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SCSL-03-01-T
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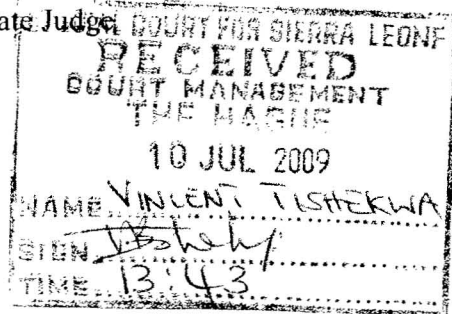
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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: 10 July 2009



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC WITH CONFIDENTIAL ANNEXES A TO B

**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 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. Pursuant to Rules 54 and 73 of the Rules of Procedure and Evidence (“Rules”), the Prosecution files this motion seeking an order prohibiting contact between the Accused and Defence witnesses in order to protect the integrity of the proceedings. The Prosecution seeks this relief based on information showing the Accused has manipulated his rights to privileged communications in order to engage in unauthorized unmonitored communications.
2. In the alternative, the Prosecution asks for an order that all contacts between the Accused and Defence witnesses be monitored by the Registry, and that record of all visits or telephone contacts between the Accused and persons outside of his Defence team be available to the parties.
3. This motion is strictly limited to regulating direct contacts between the Accused and Defence witnesses. The Prosecution does not seek to restrict contacts between the Accused and his counsel, nor does the Prosecution in this motion seek to restrict the ability of the Accused's lawyers and investigators to contact Defence witnesses. This written motion is filed at the direction of the Trial Chamber following oral submissions on the issue.¹

II. BACKGROUND

4. At the Pre-Defence Conference held on 8 June 2009, the Prosecution had argued that it was within the Trial Chamber's discretion to regulate the Accused's contact with Defence witnesses. At the time, the Defence stated that their investigations were ongoing and required the assistance of the Accused. The Prosecution at that time stated it had no objection to the Accused having contact with witnesses.²
5. However, in light of information revealing that the Accused has engaged in subterfuge to use privileged phone lines assigned to his defence team in order to have unmonitored

¹ *Prosecutor v. Taylor* SCSL-03-01-T, Trial Transcript (“T”) 6 July 2009, 24284:18-24285:3.

² T, 8 June 2009, 24249:12-19.

conversations with unknown persons, the Prosecution can no longer take that position.³

6. After Defence co-counsel Supuwood publicly complained that his access to privileged communications with the Accused was temporarily restricted by the Registry, it came to light that the Accused had abused the privileges granted. Upon inquiry of the Prosecution, on 12 June 2009 the Acting Registrar provided information related to the basis for that restriction. The Prosecution was informed that the Accused had abused privileged access lines to talk with persons not entitled to privileged communication with the Accused.⁴ The Accused's abuse seemingly occurred with the knowledge of a member of the Defence team. The event which triggered the restriction involved privileged communications supposedly with Cllr Supuwood. According to a report from the International Criminal Court ("ICC") Deputy Custody Officer, while the Accused, upon his request, was connected via a privileged access line to Cllr. Supuwood, the latter supposedly called the ICC Detention Centre and asked to be connected to the Accused. The Accused was still engaged in the "privileged" conversation with the person he claimed to be Cllr. Supuwood. It became apparent that at least one of these persons was **not** Cllr. Supuwood.⁵
7. According to the Acting Registrar, from her review of available evidence, **this was not the first such occurrence** of abuse by the Accused of the privileged access lines of Cllr. Supuwood.⁶ Cllr. Supuwood, was at the time Assistant Counsel for the Accused.⁷

III. ARGUMENT

8. The Trial Chamber has the authority under Rule 54 to issue any order necessary for the conduct of the trial:

³ T, 6 July 2009, 24277:10-24.

⁴ See Email from the Acting Registrar of the Special Court for Sierra Leone of the 12 June 2009 to the Prosecutor provided in confidential Annex A.

⁵ See *Confidential* Email from the Acting Registrar of 1 June 2009 "Interim Order for suspension of Privileged Communications by Cllr. Supuwood to the Accused, Charles Ghankay Taylor – Case No. 03-01-T" at para. 2 provided in confidential Annex B.

