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The SPECIAL COURT FOR SIERRA LEONE

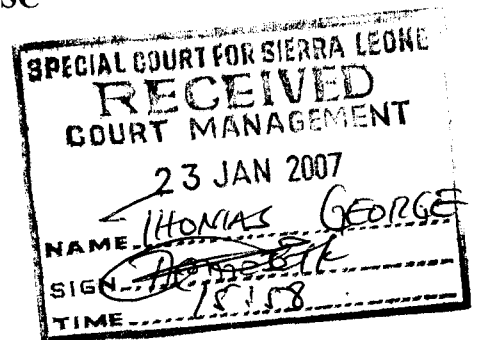
BEFORE THE PRESIDENT

Before: Hon. Justice George Gelaga King, President

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 23 January 2007

Case No.: SCSL-2003-01-PT



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

**DEFENCE REPLY TO THE "REGISTRAR'S SUBMISSION ON THE
CORRIGENDUM TO THE SECOND DEFENCE MOTION REQUESTING
CESSATION OF VIDEO SURVEILLANCE OF LEGAL CONSULTATIONS",
FILED ON 19 JANUARY 2007**

Office of the Prosecutor

Mr. Stephen Rapp
Ms. Wendy van Tongeren
Ms. Shyamala Alagendra
Mr. Alain Werner

Counsel for Charles Taylor

Mr. Karim A. A. Khan
Mr. Roger Sahota

I INTRODUCTION

1. The Defence welcome the conclusion reached by the Registrar in the *Registrar's Submissions on the Corrigendum to the Second Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations dated 19 December 2006, filed on 8 January 2007, pursuant to Rule 33 (B) of the Rules of Procedure and Evidence, filed on 19 January 2007* ("Registrar's Submissions")¹. However, the Defence respectfully disagrees with the reasoning advanced in the Registrar's Submissions, for the reasons detailed below.
2. The Defence note, and respectfully support, the Registrar's conclusion that the International Criminal Court ("ICC") may not, from a plain reading of its own rules and the applicable order of the ICC Pre-Trial Chamber, place privileged legal communications under video surveillance.
3. The Registrar's Submission is mistaken or otherwise deficient, however, in that they fail to address any aspect of the Defence submissions on the Special Court's continuing and exclusive jurisdiction over Mr. Taylor.² Indeed, the Registrar's Submissions acknowledge the *ultra vires* delegation of authority by the Special Court to the ICC.
4. The current arrangement, as articulated by the Registrar's Submission, deny Mr. Taylor the right to effective relief for it leaves the Registrar, and far more troublesome still, the Trial and Appeals Chamber judges of the Special Court redundant and impotent in relation to one of the accused. Further, in subjecting *only* Mr. Taylor to video surveillance, his right to equal treatment vis-à-vis other Special Court detainees is implicated. None of these critical issues are addressed in the Registrar's Rule 33 submission to the President.

¹ *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-162, Registrar's Submissions on the Corrigendum to the Second Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations dated 19 December 2006, filed on 8 January 2007, pursuant to Rule 33 (B) of the Rules of Procedure and Evidence, 19 January 2007. The Defence note that the present issue affects Mr. Taylor's right to confidential, free and open communication with his legal counsel. Despite the importance of this issue, the Registrar made his first submissions only on 19 January 2007, 11 days after the latest Defence motion on the issue, and more than a month after both the ICC official response to the Registrar and the Trial Chamber's urging of the Registrar to address the issue "promptly". 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.

² See *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-156, Second Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, 8 January 2007, para. 10.

II PROCEDURAL HISTORY

5. The Defence motion, was originally filed incorrectly on 15 December 2006, and re-filed, due to the Special Court's official vacation recess, on 8 January 2007.
6. Previously, on 30 November 2006, Trial Chamber II (the "Chamber"), in response to the Defence's original motion seeking similar relief,³ held that the issue was within the "administrative preserve" of the Registry, with "the right of appeal to the President". The Chamber also urged the Registry to address the issue "promptly".⁴
7. The legal consultations between Mr. Taylor and his Defence team have been prejudiced since 10 November 2006, when the ICC, without notice or consultations, interpreted various ICC Regulations, and applied them unilaterally to Mr. Taylor so as to order video surveillance of legal conferences between the SCSL accused and his Defence team.
8. The Defence initially requested the Special Court Registry to cease video surveillance of Mr. Taylor's legal consultations on 14 November 2006. On 8 December 2006, the Registry promised resolution, in consultation with the ICC, by the end of the week. More than a month later, the Registry's response, rather than presenting a resolution, is unsatisfactory and troubling in its reasoning. It demonstrates an institutional acceptance for the ceding of the Special Court's exclusive jurisdiction over Mr. Taylor which, the Defence submit, should not be adopted judicially.

