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SCSL-03-01-T
(32142-32152)

32142

THE SPECIAL COURT FOR SIERRA LEONE

Appeals Chamber

Before: Justice Jon M. Kamanda, Presiding
Justice Emmanuel Ayoola
Justice Renate Winter
Justice George Gelaga King
Justice Shireen Avis Fisher

Registrar: Ms. Binta Mansaray

Date: 14 January 2011

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO 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

Office of the Prosecutor:
Ms. Brenda J. Hollis

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Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick, Legal Assistant

I. INTRODUCTION

1. This is the Defence's Reply to the *Confidential Prosecution Response to 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.*[1] Most of the issues raised in the Prosecution's Response are adequately covered in the Appeal and do not warrant re-litigation. The Defence will therefore confine itself to the few novel issues raised in the Prosecution's Response.
2. As a preliminary matter, the Defence notes that the entire Response was filed as "Confidential" and requests that the Prosecution be ordered to file a public redacted version in due course.[2]

II. SUBMISSIONS

First Ground of Appeal: Lack of Specificity

Prosecution arguments relating to Scope of Rule 77 personal jurisdiction: Prosecution Response, paragraphs 8-13

3. In an attempt to deflate the Defence's argument that it is legally tenable for a Trial Chamber to order an investigation of the Office of the Prosecutor ("OTP") as an organ of the court under Rule 77, the Prosecution makes the most spacious arguments, rejecting that the OTP is indeed an organ of the court, and rather attempts to make a false distinction between the OTP and the Prosecutor. Taken to its logical conclusion, or rather more appropriately, illogical conclusion, the Prosecution suggests that the Prosecutor and the OTP are two separate entities. The same argument, by parallel, would also make a legal distinction between the Registrar and Registry.
4. The Defence submits that, save in exceptional circumstances, where the Statute or the Rules attach specific rights or obligations to the person occupying the office of the Prosecutor – the

[1] *Prosecutor v. Taylor,* SCSL-03-01-AR73-1151, Confidential Prosecution Response to 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, 10 January 2011 ("**Response**").
[2] See, for example, a similar order made in *Prosecutor v. Taylor,* SCSL-03-01-AR73-1148, Decision on Urgent Prosecution Motion to Classify as "Confidential" the 'Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma' Due to Protective Measures Violations, 10 January 2011.

Prosecutor properly so called; the distinction the Prosecution seeks to make between the Prosecutor and the OTP is otherwise irrelevant. The OTP simply is what its acronym suggests: the Office of the Prosecutor. The Prosecutor is the embodiment of the OTP for purposes of the internal workings of the court and the conduct of the trial.

5. Indeed, there is jurisprudence to underline this point. In the *Lubanga* case at the ICC for instance, in an appeal by the Prosecution against a decision by the Trial Chamber for a permanent stay of proceedings on account of the OTP's failure to fulfill its disclosure obligations per the Trial Chamber's order, the ICC Appeal Chamber upheld the appeal, *inter alia*, on the basis that the Trial Chamber's decision was disproportionate.[3]
6. In *Lubanga,* the Appeals Chamber held that the Trial Chamber should have availed itself of other less drastic measures, including contempt of court proceedings against the Prosecutor before resorting to the drastic remedy of a stay. Noteworthy about this decision is the suggestion that sanctions for acts of omission by the OTP on trial related matters could be visited upon the Prosecutor; ostensibly as the accounting officer as well as the statutory embodiment of the OTP. This decision, it is submitted, underscores the fallacy of the Prosecution's distinction between the Prosecutor and OTP for purposes of the Rules; which leads us to the second tier of the Prosecution's argument relating to the legal personality of the OTP.
7. It is not necessary to repeat the Prosecution's arguments here, suffice it to submit that the Prosecution's seemingly erudite submissions at paragraphs 10 -12, are with respect, irrelevant and misplaced as the Defence's argument specifically related to the question of the OTP as a *legal persona* for purposes of the internal workings of the Court and the application of the Rules. The Prosecution's extensive arguments however address the legal personality of the entire Special Court in international law, which was not in contention. The arguments suggest that the Defence had argued that the OTP is a legal person in international law, which was not the case. The Defence argument that the OTP is a *legal persona* only related to its inter-party obligations in this case. Put differently, the Defence's position was simply that, for purposes of the Rules and other working documents of the court, and only for

[3] *Prosecutor v. Lubanga,* ICC-01/04-01/06 OA 18, Judgement on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the WVU", 8 October 2010.

internal purposes, the Prosecution as an entity is a legal person possessed of legal rights and obligations. The Prosecution's arguments on this point therefore clearly misdirected.

