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SCSL-12-01-T
(466-491)

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SPECIAL COURT FOR SIERRA LEONE

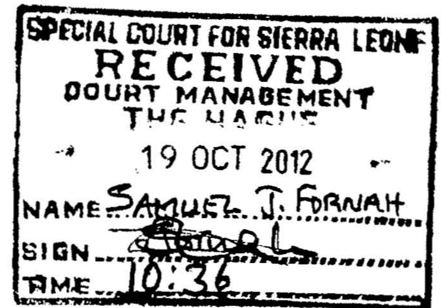
TRIAL CHAMBER II

Before: Justice Teresa Doherty, Single Judge

Binta Mansaray

Case No.: SCSL–12-01-T

Date: 19 October 2012



In the Matter of Contempt Proceedings Arising from the Case of
The Prosecutor v. Charles Ghankay Taylor

PUBLIC

JUDGEMENT IN CONTEMPT PROCEEDINGS

Office of the Prosecutor:
Brenda J. Hollis
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Counsel for the Accused:
Courtenay Griffiths, Q.C.
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Office of the Principal Defender:
Claire Carlton-Hanciles

I, Justice Teresa Doherty, Single Judge 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 Urgent Interim Measures," filed on 17 February 2011 ("Motion");[1]

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");[2]

NOTING 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 ("Reply");[3]

RECALLING the "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," filed on 24 March 2011;[4]

RECALLING the "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," filed on 19 June 2012 ("Decision");[5]

NOTING the "Confidential with Confidential Annexes Additional Evidence and Submissions Relevant to the Single Judge's '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' of 19 June 2012," filed on 12 July 2012 ("Prosecution's Supplemental Submissions");[6]

NOTING the "Defence Counsel's Response to the Prosecution's Confidential Filing of Additional Evidence and Submissions Relevant to the Single Judge's Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the

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[1] SCSL-03-01-T-1208.
[2] SCSL-03-01-T-1212.
[3] SCSL-03-01-T-1213.
[4] SCSL-03-01-T-1235.
[5] SCSL-03-01-T-1294.
[6] SCSL-12-01-T-001.

Special Court for Sierra Leone and for Urgent Interim Measures of 19 June 2012,'" filed on 22 August 2012 ("Defence Supplemental Submissions");[7]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("the Statute"), Rules 46, 73, 77 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules") and the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone ("the Code of Conduct");

HEREBY decide as follows based solely on the written submissions pursuant to Rule 73(A):

BACKGROUND AND PROCEDURAL HISTORY

1. In its motion filed on 17 February 2011, the Prosecution requested that the Trial Chamber, in accordance with Rule 77(C)(i), summarily deal with a contempt of the Special Court for Sierra Leone and submitted that there is "reason to believe" that Mr. Courtney Griffiths Q.C., Lead Defence Counsel in *The Prosecutor v. Charles Ghankay Taylor* case, ("Defendant Counsel") knowingly and wilfully and/or with reckless indifference, disclosed the identities of seven protected Prosecution witnesses in Public Annex A of the Corrigendum to the Defence Final Trial Brief as filed on 3 February 2011, and as re-filed on 8 February 2011[8].
2. The Prosecution submitted that Public Annex A was not filed publicly by accident, and therefore there was reason to believe that Defendant Counsel was in contempt of the Special Court by wilfully and knowingly and/or by reckless indifference disclosing the identities of the seven protected witnesses in violation of Rule 77(A)(ii) and/or 77(B) of the Rules[9].
3. In the alternative, the Prosecution submitted that Defendant Counsel committed an abuse of process punishable under Rule 46(C) and has repeatedly disclosed identifying information of

[7] SCSL-12-01-T-004.
[8] Motion SCSL-03-01-T-1208 para 1
[9] Motion SCSL-03-01-T-1208 paras 15-20, 24

Prosecution protected witnesses. They argue that a finding of bad faith or specific intent is not required for imposition of sanctions under Rule 46[10].

