Sierra Leone, Special Court Ruling on Immunity for Taylor

[**Source**: Special Court for Sierra Leone, *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, 31 May 2004, available on Decision http://www.rscsl.org/]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

SPECIAL COURT FOR SIERRA LEONE IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding Justice George Gelaga King Justice Renate Winter

Registrar: Robin Vincent Date: 31 May 2004

PROSECUTOR Against CHARLES GHANKAY TAYLOR

Case Number SCSL-2003-01-I

DECISION ON IMMUNITY FROM JURISDICTION [...]

I. INTRODUCTION: PROCEDURAL AND FACTUAL HISTORY

1. This is an application by Mr. Charles Taylor, the former President of the Republic of Liberia, to quash his Indictment and to set aside the warrant for his arrest on the grounds that he is immune from any exercise of the jurisdiction of this court. The Indictment and arrest warrant were approved by Judge Bankole Tompson on 7 March 2003, when Mr. Taylor was Head of State of Liberia. At the request of the Prosecutor on 4 June 2003, they were transmitted to the appropriate authorities in Ghana, where Mr Taylor was visiting, but proved ineffective to secure his apprehension. [...]

2. Mr. Taylor was elected President of the state of Liberia in 1997. [...]
3. Mr Taylor remained Head of State until August 2003, his tenure of office covering most of the period over which the Special Court has temporal jurisdiction, pursuant to its mandate to try those primarily responsible for the war crimes and crimes against humanity that were committed in Sierra Leone since 30 November 1996.
4. The Indictment against Mr. Taylor contains seventeen counts. It accuses him of the commission of crimes against humanity and grave breaches of the Geneva Conventions, with intent "to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the state". It is alleged that he "provided financial support, military training, personnel, arms, ammunition and other support and encouragement" to rebel factions throughout the armed conflict in Sierra Leone. The counts variously accuse him of responsibility for "terrorizing the civilian population and ordering collective punishment", sexual and physical violence against civilians, use of child soldiers, abductions and force labour, widespread looting and burning of civilian property, and attacks on and abductions of UNAMSIL peacekeepers and humanitarian assistance workers. In short, the prosecution maintains that from an early stage and acting in a private rather than an official capacity he resourced and directed rebel forces, encouraging them in campaigns of terror, torture and mass murder, in order to enrich himself from a share in the diamond mines that were captured by the rebel forces.

II. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

1. The Applicant argues first that:
    a. Citing the judgment of the International Court of Justice ("ICJ") in the case between the *Democratic Republic of Congo v Belgium* ("Yerodia case", [**See** ICJ, Democratic Republic of the Congo v. Belgium]) incumbent Head of State at the time of his indictment, Charles Taylor enjoyed immunity from criminal prosecution;
    b. Exceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter ("UN Charter");
    c. The Special Court does not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court;
    d. The indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution. [...]
2. The Applicant also puts forward a second argument that:
    a. Citing the *Lotus* case [**Available on** http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf] the principle of sovereign equality prohibits one state from exercising its authority on the territory of another.
    b. Exceptionally, a state may prosecute acts committed on the territory of another state by a foreigner but only where the perpetrator is present on the territory of the prosecuting state.
    c. The Special Court's attempt to serve the Indictment and arrest warrant on Charles Taylor in Ghana was a violation of the principle of sovereign equality.
3. The Applicant seeks :
    a. Orders quashing the Indictment, arrest warrant and all consequential orders.
    b. Interim relief restraining the service of the Indictment and arrest warrant on Charles Taylor.

B. Prosecution Response

1. The Prosecution submits in relation to the first argument of the Defence that: [...]
    a. The *Yerodia* case concerns the immunities of an incumbent Head of State from the jurisdiction of the courts of another state.
    b. Customary international law permits international criminal tribunals to indict acting Heads of State and the Special Court is an international court established under international law.
    c. The lack of Chapter VII powers does not affect the Special Court's jurisdiction over Heads of State. The International Criminal Court ("ICC"), which does not have Chapter VII powers, explicitly denies immunity to Heads of State for international crimes.
2. In response to the Applicant's second argument, the Prosecution asserts that:
    a. Charles Taylor has been indicted in accordance with Article 1 (1) of the Special Court Statute, for crimes committed in the territory of Sierra Leone and not the territory of another state.
    b. The transmission of documents to Ghanaian authorities could not violate the sovereignty of Ghana. [...]

