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SCSL-11-02-T
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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding

Registrar: Ms. Binta Mansaray

Date filed: 28 June 2012

Independent Counsel

Against

**Hassan Papa Bangura
Samuel Kargbo
Santige Borbor Kanu
Brima Bazzy Kamara**

Case No. SCSL-11-02-T

PUBLIC

AMICUS CURIAE BRIEF

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SPECIAL COURT FOR SIERRA LEONE	
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1. This brief is submitted pursuant to a request by Justice Teresa Doherty, following her ruling of 18 June 2012 in the case of *Prosecutor v. Bangura et al.* (Interim Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena). The learned judge did not rule on issuance of a subpoena to the Principal Defender, Claire Carlton-Hanciles, postponing her decision on the application in order to consider an amicus curiae brief on 'the application of Rule 97 and the Code of Professional Conduct for Council with the Right of Audience before the Special Court for Sierra Leone to the Principal Defender' (*Prosecutor v. Bangura et al.*, Interim Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena, 18 June 2012, para. 3). She subsequently issued detailed instructions to the undersigned, asking for responses to three questions (Request Pursuant to Rule 74 to File Amicus Brief, 18, June 2012, para. 4):

- (i) Do the provisions of Rule 97 apply to the Principal Defender?
- (ii) If they do apply to the Principal Defender does the privilege therein extend to communications made to him/her for the purpose of obtaining advice on the commission of a future crime?
- (iii) If the answer to (ii) is in the affirmative, does the Principal Defender have a different or particular privilege by virtue of the status and duties provided by Rule 45.

The Presiding Judge indicated that with respect to the application of Rule 97, she is interested in 'whether the Principal Defender has a different and particular privilege by virtue of her/his office'.

2. Rule 97 provides as follows:

Rule 97: Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

- i. The client consents to such disclosure; or
- ii. The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.
- iii. The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance.

Rule 45 states:

Rule 45: Defence Office

The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender.

(A) The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:

- i. suspects being questioned by the Special Court or its agents under Rule 42, including non-custodial questioning;
- ii. accused persons before the Special Court.

(B) The Defence Office shall fulfil its functions by providing, inter alia:

- i. initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
- ii. legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
- iii. adequate facilities for counsel in the preparation of the defence.

(C) The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified criminal defence counsel whom he believes are appropriate to act as duty counsel or to lead the defence or appeal of an accused. Such counsel, who may include members of the Defence Office, shall:

- i. speak fluent English;
- ii. be admitted to practice law in any State;
- iii. have at least 7 years' relevant experience; and
- iv. have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused.

(D) Any request for replacement of an assigned counsel shall be made to the Principal Defender. Under exceptional circumstances, the request may be made to a Chamber upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

(E) Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances. In the event of such withdrawal the Principal Defender shall assign another Counsel who may be a member of the Defence Office, to the indigent accused.

3. In addition to the mandate set out in Rule 45, the Principal Defender assumes responsibility for convicted persons who are serving their sentences in Rwanda. This is described in the 2010 Annual Report of the Court :

Following the transfer of prisoners from Freetown, the Defence office assumed the additional responsibility of acting as the primary contact for all convicts who were ordered to serve their respective jail terms in Rwanda. Relatives of these convicts and the general public access this office as well as

that of the office of the Registrar on all issues relevant to the special court. In this regard the office also provides information regarding the service of sentence by the Prisoners at the Mpanga Prison in Kigali, Rwanda. The Principal Defender visited the convicts in Kigali and continues to guarantee the maintenance of the rights of all convicts under the Memorandum of Understanding signed by the SCSL and the Government of Rwanda. These rights include but are not limited to visitation, food, medical facility, telephone access to call relatives, exercise, recreation, education etc. the Principal Defender continues to keep in constant touch with the convicts and the Rwandan correctional facilities officials.

4. Also of relevance is the Code of Conduct. It 'does not name the Principal Defender', and the application of the Code of Conduct to the Principal Defender is an issue that has apparently not yet been settled. (Request Pursuant to Rule 74 to File Amicus Brief, 18, June 2012, para 6.). Counsel for one of the accused has indicated that if the Code applies, articles 12 and 14 may be of particular relevance. Article 12 of the Code concerns counsel as witness, and states the familiar rule that counsel should not act in a matter where there is a 'substantial probability' that counsel may be called to testify. Special reference is made to paragraph B, which holds that opposing counsel should not call defence counsel as a witness 'unless there is a compelling need for such testimony'. It is really about collegial relations between professionals rather than matters of privilege and admissibility of evidence. Article 14, which is in the section of the Code dealing with obligations upon defence counsel, concerns the scope of representation of defence counsel. The Court has been referred specifically to paragraph C, concerning the duty upon counsel not to advise or assist a client in illegality. But no misconduct by the Principal Defender has been alleged or implied.
5. The Defence Office, which is headed by the Principal Defender, is an innovation at the Special Court for Sierra Leone. At the other international tribunals, the responsibility for dealing with defence matters has been addressed through administrative bodies. Set out in Rule 45, the primary function of the Defence Office is 'ensuring the rights of suspects and accused'. According to the Court's website, the Defence Office 'acts as a counterbalance to the Prosecution and is mandated, to ensure the rights of suspects and accused persons'. The Principal Defender has acted as 'duty

counsel' for accused persons until dedicated counsel have been duly appointed. As Rule 45 makes clear, attorneys from the Defence Office may appear before the Court and represent the interests of accused persons.

A. Application of Rule 97

6. To the extent that a lawyer-client relationship existed between the Principal Defender with regard to the communications in question in the present case, there cannot be any serious dispute about the application of Rule 97. Although the activities of the Principal Defender may not always fall within the scope of the traditional lawyer-client relationship, where they do they must be sheltered by the privilege because the Principal Defender is acting as defence counsel as a matter of fact. The Principal Defender is a qualified lawyer and the relationship between defendant and Principal Defender is comparable to the traditional lawyer-client relationship in such circumstances.
7. The learned judge has already indicated that she has accepted the Prosecutor's submission that besides the provisions of Rule 97, there is a 'crime-fraud exception' to the general principle of lawyer-client privilege. Such an exception has been recognized by certain domestic tribunals, and is codified in the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (see Rule 163(iii); there is no relevant case law, which is hardly surprising because no defendants have appeared or been taken into custody at that institution). The Prosecutor's submission on this point makes a compelling case for the need to obtain the evidence of Mr. Daniels (see para. 8 of Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena, 11 June 2012), but no similar submissions are made in the case of the Principal Defender.
8. The Prosecutor seeks a subpoena addressed to the Principal Defender in order to prove that during meetings with the accused in the Rwandan detention centre, the accused 'raised with her and discussed Rule 120 of the Special Court, which provides for Review Proceedings... Also discussed were Rules 123 and 124...' (Prosecutor's Pre-Trial Brief and Filings Pursuant to

Scheduling Order of 1 May 2012, 16 May 2012, para. 49.) These issues were raised '[i]n almost all her visits to Rwanda since their imprisonment there'. Her testimony is expected to take two hours. Without disputing the bare relevance of the facts that the Prosecutor seeks to prove, they are hardly decisive in attempting to establish that a contempt of court was committed. At best, the evidence that it is alleged that the Principal Defender may tender provides corroboration that the accused were interested in the legal issues concerning a reversal of their convictions, something that is not surprising and that courts might well presume to be a feature of most convicted persons serving lengthy sentences, in any jurisdiction and for any crime. The Prosecutor concedes that the testimony of either of two other witnesses, 'standing alone, would be sufficient to convict beyond a reasonable doubt. Together, their evidence provides overwhelming evidence of guilt.' (Prosecutor's Pre-Trial Brief and Filings Pursuant to Scheduling Order of 1 May 2012, 16 May 2012, para. 17). In other words, he considers that he can easily prove the case without the testimony of the Principal Defender.

9. Assuming, *arguendo*, that there was not a lawyer-client relationship within the meaning of Rule 97 between the Principal Defender and the detained accused, the learned judge has asked whether some other basis may exist for determining that the communications are privileged. The question appears to be a novel one, at least as far as the Principal Defender is concerned. According to Justice Claire L'Heureux-Dubé of the Supreme Court of Canada in *A. v. B.*, [1995] 4 SCR 536:

The doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure. Although all relevant information is presumptively admissible at trial, some probative and trustworthy evidence will be excluded to serve other overriding social interests. The same principles apply to exempt, completely or partially, particular communications arising out of certain defined relationships from disclosure in judicial proceedings. Since the existence of privilege impedes the realization of the central objective of our legal system in order to advance other goals, the question of privilege is essentially one of public policy.

Should the Court wish to consult commentators on the subject, here are the most relevant sources: Richard May and Mariëka Wierda, *International Criminal Evidence*, Ardlsey, NY: Transnational Publishers, 2002, pp. 90-91; Karim A.A. Khan, Caroline Buisman and Christopher Gosness, eds. *Principles of Evidence in International Criminal Justice*, Oxford: Oxford University Press, 2010, pp. 551-598. These writers consider the various forms of privilege recognized by the caselaw, but although helpful in terms of background they do not shed much light on the problem at hand.

10. There are several examples in relevant case law of international tribunals, including that of the Special Court for Sierra Leone, where a privileged relationship has been recognized even in the absence of an appropriate provision in the applicable legal texts.
11. In the AFRC trial, it was the Prosecutor who invoked an uncodified privilege with respect to a former United Nations human rights officer who ran the risk of being cross-examined by defence counsel about confidential sources and informants. The Trial Chamber recognized ‘the privileged relationship between a human rights officer and his informants, as well as the public interest that attached to the work of human rights officers gathering confidential information in the field [but] found that that these considerations should not outweigh the rights of the accused to a fair trial as guaranteed by Article 17 of the Statute of the Special Court’. (*Prosecutor v. Brima et al.*, Decision on Prosecution Appeal Against Decision on Oral Application for Witness ST1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, para. 32).
12. On appeal, the Appeals Chamber did not consider the existence of a privileged relationship in any detail because it felt the issue was adequately addressed by Rule 70, and this issue is not relevant to the present proceedings. (para. 33). In adopting an alternative approach, the Appeals Chamber did not overturn the finding of the Trial Chamber, nor did it comment negatively upon the approach of the Trial Chamber. In considering the relevance of this decision to the present proceedings, the Court might consider the fact that as the

Prosecutor is challenging the existence of privilege and not invoking it, there is no need to balance the restriction on admissibility of evidence against the right of an accused to a fair trial. However, the Court might well consider that other important interests are at stake given the nature of contempt proceedings. Careful attention might be given to the fact that although attempting to bribe witnesses is potentially damaging to the administration of justice, this is perhaps not among the most sensitive types of cases with which contempt prosecutions have been concerned, such as disclosing the identity of witnesses.

13. In *Taylor*, the Trial Chamber recognized the existence of a journalistic privilege which it said ‘stems from the right to freedom of expression and serves to protect the freedom of the press and the public interest in the free flow of information’. (*Prosecutor v. Taylor*, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential ‘Source’ Raised During Cross-Examination of TF1-355, 6 March 2009, para. 25). The Trial Chamber referred to the leading case on the issue of journalistic privilege, decided by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, 11 December 2003). It noted that the privilege was not absolute, and that it could give way where ‘the evidence sought is of direct and important value in determining a core issue in the case’ and where ‘the evidence sought cannot reasonably be obtained elsewhere’. Under the circumstances, the Trial Chamber considered that ‘obliging the Witness to divulge his sources without a compelling reason to do so would set an uncomfortable precedent’ (*Prosecutor v. Taylor*, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential ‘Source’ Raised During Cross-Examination of TF1-355, 6 March 2009, para. 33).