4. The Prosecution requested that the Trial Chamber summarily deal with the possible contempt of court but that "in the interests of a fair and expeditious trial," it should postpone a decision until either after the hearing is declared closed or the trial completed[11].
5. In their Response, the Defence emphasised "that it did not file the Table of Contents with the intent of knowingly and wilfully and/or with reckless indifference" disclosing the identity of protected witnesses and "accepted and apologised" for the fact that the identities of the seven protected witnesses were inadvertently disclosed in the table of contents of Public Annex A. The Defence made further submissions concerning material provided by Professor William Schabas and disputed that the disclosure, which they described as "an unintentional mistake" should lead to disciplinary action or contempt proceedings.[12]
6. The original submissions as recited in the Decision of 24 March 2011 are annexed hereto at Annexes A and B.
7. On 19 June 2012, the Single Judge found that "the undisputed facts ... show that the names of seven protected witnesses were disclosed in a publicly filed document annexed to the Defence Final Trial Brief" and that this disclosure is sufficient to constitute "reason to believe" that Defendant Counsel disclosed information in violation of an order of a Chamber, and accordingly that he may be in contempt.[13]
8. At a status conference held on 6 July 2012, both parties were ordered, by consent, to file supplemental submissions; the Prosecutor did so on the 12 July 2012 and Defendant Counsel

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[10] Motion SCSL-03-01-T-1208 paras 21-23
[11] Motion SCSL-03-01-T-1208 para 26
[12] Response SCSL-03-01-T-1212. Paras 7, 3,10-11
[13] SCSL-03-01-T-1294, paras 9-10.

on 22 August 2012 but without prejudice to h is object ion to the jurisdiction fi led the previous day.[14].

SUPPLEMENTAL SUBMISSIONS OF THE PARTIES

Supplemental Submissions of the Prosecution

9. In its Supplemental Submissions, the Prosecution submits that Defendant Counsel is in contempt of the Special Court for violation of Rule 77(A)(ii) and/or of misconduct pursuant to the provisions of Rule 46. The Prosecution requests that Defendant Counsel therefore be punished pursuant to Rule 77(G), and sanctioned pursuant to Rule 46.[15] The Prosecution notes that it views its Supplemental Submissions as final written submissions on a matter which has been determined to require a hearing to decide if the evidence proves beyond a reasonable doubt that Defendant Counsel is guilty of contempt or misconduct.[16]
10. The Prosecution incorporates by reference its Motion, filed on 17 February 2011, and Reply, filed on 22 February 2011, in its Supplemental Submissions.[17] The Prosecution also incorporates by reference the jurisprudence relating to *mens rea* set out in its Motion, and the additional authorities listed in Confidential Annexes A and B attached to its Supplemental Submissions.[18]
11. The Prosecution submits that jurisprudence establishes that the *mens rea* requirement for a violation of Rule 77(A)(ii) is satisfied by proof of:

    (i) actual knowledge that the disclosure is in violation of a Chamber's order; or
    (ii) wilful blindness to the existence of the order; or

[14] SCSL-12-01-T-003 "Defence Challenge to Jurisdiction"
[15] SCSL-12-01-T-001, para. 3.
[16] SCSL-12-01-T-001, para. 2.
[17] SCSL-12-01-T-001, para. 1, citing SCSL-03-01-T-1208; SCSL-03-01-T-1213.
[18] SCSL-12-01-T-001, para. 4.

