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SCSL-03-01-T
(35608-35626)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 24 March 2011

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON CONFIDENTIAL WITH CONFIDENTIAL ANNEXES A-E PROSECUTION MOTION FOR THE TRIAL CHAMBER TO SUMMARILY DEAL WITH CONTEMPT OF THE SPECIAL COURT FOR SIERRA LEONE AND FOR URGENT INTERIM MEASURES

Office of the Prosecutor:
Brenda J. Hollis
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Morris Anyah
Silas Chekera
James Supuwood

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures", filed on 17 February 2011 ("Motion");[1]

RECALLING the Trial Chamber's "Order for Expedited Filing", dated 17 February 2011,[2] wherein the Trial Chamber ordered expedited filing schedules for the response and reply to the Motion and ordered the Court Management Section to re-classify Annex A of the Corrigendum as Confidential pending the Trial Chamber's decision on the Motion;

NOTING the "Confidential Defence Response to Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures", filed on 21 February 2011 ("Response");[3]

NOTING ALSO the "Confidential Prosecution Reply to Confidential Defence Response to Prosecution Motion for the Trial Chamber to Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures", filed on 22 February 2011;[4]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 75 and 77 of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES AS FOLLOWS, based solely on the written submissions of the parties, pursuant to Rule 73(A) of the Rules;

I. BACKGROUND

1. On 3 February 2011, the Defence confidentially filed its "Confidential, with Annexes A-C Defence Final Brief" ("Defence Final Brief").[5] On 7 February 2011, the Trial Chamber, by a majority, held that the Defence Final Brief would not be accepted due to its late filing.[6] On 8 February, the Defence filed a "Public with Annex A and Confidential Annex B Corrigendum to Defence Final Brief" ("Corrigendum"), noting that it did so for reasons of "posterity and in order to preserve the record on appeal"[7] despite the refusal of the Trial Chamber majority to accept the Defence Final

[1] SCSL-03-01-T-1208.
[2] SCSL-03-01-T-1210.
[3] SCSL-03-01-T-1212.
[4] SCSL-03-01-T-1213.
[5] *Prosecutor v. Taylor*, SCSL-03-01-T-1186, Confidential, with Annexes A-C Defence Final Brief, 3 February 2011.
[6] *Prosecutor v. Taylor*, SCSL-03-01-T-1191, Decision on Late Filing on Defence Final Trial Brief, 7 February 2011.
[7] See CMS Notice of Deficient Filing in Confidential Annex B to the Motion.

Brief.[8] The Corrigendum included a table of contents at "Public Annex A" and a corrected version of the Defence Final Brief at "Confidential Annex B". Upon receipt of the Corrigendum filing, the Court Management Section ("CMS") handled it in accordance with the Defence instructions indicated on the Filing Cover Sheet[9] by posting "Public Annex A" to the CMS Records Website[10] that is accessible to the public and circulating it to the list of public recipients on the Court's database. CMS attached a "Certificate of Confidentiality" on "Confidential Annex B" and only circulated it to the recipients entitled to receive confidential filings.

2. On 14 February 2011, the Chief of Prosecution wrote an e-mail to the Court Management Section ("CMS"), with a copy to Lead Defence Counsel, indicating its concern that the names of seven protected Prosecution witnesses had been disclosed in Public Annex A and requested CMS to take immediate action to ensure there was no longer any public access to the pages of Public Annex A which identified the witnesses.[11] CMS replied on the same day to the parties, indicating that it had temporarily withdrawn "Public Annex A" from the intranet/public website and that the public no longer had access to the names of the protected witnesses.[12] On 17 February 2011, after the present Motion was filed, the Trial Chamber issued an interim order to CMS to re-classify Annex A of the Corrigendum as Confidential pending the Trial Chamber's decision on the Motion.[13]

II. SUBMISSIONS

Motion

3. The Prosecution submits that the table of contents in Public Annex A included a list of 17 Prosecution witnesses by pseudonym and name, seven of whom were subject to protective measures ordered by the Trial Chamber prohibiting the disclosure of identifying information.[14] It submits that the Defence's public filing of Public Annex A was not accidental and therefore gives reason to believe that lead Defence Counsel is in contempt of the Special Court by wilfully and knowingly, and/or

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[8] *Prosecutor v. Taylor*, SCSL-03-01-T-1194, Public with Annex A and Confidential Annex B Corrigendum to Defence Final Brief as Filed on 3 February 2011, 8 February 2011.

[9] The Filing Cover Sheet shows that only Annex B of the filing was to be treated confidentially and the reasons for confidentiality are that "Annex B contains information relating to protected witnesses".

[10] See http://www.sc-sl.org/scsl/Listcases.asp.

[11] Email from Brenda Hollis to Advera Kamuzora, Court Management Section, copied to Lead Defence Counsel and Senior Legal Officer, Trial Chamber II.

[12] Email from Advera Kamuzora, Court Management Section, to Brenda Hollis, Prosecutor, copied to Lead Defence Counsel and Senior Legal Officer, Trial Chamber II, 14 February 2011.

