817) SCSL-03-01-T (26030 – 26035) 26030

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

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

Registrar: Ms. Binta Mansaray

Date filed: 23 July 2009

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION REPLY TO "DEFENCE RESPONSE TO 'PROSECUTION MOTION FOR AN ORDER PROHIBITING CONTACT BETWEEN THE ACCUSED AND DEFENCE WITNESSES OR ALTERNATIVE RELIEF'"

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INTRODUCTION

1. Pursuant to Rule 7 of the Rules of Procedure and Evidence ("Rules"), the Prosecution files its Reply to the "Defence Response to 'Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief'".[1]

REPLY

2. The most notable aspect of the Response is that at no point does the Defence deny that the Accused has repeatedly engaged in subterfuge to misuse privileged telephone lines assigned to his Defence team for unmonitored conversations with unknown persons. The Response fails to address the obvious importance of this history in addressing the right of the Accused to have further unmonitored contact with potential witnesses. Certainly, if the Defence could have made a reasonable argument that such abuse was not relevant to the issues in the Motion, they would have done so and the failure to address the issue must be understood in this light. The Accused's abuse goes to the heart of the Prosecution Motion. It is because of the Accused's abuse that the Prosecution argues that it is no longer appropriate for the Accused to be permitted unmonitored direct contact with potential witnesses.

Scope of the Lawyer-Client Privilege:

3. By both the plain meaning of the terms and the express provisions of Rule 97, the Lawyer-Client Privilege applies to communications between a lawyer and their client.[2] Mr. Taylor is not a lawyer and the Defence witnesses are not his clients. Contrary to the Defence argument at paragraphs 4 – 6 of the Response, Lawyer-Client privilege does not extend to communications between an accused and third parties. International criminal jurisprudence provides that the Lawyer-Client privilege pertains only to communications between a lawyer and his/her client as argued at paragraphs 21 – 23 of the Motion.[3] Even meetings between lawyers and

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-811, Defence Response to the "Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief'" ("Response").
[2] Rule 97 specifically refers to "communications between lawyer and client" and Rule 97(ii) provides that communications between lawyer and client may be subject to disclosure where "(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".
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-808, Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief ("Motion").

witnesses are not privileged as the nature of the questions asked and answers given, as well as any inducements offered or threats implied, are legitimate areas for cross examination. In the case of *Tadic*, the ICTY Appeals Chamber rejected a Defence argument that Defence witness statements were privileged, noting expressly:

> "The Appeals Chamber is also of opinion that no reliance can be placed on a claim to privilege. Rule 97 relates to lawyer-client privilege; it does not cover prior Defence witness statements." [4]

No necessity for the Accused to speak directly to Defence Witnesses in the circumstances:

4. By granting the relief requested by the Prosecution, the Accused's ability to provide instructions to his legal team in relation to potential Defence witnesses is in no way curtailed. However, given the fact that the Accused has engaged in subterfuge and abused his access to privileged telephone lines, it is vital that those measures requested by the Prosecution be put into place in order to ensure the probity of the proceedings. Given that the Accused has a sizeable legal team, whom are capable of liaising with potential Defence witnesses pursuant to the Accused's instructions, the measures requested by the Prosecution do not prevent the Defence from preparing their case but rather it is imperative in order to protect the integrity of these proceedings.

No Violation of existing Protective Measures:

5. Contrary to the Defence argument at paragraphs 7 -8 of the Response, the protective measures Decision of this Trial Chamber,[5] would not be violated by either prohibiting contact between the Accused and Defence witnesses or monitoring contact between the Accused and Defence witnesses by the Registry. The Prosecution position is that the Registry should continue to monitor all conversations that the Accused has with persons other than his Counsel.[6] This practice of monitoring conversations of detainees is common both in other

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[4] *Prosecutor v. Tadic*, ICTY-IT-94-1-A, Appeal Judgment, 15 July 1999, at para. 325 and see generally the discussion at paras. 318-326.

[5] *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.

[6] It is the Prosecution's understanding that the Registry's detention rules currently require that all conversations of the Accused, other than those which are privileged, are monitored.

international detention facilities and in national detention facilities for reasons of security of these institutions. The Defence is not required to identify which of those persons with whom the Accused has had contact are Defence witnesses. However, once a witness is called to testify, the Prosecution will know the identity of the witness. At that time the Prosecution will have a means to verify the testimony of the witness regarding whether there has been contact with the Accused. This allows for more effective testing of the evidence, thereby enhancing the truth seeking function of the Trial Chamber. Such procedure also provides some measure of protection for the integrity of the process, but in no way violates protective measures.

6. Further, the protective measures ordered by the Trial Chamber in relation to Defence witnesses relate to rolling disclosure of witnesses names to "the Prosecution" and the non-disclosure of witnesses names to "the public" or "the media." The "Registry" does not of course fall into any of these categories. The Registry employees already assist the Defence with witnesses by providing interpretation and arranging transportation, necessitating the disclosure of the identity of the witnesses.

7. Certainly, as acknowledged by the Defence in paragraph 9 of the Response, it is important that parties be given the opportunity to cross-examine witnesses about contacts with an Accused. However, hiding such contacts under the cloak of privilege deprives the Prosecution of independent means to test the truthfulness of any denials of contact. Given that the Accused's intentional abuse of his right to privileged communications with counsel has not been refuted, it would be naïve to deny the Prosecution an independent means of confirming such contacts.

<u>The Defence proposal that Defence Counsel monitor the Accused's contact with potential witnesses:</u>

8. The Defence suggestion that Defence counsel monitor phone calls of the Accused is impractical and ineffective. It would put Defence counsel in the position where they would be witnesses who would be under an obligation to report to the court and prosecution any express or implied inducements, threats or coaching of witnesses. This would put any counsel representing an accused in an obviously difficult

situation and could potentially result in a situation where counsel could be put in a situation where he has a conflict of interest with his client. Such an outcome could have potentially disastrous consequences in relation to the progression of these proceedings. Moreover, the history of the repeated abuse of Mr. Supuwood's privileged telephone line clearly presents a potential danger that such abuse may go unreported.

CONCLUSION

9. The Defence arguments as set out in the Response are without merit and should be dismissed. For the reasons set out in the Motion and above, the Prosecution requests that the Trial Chamber grant the order requested by the Prosecution in the Motion.

Filed in The Hague,
23 July 2009
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

***Prosecutor v. Taylor*, Case No. SCSL-03-01-T**

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.

ICTY Cases

Prosecutor v. Tadic, ICTY-IT-94-1-A, Appeal Judgment, 15 July 1999. http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf