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SCSL-2004-15-T
(9573-9581)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Judge Benjamin Itoe (Presiding)
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 19th November 2004

The Prosecutor

-v-

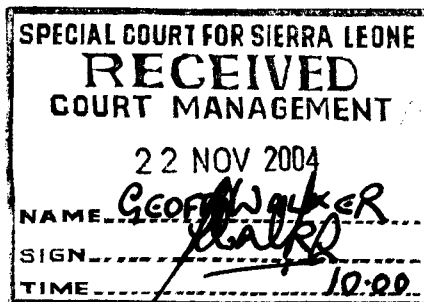
Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – T

**DEFENCE REPLY TO PROSECUTION RESPONSE TO
MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP BETWEEN THE
UNITED STATES OF AMERICA’S GOVERNMENT and/or ADMINISTRATION
and/or INTELLIGENCE and/or SECURITY SERVICES AND THE
INVESTIGATION DEPARTMENT OF THE OFFICE OF THE PROSECUTOR**

Office of the Prosecutor

Lesley Taylor
Peter Harrison
Chris Santora



Defence

Wayne Jordash
Serry Kamal
Sareta Ashraph

INTRODUCTION

PROSECUTION RESPONSE

1. The Prosecution response to the aforementioned requests can be summarised as follows:
 - (i) That the Office of the Prosecutor is charged with both investigating crimes and prosecuting crimes that fall within the jurisdiction of the Court and therefore pursuant to the Statute and Rules they are enabled to seek information and assistance from other entities in carrying out the functions of the Office of the Prosecutor .¹
 - (ii) That the Office of the Prosecutor has not sought or received instructions from any other entity.²
 - (iii) That “the cooperation between the Office and the Prosecutor and foreign agencies does not only make sense but is necessary in order to implement the statutorily protective measures for Prosecution’s witnesses”.³
 - (iv) That the Defence “does not show any evidence whatsoever that the Prosecution have failed” to comply with their duties pursuant to Rule 68.⁴
 - (v) That the Defence have failed to state with specificity what they are seeking in relation to disclosure of the “relationship” between the OTP and the United State’s administration.⁵
 - (vi) That the Office of the Prosecution will not disclose what work they have conducted with other agencies as the ongoing investigations would be compromised.⁶
 - (vii) That there is no evidentiary basis for seeking the disclosure of the assistance offered and given to General Tarnue by the OTP investigators. The Defence have put questions to General Tarnue on

¹ See for example paragraphs 8 – 22 of the Prosecution response. .

² See paragraph 21 of the Prosecution response.

³ See paragraph 23 of the Prosecution response.

⁴ See paragraphs 25 & 26.

⁵ See paragraph 27 of the Prosecution response.

⁶ See paragraph 29 & 30 of the Prosecution response.

this topic and “Defence counsel can seek to compel others to testify on this and related topic”.

- (viii) That the request for disclosure of any information in the possession of or known to the Office of the Prosecutor which discloses any illegal activity in breach of the Statute or the Rules by any investigator of the OTP is an “offensive and mischievous.... Irrelevant....fishing expedition”.

DEFENCE REPLY

2. *That the Office of the Prosecutor is charged with both investigating crimes and prosecuting crimes that fall within the jurisdiction of the Court and therefore pursuant to the Statute and Rules enables them to seek information and assistance from other entities in carrying out the functions of the Office of the Prosecutor.* The Defence accept and agree with this proposition. However the evidence of General Tarnue that Dr White’s actions (according to Dr White) were to be based upon a decision of the State department⁷ suggests⁸ that the OTP’s actions (through the agency of Dr White) were based upon instructions received from the State Department.
3. The Prosecution deny that this is the case but refuse to outline in any way what Dr White was doing working with the FBI. This refusal has nothing to do with their fear of compromising investigations given that General Tarnue has finished giving evidence but everything to do with refusing to disclose what assistance was given to General Tarnue. Clearly if the Prosecution were not taking instructions from the FBI but were seeking information and assistance from the FBI as they imply (but do not at any stage explicitly admit⁹) then they ought to

⁷ See October 5th pp.195.

