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SCSL-03-01-T
(32399-32407)

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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: 31 January 2011

Case No.: SCSL-03-01-T

THE PROSECUTOR
-v-
CHARLES GHANKAY TAYLOR

SPECIAL COURT FOR SIERRA LEONE	
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**DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON
URGENT AND 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**

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. Pursuant to Rule 73(B), the Defence seeks leave to appeal the Trial Chamber's *Decision on Urgent and Public with Annexes A-N Defence Motion For Disclosure an/or Investigation of United States Government Sources in the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables*.¹
2. The Trial Chamber's denial of the Defence Motion² overlooks the fundamental and important nature of the request to the Accused's case and the centrality of the issues involved to the integrity of the present proceedings. This amounts to exceptional circumstances and results in irreparable prejudice to the Defence.
3. Specifically, the Trial Chamber erred in law/and or on a point of procedure in dismissing the Defence motion for disclosure and or an investigation in that:
 - (i) The Trial Chamber failed to understand the basis of the Motion and what was required of it. The Motion made two alternative requests: first, to the extent that the information was known to the three concerned organs of the Court, the identity of the persons in those respective organs in contact with the USG and extent and nature of the interactions thereof should be disclosed; secondly, and contingent on the first, an investigation to establish the foregoing.
 - (ii) The request was made against a reasonably held and uncontested apprehension that members in all three organs of the Court were in secret communication with the USG, a party with a stated agenda to keep the

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1174, Decision on Urgent and Public with Annexes A-N Defence Motion For Disclosure an/or Investigation of United States Government Sources in the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables, 28 January 2011 ("Decision").

² *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Urgent and Public with Annexes A-N Defence Motion For Disclosure an/or Investigation of United States Government Sources in the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables, 10 January 2011 ("Motion").

Accused out of West Africa by all means. The request for an investigation was therefore to establish: firstly, to what extent the USG might have influenced or tried to influence this case through the alleged contacts, and in view of its stated position; and secondly, to how and to what extent the court members concerned were susceptible to such influence. In this context, the question was therefore not whether the USG has “any influence over the outcome of the trial” but whether, through its contacts, it might have tried to influence the outcome, and if so, the success or failure of such endeavours. These are the issues that the Trial Chamber was requested to investigate.

- (iii) For the same reasons, the cables themselves needed not “demonstrate whether these ‘contacts’ have any relationship with the USG capable of interfering with the independence or impartiality of the Court, or any organ of the Court”.³ This again would have been the object of the contemplated investigation. Indeed, if the cables had demonstrated direct inference, as the Trial Chamber suggests they should have, the Defence would not have requested an investigation. It could have simply brought forth a case for abuse of process with respect to the Prosecution, and a case for recusal if the matter related to a judicial member in Chambers. For the same reasons, the cables needed not demonstrate that the alleged sources “were in fact receiving instructions from the USG”.
- (iv) The Defence submits that the facts before the Trial Chamber sufficiently established a *prima facie* case that all three organs might have compromised their independence with the USG, and that, it is submitted, suffices for purposes of instituting an investigation under Rule 54.
- (v) It is therefore submitted that the Trial Chamber erred in law and/or on a point of procedure in that it failed to apply itself properly to the facts before it

³ Decision, p. 6.

and/or took irrelevant and extraneous factors into consideration and/or failed to take into account relevant considerations, in dismissing the Motion.

- (vi) Furthermore, for reasons given above, the Defence submits that the Trial Chamber abused its discretion by refusing to investigate itself/and or members under it in circumstances where there is *prima facie* evidence that such person(s) are or have been in secret contact with the USG, an external party that has clearly demonstrated its animosity to the Accused. The Defence submits that mere evidence of secret contact between any member of the Trial Chamber and an external party with a vested interest in this case undermines any perception of judicial independence. As the Trial Chamber rightly observed in its Decision,⁴ there are a number of ways through which all organs of the Court could legitimately interact with external agents, for instance, through briefings with the management committee. Precisely for that reason, that faceless members in the Prosecution or Chambers would still visit the American Embassy in the still of the night to discuss, among other things, the management of the trial, with respect, rids the process of any semblance of judicial or prosecutorial independence.
- (vii) Furthermore, the Defence submits that the Trial Chamber abused its discretion by refusing to order an investigation in circumstances where some person(s) among or within itself made serious remarks undermining the integrity of a Judge of this Court, which it is submitted, in itself undermines the integrity of the Court and brings the administration of justice into disrepute. That a person in Chambers should make allegations to an external party that an esteemed judge of this court would manage this trial guided by considerations other than what is judicially prudent, in and of itself, would require investigation. The issue not only raises questions of potential contempt of court, but also the capacity of the Judges of this Court to determine this case guided only by judicial considerations.

⁴ Decision, p. 6.

4. The Defence submits that all the foregoing errors invalidate the Trial Chamber's decision. Had the Trial Chamber properly applied itself to the case before it, it could not have come to the decision that it did. Indeed, no reasonable arbiter properly applying themselves to all the factual and legal issues before the Trial Chamber would have come to the conclusion that the application did not make a prima facie showing that the judicial or prosecutorial independence could have been compromised, as would have required further investigation.

II. APPLICABLE LAW

5. Rule 73(B) sets out the legal standard for leave to appeal: It provides that:

“Decisions rendered on such motions [brought by either party for appropriate ruling or relief after the initial appearance of the accused] are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.”

6. Rule 73(B) is a restrictive provision⁵ and an interlocutory appeal does not lie as of right. The rationale behind this rule is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.⁶ The party seeking leave to appeal must meet the conjunctive conditions of “exceptional circumstances” and “irreparable prejudice” before the Trial Chamber can exercise its discretion; this is a “high threshold”.⁷

⁵ *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004, para. 11.

⁶ *Id.*

⁷ *Id.*, para. 10.

7. There is no comprehensive or exhaustive definition of “exceptional circumstances” as the “notion is one that does not lend itself to a fixed meaning [and it cannot be] plausibly maintained that the categories of ‘exceptional circumstances’ are closed or fixed”.⁸ Exceptional circumstances will depend on the circumstances of each case. Instances may include where for instance the question is one of general principle to be decided for the first time; where the interests of justice *might* be interfered with (there is no requirement to prove that such interference *will* definitely arise); where further decision is conducive to the interests of justice; or where the question is of fundamental legal importance.⁹
8. Irreparable prejudice arises where the Trial Chamber’s decision is not remediable on final appeal. The Appeals Chamber has noted that although most decisions will be capable of disposal at final appeal “the underlying rationale for allowing such appeals is that certain matters cannot be cured or resolved by final appeal against judgment”.¹⁰

III. SUBMISSIONS

Exceptional Circumstances

9. All the foregoing errors of law and or fact, it is submitted, amount to or give rise to exceptional circumstances in that, it is in the interest of justice that, as the time-honoured adage goes, justice must not only be done, but must be seen to be done. That a case, *prima facie*, showing that members in all three organs of the Court are in secret contact with the USG, a party whose aversion for the Accused at bar is a matter of public record, should go un-investigated, undermines any perception of judicial transparency. Rather, it is in the interest of justice that any issue that, *prima facie*,

⁸ *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 21.

⁹ *Id.*, para. 26.

¹⁰ *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para 29.

raises questions going to the independence and integrity of any of the organs of the court, particularly the Prosecution and Chambers, should be properly investigated.

10. The importance of the need for prosecutorial and judicial independence cannot be overemphasized. As the Trial Chamber rightly noted, it is guaranteed in the Statute, and is one of the main guarantees for a fair trial. Any allegations therefore which, *prima facie*, shows that, that independence might have been compromised, must not be taken lightly. Such allegations raise an issue of fundamental legal importance. Furthermore, in this case where the issues raised impacts on the Trial Chamber itself, further decision by the Appeals Chamber on the matter is conducive in the interests of justice.

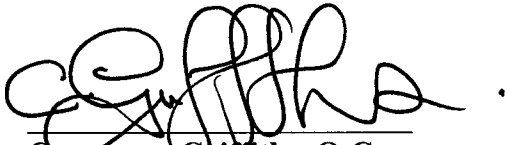
Irreparable Prejudice

11. The Defence would suffer irreparable prejudice if the identity of the persons in the three organs of the Court, and the nature and extent of the interactions of such persons with the USG is not established. This argument applies with stronger force to the Prosecution and the Trial Chamber, given the importance of the two organs to guaranteeing the Accused a fair trial. The Defence submits that the Accused's right to a fair trial also entails all the necessary guarantees that the trial is indeed fair. This also includes the right to judicial transparency. Refusing such transparency in a case where there is a *prima facie* basis for suspecting that some members at unknown levels both in the Trial Chamber and in the Prosecution, may have compromised their independence to a party with a vested interest in the matter, it is submitted, occasions irreparable prejudice.

IV. CONCLUSION AND RELIEF REQUESTED

12. The Defence submits that this Motion meets the conjunctive requirements for leave to appeal and thus leave should be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'CG Griffiths', written over a horizontal line.

Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 31st Day of January 2011,

The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1174, Decision on Urgent and Public with Annexes A-N Defence Motion For Disclosure an/or Investigation of United States Government Sources in the Trial Chamber, the Prosecution and the Registry based on leaked USG Cables, 28 January 2011

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SCSL Cases

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Prosecutor v. Sesay et al., SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004

Prosecutor v. Norman et al., SCSL-04-14-T-669, Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005