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SCSL-11-02-T  
(382-391)

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SPECIAL COURT FOR SIERRA LEONE

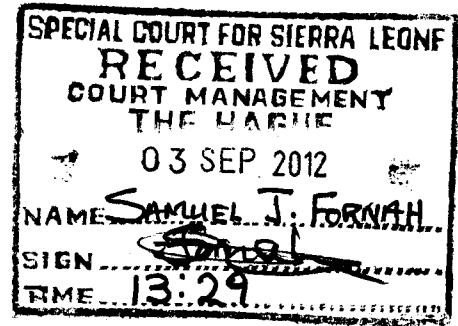
TRIAL CHAMBER II

Before: Justice Teresa Doherty, Single Judge  
Registrar: Binta Mansaray  
Case No.: SCSL-2011-02-T  
Date: 3 September 2012

INDEPENDENT COUNSEL

v.

Hassan Papa BANGURA  
Samuel KARGBO  
Santigie Borbor KANU  
Brima Bazy KAMARA



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PUBLIC

DECISION ON PROSECUTOR'S ADDITIONAL STATEMENT OF ANTICIPATED TRIAL ISSUES  
AND REQUEST FOR SUBPOENA IN RELATION TO THE PRINCIPAL DEFENDER

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Independent Counsel:  
Robert Herbst

Counsel for Bangura:  
Melron Nicol Wilson  
Counsel for Kargbo:  
Charles Taku  
Counsel for Kanu:  
Kevin Metzger  
Counsel for Kamara:  
Abdul Serry Kamal

I, Justice Teresa Doherty, Single Judge of the Special Court for Sierra Leone (“Special Court”)

**RECALLING** the “Prosecutor’s Additional Statement of Anticipated Trial Issues and Request for Subpoena” filed on 11 June 2012, in which the Independent Counsel requested that the Court issue a subpoena, pursuant to Rule 54 of the Rules, to secure the appearance at trial of Andrew Daniels and Principal Defender Claire Carlton-Hanciles.<sup>1</sup> The Independent Counsel, addressing the Defence objection to this subpoena being issued on the grounds of the lawyer-client privilege in Rule 97 of the Rules, requested that this Trial Chamber recognise and apply what Independent Counsel called a “crime-fraud exception” to the Rule.<sup>2</sup>

**RECALLING** the “Defence Pre-Trial Brief on Behalf of Santigie Borbor Kanu filed Pursuant to Scheduling Order of 1 May 2012” filed on 29 May 2012, wherein Counsel for Santigie Borbor Kanu opposed the issuance of a subpoena to Andrew Daniels and Claire Carlton-Hanciles.<sup>3</sup> Counsel argued that the lawyer-client privilege “should not be torn asunder in this case.”<sup>4</sup>

**RECALLING** the “Defence Pre-Trial Brief on Behalf of Brima Bazzy Kamara,” filed on 1 June 2012, wherein Counsel for Brima Bazzy Kamara opposed the issuance of a subpoena to Andrew Daniels and Claire Carlton-Hanciles,<sup>5</sup> submitting that all conversations between Kamara and Daniels and/or Carlton-Hanciles were within the framework of the lawyer-client privilege, and that the sanctity of the privilege should be upheld.<sup>6</sup> Counsel further submitted that the lawyer-client privilege was “sacrosanct” and is “rarely abrogated by Courts and only then in exigent circumstances.”<sup>7</sup> Counsel also contended that this privilege is “the benchmark of the judicial system as it enables and empowers those seeking legal advice to speak freely without fear of disclosure.”<sup>8</sup>

**RECALLING** the oral submissions made by the Independent Counsel on 16 June 2012, wherein Counsel conceded that there is no crime-fraud exception to the lawyer-client privilege under Rule 97, nor is there jurisprudence on this particular issue from the international tribunals.<sup>9</sup> Counsel noted, however, that there was recognition of a crime-fraud exception in the Code of Conduct, which provides that if a defence lawyer knows of a crime to be committed or understands that his services

<sup>1</sup> SCSL-2011-02-26-PT, para. 1.

<sup>2</sup> SCSL-2011-02-26-PT, para. 2.

<sup>3</sup> SCSL-2011-02-21-PT.

<sup>4</sup> SCSL-2011-02-21-PT, paras. 21-22.

<sup>5</sup> SCSL-2011-02-23-PT.

<sup>6</sup> SCSL-2011-02-23-PT, para. 17.

<sup>7</sup> SCSL-2011-02-23-PT, para. 17.

<sup>8</sup> SCSL-2011-02-23-PT, para. 17.

<sup>9</sup> Transcript 16 June 2012 pp. 46-48.

are being used in furtherance of a crime, the privilege will be lost.<sup>10</sup> Counsel noted that the crime-fraud exception is recognized in both the United States and the United Kingdom.<sup>11</sup>

RECALLING the oral submissions made by Counsel for the Accused Brima Bazy Kamara on 16 June 2012, wherein Counsel argued that as the privilege was vested in the client, only the client could waive this privilege, and Rule 97 of the Rules has highlighted the exceptional circumstances under which this privilege can be waived.<sup>12</sup>

RECALLING the oral submissions made by Counsel for the Accused Santigie Borbor Kanu on 16 June 2012, wherein Counsel noted that in both international and national courts, the lawyer-client privilege attaches to the client, and not the lawyer; thus it is the client who is entitled to waive the privilege.<sup>13</sup> Article 14 (A) (ii) of the Code of Conduct states that Defence counsel must abide by a client's decision concerning the objectives of trial, unless this is inconsistent with counsel's duties under the Code or counsel's best professional judgement.<sup>14</sup> Therefore, Counsel contended, Article 17 of the Code of Conduct provides that a lawyer may break the lawyer-client privilege only if the lawyer feels that the situation is inconsistent with his duties under the code, or his professional judgement, which is a subjective standard.<sup>15</sup> In any other situation, Counsel contended, it is only the client that has the right to break the privilege.<sup>16</sup>

RECALLING the Single Judge's "Interim Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena" filed on 18 June 2012, in which the Single Judge stated that she did not consider that the lawyer-client privilege vested in a client by Rule 97 of the Rules is absolute if the purpose of the communication is obtaining advice on the commission of a future crime. Accordingly, the Single Judge granted the application to subpoena Andrew Daniels but sought submissions from Amicus Curiae in respect of the application of the exception to the Principal Defender.<sup>17</sup> The Single Judge requested that Amicus Curiae, Professor William Schabas, file an Amicus Brief on the application of Rule 97 and the crime-fraud exception to the Principal Defender.

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<sup>10</sup> Transcript 16 June 2012 pp. 46-48, 74-76.

<sup>11</sup> Transcript 16 June 2012 p. 48.

<sup>12</sup> Transcript 16 June 2012 pp. 57-58.

<sup>13</sup> Transcript 16 June 2012 p. 60.

<sup>14</sup> Transcript 16 June 2012 p. 61.

<sup>15</sup> Transcript 16 June 2012 p. 62-64.

<sup>16</sup> Transcript 16 June 2012 p. 62-64.

<sup>17</sup> SCSL-2011-02-27-T.

**NOTING** the Amicus Curiae brief of Professor William Schabas filed on 28 June 2012, in which the Amicus Curiae reviewed the Rules of Procedure and Evidence, the duties of the Principal Defender, the application of Rule 97 to the Principal Defender to the extent that a lawyer-client relationship existed, the application to the facts in the instant case and, after a comprehensive review of the jurisprudence and similar rules in other international tribunals considered that “strong policy reasons exist justifying the recognition of a *sui generis* privilege in the case of the Principal Defender;”<sup>18</sup>

**RECALLING** the Single Judge’s oral ruling on 29 June 2012 refusing the issue of a subpoena to the Principal Defender and undertaking to give reasons for my decision when time permits;

**COGNISANT** of Article 17 of the Statute of the Special Court for Sierra Leone (“the Statute”); Rules 2, 45, 72*bis*, 73, 77 and 97 of the Rules of Procedure and Evidence (“the Rules”); and Articles 12 and 17 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“the Code of Conduct”);

**HEREBY RENDER THIS DECISION** based solely on the written pleadings and oral arguments:

#### APPLICABLE LAW

1. Rule 45 (A) and (B) of the Rules (“Defence Office”) provides:

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 the 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

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<sup>18</sup> Amicus Curiae Brief.



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.

2. Rule 72*bis* of the Rules (“General Provisions on Applicable Law”) provides:

The applicable laws of the Special Court include:

- (iii) general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards.

3. Rule 97 of the Rules (“Lawyer-Client Privilege”) provides:

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.

4. Article 17 (C) (iii) of the Code of Professional Conduct (“Confidentiality”) provides:

Notwithstanding paragraph (B) and subject to Article 13 of this Code, Defence Counsel may reveal information which has been entrusted to him in confidence in any of the following circumstances:

- (iii) When necessary to prevent an act which Defence Counsel reasonably believes:
  - (a) is a criminal offence within the territory in which it may occur; and/or
  - (b) may result in death or substantial bodily harm to any person unless the information is disclosed.

