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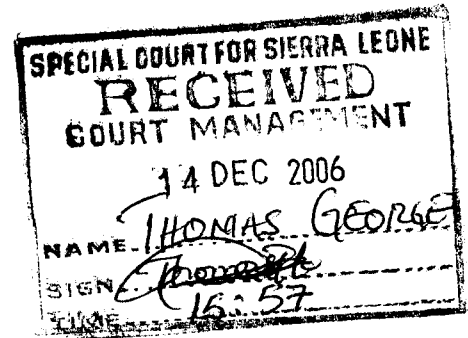
The Special Court for Sierra Leone

Case No. SCSL-03-01-PT

Before: Justice George Gelaga King, President

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 14 December 2006



THE PROSECUTOR

-v-

CHARLES TAYLOR

PUBLIC

DEFENCE APPLICATION REQUESTING REVIEW OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE SPECIAL COURT OF SIERRA LEONE DATED 13 APRIL 2006 & MODIFICATION OF MR. CHARLES TAYLOR'S CONDITIONS OF DETENTION

Office of the Prosecutor

Mr. Christopher Staker

Ms. Wendy van Tongeren

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Counsel for Charles Taylor

Mr. Karim A. A. Khan

Mr. Roger Sahota

Introduction

1. On 19 June 2006 the President of the Special Court for Sierra Leone (“SCSL”) ordered that the Accused, Mr. Taylor be transferred and detained in The Hague and that the pre-trial proceedings, trial, and any appeal of the Accused be conducted in The Hague. On the same date, pursuant to Rule 64, the Registrar of the SCSL ordered that the rules of detention and standards of the International Criminal Court (“ICC”) should apply to the detention of Mr. Taylor *mutatis mutandis* as well as the complaints procedure set out in Rule 59 of the Rules of Detention of the Special Court (“Rules of Detention”). The Registrar’s order was endorsed pursuant to Rule 64 by the President of the SCSL and on 21 June 2006, Mr. Taylor, who had been detained at the SCSL Detention Facility in Freetown, was transferred to the ICC Detention Centre in The Hague.
2. Prior to Mr. Taylor’s transfer, the SCSL and ICC entered into a **Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone** (“MoU”), dated 13 April 2006. The MoU has been applied to the effect that, in the last few months, critical decisions relating to the day to day management of the conditions of detention have been made *ad hoc*, either unilaterally by the ICC, or through negotiations between the SCSL and the ICC, with the final authority apparently resting with the ICC.¹
3. The ICC detention framework differs significantly from the SCSL practice and rules.² The application of the ICC detention framework violates Mr. Taylor’s right to be treated equally to SCSL prisoners detained in Freetown, pursuant to Article 17 of the Statute of the SCSL and the Special Court Agreement (Ratification) Act of 2002, which both provide that “All accused shall be equal before the Special Court”. The Defence submit that all the guarantees provided for in the SCSL Statute are implicitly incorporated into the Rules, which must be applied in such a manner as to protect those statutory rights.

¹ For example, when Mr. Taylor’s Defence addressed the SCSL Registry on complaints concerning Mr. Taylor’s detention conditions and restrictions imposed by the ICC detention regime, the SCSL Registry ruled that the ICC policy was applicable where “the policy of the ICC and the policy of the SCSL” were in conflict. *See* Letter from Registry to Lead Counsel for Mr. Taylor, dated 27 September 2006 (annex 5). This situation was highlighted as early as July when Lead Counsel noted that “there is nobody that has a particular responsibility...to look after the welfare of my client from an administrative point of view”, *see Prosecutor v. Taylor*, Case No. SCSL-2003-01-PT, Status Conference, 21 July 2006, (Presided over by Judge Lussick) (“July Status Conference”), at 12:01:02, p 16 of 25.

² The ICC detention framework refer to both Chapter 5, ‘Detention Matters’, in the ICC Regulations of the Registry, and Chapter 6, ‘Detention Matters’ in the ICC Regulations of the Court, and their implementation. The SCSL regime is governed by the SCSL “Rules of Detention”.

