

1169)

SCSL-03-01-T
(32337-32345)

32337



THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 25 January 2011

Case No.: SCSL-03-01-T

THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
25 JAN 2011	
NAME	ALHASSAN FORWANI
SIGN	
TIME	16:15

PUBLIC

**DEFENCE REPLY TO 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

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick, Legal Assistant

I. INTRODUCTION

1. This is the Defence Reply to the *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* (“Response”).¹ The Defence observes that, in an attempt to escape scrutiny and possibly out of embarrassment, the Prosecution tries to trivialize the content of the Cables throughout its Response. The Prosecution, however, makes no sound legal argument of substance.
2. By failing to disclose who within its walls is giving information to the USG outside the official channels of communication, the Prosecution makes this issue contentious. Notwithstanding its protestations of innocence at paragraph 3 of the Response, the Prosecution could have simply explained that the comments attributed to it in the Cables were made by such and such individuals in this and that context, leaving it to the Trial Chamber to determine whether the sources improperly sought instruction or were influenced by the USG. Instead, the Prosecution furtively argued that there was no basis in law or fact for the concerns raised by the Defence in relation to the disclosed Cables.
3. Furthermore, the Prosecution’s primary contention,² that the Cables actually demonstrate the Court’s independence does not obviate the concern that while the Court may ultimately be deemed impartial and independent, the Prosecution has not improperly sought instruction from and been influenced by the USG along the way.
4. Choices have consequences, and as the Prosecution has chosen not to disclose the information of its own accord, the Trial Chamber should now order the Prosecution to

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1164, 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, 20 January 2011 (“Response”); and *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Public with Annexes A-N 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 See, for ex., paras. 2, 7-19.

disclose the same. Alternatively, the Trial Chamber should order an investigation into the issues as requested by the Defence in its Motion.³

II. SUBMISSIONS

The Motion is neither frivolous nor untimely

- 5. At paragraphs 4-6 of its Response, the Prosecution submits that the Defence motion is frivolous and untimely. The Prosecution suggests that the Defence has simply repeated arguments that have already arisen in this case and at the Special Court generally. However, the Prosecution must realize that this is the first time that the Defence has had evidence attributable directly to the United States Government which suggests that a member(s) of the Prosecution has been in communication with the USG outside the official channels.
- 6. Specifically, the April 2009 Cable, released on 17 December 2010, states the following in relation to communications from the Prosecution to the USG:

“Moreover, contacts in Prosecution and Registry speculate that Justice Sebutinde may have a timing agenda. They think she, as the only African judge, wants to hold the gavel as presiding judge when the Trial Chamber announces the Taylor judgment”.⁴

Such speculation on the part of the Prosecution is not only unseemly, but raises the question of what the Prosecution expected the USG to do with that information in return. One must ask why the Prosecution would speculate with the USG if it did not anticipate some subsequent instruction from the USG on how the Prosecution should deal with Justice Sebutinde’s alleged timing agenda. This is especially troubling given that the alleged delay by Justice Sebutinde was couched in the context of discussions of an imminent budget crisis, including the fact that the Registry would likely seek the USG’s assistance on financial issues.⁵

- 7. Despite this newly-obtained, cogent evidence, the Prosecution characterizes the Defence’s motion as frivolous, sensationalist and lacking in substance and novelty. The Defence submits it is because the Prosecution is professionally embarrassed that it attempts to distance itself from the allegations it made and from the significance of

³ Motion, para. 22.
⁴ Motion, Annex B, para. 7.
⁵ Motion, Annex B, paras. 10-12.

its communication with the USG. Indeed, this mischaracterization of such a serious issue, impinging on the integrity of a Judge of this Court, is no trifling matter and is insulting.

