1164)

SCSL-03-01-T
(32239 – 32249)

32239

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Date filed: 20 January 2011

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

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION RESPONSE TO DEFENCE MOTION FOR DISCLOSURE AND/OR INVESTIGATION OF UNITED STATES GOVERNMENT SOURCES WITHIN THE TRIAL CHAMBER, THE PROSECUTION AND THE REGISTRY BASED ON LEAKED USG CABLES

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

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

I. INTRODUCTION

1. The "Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables"[1] should be dismissed. The Defence's submissions have absolutely no factual basis and simply demonstrate desperation to delay the trial and divert attention from the evidence that overwhelmingly proves the guilt of the Accused.

2. The information presented in the Motion - newspaper articles concerning the WikiLeaks Cables[2] - plainly refutes the Defence allegation that is the basis of the Motion. Nothing in the Cables shows that the USG[3] is giving instructions to any organ of this Court. Defence reliance on unfounded and inflammatory language such as "secret sources", "hidden hands" and "clandestine funding" simply highlights the Motion's lack of substance.[4] As fully discussed below, the Cables clearly show the Court's independence and that the USG has neither foreknowledge nor control over these proceedings or the final verdict. The verdict will rather be based on the evidence presented in this trial, which the Accused through his Defence team is apparently unwilling to address.

3. The Prosecution notes that it is routine practice in Defence pleadings to ignore the Prosecution's clear denials of baseless allegations.[5] Therefore, should there be any doubt as to the Prosecution's position regarding all the allegations of misconduct, improper action, impropriety, explicit or implied, contained in the Motion, the Prosecution underlines that it has never engaged in any conduct which violates the Statute, the Rules or any code of conduct and has never sought or received instruction from the USG or any other government or other source. As to "clandestine" Prosecution funds, this baseless

---

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1143, "Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables", 10 January 2011 ("**Motion**").
[2] "Cables" is defined at Motion, footnote 5.
[3] "USG" is defined at Motion, para. 1.
[4] Motion, paras. 3 & 20.
[5] See for example *Prosecutor v. Taylor*, SCSL-03-01-T-1102, "Defence Reply to Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators", 11 October 2010, para. 17 and *Prosecutor v. Taylor*, SCSL-03-01-T-1134, "Public Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators", 10 December 2010, para. 41 both of which ignored the Prosecution's blanket denial of all allegations of wrongdoing made in *Prosecutor v. Taylor*, SCSL-03-01-T-1097, "Public with Confidential Annexes Prosecution Response to 'Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and Its Investigators'", 4 October 2010, para. 25.

accusation is premised on the irresponsible and deliberate misinterpretation of a footnote in a statement by David Crane.[6]

II. SUBMISSIONS

Motion should be dismissed as frivolous and/or untimely

4. Defence attempts to question the independence and impartiality of various organs of this Court are not new and on each occasion have been dismissed.[7] The decisions dismissing such claims have underlined that given the "grave implications for the justice process" all allegations must be properly substantiated and inferences regarding failures to act independently will not be "lightly ... drawn".[8]

5. Set in this context, the Motion can clearly be characterized as frivolous. The fact that the WikiLeaks disclosure occurred after the 24 September 2010 deadline set for filings in this case[9] does not justify the late filing of this Motion when it simply repeats arguments already canvassed before and dismissed by this Court. The Motion in large part simply rehearses the unfounded allegations made in the *Sesay et al.* case regarding the Prosecution's links to the USG.[10] Its frivolous nature is further evidenced by the fact that the substance of the Cables, as argued more fully below, does not in *any* way support the Defence's main claim that the Court's integrity has been compromised. Absent substance or novelty, it is reasonable to conclude that the real purpose of the Motion was to capitalize on the sensationalist aspect of the WikiLeaks documents rather than to bring any real issue for determination before the Court.

6. Further, the Motion is untimely and appears to be a deliberate attempt to delay the proceedings and divert attention from the evidence of record. The Motion relies in part on statements made by former Prosecutor David Crane in 2006 to the Subcommittee on

---

[6] Motion, paras. 9 & 20.