[13] *Prosecutor v. Taylor*, SCSL-03-01-T-1198, Order for Expedited Filing, 17 February 2011.

[14] Motion, para. 11. The identities and relevant protective measures orders in relation to all seven witnesses are set out at Confidential Annex A of the Motion.

with reckless indifference to Court-ordered protective measures, disclosed the identities of seven protected witnesses in violation of Rules 77(A)(ii) and/or 77(B).[15]

4. The Prosecution submits further that portions of the confidential Defence Final Brief and/or Confidential Annex B to the Corrigendum[16] were obtained by Professor William Schabas, the Director of the Irish Centre of for Human Rights at the National University of Ireland, Galway, and posted on the internet on 11 February 2011.[17] In the portion of the brief published on the blog citations were made to witnesses whose testimony was adduced partially or entirely in closed session, with no indication that their testimony had been in fact given in closed session.[18] The Prosecution argues that under Article 4(B) of the Practice Direction on Filing Documents Before the Special Court for Sierra Leone ("Practice Direction") only public documents may be disseminated publicly and confidential documents retain that classification until reviewed by the Trial Chamber. Thus, the dissemination of a portion of the Confidential Final Trial Brief and/or Confidential Annex B of the Corrigendum (to Prof. Schabas) further demonstrates reason to believe that lead Defence Counsel acted with, at minimum, reckless indifference to court orders, rules and directives.[19]

5. Furthermore, the Prosecution maintains that there are other indications that the dissemination of a confidential filing in the instant scenario was "not accidental, or at minimum, was done recklessly, demonstration lead Defence Counsel's disregard for the Court's authority and for the protective measures ordered."[20] The Prosecution observes that the portion of the defence Final Brief and/or Corrigendum posted on the internet was amended: the procedural history was deleted and the introduction section title was changed. Even as these amendments were made in order to prepare this version for public dissemination, no redactions were made of references and citations to closed session testimony. Therefore, this portion of the defence Final Brief was properly filed confidentially and should not have been disseminated without judicial re-classification.[21]

6. The Prosecution concludes that considering the purpose of the Corrigendum, the time lapse between the filing of the Defence Final Brief and the Corrigendum, and the on-going improper disclosure of protected information in violation of Court orders, as well as improper dissemination of

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[15] Motion, paras 1, 15-20, 24.
[16] The Prosecution submits in Footnote 17 that after comparing the filed and posted versions, it was unable to determine whether the portion "obtained" by Prof. Schabas was from the Defence Final Trial Brief filed confidentially on 3 February 2011 or from the Corrigendum filed on 8 February 2011.
[17] Motion, Confidential Annex D referring to the blog entitled "PhD Studies in Human Rights" and accompanying Table of links (http://humanrightsdoctorate.blogspot.com/2011/02/defense-brief-in-charles-taylor-trial.html).
[18] Motion, para.12
[19] Motion, para. 18.
[20] Motion, para. 19.
[21] Motion, para. 19

portions of confidential filings, there is reason to believe that lead Defence Counsel knowingly and wilfully and/or with reckless indifference for court-ordered protective measures, disclosed the identities of seven protected Prosecution witnesses in violation of Rules 77(A)(ii) and/or 77(B).[22]

7. In the alternative, the Prosecution submits that lead Defence Counsel committed an abuse of process punishable under Rule 46(C), arguing that "a finding of bad faith or specific intent is not required for imposition of sanctions" under Rule 46. The Prosecution argues that sanctions are justified when (as in the present case) Counsel's conduct constitutes "a flagrant disregard for (Court's) orders...contrary to the interests of justice;" or when Counsel's actions are "not coincidental, but...typical and strategic" or "demonstrate a deliberate breach or pattern of continuous lack of diligence." [23]

8. The Prosecution requests that the Trial Chamber summarily deal with this possible contempt of court, but that "in the interests of a fair and expeditious trial" should postpone a decision on this Motion until after the hearing is declared closed pursuant to Rule 87(A) or the trial is completed. Alternatively, the Prosecution requests that sanctions should be imposed upon lead Defence Counsel pursuant to Rule 46(C).[24]

9. The Prosecution further urgently requests that the Trial Chamber order the following interim measures:

(i) that Annex A of the Corrigendum is reclassified as Confidential;

(ii) that Lead Defence Counsel disclose to the Prosecution, Witness and Victims Section and Trial Chamber the names of all persons not currently employed as part of the Defence team who received a portion of either annex to the Corrigendum and/or the confidential Defence Final Brief;

(iii) that Lead Counsel retrieve all copies of Public Annex A or Confidential Annex B of the Corrigendum and/or the confidential Defence Final Trial Brief which it has disseminated to third parties and;

(iv) that all parties in receipt of the Defence Final Trial Brief and/or annexes to the Corrigendum, regardless of the source of the material, should be ordered to disregard the material, refrain from dissemination, and delete all relevant electronic copies.[25]

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[22] Motion, para. 20.
[23] Motion, paras.21-24
[24] Motion, paras 4, 21-23, 26.
[25] Motion, para. 2.

