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SCSL-03-01-PT
(3916-3926)



THE SPECIAL COURT FOR SIERRA LEONE

Case No.: SCSL-03-01-PT
Before: Hon. Justice George Gelaga King, President
Registrar: Mr Lovemore G. Munlo, SC
Date filed: 19 January 2007

THE PROSECUTOR
-v-
CHARLES TAYLOR

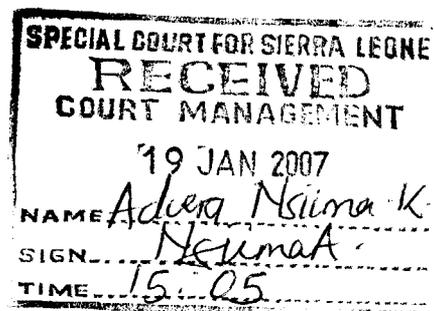
**REGISTRAR'S SUBMISSION ON THE *CORRIGENDUM* TO THE SECOND DEFENCE
MOTION REQUESTING CESSATION OF VIDEO SURVEILLANCE OF LEGAL
CONSULTATIONS DATED 19 DECEMBER 2006, FILED ON 8 JANUARY 2007,
PURSUANT TO RULE 33 (B) OF THE RULES OF PROCEDURE AND EVIDENCE**

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. On 10 November 2006, the Detention Centre of the International Criminal Court (the "ICC") installed a video surveillance camera in the conference rooms available legal consultations of the Special Court Detainee Charles Taylor.
2. On the same day, in the case of *Thomas Lubanga Dyilo*, the ICC Pre-Trial Chamber in charge of that case issued an oral decision, ordering the Registrar of the ICC to stop using the camera during "interviews between Mr Lubanga and his counsel or the assistants".¹ Mr Lubanga is detained at the same Detention Centre as the Special Court Detainee Charles Taylor.
3. On 14 November 2006, the Defence of Mr Taylor ("the Defence") raised its concern to the Special Court Registry regarding the camera-video surveillance.
4. On 17 November 2006, the Registry of the ICC denied the Defence's request to cease video-camera surveillance on the ground that the decision issued by the ICC Pre-Trial Chamber in the *Lubanga* case "only concern[ed] the case of Mr Lubanga Dyilo and the order cover[ed] the period of his confirmation hearing."²
5. On 28 November 2006, the Defence filed an Urgent and Public Motion Requesting Removal of Camera from Conference Room before Trial Chamber II. On 30 November 2006, Trial Chamber II denied the Defence Motion, finding that "the detention issues raised in the Motion are within the administrative preserve of the Registrar, with the right of appeal to the President, and that therefore the Motion is premature." The Trial Chamber urged the Chief of Detention and the Registrar to deal with the matter promptly in accordance with Rule 59 (C) of the Rules of Detention.
6. Subsequently, the Special Court Deputy Registrar held a meeting in The Hague with the ICC Director, Division of Court Services, on 5 December 2006. Following that meeting, the ICC Director provided information on types of supervision applied at the ICC Detention Centre in a letter dated 15 December 2006.³ In this letter, the Director, Division of Court Services, stated that the use of video surveillance with no audio facilities or recording during privileged

¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Confirmation of Charges Hearing, Transcript 10 November 2006, p. 34 lines 6-12.

² Email from Ms Diarra, Legal Coordinator, Division of Court Services, ICC, to Mr Sahota, dated 17 November 2006.

³ International Criminal Court, Letter from Mr Dubuisson, Director, Division of Court Services, to Mr von Hebel, Deputy Registrar of the Special Court, 15 December 2006, attached to this submission as **Annex A**.

communications was in accordance with Regulation 183 (1) of the Regulations of the ICC Registry. The Letter further stated that the decision of the ICC Pre-Trial Chamber in the *Lubanga* case was not applicable to the case of Mr Taylor.

- 7. On 15 December 2006, the Defence submitted before Trial Chamber II a Second Motion Requesting Cessation of Video-Surveillance of Legal Consultations.
- 8. On 19 December 2006, the Defence submitted a *Corrigendum* to the Second Motion Requesting Cessation of Video-Surveillance of Legal Consultations. In the submission, the Defence noted that the document was inadvertently addressed to Trial Chamber II and requested that a new cover page, referring the matter to the President, be attached to the Motion and that it be immediately put before the President.
- 9. In accordance with Rule 33 (B) of the Rules of Procedure and Evidence, the Registry submits the present brief to the President.