8. The Prosecution further characterizes the Motion as untimely. This is a curious argument: the Cables were only released on 17 December 2010 and the Defence was prepared to file its Motion on 31 December 2010. The Defence in fact filed the Motion on the first day back from the Judicial Recess.⁶ The Prosecution considers issues surrounding the political nature of the prosecution of Mr. Taylor well-canvassed⁷ and therefore since the Defence has been able to make some argument as to undue American influence on the trial previously, the Defence should not be able to evaluate new evidence in conjunction with existing evidence on record. The fact that the information in the Cables, clearly stating that the USG wants Taylor convicted by all means corresponds with the information already on record from David Crane does not make the Motion untimely. Rather it lends credence to the Defence's concerns.
9. Contrary to indications from the Prosecution that the Defence's motion is a deliberate attempt to delay the proceedings, the Defence submits that quite to the contrary, the Defence is merely doing what it is professionally bound to do: litigate its client's case as best as it can. That other parties might be motivated by other considerations should not deter the Defence in its professional duties. Therefore, the filing of the Motion was not a dilatory tactic by the Defence, but a necessary aspect of fulfilling its professional obligations to its client.

The Court's Impartiality and Independence has been Breached

10. At paragraphs 7-8 of its Response the Prosecution accepts that statutorily the Prosecutor and the judges must refrain from seeking or accepting instructions from any Government or source. The Prosecution then disavows that the Cables provide proof that instructions were sought or received from the USG. Be that as it may, it is however still quite curious why then the Prosecution should be reporting to the USG

⁶ Motion, para. 6.

⁷ Response, para. 6.

outside the official lines of communication; and while at it maligning Judges of this Court. There is nothing above board in these communications and a negative inference can surely be drawn in this respect.⁸

11. At paragraph 9 of its Response, the Prosecution argues that the discussions in the March 2009 Cable regarding the need for USG contingency plans in case Mr. Taylor is released by the Special Court, is evidence that the Court is indeed impartial and independent. To the contrary, the fact that the USG is considering other options by which they can try to convict Mr. Taylor justifies the Defence's concern that politics is the driving force behind the prosecution of Mr. Taylor. This is particularly so given the evidence that the USG is at the same time clandestinely funding some obscure operations of the Prosecution. Thus, that the USG cannot determine the outcome of the current trial does not negate the fact that the USG may have been giving instructions and influencing the Special Court Prosecution in this case. Indeed, that offends the principle of prosecutorial independence.
12. The Prosecution Response at paragraphs 10-13 relies on irrelevant Special Court jurisprudence to argue against the Defence's position. In its Motion, the Defence argued that the fact that the USG has provided funding directly to the Prosecution (over and above its contributions to the general Special Court budget administered by the Registry),⁹ suggests that the USG has interests other than for the Court to "do justice to every defendant according to law".¹⁰ The Prosecution denies "clandestine" funding from the USG and argues that the Defence has irresponsibly misinterpreted David Crane's comments.¹¹ Yet the Prosecution does not provide any alternative explanation or interpretation. Instead, the Prosecution persists in its practice of failing to acknowledge or explain how such money is used by the Prosecution's Witness Management Unit ("WMU") or otherwise and to whom the Prosecution is

⁸ *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, para. 51.

⁹ Motion, para. 9 and FN 22 (citing Exhibit D-404, p. 77, FN 3) and para. 20.

¹⁰ *Prosecutor v. Norman*, SCSL-04-14-AR72(E)-34, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), 13 March 2004 ("**Judicial Independence Decision**"), Separate Opinion of Justice Geoffrey Robertson, para. 24.

¹¹ Response, para. 3.

accountable as regards the expenditure of such money.¹² Crane's expression of thanks to the U.S. Congress for the USG's independent funding to the Prosecution is, in any event, quite clear. There is no interpretation of the statement needed. It is indeed unfortunate that the Prosecution should resort to calling the Defence names in an attempt to hide its shame.