III REGISTRAR'S CONCLUSIONS ARE WELCOME

9. Firstly, the Defence welcome Paragraphs 10 and 11 of the Registrar's Submissions. Rule 97 of the Special Court's Rules of Procedure and Evidence, and Rule 44 (A) of its Rules of Detention explicitly grant Mr. Taylor the right to privileged confidential communication with counsel and legal assistants. The Registry agrees that the video surveillance of Mr. Taylor's legal consultations is inconsistent with SCSL practice and regulations, and infringes Mr. Taylor's right to confidential, free and open communication with his counsel.

³ *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-133, Urgent and Public Defence Motion Requesting Removal of Camera from Conference Room, 28 November 2006.

⁴ *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.

IV REGISTRAR'S SUBMISSIONS ARE WRONGLY REASONED

10. The Defence respectfully, however, urge the President to reject the basic assumption underlying the Registrar's Submission – that Mr. Taylor's conditions of detention are subject to the ultimate authority of the ICC detention framework, albeit that they have been misapplied in this instance.

The Special Court Cannot Cede Jurisdiction to the ICC over Mr. Taylor's Conditions of Detention

11. The Registrar's Submission fails to address the Defence arguments germane to this issue, and reiterated in Paragraph 11 of the Motion (that the Memorandum of Understanding regarding Administrative Arrangements between the ICC and the Special Court signed on 13 April 2006 (the "MoU") and working practice notwithstanding, Mr. Taylor is subject to the exclusive jurisdiction of the Special Court, not the ICC).
12. Mr. Taylor remains a Special Court detainee, incarcerated on a Special Court indictment, and the Registrar, as the primary administrative authority at the Special Court, must remain responsible and accountable for Mr. Taylor's conditions of detention, including the decision to subject Mr. Taylor's legal consultations to video surveillance. He must, furthermore, be empowered to vary or enforce any decision impacting upon Mr. Taylor's detention, in order to properly discharge his obligations, *inter alia*, those set out by Rule 33(c) of the Rules of Procedure and Evidence,⁵ and so as to fulfil his Rule 32 oath of office. The Registrar's Submissions, and the current working practice, have the effect of reducing the Registrar's area of responsibility to that of a liaison officer, or a mere facilitator, wholly dependent upon the decisions and practices of an alien legal institution, namely the ICC. The practical effect of this, in the respectful submission of the Defence, is to demonstrate the *ultra vires* delegation of authority by the Special Court to the ICC.

⁵ Rule 33(c) of the Special Court's Rules of Procedure and Evidence provides that: "The Registrar mindful of the need to ensure human rights and fundamental freedoms and particularly the presumption of innocence, shall...adopt and amend rules governing the detention of persons awaiting trial...and *ensure conditions of detention.*" (emphasis added.)