[7] See *Prosecutor v. Norman*, SCSL-04-14-AR72(E)-34, "Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence)", 13 March 2004 ("***Norman* Judicial Independence Decision**") and *Prosecutor v. Sesay et al.*, SCSL-04-15-T-363, "Decision on Sesay – Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor", 2 May 2005 ("***Sesay* Disclosure Decision**").

[8] *Sesay* Disclosure Decision, para. 42. See also *Norman* Judicial Independence Decision, para. 24. See further *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 41 which underlines the need for concrete evidence to support of allegations that a prosecutor has not acted independently.

[9] Trial Transcript, 13 September 2010, p. 48323.

[10] See *Sesay* Disclosure Decision. "USG" is defined at Motion, para. 1.

Africa, Global Human Rights and International Operations of the United States House of Representatives' Committee on International Relations.[11] As the Motion acknowledges, these statements were referred to in the Defence's opening statement and the Accused testified repeatedly about his complaint that he is being prosecuted for political reasons.[12] Therefore, as the Motion simply repeats these claims, it should be dismissed as untimely. As set out below, the Cables do not "provide further insight into [the] relationship between the OTP and the USG"[13] and thus do not justify this Defence attempt to re-visit this already well canvassed theme.

Claim that the Court's impartiality and independence has been compromised is without merit

7. The Cables do not provide "any evidentiary basis or factual foundation"[14] for the allegations put forward by the Defence concerning any organ of the Court.

8. In order to protect the independence of the Prosecutor and the judges, the Statute specifically states that none of these individuals shall accept or seek instructions from any Government or any other source.[15] In this regard, it is clear that the Cables provide no evidence that such a prohibition has been violated; there is no reference to instructions being given to any individual in any organ of the Court by the USG. There is also no reference to any individual seeking such instruction. The *Sesay* Disclosure Decision clearly states that without proof that instructions were received from a government, including the nature and content of such instructions, the test to establish a breach of the duty to act independently is not satisfied.[16]

9. Indeed, the Cables clearly evidence the Court's impartiality and independence. This is demonstrated by the fact that the author of the March 2009 cable discusses the need for the USG to consider possible actions if Taylor is set free by the Special Court. The fact that the case's outcome is unknown to the USG plainly demonstrates the independence of this Court.[17]

---

[11] Motion, paras. 8 & 9.
[12] Motion, paras. 8 & 10.
[13] Motion, para. 11.
[14] *Sesay* Disclosure Decision, para. 24.
[15] Statute, Arts. 13(1) & 15(1).
[16] *Sesay* Disclosure Decision, para. 52.
[17] Motion, Annex A, paras. 1, 3 & 13.

10. Further, contrary to the Defence allegations, the Cables do not evidence the disclosure of "sensitive" information to the USG.[18] Nowhere in the Motion does the Defence identify or explain what in the Cables is the "sensitive information" which should not be discussed publicly, other than the oblique statement in footnote six that "Sensitive comments, *inter alia*, relate to the pace and efficiency of the trial, as well as funding and personnel issues." Yet, the issues actually discussed in the Cables are all matters of public record and open to fair comment not only by the donors but any member of the public. This Court, like all criminal courts, is a public institution paid for by public funds. The Annual Reports of this Court are published and discuss exactly these issues. A plain reading of the Cables themselves shows that the information provided to the USG simply concerns funding and budgetary issues plus estimates or speculation relating to the length of the trial. These are all legitimate topics for discussion with a donor country as it is impossible to budget or staff a court without planning for the length of the proceedings. Indeed, the speculation as to the length of the trial proved to be wholly inaccurate,[19] again demonstrating the USG's lack of control over these proceedings and the independence of the Court.

11. The complete lack of any credible evidence that the Prosecution is acting on the instructions of the USG is further demonstrated by the Defence's four completely specious arguments set out in paragraph 20 of the Motion.

12. The first argument, that the Court and Prosecution are funded in large part by the USG, is irrelevant to showing that the impartiality and independence of this Court has been compromised. The Sixth Annual Report of the Special Court for Sierra Leone lists 29 governments that contributed to the Court during the 2008-2009 period. While the United States is the largest contributor, it also has the largest economy in the world and is consequently the largest donor to the United Nations. But more fundamentally, the Defence logic that an accused cannot get a fair trial where a case is funded by a government is fatally flawed. All criminal courts, international and domestic, are public institutions funded by governments. Following the Defence's logic, no domestic prosecutions could take place where an individual is perceived as dangerous by a

[18] Motion, para. 3.

