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SCSL-03-01-T
(26706-26726)

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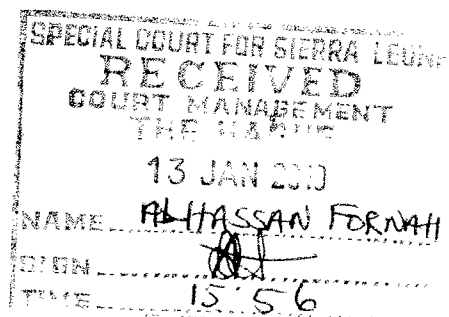
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

TRIAL CHAMBER II

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

Acting Registrar: Ms. Binta Mansaray

Date filed: 13 January 2010



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

**PUBLIC WITH ANNEX A AND B AND CONFIDENTIAL ANNEX C
URGENT PROSECUTION REQUEST FOR AN ORDER TO DIRECT THE REGISTRY TO DISCLOSE
NON-PRIVILEGED INFORMATION**

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Nina Jørgensen

Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. The Prosecution files this Motion pursuant to Rules 54 and 73 of the Rules of Procedure and Evidence seeking an order directing the Acting Registrar to disclose materials related to the Accused's use of privileged access telephone lines.
2. Following cross-examination of the Accused on 16 November 2009 and 25 November 2009 on the subject of his use of privileged access telephone lines, in particular with respect to events on 29 May 2009, the Prosecution sought to obtain information from the Acting Registrar by way of a letter dated 2 December 2009 and attached to this Motion as **Annex A**.
3. In a letter dated 15 December 2009 and attached as **Annex B**, the Acting Registrar denied the Prosecution's requests.
4. The Prosecution seeks relief from the Trial Chamber as set out in this Motion.
5. Additionally, in view of the advanced stage of the cross-examination of the Accused and the fact that the Motion relates to material to be used in cross-examination, the Prosecution requests an expedited timetable for the Defence response and the Prosecution reply (if any).

II. ARGUMENT

6. In its "Decision on Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief", the Trial Chamber noted that "where there is a possibility that a witness's testimony has been contaminated by communication with another witness, the appropriate remedy is for the credibility of the witnesses to be tested in cross-examination."¹ This was one of the purposes of the cross-examination of the Accused on 16 November 2009² and 25 November 2009³ in relation to the incident of 29 May 2009. The information sought in this Motion is accessible by the Registrar, is not privileged, and is necessary to test adequately the evidence of the Accused in relation to the use of his privileged access telephone line. By refusing the Prosecution's request in its totality, the Acting Registrar has deprived

¹ *Prosecutor v. Taylor*, SCSL-03-1-T-832, "Decision on Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief", 14 August 2009, para. 31.

² Transcript, 16 November 2009, 31720-31733.

³ Transcript, 25 November 2009, 32399-32405.

the Prosecution of its ability to exercise to the fullest extent its fair-trial right to challenge evidence through cross-examination.

7. The ICTY Appeals Chamber considered in the *Krajišnik* case that “a party is always entitled to seek material from any source to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown”.⁴ The material currently sought is as follows:

- i. All records or logs maintained by the ICC Detention Centre, or SCSL Registry, of phone calls received for Mr. Taylor or dialed out for Mr. Taylor on 29 May 2009, including the names given and corresponding telephone numbers for these calls, the times of the calls, and the duration of the calls;
- ii. All phone bills related to calls made by Mr. Taylor on 29 May 2009;
- iii. Any and all incident reports relating to events on the 29 May 2009 from the ICC Detention Centre;
- iv. A list of all phone numbers designated for Mr. Supuwood as privileged communication lines for the period during which Mr. Taylor has been in custody;
- v. All records or logs maintained by the ICC Detention Centre, or SCSL Registry, of phone calls received for Mr. Taylor or dialed out for Mr. Taylor in relation to the phone numbers designated for Mr. Supuwood as privileged communication lines for the period during which Mr. Taylor has been in custody.
- vi. All records of policies and limitations regarding the use of privileged and non-privileged phone lines concerning Mr. Taylor.
- vii. All records of advisements given to Mr. Taylor as to these policies and limitations and all acknowledgements by Mr. Taylor of his awareness of these policies and limitations, particularly the limitations on passing the phone to other persons.