4. The ICC Detention Centre has imposed a plethora of unnecessary, unreasonable, and discriminatory restrictions on Mr. Taylor despite complaints and requests for administrative relief from the Defence team.³ Similar restrictions are not observed at the SCSL Detention Facility. The Defence seek the President's intervention and request immediate relief in relation to these conditions of detention which leave Mr. Taylor at a disadvantage vis-à-vis other SCSL detainees as:

- (i) The ICC detention regime is *unduly restrictive* with regard to, *inter alia*, visits and means of communication. For instance, the Registry's agreement with the Netherlands on the visa procedure for visitors to Mr. Taylor restricts Mr. Taylor's contact with visitors by stating that "[o]nly one person will be allowed to visit [the Netherlands] at a time".⁴ The restrictions in place are not applicable to detainees of the SCSL in Freetown, nor to European ICTY detainees using the same facility.
- (ii) The arrangements at the ICC detention centre do not take account of the detainee's cultural background, thereby breaching the Geneva Convention.

5. Rule 64 empowers the Registrar to order special measures of detention without restriction subject to the President's endorsement. The Defence submit that the effect of the Registrar's Order of 19 June 2006 and the MoU is to cede jurisdiction to the ICC over Mr. Taylor's conditions of detention in violation of the Special Court Agreement (Ratification) Act, 2002, dated 29 March, 2002. This situation leaves Mr. Taylor without the right to seek effective relief over his conditions of detention, and the Defence for Mr. Taylor thus seek the President's intervention in ensuring the SCSL's primacy in these decisions.

³ An example of this is the placing of a surveillance camera in the conference room, where the Defence hold privileged legal discussions with Mr. Taylor. The Defence sought the removal of the camera through the SCSL Registry, and subsequently filed a motion with the SCSL Trial Chamber, who directed the matter back to the SCSL Registrar (see *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-137, Decision on Urgent and Public Defence Motion Requesting Removal of Camera from Conference Room, 30 November 2006). The Defence are still waiting for this matter to be resolved. The same measure was imposed on the only ICC detainee, Mr. Lubanga. In that case, the ICC Judges felt able to act immediately on the merits and, without the impediment of administrative uncertainty, ordered the Registrar to stop video surveillance of legal conferences, and the ICC Registrar implemented the order accordingly. Video surveillance of legally privileged conferences are not, of course, imposed on SCSL detainees and defence teams in Freetown.

⁴ Application Process for Personal Visitors to the Detainee Charles Taylor Requiring a Visa to Enter the Territory of the Netherlands, Draft Pending Review by the Dutch Authorities, para. 4.

Jurisdiction – Modification of Conditions of Detention

6. Specific restrictions on Mr. Taylor’s contact with visitors falls explicitly within the enumerated situations where the President has jurisdiction to oversee the Registrar on conditions of detention -- to order a report into the death in custody of an indictee (Rule 22(C)); to approve any order by the Registrar for cell video surveillance which order lasts longer than 14 days (Rule 24(C)); and to hear appeals by a detainee from any decision to prohibit or impose conditions on communications and visits (Rule 47).⁵ The visa provision restriction preventing more than one visitor at a time from visiting Mr. Taylor falls squarely within Rule 47.

7. The Trial Chamber, in this instance, has recognised that the remit of the President to review the conditions of detention of an Accused extends beyond these three situations. At the Initial Appearance on 21 June 2006, the Trial Chamber directed the Defence, with regard to conditions of detention, to address the President directly as the “overseer” of administrative complaints concerning conditions of imprisonment.⁶

Jurisdiction – Presidents Endorsement of Registrars Order of 19 June 2006

8. Rule 64 of the RPE states:
 - a. Upon his transfer to the Special Court, the accused shall be detained in the Detention Facility, or facilities otherwise made available pursuant to Rule 8(C). The Registrar, in a case where he considers it necessary, may order special measures of detention of an accused outside the Detention Facility. The order of the Registrar shall be put before the President for endorsement within 48 hours of the order being issued.

9. Although the SCSL Rules do not explicitly provide for a mechanism to seek review of the Registrar’s Rule 64 orders, Rule 64, in requiring the President’s endorsement, implicitly grants the President the jurisdiction to review the Registrar’s special orders on conditions of detentions. To suggest the contrary – that no jurisdiction to review the Registrar’s special orders on conditions of detention exists – would leave Mr. Taylor without the right to effective relief – an affront to the principles of natural justice. This motion is therefore submitted to the President of the Special Court with a request for a

⁵ See *Prosecutor v. Norman*, SCSL-03-08-PT-119, SCSL President’s Decision, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 5.

⁶ Initial Appearance of 21 June 2006, Transcript, p. 9 lines 17-22 (annex 10). This was reiterated at the July Status Conference, where the Defence were directed to “find their way to the President”, if satisfaction was not gleaned using the complaints procedure system, see *Prosecutor v. Charles Taylor*, SCSL 2003-01-PT, Status Conference, 21 July 2006, 12:13:39, p. 22 of 25.

Direction to the Registrar that the terms of the MoU and the Registrar's 19 June 2006 Order should be reviewed along with the modalities for its practical implementation.

The MoU is ambiguous and confusing and cedes jurisdiction to the ICC

10. As stated above, Rule 64 empowers the Registrar to order special measures of detention without restriction subject to the President's endorsement. The MoU sets out the special measures that the Registrar has ordered. The MoU is itself ambiguous and confusing. On the one hand, Paragraphs 6.1, 6.2 and 6.5 state that that the ICC's rules and regulations are applicable to Mr. Taylor's detention conditions, and that the ICC Registrar has "overall responsibility for all aspects of the management of the ICC," including decision-making powers; on the other hand, Paragraph 6.4 states that the SCSL retains "full legal control and authority" over Mr. Taylor. In practice, however, and, it is submitted, as erroneously conceded by the SCSL, the ICC has primary authority over Mr. Taylor's conditions of detention, as well as the management of his day-to-day detention.⁷
11. It is submitted that the current arrangements amount to a sub-delegation of the courts administrative powers. It is a rule of constitutional and administrative law that any sub-delegation of administrative powers to an independent outside agency must be expressly authorised.⁸ In the present case, the Defence respectfully submit that the sub-delegation of the functions of the SCSL to the ICC and the practical operation of

⁷ It is the operation of the current ICC regime, compounded by an ambiguous MoU, that leaves the Accused, in practice, without an effective remedy. Any review procedure that, in the final analysis, leaves ultimate decisions to the ICC as matters of that Court's policy and procedures would be cosmetic and ineffective. It is a principle of international human rights law that rights guaranteed must be "practical and effective not theoretical and illusory" (see in context of the European Court Human Rights (ECHR), *Artico v Italy*, ECHR Judgment of 13 May 1980, Application no. 6694/74, para 33). The Defence further submit that the primacy of the SCSL in all matters relating to Mr. Taylor's detention must be established. In addition, the principle that any decision by any judge or the Registrar of the SCSL is *directly effective* in the ICC Detention Centre context must be guaranteed. With respect, a review of the "negotiations" between the SCSL and the ICC on matters relating to the SCSL detainee in The Hague discloses that neither of these important principles has been hitherto adequately established.

⁸ See *U.S. Telecom Ass'n v. F.C.C. et. al.*, 359 F.3d 554 (D.C. Cir. 2004), (annex 11) ("When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. But the cases recognize an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*. The presumptions that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization." (citations omitted)); Cardona, *The Delegation of Administrative Decision-Making Powers: A Tool for Better Public Performance*, SIGMA/OECD, available at <<http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan018471.pdf>>.

the regime constructed leaves the Accused without an effective remedy. It submitted that an objective review of how the issues raised in the almost six months since Mr. Taylor's transfer to the Hague have been resolved, demonstrate that the *locus* of decision-making lays not in Freetown with the judges and Registry as it ought, but with an *outside* institution namely the ICC.

12. According to the U.S. Court of Appeals, sub-delegation to outside agencies is prohibited as it impinges on the accountability of institutions, confuses the rights to effective remedy, and may lead to inconsistent policy implementation.⁹ This is, with respect, precisely the flaw in the present arrangement. The conflicting policy objectives and priorities of the SCSL and ICC are, constantly, being decided in favour of the ICC regime. There is an apparent unwillingness by the SCSL to assert itself in situations where there is a conflict with an ICC regime which is inconsistent with the policy of the SCSL as evinced by the operation of the Court in Freetown. It is respectfully submitted that the MOU is not operating in practice so as to safeguard either the rights of Mr. Taylor, nor to primacy of the SCSL in relation to him.

13. The Defence submit that the drafters of Rule 64 can not have envisaged a scenario where the Registrar would in effect cede administrative jurisdiction in relation to the conditions of detention of an accused altogether as this would violate the Special Court Agreement, 2002 (Ratification) Act, 2002, dated 29 March, 2002¹⁰ as recognized by the Security Council Resolution 1688 (2006), which, whilst authorising the court to "meet away from its seat." stated that:

... the Special Court shall retain **exclusive** jurisdiction over former President Taylor during his transfer to and presence in the Netherlands in respect of matters within the Statute of the Special Court".¹¹

⁹ See, *Ibid*, 13-14, ("[T]he proscription against subdelegation to an outside agency without express authorisation] is entirely sensible.")

¹⁰ The Sierra Leone Ratification Act is the SCSL's primary charter document, giving effect to and appending the Agreement between Sierra Leone and the United Nations. Further, the Defence for Mr. Taylor submit that the SCSL, a legal personality within the Sierra Leone constitution, (Constitution of Sierra Leone of 1991) may not act in contravention of that constitution. Article 40 (4)(h) of the 1991 Constitution of Sierra Leone grants the President the power to enter into treaties, agreements or conventions, subject to ratification by Parliament. Article 40 (4)(h) of the 1991 Constitution of Sierra Leone grants the President the power to enter into treaties, agreements or conventions, subject to ratification by Parliament. The Defence raise, as a subsidiary argument, that the SCSL's powers are limited by the Agreement and the Act, and without express authority of the President of Sierra Leone, ratified by the Sierra Leone Parliament, may not be subdelegated to an outside agency.

¹¹ SC Resolution 1688 (2006) Adopted by the Security Council at its 5467th meeting, on 16 June 2006, para. 7 (emphasis added).

The SCSL's sub-delegation also precludes Mr. Taylor from seeking effective relief from the SCSL Registry, which has no authority over the ICC.

Equal Treatment with Other SCSL Detainees and Geneva Convention

14. Mr. Taylor is subject to the SCSL rules of detention, "which are designed to provide for a regime of humane treatment for unconvicted prisoners",¹² and he is entitled to equal treatment under these rules. Other SCSL detainees are not subject to the constraints, with regard to food, personal effects (documented below) and are detained in an environment and afforded facilities and reside in a regime consistent with their culture. The Defence for Mr. Taylor submit that he must be afforded equivalent conditions of detention, regardless of his physical presence at the ICC detention centre.¹³
15. In comparison to the SCSL rules, the ICC detention framework is Euro-centric in many respects and does not take account of Mr. Taylor's cultural background. This is no trivial complaint – a former SCSL President has held, when discharging his functions in this regard, that the conditions of detention "should conform to the provisions of the 1949 Geneva Conventions"¹⁴ For instance, the provision of culturally appropriate food is the *absolute minimum* guarantee for prisoners of war outlined in the Third Geneva Convention, which provides that "Account shall also be taken of the habitual diet of the prisoners."¹⁵

Specific Complaints and Remedies Sought

Unduly Restrictive Conditions - Visitors

16. The Defence for Mr. Taylor submit that the SCSL's agreement with the Dutch authorities which only allows one person "to visit [the Netherlands] at a time."¹⁶ is

¹² *Prosecutor v. Norman*, SCSL-2003-08-PT-119, SCSL President's Decision, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 5.

¹³ Lead Counsel highlighted the importance of equal treatment with other SCSL detainees in correspondence of 12 July 2006 addressed to the Principal Defender (annex 1). See also July Status Conference, where Lead Counsel drew the Judge's attention to the "wide disparity in treatment" afforded to detainees before the SCSL in Freetown and those afforded the only SCSL detainee in the Hague; the differences were, and continue to be, multifarious, see 11:52:22, p 15 of 25.

¹⁴ *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, SCSL President's Decision, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 5.

¹⁵ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Part III: Art. 26. Moreover, The Geneva Conventions are for the most part considered to constitute customary international law.

¹⁶ Application Process for Personal Visitors to the Detainee Charles Taylor Requiring a Visa to Enter the Territory of the Netherlands, Draft Pending Review by the Dutch Authorities, para 4. By the same reasoning, the

prima facie discriminatory. SCSL detainees have no such restrictions. ICTY detainees, also present in the Netherlands, are not subject to similar restrictions on the number of visitors, and are even provided compensation for the cost of family visits. In contrast, Mr. Taylor's right to contact with visitors, already burdened by the prohibitive cost of family members travelling to the Netherlands, is unduly restricted without appropriate justification. Forcing women to travel unaccompanied abroad, particularly when they have young children, is often considered culturally unacceptable in many non-western societies. In effect, the geographic dislocation of Mr. Taylor from his family, the cost of travel, and the visa restrictions combine to impose conditions severely restricting Mr. Taylor's right to family contact protected under Article 8 of the European Convention on Human Rights (ECHR) and also militating against the realisation of his rights under the Statute and Rules of the SCSL.

Unduly Restrictive Conditions – Telephone Calls and DVD player

17. Since his transfer to The Hague, Mr. Taylor has consistently been subject to unequal treatment vis-à-vis other SCSL detainees. Unlike other SCSL detainees in Freetown¹⁷ and despite repeated requests, Mr. Taylor is not allowed to receive calls directly from outside the Detention Unit.¹⁸ Also, in contrast to other SCSL detainees, Mr. Taylor is allowed 100 fewer free call minutes per month without any rational explanation. He is also not allowed access to a private DVD player (even at his own expense) which he had in Freetown.¹⁹

time limit of a maximum visa grant of 14 days is unfair, unreasonable, *prima facie* discriminatory and is causing unnecessary hardship and expense.

¹⁷ cf. *Prosecutor v. Norman*, SCSL-2004-14-T-141, Decision on Request by Samuel Hinga Norman for Additional Resources to Prepare his Defence, 23 June 2004, para. 14 (where the Trial Chamber ordered, in addition to the regular common phone, the placement of a "stationary disk telephone in [the detainee's] cell which he can use at any time for the purpose of being in contact with standby counsel).

¹⁸ Lead Counsel for Mr. Taylor requested remedy for Mr. Taylor's unequal treatment in receiving phone calls, and restrictions on the number of free call minutes allowed to Mr. Taylor. The relatively higher costs to Mr. Taylor, an indigent detainee, of calling Africa, must also be considered. Both of these issues were initially raised Lead Counsel during the July Status Conference, at 11:45:24, p 9 of 25. By letters of 18 September 2006 and 27 September 2006, the Registry rejected these and other requests, informing the Taylor Defence Team that, despite the fact that Mr. Taylor was an SCSL prisoner, the stricter policy of the ICC was being applied because no appropriate solution had been found (annexes 4 and 5).

¹⁹ On 15 July 2006, Lead Counsel for Mr. Taylor corresponded with the SCSL OPD, and on 22 August 2006 with the SCSL Registry, requesting, *inter alia* that Mr. Taylor be permitted to have a DVD-player in his ICC cell on the ground that, absent any satellite television in The Hague, Mr. Taylor can only watch programs suitable for a Dutch audience, which is yet another example of a lack of cultural consideration. This request was rejected on 18 September 2006 (annex 4). It should be noted that the common room in the ICC the one DVD player is shared by ICC, ICTY and SCSL detainees. Nor is access possible during "lockdown."

