as long as that Chamber's discretion was properly exercised in accordance with the relevant law in reaching that decision".[12] In simple terms, the question is whether the exercise of the discretion was "reasonably open" to the Trial Chamber,[13] or whether conversely, the Trial Chamber "abused its discretion".[14]

III. GROUNDS AND SUBMISSIONS IN RESPONSE TO THE APPEAL

FIRST GROUND OF APPEAL – LACK OF SPECIFICITY

The Trial Chamber erred in law and/or fact and/or procedure in making a preliminary dispositive finding that the Motion amounts to a request for a general audit of the

---

[7] *Prosecutor v. Norman et al.*, SCSL-04-14-T-688, "Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone", 11 September 2006 ("***Norman* Appeals Decision**"), para. 7.
[8] *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, "Judgement", Appeals Chamber, 12 June 2002, para. 38.
[9] *Prosecutor v. Kupreskic et al.*, IT-95-16-A, "Judgement", Appeals Chamber, 23 October 2001, para. 30.
[10] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A-829, "Judgement", Appeals Chamber, 28 May 2008, para. 33.
[11] See e.g. *Prosecutor v. Delalic* et al, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 ("***Delalic* Appeals Judgement**"), paras. 630–639; and *Prosecutor v. Krstic*, IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004, para. 187.
[12] *Norman* Appeals Decision, para. 5.
[13] *Delalic* Appeals Judgement, para. 274.
[14] *Delalic* Appeals Judgement, para. 533.

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

8. This ground of appeal should be dismissed as the Defence has not shown that the Trial Chamber erred in law and/or fact and/or procedure in finding that Rule 77 is not concerned "with the general operations of an office or party, but rather with the conduct of individuals who have allegedly committed contempt."[15]

9. The Defence's primary argument under this ground of appeal is that the Office of the Prosecutor ("**OTP**") is an entity with separate legal personality and thus can properly be the subject of an order for an investigation into alleged contemptuous conduct.[16] Effectively, the Defence argues that the OTP is a "person" for the purposes of the jurisdiction conferred by Rule 77 and that the term "person" as used in the Rule is not restricted to natural persons.[17] This argument is flawed *ab initio* as the OTP is not a legal or statutory person; thus, the wider issue of whether such persons fall within the ambit of Rule 77 is irrelevant in this instance.

10. A considered analysis of the issue of whether the OTP has a separate legal personality is lacking in the Appeal. Instead, the Defence simply and erroneously asserts that the OTP is a separate *legal persona* based on Article 15 (The Prosecutor) of the Statute and Rule 37 (Functions of the Prosecutor).[18] However, as is evident from the titles and a plain reading of these provisions, the focus of both is the Prosecutor, not the OTP. This focus follows from the fact that it is the Prosecutor and not the OTP which is one of the organs of the Court.[19] A wider analysis of the Agreement, the Statute and the Rules also clearly indicates that the Defence argument is wrong; it is the Court, of which the three organs are only constituent elements, which is imbued with legal personality or "juridical capacity".

11. The issue of juridical capacity is specifically addressed in Article 11 (Juridical Capacity) of

---

[15] Decision, para. 28. "**Decision**" is defined in paragraph 4 of the Appeal.
[16] Appeal, para. 18(a).
[17] In the context of contempt proceedings at the Special Court, Rule 77 provides jurisdiction over a "person" (see rreferences to "person" made at Rule 77(A), (C), (F) & (G)). No definition of "person" is provided in the Rules, Statute or Agreement.
[18] Appeal, para. 18(a).
[19] Article 11 of the Statute identifies the three organs of the Court, one of which is the Prosecutor.

the Agreement, a provision the Defence ignores in the Appeal. This Article provides the "Special Court" with the juridical capacity to perform various necessary functions for its operation. This Article does not make any separate provision for the OTP.

12. Further, evidence that it is the Court which has legal personality and through which its organs are supposed to function is provided in the simple example of staff members' employment contracts. Whether the staff member works for the Prosecutor, Registry or Chambers, the contract is between the Court and the individual and not between the organ and the individual.[20] Obviously, the Court as an artificial person is required to operate through a natural person which is generally the Registrar pursuant to the powers and functions accorded to him/her by Article 4 (Appointment of a Registrar) of the Agreement, Article 16 (The Registry) of the Statute and the Rules.

13. Therefore, in relation to the request for an investigation into the conduct of the OTP, the Trial Chamber correctly concluded that Rule 77 does not extend to any office or party of the Special Court. Rather, any request made under Rule 77 must be directed to a specific individual or individuals.

14. The Defence's second argument under this ground of appeal is scattered over a number of sub-paragraphs of paragraph 18 of the Appeal but can effectively be condensed into the complaint that the Trial Chamber erred in law and/or procedure by failing to distinguish between the different stages involved in Rule 77 and that sweeping, imprecise allegations are competent at the investigative stage.[21] This argument must fail as it has no basis in law.

15. The jurisprudence clearly establishes that no distinction is to be made between the various stages involved in Rule 77 contempt proceedings in terms of the seriousness with which they are to be viewed and the precision which is required as regards pleading. As observed by the ICTR Trial Chamber "any allegations of contempt are to be handled with due care" and the "gravity of such allegations" is to be borne in mind.[22] The initial investigative stage is viewed no less seriously than any of the other stages of Rule 77 such that some measure of flexibility is implied which permits imprecise allegations to be made. Rather,

---

[20] Article 3(4) of the Agreement and Article 15(4) of the Statute provide that the Prosecutor may be assisted in his/her functions by individual staff members .

[21] Appeal, paras. 18(b) to 18(h).

[22] *Prosecutor v. Nyiramasuhuko et. al.*, ICTR-97-21-T, "Decision on the Prosecutor's Allegations of Contempt, the Harmonization of the Witness Protective Measures and Warning to the Prosecutor's Counsel", 10 July 2001 ("***Nyiramasuhuko* Decision**"), paras. 5 & 6. See also *Prosecutor v. Rukundo*, ICTR-2001-70-T, "Decision on the Haguma Report", 14 December 2007.

the only distinction envisaged between the various stages of contempt proceedings is that related to the legal standard to be applied. However, the fact that the "reason to believe" standard referred to in Rule 77(C) has been described as a standard lower than that required for committal for trial does not mean that little or no specificity is required.[23] When extremely serious allegations of contempt are being made, precision in pleading is fundamental and necessary on the basis of natural justice in order that the party against whom such allegations are being made can address them properly.[24]

16. When set in the above context, the Defence arguments are plainly untenable and unsupported. What the Defence appear to be arguing is that Rule 77 effectively permits a fishing expedition into the Prosecution's operations in the hope that a possible target might be identified.[25] However, contrary to the Defence argument, simply because this stage is investigative does not mean that one of its purposes might be to identify a target.[26]

17. Indeed, the argument at paragraph 18(c) of the Appeal regarding specificity contradicts the Defence's starting premise that allegations made against the OTP as a *legal persona* are competent and do not require greater precision such as the identification of specific individuals. In paragraph 18(c), the Defence states that the 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". This statement in essence concedes the accuracy of the Trial Chamber's finding that "Rule 77 must be targeted at an individual engaging in specific conduct" and blanket allegations against "offices" are unworkable and incompetent.[27]

18. It is clear from the Trial Chamber's reasoning that it was cognizant of and correctly applied the different legal standards applicable to each stage of contempt proceedings.[28] Further, the Trial Chamber correctly concluded that allegations of contempt must be precisely

---

[23] *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 Appeal Decision**"), para. 17.

[24] *Nyiramasuhuko* Decision, para. 8 which noted that the allegations in that case lacked precision in terms of *inter alia* how many and which of the witnesses were intimidated, when the alleged intimidation took place and the identity and status of the individuals who contacted the witnesses.

[25] See in particular the arguments made at Appeal, para. 18(e).

[26] Ibid.

[27] Decision, para. 28.