[19] The April 2009 cable reports speculation that judgement would be rendered during the term of the last Presiding Judge, which would have meant judgment would already have been rendered in this case when in fact, final submissions of the parties are not even scheduled to be held until February 2011.

government, because the government is funding the court and prosecution. Taking the Defence logic further, those who engage in acts against a State or commit crimes of terrorism against its citizens would enjoy effective impunity because the government funds the court, the prosecution and, for indigent accused, the defence. Thankfully, this flawed Defence logic is not the reality. Rather, courts all over the world have an obligation to act impartially and base their verdict on the evidence without taking instructions from a government, even when that government funds the court.

13. The fallacy of the Defence logic is further highlighted when one recalls that the Accused in this case has claimed "partial" indigency. All of the known Defence expenses are paid for by the Court. Thus, it is the donors, including the USG, that have financed the millions of dollars that have been provided to the Defence in this case.[20] Indeed, it is the USG which has in part financed Defence efforts on this very Motion. However, the fact that all of their funding comes from the donors should not lead to the conclusion that the Defence are taking instruction from the USG or any other donor government.

14. The Defence's second argument in paragraph 20 of the Motion points to the nationality of certain leading former and current OTP team members to support the claim that this trial is basically an extension of the USG's foreign policy objectives. In addition to ignoring the jurisprudence of this Court discussed in paragraph 18 below, this argument also ignores that each member of any organ of the Court must pledge not to take instructions from any government. Absent evidence to the contrary, it is irresponsible to make allegations that individuals are taking instructions from their national government.

15. The Defence's submissions relying on nationality are further shown to lack substance if the make-up of the Defence's own team is considered. When the Accused dismissed his previous Defence team in June 2007, the U.K. barrister leading the team was replaced by three other U.K. barristers, including one former British military officer. Further, on assuming his new position, lead Defence Counsel retained the services of an attorney who attended law school in the United States, lists his offices as in the United States and The

[20] In an interview on the Charles Taylor Trial website (see www.charlestaylortrial.org/2010/03/19/charles-taylors-defense-counsel-courtenay-griffiths-answers-your-questions-part-ii/) lead Defence Counsel acknowledges that he heads "the best resourced team that perhaps there has ever been in the international criminal justice arena."

Hague, and whose national practice has been in the United States.[21] The Prosecution certainly does not allege - as it would be completely irresponsible to allege - that the Defence were or are taking instructions from, their national governments in violation of their professional obligations. It is equally reckless for the Defence to allege that members of the Prosecution have violated their professional obligations based on their nationality or prior occupations.

16. The third argument made by the Defence in paragraph 20 of the Motion is also flawed. The Defence is correct that the March 2009 cable demonstrates that the USG and Liberian government fear that Charles Taylor remains capable of destabilising peace in Liberia and the region. However, this fact is irrelevant to determining whether Taylor committed the crimes charged in Sierra Leone during the Indictment period. The legal premise that the Defence wants the court to adopt, that one cannot try a person accused of war crimes and crimes against humanity who are perceived as dangerous, would lead to simply absurd results - granting impunity to the most dangerous of accused.

17. The fourth argument made by the Defence in paragraph 20 concerns selective prosecution. However, despite repeated attempts by the Accused and his Defence team to portray Charles Taylor as the "victim" in this trial, the plain fact is that Taylor is being prosecuted in accordance with Article 1 of the Statute as one of the persons most responsible for the crimes committed in Sierra Leone. The overwhelming evidence in support of this conclusion is summarized in the Prosecution's recently filed Final Trial Brief with its clear emphasis on the link between Taylor and the crimes committed in Sierra Leone.[22] However, rather than face this evidence head on, the Accused through his Defence team seeks to divert with a barrage of completely irrelevant and frivolous motions.

18. The Appeals Chamber has already clearly ruled that the foreign policy objectives of donor states are completely irrelevant to the work of this Court,[23] of which jurisprudence the Defence ought to be aware after practicing for over three years before this Court. In

---

[21] See information printed from the website http://www.morrisanyah.com/ regarding the professional practice and qualifications of Morris Anyah.
[22] *Prosecutor v. Taylor*, SCSL-03-01-T-1156, "Confidential Prosecution Final Trial Brief", 14 January 2011.
[23] *Norman* Judicial Independence Decision.