13. The Appeals Chamber's Judicial Independence Decision upon which the Prosecution relies heavily is readily distinguished from the instant case. Therein, the *Norman* Defence, as a preliminary objection to the Special Court's jurisdiction, essentially challenged the notion that the Defence could get a fair trial where the judges' salaries were contingent on voluntary contributions from donor states.¹³ In that context, and *absent any factual basis for the allegation*, the Appeals Chamber found that the funding arrangement of the Court could not reasonably occasion the denial of a fair hearing.¹⁴ The Defence herein has never suggested that the judges are performing their jobs in anticipation of some improper pecuniary benefit. Rather, the Defence's argument in relation to funding is that the Prosecution has surrendered its independence to the USG in that it is not only receiving clandestine funding but is also in communication with the USG outside official channels of communication.
14. Further, that this is exacerbated by the fact that high-level Prosecution personnel are former and/or current employees of the USG.¹⁵ Prosecution comparisons at paragraphs 14-15 of its Response, to British or American nationals on the Defence team are inapposite. The Defence is not suggesting that every national of a country is acting pursuant to that country's instructions. Instead, the Defence makes the limited submission that the named American nationals (David Crane, Alan White, Jim Johnson, Stephen Rapp and Brenda Hollis), having occupied significant positions within both the Prosecution and the USG, in light of USG payments to and communications with the Prosecution, may have compromised the impartiality and

¹² See also, *Prosecutor v. Taylor*, SCSL-03-01-T-1097, 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. 11 (wherein the OTP states the Defence has misrepresented the mandate of the WMU but again provides no explanation as to its mandate).

¹³ Judicial Independence Decision, para. 18.

¹⁴ Judicial Independence Decision, para. 37.

¹⁵ Motion, paras. 7 and 20.

- independence of the Prosecution. This should be disclosed and/or investigated if the prosecution of Mr. Taylor is to be fair and be seen to be fair, as required by the law.
15. The Defence is unclear as to what paragraph of the Motion the Prosecution is referencing at paragraph 16 of its Response. However, with respect to the substantive commentary therein, the Prosecution misconstrues the Defence's argument. The Defence does not suggest that one cannot try a person accused of war crimes and crimes against humanity who are perceived as dangerous. Rather, that one should not try such an accused under false pretenses. Put differently, that a Prosecution should not pander to the dictates of politics, only the law.
16. As regards selective prosecution, at paragraphs 17-19 of the Prosecution Response, the Prosecution emphasizes its broad prosecutorial discretion to justify its indictment of Mr. Taylor. However, the Prosecution concedes that in terms of international criminal law jurisprudence, where there is evidence establishing that the prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute an accused, the Chamber can consider an argument pertaining to selective prosecution. Against the background of evidence already on record, the Cables themselves suggest an improper motive on the part of the USG in conjunction with the Prosecution. Information stemming from further disclosure and/or an investigation to that effect could support the Defence's theory.

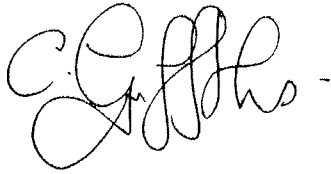
Basis Upon Which to Order Disclosure and/or an Investigation

17. At paragraph 20 of its Response, the Prosecution suggests that there is no basis upon which the Trial Chamber may order disclosure and/or an investigation into allegations relating to a breach of impartiality and independence of the Prosecution and/or Court. Such a suggestion curtails the broad powers and obligations of the Trial Chamber to ensure that the proceedings before them are impartially and independently adjudicated.

III. CONCLUSION AND RELIEF REQUESTED

18. The Defence urges the Trial Chamber to order the relief requested in paragraph 22 of its Motion.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Griffiths' with a stylized flourish at the end.

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 25th Day of January 2011,
The Hague, The Netherlands

Table of Authorities**Prosecutor v. Taylor**

Prosecutor v. Taylor, SCSL-03-01-T-1143, Public with Annexes A-N 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-1164, 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, 20 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1097, 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

Other Special Court Cases

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-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