[28] Decision, para. 28: 'an investigation under Rule 77 must be targeted at an individual engaging in specific conduct and a moving party has to identify the specific acts committed by that individual amounting to interference with the administration of justice, in accordance with the "reason to believe" standard."

pleaded and no flexibility is to be imported at the investigation stage such as to permit a "general audit". The Trial Chamber's Decision on this basis was one which was "reasonably open" to it. Further, the Decision is supported by the jurisprudence and the Defence have thus failed to establish an error of law *invalidating the Decision.*

19. The Defence's next argument under this ground spread out over paragraphs 18(i) to 18(m) of the Appeal seeks to place the burden of remedying the Motion's defects on the Trial Chamber by arguing that the Trial Chamber ought itself to have limited the Defence's unmanageably wide request.[29] However, having made this argument, the Defence then proceeds at paragraph 19 of the Appeal to argue that the Trial Chamber's analysis of all the documentation accompanying the Motion contradicts the Chamber's preliminary dispositive finding that the Motion should fail for lack of specificity. The contradictory nature of the Defence arguments aside, it is clear that the Chamber was not required to remedy the defective Motion and that it committed no error by reviewing all the material provided with it.

20. First, the plain fact is that the Motion was defective in that it made sweeping allegations against individuals, former and current Prosecutors and their subordinates and/or agents, and requested an independent investigation into the conduct of all the Prosecution's employees or agents since the inception of the Court.[30] While the body and annexes of the Motion refer in parts to specific individuals, this does not detract from the fact that the relief requested by the Defence extended beyond these individuals.[31] Where a pleading is defective such as in the instant case for *inter alia* lack of specificity, a Trial Chamber is not required by law to rectify that deficiency - in this case to narrow the scope of the request, whether under Rule 77, the Court's inherent power to deal with contempt or any other substantive or procedural law. Further, the jurisprudence of this Court establishes that it is not an abuse of a Trial Chamber's discretion to dismiss a motion on the basis that it is defective for lack of specificity. Such a decision was reasonably open to this Trial Chamber.[32] Indeed, the Defence's complaints that the Trial Chamber focused "on technical

---

[29] Appeal, paras. 18(i) to 18(m).
[30] Motion, paras. 11 & 30.
[31] Motion, para. 30.
[32] The jurisprudence of this Court at both the Trial Chamber and the Appeals Chamber levels in relation to the specificity required in Rule 92*bis* documentary submissions and judicial notice applications where the Chambers were unwilling to correct defects in pleading applies equally to the present case. See *Prosecutor v. Norman et al.*,

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" and also "chose to emphasis form over substance", for which in both instances one can read "appropriate legal standards and jurisprudence", are counterintuitive and, thus, irrelevant.[33]

21. Second, the Defence reliance on the *Haradinaj* case is unfounded.[34] It is clear on reading the *Haradinaj* Appeals Chamber decision that the Trial Chamber in that case was faced with a completely different situation.[35] In *Haradinaj* no issues of specificity and the scope of Rule 77 were raised. Further, in *Haradinaj* the Appeals Chamber did not determine that it was incumbent on the Trial Chamber to correct Defence failures and to order investigations into contempt even where the "reason to believe" standard had not been met. Rather, the Appeals Chamber held that it was incumbent on the Chamber to take more active steps in addressing and dealing with witness intimidation problems of which the Chamber was clearly aware and which it considered credible. Indeed, as highlighted by the ICTY Appeals Chamber, the *Haradinaj* Trial Chamber heard testimony specifically on the witness intimidation issue and also acknowledged the problem in its judgement.[36] Accordingly, as the *Haradinaj* case is clearly distinguishable, that decision does not provide support for the Defence argument that the Trial Chamber erred in law or procedure or abused its discretion in the present case.

22. Third, it is clear that the Trial Chamber in the present case properly exercised its discretion and took additional steps to try to deal with the Defence failures despite the absence of any legal duty to do so. In this regard, the Trial Chamber's decision to wade through the

---

SCSL-04-14-T-398, "Fofana – Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", 16 May 2005, Separate Opinion of Justice Robertson, para. 30: a "mass of undigested paperwork should not be imposed on the Trial Chamber and the defence in such an undisciplined fashion"; para. 31: "The wider admissibility provisions in the SCSL carry a concomitant duty on the parties to narrow the documentary material they seek to introduce and to identify only those passages which are of direct relevance to the case"; *Prosecutor v. Brima et al.*, SCSL-04-16-T-423, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence", 25 October 2005, relying on the foregoing comments of Robertson. J. at para. 71: "We do not think we are required to wade through this mountain of material trying to separate relevant facts from what are irrelevancies, opinions, and legal findings, in order to admit into evidence only the evidence that satisfies the Rule. Instead, the Prosecution should have clearly indicated on each document the passages that we are being asked to consider on the question of relevance." Both the foregoing decisions were cited with approval and applied in the present proceedings, see *Prosecutor v. Taylor*, SCSL-03-01-T-369, "Decision on Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92bis", 7 December 2007, pp. 2-3.

[33] Appeal, paras. 18(j) & 18(m).

[34] Appeal, paras. 18(l)& 18(m).

[35] *Prosecutor v. Haradinaj et al.*, IT-04-84-A, "Judgement", 19 July 2010, paras. 34-40.

[36] Ibid, para. 37.

Motion and its related annexes, which included a considerable amount of irrelevant material,[37] in order to try to determine the basic outline of the Defence complaints is not evidence of an internally contradictory decision.[38] Rather, and as specifically stated by the Chamber, the seriousness of the allegations caused the Chamber to take the additional step of assessing all the material presented by the Defence.[39] The Chamber could have competently dismissed the Motion on the basis of lack of specificity alone. However, it proceeded to determine whether there was any reason to believe that any form of contemptuous conduct had occurred by anyone mentioned in the Motion. In view of the difficulties presented by the Motion as identified by the Chamber at paragraph 29 of its Decision, it is clear that the Chamber went to considerable lengths to surmount these issues and to address the imprecision in the pleading. In this regard, the Trial Chamber effectively carried out the exercise the Defence complain it ought to have done. The fact that the Chamber did not then order an investigation is because it made the factual finding that the allegations were insufficient to satisfy the "reason to believe" standard. Accordingly, contrary to the Defence assertion at paragraph 19 of the Appeal, the Trial Chamber did not err in law.

SECOND GROUND OF APPEAL – UNDUE DELAY

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

23. This ground should be dismissed as the Defence did fail to bring the alleged acts of contempt to the attention of the Trial Chamber within a reasonable time and to provide an explanation for the delay.[40] Thus, the Trial Chamber did not err in fact, law and/or procedure in dismissing the Motion.

24. The crux of the Defence's argument under this ground is that the Trial Chamber erred in dismissing the Motion on the basis of delay as it failed to appreciate when the Defence

[37] Motion, Annexes L (Vacancy Announcement for the Chief of the Witness Management Unit) and O (Power point presentation given by David Crane).
[38] Appeal, para. 19.
[39] Decision, para. 22.
[40] Decision, para. 26.

learned of the criminal conduct.[41] This argument should be dismissed as the Defence does not demonstrate any error in the Decision on this point.

25. In the context of assessing allegations of contempt, the issue of undue delay is relevant for two reasons, both of which were properly considered by the Trial Chamber in the Decision. First, the parties are under an obligation to bring allegations to the attention of the Trial Chamber as soon as possible and to provide an explanation for any failure to do so.[42] Second, where individuals have delayed in bringing forward allegations of misconduct, this delay is a valid factor in assessing the individual's credibility. An explanation of the delay again is crucial. In relation to these points, the Defence's original pleadings provided no information about *when* it learned of the allegations save in respect of DCT-192[43] or why the individuals delayed reporting the alleged misconduct, apparently even to the Defence.

26. Rather than provide this information or explanation, the Defence instead argued that "the conduct complained of in this case is different" as it "does not arise from a single incident or an isolated event".[44] The Defence's original strategy in challenging the issue of delay was, therefore, to focus on the cumulative nature of the conduct and not to argue recent knowledge. In the absence of any other information or explanation, the Trial Chamber was accordingly entitled to proceed on the basis that, save in respect of DCT-192, the Defence and/or the individuals had unduly delayed. The Trial Chamber would have been required to deal in inappropriate speculation to have concluded otherwise.

