



**THE APPEALS CHAMBER** (“Appeals Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Justice Jon Moadeh Kamanda, Presiding, Justice Emmanuel Ayoola, Justice George Gelaga King, Justice Renate Winter and Justice Shireen Avis Fisher;

**NOTING** the Trial Chamber’s Oral Decision dismissing the Defence “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” of 22 October 2010 (“Oral Decision”);

**NOTING** the written reasons for the Oral Decision contained in the “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 Prosecutor and its Investigators” dated 11 November 2010 (“Impugned Decision”), and the “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” (“Decision on Leave to Appeal”), dated 3 December 2010, wherein the Trial Chamber granted the Defence leave to appeal;

**BEING SEISED** of the “Public Notice of Appeal and Submissions Regarding the Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators” filed on 10 December 2010 (“Appeal”);

**CONSIDERING** the “Prosecution Response to Public Defence Notice of Appeal and Submissions Regarding the Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators” filed confidentially on 10 January 2011 and the “Public with Redactions” version thereof filed on 21 January 2011 (“Response”);

**CONSIDERING** the “Defence Reply to Prosecution Response to 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” filed on 14 January 2011 (“Reply”);

**CONSIDERING** the Statute of the Special Court (“Statute”) and the Rules of Procedure and Evidence (“Rules”);

**HEREBY RENDERS this Decision on the Appeal based on the written submissions of the Parties:**

## **I. BACKGROUND**

1. On 27 September 2010, the Defence filed its “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” (“Motion”),<sup>1</sup> wherein it submitted that it had reason to believe that the Office of the Prosecutor had been conducting its investigations in a manner that amounted to an abuse of process and that had brought the administration of justice into disrepute. The Defence alleged that in several instances the Prosecution knowingly and wilfully interfered with the administration of justice by, *inter alia*, threatening, intimidating, causing injury or offering bribes to or otherwise interfering with witnesses or potential witnesses.<sup>2</sup>

2. The Defence requested the Trial Chamber to order an investigation pursuant to Rule 77(C)(iii) of the Rules into: (i) the conduct of the Prosecution, including all its employees or agents, since the inception of the Special Court, in relation to witnesses and potential witnesses in the case, which it alleged is in breach of the Statute, Rules and Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“Code”); and (ii) all payments and benefits, including on-going payments and relocations, offered and/or paid by the Prosecution to witnesses, potential witnesses or sources in connection with the case. The Defence requested that the investigation so ordered by the Trial Chamber, should explore the full mandate of the Prosecution’s Witness Management Unit, the source of its funding, and all disbursements made by that Unit in relation to the case.<sup>3</sup>

<sup>1</sup> SCSL-03-01-T-1089, Motion.

<sup>2</sup> Motion, paras 1, 2.

<sup>3</sup> Motion, para. 30.

3. The Defence submitted that it had reason to believe that the former Prosecutor, David Crane, and all his successors in title, through their own acts of commission or omission and/or through the acts and conduct of their subordinates and/or agents, violated the Statute, the Rules and the Code in that they have (i) assaulted a suspect and/or potential witness or source; (ii) exerted undue pressure by threatening, intimidating, or harassing suspects, witnesses, potential witnesses or sources; and (iii) offered and/or provided improper, unjustifiable or undue payments, benefits or other incentives, including relocation, to witnesses, potential witnesses or sources, which acts the Defence submitted, amount to misconduct, abuse of process and most importantly, contempt.<sup>4</sup>

4. The Defence submitted that the Prosecution's conduct additionally affected the case in two principal ways: first, that it casts doubt on the credibility of the entire evidence before the Special Court, and second, that this conduct has negatively affected the Accused's fair trial rights in that it has generally poisoned the environment and made it difficult for the Defence to find witnesses who had not compromised themselves with the Prosecution.<sup>5</sup>

5. The Prosecution opposed the Motion. It requested the Trial Chamber to dismiss it on the grounds that (i) it was untimely as none of the allegations made by the Defence related to recent incidents, events or contact, and the alleged misconduct was not brought to the attention of the Trial Chamber without undue delay;<sup>6</sup> and (ii) the Motion failed to establish that there is any credible reason to believe that any member of the Prosecution has been involved in conduct which would constitute contempt of court.<sup>7</sup> In support of the latter submission, the Prosecution submitted that the allegations were based on statements of admitted liars and a person with an on-going financial relationship with the Accused, speculation, a misrepresentation of the mandate of the Office of the Prosecutor's Witness Management Unit ("WMU"), matters already subject to cross-examination, inaccuracies and irrelevant documentation.<sup>8</sup>

6. The Prosecution further submitted that there had been no infringement of the Accused's fair trial rights as it had fully complied with its disclosure obligations pursuant to

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<sup>4</sup> Motion, paras 11,12.