⁶ *Ibid.*, page 2 at para. 4.

⁷ He was promoted to Co-Counsel effective as of 12 June 2009.

At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

9. The Rules recognize the importance of preserving the integrity of individual witness evidence by avoiding the danger of witnesses influencing each other's testimony. Rule 90 (D), for example, provides that witnesses, other than an expert, who have not yet testified may not be present during the testimony of other witnesses without the leave of the Trial Chamber.
10. The Rules implicitly acknowledge that the danger of tailoring witness testimony to fit that of others applies to the Accused's testimony. Rule 85(C) provides that the Accused, if he chooses to testify, must testify before calling his other witnesses.⁸ This Rule limits the possibility of the Accused's testimony being tailored to fit other evidence he has heard during the presentation of the Defence case.
11. Clearly the Defence has a right to interview witnesses under Article 17 of the Statute and the Prosecution does not seek to restrict the right of the Defence team to contact witnesses. However, there is nothing in the Statute or the Rules which grants an Accused represented by Counsel, and with a defence team comprised of more than a dozen lawyers and investigators, the right to personally speak to witnesses. Such contacts between the Accused and witnesses may well raise questions as to the integrity of the defence testimony and make it much more difficult for the Trial Chamber to evaluate the credibility of the defence evidence.
12. This Trial Chamber recognized that the risk of corruption of evidence posed by contacts between a witness and an accused in a 2005 Decision:

We do not agree with the reasoning of the Defence that the risk of two closely-

⁸ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-559, "Decision On Application By Court Appointed Counsel For The First Accused For Leave To Lead Evidence On Alternate Days And For Right To Communicate", 16 February 2006, page 2

related witnesses influencing each other's testimony is a more serious risk than the risk of a witness being influenced by a party. Unlike a witness, a party has a definite cause to pursue and therefore a motive to influence the testimony of a witness.⁹

13. A year later, in a separate decision this Trial Chamber noted that, "it would be naive to presume that there could not be collusion between an accused and a witness."¹⁰ In that decision, the Trial Chamber denied a Prosecution request to restrict contacts between the accused and witnesses on the basis that the Prosecution had failed to establish that there had been any contact between an accused and any witness.¹¹ However, the Trial Chamber reminded Defence Counsel of the duty to ensure that the integrity of the evidence is maintained.¹²
14. Given that the Accused has demonstrated a *repeated*¹³ willingness to use subterfuge in order to use privileged access lines to have unmonitored conversations with unknown persons, the need to reduce the risk of further damage to the integrity of the proceedings is apparent. The best way to ensure that the integrity of defence evidence is maintained is an order prohibiting contacts between the Accused and Defence witnesses.
15. Such order is appropriate in these proceedings given that the Defence has specifically acknowledged that the Accused seeks to contact witnesses directly.¹⁴ Recent events make it evident that the Accused cannot be relied upon to self-monitor his contacts with witnesses.
16. Counsel is of course free to consult with the Accused and take his instructions before and

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, pages 5-6 at para. 17. ("**First AFRC Decision**").

¹⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-566, "Decision On Urgent Prosecution Motion For An Order Restricting Contacts Between The Accused and Defence Witnesses And Requiring Disclosure Of Such Contacts", 10 October 2006, page 4 at para 13, ("**Second AFRC Decision**").

¹¹ Second AFRC Decision, page 5 at para. 16.

¹² *Ibid.*, page 5 at paras 17-18.

¹³ See para 6 above (emphasis added).

¹⁴ T, 8 June 2009, 24249:14-15.

after Counsel speaks to witnesses. The Accused will not be examining witnesses himself as he is represented by counsel, and it is they who, therefore, need to prepare the examination. Indeed, the Presiding Judge of this Trial Chamber stated clearly at the Accused's initial appearance:

We will lay the rule right now, that if an accused is represented by counsel, then it is counsel who will put the accused's case to the court. There are some very good reasons for that, which I'm sure all counsel here today know. That is the way it is going to be in this court.¹⁵

17. Therefore, the best course to preserve the integrity of the proceedings is to permit contact between the Accused's Defence counsel and investigators and Defence witnesses, but to prohibit direct contact between the Accused and these witnesses.

