



**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Justice Richard Lussick, Presiding Judge, Justice Teresa Doherty and Justice Julia Sebutinde;

**SEISED** of the Urgent Prosecution Motion for an Order Restricting Contacts between the Accused and Defence Witnesses and Requiring Disclosure of Such Contacts, filed on 27 July 2006 (“the Motion”);

**NOTING** the Joint Defence Response to the Prosecution’s Motion, filed on 21 August 2006 (“the Response”);

**NOTING** the Prosecution Reply to the Defence Response, filed on 28 August 2006 (“the Reply”);

**COGNISANT** of Article 17 (4) of the Statute of the Special Court for Sierra Leone (“the Statute”);

**HEREBY DECIDES AS FOLLOWS** based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court (“Rules”).

## I. SUBMISSIONS OF THE PARTIES

### *Prosecution Motion*

1. As a consequence of statements made by Defence Counsel in open court that some prospective witnesses had requested to speak to the Accused before testifying<sup>1</sup>, the Prosecution seeks orders (1) that the Trial Chamber order expedited filings relating to this Motion (2) prohibiting contacts between the three Accused and any Defence witnesses, in particular contacts between the First Accused and alibi witnesses, without the prior authorisation of the Trial Chamber, and (3) that the Registrar inform the Trial Chamber and the parties of past visits by any defence witnesses to the Accused.

2. The Prosecution submits that in England it is a “well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness”.<sup>2</sup> in order to avoid any unfounded perception that one witness may tailor his evidence in the light of what someone else said. Nevertheless, the Prosecution concedes that any discussion between witnesses does not preclude the evidence being called nor cause such evidence to be excluded. The Prosecution also refers to Rule 615 of the Federal Rules of Evidence (United States of America) and case law arising therefrom which permit domestic courts to exclude a witness from hearing the testimony of another witness.

3. The Prosecution further submits that “the same dangers and considerations that apply in relation to contacts between witnesses apply also in relation to contacts between an accused and defence witnesses”, as the Defence witness may be inadvertently contaminated.<sup>3</sup> In addition, the

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<sup>1</sup> Motion, para. 4.

<sup>2</sup> Motion, para. 7, citing *R v. Momodou*. (2005) EWCA Crim 177.

<sup>3</sup> Motion, para. 14.

Prosecution argues that since the First Accused was also a witness, any contact between him and prospective witnesses is tantamount to contact between witnesses.

### *Defence Response*

4. The Defence jointly oppose the motion. They submit that an accused's "facility for the preparation of his or her defence", includes assessing and selecting witnesses and that

*"the selection of witnesses by the accused is part and parcel of the fair trial rights of the accused him or herself, and not (only) ascribed to the competence of Defence Counsel under Article 17 (4) (b) of the Statute, Article 6 (3) (b) ECHR<sup>4</sup> and Article 14 (3) (d) ICCPR<sup>5</sup>".<sup>6</sup>*

Hence they submit that restricting the contacts between the Accused and defence witnesses is an infringement on the fair trial rights of the Accused.<sup>7</sup>

5. However, the Defence do not cite any authorities to support this interpretation of Article 17 (4) (b) of the Statute or the relevant Articles of the Conventions.

6. The Defence seek to distinguish the English and North American case law relied on by the Prosecution, submitting that the cases emanate from the common law context of jury trials and strict rules of admission of evidence which are not applicable to the Special Court and Rule 89 (C).

7. In response to the Prosecution submission distinguishing contact between Defence Counsel and witnesses from contact between Accused and witnesses, the Defence state:

*"The position of Defence Counsel cannot be abstracted from that of the Accused. If one accepts the right to self-representation within international criminal proceedings, as set forth by the ICTY Appeals Chamber ruling in Prosecutor v. Milosevic, the same procedural powers which apply to Defence Counsel should also apply to the accused him or herself".<sup>8</sup>*

8. The Defence submit that there is no "factual foundation" for the Prosecution Motion and no proof is given that witnesses will be influenced by any contact with an Accused. The Defence also refer to the reason given orally for the proposed visits, viz. to permit the witnesses to "explain their fate" and "not to get their stories to coincide",<sup>9</sup> and to the remarks of the Presiding Judge that the Prosecution can test the defence witnesses in cross examination.