Response

10. The Defence "accepts and apologizes for the fact that the identities of the seven protected witnesses were inadvertently disclosed in the public Table of Contents in Public Annex A of the Corrigendum" and submits that it "appreciates that the Prosecution and the Trial Chamber have swiftly and appropriately taken corrective action to remedy this breach and to limit the further dissemination of this information."[26] The Defence submits that "viewed objectively, it is understandable given the considerable time pressure and work load the defence was under, that the Table of Contents was mistakenly filed as public with confidential information included."[27] However, the Defence disputes that this should lead to disciplinary action or contempt proceedings, as the disclosure was an "unintentional mistake". The Defence contends that the Prosecution has not shown reason to believe that the Defence knowingly and wilfully acted contemptuously and/or that through this breach, the Defence has abused the process in such a way that merits sanctions.[28]

11. With respect to the material provided to Professor Schabas, the Defence submits that there is no merit in the Prosecution complaint as this is work product by the Defence which does not compromise or disclose the identity of any protected witnesses.[29] It argues further that the Practice Direction is an internal guideline to the parties on the filing of Court documents before CMS that does not purport to restrict the ability of Counsel to disseminate non-confidential case-related work product or materials to the press or media outside the Special Court.[30] The Defence therefore submits that it would be proper for it to disseminate public aspects of its work product to Professor Schabas, regardless of whether or not that public information was also contained in a larger confidential document filed with the Court.[31] The Defence further submits that the instances where the closed session witnesses are cited cannot plausibly reveal the identity of these individuals, and that where references and citations to closed session testimony do not risk disclosure of the identity of witnesses, it is not necessary to make redactions or to indicate that the testimony was obtained in closed sessions.[32]

12. The Defence submits, with respect to the interim measures requested, that:

(i) it does not oppose the permanent reclassification of the Table of Contents as confidential and notes that the Trial Chamber has already adopted this interim measure;

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[26] Response, para. 3.
[27] Response, para. 8.
[28] Response, paras 3, 7-9.
[29] Response, para. 4.
[30] Response, para. 10.
[31] Response, para. 11
[32] Response, paras 13-16.

(ii) the Defence does not need to disclose the names of persons not currently employed as part of the Defence team who received a portion of either annex to the Corrigendum and/or the Confidential Defence Final Brief, as the Defence has not disseminated the Table of Contents to any third party and as there is nothing untoward about the dissemination of public portions of the brief as obtained by Schabas;

(iii) as above, the Defence submits there is nothing to retrieve;

(iv) as above, the Defence submits there is no need for an order to third parties to disregard the material and refrain from further dissemination and/or to delete all relevant electronic copies; and

(v) as above, the Defence submits that there is no need for an order to third parties to disregard the material and refrain from further dissemination and/or to delete all relevant electronic copies; and

(vi) the Defence is certain that the Registrar would take all reasonable steps to ensure that the Table of Contents is not further disseminated to the public as a normal part of her duty, and thus the requested measure is not necessary.[33]

Reply

13. The Prosecution submits in reply that it is implausible that the Defence inadvertently disclosed the protected witnesses' identity, and that this is one in a series of incidents that shows a pattern of conduct by lead Defence Counsel of knowingly, willingly, and/or with reckless indifference revealing information in violation of existing protective measures orders. The Prosecution further contends that this breach should not be viewed in isolation, but that in conjunction with the improper disclosure relating to the internet blog of Professor Schabas, this demonstrates that lead Defence Counsel's conduct "constitutes knowing, wilful and/or reckless indifference to court-ordered protective measures, is abusive, contrary to the interests of justice and warrants appropriate judicial response".[34]

14. The Prosecution notes that the Defence does not deny providing Professor Schabas with a portion of its Confidential Final Trial Brief and/or Confidential Annex B to the Corrigendum, and reiterates its argument that these filings retain their confidential status as they have not been reviewed or reclassified by the Trial Chamber, nor has the Defence filed either publicly.[35]

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[33] Response, para. 19.
[34] Reply, paras 3-4.
[35] Reply, paras 5-7.

III. DELIBERATIONS

Merits

15. The Trial Chamber by a Majority, Justice Sebutinde partially dissenting, agrees with the Prosecution submission that, in the interests of a fair and expeditious trial, a decision on whether a person may be in contempt of the Special Court should be postponed until the trial is completed. The Defence, in its Response, did not comment on, or specifically object to, this particular submission. The Trial Chamber points out, however, that when it does come to consider the merits of the Motion its options will not be limited to Rule 77(C)(i) ("deal with the matter summarily itself") as suggested by the Prosecution. The Trial Chamber therefore makes no determination at this time on the issues of whether lead Defence Counsel has engaged in contemptuous conduct in violation of Rule 77(A)(ii) or whether his conduct merits sanctions pursuant to Rule 46(C).

Interim Measures

16. The Trial Chamber holds that as the filing of Public Annex A reveals the names of protected witnesses, it should be permanently reclassified as confidential.

17. With respect to the remaining interim measures sought by the Prosecution, the Trial Chamber finds that the Prosecution has not substantiated its claim that the Defence has disseminated Annex A of the Corrigendum to the public or any former employees of the Defence team, and accepts the Defence contention that it has not disseminated the document to any third parties. This interim measure is therefore unnecessary. For the same reason, the Trial Chamber finds that the third interim measure sought by the Prosecution, that the Defence should retrieve all copies of Annex A that have been circulated to third parties, is also unnecessary.

18. With respect to the fourth interim measure requested by the Prosecution, that all parties in receipt of the Defence Final Brief and/or annexes to the Corrigendum be ordered to disregard the material, refrain from further dissemination, and delete all relevant copies, the Trial Chamber finds that this is unenforceable as the persons to whom the brief was disseminated are unknown. The Trial Chamber therefore dismisses this request. Nevertheless, in the circumstances it finds that it would be prudent to direct Court Management Section to notify all persons on the public dissemination list, and who therefore received Public Annex A, that the document has been re-classified as confidential and that those recipients should refrain from any onward distribution of the annex.

19. The Trial Chamber finds that, with respect to the extracts of the Defence Final Trial Brief that are linked on Professor Schabas' blog, no interim measures are necessary, as the material linked on the blog does not disclose the identity of any protected witnesses.

20. Finally, the Trial Chamber notes that even though the submissions of the Parties were filed confidentially, nothing in this decision identifies a protected witness. Therefore the decision is filed publicly.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

GRANTS THE MOTION in part;

DEFERS its decision on the merits of the Motion until the trial is completed; and

ORDERS the Court Management Section to permanently reclassify Annex A of the Corrigendum as Confidential;

FURTHER ORDERS that Court Management Section notify all persons on the dissemination list who received Public Annex A that it has been re-classified as confidential and that they should refrain from any onward distribution of the annex.

DISMISSES the remainder of the interim measures requested by the Prosecution.

Justice Julia Sebutinde appends a seperate Opinion.

Done at The Hague, The Netherlands, this 24th day of March 2011.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

PARTIALLY DISSENTING OPINION OF JUSTICE JULIA SEBUTINDE

Introduction

1. The Prosecution, in asking the Trial Chamber itself to summarily deal with the Motion pursuant to Rule 77(C)(i), also requested that any decision regarding initiation of such contempt proceedings if deemed necessary, is made "after either the hearing is declared closed in accordance with Rule 87(A) or the trial is completed."[1] It is clear from the Decision that the Majority has decided to postpone a decision on whether a person may be in contempt of the Special Court until the trial is completed.[2] In this regard I do agree with the Majority that it was appropriate, in the interests of a fair and expeditious trial, to postpone the decision on the merits of the Motion at least until after the hearing was declared closed. I do also agree with the position of the Majority on the interim measures sought by the Prosecution in the Motion. However, given the urgency with which the Trial Chamber has always enjoined the parties to promptly bring suspected contempt cases including this one, to its attention,[3] the seriousness of the allegations levelled against lead Defence Counsel,[4] and the Trial Chamber's overriding duty to dispose of the matter expeditiously,[5] I am of the view that it is appropriate to expeditiously deal with the merits of the Motion at this stage after the hearing has been declared closed,[6] rather than "at the end of the trial" which, in any event, may take a few weeks or months, thus this separate Opinion in which I examine the merits of the Motion.

2. Although the Special Court has hitherto handled many allegations of contempt pursuant to Rule 77, it is note-worthy that this is the first time in its history that a Trial Chamber has been asked to summarily handle a contempt proceeding arising out of its own proceedings, rather than referring the investigation to independent Counsel or alternatively, designating another judge who has had no pre-existing involvement in the proceedings from which the contempt arose, to handle the contempt

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[1] Motion, para. 1.

[2] See Majority Decision, para. 15.

[3] *Prosecutor v. Taylor*, SCSL-03-01-600, Confidential Decision on Prosecution Motions 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* 11 November 2010 Contempt Decision, p. 20. See also Trial Chamber's Order for Expedited Filings: SCSL-03-01-T-1210 17 February 2011.

[4] Under Rule 77(G) the maximum penalty that may be imposed on a person found guilty of contempt of the Special Court, by the Trial Chamber, is a term of imprisonment not exceeding six months, or a fine not exceeding 2 million Leones or both. In addition, under Rule 77(I) the Chamber making the finding of guilt against Counsel may determine that Counsel is no longer eligible to appear before the Special Court or that such conduct amounts to misconduct of Counsel under Rule 46, or both.

[5] Rule 77(C)(i) enjoins the Trial Chamber to deal with the matter "summarily". See also the *Prosecutor v. Brima et. al.* SCSL-04-16-AR77, Separate and Concurring Opinion of Justice Geoffrey Robinson on Joint Defence Appeal Against the decision on the report of the independent Counsel, Pursuant to Rule 77C)(iii) and 77(D), 17 August 2005, at para. 8. See also *Prosecutor v. Brima, Kamara and Kanu*, 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 Appeals Decision"), para. 2.

[6] The hearing in this trial was declared closed on Friday, 11 March 2011.

trial. Thus there is little by way of precedent from the jurisprudence of the Special Court, from which the Trial Chamber can draw guidance as to how to proceed.