⁸ The Prosecution response to the Motion is replete with suggestions that the Defence are making direct allegations against them. This is untrue. The Defence have studiously avoided making direct allegations on the basis that the evidence given by General Tarnue simply raises questions about the role of the investigators and raises possible breaches of Article 15. The Defence seek answers to these questions and have no interest in making unwarranted and unsubstantiated allegations and moreover resent the Prosecution’s attempts to characterise their legitimate and justified enquiries in this way.

⁹ See for example the last sentence of paragraph 8 of their response - “However, the Office of the Prosecutor has, as it is permitted to do, sought information from and the assistance of, other entities in pursuing investigations”.

- disclose that assistance pursuant to Rule 68. The Trial Chamber can then properly consider and weigh General Tarnue's motivation for giving evidence.
4. ***That “the cooperation between the Office and the Prosecutor and foreign agencies does not only make sense but is necessary in order to implement the statutorily protective measures for Prosecution’s witnesses”.*** The Defence accept and agree with this proposition. The question therefore remains; what was the nature of the cooperation between the FBI and Dr White and more importantly what assistance was provided to General Tarnue as a result of that cooperation. The Prosecution studiously have avoided answering this question in relation to General Tarnue.¹⁰

 5. ***That the Defence “does not show any evidence whatsoever that the Prosecution have failed” to comply with their duties pursuant to Rule 68.*** This Prosecution assertion logically must mean that the evidence General Tarnue gave in relation to Dr White's work with the FBI and the assistance he gave to General Tarnue is true. The question therefore remains: what was the nature of that assistance and has it affected the motivation and credibility of his evidence. The Prosecutor has an absolute obligation to disclose material which “may¹¹ affect the credibility of this and all evidence it seeks to rely upon.”¹²

 6. ***That the Defence have failed to state with specificity what they are seeking in relation to disclosure of the “relationship” between the OTP and the United State’s administration.¹³ . That the Office of the Prosecution will not disclose what work they have conducted with other agencies as the ongoing investigations would be compromised.¹⁴*** The Defence do not seek this

¹⁰ In fact the Prosecution have refused to disclose any assistance in relation to any witness – with the exception of monetary payments.

¹¹ The Defence highlight that the test is “may”. The material enables the Trial Chamber to decide, in the circumstances of the specific evidence being considered, whether it actually has affected the credibility of the evidence. The Prosecution's attempt to avoid disclosing this information is an attempt to usurp the role of the Trial Chamber in making an assessment of the impact of this assistance on the evidence adduced.

¹² See Rule 68 of the Rules of the Special Court and the ICTY and ICTR.

¹³ See paragraph 27 of the Prosecution response.

¹⁴ See paragraph 29 & 30 of the Prosecution response.

information unless it either breaches the Rules of the Special Court and/or if it results in assistance provided to General Tarnue or any other Prosecution witness. The Defence reiterate that the evidence given by General Tarnue prima facie discloses a breach of Article 15 and/or (as the Prosecution imply) indicates assistance offered to him by the OTP. In either case it ought to be disclosed as it is relevant to an evaluation of the evidence by the Trial Chamber.

7. ***That there is no evidentiary basis for seeking the disclosure of the assistance offered and given to General Tarnue by the OTP investigators. The Defence have put questions to General Tarnue on this topic and “Defence counsel can seek to compel others to testify on this and related topics”.***¹⁵ These are curious and contradictory assertions by the Prosecution. On the one hand they assert that there is no evidence which suggests that there was assistance offered and given to General Tarnue and on the other they suggest that the Defence should either be satisfied with the evidence (detailing that assistance) which we were able to obtain from General Tarnue and/or compel others to testify as to that assistance.