<sup>5</sup> Motion, paras 13,14.

<sup>6</sup> *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, paras 8-10 ("Response to Motion").

<sup>7</sup> Response to Motion, para. 11.

Rule 68 for all Prosecution witnesses, with the Defence having had the opportunity to cross-examine them thereon.<sup>9</sup>

7. The Trial Chamber orally dismissed the request of the Defence in its entirety and subsequently published the impugned decision.<sup>10</sup> In the impugned decision the Trial Chamber made the following preliminary findings: (i) that the request was time-barred due to the fact that the Defence had failed to bring the allegations of contempt to the Court's notice within a reasonable time, and (ii) that the Defence request amounting to an audit of the Office of the Prosecutor from its inception, lacked specificity and was outside the ambit of Rule 77. The Trial Chamber held that "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".<sup>11</sup> The Trial Chamber further held that even though its preliminary findings were sufficient, it considered it to be in the interests of justice, given the "serious allegations of contempt of court" to examine the merits.<sup>12</sup> It found that it was not satisfied that any of the allegations submitted by the Defence provided 'reason to believe' that contempt may have been committed by members of the Prosecution and dismissed it in its entirety.<sup>13</sup>

8. The Defence application for leave to appeal the impugned decision was granted by the Trial Chamber, which found that the Defence had "met the conjunctive conditions of exceptional circumstances and irreparable prejudice as prescribed by Rule 73(B)".<sup>14</sup> The Trial Chamber considered that exceptional circumstances existed in that the Motion raised issues of fundamental legal importance relating to the interpretation and application of Rule 77, in particular, "whether the Rule extends to general complaints regarding the operations of the Office of the Prosecutor and its staff, including payments or benefits made to witnesses, potential witnesses and sources". It also considered that "as the Defence allegations of contempt of court could have serious implications on the integrity of the Office of the

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<sup>8</sup> Response to Motion, para. 11-24.

<sup>9</sup> Response to Motion, para. 25.

<sup>10</sup> SCSL-03-01-T-1118, Impugned Decision.

<sup>11</sup> Impugned Decision, para. 28. The Trial Chamber further found "that the Defence did not act with due diligence in failing to bring the alleged acts of contempt to the attention of the Trial Chamber within a reasonable time and that no satisfactory explanation for the inordinate delay has been offered by the Defence," at para. 26.

<sup>12</sup> Impugned Decision, para. 22.

<sup>13</sup> Impugned Decision, para. 150.

Prosecutor that may ultimately affect the integrity and/or fairness of these proceedings, the Accused might suffer irreparable prejudice that cannot be easily remedied on final appeal”.

## II. SUBMISSIONS OF THE PARTIES

### A. Appeal

9. The Defence raises three main grounds in this Appeal: (i) the Trial Chamber’s findings in respect of the ambit of Rule 77, in particular the extent to which the Rule requires specificity; (ii) the Trial Chamber’s findings in respect of the timing of the requested relief and; (iii) the Trial Chamber’s findings on the merits including its finding that the Defence could not have brought the issue of improper payments to witnesses under Rule 77 but only under Rule 39(ii).

10. With respect to the ambit of Rule 77, the Defence submits first that the “Trial Chamber erred in law and/or fact and/or procedure in 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 [*sic*] the contempt allegations and their corresponding contemptuous acts”, and that in this respect the Motion “fell outside the personal jurisdiction of Rule 77”.<sup>15</sup>

11. The Defence contests the Trial Chamber’s finding that an investigation under Rule 77 must be targeted at an individual engaging in specific conduct, and that a moving party has to identify the specific acts committed by that individual amounting to interference with the administration of justice. It submits that the Office of the Prosecutor (“OTP”) is a legal person constituted under Article 15 of the Statute and Rule 37 of the Rules, separate from the natural persons it employs and that there is no provision in criminal law or Rule 77 prohibiting the institution of criminal proceedings against statutory persons of which the OTP is one.<sup>16</sup>

12. The Defence submits that Rule 77 does not prevent a “general audit of” the operations of the Office of the Prosecutor, “at the preliminary investigative stage”, especially when the subject matter of the contempt allegations involves conduct that “pervades the entire system

<sup>14</sup> SCSL-03-01-T-1130, Decision on Leave to Appeal.

<sup>15</sup> Appeal, paras 8, 9.