(iii) reckless indifference to the existence of the order.[19]

12. Hence, the Prosecution submits, "proof establishing a knowing violation of an order of a Chamber is sufficient for a finding of contempt of the Special Court."[20] There is no additional requirement to prove specific intent to interfere with the administration of justice, as this is a consequence of the knowing violation of an order of a Chamber.[21] The Prosecution further submits that "proof of actual knowledge can be inferred from a variety of circumstances," which include the receipt of orders regarding the confidentiality of information, and markings on the information indicating its confidentiality and information disclosed in *inter partes* documents.[22]

13. The Prosecution also notes that the Special Court has held that Defence Counsel is meant to serve not only the interest of his client, but also those of the Court and the overall interests of justice.[23] The Code of Conduct is consistent with this jurisprudence, and its provisions are relevant to proof of the requisite *mens rea*. As Article 8(A) states counsel has an "overriding duty to act in the interests of justice." It requires Counsel to "preserve confidentiality, and not disclose information which may jeopardise the privacy, safety and security of victims and witnesses," in particular protected witnesses. It also requires Counsel to "respect the confidentiality of all information which has been entrusted to him in connection with his representation of a client." Further, the Code requires Counsel to act with competence, honesty, skill and professionalism" in conducting his case and "integrity to ensure his actions do not bring the administration of justice into disrepute."[24]

[19] SCSL-12-01-T-001, para. 4.
[20] SCSL-12-01-T-001, para. 5.
[21] SCSL-12-01-T-001, paras 6-7.
[22] SCSL-12-01-T-001, para. 5.
[23] SCSL-12-01-T-001, para. 8, citing *The Prosecutor v. Norman et al.*, SCSL-04-14-T-125, Decision on the Application of Sam Hinga Norman for Self-representation under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004.
[24] SCSL-12-01-T-001, paras 8-11, citing Articles 5(i) and (iii), 8(A), 10(A)(i) and 17(A) of the Code of Conduct.

14. In relation to the instant case, the Prosecution incorporates by reference the evidence set forth in its Motion and refers to the protective orders accorded to TF1-375, TF1-371, TF1-516, TF1-539, TF1-567, TF1-579 and TF1-585 whose identities were revealed in Public Annex A.[25] The Prosecution presents additional evidence in Confidential Annex C, attached to its Supplemental Submissions, stating that all of this evidence establishes the requisite *mens rea* for contempt under Rules 77(A)(ii) and 46.[26] It cites the incidents in which Defendant Counsel revealed the identities of these witnesses as evidence that he had the requisite *mens rea* for contempt in violation of Rule 77(A)(ii) and Rule 46:

- On 24 January 2008, at the start of TF1-371's testimony, Defendant Counsel "strenuously objected" to the applicability of his protective measures[27]
- On 12 March 2008 in open session, Mr. Griffiths revealed the identity of Witness TF1-371 by stating his name and was warned. Mr. Griffiths responded that it was "a name mentioned by the witness himself during the course of the proceedings ...."[28]
- On the same date in private session, the Prosecution submitted this was, at best, a "negligent violation of protective measures," and requested that the Chamber warn Defendant Counsel not to violate and to be aware of and appreciate protective measure orders. The Presiding Judge accepted the Prosecution's concerns.[29]
- On 29 May 2009, the Defence filed their witness summaries and again breached the protective measures in relation to TF1-371, by revealing his name and stating that he testified in another case. The Trial Chamber responded by *proprio motu*

[25] SCSL-12-01-T-001, paras 13 and 14.
[26] SCSL-12-01-T-001, para. 12.
[27] SCSL-12-01-T-001, para. 15.
[28] SCSL-12-01-T-001, para. 17.
[29] SCSL-12-01-T-001, para. 18.

issuing an *inter partes* order to redact the filing. The Chamber also reminded the Defence to "ensure the security of victims and witnesses by complying with any protective measures ordered by the Special Court" and reminded the Defence to comply with protective measures orders[30]