8. The Prosecution’s duties pursuant to Rule 68 have been identified with precision by the Trial Chamber in this case.¹⁶ In the Decision of the 9th July 2004 the Honourable Trial Chamber quoted with approval the case of Prosecutor v. Baglishema, Case No. ICTR- 95 – 1A-T¹⁷. In that case it was made clear that, “the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession or has control of the said evidence”.¹⁸ In addition the Trial Chamber quoted with approval the case of Prosecutor v. Ndayambje¹⁹ in which it was also established that the Defence must justify such request by prima facie establishing the exculpatory nature of the material requested”.

¹⁵ See paragraph 31 of the Prosecution response.

¹⁶ See decision on Sesay - Defence motion for disclosure pursuant to Rules 66 and 68 dated 9th July 2004.

¹⁷ Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000. (See para.33 of the 9th July 2004 Decision).

¹⁸ See paragraph 33 of the 9th July 2004 Decision.

¹⁹ See paragraph 33 of the 9th July 2004 Decision. Also see closed session 6th October 2004 pp27 for General Tarnue’s admission that both he and Alan White were obligated to each other.

EXCULPATORY NATURE OF THE MATERIAL REQUESTED

9. The Prosecution in the present case have denied that the evidence of General Tarnue indicates a breach of Article 15. They have asserted that the evidence instead demonstrates only that they have sought the assistance of the FBI in relation to their investigations. General Tarnue has given evidence that he was assisted by Dr White in his attempt to obtain asylum and to escape from Ghana. This assistance “may affect the credibility of prosecution evidence”²⁰.

CUSTODY, POSSESSION OR CONTROL OF THE EXCULPATORY MATERIAL

10. On the basis that the Prosecution do not suggest that General Tarnue has lied in his evidence as regards the assistance given to him by Dr White it is logical to deduce that the details of that assistance are in the knowledge of Dr White acting on behalf of the OTP.²¹ The Prosecution have stated, “the conduct complained (that is the involvements of Dr White with the FBI and General Tarnue) is permitted by the governing legislation.... is authorised by the Statute and Rules”.²² In other words they have admitted that the FBI assisted Dr White in assisting General Tarnue – as stated clearly by General Tarnue during the course of his evidence.
11. Moreover they suggest that the Defence can obtain further details of this assistance by seeking “to compel others to testify on this and related topics”. This assertion is significant for two reasons (i) it amounts to an admission that further information about the assistance given to General Tarnue exists and (ii) it demonstrates an abdication of their duty to disclose *themselves* that evidence pursuant to Rule 68.
12. Worryingly the Prosecution do not even suggest who it is the Defence ought to seek to compel to give evidence on this topic. They assert, with disapproval, in

²⁰ See Rule 68 of the Rules of the Special Court.

²¹ This assertion is based upon the assumption that the OTP are correct in their assertions that Dr White was not acting in breach of Article 15 of the Statute of the Special Court.

²² See paragraphs 21 and 24 of their Response.

their response to a Defence disclosure request, that the Defence are engaged in a fishing expedition²³ for information and yet appear to be encouraging the Defence to do exactly that in relation to the assistance offered to General Tarnue.

13. The Prosecution appear to believe that it is for the Defence to investigate what assistance has been given to General Tarnue notwithstanding that the information is within their custody, control and possession. Rule 68 allows for no such interpretation or qualification.
14. *That the request for disclosure of any information in the possession of or known to the Office of the Prosecutor which discloses any illegal activity in breach of the Statute or the Rules by any investigator of the OTP is an "offensive and mischievous.... Irrelevant....fishing expedition.* The Prosecution have referred to the Defence Motion as mischievous on three occasions.²⁴ The Defence strenuously refute this characterisation.
15. The Defence represent an accused that faces, if convicted, a sentence which may mean he remains in detention for the rest of his life. As the Trial Chamber will appreciate it is no small thing to deprive a man of his freedom for a short time never mind for the remainder of his life. The Defence believes that if the evidence is placed before the Trial Chamber *fairly and transparently* the accused will be acquitted and can live the remainder of his life in peace as a free man. In order to achieve this objective the Defence seek no favours from the Prosecution but simply seek that the Prosecution put before the Trial Chamber *all* the evidence which might affect the motivation and the credibility of the evidence it relies upon. It ought not to seek to hide that evidence (or abdicate responsibility by suggesting ways in which the Defence might recover it themselves) because it ought to have nothing to fear from a proper weighing of this evidence. It ought to have confidence that its witnesses give evidence because they are telling the truth