3. Whilst a decision as to how to proceed under Rule 77(C) is essentially a discretionary one, summary trial of contempt by a Chamber pursuant to Rule 77(C)(i) is more appropriate where the matter is not overly serious and can be determined speedily and with minimum disruption[7] or where the contempt is, so to speak, "in the face of the court." However, it may be inappropriate for the Trial Chamber to summarily deal with contempt where the alleged contempt is serious or requires Counsel to give evidence or where the judges of the Trial Chamber feel personally involved.[8] Indeed, Justice Emmanuel Ayoola in explaining the options where the Trial Chamber chooses to "deal with the matter summarily itself" under Rule 77 (C) (i) opined:

> When the summary option is chosen, the Judge or Trial Chamber acts, as it is usually put, "*ex mero motu.*" The Judge or Trial Chamber does not need, and is not expected, to give the alleged contemnor any formal notice of his / its intention to initiate summary contempt proceedings at that stage and to ask him to address whether or not such should be initiated. Since the summary procedure is reserved for cases of contempt in the face of the court, the Judge or Trial Chamber deals, there and then, with the alleged contempt himself / itself and satisfies the demands of natural justice by stating clearly to the alleged contemnor the specific charge against him, calling upon him and giving him an opportunity to "show cause" why he should not be committed for contempt.[9]

4. Although the Prosecution does not specify in the Motion why it prefers that the Trial Chamber summarily deal with the matter rather than appoint independent Counsel to investigate the alleged contempt, it is apparent from the facts that the conduct complained of arises from filings before the Court. As it were, the filings "speak for themselves" and do not require additional investigation. By requesting the Trial Chamber to "summarily handle the matter itself" pursuant to Rule 77(C)(i), the Prosecution is in effect requesting the Trial Chamber both to investigate as well as summarily try the alleged contempt. I also note that the Defence does not object to the Trial Chamber summarily handling the matter.

The ambit of contempt proceedings

5. Rule 77 sets out the law and procedure for dealing with contempt of the Special Court. The relevant parts of Rule 77 provide:

> **Rule 77: Contempt of the Special Court**

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[7] AFRC Appeals Decision, para. 18.
[8] AFRC Appeals Decision, para. 18.
[9] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-AR77-315, Separate and Concurring Opinion of Hon. Justice Emmanuel Ayoola on the Decision on Appeal against the 10 March 2005 Oral Ruling on Allegations of Contempt, 23 June 2005, para. 23.

(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and wilfully 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;

(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) [...]

(E) The rules of procedure and evidence in Parts IV to VIII shall apply, as appropriate, to proceedings under this Rule.

(F) [...]

(G) The maximum penalty that may be imposed on a person found to be in contempt of the Special Court pursuant to sub-Rule (C)(i) shall be a term of imprisonment not exceeding six months, or a fine not exceeding 2 million Leones or both, and the maximum penalty pursuant to sub-Rule (C)(iii) shall be a term of imprisonment for seven years or a fine not exceeding 2 million Leones, or both.

(H) [...]

(I) If a counsel is found guilty of contempt of the Special Court pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to appear before the Special Court or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

6. Rather than define the offence of "contempt" or "offences against the administration of justice," Rule 77 instead lists examples of contemptuous conduct proscribed as offences within the jurisdiction of the Special Court. The list is not exhaustive. In interpreting the powers of the Court under Rule 77 (A), the Appeals Chamber of the Special Court held:

> These powers are not vouchsafed to bolster the self-regard of judges, officials or counsel, who must in the discharge of their duties put up with criticism, however wrong-headed, of their actions. The power to investigate and punish what is generically (and somewhat misleadingly) referred to as "contempt of court" *can only be used against those whose actions are calculated to obstruct*

the court's task of getting at the truth - in the terms laid down by Rule 77(A), any person who knowingly and wilfully interferes with the administration of justice.[10] [emphasis is mine]

7. It follows from the Appeals Chamber holding that merely "inadvertence" or even "negligence"[11] that is not motivated or accompanied by a "knowing and wilful interfere with the administration of justice" does not qualify as "contempt of court" under the Rules. Put differently, "[n]ot every example of misconduct in the investigation or conduct of a case amounts to contempt. Accordingly, where the Prosecutor alleges contempt, it is not sufficient merely to relate instances of misconduct or inappropriate behaviour. The Prosecutor must also detail why the alleged conduct would amount to contempt within the [...] Rules".[12] Thus, "before contempt proceedings are initiated, the alleged contempt should attain a sufficient level of seriousness. Contempt proceedings, particularly against Counsel should not be lightly undertaken. 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, is accepted as trust, unless there is good reason to doubt his *bona fides*."[13]

The burden and standard of proof under Rule 77 (C):

8. Rule 77 (C) enshrines two separate standards of proof. The first standard to be applied by the Trial Chamber or Judge as a preliminary enquiry into an allegation of contempt, is one of "*reason to believe*" that a person may be in contempt.[14] The second standard, namely, one to be applied by the Trial Chamber dealing with the matter by way of a summary trial, is one of "*proof beyond reasonable doubt*" that a person did commit contempt.[15] At each stage of the contempt proceedings, the burden is upon the party alleging the contempt, in this case the Prosecution, to prove the offence to the required standard.