⁴ *Prosecutor v. Krajišnik*, IT-00-39-A, “Decision on Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose certain Correspondence and Decisions”, 30 October 2008, p. 2.

8. The material sought is relevant and necessary to an effective cross-examination and thus serves a legitimate forensic purpose in two main ways. First, there is reason to believe, having reference to information concerning the incident on 29 May 2009 that the ICC Detention Centre previously provided to the SCSL Registry, that the material requested in this Motion will directly impeach the sworn testimony of the Accused concerning this incident. Thus, the material will contribute towards the Court's quest for the truth. An accused's willingness to deceive the Trial Chamber on any issue is relevant to his credibility in relation to all of his testimony.
9. Mr. Taylor has provided three conflicting versions of the events which occurred on 29 May 2009, first in his account to the Custody Officer at the ICC Detention Centre on the day of the incident, secondly during cross-examination on 16 November 2009 and finally during cross-examination on 25 November 2009.
10. The e-mail message from the Deputy CCO of the ICC Detention Centre, attached as Confidential **Annex C** (and previously provided to the Court⁵) indicates that Mr. Taylor explained to the Custody Officer on the date of the incident that his Defence team was in Africa and since some members had no access to a mobile phone, all needed to use Mr. Supuwood's phone. On 16 November 2009, Mr. Taylor stated: "Well, in part there was a mix-up with Mr. Supuwood being in one room and I'm speaking to him while I'm speaking to a prospective witness and then someone called me to get to him from another room".⁶ On 25 November 2009, Mr. Taylor testified that during the first call to Mr. Supuwood the telephone was handed by Mr. Supuwood to an investigator, Mr. Grey, and Mr. Supuwood then called in to the ICC Detention Centre to speak to Mr. Taylor without knowing that Mr. Taylor was still engaged in the first call.⁷ According to Mr. Taylor, Mr. Supuwood has two telephones, one having a Ghanaian number and the other having a Liberian number.⁸ Mr. Taylor testified that both phones were being used by Mr. Supuwood, who had

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-808, Public with Confidential Annexes A to B, "Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief", 10 July 2009, Confidential Annex B.

⁶ Transcript, 16 November 2009, 31724.

⁷ Transcript, 25 November 2009, 32400-32402.

⁸ Transcript, 25 November 2009, 32402.

simply passed one call to Mr. Grey, an investigator based in Liberia.⁹ The material sought will be used to cast further doubt on Mr. Taylor's credibility by challenging his varying version of events and variously expressed understanding of the scope of his privileges.

11. Secondly, the material sought will assist in demonstrating that the Accused engaged in a subterfuge in order to have unmonitored communications with unknown third parties, possibly including Defence witnesses. The Accused has admitted in his testimony that the Ghanaian phone company includes call-forwarding services.¹⁰ The telephone records showing an incoming call from Mr. Supuwood while the Accused was still engaged in the first conversation on the Ghanaian number assigned to Mr. Supuwood will further demonstrate that the Ghanaian line was used in order for Mr. Taylor to communicate with persons other than his assigned counsel.
12. Because the Accused's subterfuge was successful, the identities of the persons contacted and the content of the conversations is unknown. However, the fact that the accused engaged in this subterfuge in order to have unmonitored conversations raises concerns as to the possible tainting of the evidence of Defence witnesses. This Trial Chamber has recognized that the risk of evidence becoming tainted by communications between a party and a witness is greater than the risk of evidence becoming tainted by communications between two witnesses because "[u]nlike a witness, a party has a definite cause to pursue and therefore a motive to influence the testimony of a witness".¹¹
13. The only change in circumstances since the 29 May 2009 incident is that Mr. Supuwood is now a full counsel on the Defence team, and there is therefore no reason to believe the practice has stopped. Thus the risk continues that the Accused is having unmonitored conversations with witnesses by means of Mr. Supuwood's phone being given to third parties or calls to Mr. Supuwood being forwarded to third parties. The material sought will assist the Prosecution in exploring the risk of tainted evidence and consequently the credibility of both the Accused and Defence

⁹ Transcript, 25 November 2009, 32400.