27. In so far as DCT-192's allegations are concerned, it is clear that no error occurred as the Trial Chamber took into consideration the recent revelation of his allegations to the Defence.[45] However, as noted at paragraph 26 of the Decision "no satisfactory explanation

---

[41] Appeal, paras. 20-21.

[42] Decision, para. 21 citing *Prosecutor v. Taylor*, SCSL-03-01-T-600, "Confidential Decision on Prosecution Motion for Investigations into Contempt of the Special Court for Sierra Leone (SCSL-03-01-451; SCSL-03-01-452; SCSL-03-01-457; SCSL-03-01-513)", 19 September 2008, paras. 14-15. See also AFRC Contempt Appeal Decision, para. 2. While the Appeals Chamber's comments were made in the context of a breach of protective measures, arguably the duty to expeditiously bring any allegation of contempt to the Chamber's attention is part of the rigorous protection advocated by the Appeals Chamber.

[43] Motion, Confidential Annex B, paras. 1 & 2.

[44] *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 ("**Reply**"), paras. 8 & 9.

[45] It is clear that the Trial Chamber took into consideration *when* the Defence learned of DCT-192's allegations and, further, understood that the allegations had only recently been revealed on an analysis of the Decision. Paragraph 45 of the Decision states: "...this incident is **only now** being alleged" (emphasis added). This is to be compared with the Chamber's approach to DCT-102, for example, where at paragraph 50 of the Decision it is observed that: "the

for the inordinate delay [was] offered by the Defence." A review of the pleadings confirms that this is correct.

28. The other examples raised by the Defence in the Appeal also do not withstand scrutiny. Contrary to the Defence's position, the Trial Chamber did not query why the Defence had not cross-examined Abu Keita in January 2008 about a newspaper article dated 29 September 2009.[46] This is a clear misstatement of the Decision. Rather, the Chamber stated that "the Defence had ample opportunity to cross-examine him in relation to these allegations, in particular his alleged "deals" with the Prosecution on relocation."[47] No mention is made of any newspaper article. Instead, it is clear that the Trial Chamber correctly considered that the motivations of Prosecution witnesses, particularly insiders, is an obvious area for Defence challenge and one which could have been explored by the Defence in Court some 20 months earlier. The relevance of Defence Exhibit 468 for the Defence is basically Keita's motivations tied to the Defence allegations of Prosecutorial wrongdoing. It is "these [types of] allegations" which the Chamber was referring to at paragraph 127 of the Decision. Further evidence that the Defence's allegations concerning Keita are not new and therefore are untimely is provided by a review of the witness' cross-examination. During cross Defence Counsel challenged Keita about statements he was alleged to have made to other witnesses regarding co-operation with the Special Court and relocation.[48] Therefore, Defence Exhibit 468 basically continues the thread of the Defence challenge to Keita made in Court and adds nothing new.

29. When placed in proper context, the Defence's submissions that Justice Sebutinde found that it had acted diligently in bringing the complaint concerning DCT-032 overstates Justice Sebutinde's statement.[49] First, Justice Sebutinde's comments were made in relation to a late disclosure complaint and not the contempt complaint. Further, the basis of Justice Sebutinde's comments is an assumption made by her regarding the date on which the Defence learned about the existence of "exculpatory material" and not about when they learned about the allegations of contempt. Indeed, Justice Sebutinde was not confirming

---

allegation relates to events dating back to 2003, but was **not brought to the attention of the Court until now**" (emphasis added).

[46] Appeal, para. 21.

[47] Decision, para. 127.

[48] Trial Transcript, 24 January 2008, pp. 2151-54.

[49] Appeal, para. 21.

detailed information provided by the Defence but was only able to state that the Defence "*most probably* learned of the existence of the *exculpatory material* ... in September 2010".[50] It is notable that at no time in the pleadings has the Defence simply stated when it learned about all the allegations of contempt including those made by DCT-032. Instead, it appears to be tactically avoiding this issue. However, a common sense review of the information available indicates that it is likely that the Defence has been aware of the allegations of contempt for sometime. DCT-032 has been known to the Defence since at least June 2009 when the Defence filed the summary of his anticipated evidence, which includes his denial of any involvement in the murder of Johnny Paul Koroma.[51] DCT-032 has also been identified by the Defence twice as a reserve witness for an upcoming week.[52] Further, four witness summaries have been filed with the Court, none of which have changed since the first filed on 12 June 2009.[53] On the basis that it was anticipated that JPK's murder would be included in this witness' testimony, the Defence must have spoken with the witness on this matter in preparation for testimony. It is highly unlikely, therefore, that he would not have been asked to explain the contradiction between the Prosecution evidence implicating him in the killing and his version denying involvement. It is this explanation which is at the heart of the contempt allegations.

30. The Defence's second argument under this ground is effectively an extension of the first. The Defence erroneously argues that the Trial Chamber made a series of unfounded assumptions regarding when contempt complaints come to light and the mechanism through which they are handled.[54] The Defence does not identify where in the Decision the Chamber made such assumptions and no support for this argument is provided. As a result, the relevance of the reference to DCT-192's case by the Defence is unclear.

---

[50] *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 (emphasis added).

[51] The first witness summary was provided in *Prosecutor v. Taylor*, SCSL-03-01-T-793, "Public with Annex A and Confidential Annex B – Updated and Corrected Defence Rule 73*ter* Filing of Witness Summaries", 12 June 2009, CMS p. 25505.

[52] DCT-032 was identified as a reserve witness in *Prosecutor v. Taylor*, SCSL-03-01-T-951, "Public with Annex A – Defence Witness Order for the Week 17 – 21 May 2010", 3 May 2010 and *Prosecutor v. Taylor*, SCSL-03-01-T-966, "Public with Annex A and Confidential Annex B – Defence Witness Order for the Week 7 June – 11 June 2010", 25 May 2010.

[53] See the following filings: SCSL-03-01-T-793 of 12 June 2009; SCSL-03-01-T-809 of 10 July 2009; SCSL-03-01-T-897 of 29 January 2010; and SCSL-03-01-T-957 of 12 May 2010.

[54] Appeal, para. 22.

Notwithstanding this omission in the Defence pleading, it is clear from a reading of the Decision that the assumptions complained of by the Defence were not made by the Chamber. Rather, the Trial Chamber correctly considered the issue of undue delay for the two purposes identified above.

31. The Defence argument at paragraph 23 of the Appeal regarding the alleged failure of the Trial Chamber to consider the reluctance of individuals to bring forward allegations against the Prosecution is a sweeping and generally unfounded criticism of the Trial Chamber's Decision. The Defence fails to identify: (i) what legal principle should have been applied; (ii) which facts were erroneously considered; or (iii) the error as to the facts upon which the Chamber exercised its discretion. However, on reading the Appeal, it is clear that the Defence argument is a simple, if erroneous, assertion that the Chamber failed to take into consideration a relevant factor.

32. A review of the documents accompanying the original Motion, however, does not provide any support for this assertion. None of the individuals mention reluctance, nor does the Defence make any submissions in the Motion in this regard. The Defence argument is, therefore, based on pure speculation and seeks to provide a retrospective justification for the delay. The course adopted by the Chamber, therefore, was not an unreasonable exercise of its discretion.

33. The Defence argument at paragraph 24 of the Appeal is frivolous and does not support the contention that the Trial Chamber erred in the Decision regarding its finding of undue delay. The argument also purposefully ignores the fact that the Court did not exist until 2002, issued indictments in 2003 and proceedings in the current case only started in 2006 because up until that point the Accused had been at large.

34. Again, in paragraph 25 of the Appeal, the Defence engages in unsupported argument. The Decision is not based on any application of "legal bar". Rather, as set out at paragraph 25 above, the Trial Chamber properly considered the impact of undue delay in the context of the Defence submissions.