9. In the present case, the Trial Chamber is required on the basis of the Prosecution evidence before it, to make a preliminary determination under Rule 77 (C) as to whether or not *there is reason to believe* that lead Defence Counsel may have committed contempt against the Special Court, based

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[10]AFRC Appeals Decision para. 2

[11] *Prosecutor v. Aleksovski*, Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, para. 45.

[12] Jones and Powles, International Criminal Practice, 3rd Edition, 2004, page 327, para. 4.2.601.

[13] *Prosecutor v. Aleksovski*, Judgement on Appeal by Anto Nobilo against finding of Contempt, Separate Opinion of Judge Patrick Robinson, 30 May 2001, para. 2.

[14]AFRC Appeals Decision. para. 17.

[15] Rule 87 read in conjunction with Rule 77(E) requires that "a finding of guilty may be reached only when a majority of the Court is satisfied that guilt has been proved beyond reasonable doubt". See also the Judgement of Justice Pierre Boutet in *Independent Counsel v. Brima Samura*, SCSL-2005-01, Judgement in Contempt Proceedings, 26 October 2005, para. 28. It could be argued that there is a third standard applied by independent Counsel under Rule 77 (C) (iii), when determining whether or not "there are sufficient grounds for instigating contempt proceedings." However, this Opinion does not discuss this third standard.

on the evidence submitted by the Prosecution. Only where the Prosecution evidence has met that standard, should the Trial Chamber proceed to summarily try the alleged contemnor pursuant to Rule77 (C) (i). At trial, the Trial Chamber would have to be satisfied *beyond reasonable doubt* that lead Defence Counsel did in fact commit contempt, before finding him guilty as charged. I propose to examine the merits of the Motion through these two stages.

The Prosecution allegations:

10. The Prosecution posits that *there is reason to believe*:

(i) That the public filing of "Public Annex A" to the Corrigendum in which the names of seven protected Prosecution witnesses were revealed in violation of a protective order of the Court was not accidental, but rather was done "wilfully and knowingly, and/or with reckless indifference to court orders" on the part of lead Defence Counsel who authorised and/or signed the filing, in violation of Rules 77(A)(ii) and/or 77(B);[16] and

(ii) That the dissemination to members of the public, in particular Professor William Schabas, of portions of the "confidential Defence Final Trial Brief and/or Confidential Annex B to the Corrigendum" referring to closed-session testimony was not accidental, but rather was done with "at a minimum reckless indifference to court orders, rules and directives, if not knowingly and wilfully" on the part of lead Defence Counsel who authorised and/or signed the filing, in violation of Rules 77(A)(ii) and/or 77(B).[17]

Merits of the Motion:

Publication of Public Annex A:

11. Public Annex A is an index or Table of contents to the Corrigendum. It consists of six pages, the last of which has a part titled "Credibility Analysis of Prosecution witnesses". It is under this part that the names and pseudonyms of several witnesses, seven of whom are protected by orders of the Court, are listed. It not unusual for the parties to file confidential copies of their respective Final Trial Briefs and to file publicly only the index or table of contents of the Briefs.[18] In doing so however, a party is expected to exercise due diligence and care to ensure that no confidential material is included in the public filing. In this case, the Trial Chamber has already established that Public Annex A to the Corrigendum does disclose the names of seven witnesses who are subject to

[16] Motion, paras 1, 15-20, 24.
[17] Motion, para. 18.
[18] See e.g. *Prosecutor v. Taylor*, SCSL-03-01-T-1158, Public with redactions Prosecution final trial briefs, sections I-I.J, 17 January 2011.

protective measures ordered by the Special Court and has accordingly ordered CMS to reclassify the document as "confidential".[19]

12. The question is whether the publication of the names and pseudonyms of the seven protected witnesses amounts to "*a knowing and wilful interference in the administration of justice*" on the part of Mr. Griffiths, lead Defence Counsel, within the meaning of Rule 77(A) (ii) and/or 77(B) as alleged by the Prosecution, or to use the language of the Appeals Chamber, such publication was "*calculated to obstruct the court's task of getting at the truth.*"

13. In its Response, the Defence "accepts and apologizes for the fact that the identities of the seven protected witnesses were inadvertently disclosed in the public Table of Contents in Public Annex A of the Corrigendum" and submits that it "appreciates that the Prosecution and the Trial Chamber have swiftly and appropriately taken corrective action to remedy this breach and to limit the further dissemination of this information."[20] The Defence submits that "viewed objectively, it is understandable given the considerable time pressure and work load the Defence was under, that the Table of Contents was mistakenly filed as public with confidential information included."[21] The Defence describes the disclosure as an "unintentional mistake" that does not warrant contempt or disciplinary proceedings.[22]

14. It would appear from the history of this matter that the first time that the Defence's attention was drawn to this anomaly was on 14 February 2011 upon receiving a copy of Ms. Hollis' e-mail to CMS articulating the problem and asking CMS to withdraw Public Annex A from the public domain.[23] Thereafter, CMS in fact temporarily removed Public Annex A from the public domain of the Court's database, pending an order of the Trial Chamber. The Trial Chamber's order reclassifying the document as "confidential" was issued on 17 February 2011 at the Prosecution's request.[24]

