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SCSL-03-01-T
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SPECIAL COURT FOR SIERRA LEONE

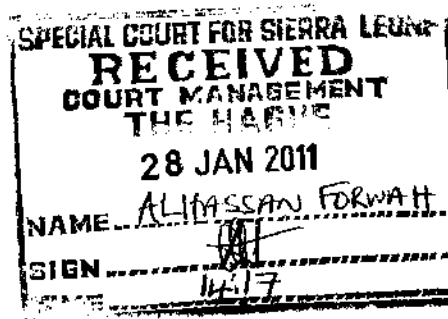
TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 28 January 2011



PROSECUTOR

v.

Charles Ghankay TAYLOR

**DECISION ON URGENT AND PUBLIC WITH ANNEXES A-N
DEFENCE MOTION FOR DISCLOSURE AND/OR INVESTIGATION OF UNITED STATES
GOVERNMENT SOURCES WITHIN THE TRIAL CHAMBER, THE PROSECUTION AND
THE REGISTRY BASED ON LEAKED USG CABLES**

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Leigh Lawrie

Counsel for the Accused:

Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");¹

SEISED of the "Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 10 January 2011 ("Motion"),² wherein, in light of the publication of two leaked United States Government ("USG") cables and an article in the New Democrat, a Liberian Newspaper ("Newspaper Article"), the Defence seeks, pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules") immediate disclosure and/or an investigation into:

- (i) the identity of the source(s) within the Trial Chamber, Prosecution and Registry who provided the USG with the information in the Cables;³
- (ii) the full nature of the respective sources' relationship with the USG, specifically including an explanation of the context and circumstances in which each of the comments recorded in the Cables were made to representatives of the USG;⁴
- (iii) information tending to suggest that the Prosecution has sought or received instructions from the USG regarding any aspect of the Taylor trial;⁵ and
- (iv) a full explanation of the money provided by the USG to the Prosecution, including the amounts of money given and when; the purpose of the funds; how the funds were used; and who the OTP was accountable to in the distribution and use of the funds;⁶

on the basis that the USG Cables and Newspaper Article clearly indicate 1) the USG's desire to ensure that Mr. Taylor does not return to Liberia; and 2) proof that there is and have been contacts

¹ Noting that Justice Sebutinde has appended a declaration stating that she has voluntarily withdrawn herself from a decision on this Motion.

² SCSL-03-01-T-1143.

³ Motion, paras 4-5, 22.

⁴ Motion, paras 4-5, 22.

⁵ Motion, para. 22.

⁶ Motion, para. 22.

between the Trial Chamber, the Office of the Prosecutor and the Registry, and agents of the USG outside the official lines of communication;⁷ 3) the only way to remove any doubt about the independence and impartiality of the tribunal is to order the disclosure and/or the investigation into the identity of the sources within the Trial Chamber, Prosecution and Registry and the full nature of their relationship with the USG;⁸

NOTING the "Prosecution Response to Defence Motion for Disclosure and/or Investigation of United States Government Sources Within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 20 January 2011 ("Response"),⁹ wherein the Prosecution opposes the Motion and submits that it should be dismissed on the basis that;

- (i) it is untimely and frivolous, appears to be a deliberate attempt to delay the proceedings, and rehearses the unfounded allegations made in the *Sesay et al.* case in relation to the Prosecution's link to the USG;¹⁰
- (ii) the Cables do not provide any evidentiary basis or factual foundation for the allegations put forward by the Defence concerning any organ of the Court, and in fact clearly evidence the Court's impartiality and independence;¹¹

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry Based on Leaked USG Cables", filed on 25 January 2011 ("Reply");¹²

⁷ Motion, para. 19.

⁸ Motion, para. 21.

⁹ SCSL03-01-T-1164.

¹⁰ Response, paras 4-6, citing *Prosecutor v. Sesay, Kallon and Gbao*, SCSL04-15-T, Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005 ("*Sesay Decision*").

¹¹ Response, paras 7-21.

¹² SCSL03-01-T-1169.

