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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

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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:	12 November 2009

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

Case No. SCSL-03-01-T

PUBLIC PROSECUTION MOTION FOR AN ORDER RESTRICTING CONTACT BETWEEN THE ACCUSED AND DEFENCE COUNSEL DURING CROSS-EXAMINATION

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

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 the oral direction of the Presiding Judge during proceedings on 10 November 2009,[1] the Prosecution files this Motion seeking an order restricting contact between the Accused and Defence Counsel for the duration of the cross-examination of the Accused.

2. Consistent with the oral application made on 10 November 2009 by the Principal Trial Attorney, the Prosecution requests that the Trial Chamber restrict the Accused's access to Defence Counsel during cross-examination, with the caveat that should the Defence need to speak with the Accused about a matter not related to his testimony then they should provide notice of the same to the Prosecution and that any dispute regarding the same should be resolved by the Trial Chamber.[2]

3. This motion is limited to the period of cross-examination and no such order is sought for the period of re-examination.

II. BACKGROUND

4. On 8 June 2009 during the Pre-Defence Conference, the Principal Trial Attorney for the Prosecution asked what the Defence intention was regarding contact with the Accused once the Accused began to testify.[3] In response to this Lead Defence Counsel suggested that the Accused have access to counsel and Defence staff, first, in order to progress the investigation of his case whilst he is giving evidence and secondly, in relation to his testimony, given the expected length and detail involved; and further, that the Accused should also be permitted to converse directly with potential witnesses.[4] In response the Principal Trial Attorney stated that the matter was within the Trial Chamber's discretion in accordance with the jurisprudence; that the Prosecution had no objection in relation to contact between the Accused and Defence Counsel for the furtherance of their investigations and that any contact would become

[1] *Prosecutor v. Charles Taylor*, Transcript, 10 November 2009, 31564 – 31565.
[2] *Prosecutor v. Charles Taylor*, Transcript, 10 November 2009, 31557 – 31558.
[3] *Prosecutor v. Charles Taylor*, Transcript, 8 June 2009, 24247.
[4] *Prosecutor v. Charles Taylor*, Transcript, 8 June 2009, 24247 - 24248.

a suitable area for cross-examination.[5] Further legal argument ensued between Lead Defence Counsel and the Principal Trial Attorney regarding the suitability of this area for cross-examination.[6] At the end of the Pre-Defence Conference the Trial Chamber did not specifically rule on this matter, rather the Presiding Judge stated that various procedural matters had been raised which were capable of being settled between the parties, failing which the appropriate procedure would be to apply to the Court for an order.[7]

5. On 6 July 2009 during the second Pre-Defence Conference, Prosecution Counsel explained that in light of changed circumstances the Prosecution could no longer take the position articulated on 8 June 2009 in relation to the Accused's contact with Defence witnesses and proposed that the Accused should no longer be allowed direct contact with Defence witnesses, or in the alternative that such contact be monitored.[8] In light of disagreement between the parties in relation to this issue the Presiding Judge directed that the Prosecution should file a formal Motion in relation to the same.[9] Pursuant to this direction a Motion, Response and Reply were filed and the Trial Chamber made a Decision on 14 August 2009.[10] This decision related to the discrete issue of the Accused's access to Defence witnesses.

6. During the course of proceedings on 14 July 2009 two related issues arose. First, the Presiding Judge raised the issue of the words to be used in the caution and ruled on the same.[11] Secondly, the Presiding Judge orally gave some direction in relation to the scope of cross-examination as regards communications between Defence Counsel and the Accused.[12]

7. The Trial Chamber has not formally ruled on the issue of contact between Accused

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[5] *Prosecutor v. Charles Taylor*, Transcript, 8 June 2009, 24249.
[6] *Prosecutor v. Charles Taylor*, Transcript, 8 June 2009, 24249 – 24252.
[7] *Prosecutor v. Charles Taylor*, Transcript, 8 June 2009, 24266 – 24267.
[8] *Prosecutor v. Charles Taylor*, Transcript, 6 July 2009, 24277 – 24278.
[9] *Prosecutor v. Charles Taylor*, Transcript, 6 July 2009, 24284.
[10] *Prosecutor v. Charles Taylor*, SCSL-03-01-T-832, "Decision on Prosecution Motion for an Order Prohibiting Contact Between the Accused and Defence Witnesses or Alternative Relief", 14 August 2009.
[11] *Prosecutor v. Charles Taylor*, Transcript, 14 July 2009, 24456, where the Presiding Judge ruled that the caution that will be given at the end of every day "will be a caution that Mr Taylor not discuss the evidence he is giving with any other person, but of course that will be read in light of his rights under article 17".
[12] *Prosecutor v. Charles Taylor*, Transcript, 14 July 2009, 24455 – 24456.

