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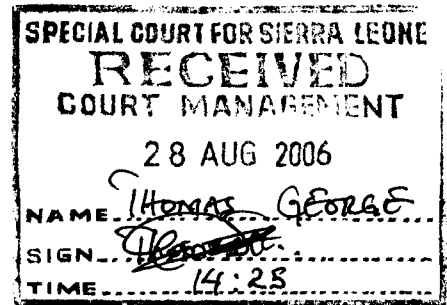
18971

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 28 August 2006



THE PROSECUTOR

Against

Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL-04-16-T

PUBLIC

PROSECUTION REPLY TO DEFENCE RESPONSE TO MOTION FOR AN ORDER RESTRICTING CONTACTS BETWEEN THE ACCUSED AND DEFENCE WITNESSES AND REQUIRING DISCLOSURE OF SUCH CONTACTS

Office of the Prosecutor:
Mr. James C. Johnson
Mr. Karim Agha
Ms. Nina Jørgensen

Defence Counsel for Alex Tamba Brima
Mr. Kojo Graham
Ms. Glenna Thompson

Defence Counsel for Brima Bazzy Kamara
Mr. Andrew Daniels
Mr. Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu
Mr. Geert-Jan Alexander Knoops
Ms. Carry Knoops
Mr. Abibola E. Manly-Spain

I. INTRODUCTION

1. The Prosecution files this Reply to the “Public Joint Defence Response to Prosecution Motion (“**Motion**”) for an Order Restricting Contacts between the Accused and Defence Witnesses and Requiring Disclosure of Such Contacts” (“**Joint Defence Response**”) dated 21 August 2006.¹
2. In its Motion, the Prosecution sought two orders: (1) an order prohibiting contacts between all three Accused and any Defence witnesses without prior authorization of the Trial Chamber, and (2) an order requiring the Registrar to inform the Trial Chamber and the parties of the details of any Defence witnesses who have visited the Accused in this case.
3. The Defence opposes the Motion on the grounds that granting the orders sought would violate the fair trial rights of the Accused; that the Motion lacks a legal basis; that the Motion lacks a factual foundation; and that the matter may be dealt with through cross-examination.
4. The Prosecution submits that the orders sought should be granted for the reasons stated in its Motion and for those set out in this Reply.

II. ARGUMENT

5. The Prosecution does not dispute that fair trial rights include the right of the Accused to select witnesses. However, the Prosecution does not agree that this right necessarily includes the ability to meet with witnesses where an accused is fully represented by counsel. Indeed, in most instances this would not be feasible practically for a detained accused. The analogy with an accused who is exercising the right to self-representation is inapposite. The decision of the ICTY Appeals Chamber in the *Milosevic* case² dealt with the definition of the role of imposed counsel following the revocation of the unrestricted right to self-representation by the Trial Chamber. The Appeals Chamber found that any restrictions on Milosevic’s right to represent himself had to be limited to the minimum extent necessary to ensure an expeditious trial and to minimize the practical impact of the formal assignment of counsel. For this reason, Milosevic was to take the

¹ SCSL-2004-16-T-533.

² *Prosecutor v Milosevic*, IT-02-54-AR73.7, “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel”, Appeals Chamber, 1 November 2004.

lead in presenting his case by, for example, choosing which witnesses to present, much as he had done when representing himself. The position is different when an accused voluntarily elects to be represented by counsel. While this does not impact upon the right of the accused to select witnesses, the manner in which such selection takes place may differ and does not include the presentation of each potential witness to the accused in person for an assessment as to value and credibility.

