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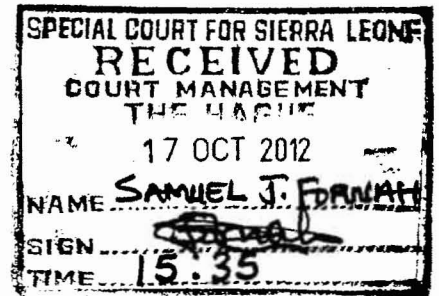
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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Single Judge
Binta Mansaray
Case No.: SCSL-12-01-T
Date: 17 October 2012



In the Matter of Contempt Proceedings Arising from the Case of
The Prosecutor v. Charles Ghankay Taylor

PUBLIC

DECISION ON URGENT AND PUBLIC WITH ANNEX
DEFENCE CHALLENGE TO JURISDICTION

Office of the Prosecutor:

Brenda J. Hollis
Ula Nathai-Lutchman
James Pace

Counsel for the Accused:

Courtenay Griffiths, Q.C.
Logan Hambrick

Office of the Principal Defender:

Claire Carlton-Hanciles

I, Justice Teresa Doherty, Single Judge of the Special Court for Sierra Leone (“Special Court”);

SEISED of the “Urgent and Public with Annex Defence Challenge to Jurisdiction,” filed on 21 August 2012 (“Motion”);¹

RECALLING the “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,” filed on 19 June 2012;²

RECALLING the “Direction to Defendant Counsel,” filed on 17 August 2012;³

NOTING the “Public with Confidential Annexes A & B Prosecution Response to Defence Challenge to Jurisdiction,” filed on 24 August 2012 (“Response”);⁴

RECALLING the Status Conference of 6 July 2012, where the Prosecutor and Defendant Counsel were in attendance;

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“the Statute”), Rules 46, 73 and 77 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“the Rules”) and the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“the Code of Conduct”);

HEREBY decide as follows based solely on the written submissions pursuant to Rule 73(A):

SUBMISSIONS OF THE PARTIES

Defence Motion

1. Mr. Courtenay Griffiths, Q.C. (“Defendant Counsel”) challenges the jurisdiction of the Single Judge to preside over the current contempt proceedings instituted against him by the Prosecution, and urgently requests that the current contempt proceedings be stayed.⁵ Defendant Counsel further submits that the current contempt and misconduct

¹ SCSL-12-01-T-003.

² SCSL-03-01-T-1294.

³ SCSL-12-01-T-002.

⁴ SCSL-12-01-T-007.

⁵ SCSL-12-01-T-003, para. 31.

- proceedings before the Single Judge be vacated for lack of jurisdiction in the absence of any proof thereof or alternatively, if such proof exists, that the proceedings be vacated for a lack of jurisdiction on the basis that Trial Chamber II could not lawfully delegate jurisdiction to a Single Judge.⁶
2. Defendant Counsel recites the history of the current application, which arose from a Prosecution motion filed on 17 February 2011 (“Original Motion”) citing him for breach of “protective measures ordered by the Court,” by revealing the identity of seven protected witnesses in his filing of a public table of contents to a corrected version of the Defence Final Trial Brief in the matter of *The Prosecutor v. Charles Ghankay Taylor* (“the *Taylor* case”). In the original motion, the Prosecutor sought sanctions pursuant to Rule 46 and/or 77(C)(i), but asked the Trial Chamber to postpone the decision on the original motion until the hearing was closed or the trial completed. The Trial Chamber issued a majority decision postponing a decision on the merits until the trial was completed.⁷
 3. Defendant Counsel notes that almost three weeks after the judgement and sentence had been rendered in the *Taylor* case, the Single Judge⁸ issued a decision that the disclosure of the names of the seven protected witnesses was sufficient to constitute a “reason to believe” that he, as Lead Counsel, had disclosed protected information, and directed that a status conference be held.⁹ Counsel submits that I, as Single Judge, have not produced any documented authorisation from the Trial Chamber or the President which would give me the competence to initiate and preside over the contempt proceedings in a capacity as a Single Judge.¹⁰

⁶ SCSL-12-01-T-003, para. 32.

⁷ SCSL-12-01-T-003, para. 1.

⁸ Counsel refers to the Single Judge’s actions as done in “a presumably unjustified and undesignated capacity as ‘Single Judge of the Special Court for Sierra Leone’” SCSL-12-01-T-003, para. 3.

⁹ SCSL-12-01-T-003, para. 3. The status conference was held on 6 July 2012.