The MoU, as Implemented, is Flawed

13. The Registrar's Submission confirms arguments advanced in the *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 and Modification of Mr. Taylor's Conditions of Detention*, filed 14 December 2006, that the MoU was confusing and ambiguous and had in practice, improperly granted the ICC primary authority over Mr. Taylor's conditions of detention, as well as the management of his day-to-day detention.⁶
14. To underscore the *de facto* subordination of the Special Court for Sierra Leone to the ICC, the Registrar's Submission makes no reference to Article 6.4 of the MoU, or how to reconcile the Article 6.2 responsibilities and powers of the ICC with Article 6.4's insistence that the Special Court nonetheless retains "full legal control and authority" over Mr Taylor.⁷ Instead, the Registrar's Submission apparently relies explicitly and solely on Article 6.1 of the MoU to cede supremacy over Mr. Taylor's conditions of detention to the Judges and Registrar of the ICC, including issues that go to the right to a fair trial. Such subordination is a function of a flawed MoU and / or its erroneous application by the ICC and SCSL.
15. The Defence reiterate its earlier submission that the MoU as practiced, in delegating the Special Court's jurisdiction over Mr. Taylor to the ICC, is *ultra vires* without express authorisation. The Special Court's charter documents and the relevant Security Council resolutions authorise only a shift in venue, not a delegation of jurisdiction. On the contrary, the Security Council, in shifting the venue of the trial to The Hague, explicitly reiterated that the Special Court retains "exclusive jurisdiction" over Mr. Taylor.⁸
16. Paragraphs 16 - 19 of the Registrar's Submission are thus mistaken. While the Defence respectfully concur with Paragraph 16 of the Submission (that the ICC's Pre-Trial Chamber's order should apply to all persons covered by that regulation), Mr. Taylor is not in that

⁶ *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-146, 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 and Modification of Mr. Taylor's Conditions of Detention, 14 December 2006, para. 10 ("Motion Requesting Review of MoU").

⁷ *Special Court for Sierra Leone*, Memorandum of Understanding regarding Administrative Arrangements between the ICC and the Special Court, 13 April 2006.

⁸ Motion Requesting Review of MoU, paras. 11 and 12 *citing* The Sierra Leone Ratification Act, Sierra Leone constitution, (Constitution of Sierra Leone of 1991); SC Resolution 1688 (2006) Adopted by the Security Council at its 5467th meeting, on 16 June 2006, para. 7.

position. He is not an ICC detainee. To give effect to the Registrar's Submission in these paragraphs, Mr. Taylor would only be able to extract relief from the ICC if another detainee, in effect Mr. Lubanga, would be similarly prejudiced, be inclined to appeal the prejudice, and be granted relief. Even in this fortuitous chain of events, Mr. Taylor would be denied relief or even a hearing on rights specific only to the Special Court, such as equal treatment vis-à-vis other Special Court detainees. The Defence for Mr. Taylor cannot be wholly dependent on advocates and arguments adduced before the ICC, a forum before which it has no *locus standi*.

The Current Arrangements Deny Mr. Taylor Any Effective Remedy

17. Indeed, this instance is illustrative of the fault lines in the Special Court's *ultra vires* delegation of authority to the ICC. As submitted in another motion, sub-delegation is proscribed because it "impinges on the accountability of institutions, confuses the right to effective remedy, and may lead to inconsistent policy implementation."⁹ Here, the Special Court's Registry, in disagreement with the infringement of the legal rights of a detainee in its jurisdiction, has submitted that it is powerless to redress the infringement of Mr. Taylor's rights, and should not be held accountable, primarily because of the *ultra vires* delegation of authority to the ICC.
18. The Registrar's Submission is disquieting in confirming the Defence's prior submission that Mr. Taylor, subject to the ICC's detention framework, is without effective relief.¹⁰ Contrary to Paragraph 14 of the Registrar's Submission, no "ICC legal review procedures are available", and none are referred to. Mr. Taylor has no procedural right to seek relief from the ICC, and the Registrar has pled lack of authority.
19. To be meaningful, the Special Court's jurisdiction over Mr. Taylor must allow meritorious relief for deficiencies in Mr. Taylor's treatment or conduct of his trial. Such relief, when ordered by the Special Court's Chamber or President, as appropriate, cannot be dependent on an ICC implementing order. Facially however, the Registrar's Submission requires, even if the Special Court's President were to order cessation of the video surveillance of Mr. Taylor's

⁹ Motion Requesting Review of MoU, para 12 citing *U.S. Telecom Ass'n v. F.C.C. et. al.*, 359 F.3d 554 (D.C. Cir. 2004) ("[The proscription against subdelegation to an outside agency without express authorisation] is entirely sensible.").

¹⁰ Motion Requesting Review of MoU, para 12.

legal consultations, an intervening ICC Chamber decision. Such a methodology is not only *ultra vires*, but *prima facie* impractical.

