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SCSL-03-01-T
(30710-30722)

30710



THE SPECIAL COURT FOR SIERRA LEONE

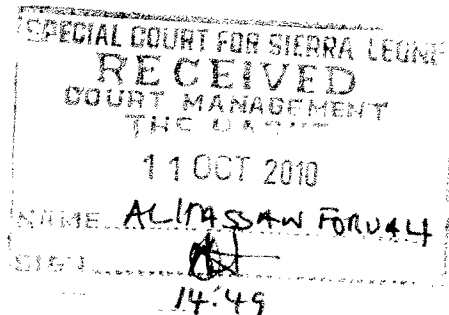
Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 11 October 2010

Case No.: SCSL-03-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC, WITH CONFIDENTIAL ANNEX ONE

**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION
REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT
BY THE OFFICE OF THE PROSECUTION AND ITS INVESTIGATORS**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. This is the Defence's Reply to the Prosecution's Response¹ to the *Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators*.²
2. The Prosecution, in its Response, makes two basic arguments. Firstly, that the Defence Motion is untimely and is only intended to delay the proceedings. Secondly, that none of the allegations of contemptuous conduct made by eight different potential witnesses are credible. The Prosecution also raises a question of law on the interpretation of Rule 77 and conveniently, albeit erroneously, attempts to narrow the application of Rule 77 to the present situation. The Defence addresses these arguments below, followed by a specific reply to each of paragraphs 11-24 of the Response.

II. SUBMISSIONS

Scope of the contemplated investigation/ scope of application of Rule 77(A)(iv)

3. The Prosecution makes a preliminary argument on the scope of Rule 77(A)(iv) and argues for a narrow construction of this clause. The Prosecution argues that since there are no witnesses "giving" or "about to give" evidence, and there is little chance that there are any "potential witnesses" in that the Defence is unlikely to call any additional witnesses, then an investigation should not be ordered.³ In other words, that the scope of Rule 77(A)(iv) is limited to present (those giving evidence) and future witnesses (those about to give evidence) only.
4. The clear wording of Rule 77(A)(iv) however provides for four types of witnesses: those who are giving, those who have given, those who are about to give, and those who had the potential of giving evidence – potential witnesses. In the Motion, the Defence provides enough reason to believe that contempt may have occurred in

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1097, Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 4 October 2010 ("Response").

² *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010 ("Motion").

³ Response, para. 6.

relation to both those who have given evidence⁴ and those who had the potential of giving evidence for the Prosecution and/or for the Defence.⁵ Thus the Defence's request for an investigation is well within the ambit of Rule 77(A)(iv).

5. The Prosecution attempts, erroneously, to support its restrictive interpretation of Rule 77(A)(iv) by comparing the Defence's so-called "open-ended" request for an investigation with the limitations of the ICTY *Seselj* investigation.⁶ This argument however overlooks one fundamental difference that at the ICTY, Rule 77(A)(iv) is limited to only three categories of witnesses: those who have given evidence, those who are giving evidence, and those who are about to give evidence. The SCSL Rule 77(A)(iv), on the other hand, is deliberately wider and includes a separate, fourth category of potential witnesses. Thus, those witnesses termed "potential Defence witnesses" in the *Seselj* Decision are, in the SCSL, really the same as those "about to give evidence" and are different from "potential witnesses" in terms of the SCSL Rule 77(A)(iv).
6. Furthermore, to the extent that the Prosecution argues that the request for an investigation is open-ended, the Defence submits that the Relief sought in the Motion clearly identifies the scope and the parameters of the contemplated investigation. The Defence however recognizes that any proper and thorough investigation must have a degree of flexibility and must be able to cover additional and ancillary matters that may come to light as the investigation progresses.
7. The Defence further notes that while it raises other allegations of misconduct and abuse of process, the Motion is one for contempt of court. Those other issues were

⁴ Motion, para. 28 (TF1-362, Abu Keita, Issac Mongor, Foday Lansana, John Tarnue) and Annex N. The Defence further notes that TF1-139 was relied on thirteen times in the Prosecution's Pre-Trial Brief. See *Prosecutor v. Taylor*, SCSL-03-01-T-218, Prosecution Rule 73bis Pre-Trial Conference Materials, 4 April 2007 ("**Pre-Trial Brief**").