35. The thrust of the final argument made by the Defence under this second ground of appeal is the erroneous complaint that the Trial Chamber failed to appreciate the Defence's original argument that individual acts which are themselves contemptuous only become obviously contemptuous when seen relative to one another, i.e. somehow create a critical mass

indicating that these acts individually and collectively are contemptuous.[55] This argument should be dismissed as it is a retrospective amendment to the original Defence pleadings. The Defence Reply clearly emphasizes that it is the cumulative nature of the conduct rather than the individual incident that "elevates ... [it] ... to a level of contempt that cannot be ignored".[56] The Trial Chamber correctly rejected this self-serving argument. That conduct might only become clearly potentially contemptuous at a date only the Defence is able to determine is without merit and encourages speculation and delay. Therefore, contrary to the Defence assertion, the Chamber did not make an error in law invalidating the Decision.

36. In relation to all the Defence arguments under this ground of appeal, the Defence has failed to meet the standard for appellate review. However, even if *arguendo*, this second ground of appeal were successful the Decision dismissing the Motion still stands as the Trial Chamber went on to consider the material accompanying the original Motion and did not dismiss any allegation on the basis of delay alone.

THIRD GROUND OF APPEAL – MERITS

(i) The Trial Chamber erred in law and/or fact and/or procedure in its determination of the Motion on the merits in that, in assessing the facts, it failed to apply the 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;

(ii) The Trial Chamber erred in law and/or fact and/or procedure in its determination of the Motion on the merits in finding that the Motion did not contain <u>any</u> credible allegations of contempt that satisfy the very low "reason to believe" evidentiary threshold under Rule 77 and the Trial Chamber applied a higher standard than was required at that stage;

(iii) The Trial Chamber erred in law and/or fact and/or procedure in its determination of the Motion on the merits in finding that the Motion could not have brought issues of improper payments to witnesses under Rule 77, but only under Rule 39(ii).

37. The focus of the Defence's third ground of appeal is the merits of the Decision. It is trite

[55] Appeal, para. 26.
[56] Reply, para. 10.

law that, in challenging the exercise of a Trial Chamber's discretion as set out in its decision, the challenge does not amount to "a hearing *de novo*."[57] "[T]he issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber but whether the Trial Chamber has abused its discretion in reaching that decision."[58]

38. It is established jurisprudence that "the language of Rule 77 is discretionary."[59] The determination of whether on the facts before a Trial Chamber there is "reason to believe" that a person may be in contempt of court is discretionary. Further, even where a Trial Chamber has reason to believe that a person is in contempt, this fact does not oblige it to order an investigation.[60] Therefore, the standard of appellate review to be applied by the Appeals Chamber is that applying to abuse of discretion. Therefore, plainly, unless there is a clear abuse of discretion, the Decision must stand.

39. The third ground of appeal should be dismissed as the Trial Chamber did not abuse its discretion in dismissing the Motion on its merits. The Decision to dismiss was one which was "reasonably open" to the Chamber based on the facts before it and involved no error of law or procedure.

40. Contrary to the Defence argument, the Trial Chamber did not apply a standard higher than "reason to believe" and so conduct a summary trial concerned with the veracity of the allegations.[61] This Court's jurisprudence clearly establishes that allegations of contempt *must be credible* and that this credibility element is a part of the "reason to believe" standard applicable when deciding whether or not to order an investigation under Rule 77(C).[62] The Trial Chamber was cognizant of this standard, as is clear from paragraphs 19 and 20 of the Decision. Moreover, the Trial Chamber correctly assessed the allegations in accordance with this standard.

41. The Defence's second argument under this ground that the Trial Chamber erred in law by applying disparate and unfair legal standards in its assessment of Prosecution and Defence

---

[57] *Prosecutor v. Halilović*, IT-0148, "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar table", 19 August 2005, para. 5.
[58] Ibid.
[59] *Prosecutor v. Nshogoza*, ICTR-07-91-A, "Decision on Defence Allegations of Contempt by Members of the Prosecution", 25 November 2010 ("***Nshogoza* Decision**"), para. 20.
[60] Ibid.
[61] Appal, para. 29.
[62] AFRC Contempt Appeal Decision, para. 2.

evidence, favouring the Prosecution over the Defence, is also without foundation.[63]

42. First, the Defence incorrectly describes the Prosecution as leading evidence from the bar table.[64] The Prosecution did not lead evidence. Rather, it challenged the sufficiency of the Defence "evidence" as it is entitled to do and argued that the Defence had not met the requisite standard to trigger an order for an investigation into contempt. As the Defence stresses throughout its Appeal, various stages are involved in contempt proceedings. The stage which the Motion is concerned with is not the stage at which the Prosecution is required to lead evidence. It is the stage at which it challenges the legal basis on which the request for an investigation is being made. In this regard, the Chamber is entitled to rely on the submissions of an officer of the Court.

43. Secondly, in support of its claims of unfairness, the Defence seeks to compare an officer of the court, the Prosecutor, with an individual previously unknown to the Court – DCT-097.[65] These are not appropriate comparators. The special position occupied by officers of the court and the reliance which might be placed on the submissions they make was noted in the *Aleksovski* case: "No court can function efficiently without a relationship of trust between counsel and the judges. Counsel is an officer of the court, and in judicial proceedings quite often the court must act on counsel's word, which given as an officer of the court, is accepted as trust, unless there is good reason to doubt his *bona fides*."[66] In this case, no basis has been established on which to doubt the *bona fides* of the Prosecutor as, at the time the Response was filed, the allegations against *inter alia* her were simply allegations. As the position of the Prosecutor cannot be compared with that of an individual who has not taken any oath before the Court or been shown to have any independent duty of candor to the Court, it is clear that the Defence arguments are erroneous and do not establish an abuse of discretion by the Chamber.

44. The Defence's third argument under this ground, asserting that the Chamber made an error in law, fact and/or procedure by reading into the record evidence which was not adduced by either party, is without foundation.[67] None of the examples provided by the Defence

---

[63] Appeal, paras. 30-33.
[64] Appeal, para. 32.
[65] Ibid.
[66] *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, Separate Opinion of Judge Patrick Robinson, para. 2.
[67] Appeal, paras. 34-36.

support this contention.

45. In relation to DCT-102, it was reasonably open to the Trial Chamber to conclude from his allegations that any discussion of $90,000 was part of the costs of relocation. Relocation is one of the legitimate protective measures which might be discussed with a witness who has expressed concerns about his security or that of his family. However, such a measure will only be implemented by WVS, not the Prosecution, if the witness' concerns are established to be genuine. [redacted] Security concerns were, therefore, clearly raised in the affidavit. [redacted] In context, it is not unreasonable for the Trial Chamber to have concluded that if DCT-102's account of this meeting was what he believed to be the truth, relocation as a protective measure was being discussed. Therefore, it was not unreasonable for the Trial Chamber to link the monetary offer to the relocation offer. [redacted] Moreover, the finding that the Defence had not demonstrated that the "offer" was excessive is borne out by the pleadings – no submissions are made on this point. On this basis, it is clear that the Trial Chamber did not read any evidence into the record which was not adduced by either party. The Trial Chamber's findings on DCT-102 on this point clearly stem from the affidavit.

46. Further, the tenor of the Defence submissions regarding the Chamber's findings on the alleged interview between DCT-102 and Crane appear to cast doubt on the reliability of their own witness and imply that his story that he was interviewed by Crane cannot be relied upon as the identity of the person who introduced himself as Crane has not been incontrovertibly established.[71] This is a curious submission. That aside, a plain reading of the affidavit establishes that it was reasonably open to the Trial Chamber to find that

[68] Motion, Confidential Annex F, CMS p. 30525, para. 19.
[69] Ibid, para. 21.
[70] Ibid.
[71] Appeal, para. 36 and footnote 49.

"DCT-102 "was later interviewed by David Crane in Freetown".[72] [redacted] Clearly sufficient information is provided on the face of the affidavit alone for the Chamber to make its finding. The affidavit does not indicate that DCT-102 felt any doubt or uncertainty regarding the identity of Crane. The fact that the affidavit proceeds to describe a subsequent interview at which Crane was not present does not somehow negate the alleged occurrence of the first interview with Crane.