Alternative Request for Relief

18. Should the Trial Chamber be inclined to deny the Prosecution's requested order to prohibit contact between the Accused and Defence witnesses, the Prosecution requests as alternative relief that the Trial Chamber order that such contact continue to be monitored by the Registry in accordance with existing practice for monitored contacts.
19. Further, the Prosecution requests that the Trial Chamber order the Registry's records of the names, dates and times of all those, other than members of the Defence team, who visit and have telephone conversations with the Accused be available to both parties.
20. Such alternative relief is consistent with the Accused's fair trial rights and protects the integrity of the proceedings. In addition, to the knowledge of the Prosecution, this relief imposes no new burden of record keeping on the Registry.

¹⁵ T, Initial Appearance, 3 April 2006, 17:18-18:2.

Privileged Communication

21. Contrary to Defence assertions¹⁶, the Accused's contacts with witnesses are not privileged. Such assertion has no support in the Rules or international jurisprudence.¹⁷ Rule 97 defines the Lawyer-Client privilege to extending to, "[A]ll communications between a lawyer and his client..." Even in the national jurisdiction in which lead defence counsel practices, there is no support for the proposition that conversations between an accused and witnesses are privileged. Archbold defines the legal professional privilege as "attached to communications between a professional legal advisor and his/her lay client, or any person representing the client, in connection with and in contemplation of, and for the purpose of legal proceedings or in connection to the giving of legal advice to the client."¹⁸
22. Privileged communication between an attorney and client is protected from abuse by professional codes of conduct and sanctions for violations of such. The Accused, on the other hand, is not bound by the professional and ethical codes of conduct that bind counsel.
23. Communications between the Accused and persons who are not defence counsel or part of the defence team are not privileged, and should continue to be monitored in order to prevent abuse of the privileges granted. Monitoring of such conversations is a means of preventing abuse of the privileges granted. In this regard, it should be noted that the International Criminal Court ("ICC") Registry Regulations provide that all contacts between detained persons and those who are not part of the Defence team are at least passively monitored.¹⁹

IV. CONCLUSION

24. Accordingly, the Prosecution seeks an order prohibiting contact between the Accused and

¹⁶ T, 6 July 2008, 24281:20-25.

¹⁷ Only the lawyer-client privilege is expressly recognised in the *ad-hoc* Tribunals. See Rule 97 of the Rules and Procedure of Evidence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda

¹⁸ Archbold Criminal Pleading, Evidence and Practice, London Sweet & Maxwell 2008, 12-7.

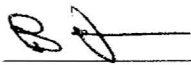
¹⁹ See Rule 174 of Regulations of the Registry. Passive monitoring includes recording the communications.

Defence witnesses. This order would not prevent contact between Defence counsel or investigators and witnesses, enabling the Defence to prepare effectively for the trial. In the alternative, the Prosecution asks for an order that all contacts between the Accused and Defence witnesses be monitored by the Registry, and that record of all visits or telephone contacts between the Accused and persons outside of his Defence team be available to the parties.

Filed in The Hague,

10 July 2009

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

LIST OF AUTHORITIES

SCSL

Prosecutor v. Taylor

1. *Prosecutor v. Taylor* SCSL-03-01-T, Trial Transcript, 3 April 2006
2. *Prosecutor v. Taylor* SCSL-03-01-T, Trial Transcript, 8 June 2009
3. *Prosecutor v. Taylor* SCSL-03-01-T, Trial Transcript, 6 July 2009

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14-T

1. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-559, “Decision On Application By Court Appointed Counsel For The First Accused For Leave To Lead Evidence On Alternate Days And For Right To Communicate”, 16 February 2006

Prosecutor v. Brima et al., SCSL-04-16-T

1. *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
2. *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-566, “Decision On Urgent Prosecution Motion For An Order Restricting Contacts Between The Accused and Defence Witnesses And Requiring Disclosure Of Such Contacts”, 10 October 2006

Rules and Regulations

ICTY

Rule 97 of the Rules of Procedure and Evidence

http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf

ICTR

1. Rule 97 of the Rules of Procedure and Evidence

<http://www.icttr.org/ENGLISH/rules/080314/080314.pdf>

ICC

1. Regulations of the Registry

Copy attached.