<sup>16</sup> Appeal, para. 18(a)

and has been going on for a long time”.<sup>17</sup> It submits that the Trial Chamber’s erroneous interpretation of the degree of specificity required stems from its conflation of the two distinct stages provided for by Rule 77 namely: the preliminary investigative stage and the prosecution stage. The Defence submits that the preliminary investigative stage at which the complainant must establish only “reason to believe” that a person may have committed an act of contempt, is by its nature “investigative,” “provisional” and “consequently requires a measure of flexibility”. Thus, it submits while some degree of specificity would be required at that stage so as to direct an investigation, it need not necessarily possess the “concreteness of an indictment” as at the prosecution stage.<sup>18</sup>

13. In this regard, the Defence submits that its Motion “properly pled jurisdiction for purposes of a preliminary investigation under Rule 77” and that it was sufficiently specific. In submits in particular that with respect to the *ratione personae*, the Motion identifies “the Prosecutor, David Crane and all his successors in title” as the persons subject to the contempt allegations. Furthermore it submits, other accomplices, to the extent that their identities could be ascertained were also sufficiently identified in the Motion and that for proceedings of a criminal nature, the fact that some of the persons subject to criminal proceedings were not identified with sufficient specificity does not detract from those who were clearly identified and thus could have been investigated.<sup>19</sup>

14. Regarding the specific acts allegedly amounting to contempt under Rule 77, the Defence submits that its Motion sufficiently identifies these as arising from “the individual acts of the Prosecutor, acts of Prosecution employees and acts of Prosecution agents”.<sup>20</sup> The Defence submits in the alternative that to the extent concrete specificity was required at the preliminary stage, which is disputed, its Motion if considered as a whole was in substantial compliance as it sufficiently identified most of the persons who were the subject of the contempt allegations and the corresponding allegations.<sup>21</sup>

15. The Defence submits that the Trial Chamber could also have dealt with the alleged misconduct under its inherent power to deal with contempt, separate and apart from that

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<sup>17</sup> Appeal, para. 18(a).

<sup>18</sup> Appeal, para. 18(e).

<sup>19</sup> Appeal, para. 18(j).

<sup>20</sup> Appeal, para. 18(c).

<sup>21</sup> Appeal, para. 18(i). The Defence refers to its specific allegations against current Prosecutor Brenda Hollis and former Prosecutor David Crane as examples of compliance with such concrete specificity.

provided for by Rule 77. It relies in support of this submission on the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber decisions in *Prosecutor v. Tihomir Blaskic* and *Prosecutor v. Haradinaj*.<sup>22</sup> The Defence submits that the Trial Chamber's failure to order an investigation into the allegations of contempt either under Rule 77 or pursuant to its inherent powers constitutes a discernible error in the exercise of its discretion.<sup>23</sup>

16. The Defence submits that the Trial Chamber therefore erred in law and/or in procedure in finding that it could not order a general investigation of the OTP as an organ of the court.

17. With respect to the issue of undue delay, the Defence submits that the "Trial Chamber erred in law and/or fact and/or procedure in finding that the Defence Motion was time-barred because the defence had delayed in bringing the alleged acts of contempt to court".<sup>24</sup> It submits that the Trial Chamber erroneously focused on the time when the alleged contemptuous conduct took place, instead of focusing on the time at which the Defence became aware of it such that it could raise the issue with the court.<sup>25</sup> The Defence submits that this error resulted from the several unfounded assumptions relied upon by the Trial Chamber such as the fact that contemptuous conduct comes to light as soon as it is committed,<sup>26</sup> and further submits that, "there is nothing in [Rule 77] or anywhere else in the Rules to suggest a statute of limitation regarding contempt of court".<sup>27</sup> It submits that the Trial Chamber therefore committed a discernible 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 failed to give them sufficient weight and/or made an error as to the facts upon which it exercised its discretion.

18. The Defence further challenges the Trial Chamber's disposition of its argument "that the Motion did not arise from separate isolated events but rather a consistent pattern of

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<sup>22</sup> Appeal, paras 18(k), (l), citing *Prosecutor v. Tihomir Blaskic*, 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; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010, paras 34, 35.

<sup>23</sup> Appeal, para. 18(m).

<sup>24</sup> Appeal, para. 10.

<sup>25</sup> Appeal, para. 20.

<sup>26</sup> Appeal, paras 22, 23.

<sup>27</sup> Appeal, para. 25.



conduct and the culmination of separate incidents,” and submits that the Trial Chamber could have read and relied on them differently.