47. The Defence did in fact, call DCT-102 to testify as the last witness in the case.[75] The testimony of DCT-102, Sam F. Kolleh, is instructive as to why the Defence chose not call the other affiants to testify where their allegations of misconduct could have been tested before the Trial Chamber. It was not because they were unwilling to come forward; it was because they were not credible.

48. In his testimony, Kolleh admitted he had lied not just to the Prosecution[76] but also, before ever meeting the Prosecution, to the Sierra Leone Truth and Reconciliation Commission.[77] Confronted with a transcript of his sworn testimony before the Sierra Leone TRC, Kolleh admitted he lied about his name, his nationality (Liberian) and the fact that he was captured by an NPFL soldier and taken to Camp Naama in Liberia for training.[78] Although he was on the original Defence witness list filed in 2009, and had been scheduled to testify in April 2010,[79] Kolleh could not explain why even the fifth summary of his evidence, prepared in

---

[72] Decision, para. 47.
[73] Motion, Confidential Annex F, CMS p. 30524, para. 11.
[74] Motion, Confidential Annex F, CMS p. 30524.
[75] DCT-102 testified on 1, 3-9th November 2010.
[76] Trial Transcript, 4 November 2010, pp. 48705-06: Kolleh used a false name, Mustapha Koroma, for disarmament in 2001, the TRC, and again when he met the Prosecution.
[77] Trial Transcript, 9 November 2010, p. 49042.
[78] Ibid.
[79] *Prosecutor v. Taylor*, SCSL-03-01-T-933, "Public with Annex A and B Defence Witness Order for the Week 12-16 April 2010 and 19-23 April 2010", 29 March 2010.

May 2010,[80] made no mention of his accusations of being threatened by the Special Court Prosecutor and being offered $90,000.[81] Kolleh even denied that he was known as Sam Kolleh. In explaining why he never appeared when the Liberian TRC issued a summons for "Sam Kolleh," he said this was not his name, he was Sam F. Kolleh.[82] [redacted] Kolleh also lied, denying he had spoken to the Defence in The Hague before testifying, until he was confronted with an email the Prosecution had received from the Defence saying they had spoken to Kolleh in The Hague and would be doing so again before he began his testimony.[83]

49. Kolleh testified in direct examination that when the Prosecution interviewed him the day he claimed to have met David Crane, he was asked about diamonds being given to Charles Taylor.[84] Kolleh even testified that "The whole question focused on diamond that time."[85] However, in the 173 page transcript of Kolleh's 2003 interview with the Prosecution, the name Charles Taylor does not appear. Contrary to Kolleh's testimony that the interview focused on diamonds, the investigators asked Kolleh if he has anything to add and he pointed out they had not asked him anything about diamonds that day.[86] A strong indicator of Kolleh's overall credibility was his response when asked how many people he had killed he repeatedly claimed not to recall if he had killed anyone.[87] Kolleh's testimony made clear the complete lack of substance and credibility of the Defence allegations that are the basis of the Motion for a contempt investigation.

50. No "similar error" was made by the Trial Chamber in relation to its findings regarding Abu Keita.[88] The Defence statement made in typically inflammatory language that "the Prosecution never said that they did not promise him relocation, nor could that factual

---

[80] *Prosecutor v. Taylor*, SCSL-03-01-T-957, "Public with Annex A, C and Confidential Annex B Defence Rule 73*ter*Filing of Witness Summaries - Version Five", 12 May 2010.
[81] Trial Transcript, 9 November 2010, pp. 48982-83.
[82] Trial Transcript, 9 November 2010, pp. 48996-98.
[83] Trial Transcript, 8 November 2010, pp. 48949-53.
[84] Trial Transcript, 3 November 2010, pp. 48583, 48608-09.
[85] Trial Transcript, 3 November 2010, p. 48609.
[86] The transcript of the interview with Kolleh on 18 November 2003, the date of the alleged intimidation by David Crane was admitted into evidence as exhibit P-611.
[87] Trial Transcripts, 4 November 2010, p. 48742-43 & 9 November 2010, p. 49045.
[88] Appeal, para. 35.

finding be reasonably inferred from the Prosecution's *glaring* silence on that point"[89] is quite simply wrong. Paragraph 23 of the Prosecution's Response clearly states: "The Defence reference to Abu Keita does not support its allegation under this head *as the OTP made no promises* ...".[90]

51. As regards the example provided concerning DCT-192 and the Chamber's finding that this individual was never a potential witness in this trial, this example is simply a matter of the Defence taking the finding out of context.[91] It is instructive to consider the complete finding: "Further, contrary to the Defence suggestion, DCT-192 was never a potential witness *in this trial*; rather, he was *interviewed by the Prosecution during its investigations of Hinga Norman*, a suspect in the Civil Defence Forces case at the time."[92] It is clear that in this part of the Decision the Chamber correctly concluded that DCT-192 has never been considered by the Prosecution as a witness in this trial. As is evident from the complete finding repeated above, the Chamber's finding is clearly restricted to *this* trial. However, to address the Defence contention that DCT-192 was also a potential Prosecution in the CDF trial,[93] DCT-192's own affidavit supports the conclusion that he was never considered a potential Prosecution witness in the CDF trial as he refused to testify.[94]

52. As is evident from the discussion above, the hallmark of all the examples provided by the Defence in support of this argument is their triviality to the overall Decision. None of the examples were pivotal to the Chamber's overall conclusion that no credible reason to believe had been established by the Defence in relation to the allegations of contempt.

53. The above analysis of the Defence examples also demonstrates that the submission concerning "judicial activism" is completely without merit.[95] There has, therefore, been no application of double standards and demonstration of partiality such as to constitute an error of law and/or procedure and it is irresponsible of the Defence to have suggested otherwise without firm evidence in support.

---

[89] Appeal, footnote 50.
[90] *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 Prosecution and Its Investigators'", 4 October 2010 ("**Response**").
[91] Appeal, para. 34 and footnote 31.
[92] Decision, para. 45 (emphasis added).
[93] Appeal, footnote 51.
[94] Motion, Confidential Annex B, CMS p. 30468, para. 2(l).
[95] Appeal, para. 37.

54. The Defence erroneously argues at paragraph 38 of the Appeal that the Chamber made an error of law and/or procedure by finding that there must be a link between the alleged act of contempt and a witness' unwillingness to testify. The Chamber did not make such an error as is evident from its reasoning but was rather responding to the myriad of claims included in the Motion including the claim that the Prosecution had "generally poisoned the environment" making it difficult for the Defence to find witnesses.[96] The Chamber specifically notes at paragraph 4 of the Decision the Defence's "poisoned environment" complaint and notes that the complaint is made "in addition" to the contempt allegations. One of the failings of the Motion, as was observed in the Response, was its failure to focus properly on the relief which was ultimately requested – an investigation into contempt allegations.[97] Instead, in addition to the contempt complaints, the Motion included sweeping allegations of abuse of process, misconduct and impropriety;[98] although the Defence did later confirm in its Reply that the Motion was simply one for contempt.[99] Therefore, in context, the observations made by the Chamber in response to these other claims of prejudice and wrongdoing were legitimate. Further, as no allegation was dismissed only on the basis that the witness was willing to testify, it is clear that the Chamber did not employ a narrow application of Rule 77 when assessing the allegations.

