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THE SPECIAL COURT FOR SIERRA LEONE

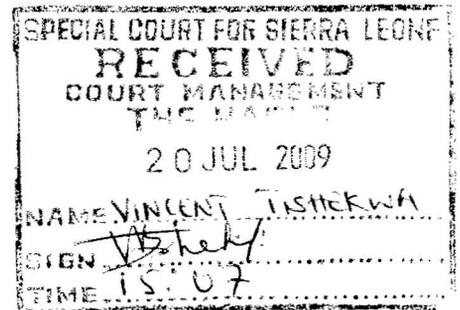
Trial Chamber II

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

Acting Registrar: Ms. Binta Mansaray

Date: 20 July 2009

Case No.: SCSL-03-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO PROSECUTION MOTION FOR AN ORDER
PROHIBITING CONTACT BETWEEN THE ACCUSED AND DEFENCE
WITNESSES OR ALTERNATIVE RELIEF**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Ula Nathai-Lutchman

Counsel for Charles G. Taylor:

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

I. INTRODUCTION

1. This is the Defence Response to the “Public with Confidential Annexes A and B Prosecution Motion for an Order Prohibiting Contact Between the Accused and Defence Witnesses or Alternative Relief”,¹ filed on 10 July 2009.
2. The Defence opposes the Motion for the reasons articulated below.

II. BACKGROUND

3. On 8 June 2009 at a Pre-Defence Status Conference, the parties agreed that the Accused had the right to speak to potential Defence witnesses and that this would also run while the Accused was testifying.² The Defence proposed, and the Prosecution did not object, that there would be no limits concerning the privilege of the Accused’s conversations with witnesses. The Prosecution stated that an appropriate consequence was the mechanism of submitting such conversations to cross-examination; as cross-examination would provide the Prosecution an adequate facility to ensure integrity of the proceedings.³

III. ARGUMENT

A. The Information is Privileged

4. The Accused has the fundamental right to adequate access and opportunity to prepare for his defence.⁴ The Defence maintains that the Accused, Defence Counsel, Defence Team and investigators act as one when preparing the defence strategy. In order to adequately and efficiently prepare for the Accused’s case, conversations between the

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-808, “Public with Confidential Annexes A and B Prosecution Motion for an Order Prohibiting Contact Between the Accused and Defence Witnesses or Alternative Relief”, 10 July 2009 (“**Motion**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T, “Transcript of Proceedings”, 8 June 2009, p. 24249.

³ *Prosecutor v. Taylor*, SCSL-03-01-T, “Transcript of Proceedings”, 8 June 2009, p. 24249-24252.

⁴ *Special Court for Sierra Leone, Statute*, Article 17(4)(b).

accused, counsel and potential witnesses must take place. These conversations, where lawyer and client are present, are protected by the Lawyer-Client Privilege.⁵

5. It is unreasonable for the Prosecution to suggest that while potential witnesses are present, no discussions that fall under the Lawyer-Client privilege can take place. This suggestion would effectively deny the Accused the ability to adequately prepare for his defence and any monitoring of such conversations would deny the Accused the protection intended in the Lawyer-Client privilege. Therefore, conversations between the Accused and his Defence Team, with a potential witness present, must fall under the Accused's right to Lawyer-Client Privilege.
6. Conversations between the accused and a witness will include discussion of facts that concern the preparation of the defence case and strategy. Discussion of these facts cannot be accessed by the Prosecution or any other person not a member to the Defence Team. These discussions are protected by the security that the work product privilege secures.
7. The Prosecution's suggestion that conversations between the Accused and potential witnesses be monitored goes beyond violating the rights of the Accused to jeopardise the safety of the witnesses.⁶ This demand by the Prosecution violates the security that protective measures have guaranteed for witnesses.
8. Pursuant to this court's May 27, 2009 Decision, all Defence witnesses who do not expressly or affirmatively waive their right to protection will be automatically granted protective measures.⁷ The Prosecution's demand to monitor and track conversations, even by exposing a witness's name to security guards, blatantly disregards the safety of these witnesses out of fear of speculated and inconclusive corruption. In order for the Prosecution to overcome this protection, a motion would be required for each witness; considerably slowing the proceedings. The Prosecution's demand is unnecessary, given the fact that the Prosecution has adequate remedy to address any suspicion of corruption.

⁵ *Special Court for Sierra Leone, Rules of Procedure and Evidence*, Rule 97. Lawyer-Client Privilege. States "All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered..."

⁶ Motion, paras 18-20.

⁷ *Prosecutor v. Taylor*, SCSL-03-01-T-782, "Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials", 27 May 2009.

9. The Defence maintains that allowing the Accused access to his potential witnesses will not jeopardise “the integrity of individual witness evidence,” nor raise the “risk of corruption.”⁸ The Prosecution’s power to cross examine witnesses is a sufficient and adequate remedy to address any concerns regarding witness testimony integrity. The Prosecution’s reference to *Prosecution v. Brima*, et. al., examines the question of witness reliability.⁹ The Trial Chamber held that the reliability of a witnesses or any motive to give false testimony is a determination made individually. The Trial Chamber went on to assert that a witness could only be deemed unreliable after such accusations are substantiated by cross examination. The Trial Chamber affirmatively held that cross examination adequately tests the credibility of a witness and provides sufficient protection and remedy for an inquiry into potential contamination of evidence.