¹⁰ SCSL-12-01-T-003, para. 17.

4. Accordingly, Defendant Counsel submits his challenge to the jurisdiction before Trial Chamber II as fully constituted, and says that he has made every effort to cooperate with the proceedings. He recites a series of emails and a letter sent to the Single Judge's legal officer asking her to "provide a formal document or designation" on the basis that the Single Judge had undertaken to approach the President if this is what he required. However, neither the "requested designation of authority," nor a copy of any formal document of designation of the Single Judge to hear and deal with the matter of the contempt proceeding has been produced.¹¹
5. Counsel submits that from a reading of the Statute and the Rules it is the "Trial Chamber as a whole" that is the primary arbiter of all matters that arise during the preliminary and trial phases of a case; a Single Judge may only act where it is expressly provided for in the Rules, and a full Chamber must hear preliminary issues pursuant to Rule 72. It is only after an initial appearance of an accused that a Single Judge, whether designated or by delegation, may adjudicate on motions.¹² Counsel further submits that Rule 72(B)(i) provides that objections of lack of jurisdiction are preliminary motions and Rule 72(D) states that the Trial Chamber must dispose of preliminary motions before the trial. Hence, Counsel submits, questions of jurisdiction must be adjudicated upon before a fully constituted Trial Chamber.
6. Counsel also submits that alternatively, Rule 73(A) provides that either party may move before the Designated Judge, a Trial Chamber or a judge designated by the Trial Chamber from among its members to rule on motions after the initial appearance of the accused. He submits that in the instant case there is no Designated Judge in accordance with Rule 28, nor is there a judge properly designated by the Trial Chamber from among its

¹¹ I note the transcript correctly states that I used the word "President," but I mis-spoke, as my intention was to refer to the "Presiding Judge" i.e. the Presiding Judge in Trial Chamber II.

¹² SCSL-12-01-T-003, para. 18.

- members. Hence, Counsel has filed this jurisdictional challenge before the entire Trial Chamber II.¹³
7. Counsel submits that pursuant to Rules 77 and 46, the entirety of the Trial Chamber, seised of the issue from the outset, must be involved in its determination. Counsel further submits that under Rule 77(D), only proceedings initiated under Rule 77(C)(iii) may be assigned to be heard by a Single Judge of a Trial Chamber. In the instant case, where the alleged contempt is brought to the attention of the Trial Chamber as a whole and the Trial Chamber as a whole made a preliminary ruling, the jurisdiction must remain with the Trial Chamber as a whole.¹⁴
 8. Further, Rule 46 deliberately restricts disciplinary action to a Trial Chamber rather than a Single Judge.¹⁵
 9. Counsel also submits that contempt proceedings, which entail criminal sanctions, are subject to and safeguarded by Article 17 of the Statute, which involves, *inter alia*, a properly constituted adjudicating authority. Rule 35 requires the Registry to take minutes of the sittings of Chambers other than private deliberations, and an assignment of designation would have to be filed or minuted.¹⁶ As the Trial Chamber has been seised of the alleged contempt and misconduct case from the outset, the matter could not and should not have been delegated to a Single Judge, as this would be *ultra vires* the Rules, and in particular Rules 77(C) and 46(C).

Prosecutor's Response

10. The Prosecutor responds that Defendant Counsel's motion is untimely, without merit and should be dismissed. She submits that the Single Judge has jurisdiction over the

¹³ SCSL-12-01-T-003, para. 20.

¹⁴ SCSL-12-01-T-003, para. 21.

¹⁵ SCSL-12-01-T-003, para. 22.

¹⁶ SCSL-12-01-T-003, paras 23-25.

disposition of the alleged contemptuous conduct, having been assigned the matter by Trial Chamber II. The Prosecutor submits that such assignment is appropriate, as the Rules of Procedure and Evidence must be read in a way that gives full effect to the provisions of Rules 77(C) and 77(C)(i).¹⁷ The Prosecutor also notes that the Defence motion does not comply with the Practice Direction on Dealing with Documents in The Hague Sub-office, as a list of authorities relied upon was not included.¹⁸