Other Documents

1. Archbold Criminal Pleading, Evidence and Practice, London Sweet & Maxwell 2008

Copy attached.

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ICC Regulations of the Registry

**Cour
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Internationale**



**International
Criminal
Court**

Regulations of the Registry

ICC-BD/03-01-06-Rev.1

Date of entry into force: 6th March 2006

Date of the first revision: 25th September 2006

Official Journal Publication

3. The Chief Custody Officer may impose limits on the amount and weight of correspondence sent by an indigent detained person.
4. An indigent detained person may file a complaint against any restrictions imposed by the Chief Custody Officer under sub-regulation 3, in accordance with the complaints procedure set out in section 5 of this chapter.

Regulation 173

Telephone calls

1. The Chief Custody Officer shall maintain a log of all incoming and outgoing telephone calls. The log shall clearly show the name and telephone number of the caller, the time, date and duration of the call.
2. Incoming and outgoing calls may be received or made by a detained person at any time between 9 a.m. and 5 p.m. The Hague time each day, subject to the reasonable demands of the daily schedule of the detention centre and to any financial limits imposed by the Registrar.
3. All incoming calls for a detained person shall be received by the Chief Custody Officer. The Chief Custody Officer may permit a detained person to receive an incoming call outside the hours described in sub-regulation 2 if he or she considers it to be exceptional circumstances.
4. Likewise, in exceptional circumstances, the Chief Custody Officer may permit a detained person to make calls outside the hours described in sub-regulation 2.
5. A detained person shall not be allowed to use or to have a mobile telephone in his or her possession.

Regulation 174

Passive monitoring of telephone calls

1. All telephone conversations of detained persons shall be passively monitored, other than those with counsel, diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court.
2. Subject to the provision of sub-regulation 1, passive monitoring entails the recording of telephone calls but without simultaneous listening. These recordings could be listened to subsequently in cases listed under regulation 175, sub-regulation 1.
3. The detained person shall be informed of the monitoring of telephone calls.

4. Records of telephone conversations shall be erased after the completion of the proceedings.

Regulation 175

Active monitoring of telephone calls

1. If the Chief Custody Officer has reasonable grounds to believe that the detained person may be attempting to:

- (a) Arrange an escape;
- (b) Interfere with or intimidate a witness;
- (c) Interfere with the administration of justice;
- (d) Otherwise disturb the maintenance of the security and good order of the detention centre;
- (e) Jeopardise the interests of public safety or the rights or freedom of any person; or
- (f) Breach an order for non-disclosure made by a Chamber,

he or she may immediately terminate the call and advise the detained person concerned of his or her reasons for doing so. The Chief Custody Officer shall report the matter to the Registrar and shall seek his or her permission to actively monitor telephone calls, providing his or her reasoning for the request.

2. The Registrar alone may order that all telephone calls to and from the detained person, other than those with counsel, with diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court be monitored for a period not exceeding 14 calendar days. The Registrar shall report the matter to the Presidency.
3. Prior to its implementation, the order of the Registrar taken under sub-regulation 2 shall be notified to the detained person and his or her counsel.
4. At the end of the 14-day period, the Registrar shall review the situation in consultation with the Chief Custody Officer, and may decide to extend the period of active monitoring for up to another 14 calendar days or return to passive monitoring of the detained person's telephone calls. The subsequent order of the Registrar shall be reported to the Presidency and shall be notified to the detained person and to his or her counsel prior to its implementation.