Prosecution arguments on the Trial Chamber's failure to apply disparate standards to the different Rule 77 stages: Prosecution Response, paragraphs 14-18

8. Under this heading, the Prosecution attempts to address the Defence's argument that the Trial Chamber erred in that it failed to apply the disparate legal standards to the different Rule 77 stages in that it conflated the processes and ended up erroneously applying a much higher standard at the preliminary investigative stage where the appropriate standard (the "reason to believe" standard) is actually much lower.
9. It is important to note from the onset that the Prosecution does not dispute that Rule 77 has different stages with disparate legal standards. Rather, the thrust of Prosecution's argument is that the serious nature of contempt allegations justified the application of a stringent standard even at the preliminary investigations stage. This argument is however circular in that the Prosecution effectively argues that the serious nature of the allegations overrides the disparate applicable standards, which are clearly and specifically designed in relation to contempt. The Defence submits that its insistence that the Trial Chamber should have applied the appropriate standard at the preliminary investigative stage did not in any way detract from the seriousness of the allegations.
10. Quite to the contrary, the Defence submits that it is in fact on account of the serious nature of contempt allegations that the standard for a preliminary investigation is much lower; as the overriding consideration is the protection of the integrity of the proceeding, and not a party to the proceedings. Indeed, at the preliminary stage, the standard is deliberately pitched much lower in order to facilitate investigations. It would be therefore wrong at that stage, to require the precision of an indictment with respect to the pleading of subject matter or personal jurisdiction, as the Trial Chamber did.
11. Indeed, the Prosecution's fishing expedition argument at paragraph 16 is without merit in that the degree of specificity advocated by the Prosecution negates the need for the disparate standards under the Rule 77 contempt proceedings. The Defence reiterates that the preliminary investigative phase under Rule 77, is exactly that, investigative. Consequently it is not conclusive and concrete as the Prosecution would have it.

12. Turning to the plain language of Rule 77(C)(iii), it states that the Registrar should appoint an "experienced independent counsel to investigate *the matter* and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings" (emphasis added). The language of the rule itself makes it clear that it is not necessarily a specific person that is being investigated at this preliminary stage, but rather "a matter", the investigation of which may lead to the instigation of contempt proceedings against specific individuals. Thus the Defence request for the investigation into the conduct of the Prosecution and its investigations as a whole, based on evidence of specific incidents of concern, was entirely appropriate and within the ambit of Rule 77. This preliminary stage of investigations can be compared to a matter familiar to the Prosecution: the initial investigations into "the matter" of the conflict in Sierra Leone, which lead to the indictment of specific individuals such as the Accused at bar.

Arguments relating to the to the Trial Chamber's failure to remedy defects in the Motion: Prosecution Response, paragraphs 19-22

13. The Prosecution mischaracterizes the Defence's argument under this heading. The crux of the Defence's argument was that in finding that the Defence Motion for Contempt was defective for lack of specificity, the Trial Chamber did not properly apply itself to the facts, due regard being had to the applicable rules of interpretation and the relevant case law. Firstly, the Trial Chamber failed to apply the cardinal principle of construction that in interpreting a legal document, it is important to look at the document as a whole.[4]

14. Indeed it is ironic that the Trial Chamber should make that error when this was exactly the same approach that the Chamber, by a majority decision, adopted in the interpretation of the Prosecution's indictment against the Accused in this case – a decision on a Defence Motion alleging the improper pleading of Joint Criminal Enterprise.[5] So expansive was the Trial Chamber's application of this principle that in the words of Justice Lussick in a dissenting opinion, the approach asked for the Accused to undergo the "brain-twisting exercise" of

[4] See, for example, *Prosecutor v. Taylor,* SCSL-03-01-T-752, Decision on Public Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 27 February 2009, para. 63 ("The Appeals Chamber has held that in order to determine whether the Prosecution properly pleaded a joint criminal enterprise, the Indictment **should be read as a whole**").
[5] Id.

reading together different paragraphs in the Indictment paragraphs "in order to fathom what liability facts [were] most likely to form the basis of his alleged joint criminal enterprise".[6]

