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SCSL-03-01-T
(31057 - 31067)

31057

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: 26 November 2010

Case No.: SCSL-03-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR
–v–
CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO "PUBLIC PROSECUTION RESPONSE TO PUBLIC WITH ANNEX A DEFENCE MOTION FOR RECONSIDERATION OF DECISION ON DEFENCE MOTION REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT BY THE OFFICE OF THE PROSECUTOR 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. The Defence brings forth this reply to the "Public Prosecution Response to Public with Annex A Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators."[1]
2. The Response argues that the Defence has failed to satisfy the relevant legal standard for reconsideration of the Decision[2], in that neither clear errors of reasoning nor the necessity to prevent injustice have been demonstrated[3]. Dismissal of the Motion[4] is consequently suggested in the Response[5].
3. That the Response misperceives and misapprehends several arguments put forth in the Motion is an understatement and something which the Defence submits, renders it devoid of merit.

II. SUBMISSIONS

4. A preliminary observation regarding the applicable legal standard is necessary before considering the merits of the Response. The Defence and the Prosecution are ostensibly in agreement that reconsideration is proper when a clear error of reasoning in a decision is demonstrated or in order to prevent an injustice[6]. This is a disjunctive standard[7] that is satisfied when either component is demonstrated: meaning that the

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1125, Public Prosecution Response to Public with Annex A Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 19 November 2010 ("**Response**").
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, dated 11 November 2010 and filed 12 November 2010. The Decision was rendered orally in open court by the Trial Chamber on 22 October 2010 (see, Transcripts of Proceedings, 22 October 2010 page 48338) and the written decision was issued and filed, respectively on 11 and 12 November 2010 ("**Decision**").
[3] Response, paras. 1 and 12.
[4] *Prosecutor v. Taylor,* SCSL-03-01-T-1123, Public with Annex A Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 15 November 2010 ("**Motion**").
[5] Response, paras. 1 and 12.
[6] Motion, paras. 2 and esp. 8; Response, paras. 1, 3, 6 and 12.
[7] See, e.g., *Prosecutor v. Dragan Jokić and Vidoje Blagojević,* IT-02-60-A, Decision on Dragan Jokić's Supplemental Motion for Extension of Time to File Appeal Brief, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 31 August 2005, para. 7 ("a clear error in reasoning in the Decision, **or** of particular circumstances justifying its reconsideration in order to avoid injustice"(emphasis added)); *Prosecutor v. Galić,* IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2 ("a clear error in

Defence need not show both (i) a clear error in reasoning and (ii) the necessity to prevent or avoid an injustice – a showing of one alone suffices to warrant reconsideration. This is important when reviewing the Response because though the disjunctive standard is there embraced explicitly[8], irrelevant and legally inapplicable legal standards are applied, on occasion, to the Motion in the Response[9]. Indeed, an earlier decision of this Chamber confirms the disjunctive nature of the standard, inasmuch as express mention was there made of only the component requiring a showing of "a clear error in reasoning"[10].

5. Bearing in mind the applicable legal standard for reconsideration, it become obvious that nothing in the Response diminishes or minimizes the legal viability and sustainability of the Motion.

(i) Undue Delay

6. Firstly, and in relation to the issue of "undue delay," the Response avers that none of the affiants in support of the Original Motion[11] mention "reluctance" in coming forward with their allegations, therefore arguments that rely on "reluctance" as

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reasoning in the Decision, **or** of particular circumstances justifying its reconsideration in order to avoid injustice"(emphasis added)); *Prosecutor v. Brima, et al.*, SCSL-04-16-A, *Judgment*, dated 22 February 2008 and filed on 3 March 2008, para. 63, citing *Prosecutor v. Ntagerura, et al.* Case No. ICTR-99-46-A, Appeal Judgment, 7 July 2006, para. 55 (reconsideration is proper if a clear error of reasoning has been demonstrated **or** if it is necessary to prevent an injustice (emphasis added)); Cf. *Prosecutor v. Mucić, et al.*, IT-96-21A*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment on Sentence Appeal, 8 April 2003, para. 49 (suggesting a conjunctive standard).