COGNISANT of the provisions of Articles 13(1), 15(1) and 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 54 of the Rules of Procedure and Evidence ("Rules");

NOTING that two United States Government cables, one dated 10 March 2009 ("First USG Cable"),¹³ and the other dated 15 April 2009 ("Second USG Cable"), were leaked through Wikileaks, an internet platform which allows anonymous disclosure of leaked information,¹⁴ and published by the Guardian newspaper on 17 December 2010;¹⁵

NOTING that on 23 December 2010, an article was published in the New Democrat entitled "Sorry for the Leaks; Pres. Sirleaf Acknowledges US Ambassador's Apology";¹⁶

RECALLING that on 13 September 2010, the Trial Chamber ordered the Defence to file all remaining motions by 24 September 2010;¹⁷

CONSIDERING that, with respect to the Defence request for a full explanation of the funds provided by the USG to the Prosecution, the Defence relies on statements made by former Prosecutor David Crane in 2006 to the Subcommittee on Africa, Global Human Rights and International Operations of the United States House of Representatives' Committee on International Relations, a statement which is already in evidence in this case,¹⁸ and which has already been used by the Defence in its opening statement and examination-in-chief of the Accused;¹⁹

HOLDING, therefore, that as the Defence has already had an opportunity to raise this issue prior to the deadline of 24 September 2010, and as this issue is unrelated to the recently leaked USG Cables,

¹³ Motion, Annex A.

¹⁴ www.wikileaks.org.

¹⁵ Motion, Annex B.

¹⁶ Motion, Annex C.

¹⁷ *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 13 September 2010, p. 48323 ; Response, para. 5.

¹⁸ Exhibit D-404, p. 77.

¹⁹ *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 13 July 2009, p. 24290; Transcript 9 November 2009, pp. 31479- 31482.

this aspect of the Motion is untimely, but that it is in the interests of justice to consider the remainder of the Motion at this time;

NOTING that Article 13(1) of the Statute provides that:

The judges shall be persons of high moral character, impartiality and integrity [. . .] They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or other source;

NOTING that Article 15(1) of the Statute provides *inter alia* that:

The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or any other source;

NOTING that Rule 54 of the Rules provides that:

At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial;

RECALLING that this Trial Chamber has previously held, in relation to Rule 54, that the “test for whether the Trial Chamber should issue an order under the Rule is whether to do so is necessary (not simply useful or convenient) for the purposes of an investigation or for the preparation or conduct of the trial”;²⁰

RECALLING that Trial Chamber I has held that, in order for a disclosure order to be granted in relation to a breach of Article 15(1), a party must establish a *prima facie* case that there has been such a breach,²¹ and in so doing must determine, whether there is, at this point in time, any evidentiary basis or factual foundation to warrant a conclusive finding of fact that there has in law been such a breach;²²

²⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-355, Decision on *Ex Parte* and Confidential Prosecution Motion for an Order to Provide to the Prosecution Non-Privileged Documents Recently Obtained from the Accused’s Personal Archive, 5 November 2007, para. 10. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-, Decision on Joint Defence Motion for General Orders Pursuant to Rule 54, 28 July 2005, para. 20.

²¹ *Sesay* Decision, para. 43.

²² *Sesay* Decision, para. 41.

CONSIDERING that with respect to a request for disclosure or an investigation in relation to a Judge or a member of the Trial Chamber, a party must specifically identify the information it seeks to have disclosed, and must make a *prima facie* showing that such information would demonstrate actual bias or the appearance of bias;²³

CONSIDERING therefore that, in determining whether an order for disclosure and/or an investigation pursuant to Rule 54 is necessary, the Trial Chamber must determine whether a *prima facie* case has been established that there may have been interference with the independence and impartiality of the Court;

CONSIDERING that the First USG Cable does not indicate that the USG has any influence over any organs of the Court;

CONSIDERING moreover, that as the United States government raises concerns in this cable about the effect on the fragile peace in Liberia should Taylor be acquitted in The Hague or given a light sentence, it is clear that it does not have any influence over the final outcome of the trial;

CONSIDERING that while it is of concern to the Trial Chamber that the United States government may have received information from "contacts" in Chambers,²⁴ the Registry and the Prosecution, the Second USG Cable does not demonstrate whether these "contacts" have any relationship with the USG capable of interfering with the independence or impartiality of the Court or any organ of the Court;

CONSIDERING FURTHER that, as part of their official functions, the Registry and the Prosecution interact on a regular basis with government officials from a number of countries, and in

²³ *Prosecutor v. Karemera, Ngirumpatse, and Nzirorera*, ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 11.