15. At another level, the Defence also took issue with the Trial Chamber's failure to take a more progressive approach in its interpretation of Rule 77, in view of the pro-active obligation established in the *Haradinaj* case at the ICTY. *Haradinaj*, it might be recalled,[7] underscored the duty on the part of a Trial Chamber to be more proactive in investigating acts that undermine the integrity of the proceedings, in that case witness intimidation. The Prosecution, it might be observed, does not deny this duty. Rather, it attempted to distinguish the present case from the *Haradinaj*. The Defence's reliance on the *Haradinaj* case was however simply to underscore the Trial Chamber's duty to be proactive in the investigation of matters relating to contempt of court in order to safeguard integrity of the proceedings. The Prosecution's distinction of the present case from *Haradinaj* does not detract from this fundamental point.
16. Finally on this point, the Defence notes that the Prosecution skirts the Defence's unassailable alternative argument at paragraph 18(j) of the Appeal that, on the Trial Chamber's own reasoning that contempt proceedings are criminal in nature and thus require specificity with respect to the identity of the offenders, the Trial Chamber should have found that the Contempt Motion was severable, ie, that criminal proceedings could still have been instituted against those persons who were properly identified. In other words, the mere fact that an 'indictment' is defective with respect to one defendant does not exonerate co-defendants in relation to which no such defects exist.
17. In this regard, the Defence submits that the Prosecution's argument at paragraph 22, as with the Trial Chamber's findings on the merits detract from the argument that the Defence Motion was defective for want of specificity with respect to subject matter and personal jurisdiction. Indeed, the argument underscores that the Trial Chamber's finding of lack of specificity an example of strictest adherence to the merest of technicalities.
18. The Defence would also like to address one minor point raised by the Prosecution at paragraph 22, footnote 37. The Prosecution argues that Annex L (a Vacancy Announcement

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[6] *Prosecutor v. Taylor*, SCSL-03-01-T-751, Decision on Public Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009, para. 15.
[7] Appeal, para. 18.

for the Chief of the Witness Management Section which outlines the responsibilities of that individual vis-à-vis Prosecution witnesses and benefits given to them) as well as Annex O (a power point presentation given by David Crane using language indicative of his over-zealous approach to the investigation and the prosecution of Mr. Taylor) are irrelevant. In fact, both Annexes are highly relevant to evidence on record when considered in the full context of alleged Prosecution misconduct as regards payments to witnesses and the convict-Taylor-at-all-costs approach to investigation and prosecution.[8]

Second Ground of Appeal: Delay

19. The Defence must correct the Prosecution on two points. First, at paragraph 28 of its Response, the Prosecution alleges that the Defence misstates the Decision with respect to Abu Keita and the Trial Chamber's flawed reasoning suggesting that the Defence were in a position to question Abu Keita fully as regards relocation when he testified in January 2008. In fact, the Defence arguments highlighting the factual errancy of the Decision are borne out if one reads paragraphs 123 and 127 of the Decision together. The Defence could not have fully and properly cross-examined Abu Keita about his relocation in January 2008 when new information as regards his relocation came to light in September 2009. As a matter of principle, the Defence cannot put specious, unsubstantiated allegations to witnesses under cross-examination.

20. Secondly, at paragraph 29 of its Response, the Prosecution suggests that a common sense review of the information available indicates that it is likely that the Defence has been aware of the allegations of contempt relating to the Prosecution's conduct in connection with DCT-032 for some time. This is not a fair inference, given that it was not until 4 June 2010 when the Prosecution belatedly served a "Proffer" of DCT-032's evidence to the Defence, that the Defence knew that DCT-032 had ever given an account contrary to the one given to the Defence. Thus the Defence was not in a position to investigate the reason for the discrepancies in the information prior to the disclosure of the Proffer. Thus the malfeasance of the Prosecution could not have been discovered before that time.

[8] See, for example, Exhibit D-404, containing a 8 February 2006 account of David M. Crane's appearance before the Subcommittee on Africa, Global Human Rights and International Operations of the United States House of Representatives' Committee on International Relations. See also *Prosecutor v. Taylor,* SCSL-03-01-T, Defence Opening Statement, 13 July 2009, p. 24290-93.

Third Ground of Appeal: the Merits

Prosecution arguments on alleged errors by the Trial Chamber on the determination of the Defence Contempt Motion on the Merits, Prosecution Response paragraphs 37-57

21. The Prosecution's starting premise at paragraph 37 of the Response completely misconstrues the Defence's third ground of appeal under the heading "merits". Indeed, it would appear it is the caption "merits", which led the Prosecution to erroneously allege that the "focus of the Defence's third ground of appeal is the merits of the Decision". Far from it, it is quite clear from the Appeal that the Defence's bone of contention with the Trial Chamber's decision on the merits was with the *process*; that is, how the Trial Chamber arrived at its findings of fact. This misconstruction of the Defence's argument thus led the Prosecution to make irrelevant submissions at paragraphs 37-39 of the Response.