⁵ Examples from the supporting documents Annexed to the Motion include DCT-023/TF1-382 (Annex H) who was critical to the Prosecution in terms of explaining the presence of Liberians in Sierra Leone; DCT-097/TF1-354 (Annex J) in terms of his role within the RUF in trading diamonds in Liberia; DCT-102/TF1-273 (Annex F) in terms of his role within the RUF of transporting diamonds; DCT-133/TF1-575 (Annex D) in terms of his senior role in President Taylor's SSS; DCT-192/TF1-492 (Annex B) as a former enemy of Taylor and getting Taylor out of power/arrested; DCT-032 (Annex F) in linking Taylor to the death of Johnny Paul Koroma; DCT-086 (Annex E) in terms of his access to White Flower during the Indictment period; DCT-130 (Annex C) in that he is listed in their Pre-Trial Brief as a subordinate of Taylor's who participated in the common plan (Pre-Trial Brief, para. 9) and regularly went to Sierra Leone to provide guidance and advice to Bockarie and Sesay (Pre-Trial Brief, para. 62).

⁶ Response, para. 6.

only raised to highlight the extent and gravity of the Prosecution's untoward behaviour.⁷ That the Prosecution's conduct is reprehensible at so many levels and cannot go unnoticed.

There is No Inordinate Delay that would Preclude an Investigation

8. The Prosecution argues that the Defence Motion is "untimely" and must be dismissed on account of what it alleges is an "inordinate delay" by the Defence in bringing the Motion.⁸ In making the argument, the Prosecution attempts to draw authority from this Trial Chamber's earlier decision, where the Chamber dismissed an allegation of contempt by the Prosecution on the basis of what it held to be an "unacceptable delay" in bringing the case to court.⁹ As argued below, the conduct complained of in this case is different and the 'delays' by the Defence in bringing the present Motion before the Trial Chamber cannot be said to be unacceptable or inordinate.
9. The Defence submits that the conduct complained of in this case does not arise from a single incident or an isolated event. Rather, it is the culmination of a series of separate incidents, the continuous and cumulative effect of which makes them repulsive and contemptuous so as to warrant an investigation. It is the consistent pattern of conduct, or more appropriately, misconduct, by the Prosecution throughout the investigation and trial phases of this case that is the cause for concern.
10. While the Defence would have overlooked isolated acts of malfeasance by the Prosecution,¹⁰ the cumulative nature and the overall effect of the Prosecution's conduct, elevates such conduct to a level of contempt that cannot be ignored and calls for judicial intervention. Put differently, it is not so much the independent acts of misconduct that is the cause for concern. Rather it is the Prosecution's entire

⁷⁷ Response, para. 3.

⁸ Response, paras. 8-10.

⁹ The Defence appreciates that in the context of a previous contempt filing and decision regarding alleged breach of protective measures orders, the Trial Chamber found it to be an "unacceptable delay" when nine months transpired from the time the alleged offence occurred until the time the Prosecution filed its motion. However, the delay itself did not preclude the investigation; the Trial Chamber took the delay into account when ascertaining whether the allegations were serious enough to amount to contempt. In the instant case, the allegations of witness abuse, threats, intimidation and bribery are clearly of a more serious nature and should not be time-barred. See *Prosecutor v. Taylor*, SCSL-03-01-T-600, Confidential Decision on Prosecution Motions for Investigations into Contempt of the Special Court for Sierra Leone, 19 September 2008, paras. 14-18.

¹⁰ *Prosecutor v. Nikolic*, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 114 (while this case centers on abuse of process and jurisdiction over the accused and not contempt, the principle that low-level misconduct may be overlooked, is similar).

(improper) dealings with witnesses, to which those independent acts are a mere manifestation of, which is the cause for concern.