[8] Response, paras. 1, 3, 6 and 12.

[9] See, for example, the discussion in paragraph 4 of the Response, stating that even if the Trial Chamber were to reconsider its decision on the issue of "undue delay," *no prejudice to the Accused has resulted* (emphasis added). This is a mis-statement and misapplication of the standard for reconsideration since a showing of prejudice to the movant is not compulsory.

[10] *Prosecutor v. Taylor,* SCSL-03-01-T-595, Decision on Public with Confidential Annexes B and E Urgent Prosecution Application for Reconsideration of Oral Decision Regarding Protective Measures for Witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-215, dated 15 September 2008 and filed 16 September 2008, page 4.

[11] *Prosecutor v. Taylor,* SCSL-03-01-T-1089, Public, with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 24 September 2010. A corrigendum was filed in relation to the Original Motion: *Prosecutor v. Taylor,* SCSL-03-01-T-1090, Public, with Confidential Annexes A-J and Public Annexes K-O Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010 ("**Original Motion**").

justification for delay in bringing forth the Original Motion are speculative[12]. This assertion in the Response is entirely misplaced.

7. It is irrelevant whether or not the supporting affidavits expressly state that all or some affiants were *reluctant* to come forward with their allegations against the Office of the Prosecutor (OTP). What matters in an objective assessment of the question of reluctance is the nature of the pressure, threats, intimidation, improper inducements, and other like actions directed at the affiants by the OTP and, importantly, the *effects* of those actions on the affiants (emphasis added).

8. The *effects* of such actions on the affiants are detailed to a sufficient degree in the various affidavits and declarations in support of the Original Motion[13]. In the Defence's view, the relevant questions that beg for answers are whether in the totality of the circumstances, a reasonable person at the receiving end of such conduct by a prosecutor's office could be reluctant to come forward and complain, and whether the Trial Chamber ought to have considered and discussed the issue of reluctance in the Decision. The Defence answers both questions in the affirmative in maintaining that the Court's failure to consider and discuss the issue of reluctance in the context "undue delay" constituted a clear error in reasoning warranting reconsideration of the Decision.

9. The Response erroneously suggests that reconsideration of the finding of "undue delay" is not warranted because "no prejudice to the Accused has resulted."[14] This is an incorrect statement of the law, insofar as a showing of "prejudice" to an accused is not a mandatory pre-condition to reconsideration, nor is it the legal equivalent of the injustice component to the reconsideration standard.

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[12] Response, para. 4.

[13] See, for example, Confidential Annexes to the Original Motion, such as Annex B (DCT-192 "felt pressured to cooperate with the Prosecution and provide them with information"); Annex C (DCT-130 "felt intimidated..."; "felt as if they wanted to kidnap [him]"; knew "that putting this kind of pressure and offering these kinds of incentives is how the Prosecution has operated with everyone"); Annex E (DCT-086 was made "to stand against the wall" and a picture was taken of him; his SIM card and small notebook were confiscated and he never got them back and he "was afraid" at the prospect of being taken to the American Embassy to be seen on a "confidential matter"); and Annex F (DCT-102 was taken aback by the use of the word "perpetrator" that he got "so afraid but... there was nothing [he] could do"; someone sat behind him in "a threatening manner" and upon being ordered into the next room to give a statement, he "complied as [he] felt helpless in that situation").

[14] Response, para. 4.