I. Submissions of the Amici Curiae

(i) Professor Philippe Sands

1. [...] He concludes as follows:
    a. In respect of international courts, international practice and academic commentary supports the view that jurisdiction may be exercised over a serving Head of State in respect of international crimes. Particular reference may be had to the *Pinochet* cases [**See** House of Lords, available on http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm] and the *Yerodia* case.
    b. In respect of national courts a serving Head of State is entitled to immunity even in respect of international crimes
    c. The lawfulness of issuing an arrest warrant depends on the Court's powers and attributes and the legal basis upon which it was established. The Special Court is not part of the judiciary of Sierra Leone and is not a national court. Rather, it is an international court established by treaty with a competence and jurisdiction that is similar to the ICTY, ICTR and ICC, and it has the characteristics associated with classical international organisations.
    d. There is nothing in the Special Court Agreement or Statute to prevent the Court from seeking to exercise jurisdiction over offences committed on the territory of Sierra Leone by the Head of State of Liberia.
    e. The Special Court did not violate the sovereignty of Ghana by transmitting the arrest warrant for Taylor but Ghana was not obliged to give effect to such a warrant.
    f. A former Head of State is not entitled to claim immunity ratione materiae before an international criminal court in respect of international crimes.

(ii) Professor Diane Orentlicher

1. [...]

a. In the *Yerodia* case, the ICJ distinguished the law applicable in the case of an attempt by a national court to prosecute the foreign minister of another state, from the rule embodied in the statutes of international criminal tribunals. For the purposes of the distinction between prosecutions before national and international criminal courts recognised by the ICJ and other authorities, the Special Court is an international court and may exercise jurisdiction over incumbent and former heads of state in accordance with its statute.
b. A distinction must be drawn between immunity *ratione personae* (procedural immunity) which attached to the status of certain incumbent officials and operates as a procedural bar to the exercise of jurisdiction over them by the courts of another state, and immunity *ratione materiae* (substantive immunity) which operates to shield from the scrutiny of domestic courts the official conduct of foreign state officials. Although substantive immunities shield the official conduct of heads of state after such persons cease to hold office, this type of immunity is not available in respect of the crimes for which Taylor has been indicted.

(iii) African Bar Association

1. The amicus brief of the African Bar Association raises a number of issues, the third of which, dealing with the question of the validity of the Indictment against Taylor, is relevant to this Preliminary Motion. Making reference to the case of United States of America v. Noriega [**See** United States, United States v. Noriega], the *Pinochet* case, the *Milosevic* case [**See** http://www.icty.org/], the 1993 World Conference of Human Rights and the Rome Statute of the ICC [**See** The International Criminal Court]. The African Bar Association submits that Taylor enjoys no immunity for international crimes alleged to have been committed by him in Sierra Leone.

HEREBY DECIDES AS FOLLOWS:

III. CONSIDERATION OF THE MOTION

1. At the time of his indictment (7 March 2003) and of its communication to the authorities in Ghana (4 June 2003) and of this application to annul it (23 July 2003), Mr Taylor was an incumbent Head of State. As such, he claims entitlement to the benefit of any immunity asserted by that state against exercise of the jurisdiction of this Court. These bare facts raise the issue of law that we are called upon to decide, namely whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving Head of State. [...]

V. THE LEGAL BASIS OF THE SPECIAL COURT FOR SIERRA LEONE

1. The Special Court is established by the Agreement between the United Nations and Sierre Leone which was entered into pursuant to Resolution 1315 (2000) [**See** http://www.un.org] of the Security Council for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone. [...]

VI. IS THE SPECIAL COURT AN INTERNATIONAL CRIMINAL TRIBUNAL?

1. Although the Special Court was established by treaty, unlike the ICTY and the ICTR which were each

established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone. Article 39 empowers the Security Council to determine the existence of any threat to the peace. In Resolution 1315, the Security Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.

2. Much issue had been made of the absence of Chapter VII powers in the Special Court. A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court. It is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to "decide what measures not involving the use of armed force are to be employed to give effect to its decision;" an (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures. The decisions referred to are decisions pursuant to Article 39. Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41, or Article 48, should subsequent events make that course prudent may be made subsequently to establishment of the court. It is to be observed that in carrying out its duties [...] under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.
3. By reaffirming in the preamble to Resolution 1315 "that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations that the *international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law*", it has been made clear that the Special Court was established to fulfil an international mandate and is part of the machinery of international justice.
4. We reaffirm, as we decided in the Constitutionality Decision that the Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone. This conclusion disposes of the basis of the submissions of counsel for the Applicant on the nature of the Special Court.
5. For the reasons that have been given, it is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assited [*sic*] the court as *amicus curiae* as follows:
    a. The Special Court is not part of the judiciary of Sierra Leone and is not a national court.
    b. The Special Court is established by treaty and has the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).
    c. The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of ICTY and the ICTR and the ICC, including in relation to the provisions confirming the absence of

entitlement of any person to claim of immunity.

d. Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State.

6. We come to the conclusion that the Special Court is an international criminal court. The constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable.

VII. THE SPECIAL COURT AND JURISDICTIONAL IMMUNITY [...]

1. Article 6(2) of the Statute provides as follows:

The official position of any accused persons, whether as Head of State or Government or as responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.