¹⁰ Transcript, 16 November 2009, 31728.

¹¹ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-412, "Decision on Confidential Urgent Joint Defence Motion to Exclude Evidence given by Witness TF1-158 based on Lack of Authenticity and Violation of Rule 95", 10 October 2005, para. 17.

witnesses in cross-examination as indicated in the Trial Chamber's previous decision.¹²

14. The Acting Registrar justified her denial of the Prosecution's request by referring to her "duty to ensure that the rights of the Accused, including the right to hold, at any time, privileged communications with the counsel of his own choosing, be respected" and her belief that providing the Prosecution with "the logs of names, numbers and times Mr. Taylor communicates with his defence team would infringe upon that right". However, nothing in the information sought by the Prosecution would in any way interfere with the Accused's right to unrestricted and unmonitored communication with his counsel, including Mr. Supuwood.¹³ The Acting Registrar did not explain why she believed that providing the requested information could infringe upon the right of the Accused to hold privileged communications with counsel. The Prosecution does not seek to learn the content of any communication between Mr. Taylor and his counsel and none of the material covered by this request concerns material governed by client-counsel privilege.
15. Rule 97 of the Rules of Procedure and Evidence provides that *communications* between lawyer and client shall be regarded as privileged. The privilege relates to the content of communications and not to the existence of communications. An ICTY Trial Chamber has held as follows:

Legal professional privilege is a rule of evidence, which provides that confidential communications between legal practitioner and client made for the sole purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation, cannot be given in evidence nor disclosed by the client or by the legal practitioner, without the consent of the client. Legal professional privilege is the privilege of the client and not the legal adviser.

The Trial Chamber emphasizes that legal professional privilege extends only to confidential communications and documents that come into existence or are

¹² *Prosecutor v. Taylor*, SCSL-03-1-T-832, "Decision on Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief", 14 August 2009, para. 31.

¹³ The question of the assignment of counsel is a matter for the Accused and Registry and the Prosecution is not seeking any restriction on the Accused's right to privileged communications with his counsel.

generated for the purpose of giving or getting legal advice or in regard to prospective or pending litigation.¹⁴

16. The current request concerns only the records of phone calls made through the ICC Detention Centre between the Accused and his legal representatives as well as policy documents and incident reports. There is nothing in the requested material that amounts to confidential communications between client and counsel made for the purpose of legal proceedings.

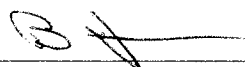
III. CONCLUSION

17. For these reasons the Prosecution requests that the Trial Chamber order the Acting Registrar to provide the materials set out at paragraph 6 above. Further, the Prosecution requests an expedited timetable for filings and a determination of this matter, and for compliance with any eventual order to the Acting Registrar.

Filed in The Hague,

13 January 2010,

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

¹⁴ *Prosecutor v. Brdanin*, IT-99-36-T, “Decision on ‘Motion for Production of Documents – Dzonlić Testimony’ of 11 March 2002”, 9 April 2002, paras 6-7.

INDEX OF AUTHORITIES

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Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-1-T-832, “Decision on Prosecution Motion for an Order Prohibiting Contact between the Accused and Defence Witnesses or Alternative Relief”, 14 August 2009.

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

Transcript, 16 November 2009, 31720-31733.

Transcript, 25 November 2009, 32400-32405.

Prosecutor v. Brima et al.