and Defence Counsel at any stage of the Accused's testimony. The examination-in-chief of the Accused proceeded on the basis of a consensus that the Accused's right to communicate with counsel was preserved, subject to cross-examination on such contact, the appropriate scope of which was indicated in the Presiding Judge's oral direction on 14 July 2009. The question of contact between the Accused and his counsel during cross-examination arises for the first time in these proceedings and is governed by different considerations requiring an explicit ruling by the Trial Chamber at this stage.

III. ARGUMENT

8. Trial Chambers retain a discretionary power to determine the proper scope of contact between an accused who testifies and his counsel in order to control proceedings so as to make them effective for the ascertainment of the truth.[13] The manner in which this discretion is exercised may vary according to the relevant stage of the proceedings.

9. Cross-examination is designed as a means of testing the evidence that a witness has given and of challenging that evidence. It is also a means of testing the credibility of the witness. Through cross-examination, a different light may be shed on the facts and the witness may be required to elaborate on points requiring clarification.[14] It is particularly important that this phase of the examination not be susceptible to rehearsal or other preparation.

10. In the case of *Norman* et al., Trial Chamber I proceeded from the premise that an accused who testifies becomes a witness of the Court and therefore there can be no communication between the Defence counsel and the Accused on the content of the Accused's testimony for the duration of that testimony.[15] However, the Trial Chamber set out a procedure for a restricted degree of communication recognizing the potential need for lawyer and client to meet on matters unrelated to the ongoing

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[13] See Rule 90(F) of the Rules and *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 ("***Prlić* Appeal Decision**"), paras 15 and 16.
[14] *Prosecutor v. Prlić* et al., IT-04-74-T, "Order Clarifying the Relationship between Counsel and an Accused Testifying within the Meaning of Rule 85(C) of the Rules", 11 June 2009, p. 6, para. 3.
[15] *Prosecutor v. Norman* et al., SCSL-2004-14-T, Transcript, 18 January 2006, 17.

testimony. It was established that if the Defence wished to communicate with the Accused on such matters during the Accused's testimony, they should inform the other parties of their intent and the nature of the matter to be discussed. In the event of a dispute, the issue would be addressed by the Trial Chamber.[16]

11. The position at both the ICTY and the ICTR prior to the Appeals Chamber's decision in the *Prlić* case was similar to that put forward in *Norman*. Accused who took the oath and testified were regarded as "witnesses of justice".[17] Communication on the content of an accused's testimony was not permitted[18] and contact between an accused and his or her counsel was limited to exceptional circumstances in order to avoid any risk, even if inadvertent, of sacrificing the integrity of the trial.[19] Exceptions were governed by a procedure similar to that adopted in *Norman*.[20] The ICTR in *Rukundo* noted that some ICTR Trial Chambers had allowed defence counsel to meet the accused during the *examination-in-chief*,[21] but that such authorization was "an exercise of the specific Trial Chamber's discretion based on an assessment of the particular situation in the case".[22]