II. Legal finding

a. Applicable Law

- 10. The principle of privileged communication between a lawyer and his client is enshrined in the basic legal instruments of the Special Court and the ICC:

Rule 97 of the Rules of Procedure and Evidence of the Special Court states:

All communications between lawyer and client shall be regarded as privileged [...].

Rule 44 (A) of the Rules of Detention of the Special Court states:

Each detainee shall be entitled to receive visits from his Counsel and Legal Assistant and to communicate fully and without restraint by letter or telephone with his Counsel and Legal Assistant [...]. All such communications shall be privileged, unless otherwise ordered by a Judge or a Chamber.

Rule 73 of the Rules of Procedure and Evidence of the ICC states:

[...] communications made in the context of the professional relationship between a person and his legal counsel shall be regarded as privileged.

- 11. Based on the principle of privileged communication, Rule 44 (D) of the Rules of Detention of the Special Court provides:

Visits from Counsels and Legal Assistants shall be conducted in the sight of but not within the hearing of the staff of the Detention Facility.

The same principle is foreseen in Regulation 97(2) of the Regulations of the ICC:

All communication between a detained person and his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68 and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre.

12. Unless exceptional circumstances apply - “in case of danger to the security and good order of the Detention Facility or danger to the health and safety of a Detainee or any other person”⁴ and for a limited period of fourteen days, renewable by the Registrar⁵ – the applicable Rules of the Special Court (Rules of Procedure and Evidence and Rules of Detention) are silent on the use of video-cameras as a type of supervision of communication with detainees, be it privileged or non-privileged communication. In contrast, the Regulations of the Registry of the ICC do mention the use of video-camera surveillance as a type of supervision of visits to detainees. Regulation 183 (1) provides:

Visits shall be conducted within the sight and hearing of the staff of the detention centre and shall be monitored by video surveillance. In addition to visits falling within regulations 97, sub-regulation 2 and 98, sub-regulation 2, of the Regulations of the Court, visits from representatives of the independent inspecting authority and officers of the Court, shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre. (...).

b. Procedure applicable to the Special Court Detainee Charles Taylor

13. Article 6.1 of the Memorandum of Understanding regarding Administrative Arrangements between the ICC and the Special Court signed on 13 April 2006 (the “MOU”) provides, *inter alia*, that:

The relevant regulations and agreements concluded by the ICC setting out the operational framework of the ICC Detention Centre including but not limited to the Regulations of the ICC and of the Registry of the ICC shall apply *mutatis mutandis* to the Special Court Detainee.

14. Therefore, for the interpretation and application of ICC Rules of Detention and standards, ICC legal review procedures are available.
15. The ICC Pre-Trial Chamber, in the *Lubanga* case, ruled on video supervision of visits, in reference to Regulation 97 (2) of the Regulations of the ICC. The Pre-trial Chamber stated:

Regarding the presence of a camera in the room in which Mr Flamme talks with Mr Thomas Lubanga Dyilo, the Chamber orders the Registrar to stop using this camera and not to use it in interviews between Thomas Lubanga

⁴ Article 24 (A) of the Rules of Detention of the SCSL.

⁵ Article 24 (A) and (B) of the Rules of Detention of the SCSL.

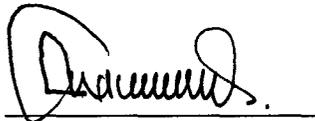
Regulation 183 (1), first sentence, is not applicable to the privileged communications between a detainee and his counsel.

21. As submitted above, Regulation 183 (1), first sentence, only relates to non-privileged communication. Regulation 183 (1), second sentence, relates to privileged communication, since it contains reference to Regulation 97 (2) of the Regulations of the Court related to Communication with Defence Counsel. Yet, the express reference to video-surveillance is only contained in Regulation 183 (1) first sentence. Hence, if video-surveillance was to be applicable to both privileged and non-privileged communication, reference to the use of a video-camera would have been either included in both sentences or omitted from Regulation 183 (1) as a whole. Furthermore, if the words "*within the sight [...] of the staff of the detention*" contained in the second sentence of the Regulation (applicable to privileged communication) encompassed the use of video-surveillance, the express reference to video-surveillance in the first sentence would be redundant. Hence, it is submitted that video-surveillance only relates to non-privileged communications, as referred to in Regulation 183 (1) first sentence.