B. The Need for the Accused to Speak to Potential Witnesses

10. As Defence Lead Counsel has stated on numerous occasions, the Defence’s investigations are ongoing.¹⁰ The Defence is still attempting to organise those witnesses it wishes to testify. The Accused’s help in this is vital. Unlike counsel, the Accused was at the heart of events in West Africa in the indictment period and has a personal and intimate knowledge of many of the events relevant to his Defence. As the Trial Chamber no doubt understands, this case is complex and it would be impossible for the Accused to transmit what amounts to effectively a lifetime of knowledge to counsel. Consequently, the Accused must have a central role in organising his Defence, including speaking to potential witnesses. That was, in essence, the rationale behind the Defence’s oral submissions on 8 June 2009 that the Accused should be free to speak to counsel and potential witnesses even during his

⁸ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-412, “Decision On Confidential Urgent Joint Defence Motion to Exclude Evidence Given by Witness TF1-157 and Evidence to Be Given by Witness TF1-158 Based on Lack of Authenticity and Violation of Rule 95” 10 October 2005.

⁹ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-412, “Decision On Confidential Urgent Joint Defence Motion to Exclude Evidence Given by Witness TF1-157 and Evidence to Be Given by Witness TF1-158 Based on Lack of Authenticity and Violation of Rule 95” 10 October 2005.

¹⁰ *Prosecutor v. Taylor*, SCSL-03-01-T, “Transcript of Proceedings”, 8 June 2009, p. 24248; Defence Opening Statement, 13 July 2009.

testimony. That position has not changed. The Prosecution's claim that the Accused should be treated differently because he is represented by counsel is therefore meaningless because in this instance it is the Accused who has superior knowledge to counsel.¹¹

11. If it happened that the Accused was not free to communicate with potential witnesses, the Defence's investigations would effectively grind to a halt, making the Defence's progress so slow that a future adjournment would be likely. The Defence submits this would both infringe the Accused's Article 17 right to have adequate facilities to prepare his defence,¹² adequate facilities in this sense being the ability to prepare efficiently, and his right to have an expeditious trial.¹³ It therefore follows that the Prosecution's request for prohibition of contact between the Accused and witnesses should be denied.
12. There is no reason to restrict either the Accused's access with counsel or with potential witnesses. International jurisprudence has held that if the Prosecution fears that counsel has coached or will coach the Accused, it has the opportunity to cross-examine the Accused.¹⁴ The Defence submits this also applies vis-à-vis the Accused and witnesses. No other relief is needed.
13. In the event that the Trial Chamber decides to place restrictions on the Accused's ability to speak with witnesses by telephone, the Defence respectfully requests that the Accused's calls not be monitored as the Prosecution suggests. This would effectively terminate the Accused's ability to discuss the Defence case with potential witnesses and so hinder the Defence's investigations. The Defence submits that the only restriction necessary is the presence of Defence Counsel to facilitate any call between the Accused and a witness. This solution would allow the Accused to discuss the Defence case with a witness, whilst allowing counsel to monitor the call, counsel

¹¹ Motion, para 11.

¹² Article 17(4)(b); also note *Prosecutor v. Tadic*, IT-94-1-A, "Judgment" (AC), 15 July 1999, paras 47-52, in which the Appeals Chamber decided that "the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case" at para 52.

¹³ Article 17(4)(c); Rule 26bis.

¹⁴ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.10, "Decision on Prosecution's Appeal Against Trial Chamber's Order on contact Between the Accused and Counsel During an Accused's Testimony Pursuant to Rule 85(C)", 5 September 2008, para 17.

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being bound by the Court's code of conduct. This would achieve the dual purpose of allowing the Defence's investigations to proceed without delay and guarantee no abuse of the Accused's right to privileged calls.

IV. CONCLUSION

14. For any one or more of the foregoing reasons, the Defence submits that the Prosecution has failed to satisfy proof necessitating any restriction on the Accused's contact with witnesses. Therefore, the Motion should be denied in its entirety. However, if the Trial Chamber is minded to place restrictions, the Defence submits that such restrictions should be outlined as above; with attention to the proposed presence of Defence Counsel during contact with witnesses.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 20th Day of July 2009,
The Hague, The Netherlands

LIST OF AUTHORITIES**SCSL*****Prosecutor v. Taylor***

Prosecutor v. Taylor, SCSL-03-01-T, “Transcript of Proceedings”, 8 June 2009.

Prosecutor v. Taylor, SCSL-03-01-T, “Transcript of Proceedings”, 13 July 2009.

Prosecutor v. Taylor, SCSL-03-01-T-782, “Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials”, 27 May 2009.

Prosecutor v. Taylor, SCSL-03-01-T-808, “Public with Confidential Annexes A and B Prosecution Motion for an Order Prohibiting Contact Between the Accused and Defence Witnesses or Alternative Relief”, 10 July 2009.

Prosecutor v. Brima, Kamara and Kanu

Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-T-412, “Decision On Confidential Urgent Joint Defence Motion to Exclude Evidence Given by Witness TF1-157 and Evidence to Be Given by Witness TF1-158 Based on Lack of Authenticity and Violation of Rule 95”, 10 October 2005.

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Prosecutor v. Prlić et al., IT-04-74-AR73.10, “Decision on Prosecution’s Appeal Against Trial Chamber’s Order on contact Between the Accused and Counsel During an Accused’s Testimony Pursuant to Rule 85(C)”, 5 September 2008.

Internet: <http://www.icty.org/x/cases/prlic/acdec/en/080905.pdf>

Prosecutor v. Tadic, IT-94-1-A, “Judgment” (AC), 15 July 1999.

Internet: <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>