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SCSL-2004-15-T
(9562-9572)

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Benjamin Itoe, Presiding Judge
Judge Bankole Thompson
Judge Boutet
Registrar: Mr. Robin Vincent
Date filed: 16 November 2004

THE PROSECUTOR

Against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO**

Case No. SCSL – 2004 – 15 – T

PROSECUTION RESPONSE TO SESAY’S “MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP BETWEEN THE UNITED STATES OF AMERICA’S GOVERNMENT and/or ADMINISTRATION and/or INTELLIGENCE and/or SECURITY SERVICES AND THE INVESTIGATION DEPARTMENT OF THE OFFICE OF THE PROSECUTOR”

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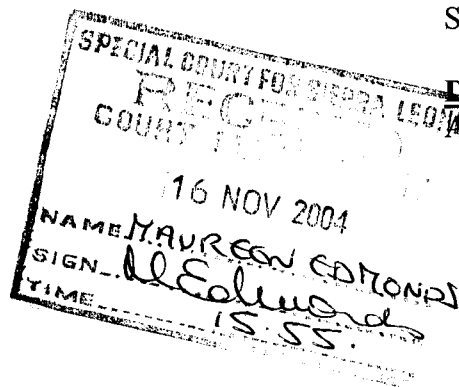
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SPECIAL COURT FOR SIERRA LEONE

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SECURITY SERVICES AND THE INVESTIGATION DEPARTMENT OF THE OFFICE
OF THE PROSECUTOR”**

The Prosecution files this response to Issa Sesay’s (the “Accused”) “Motion Seeking Disclosure of the Relationship between the United States of America’s Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor” (the Accused’s Motion”). The Prosecution submits the Motion should be denied in its entirety.

I. BACKGROUND

1. On the second session of trial on 4 October 2004, the Prosecution called General John Tarnue to give evidence on its behalf before the Trial Chamber. General Tarnue’s testimony lasted until 13 October 2004.
2. On 8 November 2004, the Accused filed a “Motion Seeking Disclosure of the Relationship between the United States of America’s Government and/or Administration

and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor”, alleging that General Tarnue’s testimony revealed a relationship between the Office of the Prosecutor and the United States of America, and that this relationship constitutes a breach of Article 15 of the Statute of the Special Court for Sierra Leone (the “Statute”).

II. SUBMISSIONS OF THE ACCUSED

3. In his motion, the Accused submits that the evidence given by General Tarnue “raises a prima facie case that the Prosecutor [...] has acted in breach of Article 15 insofar as he has worked with and/or at the behest of and/or in conjunction with the FBI.”¹
4. The Accused further submits that General Tarnue’s testimony discloses a relationship which suggests dependence “which would be inconsistent with the Prosecution’s duties pursuant to Article 15.”²
5. Moreover, the Accused argues that without an indication on the extent of the relationship between the Office of the Prosecutor and the United States of America, “the task of establishing the veracity or reliability of the evidence [...] is likely to be thwarted and incomplete.”³
6. The Accused further argues that the Prosecution breached its disclosure obligations under Rule 68 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the “Rules”) by not disclosing to the Defence the notes of “previous interviews”.⁴ The Defence alleges that it is not clear whether these interviews of the Office of the Prosecutor’s Chief of Investigations with General Tarnue, were on behalf of the Office of the Prosecutor or of the FBI.

III. ARGUMENTS

7. The Accused’s Motion implies that the Office of the Prosecutor is not acting independently and has improperly taken instructions from another entity. The Prosecution

¹ Accused’s Motion, para. 4.

² Accused’s Motion, para. 5.

³ Accused’s Motion, para. 9.

⁴ Accused’s Motion, para. 13.

rejects the assertion and submits that the Accused's Motion should be dismissed in its entirety.

8. The Statute and Rules relating to the Office of the Prosecutor must be placed in their proper context and correctly interpreted. The Prosecution submits that there can be no question that the Office of the Prosecutor must act as an independent body that does not take instructions from any other entity. Nor can there be any question that the Office of the Prosecutor may seek information and assistance from other entities in carrying out the functions of the Office of the Prosecutor. The Accused's Motion incorrectly suggests that the Office of the Prosecutor has taken instructions from another entity. It has not. However, the Office of the Prosecutor has, as it is permitted to do, sought information from and the assistance of, other entities in pursuing investigations.
9. The Office of the Prosecutor is charged with both investigating crimes and prosecuting alleged crimes that fall within the jurisdiction of the Court. Only the conduct of the investigatory function of the Office of the Prosecutor is put in issue in the Accused's Motion.

The Governing Law

10. The Accused's Motion relies on the last two sentences of Article 15(1) of the Statute. Those sentences must be read in the context of Article 15 as a whole.⁵

⁵ Article 15 states:

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.
2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.
3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.
4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

11. The Prosecution submits that the Statute makes clear, through the words of Article 15(1), that the Prosecutor:

- a) is "...responsible for the investigation and prosecution" of those who bear the greatest responsibility for those crimes that fall within the jurisdiction of the Court;
- b) "... shall act independently as a separate organ of the Special Court"; and
- c) "shall not seek or receive **instructions** from any Government or from any other source" (emphasis added).