55. The Defence also argues that the Trial Chamber erred in law in finding that the alleged improper payments to witnesses were not a question of contempt under Rule 77 but rather a question of abuse of discretion under Rule 39(ii). Again, when considered in the context of the Defence's defective Motion, it is clear that the Chamber did not make an error such as to invalidate its Decision. It is instructive to consider the Chamber's complete finding on this point, as the Defence present an incomplete and unduly narrow focus of the issue. The Chamber's finding that the "issue raised does not fall within the ambit of Rule 77 as such"[100] is based on its finding that the Motion is insufficiently specific and fails to identify a specific individual and the individual's corresponding allegedly contemptuous acts. This proviso to the Chamber's finding is evident from footnote 61 of the Decision which refers in turn to paragraph 28 of the Decision and the Chamber's findings on specificity. Indeed,

[96] Motion, para. 14.
[97] Response, paras. 3 & 4.
[98] Motion, para. 11.
[99] Reply, para. 7.
[100] Decision, para. 40.

the request made for an investigation into the full mandate of WMU is the starkest example of the Defence's imprecision which was found to be fatal to the Motion.[101] Therefore, contrary to the Defence argument, the Chamber did not find that Rule 77 and Rule 39 are mutually exclusive. Rather, the Defence's blanket request for an investigation into WMU was properly found not to fall within the scope of Rule 77.[102]

56. The final Defence arguments made at paragraphs 40 to 43 of the Appeal, are simply an attempt to re-litigate the merits of the Decision in the hope that the Appeals Chamber will reach a different conclusion.[103] The Defence arguments, while cloaked in the language used to describe the standard of review on appeal, boil down to a simple disagreement with the Trial Chamber about whether the allegations provided a credible reason to believe that a member of the Prosecution had been involved in contemptuous conduct and do not highlight a discernable error meriting correction by the Appeals Chamber. Accordingly these arguments are without merit.

57. Further, the Defence fails to establish an error of fact such that no reasonable Trial Chamber could have reached the conclusion that this Trial Chamber did on the material before it.

IV. RELIEF

58. The Appeals Chamber should dismiss the Defence request that the Appeals Chamber exercise its own discretion and order an investigation into the alleged acts of contempt of court by the Prosecution subject to such terms and conditions or restrictions that the Appeals Chamber may deem necessary. Should the Appeals Chamber, despite the above arguments, be minded so to act, then the Prosecution adopts its position set out in the Response. Accordingly the Prosecution adopts by reference all the relevant arguments made therein.

---

[101] Motion, para. 30(ii).
[102] See paragraphs 15-18 above regarding the requirement for specificity in pleading allegations of contempt.
[103] For completeness and in so far as the point might be relevant to the Appeals Chamber's deliberations, the Prosecution notes a further misstatement of the Prosecution's Response. Contrary to the Defence assertion at paragraph 41 of the Appeal that there was silence by the Prosecution on any allegation, the Prosecution clearly and categorically stated at paragraph 25 of the Response that: "The Prosecution denies *all* allegations that, at *any* time, *any* former or current staff member knowingly and willfully interfered with the administration of justice."

V. CONCLUSION

59. As argued above, the Trial Chamber did not err in fact or in law, or abuse its discretion in dismissing the Motion. Accordingly, the Appeal, including the request for relief, should be denied.

Filed in The Hague,
10 January 2011
For the Prosecution,

Brenda J. Hollis
The Prosecutor

LIST OF AUTHORITIES

SCSL

Prosecutor v Taylor, SCSL-03-01

Prosecutor v. Taylor, SCSL-03-01-T-369, "Decision on Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92bis", 7 December 2007

Prosecutor v. Taylor, SCSL-03-01-T-600, Confidential Decision on Prosecution Motion for Investigations into Contempt of the Special Court for Sierra Leone (SCSL-03-01-451; SCSL-03-01-452; SCSL-03-01-457; SCSL-03-01-513), 19 September 2008

Prosecutor v. Taylor, SCSL-03-01-T-793, Public with Annex A and Confidential Annex B – Updated and Corrected Defence Rule 73*ter* Filing of Witness Summaries, 12 June 2009

Prosecutor v. Taylor, SCSL-03-01-T-809, Public with Annex A and Confidential Annex B – Updated and Corrected Defence Rule 73*ter* Filing of Witness Summaries – Version Three, 10 July 2009

Prosecutor v. Taylor, SCSL-03-01-T-951, "Public with Annex A – Defence Witness Order for the Week 17 – 21 May 2010", 3 May 2010

Prosecutor v. Taylor, SCSL-03-01-T-966, "Public with Annex A and Confidential Annex B – Defence Witness Order for the Week 7 June – 11 June 2010", 25 May 2010

Prosecutor v. Taylor, SCSL-03-01-T-897, Public with Annex A and Confidential Annex B – Updated and Corrected Defence Rule 73*ter* Filing of Witness Summaries – Version Four, 29 January 2010

Prosecutor v. Taylor, SCSL-03-01-T-933, "Public with Annex A and B Defence Witness Order for the Week 12-16 April 2010 and 19-23 April 2010", 29 March 2010

Prosecutor v. Taylor, SCSL-03-01-T-957, Public with Annex A and Confidential Annex B – Updated and Corrected Defence Rule 73*ter* Filing of Witness Summaries – Version Five, 12 May 2010

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 Prosecution 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 Prosecution 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 Prosecution 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

Prosecutor v. Taylor, SCSL-03-01-T-1134, "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", 10 December 2010

Trial Transcripts and Exhibits

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 24 January 2008
Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 1 November 2010
Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 3 November 2010
Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 4 November 2010
Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 8 November 2010
Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 9 November 2010

Prosecutor v. Taylor, SCSL-03-01-T, Exhibit P-611
Prosecutor v. Taylor, SCSL-03-01-T, Confidential Exhibit P-612

***Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14**

Prosecutor v. Norman et al., SCSL-04-14-T-398, "Fofana – Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", 16 May 2005

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

Prosecutor v. Fofana and Kondewa, SCSL-04-14-A-829, "Judgement", Appeals Chamber, 28 May 2008

***Prosecutor v. Brima et al.*, SCSL-04-16**

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. Brima et al., SCSL-04-16-T-423, "Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence, 25 October 2005

ICTY

Prosecutor v. Aleksovski, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001
http://www.icty.org/x/cases/aleksovski/acjug/en/nob-aj010530e.pdf

Prosecutor v. Kunarac et al., IT-96-23 and IT-96-23/1-A, "Judgement", Appeals Chamber, 12 June 2002
http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf

Prosecutor v. Kupreskic et al., IT-95-16-A, "Judgement", Appeals Chamber, 23 October 2001
http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf

Prosecutor v. Delalic et al, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001
http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf

Prosecutor v. Krstic, IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004
http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf

Prosecutor v. Halilović, IT-0148, "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar table", 19 August 2005
http://www.icty.org/x/cases/halilovic/acdec/en/050819.htm

Prosecutor v. Haradinaj et al., IT-04-84-A, Judgement, 19 July 2010
http://www.icty.org/x/cases/haradinaj/acjug/en/100721.pdf

ICTR

Prosecutor v. Nyiramasuhuko et. al., ICTR-97-21-T, "Decision on the Prosecutor's Allegations of Contempt, the Harmonization of the Witness Protective Measures and Warning to the Prosecutor's Counsel", 10 July 2001
http://www.unictr.org/Portals/0/Case/English/Nyira/decisions/100701b.pdf

Prosecutor v. Rukundo, ICTR-2001-70-T, "Decision on the Haguma Report", 14 December 2007
http://www.unictr.org/Portals/0/Case/English/Rukundo/decisions/071214.pdf

Prosecutor v. Nshogoza, ICTR-07-91-A, "Decision on Defence Allegations of Contempt by Members of the Prosecution", 25 November 2010
Copy provided in annex hereto

AUTHORITY PROVIDED

***Prosecutor v. Nshogoza*, ICTR-07-91-A, "Decision on Defence Allegations of Contempt by Members of the Prosecution", 25 November 2010**

32278
4472
A

ICTR-07-91-T
25-11-2010
(4472 - 4466)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 25 November 2010

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-A

DECISION ON DEFENCE ALLEGATIONS OF CONTEMPT BY MEMBERS OF THE PROSECUTION

Rules 54, 73 and 77 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Marie Ka

For the Accused:

Allison Turner

INTRODUCTION

1. On 7 July 2009, the Chamber rendered its Judgement against Léonidas Nshogoza, in which it found him guilty of Contempt of the Tribunal pursuant to Count 1 of the Indictment and sentenced him to ten months imprisonment.[1] Mr. Nshogoza was acquitted of the remaining three Counts.[2] The Appeals Chamber upheld Nshogoza's conviction.[3]