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[16] Ibid, 18-19.
[17] *Prosecutor v. Jelisić*, IT-95-10-T, "Decision on Communication between Parties and Witnesses", 11 December 1998, p. 2.
[18] *Prosecutor v. Krajišnik*, IT-00-39-T, "Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters", 24 April 2006, para. 29: "Like any witness who has made a solemn declaration pursuant to Rule 90(B) of the Tribunal's Rules, Mr Krajišnik may not speak to anyone with respect to testimony he has given, is giving, or is about to give."
[19] *Prosecutor v. Kordić and Cerkez*, IT-95-14/2, "Decision on Prosecutor's Motion on Trial Procedure", 19 March 1999; *Prosecutor v. Milutinović* et al., IT-05-87, Transcript, 25 October 2007, pp. 17638-17639; *Prosecutor v. Rukundo*, ICTR-2001-70-T, "Decision on Defence Request to Meet the Accused During His Examination-in-Chief", 3 October 2007, para. 3: "as a general rule, once a witness, including an accused, has made a solemn declaration [...] and has commenced testifying, the parties must not communicate with the witness on the content of the witness's testimony [...] The underlying rationale behind this practice at the Tribunals is to prevent tutoring of the witness by the Counsel. Since a witness is considered a witness of the court once he is sworn in, there must be exceptional circumstances made out to deviate from this principle."
[20] *Prosecutor v. Kordić and Cerkez*, IT-95-14/2, "Decision on Prosecutor's Motion on Trial Procedure", 19 March 1999; *Prosecutor v. Milutinović* et al., IT-05-87, Transcript, 25 October 2007, pp. 17638-17639; *Prosecutor v. Krajišnik*, IT-00-39-T, "Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters", 24 April 2006, paras 30-31, imposing a detailed procedure and ordering the disconnection of Krajišnik's privileged communication telephone lines.
[21] See e.g. *Prosecutor v. Bagosora* et al., ICTR-98-41-T, Transcript, 6 October 2006, p. 53; *Prosecutor v. Nyiramasuhuko* et al., ICTR-98-42-T, Transcript, 14 May 2007, p. 10; *Prosecutor v. Renzaho*, ICTR-97-31-T, Transcript, 27 August 2007, p. 2. Notably in all these cases the request made and granted related to *examination-in-chief*.
[22] *Prosecutor v. Rukundo*, ICTR-2001-70-T, "Decision on Defence Request to Meet the Accused During His Examination-in-Chief", 3 October 2007, para. 3, emphasis added.

12. In *Prlić* the Appeals Chamber recognized that Trial Chambers exercise discretion in relation to trial management and noted that its examination of the Trial Chamber's decision in that case was limited to establishing whether the Trial Chamber had abused its discretionary power by committing a discernible error.[23] Taking the opportunity to expound on the applicable law, the Appeals Chamber regarded it as a fundamental right of an accused to have access to counsel at any stage of the proceedings.[24] Questioning whether the latter right was open to any interpretation limiting its scope, the Appeals Chamber affirmed that "a decision on the extent of contact between an accused who chooses to testify and his counsel is vested in the Trial Chamber and is therefore discretionary".[25]

13. ICTY and ICTR jurisprudence may be persuasive but is not binding on this Trial Chamber.[26] The Accused in the current case has been allowed an unfettered right to access his counsel during his examination-in-chief, subject to his obligations while under oath. It is appropriate for the Trial Chamber to exercise its discretion to restrict this access for the duration of cross-examination in order to ensure the spontaneity and reliability of the evidence elicited during this phase of examination.

14. In this respect it should be noted that the presumptions established by the Appeals Chamber in *Prlić* were simply guidelines for the exercise of a Trial Chamber's discretionary power. It is clear from the emphasis in *Prlić* on discretionary powers, read in the light of previous case law, that imposing a degree of restriction does not offend the presumption in favour of the right to consult with counsel.[27] Similarly, it is ordinarily presumed that conversations between an accused and his counsel will be "appropriate"[28] in the sense that "counsel is not permitted to advise an accused, testifying on the witness stand, how he should reply to a question or line of

[23] *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 ("***Prlić* Appeal Decision**"), para. 8.
[24] *Prlić* Appeal Decision, para. 14.
[25] *Prlić* Appeal Decision, para. 15.
[26] See Article 20(3) of the Statute of the Special Court; *Prosecutor v. Norman*, SCSL-2004-14-AR73-397, "Decision on Amendment of the Consolidated Indictment", 16 May 2005, para. 46.
[27] *Prlić* Appeal Decision, para. 16.
[28] *Prlić* Appeal Decision, para. 18.

questioning".[29] Imposing restrictions for the limited period of cross-examination serves to protect the proceedings from any suspicion of coaching. Finally, cross-examination as a means of testing whether an accused has been improperly coached does not have the same remedial function with respect to allegedly rehearsed testimony during cross-examination itself.[30]

Continued need for contact with the Accused

15. During the course of oral argument on 10 November 2009, Lead Defence Counsel stated that a difficulty from the Defence point of view was that in practical terms further contact with the Accused was necessary on outstanding issues such as the requests made by the Principal Trial Attorney in relation to the organization of the Defence case.[31]