19. With respect to the Trial Chamber’s disposition on the merits, the Defence submits that the Trial Chamber erred in law and/or fact and/or procedure in finding that the Motion “did not contain any credible allegations of contempt to satisfy the very low ‘reason to believe’ evidentiary threshold under Rule 77”. It submits that “by applying a much higher standard to the otherwise very low ‘reason to believe’ preliminary investigations threshold under Rule 77,” the Trial Chamber’s credibility analyses amounted to that of a summary trial and was inappropriate at that stage.<sup>28</sup>

20. The Defence submits that the Trial Chamber also 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.<sup>29</sup> In this regard, it submits that albeit in erroneously conducting a summary trial, the Trial Chamber erred in law in allowing the Prosecution, to lead evidence from the Bar on the facts at issue; in its evaluation of Prosecution evidence *vis-a-vis* the Defence evidence; and by reading into the record, evidence that was not adduced by either party with respect to findings relating to certain witnesses.<sup>30</sup>

21. The Defence further submits that the Trial Chamber erred in law and/or procedure, by importing 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”, thereby narrowing the definition of what could constitute “interference with the administration of justice” under Rule 77.<sup>31</sup>

22. With respect to the relationship between Rules 77 and 39(ii), the Defence submits that the Trial Chamber also erred in law and/or fact and/or made a procedural error in finding that issues concerning improper payments to witnesses could not be brought under Rule 77, but only under Rule 39(ii).<sup>32</sup> It submits that contrary to the Trial Chamber’s findings, the two Rules are not mutually exclusive but are complementary because an abuse of discretion could rise to the level of criminality sanctioned by Rule 77.

<sup>28</sup> Appeal, para. 29.

<sup>29</sup> Appeal, para. 11.

<sup>30</sup> Appeal, paras 34-37, referring to the Trial Chamber’s findings in respect of Witnesses DCT-102, DCT-197 and Abu Keita.

23. The Defence also generally challenges the Trial Chamber's findings on the question of improper inducements to witnesses, in particular its finding that there was no evidence to support the allegation that DCT-133 and the current Prosecutor negotiated a fee in order for the witness to testify and its finding regarding offers of security and/or relocation made by the Prosecution to witnesses.<sup>33</sup>

24. Based on the foregoing, the Defence requests that the Appeals Chamber sets aside the Impugned Decision, and orders an investigation into the alleged acts of contempt of court committed by the Prosecution.

### **B. Response**

25. The Prosecution filed its response confidentially and subsequently filed a public version with redactions.

26. It submits that the Trial Chamber did not err in law, fact and/or procedure, and that it did not abuse its discretion in dismissing the Motion. It submits that the three grounds of appeal raised by the Defence are without merit and requests that the Appeals Chamber denies the requested relief and dismisses the Appeal.

27. Regarding the first ground of appeal, the Prosecution submits that the Defence has not demonstrated that Trial Chamber's finding that the ambit of Rule 77 does not cover "the general operations of an office or party, but rather [...] the conduct of individuals who have allegedly committed contempt" amounted to an error of law and/or fact and/or procedure.<sup>34</sup> It contests the Defence argument based on Article 15 of the Statute and Rule 37 of the Rules, that the OTP is a statutory legal person and submits that a plain reading of both provisions shows that they are concerned with the Prosecutor and not the OTP.<sup>35</sup>

28. The Prosecution challenges the Defence submission that the Trial Chamber erred in law and/or procedure in failing to distinguish between the different stages envisaged by Rule

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<sup>31</sup> Appeal, para. 38.

<sup>32</sup> Appeal, para. 13.

<sup>33</sup> Appeal, para. 42.

<sup>34</sup> Response, para. 8.

77, and argues that the pleading requirements and the seriousness with which the allegations are to be viewed are the same for the various stages. It submits that the fact that different legal standards are applicable to the various stages, and the fact that the “reason to believe” standard has been described as “lower” when compared for instance to that required for committal for trial, does not translate into a lesser degree of specificity being required for pleadings at the investigative stage. The Prosecution submits that the Trial Chamber therefore correctly applied the legal standard in concluding that “allegations of contempt must be precisely pleaded” and that “no flexibility is to be imported at the investigation stage such as to permit a ‘general audit’”.<sup>36</sup>

29. The Prosecution further submits that there was no legal requirement on the part of the Trial Chamber to “remedy the defective Motion” by limiting the “Defence’s unimaginably wide request”; that it committed no error by nonetheless reviewing all the material before it; that it did not abuse its discretion by dismissing the Motion on the basis of lack of specificity; and that the *ICTY* Appeals Chamber decision in *Haradinaj* on which the Defence relies to argue that it focused “on technical rules of pleading at the expense of the Accused’s fair trial rights” thereby wrongly emphasising “form over substance” is not instructive.<sup>37</sup>

