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SCSL-03-01-PT
(3297 - 3302)



THE SPECIAL COURT FOR SIERRA LEONE

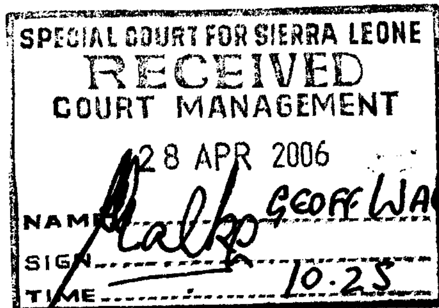
CASE NO. SCSL-03-01-PT

IN TRIAL CHAMBER II

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo, SC

Date Filed: 27 April 2006




THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

# DEFENCE REPLY TO PROSECUTION RESPONSE TO "MOTION FOR AN ORDER THAT NO CHANGE OF VENUE FROM THE SEAT OF THE COURT IN FREETOWN BE ORDERED WITHOUT THE DEFENCE BEING HEARD ON THE ISSUE AND MOTION THAT THE TRIAL CHAMBER REQUEST THE PRESIDENT OF THE SPECIAL COURT TO WITHDRAW THE REQUESTS REPORTEDLY MADE TO (1) THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS TO PERMIT THAT THE TRIAL OF CHARLES GHANKAY TAYLOR BE CONDUCTED ON ITS TERRITORY & (2) TO THE PRESIDENT OF THE ICC FOR USE OF THE ICC BUILDING AND FACILITIES IN THE NETHERLANDS DURING THE PROPOSED TRIAL OF CHARLES GHANKAY TAYLOR."

Office of the Prosecutor:

Mr. Desmond de Silva QC
Mr. Christopher Staker
Mr. James C. Johnson
Ms. Brenda Hollis

Counsel for Mr. Charles Taylor:

Mr. Karim A. A. Khan

## I. INTRODUCTION

1. On 25 April the Prosecution filed its Response ("the Response") to an urgent Defence Motion ("the Defence Motion") requesting, *inter alia,* that no change of venue be ordered from the seat of the Special Court for Sierra Leone ("the Court") in Freetown in this matter without the Defence being heard on the issue. The Defence hereby submits its Reply ("the Reply").

2. It is submitted that the Prosecution Response is unfortunately misconceived and highly objectionable.

## II. ARGUMENT

3. At paragraph 25 of the Response the Prosecution feel "compelled" to allege that the Accused has not acted in good faith in instructing counsel in this matter. The Prosecution cite "individuals allegedly speaking on behalf of the accused" and "given the prior pronouncements allegedly made by the Accused or on his behalf, the Prosecution is concerned this instruction to counsel may be in bad faith and made with the sole aim of using the processes of the Special Court for a political purposes."

4. Whilst the Prosecution's submissions may play well with the public profile they wish to project of the Accused, the comments are highly inflammatory, untenable and disclose, in the Defence's respectful submission, a singular lack of judgement.

5. Firstly, the Prosecution simply have no business in seeking to go behind the instructions a client gives his counsel. This is subject to legal professional privilege as the Prosecution should have been expected to know. Secondly, counsel take instructions from a client and advice on legal options - and in doing so all counsel must act in accordance with the law, the relevant rules of professional conduct and in the best interests of the client. If the Prosecution have any objection to Defence counsel's filing in this matter, they should object to counsel's conduct, rather than seek to hide behind the Accused.

6. The Prosecution intrusion into the area of legal professional privilege is as startling as it is unwarranted. What adds to the rather bizarre nature of the

Prosecution's comments is the lack of evidential scrutiny the submission discloses. The Prosecution seek to hold an accused accountable to comments attributed to him without any evidence that the accused holds such views or the context in which such purported views were conveyed.

7. It would not have escaped the attention of the Prosecution, one would hope, that all the comments attributed to "individuals allegedly speaking on behalf of the Accused" were made in the immediate aftermath of the Accused's transfer to the seat of the Court and *prior* to the provisional assignment of counsel to Mr. Taylor. Since legal representation has been afforded to Mr. Taylor no press comments have been issued by counsel on behalf of the Accused. It cannot be reasonably said that any bad faith is involved directly or indirectly by counsel seeking the protection of the Trial Chamber to safeguard the rights of his client.

8. The Prosecution has, moreover, either misrepresented or failed to comprehend the Motion at the most basic level. The Prosecution submit that "the Accused has apparently instructed counsel to submit a motion requesting that his trial be held in Sierra Leone" (Prosecution Response, paragraph 25). This is simply not the case and perhaps results from the misguided attempt by the Prosecution to go behind instructions to counsel. The Motion is silent on the issue of venue. The primary submission made in the Motion is that the Defence have a *right to be heard* before a change of venue is ordered. It would be premature for the Defence to take a firm position on venue without knowing the precise reasoning and basis for the Requests made by the President of the Court. It is simply not known what the reasons are, or how credible is the evidence relied upon for the proposed change in venue.