16. In relation to the need to consult with the Accused on the issues such as those raised by the Principal Trial Attorney, namely the list of primary and secondary witnesses,[32] it is difficult to understand why further consultation is necessary given that the Accused has had legal representation since his arrest three and a half years ago and the Defence were ordered to file the list of witnesses they intend to call pursuant to Rule 73*ter* by 29 May 2009, more than 5 months ago. Therefore, ample time has been allowed for the Defence to consult with their client on the list of witnesses to be called. Furthermore, given that the Prosecution agreed to proceed with cross-examination while this matter was litigated, the Defence has had further time to consult with the Accused in relation to the same. However, most importantly, there is nothing in the proposal made by the Principal Trial Attorney that would prevent Defence Counsel from consulting with the Accused on exactly these issues once the procedure for notice has been complied with.

Legal professional privilege is no impediment to the proposed procedure

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[29] *Prlić* Appeal Decision, p. 10.
[30] *Prlić* Appeal Decision, para. 17.
[31] *Prosecutor v. Charles Taylor*, Transcript, 10 November 2009, 31560.
[32] *Prosecutor v. Charles Taylor*, Transcript, 10 November 2009, 31554 – 31555.

17. Contrary to the assertion made by Lead Defence Counsel on 10 November 2009, legal professional privilege is no impediment to the operation of the proposed procedure as nothing in the proposal would force the Defence to reveal confidential communications with their client.

18. The procedure advocated has been utilized in practice in the international criminal tribunals and has not been found to offend legal professional privilege. At the SCSL, Trial Chamber I did not take the view that the same procedure was incompatible with legal professional privilege. Likewise at the ICTY, Trial Chambers have utilized such a procedure without fear of offending the principle. By way of example, in the case of *Milutinovic*, Judge Bonomy indicated to the Defence that "it would be safest for you to have absolutely no contact with [the Accused] and that therefore any contact required should be after you apply to us and have our authority for a particular purpose".[33]

19. Further, in England and Wales, the norm is that counsel has no contact with the accused during the course of the Accused's testimony. However, should the accused indicate during the course of his testimony that he wishes to communicate with counsel, the nature of the issue may be raised in open court before any ruling by the Judge about whether such contact would then exceptionally be permitted.

20. Moreover, such practice is consistent with the principle underlying legal professional privilege. This principle is that advice cannot effectively be obtained unless a client is able to put all the facts before his legal adviser, without fear that they may afterwards be disclosed to his prejudice.[34] Merely indicating the category or nature of the contact, for example that the Defence wishes to speak to the Accused about the order or calling the next batch of witnesses or to speak to the Accused about witness X, Y or Z does not offend the notion of legal professional privilege.

[33] *Prosecutor v. Milutinović* et al., IT-05-87, Transcript, 25 October 2007, p. 17639. See also *Prosecutor v. Krajišnik*, IT-00-39-T, "Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters", 24 April 2006, para. 31.
[34] *R (on the Application of Morgan Grenfell and Co Ltd) v. Special Commr of Income Tax* [2002] 3 All ER 1, per Lord Hoffmann, para. 7.

It is no answer that counsel must be presumed to act properly

21. The argument that counsel must be presumed to act ethically is no answer. If that argument were sufficient, then there would be a host of unnecessary or superfluous rules, policies and practices because all parties are presumed to act properly and consistently. The same assumption of proper conduct would certainly be equally applicable to the Prosecution, which is precluded from contact with any witness after the witness is sworn.

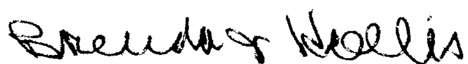
IV. CONCLUSION

22. Accordingly the Prosecution seeks an order restricting contact between the Accused and Defence Counsel during the course of cross-examination, with the caveat that should the Defence need to speak with the Accused about a matter unrelated to his testimony then they should provide notice of this to the Prosecution and that any dispute should be resolved by the Trial Chamber.

Filed in The Hague,

12 November 2009,

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

INDEX OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Prosecutor v. Charles Taylor, Transcript, 8 June 2009.
Prosecutor v. Charles Taylor, Transcript, 6 July 2009.
Prosecutor v. Charles Taylor, Transcript, 14 July 2009.
Prosecutor v. Charles Taylor, Transcript, 10 November 2009.