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ICTY

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[ICTY Court Records]

http://icr.icty.org/exe/ZyNET.exe?ZyActionD=ZyDocument&Client=LegalRefE&Index=DecisionE&Query=privileged+communications&File=E%3A%5CLegal_Ref%5CBatchStore%5CDecision%5CEnglish%5CExportedText%5C00000011%5C200016M0F9.txt&QField=DocumentId%5E2000298841&UseQField=DocumentId&FuzzyDegree=1&ImageQuality=r85g16%2Fr85g16%2Fxl50yl50g16%2Fi500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results+page&MaximumPages=1&ZyEntry=1&SeekPage=f&User=ANONYMOUS&Password=ANONYMOUS

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<http://www.icty.org/x/cases/brdanin/tdec/en/020409.pdf>

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ANNEX A



SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

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2 December 2009

Binta Mansaray
Acting Registrar
Special Court for Sierra Leone

Re: The Accused's use of privileged access lines while in detention

Dear Madam Acting Registrar,

The Office of the Prosecutor formally requests materials related to the Accused's use of privileged access phone lines. This request is further to our discussion of 18 November 2009 regarding testimony given by the Accused concerning the manner in which he is using privileged access lines at the ICC Detention facilities. The request seeks materials in the possession of the Special Court for Sierra Leone and of the ICC. Accordingly, the OTP requests the following:

1. All reports and records from the detention unit, including all statements made by Mr. Taylor, relating to the incident of 29 May 2009 wherein Mr. Taylor was supposedly contacted by two persons using the name Supuwood. As you will recall, while Mr. Taylor was supposedly talking with Assistant Counsel James Supuwood, another call came in from a person also identifying himself as Mr. Supuwood.
2. All records or logs of phone calls received for Mr. Taylor or dialed out for Mr. Taylor on that date, including the names given by individuals who called in to speak to Mr. Taylor and the time and phone numbers dialed for calls placed out on behalf of Mr. Taylor.
3. A list of all phone numbers designated for Mr. Taylor's Defence team as privileged communication lines from his transfer to The Hague to date.
4. All records of policies regarding the use of privileged and non-privileged phone lines by detainees, specifically Mr. Taylor, and all records of advisements given to Mr. Taylor and/or his Defence team as to these policies.
5. All acknowledgements by Mr. Taylor and/or his Defence team that he and/or they are aware of these policies and limitations, particularly the limitations on passing the phone to other persons.
6. A record of all phone calls Mr. Taylor has made to privileged access lines designated as belonging to Mr. Supuwood, from the start of Mr. Taylor's detention in The Hague to date.
7. To be informed of what communication has taken place with the ICC Head of Detention regarding these communications and Mr. Taylor's admissions concerning the misuse of such lines.
8. To be informed of what action the Registry is taking, and what action the Registry is aware of that the ICC Detention is taking, to ensure that Mr. Taylor not be allowed to continue the misuse and abuse of the privileged phone line rules.

We wish to make clear we are not seeking the content of any communication between Mr. Supuwood and Mr. Taylor but only the dates and times of any phone calls made or received.

These records are necessary in light of Mr. Taylor's testimony to the following on 16 November 2009 (see trial transcript of 16.11.09, starting at page 31722):

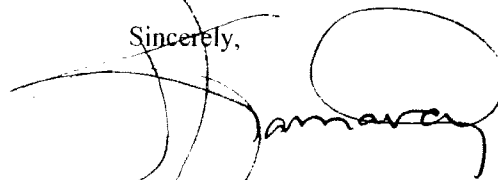
- That his understanding was that privileged communications were not restricted to his Defence counsel or Defence team members;
- That he has spoken with prospective witnesses on these phone lines;
- That he believed he was authorised to speak to prospective witnesses on such lines in the presence of his counsel, and that his counsel, specifically Mr. Supuwood and Lansana Kamara, had told him this was permitted;
- That on certain occasions he would receive a call on a privileged line from his counsel and would then be invited to speak to a prospective witness;
- That he was never provided with any written document from the Registrar indicating that he could not speak on such privileged lines to prospective witnesses;
- That he has been speaking with prospective witnesses for three or four months;
- That during such conversations, Mr. Supuwood is present;
- That the two telephones belonging to Mr. Supuwood have the ability to call-forward, which would allow Mr. Taylor to be put in contact with anyone anywhere in the world.