11. The Prosecutor sets out the procedural history by referring to the Decisions of 17 February 2011 and 19 June 2012, and notes that at no time prior to the status conference on 6 July 2012 did Defendant Counsel raise the issue of jurisdiction. Further, when he did so at the status conference he was told that all the contempt cases were assigned to the Single Judge in a meeting of the Trial Chamber. Defendant Counsel did not challenge that declaration at the time, nor did he challenge the oral decision rendered the same day that the matter would be dealt with summarily.
12. The Prosecutor further notes that this ruling was made after Defendant Counsel suggested that the matter be dealt with swiftly, after he had raised the issue of authority and after the Single Judge stated she was assigned all contempt cases. It was only after the Prosecutor filed her submission in accordance with the orders, on 21 July 2012, that Defendant Counsel sent an email to the Single Judge's legal officer seeking a formal document of designation.¹⁹
13. The Prosecutor suggests, as a preliminary matter, that the motion should have been filed before the Single Judge or, in the alternative, if the challenge is to be considered an appeal, it should have been filed before the Appeals Chamber. The Prosecutor points out

¹⁷ SCSL-12-01-T-001, para. 2.

¹⁸ SCSL-12-01-T-001, para. 9, citing Articles 5 (iii) and 7 of the Practice Direction on Dealing with Documents in The Hague Sub-office.

¹⁹ SCSL-12-01-T-001, paras 5-7.

that Trial Chamber II as formally constituted is no longer extant, and refers to Confidential Annex B.²⁰

14. The Prosecutor also submits that the motion is untimely as, despite having raised the issue at the 6 July 2012 status conference, this motion was not filed until 21 August 2012. This was a day before the deadline for Counsel to file his submissions, and some six weeks after the status conference. The Prosecutor also notes that having been informed that the matter had been assigned to the Single Judge, Defendant Counsel did not raise a jurisdictional challenge, and only did so by way of email a week after the Prosecutor filed her submissions, which was both untimely and not the proper procedure provided for in the Rules.²¹
15. The Prosecutor submits that Defendant Counsel's claim "that he made every effort to cooperate" is inaccurate, and recites the dates of his actions.²² In relation to Defendant Counsel's emails and letters, the Prosecutor notes that Defendant Counsel's arguments that he "specifically request[ed] that the letter be copied" to various individuals including the Prosecutor is irrelevant. He failed to take upon himself the responsibility to distribute the letter, and hence it was *ex parte* and, as ruled, not an appropriate legal channel for his request.²³
16. The Prosecutor submits that the challenge to the Single's Judge's jurisdiction is unwarranted and unsupported. It is based upon the premise that there is "an absence of any clear information to the contrary," and ignores the clear statement of the Single Judge that she had authority to deal with this matter and it had been assigned to her. Further, the Prosecutor submits, nothing has been introduced to show that the Single Judge was making a false statement. The Prosecutor also submits that Defendant Counsel assumes

²⁰ SCSL-12-01-T-001, para. 8.

²¹ SCSL-12-01-T-001, paras 10-12.

²² SCSL-12-01-T-001, para. 13.

²³ SCSL-12-01-T-001, paras 14-16.

that there was an offer to provide a formal document of designation but that this does not constitute a basis on which to challenge the Single Judge's jurisdiction. The Prosecution submits that Rule 28 does not apply, as this was an assignment by the Trial Chamber.²⁴

17. In response to Defendant Counsel's argument that the delegation would be *ultra vires* the Rules, the Prosecutor submits that this ignores the clear language of Rule 77(C), which specifically refers to situations when a judge or chamber has reason to believe that a person may be in contempt of court. Rule 77(C)(i) allows the Single Judge to summarily deal with such matters. Further, Rule 77(E) provides that the Rules of Procedure and Evidence in Parts IV-VIII apply, as appropriate, to proceedings under Rule 77. Hence, other applicable rules may be read in a way that gives full effect to the provisions of Rule 77(C) and (C)(i).²⁵ In addition, the Prosecutor submits, Rule 77 does not state that the Single Judge may not act unless authority to do so is delegated, and in any event the Judge made it clear that she was assigned this authority. The only limitation in Rule 77 is the penalty provisions of Rule 77(G).
18. The Prosecutor submits that Defendant Counsel's interpretation of Rule 77(D) misreads the plain language of Rule 77(C)(i) and 77(C)(iii). Rather than restricting the authority of a Single Judge, the language of these provisions makes clear that a Single Judge may adjudicate contempt proceedings under both Rule 77(C)(i) and Rule 77(C)(iii). Given the more serious punishment provided in Rule 77(G) to proceedings under Rule 77(C)(iii), the only logical interpretation is that the Single Judge may conduct proceedings under Rule 77(C)(i) as well as 77(C)(iii).²⁶
19. The Prosecutor submits that Defendant Counsel's argument in relation to Rule 46 - that actions which may be taken under Rule 46(C) are beyond the authority of the Single

²⁴ SCSL-12-01-T-007, paras 16-18.