- On 8 June 2009, the Defence filed its exhibit list signed by Defendant Counsel which showed TF1-371's name and prior communications. The Chamber again *proprio motu* issued an *inter partes* order to redact and reminded the Defence once again, to comply with any protective measures orders.[31]
- On 26 June 2009, the Defence filed an additional exhibit list which violated court-ordered protective measure. It was subsequently redacted.[32]
- On 23 September 2009, Defendant Counsel revealed identifying information from TF1-371's closed session testimony in open session, a redaction was ordered and counsel reminded of protective measures.[33]
- On 1 October 2009 Defendant Counsel disclosed the name of TF1-585, a redaction was ordered and counsel reminded of protective measures.[34]
- On 10 December 2009, Defence filed a notice of appeal signed by Defendant Counsel which revealed information adduced in closed session by TF1-375, in violation of a court-ordered protective measure. The Appeals Chamber granted the Prosecution request in part on 10 January 2010, ordering the document to be re-filed confidentially.[35]
- On 8 February 2011 the Defence revealed the identity of Witnesses TF1-375, TF1-371, TF1-516, TF1-585, TF1-539, TF1-567 and TF1-579 in Public Annex A of

[30] SCSL-12-01-T-001, paras 20-21.
[31] SCSL-12-01-T-001, paras 22-23.
[32] SCSL-12-01-T-001, paras 24-25.
[33] SCSL-12-01-T-001, para. 26.
[34] SCSL-12-01-T-001, para. 27.
[35] SCSL-12-01-T-001, paras 28-29.

their Defence Final Trial Brief Corrigendum, despite being reminded of their status as protected witnesses at the start of their testimony or via *inter partes* orders for protective measures.[36]

15. The Prosecution submits that the evidence referred to in its Motion in conjunction with the evidence presented in this Supplemental Submission, *supra*, satisfy the *mens rea* requirement for a violation of Rule 77(A)(ii): it proves that Defendant Counsel possessed actual knowledge of the court-ordered protective measures that he violated, or that he was wilfully blind or recklessly indifferent to their existence.[37] In addition, the Defence statement that they had corrected "a few substantive mistakes" before filing their Defence Final Trial Brief Corrigendum, illustrates that they had the requisite *mens rea.*[38]
16. The Prosecution states that the violations on 8 February 2011, relating to the Defence Final Trial Brief corrigendum, "were the latest in a pattern of such violations," and were committed despite notice of court orders, clearly marked "closed" and "private session" transcripts, multiple reminders by the Court, and court orders to correct the violations. Further, Defendant Counsel objected to protective measures provided to TF1-371, and subsequently violated these measures on five occasions.[39]
17. The Prosecution states that Defendant Counsel violated the protective measures in Court filings that he himself signed, and states that the Code of Conduct requires lead counsel to review the contents of all pleadings or court filings that have his signature, even if drafted by other team members. The Prosecution submits that it "strains credulity and requires one to suspend belief" that Defendant Counsel, an experienced lead counsel, would not look at the contents of Annex A.

[36] SCSL-12-01-T-001, paras 13-14, 19, 30.
[37] SCSL-12-01-T-001, para. 32.
[38] SCSL-12-01-T-001, para. 33.
[39] SCSL-12-01-T-001, para. 34, citing *Margetic Judgement*, paras 53, 56; *In the Case of Florence Hartmann*, IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, paras 59, 61.

18. The Prosecution further submits that Defendant Counsel's late filing of the Final Brief itself demonstrates his willingness to knowingly violate a court order. In addition he "repeatedly" refused to apologise to Defence Counsel after a "particularly offensive and unprofessional outburst in court," even after being ordered to do so by the Presiding Judge, and only did so when he was denied a right of audience if he did not. These instances demonstrate that the 8 February violations were not accidental or inadvertent, but done with wilful blindness or reckless indifference" to the existence of the orders.[40]
19. The Prosecution contends that this evidence establishes that Mr. Griffiths acted with actual knowledge of orders of the Chamber, or, at a minimum, wilful blindness or reckless indifference to the existence of orders of the Chamber so satisfying the *mens rea* requirement; that apologies do not mitigate the knowing violation of the orders, and their ongoing nature negates any mitigating effect and rebuts the presumption that he was acting in good faith. Further, his characterisation of the acts as inadvertent is not believable.[41]
20. The Prosecution submits that Defendant Counsel further violated Rule 46, and incorporates by reference the argument and jurisprudence set forth in its Motion. The Prosecution also notes that Defendant Counsel received "constructive warning" as required by Rule 46(A).[42]
21. The Prosecution makes several submissions on the alternative sentences provided in the Rules which may be imposed in the instant case.[43]