10. Furthermore, the Response's assertion that the Trial Chamber "did not base any finding of lack of credibility on delay alone"[15] is entirely misplaced. Separate and apart from the degree to which "undue delay" was a feature during the assessment of credibility in section (C) of the Decision ("Merits")[16], it is clearly stated in paragraph 26 of the Decision that the "inordinate delay" and the absence of a satisfactory explanation for it was alone, reason enough to dismiss the Original Motion[17]. It was that finding that dismissal of the Original Motion was warranted on the basis of undue delay alone that the Defence's submissions in paragraphs 12 through 16 of the Motion were directed. The Response no doubt misapprehends this and the thrust of the arguments in those paragraphs and consequently fails to appreciate the essence of the Defence's submissions regarding "undue delay."
11. Another case in point is the Response's clear mischaracterisation of arguments made by the Defence in reply[18] to the Prosecution's Response[19] to the Original Motion. The Response maintains that arguments in paragraphs 15 and 16 of the Motion contradict statements appearing in paragraphs 9 and 10 of the Reply[20].
12. Firstly, the Reply did not submit as an explanation for any delay in bringing the Original Motion, the "cumulative nature of the conduct"[21] or the fact that they do not "arise from a single incident or an isolated event."[22] These statements in the Reply have been mischaracterised in the Response as the "Defence's original strategy in challenging the issue of delay."[23] Instead, these statements appeared in the Reply in the context of what degree of malfeasance by the Prosecution could no longer be ignored and necessitated judicial intervention[24].

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[15] Response, para. 4; see, also, para. 6 of the Response.
[16] See, starting at page 11, paras. 32 through 150 of the Decision.
[17] Decision, para. 26.
[18] See, *Prosecutor v. Taylor,* SCSL-03-01-T-1102, 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, 11 October 2010 ("**Reply**").
[19] *Prosecutor v. Taylor,* SCSL-03-01-T-1097, Public with Confidential Annexes Prosecution Response to Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 4 October 2010 ("**Response to Original Motion**").
[20] See, Response, para. 5 and 6.
[21] Reply, para. 10.
[22] Reply, para. 9.
[23] Response, para. 5.
[24] Reply, paras. 9 and 10.

13. Secondly, and despite assertions to the contrary in the Response[25], it was never argued in the Reply that only the cumulative nature of the contemptuous conduct (as distinguished from the individual incidents) gives rise to contempt of court. The Reply stands for the proposition that the cumulative nature and overall effect of the Prosecution's conduct rose to ***a level (or degree) of*** contempt that could no longer be ignored[26] (emphasis added). Nothing could be clearer than stating that by this "the Defence was not suggesting that the disparate and separate incidents could not in their individual respects sustain a charge of contempt of court or that their characteristics changed over time."[27]
14. Indeed, and far from distancing itself from these assertions in the Reply, the Defence re-affirmed them in the Motion to illustrate a clear error in reasoning in the Decision[28]. Unfortunately and yet again, their true essence has been misperceived and escapes the Prosecution. See, for example, the quibble in the Response that the "Defence arguments at paragraph 16 of the Motion **are difficult to decipher**" (emphasis added).
15. The Defence submits that reconsideration is necessary regarding the finding of "undue delay" for reasons which are advanced in the Motion and further explicated herein.

(ii) Ambit of Rule 77

16. The Response does not dispute that the Court retains an inherent power of contempt that is distinct from, and independent of, the contempt power granted it by Rule 77 of the Rules[29]. Nonetheless, it is suggested that "imprecision of the Defence's allegations" was a sufficient basis for the Court's finding that the Motion was requesting an impermissible "general audit of the operations of the Prosecution"[30] and should consequently be dismissed[31].

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[25] Response, para. 6.
[26] Reply, para. 10.
[27] Motion, para. 16.
[28] Motion, para. 16.
[29] See Response, para. 7. See, *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, as amended on 28 May 2010 ("Rules").
[30] Decision, paras. 30 and 28.
[31] Response, para. 7.