²⁵ SCSL-12-01-T-007, para. 19.

²⁶ SCSL-12-01-T-007, paras 20-21.

Judge - is premature, as no finding has been entered that Defendant Counsel's actions amounted to misconduct under Rule 46.²⁷ In conclusion, the Prosecutor submits that the Defence motion is untimely and without merit, and that the Single Judge has jurisdiction over the disposition of the Defendant Counsel's alleged contemptuous conduct, as she was assigned the matter and her exercise of jurisdiction is consistent with the language of Rule 77.

DELIBERATIONS

20. With the benefit of hindsight, it is apparent that much of the objection in the present case could have been avoided if the Trial Chamber had anticipated that Counsel would challenge my statement that as Single Judge I had jurisdiction over all contempt matters including this matter, and a written assignment by the Presiding Judge of Trial Chamber II had been promulgated. However, to adopt the terms used by Defendant Counsel in a related document, "given the considerable time pressure and work load"²⁸ prevailing Defendant Counsel's objection was not foreseen, and a formal document was not issued prior to the completion of the *Taylor* trial on 30 May 2012 and prior to Trial Chamber II, as originally constituted, ceasing to be extant on 31 May 2012.²⁹
21. Likewise, with hindsight, if I had been aware that I could receive no communication, either electronically or by telephone, prior to the end of July 2012, I would have stated this more categorically in the course of the status conference.³⁰ As a result, the emails referred to by Defendant Counsel in his submissions were sent but did not reach me.
22. Defendant Counsel's challenge to jurisdiction is based on the provisions, *inter alia*, of Rules 28, 35, 72(B) and 77. The Prosecutor objects, raising, *inter alia*, the issue of delay in

²⁷ SCSL-12-01-T-007, para. 22.

²⁸ SCSL-12-01-T-004, para. 15.

²⁹ SCSL-12-01-T-001, Annex B.

³⁰ Transcript 6 July 2012, p. 49789.

issuing this challenge to jurisdiction. The decision that there was “reason to believe” that former Lead Defence Counsel may be in contempt of court was issued on 19 June 2012. In the course of the status conference of 6 July 2012, that is, over four weeks from the issuing of the decision of 19 June 2012, Defendant Counsel did ask “how it is that Your Honour is presiding over these proceedings, and under what authority Your Honour has been designated to preside over these proceedings, and in what capacity?”³¹ I, as Single Judge, stated that I was assigned all the contempt cases in the Trial Chamber at an internal meeting of the Chamber.³² Defendant Counsel partook in the proceedings thereafter, making submissions and suggestions for the disposal of the proceedings and, apparently, accepting an order by consent for its final disposition. Hence, the formal challenge to the jurisdiction was filed some nine weeks after the 19 June 2012 decision, when a possible challenge to the jurisdiction must have become apparent to Defendant Counsel; more than six weeks after Defendant Counsel was told, verbally, that the matter had been assigned to the Single Judge by way of an internal meeting; three weeks after the Prosecutor complied with the procedural orders made on 6 July 2012; and one day before the extended period allowed to Defendant Counsel to file submissions.

23. Defendant Counsel refers to the provisions of Rule 72, and submits it provides that a full Trial Chamber must hear preliminary issues.
24. Rule 72(A) provides that such preliminary motions shall be brought within 21 days ~~following~~ disclosure of the materials envisaged by Rule 66(A)(i), while Rule 72(B) provides that:

(B) Preliminary motions by the accused are:

(i) objections based on lack of jurisdiction.

³¹ Transcript 6 July 2012, p. 49781.

³² Transcript 6 July 2012, p. 49781.