11. The conduct complained of thus spans the entire case. Further/alternatively, even if one were to look at the individual acts complained of vis-à-vis the “inordinate delay” argument; some of the acts complained of only came to the Defence’s notice quite recently.¹¹
12. The “inordinate delay” argument therefore does not strictly apply to this case. Even if the argument potentially applied, the acts complained of, owing to their nature and their cumulative effect, measured against the Prosecution’s sacred duty of trust, raises serious issues that impact on the integrity of the proceeding such that they cannot be dismissed on a mere technicality.¹² It is therefore in the interests of justice, in view of the peculiar circumstances of the present case, that an investigation be ordered. The implications of the Prosecution’s misconduct not only undermine the integrity of the entire trial process, but also affect the Accused’s fair trial rights.
13. The recent *Haradinaj* Appeals Chamber Decision at the ICTY suggests a duty on the part of a Trial Chamber to investigate any serious allegations of misconduct by either party in relation to witnesses, which vitiates a fair trial. In that case, the Appeals Chamber ordered a retrial based on the Trial Chamber’s failure to take seriously allegations of witness intimidation. The Appeals Chamber stated that where the Trial Chamber was on notice of an atmosphere of “widespread and serious witness intimidation” it was “incumbent” upon the Trial Chamber to “do its utmost to ensure that a fair trial [was] possible” and to take all measures which are “reasonably open to them” to counter witness intimidation.¹³
14. The Trial Chamber must therefore order an investigation in this case. The Defence submits that its Motion is not a dilatory strategy as suggested by the Prosecution.¹⁴ The Defence notes that it has not asked for, nor does it intend to ask for an extension

¹¹ Contrast with the Prosecution’s argument that Response, para. 8 that none of the allegations relate to recent incidents, events, or contact.

¹² *Prosecutor v. Haradinaj, Balaj, Brahimaj*, IT-04-84-A, Judgement, 19 July 2010, para. 40 (“*Haradinaj Appeal*”). See, para. 40, discussed further below. The Appeals Chamber chastised the Trial Chamber for placing “undue emphasis” on respecting deadlines instead of appreciating the gravity of allegations before it - witness intimidation - and taking steps to safeguard the fairness of the proceedings.

¹³ *Haradinaj Appeal*, paras. 34-35.

¹⁴ Response, para. 25.

of time arising from the Motion. The Defence is committed to proceeding with the case as agreed at the last Status Conference.¹⁵ Should the Trial Chamber order an investigation, the Defence would consider its options at the appropriate time, depending on the outcome.

Allegations are Credible

15. The Prosecution brings the credibility of some of the witnesses the Defence relies on in the Motion into question and on that basis asks the Trial Chamber to dismiss the Motion.¹⁶ In so doing, the Prosecution posits its own counter factual allegations.
16. The Defence submits that while it might be necessary for the Trial Chamber to make a preliminary assessment of the credibility of allegations at this stage,¹⁷ the Prosecution, effectively raises a factual dispute that cannot resolved on the papers. Thus, rather than detract from, this question makes an investigation even more imperative.
17. Furthermore, even assuming *arguendo* that the Motion turned entirely on a preliminary individual assessment of credibility of the witnesses at this stage, the Defence notes that most of the factual allegations contained in the annexes to the Motion remain unchallenged by the Prosecution in any specific or meaningful way, save a few so-called “inaccuracies” as noted in Confidential Annex 4, and save some contextual clarifications as described in Confidential Annex 5 of the Response. The Defence submits that at a minimum, where the facts are not disputed, the information given by the Defence provides credible reason to believe that contempt may have occurred.
18. The Prosecution’s contention that the statements regarding allegations of contempt come from witnesses it calls “admitted liars”¹⁸ is merely self-serving and does not detract from the need for an investigation. Indeed those same lies lay at the heart of this Motion. The crux of the Defence’s concern in this Motion is that the contemptuous conduct by the Prosecution interfered with the administration of justice in that it resulted in witnesses and potential witnesses giving false information, which

¹⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Status Conference Transcript, 27 September 2010.

¹⁶ Response, para. 11.

¹⁷ Response, para. 7, fn 21.

¹⁸ Response, para. 11, citing statements from DCT-133/TF1-575 (Annex D); Prosecution “source” DCT-032 (Annex G); DCT-261 (Annex I) and DCT-097/TF1-354 (Annex J).

the Prosecution used or intended to use against the Accused in one way or another. These people would have had no reason to lie absent the threats, intimidation or inducement by the Prosecution. Thus, it is unfathomable that the Prosecution would now try to undermine the credibility of these witnesses in order to protect its own untoward behavior.