30. In response to the Defence’s second ground of appeal, the Prosecution submits that the Trial Chamber did not err in fact and/or law and/or procedure in finding that the Motion was time-barred because the Defence had delayed in bringing the alleged acts of contempt to court. It submits that the Defence argument that the Trial Chamber’s error arose from its failure to assess when the Defence knew of the alleged contemptuous conduct should be dismissed. The Prosecution submits that undue delay is relevant in the context of contempt allegations because first, such allegations should be brought to the Trial Chamber’s attention as soon as possible and in the event a person fails to do so an explanation must be provided; second, any such delay is a factor the Trial Chamber can take into consideration in assessing

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<sup>35</sup> Response, paras 9-13.

<sup>36</sup> Response, paras 14-18. The Prosecution cites two Trial Chamber decisions of the International Criminal Tribunal for Rwanda (*ICTR*) in support of its submissions: *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; *Prosecutor v. Rukundo*, *ICTR-01-70-T*, Decision on the Haguma Report, 14 December 2007.

<sup>37</sup> Response, paras 19-21.

the person's credibility. It submits that in the present case, the Defence did not show evidence as to when it learnt of the allegations, nor did it give an explanation as to why the individuals delayed reporting the alleged misconduct to them.<sup>38</sup>

31. It submits in the case of the allegations concerning DCT-192, the only case in which the Defence proffered an explanation as to when it learned of the allegations, the Trial Chamber found that the explanation for the inordinate delay was unsatisfactory. The Prosecution also challenges the Defence submissions on the Trial Chamber's findings on undue delay with respect to the allegations concerning Defence Witnesses Abu Keita and DCT-032.<sup>39</sup> The Prosecution submits that the Defence argument that the Trial Chamber relied on unfounded assumptions is erroneous and unsupported; that the Trial Chamber correctly considered the issue of undue delay; and that it did not exercise its discretion unreasonably.<sup>40</sup> Furthermore, it submits, that the Defence attempts to retrospectively amend its pleadings on appeal by asserting "that individual acts which are themselves contemptuous only become obviously contemptuous when seen relative to each other".<sup>41</sup>

32. With respect to the Defence's third ground of appeal, the Prosecution submits that the Trial Chamber did not err in law and/or procedure, nor did it abuse its discretion in dismissing the Motion on its merits. It submits that the Trial Chamber was cognisant of the of the "reason to believe" standard which requires that allegations of contempt be credible and that it correctly assessed the allegations in accordance with the standard.<sup>42</sup>

33. The Prosecution also challenges the Defence submissions on the Trial Chamber's assessment and evaluation of the evidence and the allegation that its determination of the case left the impression of partiality. It submits that contrary to the Defence submissions, the Prosecution did not lead evidence from the Bar, but challenged the sufficiency of the Defence evidence as regards the "reason to believe" standard, as it was rightly entitled to do.<sup>43</sup> The

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<sup>38</sup> Response, paras 23-25.

<sup>39</sup> Response, paras 28, 29.

<sup>40</sup> Response, paras 30-34.

<sup>41</sup> Response, para. 35.

<sup>42</sup> Response, para. 40.

<sup>43</sup> Response, para. 42.

Prosecution submits that the Defence argument that the Trial Chamber gave preference to the submissions of the Prosecutor over that of DCT-097 is erroneous and does not establish that the Trial Chamber abused its discretion; that the Defence argument that the Trial Chamber erred in law, fact and/or procedure by reading into the record evidence which was not adduced by either party is without foundation; and that the Defence submission that the Trial Chamber found that there must be a link between the alleged act of contempt and a witness' unwillingness to testify thereby erring in law is also without merit.<sup>44</sup>

34. The Prosecution submits that contrary to the Defence submission, the Trial Chamber did not find that Rule 77 and Rule 39 are mutually exclusive, and that it did not err in law. Rather, that the Trial Chamber's finding was based on its earlier finding concerning the insufficiency of the Motion's specificity.<sup>45</sup>

35. The Prosecution requests therefore that the Appeals Chamber dismisses the Defence request that it exercises its discretion and that it orders an investigation into the alleged acts of contempt.

### **C. Reply**

36. In Reply, the Defence submits (i) that the Prosecution seeks to make a 'false distinction' between the OTP and the Prosecutor and maintains that for the purposes of the Special Court's internal workings and the conduct of the trial, the Prosecutor is the embodiment of the OTP;<sup>46</sup> (ii) that the Prosecution's submission that 'the serious nature of contempt allegations justified the application of a stringent standard even at the preliminary investigations stage' is without merit and that on the contrary the said serious nature of contempt allegations warrants a much lower standard at the preliminary investigation stage;<sup>47</sup> (iii) that the Prosecution either 'mischaracterizes' the Defence submissions on the Trial Chamber's approach to dealing with alleged defects in the Motion or does not adequately

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<sup>44</sup> Response, paras 43-54.