22. Paragraphs 29-39 of the Appeal under the heading "*Procedural errors in determining the Merits*", which is in itself self-explanatory, categorically lists all the alleged procedural errors in the impugned decision, including the following: that the Trial Chamber erroneously applied a higher standard than the lower "reason to believe standard" at the preliminary Rule 77 investigative stage;[9] that the Trial Chamber erred in allowing the Prosecution, a party to the proceedings and the subject of the Defence Motion, to lead evidence through legal submissions, which the Chamber went on to accept without evaluation;[10] that the Trial Chamber took into account extraneous facts not on the record in making findings of fact;[11] or that the Trial Chamber misconstrued Defence arguments in making its findings of fact.[12] All these challenges clearly relate to process; the equivalence of review proceedings in municipal common law practice. The issue was therefore not what conclusions were "reasonably open" to the Trial Chamber as the Prosecution conveniently argues at paragraph 39 of the Response, but rather, how the Trial Chamber reached those conclusions.

23. In an attempt to address the Defence's argument that the Trial Chamber erred in allowing the Prosecution to lead evidence from the bar, the Prosecution makes a bizarre argument which seems to suggest that because it was merely responding to the Defence's factual allegation,

[9] Appeal, para. 29.
[10] Appeal, para. 30.
[11] Appeal, paras. 31.
[12] Appeal, para. 32.

its own factual allegations in rebuttal somewhat do not count as evidence. The Defence would have thought that any allegation of fact put before the court constitutes evidence, whether it is designed to prove or rebut a case.

24. Indeed at paragraph 43, the Prosecution continues to make further bizarre claims that a court of law is required to take the word of counsel, lock stock and barrel, even in circumstances where there is a dispute of fact, simply because the word comes from an officer of the court. This is an especially interesting argument for the Prosecution to make, since it has twice refused to accept the word of Defence Counsel given in open court.[13] In any event, no such rule exists in law and not even the most expansive reading of *Aleksovski*, cited by the Prosecution could lend credence to such legal nonsense.

25. At paragraphs 45-55, the Prosecution embarks on an elaborate analysis of the Trial Chamber's decision on the merits in an attempt to argue that the Trial Chamber's findings on the issues therein, were reasonably open to the Trial Chamber. The Prosecution's argument should however fail for two principal reasons. Firstly, on the basis of the argument already made above (save for the arguments at paragraphs 38, and those at 40-43, which the Prosecution conveniently skirted) that; the Defence did not challenge the merits of the Trial Chamber's findings, but rather how the Trial Chamber arrived at those findings.

26. Secondly, and with respect to the arguments relating to Sam Kolleh, which indeed highlights the level of the Prosecution's desperation, the Prosecution yet again violates a cardinal rule of procedure that a party may not lead new evidence on appeal, save with the leave of the court. The Prosecution's arguments at paragraphs 47 to 49 relating to the credibility of Sam Kolleh's evidence should therefore be ignored, as they are improperly before the court. Those were facts that were not before the Trial Chamber and are therefore not part of the record of appeal. The Prosecution must know this. The Defence submits that this was a deliberate ploy by the Prosecution to influence the court after it got away with a similar ploy before the Trial Chamber where, as alleged herein, it led evidence from the bar.

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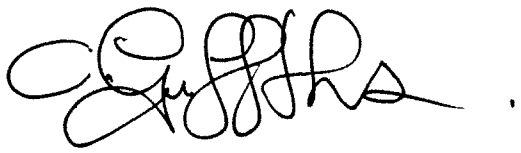
[13] Defence counsel have twice tried to explain to the Prosecution that the investigator Prince Taylor on the Defence Team is not the same as the Prince Taylor who previously served as a member of the RUF. These assurances were not accepted by the Prosecution and in fact the Defence ultimately had to resort to filing an affidavit from Prince Taylor to that effect. See *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 25 February 2008, p. 4717; 12 April 2008, p. 38718; and 8 November 2010, p. 48953-5. See also, *Prosecutor v. Taylor*, SCSL-03-01-T-1117, Defence Motion for Admission of Documents Pursuant to Rule 92bis – Prince Taylor and Stephen Moriba, 11 November 2010.

III. Relief Requested

27. For all the foregoing reasons, or any one or more of them, the Defence requests that the Trial Chamber's impugned decision be set aside and that the Appeals Chamber orders an investigation into the alleged acts of contempt of court by the Prosecution as requested in the Defence Motion, subject to such terms and conditions, and including any restrictions as the Appeals Chamber may deem necessary.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 14th Day of January 2011,
The Hague, The Netherlands

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