Further, Mr. Taylor gave two contradictory explanations for the incident in question. The first occurred during the above referenced testimony on 16 November 2009, and the second occurred during his testimony on 25 November 2009 (See trial transcript for 25 November at page 32399 et seq.).

In order to effectively challenge Mr Taylor's evidence and his credibility on this matter, the Prosecution urgently needs the information listed above. In that regard, it should be noted that the Trial Chamber has stated the Accused may have contact with potential witnesses but subject to the Prosecution's right to cross examine on such contact. The Trial Chamber did not, of course, state that the Accused may use privileged access lines to contact such witnesses. Any delay in obtaining the information will necessarily delay the completion of Mr. Taylor's cross-examination.

I thank you for your attention to this urgent request.

Sincerely,



Joseph F. Kamara
Acting Prosecutor

ANNEX B



SPECIAL COURT FOR SIERRA LEONE
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Mr. Joseph Kamara
Acting Prosecutor
Special Court for Sierra Leone

15 December, 2009

Dear Acting Prosecutor,

I am in receipt of your letter dated 2 December 2009 and would like to apologise for the delay in responding. As you are aware, I was away on mission for the past three weeks.

I take note of your concern regarding the Accused's use of privileged access phone lines and your request seeking materials in the possession of the Special Court Registry and of the ICC Detention Section.

Please rest assured that the Registry remains vigilant against any allegations of abuse of client-counsel privilege and actively continues to monitor the manner in which non-privileged and privileged communications are being conducted.

That said, I note that, on 1 July 2009, I have already provided you information concerning the misuse of privileged access lines by the Accused surrounding the 29 May 2009 incident. You are now requesting additional information concerning that particular incident, as well as complete logs including names, numbers and times of calls placed on the non-privileged access line on that day, as well as calls placed to and from the privileged lines of Co-Counsel Supuwood. You are also requesting a list of names and phone numbers of the designated members of the Defence team entitled to privileged access, as well as information concerning the records of advisement given to the Accused and his acknowledgements, if any, regarding applicable policies. Finally, you are requesting the Registry to disclose any information that could lead to conclude that the Accused has admitted misusing his client-counsel privilege.

I understand that the purpose of your request is based on Mr. Taylor's contradictory statements on cross-examination on 16 and 25 November, and that you intend to rely on that information to challenge his credibility.


Please note that the monitoring regime Mr. Taylor is subject to entirely falls within my remit, pursuant to Rule 47 of the SCSL Rules of Detention and, as such, constitutes an

administrative decision solely geared to ensure the maintenance of security and good order within the Detention Facility as well as to ensure that there is generally no interference with the administration of justice.

As I have already notified you in July, there was then, and there is still today, no evidence that the Accused was attempting to pervert the course of justice, tamper with witnesses, or interfere with trial proceedings. The temporary suspension of privilege was exclusively put in place to remedy any misunderstanding and ensure the proper use of privileged access lines by the Accused and his counsels. In light of this, it is my duty to ensure that the rights of the Accused, including the right to hold, at any time, privileged communications with the counsel of his own choosing, be respected and I believe that providing you the logs of names, numbers and times Mr. Taylor communicates with his defence team would infringe upon that right.

In light of the foregoing, I regret to inform you that I will not be in a position to provide you with the additional information you requested.

Sincerely,



Binta Mansaray
Acting Registrar
Special Court for Sierra Leone



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**

Case Number: **SCSL-03-01-T**

Document Index Number: **874**

Document Date: **13 JANUARY 2010**

Filing Date: **13 JANUARY 2010**

Document Type: **-CONFIDENTIAL ANNEX C**

Number of Pages **7** Numbers from: **26720-26726**

- Application
- Order
- Indictment
- Response
- Other**
- Correspondence

Document Title:

**PUBLIC WITH ANNEX A AND B AND CONFIDENTIAL ANNEX C URGENT PROSECUTION
REQUEST FOR AN ORDER TO DIRECT THE REGISTRY TO DISCLOSE NON –PRIVILEGED
INFORMATION**

Name of Officer:

Alhassan Fornah

Signed: 