<sup>45</sup> Response, para. 55.

<sup>46</sup> Reply, paras 3-7.

<sup>47</sup> Reply, paras 8-10.

address them;<sup>48</sup> and (iv) that contrary to the Prosecution's submissions, the Defence' third ground of appeal was not concerned with the merits of the impugned Decision, but rather with the process by which the Trial Chamber arrived at its findings of fact.<sup>49</sup>

### III. APPLICABLE LAW

37. The law and procedure for dealing with contempt of the Special Court is set out in Rule 77. It provides in relevant parts:

Rule 77: Contempt of the Special Court (*amended 14 May 2005*)

(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and willfully interferes with its administration of justice, including any person who:

(i) being a witness before a Chamber, subject to Rule 90(E) refuses or fails to answer a question;

(ii) discloses information relating to proceedings in knowing violation of an order of a Chamber;

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber; or

(vi) knowingly assists an accused person to evade the jurisdiction of the Special Court.

(B) Any 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.

(C) When a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court, it may:

(i) deal with the matter summarily itself;

<sup>48</sup> Reply, paras 13-17.

<sup>49</sup> Reply, para. 21.

- (ii) refer the matter to the appropriate authorities of Sierra Leone; or
- (iii) direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter.
- (D) Proceedings under Sub-Rule (C)(iii) above may be assigned to be heard by a single judge of any Trial Chamber or a Trial Chamber.
- (E) The rules of procedure and evidence in Parts IV to VIII shall apply, as appropriate, to proceedings under this Rule.
- (...)
- (J) Any conviction rendered under this Rule shall be subject to appeal.
- (K) Appeals pursuant to this Rule shall be heard by a bench of at least three Judges of the Appeals Chamber. In accordance with Rule 117 such appeals may be determined entirely on the basis of written submissions.
- (L) In the event of contempt occurring during proceedings before the Appeals Chamber or a Judge of the Appeals Chamber, the matter may be dealt with summarily from which there shall be no right of appeal or referred to a Trial Chamber for proceedings in accordance with Sub-Rules (C) to (I) above.

#### IV. DISCUSSION

38. In its Motion, the Defence petitioned the Trial Chamber to exercise its administrative or executive authority to order the Registrar to appoint an independent investigator to investigate contempt and/or ethical violations allegedly committed by the Prosecution going back to 2002.

39. The Petition, filed by the Defence nominally as a 'motion', sought no relief within the instant case, but requested the commencement of an investigation preliminary to the initiation of separate criminal proceedings to which neither the accused nor his counsel would be party. The Defence alleged that the outcome of such an investigation should lead to prosecution for contempt and that such a prosecution would produce facts to substantiate its claims that the fair trial rights of Mr. Taylor had been violated.

40. Specifically, the Defence alleged that contempt proceedings would disclose that the Prosecution engaged in systematic misconduct toward witnesses, and potential witnesses,

throughout the investigation and prosecution of all four of the cases prosecuted before this Court. It further alleged that this misconduct rendered the testimony of the witnesses of the Prosecution untrustworthy and tainted any subsequent testimony which witnesses might give for the Defence.

41. The Trial Chamber declined to initiate the requested investigation.

42. The relief sought under Rule 77(C)(iii), the denial of which is the subject of this appeal, is the commencement of a separate criminal investigation for contempt which, even if ordered, would lead only to the need for a further exercise of the Trial Chamber's discretion to bring or not to bring contempt charges. The Defence is apparently not appealing from the Trial Chamber's refusal to employ the alternative options under Rule 77(C), which were also open to the Trial Chamber's discretion, to "(i) deal with the matter summarily itself; [or] (ii) refer the matter to the appropriate authorities of Sierra Leone."

43. According to the Appeals Chamber's jurisprudence, the Appeals Chamber has no competence to render a decision on the subject matter of the appeal, that is, whether the Trial Chamber erred in law or in fact in refusing to institute an investigation for contempt under Rule 77(C)(iii).<sup>50</sup> Based on the plain reading of Rule 77(J) and for the reasons already established in the jurisprudence of this Court, the Appeals Chamber only has competence to review a conviction rendered in a contempt proceeding, and has no competence to review any preliminary decisions regarding investigation, initiation or referral of potential contempt cases arising before the Trial Chamber. In May 2005, the Plenary specifically amended Rule 77(J) to remove uncertainty about the scope of the right of appeal under that Rule, changing

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<sup>50</sup> *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, 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 ("First AFRC Contempt Appeal Decision"), paras 27, 30 (holding that Rule 77(J) "only allows an appeal by the parties involved in the [contempt] trial – i.e. the alleged contemnor (if convicted) and the prosecutor (if there has been an acquittal). It cannot be activated at any stage by a defendant in another trial who may have a connection with the contemnor, and it cannot be activated at all prior to the result of the contempt trial" and therefore holding that the appeal is incompetent); First AFRC Contempt Appeal Decision, para. 31(iv) ((Ayoola, J., separate and concurring opinion) holding that the Appeals Chamber is not competent to review an exercise of power by the Trial Chamber pursuant to Rule 77(C)); *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, Decision on Joint Defence Appeal Against the Decision on the Report of the Independent Counsel Pursuant to Rule 77(C)(iii) and 77(D), 17 August 2005 ("Second AFRC Contempt Appeal Decision"), para. 12 (quoting the First AFRC Contempt Appeal Decision and concurring opinion of Judge Ayoola, and holding that "a preliminary decision rendered under Rule 77(C) of the Rules is not a decision capable of appeal to this Chamber pursuant to Rule 77(J). It is the view of this Chamber that the impugned decision is not subject to appeal").



the text from “any decision rendered under this Rule shall be subject to appeal” to “any conviction rendered under this Rule shall be subject to appeal” (emphasis added).<sup>51</sup>

44. In deference to our own precedent and the plain language of the Rule, the Appeals Chamber is not competent to consider preliminary decisions made by the Trial Chamber under Rule 77, notwithstanding that the appeal was filed pursuant to leave of the Trial Chamber under Rule 73(B). “[T]he right of appeal given by [Rule 77(J)] only arises after a conviction or an acquittal – in other words after a final decision and not in relation to any interlocutory decision taken by a court at any earlier stage in the proceedings. It does not arise even if leave is obtained under Rule 73(B).”<sup>52</sup>

45. Our holding is in accord with the jurisprudence of the *ICTY*, which cited with approval this Court’s determination in the *AFRC* cases that Rule 77 allows the Appeals Chamber to consider appeals of final convictions only.<sup>53</sup>

<sup>51</sup> See First *AFRC* Contempt Appeal Decision, para. 38 (Gelaga King, J., separate and partially dissenting opinion).

<sup>52</sup> Second *AFRC* Contempt Appeal Decision, para. 18 (Robertson, J., separate and concurring opinion)

<sup>53</sup> *Prosecutor v. Vojislav Seselj*, *ICTY-03-67-AR77.1*, Decision on Vojislav Seselj’s Appeal Against the Trial Chamber’s Decision of 19 July 2007, 14 December 2007; *Prosecutor v. Haxhui*, *ICTY-04-84-R77.5-A*, Decision on Admissibility of Notice of Appeal Against Trial Judgement, 4 September 2008. The *ICTR* Rule 77(J) however differs significantly from the *SCSL* Rule 77(J), e.g. an appeal of the *ICTR* Trial Chamber’s decision not to instigate a contempt proceeding was brought under *ICTR* Rule 77(J) in *Prosecutor v. Nsengimana*, *ICTR-01-69-A*, 16 December 2010. Given the striking disparity between the *ICTY* and *SCSL* Rules and their drafting histories, the decision in *Nsengimana* provides no guidance in this matter. *ICTR* Rule 77(J) reads as follows:

“(J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless:

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.”

Originally, *ICTR* Rule 77 provided that “Any judgement rendered under this Rule shall be subject to appeal.” However, in July 2002, the Plenary of the *ICTR* amended the sub-rule to provide that “Any decision rendered under this Rule shall be subject to appeal within fifteen days of the impugned decision.” The Plenary of the *ICTR* revisited the rule in May 2003 and amended it again to add the additional language now found in *ICTR* Rule 77(J). Unlike this Court, which amended Rule 77(J) to limit its applicability to appeals of convictions, the *ICTR* took the opposite course by expressly providing to review of all decisions brought under Rule 77 and subsequently clarifying the process for doing so.

