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SCSL-12-01-T
(424 – 432)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Teresa Doherty, Single Judge
Registrar:	Ms. Binta Mansaray
Date:	22 August 2012
Case No.:	SCSL-12-01-T

IN THE MATTER OF CONTEMPT PROCEEDINGS ARISING FROM THE CASE OF *PROSECUTOR V. CHARLES GHANKAY TAYLOR*

PUBLIC

DEFENDANT COUNSEL'S RESPONSE TO THE PROSECUTION'S CONFIDENTIAL FILING OF ADDITIONAL EVIDENCE AND SUBMISSIONS RELEVANT TO THE SINGLE JUDGE'S 'DECISION ON CONFIDENTIAL WITH CONFIDENTIAL ANNEXES A-E PROSECUTION MOTION FOR THE TRIAL CHAMBER TO SUMMARILY DEAL WITH CONTEMPT OF THE SPECIAL COURT FOR SIERRA LEONE AND FOR URGENT INTERIM MEASURES' OF 19 JUNE 2012

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Ula Nathai-Lutchman
Mr. James Pace

Counsel for the Accused:
Mr. Courtenay Griffiths, QC
Ms. Logan Hambrick

Office of the Principal Defender:
Ms. Claire Carlton-Hanciles

SPECIAL COURT FOR SIERRA LEONE
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I. INTRODUCTION

1. On 17 August 2012, the Justice Doherty, acting in her stated capacity as a Single Judge designated by Trial Chamber II,[1] directed Defendant Counsel to file submissions in this matter by 22 August 2012.[2] On 21 August 2012, Defendant Counsel filed a preliminary motion before Trial Chamber II challenging Justice Doherty's jurisdiction to hear this matter sitting as a Single Judge.[3] In the Challenge to Jurisdiction, Defendant Counsel specifically requested suspensive relief with respect to the instant filing.[4] However, given that Justice Doherty's Directive has not been vacated, Defendant Counsel, without prejudice to his request that these proceedings be terminated for lack of jurisdiction, makes the following core substantive submissions.

2. Defendant Counsel also incorporates and relies upon all arguments and submissions made by the Defence on 21 February 2011 in response to the Prosecution's initial allegations[5] as well as Justice Sebutinde's arguments and conclusions as articulated on 24 March 2011 in her Partially Dissenting Opinion to the same.[6] Defence Counsel incorporates the Dissenting Opinion as if it was specifically pleaded herein.

II. SUBMISSIONS

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[1] *In the Matter of Contempt Proceedings Arising from the Case of* Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T, Status Conference Transcript, 6 July 2012, p. 49788 (Justice Doherty stated, "Given that there is no limitation in the Rule 77(C)(i) and given that this is a discrete issue before me, I direct that the matter be dealt with summarily. 77(C) provides that either a judge or a Trial Chamber can deal with contempts, and all of the contempts, including this one, arising from proceedings in Trial Chamber II have been assigned to me.)

[2] *In the Matter of Contempt Proceedings Arising from the Case of* Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T-02, Direction to Defendant Counsel, 17 August 2012 ("**Direction**").

[3] *In the Matter of Contempt Proceedings Arising from the Case of* Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T-03, Defence Challenge to Jurisdiction, 21 August 2012 ("**Challenge to Jurisdiction**").

[4] Challenge to Jurisdiction, paras 5 and 31.

[5] *Prosecutor v. Taylor,* SCSL-03-01-T-1212, Confidential Defence Response to Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 21 February 2011 ("**Response**").

[6] *Prosecutor v. Taylor,* SCSL-03-01-T-1235, Partially Dissenting Opinion of Justice Julia Sebutinde to Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 24 March 2011 ("**Dissenting Opinion**").

3. The *actus reas* of the alleged contempt and/or misconduct is not challenged. The Defence has previously accepted and apologized for the fact that the names of seven protected Prosecution witnesses were inadvertently disclosed in a public annex to the Defence's final trial brief.[7]

4. With respect to *mens rea*, the Prosecution sets out three ways that a violation of Rule 77(A)(ii) may be satisfied:[8]

    a. Actual knowledge that the disclosure is in violation of a Chamber's order;
    b. Willful blindness to the existence of the order;
    c. Reckless indifference to the existence of the order.

5. Defendant Counsel will address each in turn. First, there is no dispute that Defendant Counsel had actual knowledge that publicly disclosing the names of protected witnesses would be in violation of a Court order. However, to accept the Prosecution's position that any disclosure of protected information in violation of a known order, without any further consideration as to *mens rea*, would be tantamount to turning such disclosure into a strict liability offence. It cannot stand that simply because Defendant Counsel knew of the order and disclosed the names, he should be convicted for contempt or misconduct. The Defence further notes that at the ICTR in *Prosecutor v. Nshogoza,* the Trial Chamber found that "cases of inadvertent disclosures of protected witness information would be highly unlikely to meet the requirement that … one's conduct must be knowing and willful".[9]

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[7] Response, paras 3 and 7.
[8] *In the Matter of Contempt Proceedings Arising from the Case of* Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T-01, Prosecution's Confidential with Confidential Annexes Additional Evidence and Submissions Relevant to the Single Judge's 'Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures' of 19 June 2012, 12 July 2012 ("**Additional Evidence and Submissions**"), para. 4.
[9] *Prosecutor v. Nshogoza,* ICTR-07-91-T, Judgement, 7 July 2009, para. 176.

6. Secondly, there is no question regarding whether Defendant Counsel was willfully blind to the existence of the protective measures orders. As stated above, he was aware of the order. This form of *mens rea* is not applicable.

7. Thirdly, and with respect to whether Defendant Counsel was recklessly indifferent to the existence of the order. In the *Florence Hartmann Contempt Appeal*, the Appeals Chamber stated:

> The *mens rea* required [...] is the disclosure of particular information in knowing violation of a Chamber's order. Generally it is sufficient to **establish that the conduct which constituted the violation was deliberate and not accidental.** This may be inferred from circumstantial evidence.[10]

8. The Prosecution has not proven beyond a reasonable doubt that the violation was deliberate and not accidental.[11] Given that these are criminal proceedings, the principal of *in dubio pro reo* must apply.

9. In trying to prove that the disclosure of these names was a deliberate action, the Prosecution points to three factors. First, the Prosecution alleges that in the corrected version of the Defence's Final Trial Brief (to which the public Table of Contents listing the names was attached):

> The Defence stated that they corrected "a few substantive mistakes" including details relating to witnesses.[12]

In fact, what the Defence stated was:

> In this corrected copy, the Defence has corrected formatting, typographical and grammatical errors, as well as a few substantive mistakes (ie, a witness number was transposed, the wrong date was given for an event, or the wrong [TF1] number of prosecution witnesses was listed). These errors were due to administrative oversight. The Defence maintains an electronic version of the 3

[10] *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Appeal Judgement, 19 July 2011, para. 128. See also, Additional Evidence and Submissions, CMS p. 025.
[11] Contra Prosecution assertions at para 7 of its Additional Evidence and Submissions, which fail to appreciate that the Prosecution must still prove that the disclosure was deliberate and not accidental.
[12] Additional Evidence and Submissions, para. 33.

February 2011 filing with track-changes should there be need for comparison of the two copies.[13]

10. It cannot be reasonably said, much less proven, on the basis of this paragraph, that the corrections the Defence made to its final trial brief in that had anything to do with the disclosure of the names in the table of contents attached. Likewise, neither can the fact that the Defence filed a corrected copy of its final brief for reasons of "posterity" and preserving its position on appeal plausibly be construed to suggest that the intention of the Defence was to disclose the names of protected witnesses for posterity. Rather, the Defence's sole intention was to ensure that as complete and correct a version of its final brief as possible be on record with the Court for consideration in Defence of its client, Mr. Charles Taylor.

11. Secondly, the Prosecution rehashes a litany of what it considers to be a pattern of court-ordered protective measures violations by Defendant Counsel.[14] In this manner, the Prosecution attempts to prove *mens rea* on one specific occasion by reference to other mistakes which have been made throughout a four year trial process. The argument advanced by the Prosecution that the aggregate of past breaches establishes liability in this case is unduly prejudicial and runs counter to the tenants of a fair trial. The present breach must be considered in its own circumstances, and such circumstances must establish beyond a reasonable doubt that Defendant Counsel was recklessly indifferent to the protective measures issue. Indeed if one were to seek to establish Defendant Counsel's *mens rea* from previous conduct, the instances where the Defence abided by protective measures orders, often proactively, far outweigh the isolated instances of breaches highlighted by the Prosecution.

12. Consequently, a determination of the issue in question must be restricted to an examination of the circumstances surrounding the specific disclosure of these seven names in this particular annex. The Prosecution has not sought admission of any

[13] *Prosecutor v. Taylor*, SCSL-03-01-T-1194, Public, with Annex A and Confidential Annex B Corrigendum to Defence Final Brief as Filed on 3 February 2011, 8 February 2011 ("**Corrected Final Brief**"), para. 3.
[14] Additional Evidence and Submissions, paras 12-31 and 34-37.

additional evidence which goes directly to the pertinent issue – instead the four hundred or so pages annexed as Additional Evidence and Submissions are unconnected to the present proceedings. These submissions by the Prosecutor are simply an attempt to portray Defendant Counsel in a negative light and as someone who has no regard for court orders at all. This is not the case.

13. The record is replete with examples of instances where Defendant Counsel purposefully asked to go into closed session in order to protect the identities of witnesses for both the Prosecution and the Defence. Furthermore, there are several instances wherein Defendant Counsel, while leading the testimony of the Accused or other Defence witnesses, cautioned the witness to be careful in how he answered the question in open session so as not to reveal the identity of any protected witness.[15] On balance, and considering the length of the trial and the number of people on the team subordinate to Defendant Counsel whose work had to be supervised by him, it is clear that Defendant Counsel paid utmost respect for protective measures concerns.

14. The Prosecution's examples are irrelevant to the instant question of contempt (and are deliberately designed to cast Defendant Counsel in a negative light), and are deserving of rebuke. For instance, at paragraph 15 of its Additional Evidence and Submissions, the Prosecution attempts to link the fact that Defendant Counsel made a legitimate legal argument in opposition to the automatic applicability of protective

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[15] For example,
Prosecutor v. Taylor, SCSL-03-01-T, Transcript, 20 July 2009, p. 24783 :

Q. [Courtenay Griffiths] Now, Mr Taylor, we've gone as far as April of 1991 and you've told us about your knowledge of what had occurred leading up to the invasion in March and the response of the Momoh government to it, but I want to put to you now, please, a detail which emerged during the course the Prosecution case and **can I caution you at this point that I do not want you to mention the name of any witness in this context**. Do you follow me?

A. [Charles Taylor] I do.

Prosecutor v. Taylor, SCSL-03-01-T, Transcript, 29 October 2009, p. 30638:

Q. [Courtenay Griffiths] Mr Taylor, yesterday we had reached the point where the witness we were dealing with, and **remember this is a protected witness so we do not mention names**. That the witness described being assigned as a bodyguard by Benjamin Yeaten to Sam Bockarie,do you recall that?

A. Yes, I do.

measures granted to witnesses who testified previously in other SCSL trials, to an intention to purposefully disclose names of protected witnesses. This justifiable legal argument made by Defendant Counsel on behalf of his client (even if ultimately rejected) can in no way support an allegation of a willing breach of protective measures by Defendant Counsel.

15. Additionally, it should be noted that the time during which the alleged contemptuous conduct occurred was a highly stressful period for the Defence. Many team members hardly slept for weeks on end. It should be recalled that the four day period during which the Defence was preparing the corrected version of its approximately 600 page final brief, to which the Table of Contents was added, the Defence was also analyzing the Prosecution Final Trial Brief, preparing for oral arguments as scheduled for 9 February 2011 and ultimately seeking leave to appeal the Trial Chamber's majority decision to reject the Defence's Final Trial Brief.[16] Viewed objectively, it is understandable given the considerable time pressure and work load the Defence was under, that the Table of Contents was mistakenly filed as public with confidential information included. It is indicative of the immense pressure of the period that such a mistake could have escaped the notice of members of the team as well as Defendant Counsel.

16. Thirdly, the submissions by the Prosecution that Defendant Counsel should be strictly bound by his signature on the filing in question ignore some of the practical realities of a trial of this nature and magnitude and the specific circumstances of the filing of the Defence's final trial brief. As highlighted above, it was reasonable for Defendant Counsel to rely on his co-counsel and legal assistant, professionals and officers of the Court in their own right, who were also bound by the same professional and legal ethics, to assist him in drafting the filings. In the circumstances it was understandable that Defendant Counsel should place a measure of trust in their work. Some mistakes would have escaped his attention in this manner. While this does not excuse him with

[16] See Response, para. 8.

respect to the *caveat subscripto* rule, it does go to the question of *mens rea* in relation to the present proceedings.

17. Defendant Counsel does not at this stage address any considerations with respect to a sentence other punishment for contempt or misconduct. In terms of the Rules and the practice of this Court (which apply *mutatis mutandis* to the present proceedings), these issues will arise only after a determination of the case on the merits, and only in the event of a conviction. Thus Defendant Counsel reserves the right to make the necessary submissions on those issues at the appropriate time.

III. Conclusion and Relief Requested

18. The Prosecution have failed to prove beyond a reasonable doubt that Defendant Counsel, Courtenay Griffiths, QC, has violated Rule 77(A)(ii) by disclosing information identifying seven protected witnesses with the actual knowledge of, or willful blindness or reckless indifference to, the fact that this violated an Order of a Chamber. Consequently, he should not be found guilty of contempt under Rule 77 or misconduct per Rule 46(C).

Respectfully Submitted,

Courtenay Griffiths, QC
Defendant Counsel
Dated this 22nd Day of August 2012

Table of Authorities

In the Matter of Contempt Proceedings Arising from the Case of Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T, Status Conference Transcript

In the Matter of Contempt Proceedings Arising from the Case of Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T-01, Prosecution's Confidential with Confidential Annexes Additional Evidence and Submissions Relevant to the Single Judge's 'Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures' of 19 June 2012, 12 July 2012

In the Matter of Contempt Proceedings Arising from the Case of Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T-02, Direction to Defendant Counsel, 17 August 2012

In the Matter of Contempt Proceedings Arising from the Case of Prosecutor v. Charles Ghankay Taylor, SCSL-12-01-T-03, Defence Challenge to Jurisdiction, 21 August 2012

Prosecutor v. Taylor

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Prosecutor v. Taylor, SCSL-03-01-T-1194, Public, with Annex A and Confidential Annex B Corrigendum to Defence Final Brief as Filed on 3 February 2011, 8 February 2011

Prosecutor v. Taylor, SCSL-03-01-T-1212, Confidential Defence Response to Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 21 February 2011

Prosecutor v. Taylor, SCSL-03-01-T-1235, Partially Dissenting Opinion of Justice Julia Sebutinde to Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 24 March 2011

Other

In the Case Against Florence Hartmann, IT-02-54-R77.5-A, Appeal Judgement, 19 July 2011

Prosecutor v. Nshogoza, ICTR-07-91-T, Judgement, 7 July 2009