19. The Defence now addresses each of the Prosecution's specific concerns with regard to credibility of the allegations in turn:
20. Regarding paragraph 12 of the Response: DCT-192/TF1-492 was dropped as a witness not because the Defence feared that he would not withstand scrutiny. Rather, he was dropped when it became clear to the Defence that he was not willing to cooperate fully due to his ongoing relationship with former members of the Prosecution. The Defence also could not get him to sign a statement regarding the physical assault by a member of the Prosecution for the same reasons. This reinforces the Defence's position on the hold or sway the Prosecution (improperly) has over witnesses. In that context, it is quite convenient for the Prosecution to try to harp on one minor and tangential inaccuracy in his statement to discredit him.
21. Regarding paragraph 13: It is convenient for the Prosecution to dismiss its misconduct as "historic events" despite the ongoing effect it has had on the case as argued herein. In any event, the argument is premised on a misconception that Rule 77(A)(iv) only applies to current evidence. In any event, the reality on the ground made it difficult for these issues to come to light earlier. Firstly, at the time this conduct primarily occurred, the Prosecution worked hand in hand with governmental authorities, and there was no readily available avenue for complaint.¹⁹ Secondly, the Defence was not yet in existence as an avenue for complaint. Thus, these issues only came to light during the Defence case.
22. Regarding paragraph 14: The allegation herein against DCT-102/TF1-273 raises a dispute of fact that cannot be resolved through this Motion. Furthermore, some of the material aspects of his evidence are not disputed or can be corroborated. The Don Ray "souvenir" corroborates the witness's account that he received the card from David Crane while being threatened with incarceration before being sent in for

¹⁹ See, for example, Motion Confidential Annexes C, para. 5; D, paras. 7 and 11-13; H, paras. 4 and 8.

interrogation. The redacted Prosecution disclosure relating to TF1-273 confirms that this witness was in fact interviewed in Freetown by Yusuf Dfafe and Sharan Parmar in 2003 following his initial meetings with the Prosecution in Kailahun.²⁰

23. Regarding paragraph 15: This paragraph also raises disputes of fact that require further investigation. Most importantly, however, even the facts that are not in dispute would warrant an investigation. The mere fact, for instance, that the Prosecution should continue to entertain and even send money, however arguably legitimate,²¹ to a witness who had put a price tag to his evidence amounts to a bribery and must be investigated.
24. Regarding paragraph 16: DCT-130 was of great interest to the Prosecution as a witness.²² This witness was offered security provisions without voicing any security concern,²³ was intimidated by the Prosecution's investigative techniques,²⁴ and was asked to sign a statement against Mr. Taylor before reading it (on assurances by the investigators not to worry as Mr. Taylor was already guilty).²⁵ There is no inaccuracy between DCT-130's affidavit and his 2007 Statement vis-à-vis the Prosecution account, as he never said he actually went into the compound with his head covered, but that the investigators had wanted him to do that.²⁶ The fact that DCT-130 held a press conference in 2007 relating to his recruitment by the Prosecution lends credibility to his claims.
25. Regarding paragraph 17: While the Prosecution again, conveniently, raises a dispute of fact in relation to DCT-086's statement,²⁷ there is also independent evidence to support some of his allegations. A senior Prosecution Investigator, for instance,

²⁰ See Confidential Annex One to this Reply.

²¹ In the Response, Confidential Annex 2 the Prosecution disclose approximately \$6900 USD worth of payments to DCT-133/TF1-575. Of that total, approximately \$500 USD worth of payments appear to not be related to security, travel, or related interviews

²² See para. 4 above, fn. 5.

²³ Motion, Confidential Annex C, 2007 Statement paras. 4 and 8.

²⁴ Motion, Confidential Annex C, Affidavit, para. 8 and 2007 Statement, paras. 6-7.

²⁵ Motion, Confidential Annex C, Affidavit, para. 10 and 2007 Statement para. 8.

²⁶ Motion, Confidential Annex C, Affidavit, para. 8 and 2007 Statement, para. 7 compared to Prosecution Response, Confidential Annexes 4 and 5.