46. This determination does not infringe on the fair trial rights of the Accused for two reasons. First, the relief requested was highly speculative: *If* the Defence prevailed in its showing that there was reason to believe that a person may be in contempt, and *if* the Trial Chamber had exercised its discretion and selected the option of directing the Registrar to appoint an independent investigator as requested by the Defence rather than any other option provided under Rule 77(C), and *if*, upon return of the investigator's report, the Trial Chamber had subsequently exercised its discretion to instigate a contempt proceeding, and *if* the contempt prosecution had produced the conclusions sought by the Defence, then at best, there might be findings which might or might not have supported the Defence allegations. But those findings, even if they were made, would have come in a proceeding that would not only be separate from the instant case, but that would constitute a new criminal case in which the Defence would have no status or standing.<sup>54</sup>

47. Second, the absence of a contempt proceeding has not precluded the Defence from putting forward its arguments regarding the Prosecution's alleged misconduct toward witnesses and any alleged resulting harm caused to the Accused. The Trial Chamber has permitted evidence throughout the trial on the treatment of witnesses by the Prosecution and it has accepted evidence, disclosed by the Prosecution and proffered by the Defence, relevant to these allegations as they affected the instant case. It appears to be undisputed that the Prosecution has disclosed, and the Trial Chamber has admitted, evidence of Prosecution payments to all Prosecution witnesses, and has ruled in favour of the Defence on disclosure pertaining to Prosecution payments to Defence witnesses.<sup>55</sup> Evidence of Prosecution treatment of witnesses and potential witnesses which is relevant to this case is before the Trial Chamber and has been used in examination and cross-examination of the witnesses to which it pertains. The Defence does not suggest that it is unable to argue the weight of this evidence and its effects in their upcoming closings, if it so chooses.<sup>56</sup>

<sup>54</sup> See: Second *AFRC* Contempt Appeal Decision, paras 14-16.

<sup>55</sup> See e.g. *SCSL-03-01-T-1084*, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010; *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.

<sup>56</sup> See, e.g., *Prosecutor v. Vojislav Seselj*, *ICTY-03-67-AR77.1*, Decision on Vojislav Seselj's Appeal Against the Trial Chamber's Decision of 19 July 2007, 14 December 2007, (Shahabuddeen, J., Declaration) ("Mr. Seselj's right to a fair trial could be satisfied by his right to examine and cross-examine witnesses; the prosecution against him is not a case in which the relevant material could not be made available to the court through the exercise of the latter right. ... [I]t would be incorrect to take the view that a motion inviting the Trial Chamber to 'initiate' separate proceedings was in order.")

48. As a general principle, interlocutory appeals are a rare exception. By limiting appeals on matters pertaining to contempt of court to appeals of a conviction, Rule 77(J) is consistent with that principle. By precluding the possibility for appeal prior to judgment on the merits in contempt proceedings, Rule 77(J) acknowledges the potential for disruption to regular trial proceedings that such appeals could cause while respecting the right of those convicted of contempt to an appellate review of their conviction. The preclusion of interlocutory appeals in contempt cases also recognizes that the Trial Chamber's authority to initiate contempt proceedings is a discretionary power conferred on the Chambers for the purpose of exercising control over their proceedings. It is part of the Special Court's inherent power to address conduct interfering with the administration of justice. The decision to use this power is not a form of relief available to a party. Moreover, preliminary decisions whether to investigate or institute contempt proceedings and how this should be done, are decisions taken by the Trial Chamber not in its judicial capacity, but rather taken pursuant to that Chamber's administrative/executive responsibilities, akin to those decisions made by executive authorities within their broadly defined prosecutorial discretion, and as a consequence they are not subject to appellate review.<sup>57</sup>

49. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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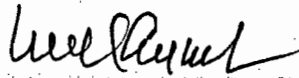
<sup>57</sup> Second *AFRC* Contempt Appeal Decision, paras 10-11: (“[I]t cannot be said that such decisions are judicial decisions. They are decisions of an executive nature and are not decisions, at that stage, that depend on any dispute or on the resolution of conflicting facts or issues.... [t]here may be several ways of challenging such decisions, but an appellate process is not one of them. The Appeals Chamber is not set up to exercise a general and roving supervisory jurisdiction over the Trial Chamber so as to review such exercise of power conferred upon it by Rule 77(C)”) (quoting First *AFRC* Contempt Appeal Decision, paras 28, 31, (Ayoola, J., separate and concurring opinion)).

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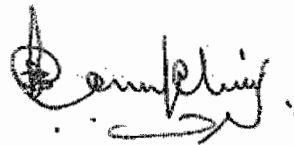
Done in Freetown this 21st day of January 2011.



Justice Jon M. Kamanda  
Presiding



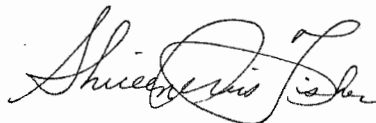
Justice Emmanuel Ayoola



Justice George Gelaga King



Justice Renate Winter



Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]