14. An important case at the International Criminal Tribunal for the former Yugoslavia also recognizes a privilege to humanitarian workers from the International Committee of the Red Cross. This privilege is rooted in customary international law (*Simić et al.*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July

1999). Arguably, the privilege goes further, extending to individuals involved in humanitarian work on behalf of organizations like the United Nations and even non-governmental organizations, something that was argued in the *Brima* case cited above.

15. As noted above, the *ad hoc* tribunals have recognized privilege in circumstances that are not codified in their Rules of Procedure and Evidence, approaching the matter essentially on a case-by-case basis. Some privileges familiar in domestic criminal proceedings, such as that recognized to spouses and to clergy, do not seem to have been considered. Certain general principles can be discerned from the analysis undertaken in the international caselaw, including the significance of the privileged relationship in terms of furthering the interests of justice or of fundamental human rights more generally. These uncodified privileges have their own exceptions, but they should not be set aside unless strong reasons exist and where the evidence is of an importance that goes beyond the normal benchmarks for admissibility.

16. In the present case, the Court may find useful guidance in the Rules of Procedure and Evidence of the International Criminal Court, where a somewhat different approach has been taken. The drafters of the Rules of Procedure and Evidence were aware of the *Simić et al.* ruling, cited above, and probably intended that it be codified. They went further, however, in setting out a scheme for the determination of privileges in a more general sense. To date, the relevant provision does not appear to have been considered in the caselaw of the International Criminal Court. The relevant provision, Rule 73, states:

Rule 73. Privileged communications and information

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:
 - (a) The person consents in writing to such disclosure; or
 - (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

2. Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:
 - (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
 - (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
 - (c) Recognition of the privilege would further the objectives of the Statute and the Rules.
 3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.
 4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence of, the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:
 - (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or
 - (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.
 5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.
 6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.
17. The Court's attention is directed to paragraph 2 of Rule 73, which sets out the three tests. Although paragraph 2 does not exclude any particular privileged relationship, paragraph 3 provides a number of examples of its potential application: a medical doctor, psychiatrist, psychologist or counsellor, and clergy. Should authority be needed, Rule 72bis (iii) provides adequate support for consideration of the Rules of the International Criminal Court.

18. The Court might consider the relevance to the Principal Defender of the three criteria in paragraph 2 of Rule 73 in ruling on the existence of a privileged relationship with detainees at the Rwandan facilities. It would appear that there are strong grounds for the application of all three grounds. Although the learned judge has not canvassed the views of the Principal Defender on this point, it would seem reasonable that she would consider her communications with persons in detention to be made 'in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure'. It seems difficult to appreciate how she could do her job otherwise. In order to act effectively on behalf of the detainees, as mandated by the agreement between the Court and the Government of Rwanda, the Principal Defender must develop and maintain a relationship of confidence that requires privacy and a reasonable expectation of confidentiality. Indeed, given that the meeting with the Principal Defender may well be the prelude to full-blown litigation, confidentiality would seem to be essential. This seems clear from the advice to deal with outside counsel given by the Principal Defender. Her communications with the defendants, as outlined in the Prosecutor's brief, were apparently directed to challenging the conviction.

19. The final question – would recognition of the privilege further the objectives of the Statute and the Rules? – provides the Special Court for Sierra Leone with an opportunity to affirm the important, indeed essential, role played by the Principal Defender. The Principal Defender will often be in contact with an accused person immediately after arrest and detention, at a time when he or she is at the most vulnerable. Probably at no other point in a criminal proceeding is the trust and candour that flows from confidentiality so important. It is vital that the Principal Defender be in a position to assure an accused person of the privileged and confidential nature of the relationship.

20. This Court is in its final stages of activity, and communication between convicted persons with great experience in the criminal justice system may not be the paradigm for the necessity of a privileged relationship. It is unlikely to have to deal with the most acute circumstances of contact between an accused

person and the Principal Defender. But the Court should not neglect the pertinence of its ruling in this case to other officials in other international judicial institutions who carry out similar functions. It is not insignificant that at the time these submissions are filed an official of the International Criminal Court with a role broadly analogous to that of the Principal Defender sits detained in Libya after a consultation with one of the accused in the *Situation in Libya*. The President of the Special Court for Sierra Leone has issued a statement calling for her release. It is a most opportune time for this Court to affirm the sanctity of this relationship even if it may not, strictly speaking, fall within the ambit of lawyer-client privilege.