c. Concluding Remarks

22. From the foregoing, it is clear that, despite a judicial interpretation of Regulation 97 (2) of the Regulations of the ICC, the two detainees present at the ICC Detention Centre and subject to the above-mentioned Regulations, are not treated equally with respect to an essential provision of their detention regime that relates to privileged communication with Defence Counsel. It is therefore prayed that the above-mentioned judicial interpretation of Regulation 97 (2) of the Regulations of the ICC should be equally applied to the Special Court Detainee Charles Taylor.
23. In view of the above, it is further prayed that the use of video-surveillance of the legal consultations of the Detainee Charles Taylor with his Counsel be discontinued.

Done in Freetown, this 19th day of January 2007



Lovemore G. Munlo SC
Registrar

ANNEX A

**Letter from Mr Dubuisson, Director, Division of Court Services of the International
Criminal Court, to Mr von Hebel, Deputy Registrar of the Special Court
dated 15 December 2006**

3923



Mr. Herman von Hebel
Deputy Registrar
Special Court for Sierra Leone
Jomo Kenyatta Road
Freetown – Sierra Leone

Reference: DS/186/MD/bbs

Date: 15 December 2006

Dear Mr. von Hebel,

Further to our meeting of last week, in which you requested some information on the different types of supervision applied at the ICC Detention Centre, please note that pursuant to the Regulations of the Court and the Regulations of the Registry, the communications regime in place is as follows:

1. Privileged and non-privileged communications:

a. General

A regular regime of 'Non-Privileged communications' within the meaning of the Regulations of the Court and the Regulations of the Registry with respect to detained persons is to be understood as:

- i) The supervision of visits within the sight and hearing of the staff of the ICC Detention Centre, the monitoring of visits through **video surveillance** and the **prohibition to pass an item** to a detained person during a visit;
- ii) The **passive monitoring of telephone calls**;
- iii) The review of items of incoming and outgoing correspondence.

In addition to this, a specific regime of 'Non-Privileged communications' following an order by the Registrar entails the following:

- i) The monitoring of visits in the form of **recording of the conversation** held during a visit;
- ii) The **active monitoring of telephone calls**.

b. Communication with counsel and assistants to counsel

Every detained person is entitled to **privileged communication** with his/her counsel with respect to visits, telephone calls and correspondence. Concerning communications with the "assistants" to counsel (Regulation 97, paragraph 2 of the Regulations of the Court), all rights with respect to communications afforded to counsel are extended to their assistants. This principle **applies to all communications** (during visits, telephone calls and correspondence) between Mr. Taylor and his counsel.

c. Communication with investigators

An investigator for the defense team **does not hold a legal entitlement to privileged communications** with the detained person. In practice, any type of communication between an investigator and a detained person, in the form of visits, correspondence, and telephone calls is monitored accordingly. However, **when investigators for the defense team are accompanied by counsel or assistants to counsel** - within the meaning of Regulation 97, paragraph 2 of the Regulations of the Court - during a visit, communication that takes place in this context is **privileged by principle** and as recognized by international jurisprudence. This is currently applicable with respect to Mr. Taylor.

2. **Visits:**

a. Supervision of visits in terms of monitoring by video surveillance

In conformity with Regulation 183, **paragraph 1** of the Regulations of the Registry **visits for Mr. Taylor are conducted within the sight and hearing of the staff of the ICC Detention Center**. However, visits from his counsel and legal assistants (that is to say visits of persons who have 'privilege' as per Regulation 97, paragraph 2 of the Regulations of the Court, visits from diplomatic or consular representatives (and of other persons described in Regulation 98, paragraph 1 of the Regulations of the Court), and visits from **officers of the Court** are conducted only **within the sight but not the hearing** of the staff of the ICC Detention Centre¹. In practice, this means that during a non-privileged visit a member of the custodial staff physically sits inside the visit room or outside on the corridor where the door of the visit room is left open. However during a privileged visit, the member of the custodial staff sits outside the visit room and the door is closed, which means that he

¹ With respect to visits from the **independent inspecting authority**, and in accordance with the agreement concluded between the ICC and the ICRC, such visits are conducted without the sight and earshot of the staff members of the Detention Centre (Article 8, paragraph 1 of the Agreement).

or she can observe the meeting through a glass panel in the door and be able to respond to any type of emergency that arises but is not able to listen to what is said during the meeting.