### **Prosecution Reply**

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<sup>4</sup> [European] Convention for Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1955).

<sup>5</sup> International Covenant of Civil and Political Rights.

<sup>6</sup> Response, para. 6.

<sup>7</sup> *Ibid.*

<sup>8</sup> Defence Response, para. 13.

<sup>9</sup> Transcript 26 July 2006, page 3.

9. In reply, the Prosecution argues that the Accused's fair trial right to select witnesses does not extend to meeting them when an accused is represented by Counsel. Prosecution submits that Counsel are "bound by ethical and professional obligations" that do not bind an accused.<sup>10</sup> It seeks to distinguish the case of *Prosecutor v Milosevic*, where the accused represented himself but had counsel imposed on him by the Trial Chamber.<sup>11</sup> The Prosecution reiterates that the First Accused was also a witness and case law relating to collusion between witnesses is, therefore, applicable in his case.

10. The Prosecution concedes that it has not made any specific allegations against the Defence, but nevertheless wants to avoid a risk of contamination of evidence.

## II. DELIBERATIONS

11. It is common ground that there is no evidence that any Accused has actually influenced a witness or a potential witness.

12. When this issue was first raised in Court, Lead Counsel for Brima stated that prospective witnesses wished to see the Accused persons in order "to discuss, if I am right, their stories, or the account, or their testimony that they are coming to give here in the Court ...".<sup>12</sup> Subsequently, Co-Counsel added that witnesses wished "to explain their fate", "not to get their stories to coincide".<sup>13</sup>

13. The Defence seek to distinguish the case law submitted by the Prosecution on the ground, *inter alia*, that it only applies to collusion between witnesses. However, it would be *naïve* to presume that there could not be collusion between an accused and a witness.

14. There is no specific provision in the Rules or the Rules of Detention<sup>14</sup> which prevents an accused speaking to a witness. Rule 90 (D) of the Rules - referred to by the parties - is not pertinent to the instant case as it deals with a witness who has not yet testified being present in court during the testimony of another witness.

15. Whilst collusion between witnesses or between an accused and a witness may occur, such contact neither prevents a witness from testifying nor results in that evidence being inadmissible. If there is a possibility that evidence has been contaminated by contact with another witness "the way to test the credibility of witnesses is by cross-examination, which can be used to determine whether witnesses, have colluded or exchanged information on their testimony".<sup>15</sup>

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<sup>10</sup> Reply, para. 10.

<sup>11</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004.

<sup>12</sup> Transcript 25 July 2006, page 8.

<sup>13</sup> Transcript 26 July 2006, page 3.

<sup>14</sup> Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone ("Rules of Detention"), adopted 7 March 2003.

<sup>15</sup> *Prosecution v. Brima, Kamara, Kanu*, Case No. SCSL-0416-T, Decision on Confidential Urgent Joint Defence Motion to Exclude Evidence Given by Witness TF1-157 and Evidence to be Given by TF1-158 Based on Lack of Authenticity and Violation of Rule 95, 10 October 2005, para. 20.

16. We find that the Prosecution has failed to establish that there has been any contact between an Accused and any witness. The statements by Defence Counsel in para. 12 above do not amount to evidence of collusion. Hence, we hold that there are no grounds to grant any of the orders sought in the Motion.

17. However, we remind Defence Counsel of the duty to ensure that his/her professional integrity is not impugned and not to bring the administration of justice into disrepute. Rule 5 (iii) Code of Professional Conduct<sup>16</sup> provides:

**Article 5 – Competence, Independence and Integrity (amended on 13 May 2006)**

Counsel shall act with:

[...]

(iii) integrity to ensure that his actions do not bring the administration of justice into disrepute.

18. We consider that this duty extends to ensuring that the integrity of the evidence is maintained.<sup>17</sup>

**FOR THE FOREGOING REASONS** the Motion is dismissed.

Done at Freetown, Sierra Leone, this 10<sup>th</sup> day of October 2006.

Justice Teresa Doherty

Justice Richard Lussick  
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

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<sup>16</sup> Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, adopted 14 May 2005.

<sup>17</sup> See also the *Prosecutor v. Jelusic*, Case No. IT-95-10, Decision on Communication between Parties and Witnesses, 11 December 1998, with reference to a specific provision in the ICTY Code of Professional Conduct for Counsel Appearing Before The International Tribunal.