20. The Defence submit that the primacy of the Special Court in all matters related to Mr. Taylor's detention must be established. At its logical conclusion, the Registrar's reasoning, on issues related to Mr. Taylor's conditions of detention, including video surveillance of his legal consultation, render not only the Registrar, but experienced and elected judges of the Special Court passive bystanders. No judicial institution can function, and enjoy confidence among its parties, unless the judges of that institution are supreme over those within its jurisdiction.
21. The impact on consistent application of the Special Court's policy is also apparent. The Registrar's Submissions state that as a policy, the Special Court oppose video surveillance of legal consultations. Yet, Mr. Taylor, detained on the Special Court's jurisdiction, is subject to continuing video surveillance of legal consultations. Surely the Registrar must implement a system of detention, despite the shift in venue, whereby Mr. Taylor's conditions of detention are at least consistent with the Registrar's interpretation of the detainee's rights.

The Registrar's Submissions Fail to Address the Issue of Equal Treatment vis-à-vis Other Special Court Detainees

22. Of all the detainees at both the Special Court and the ICC, only Mr. Taylor is currently subject to video surveillance of his legal consultations. The Defence reiterate its earlier submission, not considered in the Registrar's Submission, that Mr. Taylor has the right to be treated equally to Special Court detainees in Freetown, consistent with Article 17 of the Special Court's Statute, which provide that "[a]ll accused shall be equal before the Special Court".¹¹
23. The Registrar's Submission in Paragraphs 16 to 18 misconstrue the issue. The ICC should be consistent in its application of its regulations. However, Mr. Taylor is entitled to equality with other Special Court's detainees, irrespective of change in venue, the SCSL's subsequent arrangements with the ICC, or Mr. Lubanga's conditions of detention.

¹¹ Motion Requesting Review of MoU, para. 14.

V CONCLUSION

24. The Defence welcome the Registrar's Submission in support of the Defence Motion that the President order discontinuation of video surveillance, but submit that the Registry's reasoning is in error. The Defence respectfully maintain that the Registrar may not defer nor delegate jurisdiction over Mr. Taylor to the ICC, notwithstanding any arrangements prompted by the change in venue. The Registrar remains responsible and accountable for ensuring that Mr. Taylor's rights to a fair trial, including the right to confidential legal consultations, are implemented in practice.
25. Thus, the Defence maintain its requests that the President, consistent with the Registrar's Submission, order the immediate removal of the surveillance camera from any conference room used for legal consultations by Mr. Taylor.
26. Pending the President's decision, the video surveillance of Mr. Taylor's legal consultations continues unabated. The Defence also reiterate the request that pending a decision, the President urgently order a temporary stay on the video surveillance of Mr. Taylor's legal consultations.
27. In addition, the annexure to the Registrar's Submission indicates that the video surveillance currently being used has the capacity to be recorded.¹² To minimize prejudice to Mr. Taylor's right to privilege communication, the Defence also respectfully seek an order for the Registrar to certify, in cooperation with the ICC detention authorities, that there exist no video recordings of past video surveillance of Mr. Taylor's legal consultations.
28. Finally, the Defence also request, in light of the current issue, that no video surveillance of Mr. Taylor be allowed in the future without the explicit authority of the President of the Special Court for Sierra Leone.

¹² See Registrar's Submission, Annex A at pg 3.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'K' followed by a horizontal line that ends in a small flourish.

Karim A. A. Khan

Lead Counsel for Mr. Charles Taylor

Dated this 23rd Day of January 2007

Table of Authorities

Special Court for Sierra Leone

1. *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-162, Registrar's Submissions on the Corrigendum to the Second Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations dated 19 December 2006, filed on 8 January 2007, pursuant to Rule 33 (B) of the Rules of Procedure and Evidence, 19 January 2007.
2. *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.
3. *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-156, Second Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, 8 January 2007.
4. *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-133, Urgent and Public Defence Motion Requesting Removal of Camera from Conference Room, 28 November 2006.
5. *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-PT-146, 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 and Modification of Mr. Taylor's Conditions of Detention, 14 December 2006.
6. *Special Court for Sierra Leone*, Memorandum of Understanding regarding Administrative Arrangements between the ICC and the Special Court, 13 April 2006.