12. The drafters of the Statute clearly intended the Office of the Prosecutor to be responsible for investigating and prosecuting alleged crimes, to be independent of the other organs of the Special Court, and not to take instructions from any entity.

13. However, the Prosecution submits the Statute does not prohibit the Office of the Prosecutor from seeking assistance or information from any Government or from any other source. The prohibition is limited to proscribing the Office of the Prosecutor from taking **instructions** from any entity. This prohibition is, of course, the cornerstone of the independence of the Office of the Prosecutor. Prosecutorial decisions and prosecutorial discretion vest in the Office of the Prosecutor. The integrity of the decisions and the exercise of the discretion would be seriously undermined if the Office of the Prosecutor took instructions from any entity.

14. The drafters of the Statute also clearly intended that the Office of the Prosecutor should seek assistance from other entities. Article 15(2) states:

"The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the **Prosecutor shall, as appropriate, be assisted** by the Sierra Leonean authorities concerned." (emphasis added)

15. The Prosecution submits that the Prosecutor is not limited to seeking assistance only from Sierra Leonean authorities. The proper construction of the Statute, and the limits imposed on the Office of the Prosecutor, is that the Office of the Prosecutor cannot take instructions from any entity. It must act independently. However, the Prosecutor can

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

seek assistance and information from other entities. This scope of authority is explicitly stated with respect to the Sierra Leonean authorities. It is also implicit with respect to other authorities. The powers of the Court have a limited territorial jurisdiction. The Prosecution submits that the Prosecutor is entitled to seek the assistance of other entities in pursuing investigations and must do so to ensure that thorough investigations, for exculpatory as well as inculpatory evidence, are completed against persons alleged to bear the greatest responsibility for crimes in Sierra Leone. Indictees, suspects, witnesses, as well as physical evidence may be located in other jurisdictions. In such circumstances the Prosecutor must seek the assistance of other entities to complete its investigations and have indictees returned to Sierra Leone.

16. The Rules take into account the limited authority of the Court and of the Office of the Prosecutor. Part II of the Rules is titled “Cooperation with States and Judicial Assistance”. Of particular note are Rules 8 (C), (D) and (E), which provide that:

- (C) The Special Court may invite third States not party to the Agreement to provide assistance on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
- (D) Where a third State, which has entered into an ad hoc arrangement or an agreement with the Special Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the President may take appropriate action.
- (E) Where it appears to the Prosecutor that a crime within the jurisdiction of the Special Court is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect. The Government of Sierra Leone shall transmit to him such information forthwith in accordance with Article 17 of the Agreement.

17. In the context of the investigatory function of the Office of the Prosecutor, Part IV of the Rules, titled “Investigations, Rights of Suspects and Accused”, must also be considered. Rules 39 and 40 state that the Office of the Prosecutor may:

- a) seek the assistance of any State authority in pursuing investigations; and
- b) request any State to arrest a suspect, seize physical evidence or take measures to prevent the destruction of evidence.

18. Moreover, it has been recognised by the ICTY that, because international criminal tribunals do not have the resources for arresting a suspect, seize evidence or protect witnesses as do States, some kind of collaboration is requested from States, and this, for the efficiency of international criminal law. As stated in an Appeals Chamber's decision in the Blaskic case, "[h]owever, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal."⁶
19. The Prosecution submits that the powers given to the Office of the Prosecutor are broad, and necessary, if the Court is to complete its role within the limited time period envisioned by United Nations and the Government of Sierra Leone. Included in those powers is the power of the Office of the Prosecutor to question suspects, interview witnesses, collect evidence, take all measures deemed necessary for the purpose of the investigation, and in carrying out those tasks to seek "the assistance of any State authority concerned..."⁷

Application of the Governing Law to the Facts Asserted in the Accused's Motion

20. In paragraph 1 of his Motion, the Accused refers to contacts between the Chief of Investigations of the Office of the Prosecutor and members of the Federal Bureau of Investigation of the United States of America (the "FBI"). The Accused asserts at paragraph 4 that these contacts raise a *prima facie* case that the Office of the Prosecutor "has acted in breach of Article 15 insofar as he has worked with and/or at the behest of and/or in conjunction with the FBI."
21. The Prosecution submits that this assertion is misguided and mischievous. Not only has there been no wrongdoing by the Office of the Prosecutor, but the alleged breach claimed by the Accused is not a breach within the meaning of Article 15. Moreover, the conduct complained is permitted by the governing legislation. The Accused does not allege that

⁶ *The Prosecutor v. Tihomir Blaskic*, IT-95-14, "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", 29 October 1997, para. 26.

⁷ Rule 39(iii).

the Office of the Prosecutor sought or received instructions from another entity. Such conduct would be contrary to Article 15(1) of the Statute.