15. There is no doubt that the publication of the names of protected witnesses is a serious violation of the Trial Chamber's orders that has the potential to endanger the security of the concerned witnesses and/or their families. In this case however, the Defence's conduct or position in *(i)* acknowledging the erroneous disclosure, *(ii)* apologising for the error, *(iii)* appreciating "the swift and corrective action appropriately taken by the Prosecution and Trial Chamber to remedy this breach

[19] *Prosecutor v. Taylor*, SCSL-03-01-1210, Order for Expedited Filing, 17 February 2011. See also para. 16 of this Decision.
[20] Response, para. 3.
[21] Response, para. 8.
[22] Response, paras 3, 7-9.
[23] Motion, Confidential Annex C.
[24] *Prosecutor v. Taylor*, SCSL-03-01-1210, Order for Expedited Filing, 17 February 2011.

and to limit the further dissemination of this information," in my view, falls short of "*a knowing and wilful interference in the administration of justice,*" nor can it be described as conduct "*calculated to obstruct the court's task of getting at the truth.*"

16. The Prosecution also describes the disclosure by the Defence as "*reckless indifference to an order of the Court*". This is not a phrase used in Rule 77 and is therefore not a constitutive element of the offence of contempt under that rule. However, the phrase has sometimes been used by courts to impute "knowledge" on the part of a contemnor who would otherwise feign ignorance of a pre-existing court order.[25] In this case however, it is not necessary to resort to the phrase as the Defence does not deny knowledge of existing protective measures ordered by the Trial Chamber or the fact that the disclosure was erroneous.

17. The Prosecution further submits that the breach "is only the latest in a series of breaches engaged in by lead Defence Counsel in publicly disclosing identifying information relating to protected Prosecution witnesses."[26] However, after reviewing the transcript references cited by the Prosecution in support of this contention, there is no indication in those other instances that lead Defence Counsel acted intentionally. In one of the examples cited by the Prosecution[27] no identifying information at all was disclosed and the Trial Chamber in that instance allowed Lead Defence Counsel to continue publicly reading from closed session transcripts. In another example cited[28] lead Defence Counsel inadvertently spoke the name of a protected witness and immediately apologised for the error. This was followed by appropriate redaction of the transcript. It must be pointed out that throughout the hearing in this trial, Counsel on both sides as well as witnesses have been prone to inadvertently disclosing names of protected witnesses but this has been routinely remedied by appropriate redactions of the Transcript ordered by the Trial Chamber and appropriate editing of the video broadcast of the proceedings. It would be ludicrous to treat every such disclosure as contemptuous.

18. In view of the above, I find in relation to the publication of Public Annex A, that the Prosecution has not demonstrated "*reason to believe*" that lead Defence Counsel may have committed contempt, in violation of Rules 77(A)(ii) and/or 77(B). Put differently, I find no reason to believe that the publication of Public Annex A by the Defence was "*calculated to obstruct the court's task of getting at the truth.*"

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[25] *Prosecutor v. Aleksovski*, Judgement on Appeal by Anto Nobilo against finding of Contempt, 30 May 2001, para. 54
[26] Motion, para. 16 and footnote 27.
[27] Transcript 23 September 2009, pp. 29542-29543.
[28] Transcript 10 January 2009, pp. 30118-30119.

Publication of portions of Confidential Annex B to the Corrigendum:

19. As stated in the Introduction, the Defence Final Brief was contained in "Confidential Annex B" to the Corrigendum filed with CMS on 8 February 2011 and was filed confidentially. The Prosecution posits that the only way Professor Schabas could have obtained portions of the Defence Final Brief that later appeared on his blog, was if the Defence disseminated it to him.[29] The Prosecution submits that although only 50 pages of the Defence Final Brief were published on the Schabas blog, these pages "contain unidentified references to witness testimony adduced entirely in closed session."[30] The Prosecution does not allege that this document disclosed the identity of any protected witnesses; only that the Defence disseminated a document that was filed "confidentially".

20. The Prosecution seems unsure whether the 50 pages published on the Schabas blog were in fact taken directly out of the Defence Final Brief filed on 3 February 2011 or "Confidential Annex B to the Corrigendum" filed on 8 February 2011. This is because the 50 pages contain structural differences or "amendments" not found in the Defence's said filings.[31] The question is whether the dissemination of these 50 pages to Professor William Schabas amounts to "*a knowing and wilful interference in the administration of justice*" on the part of Mr. Griffiths, lead Defence Counsel, within the meaning of Rule 77(A) (ii) and/or 77(B) as alleged by the Prosecution, or to use the language of the Appeals Chamber, such dissemination was "*calculated to obstruct the court's task of getting at the truth.*" From the information provided by the Prosecution, it is not even clear who disseminated the portions of the Defence Final Trial Brief to Professor Schabas.