Prosecutor v. Charles Taylor, SCSL-03-01-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. Norman et al.

Prosecutor v. Norman et al., SCSL-2004-14-T, Transcript, 18 January 2006.

Prosecutor v. Norman, SCSL-2004-14-AR73-397, "Decision on Amendment of the Consolidated Indictment", 16 May 2005.

ICTY

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

Prosecutor v. Prlić et al., IT-04-74-T, "Order Clarifying the Relationship between Counsel and an Accused Testifying within the Meaning of Rule 85(C) of the Rules", 11 June 2009.
http://icr.icty.org/exe/ZyNET.exe?ZyActionD=ZyDocument&Client=LegalRefE&Index=OrderE&Query=Rule+85%28C%29&File=E%3A%5CLegal_Ref%5CBatchStore%5COrder%5CEnglish%5CExportedText%5C0000000R%5C200016UBIA.txt&QField=DocumentId%5E200318975&UseQField=DocumentId&FuzzyDegree=1&ImageQuality=r85g16%2Fr85g16%2Fx150y150g16%2Fi500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results+page&MaximumPages=1&ZyEntry=1&SeekPage=f&User=ANONYMOUS&Password=ANONYMOUS [ICTY Court Records database].

Prosecutor v. Jelisić, IT-95-10-T, "Decision on Communication between Parties and Witnesses", 11 December 1998.
http://www.icty.org/x/cases/jelisic/tdec/en/81211WG113147.htm

Prosecutor v. Krajišnik, IT-00-39-T, "Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters", 24 April 2006.
http://icr.icty.org/exe/ZyNET.exe?ZyActionD=ZyDocument&Client=LegalRefE&Index=DecisionE&Query=chamber+witnesses&File=E%3A%5CLegal_Ref%5CBatchStore%5CDecision%5CEnglish%5CExportedText%5C0000000N%5C200015HLFR.txt&QField=DocumentId%5E2000204284&UseQField=DocumentId&FuzzyDegree=1&ImageQuality=r85g16%2Fr85g16%2Fx150y150g16%2Fi500&Display=hpfrw&DefSeekPage=f&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results+page&MaximumPages=1&ZyEntry=1&SeekPage=f&User=ANONYMOUS&Password=ANONYMOUS [ICTY Court Records database].

Prosecutor v. Kordić and Cerkez, IT-95-14/2, "Decision on Prosecutor's Motion on Trial Procedure", 19 March 1999.
http://www.icty.org/x/cases/kordic_cerkez/tdec/en/90319WG57149.htm

Prosecutor v. Milutinović et al., IT-05-87, Transcript, 25 October 2007.
http://www.icty.org/x/cases/milutinovic/trans/en/071025IT.htm

ICTR

Prosecutor v. Rukundo, ICTR-2001-70-T, "Decision on Defence Request to Meet the Accused During His Examination-in-Chief", 3 October 2007.
http://69.94.11.53/ENGLISH/cases/Rukundo/decisions/071003.pdf

Prosecutor v. Bagosora et al., ICTR-98-41-T, Transcript, 6 October 2006, p. 53.
http://trim.unictr.org/webdrawer/rec/90822/view/[MILITARY%20I]%20-%20BAGOSORA%20ET%20AL%20-%20REDACTED%20TRANSCRIPT%20OF%2006102006.DOC

Prosecutor v. Nyiramasuhuko et al., ICTR-98-42-T, Transcript, 14 May 2007, p. 10,
http://trim.unictr.org/webdrawer/rec/93847/view/[BUTARE]%20-%20NYIRAMASUHUKO%20ET%20AL%20-%20TRANSCRIPTION%20CAVIARDEE%20DU%2014052007.DOC

Prosecutor v. Renzaho, ICTR-97-31-T, Transcript, 27 August 2007, p. 2,
http://trim.unictr.org/webdrawer/rec/96068/view/RENZAHO%20-%20REDACTED%20TRANSCRIPT%20OF%2027082007.DOC.

DOMESTIC

R (on the Application of Morgan Grenfell and Co Ltd) v. Special Commr of Income Tax [2002] 3 All ER 1, pages 4-5 per Lord Hoffmann.
http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/morgan-1.htm