B. An exception for consultation aiming at obtaining information on commission of a crime

21. To the extent that the crime-fraud exception exists with respect to lawyer-client privilege, there seems no good reason for it not to apply to a special privilege that may exist in relations with the Principal Defender. To rule otherwise would make the privilege of the Principal Defender more absolute than the lawyer-client privilege codified by Rule 97. It may be that other privileges, such as the privilege of a journalist or a humanitarian worker, or of clergy or of a close relative, may be more absolute. Such privileges are recognized in order to further objectives other than those protected by lawyer-client privilege.
22. The purposes of lawyer-client privilege appear to be largely identical to those necessary to the relationship between Principal Defender and accused. In fact, to the extent an accused person was able to mandate defence counsel promptly upon being placed in jeopardy, the advice sought would be comparable to that required by an unrepresented accused dealing with the Principal Defender. In the present case, the advice that was allegedly sought was about legal issues and the application of the Statute and the Rules. Because the rationale for any privilege acknowledged to the Principal Defender is similar, if not identical, to that of the defence lawyer contemplated by Rule 97, the exception in the case of illegal activity seems reasonably justified. Other functions of the Principal

Defender apart from providing legal advice to a defendant may dictate special features of such a privilege, but it is difficult to guess at what these might be in the absence of a factual foundation.

23. As noted above, in the present proceedings the evidence that the Prosecutor seeks to adduce does nothing more than corroborate the fact that the detainees in Rwanda wanted to overturn their convictions. Taken at its highest, such evidence can hardly be decisive to a prosecution for contempt of court. Under the circumstances, it seems a very thin basis for the Court to establish a precedent that might undermine the ability of international judicial officials with a special mandate to assist accused persons, especially because such consultations often arise in cases of extreme distress where an individual had not yet established a relationship with a dedicated defence counsel. With respect to the Special Court for Sierra Leone, where a particular function is assigned to the Principal Defender concerning detainees in Rwanda, that role could be irreparably damaged by a ruling denying the existence of any privilege. Given the circumstances, and the nature of the evidence being sought, any possible benefit to the Prosecution's case is greatly outweighed by the potential harm done to the relationship between the Principal Defender and those whom she is charged to assist.

C. Application of the Code of Conduct

24. The Court has noted that the Code of Professional Conduct for Council with the Right of Audience before the Special Court for Sierra Leone does not explicitly apply to the Principal Defender. Of course, there are circumstances where the Principal Defender acts as *de facto* defence counsel. Under such circumstances, the Code must also be applicable to the Principal Defender given the dual nature of her role.
25. There may be particular circumstances where the modalities of the Code are not relevant or do not apply to the specific functions of the Principal Defender, with the exception of her role as an acting defence counsel. As with the scope of the special Principal Defender privilege, it is difficult to speculate on the

circumstances that might arise. In the present proceedings, the provisions invoked by defence counsel hardly seem to be *à propos*. Article 12(B) applies to the lawyer who calls another lawyer to testify, and therefore might be said to govern the behaviour of the Prosecutor in these proceedings; it is hardly germane to the existence of a privilege. Article 14(C) would only be of interest were it alleged that the Principal Defender is complicit in the crime-fraud exception, and nothing of the sort has been suggested.

26. Conclusion

27. The *amicus curiae* considers that strong policy reasons exist justifying recognition of a *sui generis* privilege, analogous but not identical to that of defence counsel, in the case of the Principal Defender. While it may not be absolutely necessary to make a finding along these lines, given the flimsy factual basis for requiring evidence of the Principal Defender in these proceedings, circumstances at the International Criminal Court might make affirmation of this facet of the defence function by a ruling of this Court particularly timely.

The whole respectfully submitted, this 24th day of June 2012



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