21. The Defence, while not denying the dissemination of the 50 pages to Professor Schabas, responds that the 50 pages were in fact "*work product* by the Defence which does not compromise or disclose the identity of any protected witnesses."[32] The Defence submits that:

> The public introduction to the Defence Final Brief as obtained by Schabas is clearly a different document from either of the confidential and complete versions of the Defence Final Brief as filed by the Defence: there is no filing cover page as required by CMS; there is no procedural history; there is no in-depth evidentiary analysis or credibility analysis as contained in the Defence Final Brief.[33]

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[29] Motion, para. 17.
[30] Motion, para 19.
[31] Motion, para. 19 where the Prosecution notes that "the procedural history was deleted and the introduction section title was changed."
[32] Response, para. 4.
[33] Response, para. 12.

22. The first issue for me to determine is the exact nature of the document obtained and later published by Professor Schabas. In an excerpt from the Schabas blog entitled "Defence Brief in Charles Taylor Trial", dated Friday 11 February 2011, Professor William Schabas wrote:

> The prosecution brief is already on the court's website for all to read. I can't post an un-redacted version of the whole defence brief because it contains confidential material. *But I have obtained, for readers of the blog, the first portion of the defence brief – about 50 pages of it.* I know that judges and their legal assistants occasionally look at this blog. Perhaps they can read the defence brief here, even if they do not officially admit it into the record. Surely they can only benefit in their search for the truth, from consideration of the submissions of the defence. [emphasis is mine]

23. From the above excerpt it is clear that Prof. Schabas obtained only 50 pages and not the whole Defence Brief. The Prosecution contention that he received the whole Defence Brief has not been proved and is based on pure conjecture and the Prosecution's interpretation of the above statement. It should be remembered that Professor Schabas is an accomplished and experienced jurist who would know that the parties' Final Trial Briefs are bound to contain confidential material. He does not need to be in possession of one, to make such a statement.

24. Secondly, a closer examination of the 50 pages posted on the Schabas blog shows that although there are references to testimony that was adduced during closed testimony, none of it is capable of disclosing the identity of a protected witness. The fact that the closed-session testimony is not referred to as such in these 50 pages is not harmful and only helps to camouflage the fact that it was given by protected witnesses. In view of the above, I find in relation to the dissemination of the 50 pages, that the Prosecution has not demonstrated "*reason to believe*" that lead Defence Counsel may have committed contempt, in violation of Rules 77(A)(ii) and/or 77(B) or indeed that such dissemination was "*calculated to obstruct the court's task of getting at the truth.*"

Possible misconduct by lead Defence Counsel under Rule 46 (C)?

25. Article 4(B) of the Practice Direction simply provides:

> Where a Party, State, organisation or person seeks to file all or part of a document on a confidential basis, the party shall mark the document as "CONFIDENTIAL" and indicate, on the relevant Court Management section form, the reasons for the confidentiality. The judge of Chamber shall thereafter review the document and determine whether confidentiality is necessary. Documents that are not filed confidentially may be used in press releases and be posted on the official website of the Special Court.

26. The above language, while not expressly forbidding the publication of documents filed "confidentially," impliedly prohibits the use of such documents in press releases or posting thereof on

the official Court website. This indirect prohibition is however, not accompanied by any sanctions in the event of a breach. Furthermore, Article 13(A) of the Code of Conduct for Counsel[34] prohibits Counsel from "publishing or assisting in the publication of material concerning any current proceedings which is false or which discloses any confidential information." A breach of this provision can be sanctioned as misconduct under Article 27 of the Code of Conduct.

27. The Prosecution's alternative allegation that the dissemination of these 50 pages to Prof. Schabas is a contravention of Article 4(B) of the Practice Direction on Filing Documents before the Special Court that amounts to an abuse of process punishable under Rule 46(C), is based on the presumption that these pages were in fact part of a confidential filing rather than work-product, a presumption rebutted by the Defence. It will be recalled that as at 11 February 2011 when these pages were published on the Schabas blog, neither the Defence Final Brief filed on 3 February 2011, nor "Confidential Annex B to the Corrigendum" filed on 8 February 2011 were officially admitted by the Trial Chamber as part of the court record. The Prosecution, on the other hand, had filed both a public and confidential version of its Final Brief. It is therefore not inconceivable that scholars and jurists like Professor Schabas would be interested in obtaining and publishing for their readership some kind of "brief" reflecting the Defence position at the end of the trial.

28. The Defence contention that the 50 pages were in fact "work product" and are substantially different from the official filings, has not been disproved or contradicted by the Prosecution. Further, it cannot be determined from the information provided by the Prosecution whether Professor Schabas received portions of the Defence Final Trial Brief before or after the document was filed by the Defence as "confidential".

29. In the premises, I find no merit in the Prosecution's allegations of contempt or misconduct on the part of lead defence Counsel, and would dismiss the Motion in its entirety, save for the interim measures granted by the Trial Chamber above.

Done at The Hague, The Netherlands, this 24th day of March 2011.

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[34] Code of Professional Conduct for Counsel with the Rights of Audience before the Special Court for Sierra Leone, Adopted 14 May 2005, as amended 13 May 2010, Article 13(A).