Supplemental Submissions of Defendant Counsel

22. In his Defence Supplemental Submissions, Defendant Counsel incorporates and relies upon all arguments and submissions put forth in the Defence Response to the Prosecution's Motion and incorporates the arguments and conclusions articulated by Justice Sebutinde in

[40] SCSL-12-01-T-001, para. 35, citing Article 25 of the Code of Conduct, paras 36-37.
[41] SCSL-12-01-T-001, paras 39-40.
[42] SCSL-12-01-T-001, para. 41.
[43] SCSL-12-01-T-001, paras 42-48

her partially dissenting opinion to the Trial Chamber's Decision of 24 March 2011 "as if it was specifically pleaded therein."[44]

23. Defendant Counsel submits that the Prosecution has failed to prove beyond reasonable doubt that he violated Rule 77(A)(ii) by disclosing information identifying seven protected witnesses with the actual knowledge of or wilful blindness or reckless indifference to the fact that this violated an order of Chamber. Counsel submits therefore that he should not be found guilty of contempt under Rule 77, or misconduct under Rule 46.[45]

24. Defendant Counsel does not challenge the *actus reus* of the alleged contempt or misconduct, stating that he has previously accepted and apologised for the fact that the names of seven protected witnesses were inadvertently disclosed in Annex A of the Defence Final Trial Brief. Further he does not dispute that he had actual knowledge that disclosing the names of protected witnesses would be in violation of a Court order.[46] Thus, Counsel submits, the question of whether he was wilfully blind to the existence of the protective orders is not applicable.[47]

25. Defence Counsel submits that to accept the Prosecution's submissions "that any disclosure of protected information in violation of a known order, without any further consideration of *mens rea*," would be tantamount to turning such disclosure into a strict liability offence. Thus, he should not be convicted for contempt or misconduct simply because he knew of the court orders, and disclosed the names of protected witnesses. Counsel relies on the finding of the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber that "cases of inadvertent

[44] SCSL-12-01-T-004, para. 2, citing *The Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T-1235, 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 Urgent Measures, Partially Dissenting Opinion of Justice Sebutinde, 24 March 2011.
[45] SCSL-12-01-T-004, para. 18.
[46] SCSL-12-01-T-004, para. 3, 5.
[47] SCSL-12-01-T-004, para. 6.

disclosure ... would be highly unlikely to meet" the *mens rea* requirement of knowing and wilful interference with the administration of justice.[48]

26. In respect of whether he was recklessly indifferent to the existence of the order Defendant Counsel cites and relies on the ratio of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) which held that to prove the *mens rea* of a "knowing violation" of an order it is "generally ... sufficient to establish that the conduct" was "deliberate and not accidental," and this may be inferred from circumstantial evidence. The Defendant Counsel contends that the Prosecution has not proved beyond reasonable doubt that the violation was deliberate and not accidental and the principal of *in dubio pro reo* applies.[49]

27. Defendant Counsel disagrees that the filing of the corrected version of its Defence Final Trial Brief is evidence that the Defence's intention was to disclose the names of protected witnesses, as the Prosecution asserts. Counsel contends that the Prosecution, in stating that "[t]he Defence stated that they corrected 'a few substantive mistakes,' including details related to witnesses" took the Defence statement out of context, in fact the Defence stated that it corrected several types of error due to administrative oversight and that its sole purpose in filing the corrected document was "the ensure that as complete and correct a version of its final brief as possible be on the record with the Court" for their consideration of the defence of his client, Mr. Taylor.[50]