25. It is apparent that the intent of Rule 72 is that objections relating to jurisdiction be dealt with before the substantive trial, and within a maximum of 21 days of the grounds for such an objection becoming apparent. The spirit and intent of Rule 72 is to dispose of preliminary objections, including objections to jurisdiction, before the trial proper begins and to avoid interference with the trial.
26. In the instant case, Defendant Counsel waited well beyond the 21 days envisaged by Rule 72(A) as a reasonable period within which to raise objections; participated in the status conference on 6 July 2012 after being told that this contempt matter had been assigned internally to the Single Judge; and acquiesced by continuing to make submissions. I am of the view that the delay in bringing this motion is untimely, and contrary to the spirit and intent of Rule 72.
27. Defendant Counsel also submits that there was no designation to the Single Judge pursuant to Rule 28. Rule 28 empowers the President to designate judges to whom indictments, warrants and all other pre-trial matters not pertaining to a case already assigned to a Chamber shall be transmitted for review. Rule 28 cannot apply to the instant case, as this is not "a pre-trial matter[] not pertaining to a case already assigned to a Chamber." The instant case was already assigned to Trial Chamber II, thus provisions of Rule 28 do not arise.
28. In relation to designation, Defendant Counsel argues that Rule 35 requires the Registry staff to take minutes of the sittings of the Chamber or a Judge, other than private deliberations. As noted, the assignment of this contempt case to the Single Judge was made at a meeting of the judges of Trial Chamber II, and such deliberations are not the subject of minute-taking by the Registrar or a member of her staff. Per Rule 29, deliberations of the Trial Chamber are not public, and Rule 35 does not impose any duty

on a Trial Chamber to make its deliberations in writing, take minutes thereof, or issue written records of such private deliberations and decisions, other than those provided by such rules as Rules 88(C). Rule 73 does not provide that decisions on motions shall be written, although in the majority of cases before this Trial Chamber they have been, and oral decisions have been the exception.

29. Defendant Counsel also submits that the provisions of Rules 77 and 46 make it clear that the “Trial Chamber as a whole,” which was seised with the issue from the outset, must be involved in the ultimate determination of the case.³³
30. As the Prosecutor has pointed out, Counsel has filed this jurisdictional challenge before the entire Trial Chamber but, as noted above, the Trial Chamber is no longer extant and these contempt cases were assigned to the Single Judge. The Prosecutor also submits that this ignores “the clear language of Rule 77(C), which refers to situations when a Judge or Trial Chamber has reason to believe” and of 77(C)(i) which allows a Single Judge to summarily deal with such matters.
31. The issue as to whether these proceedings were to be disposed of pursuant to Rule 77(C)(i) or Rule 77(C)(iii) was canvassed and considered in the status conference. In fact, the original motion filed on 21 February 2011 specifically seeks to have the matter dealt with summarily, as shown in the title and in paragraph 1, where the request is to “in accordance with Rule 77(C)(i) summarily deal with the contempt ...”³⁴ In the decision of 24 March 2011, the Trial Chamber did not limit its options to consider the merits of this case to Rule 77(C)(i).³⁵ However, following submissions and discussions on this issue during the status conference, including Defendant Counsel’s own submissions, it was held that the matter be dealt with summarily pursuant to Rule 77(C)(i).

³³ SCSL-12-01-T-003, paras 19, 21.

³⁴ SCSL-03-01-T-1208, para. 1.

³⁵ SCSL-03-01-T-1235, para. 15.

32. I agree with the Prosecutor that the plain language of Rule 77(D) does not preclude proceedings under Rule 77(C)(i) being heard by a Single Judge. The preamble in Rule 77(C) makes clear that “when a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Special Court” the Judge or Trial Chamber may deal with the matter summarily or adopt the procedure under Rule 77(C)(ii) or (iii). The provisions of Rule 77(C)(iii) are procedural to allow an investigation, a report, and the issuing of an order in lieu of indictment. Rule 77(D) provides that the hearing, following the order in lieu of indictment, be dealt with by a Single Judge or a Trial Chamber. Hence, the clear wording of Rule 77(C) allows for a Single Judge to hear a case summarily.
33. I further agree with the Prosecutor that it is only logical that 77(C)(i) can be dealt with by a Single Judge given the provisions of Rule 77(G). If it was otherwise, the result would be that a Single Judge, on hearing a case under Rule 77(C)(iii), could give a heavier sentence than a Trial Chamber hearing a case under Rule 77(C)(i). That cannot be intent of Rule 77(G).
34. For the foregoing reasons, I consider that Defendant Counsel’s challenge to the jurisdiction is untimely, and without merit in law.
35. However, this decision, having been made by me when the issue is exclusively one of my own jurisdiction, is open to the challenge that I have become a judge in my own cause. For that reason, and for the reason that this decision involves an interpretation of Rule 28 which deals with the jurisdiction of the President, I consider this an exceptional circumstance that warrants an interpretation by the Appeal Chamber.

ACCORDINGLY, I:

- 1) Dismiss the motion; and
- 2) Give leave to appeal this decision pursuant to Rule 73(B).

Done at The Hague, The Netherlands this 17th day of October 2012.



Justice Teresa Doherty
Single Judge