²⁴ The Trial Chamber notes that the cable does not specify whether the "Chamber contact" is in the Appeals Chamber or Trial Chamber, nor does it specify whether this contact is a judge or a staff member.

particular, with member states of the management committee, including the United States of America, about the progress of the trial, including "questions of efficiency" as provided for by Article 7 of the Agreement between the United Nations and the Government between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,²⁵ which states that:

It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.

RECALLING that Trial Chamber I has held that that "mere evidence of the cooperation between the Prosecution and the FBI or the US Government, without proof that the former received instructions from the latter, including the nature and contents of such instructions, does not, per se, fulfill the test to establish a violation of Article 15(1) of the Statute";²⁶

SATISFIED that, while the statements attributed to the sources within the Prosecution Registry, and Chambers in the Second USG Cable indicate that information may have been provided to the USG government by employees within the Court, the statements do not demonstrate that such sources were receiving instructions from the USG;

FINDING therefore that the Defence it has not shown any *prima facie* evidence that there has been interference with the independence and impartiality of the Court, and therefore has shown no evidentiary basis for either disclosure by, or an investigation of, any organ of the Court;

HEREBY DISMISSES THE MOTION.

²⁵ 16 January 2002.

²⁶ Sesay Decision, para. 52.

Justice Sebutinde appends a declaration.

Done at The Hague, The Netherlands, this 28th day of January 2011.

Justice Teresa Doherty
Presiding Judge

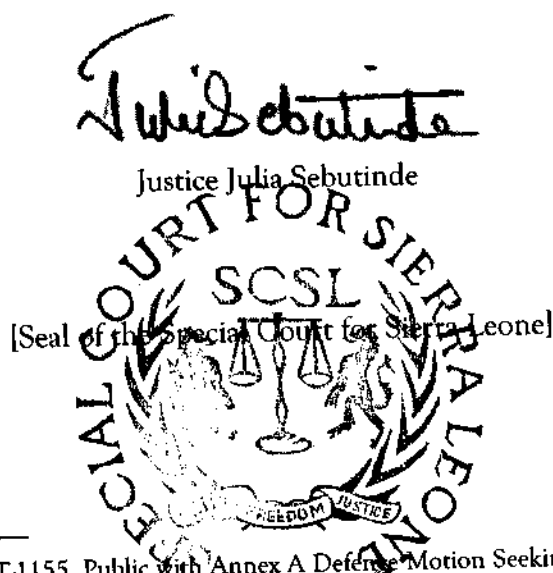
Justice Richard Lussick



DECLARATION OF JUSTICE JULIA SEBUTINDE

1. For the reasons set out below, it is my considered opinion that it would be in the interests of justice for me to voluntarily withdraw myself from a decision on this Motion. The USG Code Cable contained in Annex B of the Motion involves a statement that un-named "sources in the Prosecution, Chambers and the Registry" of the Special Court allegedly made certain specific allegations against me.
2. In the Motion, the Defence requests an investigation into the contacts or sources in the Court who made these allegations. Indeed, the Defence has observed that "[t]he only sign of how seriously some members of this Court have taken the matter is through the personal response of Justice Julia Sebutinde to the allegations in one of the cables which impinge on her integrity, as reported in the media".¹
3. I declare that while I am completely innocent of the allegations contained in the USG Code Cable and consider myself to be impartial and free of bias in relation to the issues at stake in this Motion, it is my considered view that in order for justice to be seen to be done, I should not participate in the deliberations or decision relating to this Motion.
4. Accordingly, I voluntarily withdraw from participating in the deliberations and the Decision on this Motion.

Done at The Hague, The Netherlands, this 26th day of January 2011.



¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Public with Annex A Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65bis and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011, para. 13.