DELIBERATIONS

5. I note that the Rules of Procedure and Evidence of the Special Court for Sierra Leone specifically provide for a Defence Office which is headed by the Principal Defender and that this is an “innovation” of the Special Court for Sierra Leone.<sup>19</sup>
6. The primary function of the Defence Office is “ensuring the rights of suspects and accused” and, as noted in the Amicus Brief, these duties include both “[acting] as a counterbalance to the Prosecution” and, as mandated, “[ensuring] the rights of suspects and accused persons.”<sup>20</sup> Following the transfer of convicted persons from Freetown, the Defence Office also assumed the additional responsibility of acting as a primary contact for all convicts who were ordered to serve their respective jail terms in Rwanda.<sup>21</sup>
7. Rule 45 (B) provides that the Defence Office shall fulfil its functions by providing, *inter alia*, initial legal advice and assistance as duty counsel and by being available as far as practicable to attend the Detention Facility in the event of being summoned; and by providing legal assistance as ordered by the Special Court in accordance with Rule 61.
8. Hence the Rules envisage two aspects, at least, in the Principal Defender’s role: giving advice, assistance and representation to suspects and accused, and acting as duty counsel, including appearing as duty counsel in Court.
9. Although the Rules provide that the Principal Defender shall act as duty counsel, she is not specifically named in the Code of Conduct as a counsel to whom the provisions of the Code apply. In contrast, Articles 23 to 26 of the Code of Conduct specifically refer to Prosecution counsel. However, Article 2 of the Code of Conduct provides that the Code shall apply to “all Counsel” who appear or have appeared before the Special Court “or who otherwise act or have acted on behalf of the Prosecutor, a suspect, an accused, a witness or any other person before the Special Court, and who thereby have the right of audience before the Court.” As Rule 45 (B) specifically charges the Principal Defender with an obligation to act as duty counsel and to conform with any orders of the Court made under Rules 61, it must follow that the Principal Defender is thereby acting as a counsel. Accordingly, the provisions of the Code of Conduct apply to her when she acts as counsel notwithstanding the absence of a specific reference to her office in the Code.

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<sup>19</sup> Amicus Brief, para. 5.

<sup>20</sup> Amicus Brief, para. 5.

<sup>21</sup> Amicus Brief, para. 3, *citing* the Special Court for Sierra Leone 2010 Annual Report of the Court.

10. As the Amicus Curiae has pointed out, the Principal Defender is a qualified lawyer and the relationship between a defendant and the Principal Defender is comparable to the traditional lawyer-client relationship in such circumstances.<sup>22</sup>
11. Given that a lawyer-client relationship applies to the Principal Defender, it follows that the provisions of Rule 97 of the Rules apply, and all communications between the Principal Defender when acting as a lawyer and an accused or suspect who is, in effect a client, are regarded as privileged. It must follow therefore the exception for communications made in furtherance of a crime also apply.
12. As the Office of the Principal Defender is a unique and innovative position in Special Court the further question which I ask and which I have addressed to the Amicus Curiae is: if Rule 97 of the Rules applies to the Principal Defender, does she have a different or particular privilege by virtue the status and duties provided by Rule 45 of the Rules?
13. When the Principal Defender acts, not as duty counsel, but in ensuring the rights of suspects and accused persons, her discussion with them will include matters of law and of the expectations of the suspects and accused. I ask if any privilege attaches to those particular communications.
14. I note from the outset that although Rule 45 of the Rules states that the Defence Office is established for the purpose of ensuring the rights of suspects and accused, the Defendants before me are actually convicted persons, and were convicted persons at the time of the communications with the Principal Defender. They did not become "accused persons" in this case until several months after the communications took place. The definitions of "accused" and "suspected persons" in Rule 2 of the Rules do not include convicted persons. Notwithstanding this clear wording in Rules 2 and 45 of the Rules, the spirit and intent of Rule 45 which imposes a continuing obligation on the Principal Defender to ensure the rights of persons appearing before the Special Court must extend to persons convicted by the Court who continue to be the subject of orders made by the Court. For that reason I consider that a privilege, if any, would extend to a convicted person in the same way as they extend under Rule 45 to suspects and accused.
15. In considering whether there is any other basis for determining if the communications between the Principal Defender and the detained accused exist, the Amicus Curiae has

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<sup>22</sup> Amicus Brief, para. 6.

- referred me to several examples of relevant case law in the International Tribunals, including the Special Court.<sup>23</sup>
16. In *Prosecutor v. Charles Ghankay Taylor*, this Trial Chamber recognised the existence of a journalistic privilege and referred to the case from the International Criminal Tribunal for the former Yugoslavia (ICTY) of *Prosecutor v. Brdjanin*. The Trial Chamber noted that the privilege was not absolute and 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 be reasonably be obtained elsewhere.”<sup>24</sup>
  17. In particular, Amicus Curiae refers to the privileged relationship recognised between a human rights officer and his informant in the matter of the *Prosecutor v. Brima et al.* and invites me to consider its application to the present situation when Independent Counsel is challenging the existence of privilege and not invoking it.<sup>25</sup>
  18. Amicus Curiae also refers to the ICTY case of *Prosecutor v Simic* recognising privilege in humanitarian workers of the International Committee of the Red Cross, which he notes is rooted in customary international law.<sup>26</sup>
  19. As the Amicus Curiae has helpfully pointed out, the ad-hoc tribunals have recognised privileges in circumstances that are not codified in the Rules of Procedure and Evidence, and essentially approach the matter on a case by case basis.<sup>27</sup> Reasons for recognising such uncodified privileged relationships include the furthering of the interests of justice or of fundamental human rights. He opines that whilst they have their own exceptions these should not be set aside unless strong reasons exist.<sup>28</sup>
  20. The Amicus Curiae also draws a parallel between the instant case and the provisions of Rule 73 (2) (A) of the Rules of the International Criminal Court, which recognises as privileged communications occurring within a confidential relationship producing a reasonable expectation of privacy and non-disclosure.