17. There was no "imprecision" in the Defence's allegations and that was not the finding of the Court, the erroneous assertions of the Response notwithstanding. The Decision focused instead on the propriety and scope of the ***relief*** that was sought by the Original Motion and ultimately deemed them as extending beyond the scope of Rule 77[32] (emphasis added). That said, no consideration was given in the Decision to the Court's inherent contempt power as a possible remedy for the serious allegations that were lodged by the Original Motion. It is in respect of this failing that the Defence finds a clear error in reasoning warranting reconsideration of the Decision.
18. The title to the Original Motion made explicit the Defence request for an investigation into contempt of court by "The Office of the Prosecution" and "Its Investigators."[33] Yet the Response argues that "no request for an investigation into the conduct of the 'Office of the Prosecutor' was ever made in the Original Motion."[34] This untenable argument is ostensibly proffered to invalidate the Defence's position that Rule 77 may permissibly be extended to contemptuous conduct of organisations with a legal personality, such as the OTP.
19. On the one hand, the Prosecution finds inapposite Defence objections to the application of "technical rules of pleading"[35] in the face of very serious allegations of contempt; on the other hand, the same Prosecution seeks to rely on no less than such pleading technicalities in circumventing the central legal question that is presented by the Motion – namely, does Rule 77 apply to organisations and, if so, was it a clear error in reasoning for the Trial Chamber to hold otherwise[36]? The Defence reiterates and maintains its view that the scope of Rule 77 extends beyond individuals to organizations such as the OTP; the contrary holding in the Decision[37] was a clear error in reasoning that resulted in an injustice. Reconsideration is thus necessary.

(iii)Application of Disparate & Unfair Legal Standards to Defence Evidence

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[32] Decision, paras. 30 and 28.
[33] See, cover page to the Original Motion.
[34] Response, para. 8.
[35] See paragraphs 18 and 11 of the Motion and the reference to "legal technicalities" in paragraph 2 of the Response.
[36] See Motion, para. 20.
[37] See, Decision, paras. 30 and 28.

20. The Response argues that the signature of the Prosecutor (as an officer of the Court who signed the Response to the Original Motion) was alone sufficient to sustain unsworn assertions of fact that appear in Confidential Annex 4 to the Response to the Original Motion[38]. This averment was made in response to arguments in the Motion that alleged error in the Decision, insofar as evidence put forth by the Defence to support the allegations was evaluated with a higher legal standard by the Court vis-à-vis prosecution evidence rebutting the allegations[39].
21. The errors of reasoning and law in the position now being taken by the Prosecution are several. Whilst it is true that the Prosecutor is an officer of the Court much like other counsel that appear before the Court, it cannot be the case that unsworn factual assertions can be made in rebuttal to sworn Defence evidence, merely because the signature of the Prosecutor is affixed to the document bearing the unsworn assertions. Such a procedural mechanism with implications for the substantive rights of an acussed is not permissible. Were it to be allowed, it would render meaningless the need for the Prosecution to call any witnesses at trial because the Indictment bearing the signature of the Prosecutor would alone suffice to establish the truthfulness of the factual and legal allegations against the accused.
22. Similarly, the argument that "no basis has been established on which to doubt the *bona fides* of the Prosecutor"[40] is misplaced. Firstly, the Defence has no burden to establish a basis to doubt the *bona fides* of the Prosecutor in this context. Secondly, it was the Prosecution in its Response to the Original Motion that noted that "in assessing information in previous contempt allegations, this Trial Chamber has considered whether the allegations are sworn or unsworn."[41] The Prosecution went on to add that whether or not allegations are sworn is a factor to be considered in determining what weight, if any, they ought to be given[42]. Those averments are now to be compared with the Prosecution's argument in the Response, suggesting an exception to the preference for sworn affidavits for none other than the Prosecutor

[38] Response, para. 11. See, also, Response to Original Motion, Confidential Annex 4.
[39] Motion, paras. 24 and 25.
[40] Response, para. 11.
[41] Response to Original Motion, para. 7.
[42] Response to Original Motion, para. 7.

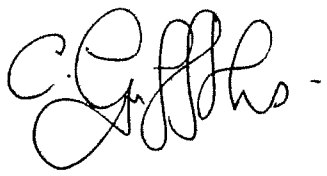
herself. That there cannot be a separate set of standards for the Prosecutor as opposed to others who bring forth evidentiary information before the Court is axiomatic.

23. The Defence embraces without reservation, the arguments put forth in Section IV(B) of the Motion, considering especially that the arguments in the Response in this regard are entirely erroneous and self-serving.

III. CONCLUSION AND RELIEF REQUESTED

24. For all of the foregoing reasons, the Defence respectfully requests that the Court reconsider the Decision in the exercise of its discretion.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 26th Day of November 2010,
The Hague, The Netherlands

Table of Authorities

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