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SCSL-03-01-T
(33315-33322)

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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: 4 February 2011

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

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION RESPONSE TO 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

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I. INTRODUCTION

1. This response to the "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" ("**Application**")[1] is filed pursuant to the "Order for Expedited Filing".[2]

2. As argued more fully below, the Application should be dismissed. In so far as the impugned Decision[3] encompasses the finding that no evidentiary basis has been shown to order an investigation,[4] this element of the Decision is not subject to appellate review. Such a decision is akin to the decision of whether or not to order an investigation into contempt under Rule 77(C)(iii), which the Appeals Chamber found is a decision:

> "taken by the Trial Chamber not in its judicial capacity, but rather taken pursuant to that Chamber's administrative/executive responsibilities, akin to those decisions made by the executive authorities within their broadly defined prosecutorial discretion, and as a consequence they are not subject to appellate review."[5]

3. Further, in so far as the impugned Decision encompasses the finding that no evidentiary basis has been shown for disclosure,[6] the Application should be dismissed as it fails to satisfy the well established conjunctive test of "exceptional circumstances" and "irreparable prejudice" and thus there is no basis on which to grant certification of the impugned Decision.

II. ARGUMENTS

General failures of the Defence Arguments

4. The Prosecution repeats the jurisprudence of this Court, which the Defence unhelpfully

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1178, "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", 31 January 2011.
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-1179, "Order for Expedited Filing", 1 February 2011.
[3] "Decision" is defined at Application, footnote 1.
[4] Decision, p. 7.
[5] *Prosecutor v. Taylor,* SCSL-03-01-T- 1166, "Decision on Public Defence 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", 21 January 2011, para. 48.
[6] Decision, p. 7.

characterises as an "old chestnut",[7] that satisfaction of the Rule 73(B) standard is not met by simply repeating arguments made in the motion which gave rise to the impugned Decision.[8] Accordingly, those Defence submissions in whichever section of the Application they are made and which do not relate to the criteria for certification but focus on the merits of potential arguments at the appeal stage[9] should be ignored. Further, the mere fact that the Defence has identified purported "procedural errors and/or errors of law and/or fact" does not *of itself* give rise to "exceptional circumstances" and "irreparable prejudice". The accepted jurisprudence of this Court is clear that even an *erroneous* ruling does not *of itself* constitute exceptional circumstances.[10]

5. As the Defence is certainly now well practised in the art of preparing applications for leave to appeal, the Prosecution assumes that the above principles and jurisprudence are known to the Defence. Thus, the logical conclusion is that the purpose of re-litigating the merits is purely strategic, designed to be deliberately provocative and to provide the Defence with yet another opportunity to air its unfounded allegations of Prosecutorial wrong-doing. The Defence resort to pure imagination - "faceless" individuals visiting "the American Embassy in the still of the night"[11]-as basis for a motion demonstrates the frivolous nature of this request. Such far fetched submissions merely highlight the Defence's underlying motives and the Application's overall lack of substance.[12]

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[7] *Prosecutor v. Taylor*, SCSL-03-01-T-1184, "Public Defence Reply to Prosecution Response to Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses", 3 February 2011, para. 3.

[8] This Court has condemned the practice of re-litigating the decision at issue at the certification stage of proceedings (see *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005 ("**TF1-141 Certification Decision**"), para. 15). See also *Prosecutor v. Ndayambaje*, ICTR-96-8-T, "Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006", 5 October 2006 in which the ICTR Trial Chamber dismissed the request for certification on the basis that "the Defence has generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision" (para. 15).

[9] Paragraphs 2, 3 and 4 of the Application specifically focus on the merits. However, other paragraphs such as paragraphs 9 and 11 also effectively boil down to an argument on the merits.

[10] *Prosecutor v. Norman et al.*, SCSL-04-14-T-643, "Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone", 28 June 2006, para. 11.

[11] Application, para. 3(vi).

[12] Note the comments of Appeals Chamber in the *Sesay et al.* case that "Judicial proceedings are not undertaken in a world of speculation or make-believe ..." (*Prosecutor v. Sesay et al.*, SCSL-04-15-AR73, "Gbao- Decision on Appeal Against Decision on Withdrawal of Counsel", 23 November 2004, para. 49).

Failure to establish "Exceptional Circumstances"

6. For the reasons given in paragraph 3 above, the Defence argument made in the first two sentences of paragraph 9 of the Application should be dismissed. The Defence appears to proceed on the basis that, if it identifies as many possible grounds of appeal on the merits as possible, it will create a critical mass which will allow it to satisfy the first limb of Rule 73(B).[13] However, an erroneous ruling, whether challenged on one or several grounds by the Defence, does not *of itself* constitute exceptional circumstances. Further, reliance on "time-honoured adages" alone also does not establish "exceptional circumstances".[14]

7. The arguments made in the final sentence of paragraph 9 and in paragraph 10 of the Application can be combined as they effectively seek to argue that decisions concerning the independence and integrity of any of the organs of the Court automatically satisfy the first limb of the Rule 73(B) test. If such an argument were to succeed, it would be tantamount to inserting an alternative ground into this first stage of the Rule 73(B) test, i.e. a party would be required to establish either "exceptional circumstances" or simply that a decision concerned the integrity and independence of a Court organ. Such an approach is clearly untenable and the argument should be dismissed.