28. Defendant Counsel contends that the Prosecution mistakenly attempts to prove the *mens rea* for one specific occasion, the 8 February disclosure, by reference to what they see as a pattern of violations by Defendant Counsel, and contends that this argument is unduly prejudicial, and "runs counter to the tenants (sic) of a fair trial." The single breach must be considered in

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[48] SCSL-12-01-T-004, para. 5, citing *The Prosecutor v. Nshogoza*, ICTR-07-91-T, Judgement, 7 July 2009, para. 176.
[49] SCSL-12-01-T-004, para. 7, citing *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Appeal Judgement, 19 July 2011, para. 128.
[50] SCSL-12-01-T-004, para. 9-10.

its own circumstances, and must establish beyond reasonable doubt that Defendant Counsel was recklessly indifferent to the protected measures at issue. A determination must be restricted to an examination of the specific disc losure of the seven names in Annex A. Counsel adds that if his *mens rea* was determined by his previous conduct, the instances in which he abided by protective measures far outweigh those instances in which he breached them.[51]

29. In considering the breach in its own circumstances, Defenant Counsel submits that the Prosecution has not, in its filings or Annexes, presented additional evidence which addresses the pertinent issue, and the Prosecution's submissions simply seek to "portray Defendant Counsel in a negative light." Counsel submits that the record is replete with instances in which Counsel requested a closed session so as to protect both Prosecution and Defence witnesses, and where counsel cautioned a witness not to disclose the identity of a protected witness. On balance and considering the length of the trial and the number of persons on Defendant Counsel's legal team, Counsel submits that he paid "utmost respect" to these concerns.[52]

30. Counsel also submits that in addition to being irrelevant, the Prosecution's examples are "deserving of rebuke." For example, in its Supplemental Submission the Prosecution links Defendant Counsel's argument in opposition to the protective measures afforded to a witness who previously testified in another trial to an intention to disclose protected witnesses' names. This "justifiable legal argument," Counsel submits, cannot support an allegation of a willing breach by Defendant Counsel.[53]

31. Defendant Counsel further notes that the time during which the allegedly contemptuous conduct occurred was a "highly stressful one" for the Defence, in that many team members

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[51] SCSL-12-01-T-004, paras. 11-12. Counsel gives examples of the cautions he gave witnesses in course of the hearing.
[52] SCSL-12-01-T-004, para. 13.
[53] SCSL-12-01-T-004, para. 14.

"hardly slept for weeks on end" It was a four day period during which the Defence was preparing the corrected version of its brief, analysing the Prosecution Final Trial Brief, preparing for oral arguments, and seeking leave to appeal the Trial Chamber's decision to reject the Defence's Final Trial Brief. It is understandable, therefore, that the mistaken disclosure was made, and the mistake is indicative of the immense pressure of the period.[54]

32. Finally, Defendant Counsel contends that the Prosecution's submission that he should be "strictly bound by his signature" on the filing ignores some of the practical realities of a trial of the Taylor case's nature and magnitude, and the circumstances of the brief's filing. It was reasonable for Counsel to rely on his legal staff, who were bound by their own professional obligations, and understandable that Counsel would place trust in their work. "Some mistakes would have escaped his attention in this matter," which goes to the question of *mens rea* in the present case.[55]

DELIBERATIONS

33. I consider that it is important not to lose sight of the fact that the allegation is limited to a charge that Defendant Counsel "knowingly and wilfully and/or with reckless indifference disclosed the identities of seven protected witnesses in Public Annex A of the Corrigendum in violation of Rule 77(A)(ii)."[56] This gives rise to a question of the application of the additional evidence in submissions outlined above which the Prosecutor submits are incidents of disclosure of the identity of protected witnesses in violation of Court orders. These examples range from incidents on 24 January 2008 to 10 December 2009.