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Archbold Criminal Pleading, Evidence and Practice, London Sweet & Maxwell 2008

ARCHBOLD

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CRIMINAL PLEADING, EVIDENCE AND PRACTICE

2008

LONDON
SWEET & MAXWELL
2008

C. LEGAL PROFESSIONAL PRIVILEGE

(1) The nature of legal professional privilege

Legal professional privilege attaches to confidential written or oral communications 12-7 between a professional legal adviser and his client, or any person representing the client, in connection with and in contemplation of, and for the purpose of legal proceedings: litigation privilege: *post*, § 12-7a) or in connection with the giving of legal advice to the client (legal advice privilege: *post*, § 12-7b). This formulation of privilege is based on section 10(1)(a) and (b) of the *Police and Criminal Evidence Act 1984* (*post*, § 15-90), which was intended to express the common law rule: *R. v. Central Criminal Court, ex p. Francis & Francis (a firm)* [1989] A.C. 346, HL (*per* Lord Goff at p. 396).

It is not necessary for a communication to have been received before privilege can be claimed: a document intended to be a communication between solicitor and client is privileged even if it is never communicated: *Three Rivers D.C. v. Governor and Company of the Bank of England (No.5)* [2003] Q.B. 1556, CA (Civ. Div.).

This common law right to consult legal advisers without fear of the communication being revealed is a fundamental condition on which the administration of justice rests; established, no exception should be allowed to its absolute nature: *R. v. Derby Magistrates' Court, ex p. B* [1996] A.C. 487, HL; and *B. v. Auckland District Law Society* [2003] 2 A.C. 736, PC. Consultations with lawyers should take place in a manner which favours full and uninhibited disclosure: *Campbell v. UK*, 15 E.H.R.R. 137, R. and see *post*, § 16-111. The right to legal confidentiality cannot be overridden by general or ambiguous statutory words; an intention to override must be expressly stated or appear by necessary implication: *R. (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax* [2003] 1 A.C. 563, HL; and *B. v. Auckland District Law Society*.

Litigation privilege

Litigation privilege is essentially a creature of adversarial proceedings and thus cannot exist in the context of non-adversarial proceedings: *Re L. (A Minor) (Police Proceedings: Privilege)* [1997] 1 A.C. 16, HL. Accordingly, litigation privilege does not apply to communications in investigative proceedings such as those under Part IV of the *Children Act 1989*: *ibid.*; or private non-statutory enquiries: *Three Rivers D.C. v. Governor and Company of the Bank of England (No. 5)*, *ante*. Thus, an expert's report prepared by a party in proceedings under Part IV of the 1989 Act is not protected from disclosure to the police, whereas a similar report prepared for the purpose of criminal, and therefore adversarial proceedings, would be protected from disclosure under the *Children Act 1989* or any other proceedings: *S. County Council v. B.* [1991] Fam D (Charles J.).

Litigation privilege does apply, it includes communications made between the legal adviser, his client or his client's representative, and any other person (see *Le Marchant* (1881) 17 Ch D 675) provided the communication was made in connection with and for the purpose of existing or contemplated legal proceedings. It does not have to be the sole purpose of the communication, provided it is the dominant purpose: *Waugh v British Railways Board* [1980] A.C. 521, HL. If the dominant purpose of a particular communication is disputed, a solicitor's assertion is conclusive: it is for the court to determine the issue on the basis of the evidence before it: *United States of America v. Philip Morris Inc.*, [2003] EWHC 3028 (Comm.), December 10, 2003 (Moore-Bick J.).

Legal advice privilege

The nature of legal advice privilege, its history, rationale and development were reviewed in *Three Rivers D.C. v. Governor and Company of the Bank of England (No. 5)*, *ante*. The privilege stems from the confidential relationship of solicitor and client. Accordingly, legal advice privilege attaches only to communications passing between solicitor and client (whether or not through intermediaries), and only to those communications. It does not attach to a document obtained



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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: **808**

Document Date: **10 JULY 2009**

Filing Date: **10 JULY 2009**

Document Type: - **CONFIDENTIAL ANNEXES A AND B**

Number of Pages **13** Numbers from: **257770-25782**

☐ Application

☐ Order

☐ Indictment

☒ **Motion**

☐ Decision

☐ Correspondence

Document Title:

**PUBLIC WITH CONFIDENTIAL ANNEXES A TO B –
PROSECUTION MOTION FOR AN ORDER PROHIBITING
CONTACT BETWEEN THE ACCUSED AND DEFENCE WITNESSES
OR ALTERNATIVE RELIEF**

Name of Officer:

Vincent Tishekwa

Signed: 