18. This situation may have arisen partly because of the fact that while the SCSL has jurisdiction over Mr. Taylor, no SCSL detention personnel²⁰ have inspected his conditions of detention, or provided for the presence of SCSL personnel at the ICC detention centre.²¹ The Defence for Mr. Taylor therefore urge the SCSL to inspect and monitor Mr. Taylor's conditions of detention to ensure he is afforded equal treatment with other SCSL detainees.

Diet and Provisions

19. The daily diet for Mr. Taylor does not include any African recipes or ingredients. Mr. Taylor is permitted to cook his own meals and can purchase food to prepare to his own taste, at his own expense²². This imposes a considerable financial burden on an indigent detainee and does not adequately fulfil the ICC's legal obligation to take account of his "habitual diet". In the absence of the provision of African food, Mr. Taylor should be entitled to compensation for any such expenditure.

20. In contrast to the SCSL, where a detainee's personal effects are purchased for them, the ICC detention framework limits purchases to products stocked at the detention centre shop. The ICC detention centre shop does not stock the same products that are available at the SCSL and many African and other non-European products are not available. Even though Mr. Taylor is willing to pay for certain provisions, the ICC detention centre will not modify the list of items they stock. Common-sense alternatives to the current rules include (1) modifying the Detention Centre shop products lists with Mr. Taylor's requested products; (2) enabling an ICC Detention Centre staff member to purchase products on Mr. Taylor's behalf, and at his expense, from outside the Detention Centre, as at the SCSL; (3) for the SCSL Detention Facility to deliver products available to SCSL Freetown detainees and requested by Mr. Taylor, at his expense.

²⁰ The Defence accept that SCSL non-detention personnel have visited, on occasion.

²¹ To that effect, on 29 November 2006, Lead Counsel for Mr. Taylor wrote to the Registrar, requesting the SCSL Chief of Detention to visit Mr. Taylor. Lead Counsel also asked that Dr. Harding, an African Doctor familiar to Mr. Taylor, could visit Mr. Taylor in The Hague, pursuant to Rule 20.A of the SCSL Rules of Detention. That request was refused by the Registrar on 30 November 2006 (annex 7).

²² Food, like other commodities, purchased through the ICC, is expensive, particularly in contrast to the cost to other SCSL detainees in Freetown of similar provisions. Lead Counsel drew attention to dietary facilities at the July Status Conference, stating that the ICC detention centre is "still a rather Eurocentric detention facility", see p 15. No, or no adequate, provision has been made by the Court for the resulting disparity caused by the different regimes in operation.

Conclusion

21. The Defence submit that the SCSL's sub-delegation to the ICC of its exclusive jurisdiction over Mr. Taylor is *ultra vires*. Its effect, in practice, is to deprive Mr. Taylor of his right to humane and equal treatment under the SCSL detention rules and practice. Mr. Taylor's conditions of detention under the ICC detention framework are, in comparison to the SCSL regime, culturally insensitive and unduly restrictive. The Defence, thus, request that the President order that the Registrar:

- (i) Modify, and/or apply the MoU, such that the SCSL retains exclusive jurisdiction over Mr. Taylor's condition of detention;
- (ii) Ensure that Mr. Taylor is granted equal and humane treatment consistent with the SCSL detention rules and practices;
- (iii) Grant Mr. Taylor's requests for:
 - b. Provision of, of compensation for, "habitual" African food;
 - c. Implementation of an alternative system for Mr. Taylor to purchase personal effects;
 - d. SCSL inspection and continued monitoring of Mr. Taylor's conditions of detention.
 - e. Amendment of the visa restrictions to ensure Mr. Taylor's right to contact with visitors, without undue and unequal restrictions;
 - f. Grant proper telephone facilities to Mr. Taylor on the same terms as SCSL detainees;
 - g. Provision by the SCSL or at the Accused's own expense of a private DVD Player.

Respectfully submitted **this 14th Day of December 2006,**



Karim A. A. Khan

Lead Counsel for Mr. Charles Taylor