2. In its Closing Brief, the Defence alleged numerous violations of witness protective measures by members of the Office of the Prosecutor ("OTP").[4] The Defence submitted that members of the OTP contacted, met with and took statements from the following Defence witnesses in violation of witness protection orders issued in the *Kamuhanda* or *Rwamakuba* cases: Witnesses GAA, A7/GEX, Fulgence Seminega, Augustin Nyagatare and Straton Nyarwaya.[5] The Defence requested the Chamber to order an investigation into these allegations.[6]

3. The Chamber found that the testimony of Witnesses Fulgence Seminega, Augustin Nyagatare and Straton Nyarwaya *prima facie* indicated that members of the OTP may have acted in violation of witness protection orders.[7] With respect to Witnesses GAA and A7/GEX, the Chamber found that, due to the *Kamuhanda* defence team's[8] failure to follow the procedures for meeting with protected Prosecution witnesses adopted by the Trial Chamber in that case, these witnesses remained protected Prosecution witnesses at the time that OTP representatives made contact with them; the Chamber therefore dismissed the Defence submissions in relation to these witnesses.[9]

4. On 16 July 2009, the Chamber issued an order requesting further submissions from the Parties concerning the Defence allegations.[10] On 7 August 2009, the Prosecution and the Defence filed submissions in response to the Order for Submissions.[11]

---

[1] *Nshogoza* Trial Judgement, 7 July 2009, para. 233.

[2] *Nshogoza* Trial Judgement, paras. 202, 211.

[3] *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement (AC), 15 March 2010 ("*Nshogoza* Appeal Judgement").

[4] Closing Brief of Léonidas Nshogoza (Confidential), 17 April 2009, paras. 96-105.

[5] Exhibit D26 (*The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, 22 March 2001); *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures, 21 September 2005.

[6] Defence Closing Brief, paras. 96-104. Also during its Closing Arguments, on 29 April 2009, the Defence further alleges several OTP violations of Defence witness protection measures. *See* T. 29 April 2009, pp. 39-40.

[7] *Nshogoza* Trial Judgement, paras. 44-45.

[8] Although the word "defence" was capitalized, it is clear from the context that the Trial Chamber intended to refer to the *Kamuhanda* defence team and not Nshogoza's defence team

[9] *Nshogoza* Trial Judgement, para. 43.

[10] Order for Submissions from the Parties on the Conduct of Staff of the Prosecution and the Possible Violation of Witness Protective Measures, 16 July 2009 ("Order for Submissions").

[11] Mr Nshogoza's Submissions on Prosecution Interference with Protected Defence Witnesses (the "Defence Submissions"), filed 7 August 2009; Prosecutor's Submissions on "Order for Submissions from the Parties on the Conduct of Staff of the Prosecution and the Possible Violation of Witness Protective Measures" ("Prosecution Submissions"), filed 7 August 2009.

DISCUSSION

Preliminary Matter: Defence Submissions on Alleged Prosecution Violations with regard to Witnesses GAA and A7/GEX

5. Despite the Chamber's dismissal of the Defence submissions concerning Witnesses GAA and A7/GEX[12] and its subsequent Order requesting the Parties to file submissions only on the alleged OTP violations with regard to Witnesses Seminega, Nyagatare and Nyarwaya,[13] the Defence has made further submissions regarding alleged Prosecution violations of witness protection orders in relation to these witnesses. The Chamber considers this a request for reconsideration of its previous decision, rendered in the Judgement. The Chamber finds, however, that the Defence has failed to demonstrate any new material circumstances warranting reconsideration of its Decision and has failed to show that there has been an error of law or an abuse of discretion. Therefore, the Defence has not met the standard for reconsideration,[14] and the Chamber will disregard the Defence's further submissions concerning Witnesses GAA and A7/GEX.

Applicable Law

6. According to Rule 77 (A) of the Rules of Procedure and Evidence,[15] the Tribunal may hold in contempt those who knowingly and wilfully interfere with its administration of justice.

7. Pursuant to Rule 77 (C), when a Chamber has reason to believe that a person may be in contempt of the Tribunal, it (i) may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt; or (ii) where the Prosecutor has a conflict of interest with respect to the relevant conduct, may direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or (iii) initiate proceedings itself.

8. Where a Chamber considers that there are sufficient grounds to proceed against a person for contempt, in accordance with Rule 77 (D), the Chamber may: (i) in circumstances described in sub-Rule (C)(i), direct the Prosecutor to prosecute the matter; or (ii) in circumstances described in sub-Rules (C)(ii) or (iii), issue an order in *lieu* of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself. The

---

[12] *Nshogoza* Trial Judgement, para. 43.

[13] The Defence claims that these submissions are presented to the Chamber in the interests of judicial economy, as the issue of the status of Witnesses GAA and A7/GEX as protected Prosecution witnesses is among the issues currently before the Appeals Chamber. *See* Defence Submissions, para. 5. The Chamber does not consider that raising submissions before it concerning a matter that is already before the Appeals Chamber promotes judicial economy.

[14] Decision on Defence Motion for Review of Provisional Measures, or alternatively, for Provisional Release, 17 November 2008, para.8; *see also The Prosecutor v. Édouard Karemera et al*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision on 17 September 2008 (AC), 30 January 2009, para. 13; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7.

[15] Unless otherwise specified, all further references in this Decision to Rules are to the Rules of Procedure and Evidence.

sufficient grounds standard is satisfied where the evidence establishes a *prima facie* case of contempt.[16]

9. As this Chamber found in the Judgement and as was upheld by the Appeals Chamber in its Judgement, a knowing and wilful violation of protective measures ordered by a Trial Chamber is punishable as contempt of the Tribunal.[17] The Chamber recalls that mistake of law is not a valid defence to contempt, and does not excuse a violation of a protective measures order.[18]

Submissions of the Parties

10. The Defence submits that members of the OTP met with and took statements from Defence Witnesses Seminega, Nyagatare and Nyarwaya in violation of the *Rwamakuba* and *Kamuhanda* witness protection orders for defence witnesses. These witnesses confirmed during their testimony in this trial that they testified as protected defence witnesses either in the *Kamuhanda* (Defence Witness Seminega) or *Rwamakuba* trials (Defence Witnesses Nyagatare and Nyarwaya). They also testified that they were subsequently contacted and interviewed by representatives from the OTP, who took statements from them.[19]

11. The Defence moves the Chamber to either direct an *amicus curiae* to prosecute the matter or to prosecute the matter itself pursuant to Rule 77 (D)(ii).[20] Alternatively, the Defence requests the Chamber to direct the Registrar to appoint an *amicus curiae* pursuant to Rule 77 (C)(ii) to conduct further investigations.[21]

12. The Prosecution submits that no violation of witness protection orders occurred and, therefore, the Defence allegations should be dismissed.[22] According to the Prosecution, it did not need to request the Appeals or Trial Chamber's authorization to interview the protected witnesses.[23] The meetings with these witnesses were part of the investigations which led to the indictments and trials of Witness GAA and Nshogoza and were undertaken pursuant to the oral ruling of the Appeals Chamber,[24] which directed the Prosecution to investigate offences against the administration of justice pursuant to Rules 77 (C)(i) and 91 (B).[25]

---

[16] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosector's Appeals of Decision Not to Prosecute Witness BTH for False Testimony (AC), 16 February 2010, paras. 19, 21 (discussing the meaning of the sufficient grounds standard for contempt and false testimony).

[17] *Nshogoza* Appeal Judgement, paras. 58, 80; *Nshogoza* Trial Judgement, para. 178; *see also*, *The Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement (AC), 15 March 2007 ("*Jovic* Appeal Judgement"), para. 30 (quoting the *Marijačić* Appeal Judgement, para. 44).

[18] *Nshogoza* Trial Judgement, para. 181; *see also, Jović* Appeal Judgement, para. 27.