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<sup>23</sup> Amicus Brief Para. 10

<sup>24</sup> *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T-759, Decision on Defence Motion for the Disclosure of the Identity of a Confidential ‘Source’ Raised During Cross-examination of TF1-355, 6 March 2009, para. 25, citing *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2003, paras 35, 37-38.

<sup>25</sup> Amicus Brief, para. 11, citing *Prosecutor v. Brima et al.*, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, para. 32.

<sup>26</sup> Amicus Brief Para. 14, citing *Prosecutor v. Simic et al.*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

<sup>27</sup> Amicus Brief Para. 15.

<sup>28</sup> Amicus Brief Para. 15.



21. I am satisfied that given the terms and obligations imposed on the Principal Defender to candidly advise those persons she is charged to assist there must exist a relationship of trust and candid openness in order for her to carry out her functions properly and in the interests of justice.
22. Any person or suspect, accused or convicted person communicating with her in the course of their confidential relationship is entitled to rely on a reasonable expectation of privacy and non-disclosure. As the Amicus Curiae has correctly, in my view, pointed out the Principal Defender will often be in contact with an accused person immediately after arrest and detention when that person is most vulnerable. Hence, the accused and the Principal Defender must be assured of a privileged and confidential relationship.<sup>29</sup>
23. For the fore-going reasons I consider that there is a particular privilege vested in communications between the Principal Defender and suspects, accused, and convicted detainees in communications with the Principal Defender when they occurred other than in her capacity as duty counsel.
24. The Amicus Curiae has noted that provisions invoked by the Defence Counsel for Kanu under Articles 12 (B) and 14 (C) of the Code of Conduct hardly seem *a propos* in this case as Article 12 (B) applies to a lawyer if he calls another lawyer to testify and Article 14 (C) "would only be of interest where it alleged that the Principal Defender is complicit in the crime-fraud exception, and nothing of the sort has been suggested here."<sup>30</sup> I agree with that view and adopt it.
25. Further, in the instant case the Independent Counsel has stated that the communications between the Principal Defender and the accused Kamara and Kanu concerned Rule 120 and discussions on Rule 123 and 124. These rules provide legal procedures for a review when a new fact has been discovered (Rule 120) and the procedures for pardon, commutation of sentence and early release (Rules 123 and 124). These are matters which may be properly discussed between any convicted person and his legal advisers. There is nothing in the facts before me that indicate any crime or fraud was discussed in the course of those conversations. For this added factual reason, I do not consider there is a good reason to issue a subpoena to the Principal Defender.
26. Since requesting the Amicus Brief, a further submission has been made by Independent Counsel relating to the exception in Rule 97 (ii) of voluntarily disclosed communications to a

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<sup>29</sup> Amicus Brief, para. 19.

<sup>30</sup> Amicus Brief, para. 25.

third party where that third party gives evidence of the disclosure. He refers to communications made to him by Kamara and submitted "it seems to me that the third party is myself and that is disclosure to a third person."<sup>31</sup>

27. I find the submission rather puzzling. It appears that Independent Counsel is submitting that he is the third party to whom the communications between the lawyer and client were disclosed. If there is a third party in any proceedings there must be a first and second party and in the instant case, the first party in this trial is the Independent Counsel. Further, if the submission is that, as Kamara communicated to him in the presence of his lawyer, it was discussions to him as a third party and so the privilege is lost, it does not take account of the provision in Rule 97 (ii) that the third party then gives evidence of the disclosure. The report of the Independent Counsel recording any statements made by Kamara and/or Kanu is not in evidence in this trial. As the Independent Counsel is not giving evidence I do not consider the Provisions of Rule 97 (ii) can apply.

FOR THE FOREGOING REASONS I confirm my Interim Order that a subpoena shall not issue to Claire Carlton-Hanciles, the Principal Defender.

Done at Freetown, Sierra Leone, this 3rd day of September 2012.



Justice Teresa Doherty

Single Judge



<sup>31</sup> Transcript 30 June 2012, p. 834