34. I have considered whether these can be taken into account as evidence of a consistent pattern of conduct pursuant to Rule 93. I note that neither Counsel has made any reference or

[54] SCSL-12-01-T-004, para. 15.
[55] SCSL-12-01-T-004, para. 16.
[56] SCSL-03-01-T-1208, para. 1.

argument in relation to Rule 93, and as these actions do not constitute "serious violations of international humanitarian law under the Statute" Rule 93 may not be applicable. I will deal with whether the past actions constitute a prior consistent pattern of behaviour that constitutes circumstantial evidence of wilful or recklessly indifferent violation of a Court order hereunder.

35. I accept as Defendant Counsel submits that this single breach must be considered in its own circumstances and I must determine if there has been a contempt on the facts surrounding the disclosure of 8 February 2011.

36. It is common ground between Defendant Counsel and the Prosecutor that the disclosure occurred, Defendant Counsel states that the *actus reus* of the alleged contempt and/or misconduct is not challenged.[57] The issue before me is whether there was the requisite *mens rea* to show that Defendant Counsel had acted "knowingly and wilfully." Both Prosecutor and Defendant Counsel acknowledge that there are three ways that a violation of Rule 77 (A)(ii) may be satisfied; that is by proof of (i) actual knowledge that the disclosure is in violation of a Chamber's order; (ii) wilful blindness to the existence of the order; or (ii) reckless indifference to the existence of the order. [58]

37. It is common ground between the parties that Defendant Counsel knew of the protective measures.[59] Hence, there is no issue that *mens rea* can be shown by way of "wilful blindness to the existence of an order."

38. Defendant Counsel concedes that he had actual knowledge that publicly disclosing the names of protected witnesses would be in violation of a court order "but without further consideration of the *mens rea*, (it) would be tantamount to turning such disclosure into a strict

[57] SCSL-12-01-T-004, para 3; Transcript 6 July 2012 pp. 49782-49786).
[58] SCSL-12-01-T-001, para. 4.
[59] SCSL-03-01-001, para 32; SCSL-03-01-004, para. 5.

liability offence".[60] The Prosecutor cites examples of how proof of actual knowledge may be adduced but I agree that actual knowledge of the order is not in itself enough to constitute the *mens rea* of knowingly and wilfully disclosing.

39. The term "knowingly and wilfully" is conjunctive. I consider in a case such as this a Court must be satisfied that a person knew he was disclosing protected information in violation of a court order and intended to make or was recklessly indifferent in making that disclosure of protected information in violation of a Court order.

40. The Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered that the mens rea required to enter a conviction for contempt under Rule 77(A)(ii) is "the disclosure of particular information in knowing violation of a Court's order. Generally it is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental. This may be inferred from circumstantial evidence. Where it is established that an accused had knowledge of the existence of a court order, a finding of intent to violate the order will almost necessarily follow." It further held that this does not require the Prosecution to prove specific intent to interfere with the administration of justice.[61]

41. The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) approved the interpretation of the mens rea for a violation of Rule 77(A) of the ICTR Rules as "the knowledge and will to interfere [with the administration of justice]."[62]

42. Given that the Rule requires the element of wilful interference, i.e. wilful action on the part of an accused person I approach the statement in the Hartmann case that "where it is established that an accused had knowledge of the existence of a court order, a finding of intent to violate the order will almost necessarily follow" with caution. The conduct must be

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[60] SCSL-12-01-T-004, para 5;

[61] *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Appeal Judgement, 19 July 2011, para 128.

[62] *Leonidas Nshogoza v. The Prosecutor*, ICTR-2007-91-A, Judgement, 15 March 2010, paras 77, 80.

shown to be deliberate and not accidental. The circumstantial evidence before me is that following both Prosecution and Defence evidence in a trial that spanned several years Defendant Counsel, in his capacity as Lead Counsel, signed and filed the Defence Final Trial Brief, with Annex A. This was a corrected version of an original Defence Final Trial Brief. Counsel submits that it was a document of some 600 pages, prepared by his "team members" during a "highly stressful period for the Defence." He recites the various matters that he and the team members were dealing with and notes that he relied on his co-counsel and legal assistants "who were also bound by the same professional and legal ethics."[63]