9. Similarly, the Defence is not currently aware of the conditions, if any, that the President will require to be included in any host country agreement. Important, in that regard, is the right that individuals who are called as Defence witnesses at trial be issued with visas for that purpose. In addition, the Defence attach great importance to the provision of visas to friends and particularly close family, in order to visit the Accused during all phases of proceedings. Given the presumption of liberty, and the constraints that detention places upon a

person, it is submitted that family support in what is very likely to be a long case is essential. Again, until the minimum conditions required by the President are known, the Defence decline to take a position on the proposed venue itself. Such a position would be precipitous given that the Defence is unaware of either the real basis of the Requests or what is envisioned regarding important practical arrangements which could impact on the rights of the Accused.

10. It is not clear what the fist attachment to the Prosecution Response (Nanjit, Susan, "Concern over Taylor trial", *Business in Africa inline,* 5 April 2006), has to do with the Prosecution Response other than be a collection of invective and personal insult against the Accused in this case. It is a collection of unbalanced and partisan insults which was unnecessary to the Response. It does the Prosecutor no credit, in the respectful submission of the Defence, to include such a diatribe in its Response.

11. In any event, the Prosecution Response does not, it is submitted, displace the arguments raised in the Motion and the Defence rely upon the original Motion in all material particulars.

12. The Prosecution submit that "nothing in the Agreement, Statute or Rules requires the President, when acting under Rule 4, to give preference to a particular location, for example, in this case, a location in West Africa." (Response, para 9).

13. This was in response to the Defence reference in paragraph 12 of the Motion to the Secretary-General's Report which included a stated preference for a West African country, in the event an alternative seat was required. The Secretary General's Report may be appropriately considered part of the context of the Statute of the Court. (See, in a similar context ICTY case of *Prosecutor v Tadic,* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10 1995, para 18: *"The context of the [ICTY] Statute is indicated in the Report of the Secretary General which contained a draft Statute..."* Also see *Prosecutor v Kordic and Cerkez,* Decision on the Joint Defence Motion to strike out Paragraphs 20 and

22 and all references to 7(3) as providing an alternative basis for imputing criminal responsibility, March 2, 1999, para 5: Secretary-General's Report "*an important part of the legislative history of the Tribunal*" to which recourse may appropriately be had.) This is particularly so, given that the Agreement and Statute of the Court were themselves appended to the Secretary-General's Report.

14. The Prosecution also take issue with the Defence reference by analogy to the Rules applicable in the International Criminal Court (ICC). It is, of course, accepted that the Court and the ICC are separate legal institutions. In areas, however, where the application of Court's Rules of Procedure and Evidence are unclear or previously undefined, it is submitted that recourse to the ICC regime may appropriately be had as expressive of the views of a great many countries on an issue germane to the Court for Sierra Leone. At the very least, the ICC regime can inform the practice and decisions of the Court. Referring to the Statute of the ICC, an ICTY Trial Chamber has held it:

> "*may, in many areas, be regarded as indicative of the legal views ie* opinion juris *of a great number of States. Resort may be had* cum grano salis *to these provisions to help elucidate customary international law. Depending upon the matter at issue, the Rome Statute may be taken to restate, reflect, or clarify customary rules or crystallise them ,whereas in some areas it creates new law or modifies existing law.*" (*Prosecutor v Furundzija,* December 10, 1998, para 227)

15. The ICC Procedure is clear and transparent. Whilst the Prosecution submit that the arguments of the Defence and the views of Professor Otto Trifterrer, a leading publicist in the area, should be discounted, the language of the ICC Rules are clear. In so far as they represent an open, transparent mechanism for cases where a change of venue may be considered desirable, they merit, in the Defence's respectful submission, very careful consideration.

16. In order to avoid *ex parte* or, extra judical communications relating to the place of proceedings, the ICC regime puts in place a mechanism in which the factors motivating such requests are put in a legal context. The ICC regime clearly evidences an intention that issues relating to venue should not be the result of decisions behind closed doors to which the Defence are hapless

spectators, nor should they be purely political. By requiring that an application from the Prosecution or Defence or a recommendation by the majority of Judges of the Court **be filed** the ICC regime ensures transparency in which the Defence have a voice and, at the very least, the precise arguments advanced in favour of the proposed change of venue. The Prosecution Response which seeks to deny the Defence a voice on the issue of venue should, it is submitted, be rejected on the merits.

17. Contrary to the Prosecution's assertions at paragraphs 21-24 of the Response, the consequence of Rule 100 of the ICC Rules of Procedure and Evidence is clear. It provides an avenue in which the parties can be apprised of the factual background of the application or recommendation and a right of response – which is the same as a right to be heard on the issue.

18. Regulation 24 of the ICC Regulations of the Court provides that "*The Prosecutor or the defence may file a response to* ***any document*** *filed by any participant in the case in accordance with the Statute, rules, these Regulations and any order of the Chamber.*" Accordingly, there is a mechanism by which the application or recommendation regarding change of venue is filed and a consequent right for the Prosecution or Defence to respond to the application or recommendation.

19. The Prosecution have, it is respectfully submitted, failed to advance any cogent reasons for opposing the same transparency being adopted by the Court.

## III. CONCLUSION

20. In the premises, it is submitted that the Defence Motion dated 06 April 2006 be granted for the reasons advanced therein.

Respectfully submitted,

Karim A. A. Khan (Defence Counsel for Charles Taylor)