Failure to establish "Irreparable Prejudice"

8. Since the Defence fails to establish "exceptional circumstances", the question of whether "irreparable prejudice" can be demonstrated is irrelevant.[15] However, *esto* the Defence is found to have satisfied the first condition of Rule 73(B) (which is denied), then the Application should be rejected as the Defence fails to satisfy the second condition of the Rule - irreparable prejudice.

9. The Defence argument in paragraph 11 of the Application is predicated on its conclusion that it has established a *prima facie* case. As already argued above at paragraph 3, this merits based argument should be dismissed.

10. *Esto* the perfunctory and unsupported argument made in paragraph 11 is considered not to

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[13] Application, para, 9: "All the foregoing errors of law and or (sic) fact ... amount to or give rise to exceptional circumstances."

[14] Application, para. 9.

[15] See for example: *Prosecutor v. Sesay et al.*, SCSL-04-15-T-703, "Decision on Application for Leave to Appeal the Decision on Defence Motion for a Ruling that the Prosecution Moulding of Evidence is Impermissible", 2 February 2007, para. 15; and *Prosecutor v. Sesay et al.*, SCSL-04-15-T-401, "Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor", 15 June 2005, para. 21.

be an attempt to re-litigate the Motion (which is denied), then, as is evident from the *Sesay et al.* case, the Decision does not result in irreparable prejudice as it is remediable on final appeal. The underlying Motion raised issues similar to those raised by the *Sesay* Defence team[16] – a request for disclosure based on an allegation of a breach of independence, albeit that in the present case the Registry and Chambers were also implicated by the Defence.[17] During the appeals stage, the *Sesay* Defence team argued two related grounds of appeal concerning the *Sesay* Disclosure Decision. The Defence first argued that the Trial Chamber committed an error in the *Sesay* Disclosure Decision by dismissing two of its six disclosure requests.[18] The *Sesay* Defence team asked the Appeals Chamber to: (i) reverse the Trial Chamber's decision on the two requests; (ii) declare that the identified material should have been disclosed; and (iii) review the previously undisclosed material to ensure that the evidence was considered in connection with the appeal.[19] The second related ground of appeal requested the Appeals Chamber on the basis of any newly disclosed evidence to dismiss the Trial Chamber's assessment of the evidence and substitute its own findings in relation to each charge.[20] While the Appeals Chamber found that the *Sesay* Defence team's submissions did not add to those raised in the underlying motion, the Appeals Chamber did consider the appeal submissions in the interests of justice.[21] This example, thus, demonstrates that requests for disclosure whether concerning the Prosecution, Registry or Chambers can be remedied on final appeal.

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[16] *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**").

[17] The underlying Motion sought, first, disclosure and, only if full disclosure was not made due to the unwillingness or inability of an organ, an independent investigation was requested (see Motion, paras. 4, 5 & 21; and Application, para. 3(i)).

[18] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, "Judgement", 26 October 2009, para. 184.

[19] Ibid.

[20] Ibid, paras. 185-186.

[21] Ibid, para. 186.

III. CONCLUSION

11. As the Defence fails to satisfy the threshold required by Rule 73(B) in order for leave to appeal to be granted, the Prosecution respectfully requests that the Trial Chamber dismiss the Application.

Filed in The Hague,
4 February 2011
For the Prosecution,

Brenda J. Hollis
The Prosecutor

LIST OF AUTHORITIES

SCSL Cases

***Prosecutor v. Taylor*, Case No. SCSL-03-01**

Prosecutor v. Taylor, SCSL-03-01-T-1178, "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", 31 January 2011.

Prosecutor v. Taylor, SCSL-03-01-T-1179, "Order for Expedited Filing", 1 February 2011.

Prosecutor v. Taylor, SCSL-03-01-T- 1166, "Decision on Public Defence 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", 21 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1184, "Public Defence Reply to Prosecution Response to Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses", 3 February 2011

***Prosecutor v. Norman et al.*, SCSL-04-14**

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Prosecutor v. Sesay et al., SCSL-04-15-T-703, "Decision on Application for Leave to Appeal the Decision on Defence Motion for a Ruling that the Prosecution Moulding of Evidence is Impermissible", 2 February 2007

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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

Prosecutor v. Sesay et al., SCSL-04-15-A, "Judgement", 26 October 2009

ICTR Case

Prosecutor v. Ndayambaje, ICTR-96-8-T, "Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006", 5 October 2006
http://www.unictr.org/Portals/0/Case/English/Ndayambaje/decisions/051006.pdf