6. In relation to paragraphs 9 and 10 of the Joint Defence Response, the Prosecution does not agree that the situations described in the case law cited by the Prosecution are “totally different” from the one being raised in the Motion. The Prosecution explained its position that “the same dangers and considerations that apply in relation to contacts between witnesses apply also in relation to contacts between an accused and Defence witnesses,” namely the risk of inadvertent contamination of evidence. Most significantly, the First Accused was a witness in this case and therefore contacts between the First Accused and Defence witnesses clearly fall within the scope of the case law, and, indeed, within the spirit of Rule 90(D). The Prosecution also noted in paragraph 10 of the Motion that, consonant with the second sentence of Rule 90(D), where pre-trial discussions between witnesses have taken place, the evidence does not necessarily have to be excluded but the appropriate inferences may be drawn.
7. In relation to paragraph 11 of the Joint Defence Response, the Prosecution submits that the more flexible approach to the admission of evidence adopted by the Special Court as compared to the admission of evidence in the context of jury trials does not mean that professional judges should be burdened unnecessarily by issues relating to potentially contaminated evidence which they are in a position to prevent. It would be a waste of resources, and, more significantly, contrary to the interests of the Accused for the threat of contamination to obscure the relevance or weight of certain evidence.
8. This latter point applies equally with respect to paragraph 12 of the Joint Defence Motion. It is surely in the interests of both parties and the Chamber to take steps to prevent the possible contamination of evidence.
9. In relation to paragraph 13 of the Joint Defence Motion, the Prosecution submits that the distinction it draws between contact between defence counsel and witnesses and contact between the Accused and witnesses is a valid one. The distinction is a consequence of

representation by counsel whereby an accused entrusts counsel with the task of acting on his behalf. This does not mean that the accused should have less information than counsel and does not affect his ability to instruct counsel in his best interests.³ However, the accused does not perform the role of investigator and advocate if he has chosen to have counsel. The Presiding Judge of this Trial Chamber stated clearly in the case of *Prosecutor v Charles Taylor*:

We will lay this rule right now, that if an accused is represented by counsel, then it is counsel who will put the accused's case to the court. There are some very good reasons for that, which I'm sure all counsel here today know. That is the way it is going to be in this court.⁴

10. Moreover, an accused is not bound by the professional and ethical obligations that bind counsel. Again, the Prosecution does not see the relevance of the *Milosevic* decision on self-representation and notes that the comment that this decision "indicates that the right to self-representation is an indispensable cornerstone of justice"⁵ is open to argument, especially in view of the tendency for the right to be qualified in practice.⁶
11. In relation to paragraphs 15 and 16 of the Joint Defence Response, the Prosecution notes that it has not made any allegation against the Defence and that the Motion concerns the desire to avoid the risk of contamination of evidence by the proposed Defence action of arranging meetings between the Accused and witnesses. The Prosecution submits that it may be assumed that during any such meeting the content of a witness's proposed testimony would be discussed and therefore the risk of contamination is inherent in the

³ Notably, however, it has been held that counsel is independent of the accused in the exercise of his professional judgement. "The Trial Chamber has to be assured that a Counsel properly conducts an accused's defence and protects the latter's lawful interest during trial, but also has to verify that the accused does not abuse this right. As a matter of principle...an accused is mistaken when saying that counsel must consult with him, whereas there are matters of professional judgement for which Counsel alone is liable. While Counsel should take full instructions about facts surrounding the case, this does not imply that Counsel have to consult with the accused whenever any step in his defence is taken by the Counsel. Nevertheless, Counsel have to keep the Accused informed of the steps taken to protect his interests and provide the Accused with a reasoned explanation as to why they took such steps". *Prosecutor v Nyiramasuhuko et al.*, ICTR-97_21-T, "Decision on Ntahobali's Motion for Withdrawal of Counsel", Trial Chamber, 22 June 2001, paras 22-23.

⁴ *Prosecutor v Taylor*, SCSL-03-01-PT, Transcript, Initial Appearance, 3 April 2006, pp. 17-18.

⁵ Joint Defence Response, footnote 12.

⁶ See *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-125, "Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court", 8 June 2004; *Prosecutor v Seselj*, IT-03-67-PT, "Decision on Assignment of Counsel", 21 August 2006, "The Chamber sees no alternative that would sufficiently protect the fairness and the integrity of the proceedings than to order that the Accused participate in the proceedings through counsel only".

very fact of a meeting between the Accused and witnesses. This assumption is strengthened by the words used by the lead counsel for the First Accused at the Status conference on 25th July 2006 to “discuss, if I’m right, their stories, or the account or their testimony which they are coming to give here in the court.”