22. The alleged wrong-doing is that the Office of the Prosecutor “worked with and/or at the behest of and/or in conjunction with” another entity. The Prosecution submits that the Accused mischievously chose not to inform the Court that under the governing legislation the Office of the Prosecutor is permitted to:

- a) request any State to forward to the Office of the Prosecutor any relevant information from investigations or criminal proceedings instituted in the courts of the State (Rule 8(E));
- b) seek the assistance of any State authority, as well as of any relevant international body, to interview witnesses , collect evidence and conduct on-site investigations (Rule 39); and
- c) request any State to arrest a suspect, seize evidence, and take all necessary measures to prevent injury to or intimidation of a witness or the destruction of evidence (Rule 40).

23. The Prosecution further submits that the issue of the relocation of witnesses involves various problematic dimensions, as for example, the safety concerns of the country where the witness should be relocated to. In consequence, the cooperation between the Office of the Prosecutor and foreign security agencies does not only make sense but is necessary in order to implement the statutorily protective measures for Prosecution’s witnesses.

24. The Prosecution therefore respectfully submits that the conduct complained of in the Accused’s Motion is authorized by the Statute and Rules. There is no wrong-doing by the Office of the Prosecutor deserving of sanction or criticism.

Disclosure Obligations under Rule 68

25. The Prosecution is aware of its duty to disclose evidence, and of the ongoing nature of that duty. The Prosecution submits that the Accused’s Motion does not show any evidence whatsoever that the Prosecution has failed to comply with this duty.

26. In the event evidence that should be disclosed becomes available, it will be disclosed. Information that is not and never was in the possession of the Office of the Prosecutor

cannot be disclosed for the simple reason that the Office of the Prosecutor cannot compel other entities to produce documents or evidence.

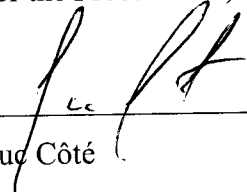
IV. CONCLUSION

27. Paragraph 14(i) of the Accused's Motion requests that the Office of the Prosecutor disclose the Chief of Investigation's and the investigation team's relationship with the FBI and the United States of America government. The Prosecution submits that the use of the word "relationship" is hopelessly vague. If it means the number of telephone calls or meetings, then there is absolutely no authority to grant such relief. If it means something else then it should be specified in a motion and facts justifying the relief must be adduced.
28. Paragraph 14(ii) of the Accused's Motion asks that, in the alternative, the Office of the Prosecutor disclose the extent to which General Tarnue's evidence is untrue or unreliable. However, the Office of the Prosecutor can only disclose evidence which is in its possession. It has done so. The Defence can, of course, seek to compel through court order evidence from any source that it deems to have relevant evidence.
29. Paragraph 14(iii) of the Accused's Motion seeks disclosure of any other investigatory work by the Office of the Prosecutor investigators working alongside any outside agency. This relief is entirely outside the scope of the conduct complained of in the Accused's Motion and is entirely without an evidentiary basis for granting such widespread relief. Investigations are ongoing. To disclose those investigations would compromise them. However, the Prosecution reiterates that the Office of the Prosecutor is clearly entitled to seek assistance from other entities. The Prosecution submits that the Court would be ignoring the authority given to the Office of the Prosecutor in the Statute and the Rules if it were to accede to the relief sought.
30. Paragraph 14(iv) of the Accused's Motion seeks disclosure of whether any fruits of a joint investigation have been shared with an outside agency. The Prosecution's submissions in relation to the relief sought in paragraph 14(iii) of the Accused's Motion apply and will not be repeated here.

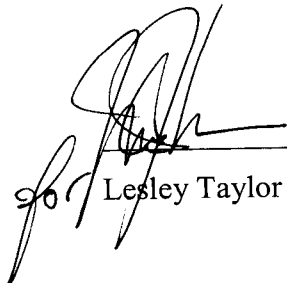
31. Paragraph 14(v) of the Accused's Motion seeks disclosure of the assistance offered and given to General Tarnue by the Chief of Investigation and other investigators. The Prosecution submits that there is no evidentiary basis to support granting this relief. Questions were put to the witness on this topic and answered. That is the sworn evidence before the Court. Should it choose to do so, Defence counsel can seek to compel others to testify on this and related topics.
32. Finally, paragraph 14(vi) of the Accused's Motion seeks disclosure of any information in the possession of or known to the Office of the Prosecutor which discloses any illegal activity or activity in breach of the Statute or the Rules by any investigator of the Office of the Prosecutor including but not limited to any involvement in an alleged attempt to arrest Benjamin Yeaten in Togo between 2000 to 2004. This, the Prosecution submits, is a "fishing expedition". It is offensive and mischievous because it implies wrongdoing without making any factual assertions of such conduct. The only mention of Benjamin Yeaten or the alleged arrest in the entire Accused's Motion is found in paragraph 14(vi). It is irrelevant to the Accused's Motion, irrelevant to the evidence against the Accused and irrelevant to the charges against the Accused. The Prosecution submits that counsel should not be encouraged to make unsupported assertions of illegal activity against any person.
33. For the foregoing reasons, the Prosecution submits that the Defence Motion should be dismissed in its entirety.

Freetown, 16 November 2004

For the Prosecution,



Luc Côté



907 Lesley Taylor

PROSECUTION INDEX OF AUTHORITIES

1. *The Prosecutor v. Tihomir Blaskic*, IT-95-14, “Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997”, 29 October 1997.