²³ See paragraph 32 of their response.

²⁴ See paragraphs 21, 22 and 23.

and not because they have been given money or relocation packages or any other assistance large or small or due to inappropriate behaviour by its investigators. In order for this determination to be made by the *Trial Chamber* it ought to disclose that assistance and not seek to hide behind pleadings, technicalities or the inability of the Defence to uncover it.²⁵

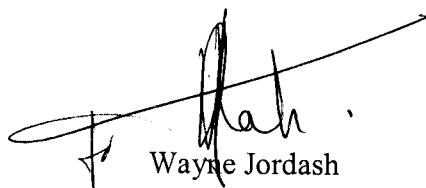
16. The Defence motion is not mischievous. It asks for nothing more than fair disclosure of evidence which might affect the credibility of the Prosecution evidence. In the case of General Tarnue the evidence he gave disclosed a relationship between the FBI and Alan White which causes the Defence concern. The Defence made no allegations (mischievous or otherwise) but simply sought clarification from the Prosecution. This was initially raised on a counsel to counsel basis. The answer the Defence received was that the request should be put into a motion or a letter. It is curious that the Prosecution now complain that the Motion is a mischievous one when the Defence made every effort to deal with these issues confidentially and quietly.²⁶

²⁵ *The Prosecutor of the Tribunal is not, or not only, a party to the proceedings but an organ of an international criminal justice system whose object is not simply to secure a conviction but to present the case for the prosecution, which not only includes inculpatory, but also exculpatory evidence in order to assist the chamber to decide the truth in a judicial setting. See Kupreskic 21st September 1998.*

²⁶ The Prosecution also suggest that the Defence request for information about illegal activity or activity in breach of the Statute including the involvement of the investigators in an attempt to arrest Benjamin Yeaten in Togo is irrelevant to the case against Mr Sesay. The Defence submit that the willingness of the investigators to breach the governing legislation of the Special Court would go to the heart of the credibility of the evidence obtained. The Prosecution rely upon Mr Sesay's interviews. Mr Sesay says he was threatened and coerced into giving those interviews by the investigators including Dr White. It is difficult to see how Dr White's and other investigators willingness to engage in behaviour in breach of fair trial rights could be irrelevant to the charges Mr Sesay faces. The Defence therefore make it crystal clear that they allege that Dr White and other investigators were involved in an illegal attempt to kidnap Benjamin Yeaten from Togo. The Togo authorities stopped them. This information and any other similar information ought to be disclosed so that the Trial Chamber can properly ascertain whether Mr Sesay is to be believed or whether Dr White and others are to be believed when they assert that they were acting in good faith and within the Rules and the Statute when gathering evidence and when interviewing Mr Sesay. In this regard the Defence also note that the Prosecution response is silent as to the disappearance of notes from previous interviews between Dr White and General Tarnue (see para 13 of the Defence Motion). Dr White has not provided an explanation.

17. Witnesses in a criminal case give evidence for many reasons – truth is but one of those motivations. Why do the Prosecution seek to keep hidden from view the *possible* motivations of their witnesses and the nature of the assistance that might have encouraged them to implicate the accused?

Dated this 19th day of November 2004

A handwritten signature in black ink, appearing to read 'Wayne Jordash', with a long horizontal stroke extending to the right.

Wayne Jordash

Serry Kamal

Sareta Ashraph