²⁷ The facts surrounding the *execution* of the search of White Flower in March 2004 rather than the lawfulness of the search are in dispute.

confirmed another attempt by the Prosecution to “kidnap” a high-profile potential witness.²⁸

26. Regarding paragraph 19: The bulk of the information provided by DCT-032 is unchallenged; what the Prosecution deems an “inaccuracy” is really a contradiction between what someone in the Prosecution earlier told DCT-032 and what the Prosecution now claims.²⁹ Information provided by DCT-023 is relevant to showing the close working relationship between the Government of Sierra Leone and the Prosecution, in terms of arrest and detention, and how the Prosecution could use that power and position of advantage to elicit false information from witnesses.³⁰ The evidence is further relevant in that it demonstrates the Prosecution’s interest in the sub-region beyond the mandate of the Special Court, such as the Gus Kowenhoven trial.³¹ It is worth noting that despite the serious allegations made by DCT-261 of LURD being a *de facto* military wing of the SCSL Prosecution to unseat and arrest Mr. Taylor, the only thing the Prosecution could say is that he is not credible because he asked for a non-family member to be relocated by the Prosecution instead of a family member.³² The rest of his affidavit is unchallenged in any substantive manner.
27. Regarding paragraph 20: The Prosecution suggests that the cross-examination of Prosecution witnesses by the Defence on the payments they received should have sufficed, and consequently should forestall contempt investigations. The argument is however flawed in law and in principle. Contempt investigations are not dependent on the nature and content of cross-examination. If anything, it is often through cross-examination that issues giving rise to allegations of contempt are unearthed. Secondly, cross-examination by its nature would not go to the bottom of the matter as would an investigation. Thirdly, in cross-examination, the witnesses are partisan and would know better than bite the hand that feeds them – in this case the Prosecution.

²⁸ See, for instance, **Testimony of Gilbert Morissette**, *Prosecutor v. Sesay et al*, SCSL-04-16-T, 12 June 2007, p. 56-58 regarding the attempted unlawful extradition of Benjamin Yeaten in Togo in 2004. See also a contemporaneous news report at <http://www.afrika.no/Detailed/5101.html>

²⁹ Motion, Confidential Annex G, para. 12 and Response, Confidential Annex 4.

³⁰ Motion, Confidential Annex H, paras. 9-11.

³¹ Motion, Confidential Annex H, paras. 5-6. See also, Motion, Annex O (deemed irrelevant by the Prosecution) where the Prosecutor admits that he was on a crusade to “humiliate” Mr. Taylor and which demonstrates the *ultra vires* sub-regional focus of the Prosecution’s investigations.

³² Motion, Confidential Annex I, para. 8.

28. Regarding paragraph 22: While DCT-097 was not called as a witness by the Prosecution, the Defence submits that the money given to him as a potential Prosecution witness tainted the information he provided to them and is an example of the corrupting influence payments can have.
29. Regarding paragraph 23: It is improper for the Prosecution to promise relocation and/or security protection when the witness concerned has not first raised that as a concern.³³ This is precisely because such protective measures could be used as inducement. Indeed this was the case with Abu Keita, who after giving evidence openly, threatened to sue the Prosecution for breach of promise after they failed to relocate him. The Prosecution's assertions regarding the relocation of Abu Keita thus contradict its own witness' statements regarding breach of an agreement for relocation. Either the Prosecution or its own witness is not being truthful in this regard and thus bears investigation.

III. CONCLUSION AND RELIEF REQUESTED

30. The Defence is justified in its request to the Trial Chamber to appoint an independent investigator pursuant to Rule 77(C)(iii). It is in the interests of justice, given the Prosecution's wide powers and public trust that its conduct not only be above board, but be seen to be above board. The seriousness of the allegations and their implications in this case makes an investigation even more imperative.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 11th Day of October 2010,
The Hague, The Netherlands

³³ See, ex, Motion, Confidential Annex D; Annex E; Annex F, paras. 19-21; Annex G, para. 12.

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1090, Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-218, Prosecution Rule 73bis Pre-Trial Conference Materials, 4 April 2007

ICTY

Prosecutor v. Haradinaj, Balaj, Brahimaj, IT-04-84-A, Judgement, 19 July 2010
<http://www.icty.org/x/cases/haradinaj/acjug/en/100721.pdf>

Prosecutor v. Nikolic, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002
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Public with confidential Annex one Defence reply to Prosecution response to Defence motion requesting an investigation into contempt of court by the office of the Prosecution and its investigators

Name of Officer:

Alhassan Fornah

Signed: 