12. Furthermore it is incorrect to suggest in paragraph 15 of the Joint Defence Motion that *this* counsel (i.e the same counsel) gave an explanation of the above remark a day after the status conference. This explanation was given by the co-counsel of the First Accused (not the counsel who made the remark). The explanation is unconvincing and, in the view of the Prosecution, most likely given in order to mitigate any potential damage which the remark may have caused to the witnesses of the First Accused yet to be called.
13. In addition, the Prosecution submits that it is an important consideration that the First Accused has now named potential alibi witnesses whom he anticipates will give evidence in support of his alibis. The Prosecution submits that at a minimum all the Accused should be prevented from meeting this category of witness to avoid the potential risk of their evidence being contaminated.
14. In relation to paragraph 17 of the Joint Defence Response, the Prosecution agrees that it may test the Defence evidence through cross-examination and welcomes the remark of the Presiding Judge that the possibility of groups of witnesses meeting with the Accused “is certainly good cross-examination material”.⁷ However, in order to cross-examine effectively on this point, the Prosecution requires access to the details of the exact contacts between witnesses and the Accused. In the absence of such information, the Prosecution would be hampered in its ability to guide the Trial Chamber in the ascertainment of the truth. The Defence does not point to any principle or regulation prohibiting the disclosure of the visitation logs, or information contained therein, held by the Detention Unit to the Prosecution. Indeed, the Defence simply states that there is no basis or necessity for such disclosure. The Prosecution has explained the need for the requested information.
15. The Prosecution further submits that it is entitled under the Rules to conduct investigations and collect evidence that is relevant to its case, including evidence that will be used to test the credibility of witnesses. In the interests of transparency, and since the

⁷ *Prosecutor v Brima, Kamara, Kanu*, Transcript, Status Conference, 25 July 2006, p. 13.

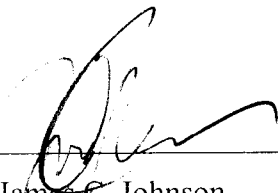
evidence sought relates to documents held by the Detention Unit and the information required by the Prosecution may need to be distilled from the visitation logs via the Registry, the Prosecution has approached the Trial Chamber with the current request for an order.

III. CONCLUSION

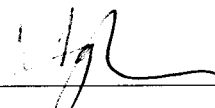
16. The Prosecution asks that its requested orders to prohibit contacts between all three Accused and any Defence witnesses, especially the First Accused's named alibi witnesses, without prior authorization of the Trial Chamber, and to require the Registrar to inform the Trial Chamber and the parties of the details of any Defence witnesses who have already visited the Accused, be granted. Should the Trial Chamber be minded to grant the second request only, the Prosecution asks that the order be put in place both with respect to past and to future visits between the Accused and witnesses.

Filed in Freetown,
28 August 2006

For the Prosecution,



James C. Johnson
Chief of Prosecutions



Karim Agha
Senior Trial Attorney

Index of Authorities

1. *Prosecutor v Brima, Kamara, Kanu*, SCSL-2004-16-T-533, “Public Joint Defence Response to Prosecution Motion (“**Motion**”) for an Order Restricting Contacts between the Accused and Defence Witnesses and Requiring Disclosure of Such Contacts”, 21 August 2006.
2. *Prosecutor v Milosevic*, IT-02-54-AR73.7, “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel”, Appeals Chamber, 1 November 2004.
3. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-125, “Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court”, 8 June 2004.
4. *Prosecutor v Seselj*, IT-03-67-PT, “Decision on Assignment of Counsel”, 21 August 2006.
5. *Prosecutor v Brima, Kamara, Kanu*, Transcript, Status Conference, 25 July 2006, p. 13.
6. *Prosecutor v Nyiramasuhuko et al.*, ICTR-97_21-T, “Decision on Ntahobali’s Motion for Withdrawal of Counsel”, Trial Chamber, 22 June 2001.
7. *Prosecutor v Taylor*, SCSL-03-01-PT, Transcript, Initial Appearance, 3 April 2006.