Moreover, Regulation 183 further stipulates that visits '*shall be monitored by video surveillance*'. In this regard, the Regulation does not distinguish or differentiate between privileged visits, and non-privileged visits, therefore, the video surveillance equipment is, in general, used in the case of all visits (except for private visits as referred to in Regulation 185 of the Regulations of the Registry). Moreover, the approach of the ICC Registry vis-à-vis Regulation 183 is that video surveillance means only by surveillance camera but not the video recording nor the audio recording of any visit. The signal of the visit being monitored is linked / forwarded only to the ICC-wing staff booth and furthermore, the camera displays a panoramic view of the interview room for security and safety purposes. In this respect whereas the Regulations do not stipulate a legal requirement to keep a video or audio recording of the visits through the surveillance camera, the equipment currently in use does have the capacity to do visual recording although this has been disabled in order to comply to the letter of Regulation 183. The camera has no audio facility.

At this point in time, the ICC Detention Centre manages a situation whereby the visits regimes for Mr. Taylor and for Mr. Lubanga differ somewhat. This stems from the fact that the oral decision by Pre-Trial Chamber I of 10 November 2006 (Ref: Transcript ICC-01-04-01-06-T-32-EN[10Nov2006Edited] 1-57 DB PT) Page 34 Line 6 to line 12), has ordered the Registrar to stop using the camera during '*interviews between Thomas Lubanga Dyilo and his counsel or the assistants*'. This particular decision by Pre-Trial Chamber I is currently only applicable during the pre-trial phase of Mr. Lubanga² and as an ICC Chamber decision with respect to a specific case, it has not been extended to Mr. Taylor.

b. Monitoring of visits by audio means

In terms of monitoring of visits, within the meaning of Regulation 184 of the Regulations of the Registry, such measure entails the recording of the conversation of a non-privileged visit by way of audio means for which a mobile audio recording unit would be used. Such measure would be required if there are reasonable grounds to believe that there is an attempt by a detained person to be engaged in activities that will result in the conduct listed under Regulation 184, paragraph 1 of

² In accordance with Regulation 53 of the Regulations of the Court, the written decision of the Pre-Trial Chamber on whether or not the charges are confirmed shall be delivered within 60 days from the date the confirmation hearing ends. With respect to Mr. Lubanga, once the Pre-Trial Chamber delivers its findings on 29 January 2007 and if a Trial Chamber is constituted, and thus marking the end of the Pre-trial phase, monitoring through video surveillance with respect to Mr. Lubanga would be resumed. If the case goes to trial this would not preclude the Trial Chamber from issuing a new order in this regard.

the Regulations of the Registry. Prior to any implementation of any such measure, the Chief Custody Officer must first **seek the permission of the Registrar** to do so, and furthermore, the detained person and his/her counsel would be notified of any such monitoring order prior to the visit.

Thus far, circumstances **have not arisen** to invoke the operation of Regulation 184, and visits for Mr. Taylor are not monitored in this manner.

3. Calls:

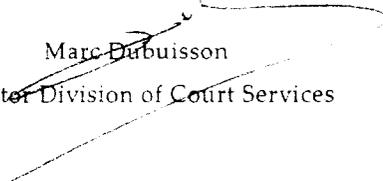
With regard to calls, there is a differentiation between passive monitoring (Regulation 174 of the Regulations of the Registry) and active monitoring (Regulation 175 of the Regulations of the Registry) of telephone calls. **Passive monitoring** of calls means that all telephone conversations of a detained person, other than privileged, **are recorded but not listened to**. This system is currently applicable in the case of Mr. Taylor. Active monitoring of telephone calls means that there is **recording and simultaneous listening** of non-privileged telephone calls of detained persons. Currently, Mr. Taylor is not subject to active monitoring of telephone calls.

4. Incoming and outgoing correspondence:

The procedure entails that the Chief Custody Officer reviews such items, with the exceptions stipulated under Regulation 169, paragraph 1 of the Regulations of the Registry. This procedure is currently in place with respect to Mr. Taylor. Should a visitor wish to bring an item intended for a detained person, the item is to be passed to a member of the custodial staff to be treated in accordance with the established procedure for incoming mail.

I hope to have satisfactorily informed you of the operations in place with respect to the communications regime applicable at the ICC Detention Centre and remain at your disposal for further clarification.

Best regards,


Marc Dubuisson
Director, Division of Court Services