1. Article 6(2) is substantially in the same terms as Article 7(2) of the Statute of the ICTY and Article 6(2) of the Statute of the ICTR. Article 27(2) of the Statute of the International Criminal Court (ICC) [**See** The International Criminal Court [Part A., Art. 27]] which entered into force on 1 July 2002 provides that:
2. A forerunner of Article 6(2) of the Statute and of similar provisions in the Statutes of the ICTY, ICTR and ICC is Article 7 of the Charter of the International Military Tribunal ("the Nuremberg Charter") which provides that:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

1. The General Assembly by resolution 177(II) directed the International Law Commission to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal". The International Law Commission proceeded in carrying out the directive on the footing that the General Assembly had already affirmed the principles recognized in the Nuremberg Charter and in the Judgment of the Tribunal and that what it was required to do was merely to formulate them. On that basis it formulated a provision from Article 7 of the Nuremberg Charter, Principle III as follows:

The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law.

As long ago as 12 December 1950 when the General Assembly accepted this formulation of the principle of international law by the International Law Commission, that principle became firmly established. [...]

1. More recently in the Yerodia case [**See** ICJ, Democratic Republic of the Congo v. Belgium], the International Court of Justice upheld immunities in national courts even in respect of war crimes and crimes against humanity relying on customary international law. That court, after carefully examining "state practice, including national legislation and those few decisions of national higher courts such as

the House of Lords or the French Court of Cassation", stated that it "has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign affairs, where they are suspected of having committed war crimes or crimes against humanity". It held:

although various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.

But in regard to criminal proceedings before "certain international criminal courts", it held:

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts*, where they have jurisdiction. Examples include the International Criminal tribunal for the former Yugoslavia and the International Criminal tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's statute expressly provides, in Article 27, paragraph 2, that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person."

1. A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from international community. Another reason is as put by Professor Orentlicher in her amicus brief that:

states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.

1. Be that as it may, the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. We accept the view expressed by Lord Slynn of Hadley that

"there is ... no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before international tribunals." [45]

1. In this result the Appeals Chamber finds that Article 6(2) of the Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court. We

hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone. [...]

2. Finally, the Applicant contended that the issue of the arrest warrant and its transmission to Ghana was an infringement of the sovereignty of Ghana. That issue should properly be raised by Ghana rather than the Applicant and the forum which Ghana has for raising the issue, if it so decides, is not the Special Court which is a court of criminal proceedings against individuals. It must be observed that a warrant of arrest transmitted by one country to another is not self-executing. It still requires the co-operation and authority of the receiving state for it to be executed. Other than a situation in which the receiving state has an obligation under Chapter VII of the United Nations Charter or a treaty obligation to execute the warrant, the receiving authority has no obligation to do so. That state asserts its sovereignty by refusing to execute it. [...]

VIII. DISPOSITION

1. For the reasons we have given this Motion must be dismissed.

Done at Freetown this thirty-first day of May 2004

Justice Ayoola

Justice King

Justice Winger

Presiding

Footnotes

- [45] See R v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet, House of Lords, 25 November 1998 [**Available on** http://www.publications.parliament.uk]

Discussion

1. What are the differences between the Special Court for Sierra Leone, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court? Do you consider that the Special Court for Sierra Leone is an international court?
2. a. If the Special Court for Sierra Leone were considered as a national court, would it be impossible for it to prosecute an incumbent head of state? Why? What about a former head of state? And if this head of state were found on the territory of Sierra Leone?
   b. Do you believe it is enough to allow only international courts, lawfully established by the international community, to prosecute persons who have personal immunity for war crimes and crimes against humanity? Or do you think that national courts should also have the right to

exercise their universal jurisdiction, even against a head of state? What would be the inconveniences of such a right?

3. a. Does the obligation to prosecute for grave breaches of IHL also exist with regard to persons who have personal immunity, such as a head of state? Does this obligation concern only international tribunals? (GC I-IV, Arts 49/50/129/146 respectively)
   b. Is there a contradiction between the obligation to prosecute and the personal immunities provided by international law? If there is a contradiction between two rules, which one prevails? The rule which belongs to *jus cogens*? Which of the two above-mentioned rules, if any, belongs to *jus cogens*? (GC I-IV, Art. 1; GC I-IV, Arts 49/50/129/146 respectively; GC I-IV, Arts 51/52/131/148 respectively)
4. Are the Ghanaian authorities obliged to execute an arrest warrant issued by an international court such as the Special Court for Sierra Leone? If not, what could oblige Ghana to execute that arrest warrant? A Security Council resolution? What if an arrest warrant is issued by the International Criminal Court? An *ad hoc* tribunal such as the International Criminal Tribunal for Rwanda? A national court? Does IHL imply an obligation to execute an arrest warrant against a person prosecuted for war crimes? To extradite such a person? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 88)