43. The document containing the disclosure was a Defence trial brief. It was intended to be put before the Trial Chamber and to be read and considered by the Trial Chamber which was already well aware of the names and the identifying details of the protected witnesses and of the evidence they had given. However it was a public document, as with any public document in a public trial it could be read by the world at large notwithstanding that its immediate target audience was not the world at large. This contrasts to the situation in, for example, the *Hartmann* case or the *Šešelj* case where the contemnors had published a book or similar publication with the intent that its contents be given a wide circulation. Whilst this comparison in no way detracts from the fact 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"[64] I am unable to find from the surrounding circumstantial evidence, the nature of the document, the timing and the circumstances of the filing that this was a deliberate action on the part of Defendant Counsel or a team member to reveal the identity of the protected witnesses.

44. I next look at the wider scenario of evidence of prior disclosures submitted by the Prosecutor in her supplemental submission. Do they show a pattern of behaviour that indicates a

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[63] SCSL-12-01-T-004, para 15,
[64] SCSL-03-01-T-1235, Justice Sebutinde's Dissenting Opinion, para. 15.

knowing and deliberate intent to violate court protective orders that culminated in the disclosure of 8 February 2011? Looked at *en masse* they show a number of statements in court and filings that disclosed information identifying protected witnesses and, in some examples, discourtesy to other counsel and defiance of the Trial Chamber. Are these a pattern of conduct demonstrating a deliberate intent to violate court orders tending to prove that the instant case is also a deliberate intent to violate such orders or a reckless indifference to them? Given the disparate nature of the events coupled with the span of time over which they were committed I do not find a pattern of conduct amounting to evidence that is probative of intent to knowingly and wilfully interfere with the administration of justice in the instant case.

45. On the facts before me, I find this was an inadvertent disclosure and accordingly I do not find that there was wilful intent to interfere with the administration of justice or reckless indifference to the existence of the orders of the Trial Chamber. Accordingly I find the Defendant Counsel not guilty of the offence of knowingly and wilfully interfering with the administration of justice of the Special Court by disclosing information relating to proceedings in knowing violation of an order of the Chamber.

Done at The Hague, The Netherlands this 19th day of October 2012.

Justice Teresa Doherty
Single Judge

[Seal of the Special Court for Sierra Leone]

ANNEX A

ANNEX A:

Prosecution Submissions extracted from 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

(Prosecution Motion and Reply 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.[65] 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 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).[66]

4. The Prosecution submits further that portions of the confidential Defence Final Brief and/or Confidential Annex B to the Corrigendum[67] 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.[68] 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.[69] 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

[65] 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.
[66] Motion, paras 1, 15-20, 24.
[67] 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.
[68] 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).
[69] Motion, para.12

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.[70]

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."[71] 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.[72]

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 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).[73]

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." [74]

[70] Motion, para. 18.
[71] Motion, para. 19.
[72] Motion, para. 19
[73] Motion, para. 20.
[74] Motion, paras.21-24

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).[75]

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

a. that Annex A of the Corrigendum is reclassified as Confidential;

b. 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;

c. 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;

d. 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.[76]

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".[77]

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[75] Motion, paras 4, 21-23, 26.
[76] Motion, para. 2.
[77] Reply, paras 3-4.

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.[78]

[78] Reply, paras 5-7.

ANNEX B

ANNEX B:

Defence Submissions extracted from 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

(Defence Response Submissions)

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."[79] 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."[80] 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.[81]

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.[82] 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.[83] 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.[84] The

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[79] Response, para. 3.
[80] Response, para. 8.
[81] Response, paras 3, 7-9.
[82] Response, para. 4.
[83] Response, para. 10.
[84] Response, para. 11

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.[85]

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

    a. 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;

    b. 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;

    c. as above, the Defence submits there is nothing to retrieve;

    d. 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

    e. 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

    f. 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.[86]

[85] Response, paras 13-16.
[86] Response, para. 19.