[19] Seminega, T. 18 March 2009 pp. 53, 56-59, *see* Exhibit D.51(E); Nyagatare, T. 23 March 2009 p.19, *see* Exhibit D.59(E); Nyarwaya, T. 20 March 2009 pp. 4, 23.

[20] Defence Submissions, para. 38.

[21] The Defence, however, submits that the second alternative would be "unnecessary" in the interests of judicial expediency with regard to some of the alleged conduct. *See* Defence Submissions, para. 39.

[22] Prosecution Submissions, paras. 4-5.

[23] Prosecution Submissions, paras. 10-11.

[24] *Jean de dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Ruling following Rule 115 Evidentiary Hearing, T. 19 May 2005 pp. 50-51 ("Appeals Chamber's Order").

[25] Prosecution Submissions, paras. 6-8.

13. According to the Prosecution, the general order issued by the Appeals Chamber authorized it to interview all persons, including protected and unprotected witnesses.[26] It claims that requesting permission to interview witnesses may have prejudiced its investigations. The Prosecution also notes that *amicus curiae* have met with and interviewed protected witnesses without having to request permission from the Trial Chamber.[27] Finally, the Prosecution submits that the interviews were conducted under the good faith belief that they were authorized by the Appeals Chamber's Order.[28]

Should the Chamber Direct the Registrar to Appoint Amicus Curiae to Investigate Possible Contempt?

14. As an initial matter, the Chamber recalls that the protective measures ordered in the *Kamuhanda* and *Rwamakuba* cases, among other things, prohibited the Prosecution from contacting defence witnesses without first notifying the respective defence teams and having them make the necessary arrangements.[29] The protective measures ordered in these cases do not require the Prosecution to seek the *Kamuhanda* or *Rwamakuba* Trial Chambers' permission to meet with the protected defence witnesses.

15. The Chamber notes that the Prosecution does not specify whether it notified the relevant defence representatives before interviewing the witnesses. Nor do the Defence submissions address this issue specifically. Nonetheless, given the content of the Prosecution submissions and the testimony of the relevant witnesses, the Chamber has reason to believe that the Prosecution did not comply with the prescribed protective measures.[30]

16. The Chamber does not consider that the Appeals Chamber's Order authorized the Prosecution to ignore the protective measures ordered in the *Kamuhanda* or *Rwamakuba* cases. There is no legal basis for different rules or procedures applying to investigations under Rules 77 and 91. On the contrary, Rule 77 specifically provides that Parts Four through Eight of the Rules of Procedure and Evidence, which cover investigations and include all relevant provisions regarding protective measures, apply *mutatis mutandis* to contempt proceedings.

17. The Chamber considers the Prosecution's reliance on the investigation practices of *amici curiae* appointed by this Tribunal to be inapposite. The relevant provisions of the *Kamuhanda* and *Rwamakuba* protective measures were directed at the Prosecution, and not at third parties.[31] To leave it to the Prosecution to determine whether it remains bound by

---

[26] Prosecution Submissions, para. 10.

[27] Prosecution Submissions, paras. 11-12.

[28] Prosecution Submissions, paras. 11-13.

[29] *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses (TC), 22 March 2001 (entered as Exhibit D26 in this case); *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Defence Motion for Protective Measures (TC), 21 September 2005; *see also* Judgement, para. 44.

[30] The Prosecution relies on the argument that the Appeals Chamber's Order authorized it to meet with apparently any protected defence witness. It does not submit that it complied with the relevant protective measures. Moreover, none of the relevant witnesses testified that his interview with the Prosecution had been arranged by the relevant defence team or that the relevant defence teams had, to the witnesses' knowledge, even been informed of the interviews.

[31] Even though it was investigating contempt pursuant to the Appeals Chamber's Order, the Prosecution remained party to the criminal proceedings against Kamuhanda and Rwamakuba, as well as all other proceedings before the Tribunal.

Chamber's orders when it is investigating contempt proceedings opens up the possibility of abuse.

18. The Chamber is not convinced that requiring the Prosecution to respect protective measures would have impeded its investigations.[32] Given the particular circumstances of this case, the Chamber cannot reject the possibility that having to inform the *Kamuhanda* defence team of its desire to interview witnesses may have impeded its investigations to the extent that they were focused on Nshogoza, who was an investigator for that defence team. In such circumstances, the Chamber considers that the proper course under such circumstances would have been for the Prosecution to seek the guidance of either the Appeals Chamber or the *Kamuhanda* Trial Chamber. In this regard, the Chamber notes that, when justified under the circumstances, *ex parte* submissions are accepted practice at the Tribunal.[33]

19. The Chamber accepts the Prosecution's submission that the interviews of the concerned defence witnesses may have been undertaken by members of the OTP in the good faith belief that they were authorized by the Appeals Chamber's Order. However, for the reasons specified above, the Chamber finds that this belief was mistaken.

20. The Chamber recalls that the language of Rule 77 is discretionary. The Tribunal *may* hold in contempt persons who knowingly and wilfully interfere with the administration of justice, but the fact that a Trial Chamber has reason to believe that a person is in contempt does not oblige it to order an investigation or prosecution.[34] Thus, even where there are sufficient grounds and therefore a *prima facie* case to pursue contempt proceedings, a Trial Chamber may consider the gravity of an alleged perpetrator's conduct or his underlying motivations when deciding whether to initiate contempt proceedings.[35]

21. The submissions of the Parties suggest that members of the OTP may have violated witness protective measures and thus may have acted in contempt by meeting with protected defence witnesses Seminega, Nyagatare and Nyarwaya in contravention of the relevant orders given by the *Kamuhanda* and *Rwamakuba* Trial Chambers. Although there may be sufficient grounds to proceed, in the Chamber's view, consideration of the gravity of the alleged conduct and underlying motivations of the OTP investigators, as well as the penal goals to be served by initiating contempt proceedings, militate against pursuing this matter further.

22. The Chamber is mindful that Nshogoza's conviction for contempt rests solely on his meetings with protected Prosecution witnesses in violation of protective measures ordered by the *Kamuhanda* Trial Chamber. However, Nshogoza was also indicted for more serious misconduct, including allegations that he engaged in bribery and induced witnesses to testify

---

[32] As a general matter, the argument that requiring the Prosecution to notify defence teams of its intention to interview defence witnesses will impede Prosecution investigations has been rejected by Trial Chambers when issuing protective measures on behalf of defence witnesses. In fact, this argument was rejected by the *Kamuhanda* Trial Chamber. *Kamuhanda*, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses (TC), paras. 6, 21.

[33] *See e.g.*, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008, para. 5 (noting that "*ex parte* applications may be necessary when they respond to the interests of justice and when the disclosure to the other party of the information contained in the application would likely prejudice the persons related to the application.").

[34] *Nshogoza* Trial Judgement, para. 176.

[35] *See Nshogoza* Appeals Judgement, para. 57.

falsely before the Appeals Chamber. The testimonies of witnesses Seminega, Nyagatare and Nyarwaya do not support such serious allegations against the members of the OTP who met with them.

23. Turning to the underlying motivations of the OTP investigators, the Chamber accepts that the members of the OTP may have acted on the mistaken belief that they were authorised to meet with the relevant defence witnesses by the Appeals Chambers Order.

24. Moreover, the Chamber does not consider that pursuit of contempt proceedings is necessary to achieve the important goals of deterrence and denunciation in this case.[36] Under the particular circumstances of this case, the Chamber declines to exercise its discretion to initiate contempt investigations or proceedings pursuant to Rules 77 (C) or (D).

FOR THESE REASONS, the Chamber

DECLINES to initiate contempt investigations or proceedings pursuant to Rule 77 (C)(ii), or Rule 77 (D)(ii), against the members of the Prosecution who met with Witnesses Seminega, Nyagatare and Nyarwaya.

Arusha, 25 November 2010

Khalida Rachid Khan	Lee Gacuiga Muthoga	Aydin Sefa Akay
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[36] *See Nshogoza* Trial Judgement, paras. 218-219 (referring to sentencing goals).