2004, Justice Robertson in his Separate Opinion clearly explained that conspiracy based arguments have no place before this Court:

> "The interest of donor states is that the Court they pay for will be successful – but "success" cannot be judged by its conviction rate ... "Success" will be judged by the Court's record in doing justice, **expeditiously** and fairly: a wrongful or wrongfully influenced conviction would amount to a 'failure" – and one which would have the result of denigrating the Court and ... the donors who supported its justice mission. Although states all have foreign policy objectives, their purpose in funding an international criminal court cannot be assumed to include the obtaining of convictions against all or even most indictees."[24] (emphasis added)

19. In addition to the clear jurisprudence of this Court on the issue, guidance can also be taken from that of the *ad hoc* tribunals regarding allegations of selective prosecution. At both the ICTY and ICTR, the jurisprudence acknowledges the Prosecution's broad discretion and states that, in order to successfully allege selective prosecution, evidence establishing that the prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute an accused must be adduced. In the absence of such evidence the claim must fail and the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued will not be considered.[25] The ICTY Appeals Chamber has also confirmed that "it cannot be accepted that 'unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial."[26] Plainly, nothing in the Cables provides sufficient evidence to satisfy the standard set out in *Delalić*. As set out above, there is nothing in the Cables which demonstrates that the Prosecutor was acting on the instructions of the USG or to suggest any unlawful or improper motive in bringing the prosecution against Taylor.

The Defence has provided no basis on which to order disclosure and/or an investigation

20. There is no basis on which to order either disclosure by, or an investigation of, any organ of this Court, as the Defence has failed to substantiate its allegations of breach of

[24] Ibid, Separate Opinion of Justice Geoffrey Robertson, para. 24.
[25] See *Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003, para. 871 applying *Prosecutor v. Delalić et al.*, IT-96-21, Judgement on Appeal, 20 February 2001, Part X.
[26] *Prosecutor v. Delalić et al.*, IT-96-21, Judgement on Appeal, 20 February 2001, para. 618.

impartiality and independence. This conclusion is supported by the approach taken by Trial Chamber I in the *Sesay* Disclosure Decision.

21. As in *Sesay*, the Defence claims made in the Motion are too broad, too vague or unspecific.[27] No "concrete proof" has been provided by the Defence regarding the instructions and their contents which it alleges any of the Court's organs have received from the USG in the prosecution of Taylor.[28] Rather, the only new material brought to the Court's attention in the Motion, the WikiLeaks Cables, is manifestly inconsistent with the Defence allegation and instead plainly proves the independence of this Court.

III. CONCLUSION

22. For the reasons set out above, the Motion is frivolous, designed to further delay the proceedings and diverts attention from the evidence of record, and should be dismissed.

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

Brenda J. Hollis
The Prosecutor

[27] *Sesay* Disclosure Decision, para. 49.
[28] Ibid, para. 51.

INDEX OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1143, "Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables", 10 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1102, "Defence Reply to Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators", 11 October 2010

Prosecutor v. Taylor, SCSL-03-01-T-1134, "Public Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators", 10 December 2010

Prosecutor v. Taylor, SCSL-03-01-T-1097, "Public with Confidential Annexes Prosecution Response to 'Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and Its Investigators'", 4 October 2010

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 13 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-1156, "Confidential Prosecution Final Trial Brief", 14 January 2011

Prosecutor v. Norman, SCSL-04-14

Prosecutor v. Norman, SCSL-04-14-AR72(E)-34, "Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence)", 13 March 2004

Prosecutor v. Sesay et al., SCSL-04-15

Prosecutor v. Sesay et al., SCSL-04-15-T-363, "Decision on Sesay – Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor", 2 May 2005

ICTY

Prosecutor v. Delalić et al., IT-96-21, Judgement on Appeal, 20 February 2001

ICTR

Prosecutor v. Ntakirutimana & Ntakirutimana, ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003
http://www.unictr.org/Portals/0/Case/English/NtakirutimanaE/judgement/030221_judgement.pdf

Prosecutor v. Nahimana et al., ICTR-99-52-A, Judgement (AC), 28 November 2007
http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf