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SCSL - 2003 - 01 - 2

(2461 - 2472)

THE SPECIAL COURT FOR SIERRA LEONE

FREETOWN - SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, QC President
Judge Emmanuel A. Ayoola
Judge Gelaga King
Judge Renate Winter
Judge

Registrar: Mr. Robin Vincent
Date filed: 11th November 2003

CASE NO. SCSL-2003-01-PT

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR - APPLICANT

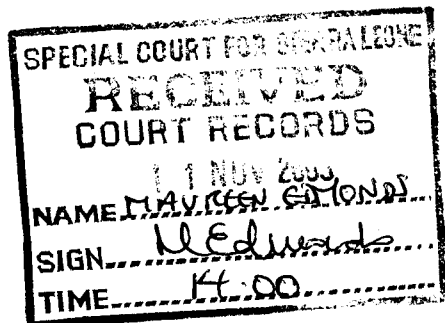
APPLICANT'S REPLY TO PROSECUTION RULE 72(G) (ii) RESPONSE TO APPLICANT'S MOTION MADE UNDER PROTEST AND WITHOUT WAIVING OF IMMUNITY accorded to a Head of State President Charles Ghankay Taylor requesting that the Trial Chamber do quash the said approved indictment of 7th March 2003 of Judge Bankole Thompson and that the aforesaid purported Warrant of Arrest and Order for transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leone, and all other consequential and related ORDER(S) granted thereafter by either the said Judge Bankole Thompson OR Judge Pierre Boutet on the 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled and/OR set aside as a matter of Law

Office of the Prosecutor:

Mr. Desmond de Silva, QC, Deputy Prosecutor
Mr. Walter Marcus-Jones, Senior Appellate Counsel
Mr. Christopher Staker, Senior Appellate Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel

Applicant's Counsel:

Terence Michael Terry



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For purposes of this Reply Counsel for the Applicant will confine himself to the arguments raised by the Prosecution at Page 3 of their response onwards starting from the heading **ARGUMENT**.

Indeed the arguments relating to alleged violation of Head of State immunity are exhaustably covered under the Applicant’s Motion, the Applicant’s Reply and the Applicant’s Additional Submissions dated the 26th day of September 20003 filed pursuant to Rule 72(G) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

In response to the rubric 10 at page 4 of the Prosecution's response, it is submitted that the purported approval of the indictment by the designated Judge, Judge Bankole Thompson on the 7th of March 2003 was one made in excess of jurisdiction. If this submission is upheld then the submission by the Prosecution that the accused had the status of an accused before the Special Court for Sierra Leone becomes a non-issue and is at best unmeritorious.

In response to rubric 13 at page 4 of the Prosecution's response, Counsel for the Applicant in his reply submits that the challenge therein in main touch and concern a clear violation of the immunity accorded to Head of State against Criminal Proceedings in accordance with customary International Law and the jurisprudence of the International Court of Justice.

In its response under the rubric 15 at page 5 the Prosecution refers to the Applicant's reply as not entirely clear. It has however, failed to demonstrate in a meaningful way what is exactly unclear to it. Assuming that the position taken by the Prosecution to the effect that the Applicant's reply acknowledges that there is at present no bar to the Indictment and Prosecution of the Accused by the Special Court for Crimes under international law on grounds that he is no longer a Head of State even if the acts with which he was charged were committed whilst he was in office, then it is respectfully submitted that if that position is taken to its logical conclusion it is up to the Prosecution to advise itself if it so so inclined to withdraw the Indictment confirmed by Judge Bankole Thompson on the 7th of March 2003 and initiate fresh proceedings. But it will be presumptuous for Counsel for the Applicant to suggest to the Prosecution the line of action to be embarked upon by them. On the question of the need to issue a new Indictment that may very well fall within the powers of the Prosecutor assuming he can surmount the Constitutional hurdle placed on him under the 1991 Constitution already alluded to in one of the additional submissions made on behalf of the Applicant pursuant to Rule 72G of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

Counsel for the Applicant herein submits that it is no business of his to engage in any clarification on any point which the Prosecution postulates as unclear when in the

next breath the Prosecution goes on to proffer under the same rubric 15 the thrust of the earlier submission of Counsel for the Applicant.

As regards rubric 17 at page 5 of the Prosecution's response, Counsel for the Applicant agrees with the Prosecution that both the Defence and Prosecution have relied on the Judgment of the International Court of Justice in the Yerodia case as the centrepiece or their respective arguments although not the only ground relied upon by Counsel for and on behalf of the Applicant to quash the said Indictment and Warrant of Arrest.

Whether OR not the Yerodia case has attracted criticism as mentioned under rubric 18 at page 5 on to page 6 of the Prosecution's response it is submitted is not of moment for the simple reason that that is the state of the law in accordance with the jurisprudence of the International Court of Justice and remains to be so until that very Court over-rules itself OR vacates its own judgment. For the Prosecution to suggest that the Special Court is not bound by that decision of the International Court of Justice is at best a red-herring and the Prosecution whilst relying on that decision when it seems to be to their advantage they are at the same time not prepared to accord it the kind of respect that should be extended to such an August body when the relevant ratio decidendi is clearly against them, but rather prefer to rely on some dicta however conceived by them from some international Tribunal of their own choosing.

The Prosecution under rubric 19 at page 6 of their response puts the Applicant's position correctly and to that extent cannot be faulted. To be precise the International Court of Justice in the Yerodia case took the position that the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances and it is submitted that those instances are not applicable to the instant case.

In reply to the Prosecution's response under rubric 23 at page 7 of their response, the Prosecution stated that the Defence appears (emphasis mine) to acknowledge that the Special Court is an international Court and not a national Court of Sierra Leone. What Counsel for the Applicant has maintained throughout is that the Special Court for Sierra Leone was established by an agreement between the Government of Sierra

Leone and the Secretary General of the United Nations dated 16th January 2002 which resulted in the Special Court Agreement, 2002 (Ratification) Act, 2002 to wit Act No. 9 of 2002 and no where in its interpretative provisions OR any where in that Act does it describe it as an international Criminal Court OR any nomenclature OR description near that for that matter.

Counsel for the Applicant states that Article 6(2) of the Statute of the Special Court for Sierra Leone violates and is inconsistent with the provisions of the Constitution of Sierra Leone OR for that matter the Constitution of the Republic of Liberia – the latter in respect of which the Applicant was effectively the Head of State at the time of the issuance of both the purported indictment and the Warrant of Arrest.

Contrary to the position taken by the Prosecution it is submitted that there is nothing in the Special Court Agreement, 2002 (Ratification Act, 2002 OR the Agreement itself to suggest in the remotest way that it is an international Criminal Court of the kind referred to in the Yerodia case. Consequently, the provisions of Section 6(2) of that Statute cannot be relied upon and/OR have any legal validity having regard to the foregoing submissions and the relevant additional submissions made by Counsel for the Applicant pursuant to Rule 72(G) of the rules of Procedure and Evidence of the Special Court for Sierra Leone.

Again under the rubric 24 at page 8 of the Prosecution's response, since the Prosecution used the word "apparently" it is clear to Counsel for the Applicant that the Prosecution has not categorically submitted that Counsel for the Accused accepted that the Special Court is an international Criminal Court. For the Prosecution to suggest that the accused gave no justification that the Special Court for Sierra Leone either by its Statute OR otherwise is not vested with powers to enable it to exercise judicial powers of the international community in so far as an incumbent Head of State OR high officials are concerned is not borne out by the facts as it is more than obvious even on a cursory glance of the Statute itself and particularly so as no less a person than the President of the Appeals Chamber Geoffrey Robertson Q.C. as late as 11th June, 2003 in a Press Release from the Press and Public Affairs Office of the Special Court for Sierra Leone captioned: Press Release Freetown, Sierra Leone 11th

June, 2003 Court President in his wisdom saw it fit to request the U.N. Security Council's Chapter Seven Powers.

As regards Article 6(2) of the Special Court Agreement 2002 (Ratification) Act 2002 Counsel for the Applicant will adopt the same arguments and reasons canvassed above in connection with Article 6(2) of the special court Agreement, 2002 (Ratification) Act, 2002.

In respect of rubric 25 at page 8 of the Prosecution's response it is submitted that it is not the Applicant but the Prosecution that is blowing hot and cold in its analysis of the Yerodia case – at one beath it relies, upon it, later on it seeks not to give that decision any weight OR the respect it deserves by boldly submitting that the Special Court is not bound by it. What a Posture?

On the vexed issue that the statute of the Special Court cannot be equated OR put on the same level with the other International Criminal Tribunal the Prosecution themselves in the last line under rubric 25 acknowledge the ICC, ICTY and ICTR as statutes of the International Criminal Court and for better OR for worse never referred to the statute of the Special Court as an International Criminal Court but described it under the nomenclature of the statute of the Special Court without more.

As regards rubric 26 at page 9 of the Prosecution's response, the Prosecution blandly states that it does not concede the correctness of the Defence submissions on the different meaning of the word "jurisdiction" without attributing any reason for so stating and with respect concludes rather erroneously that Counsel's analysis on jurisdiction is wholly immaterial to the issues before the Appeals Chamber when in fact and in substance the matter remitted to the Appeals Chamber touch and concern jurisdictional issues. What with respect renders the Prosecution's position even the more untenable and seriously flawed is that in the immediate sentence after the first 2 sentences under the said rubric 26 it embarked upon an excursion on jurisdiction when earlier on, it had canvassed was not material to the proceedings.

In response to what was stated under rubric 27 at page 9 of the Prosecution's response, the Prosecution correctly stated that the Defence Rule 72(G) submissions argue further that the decision of the Judge to approve the Indictment and to issue the

Warrant of Arrest of the Accused was given per incuriam, since the judgment of the International Court of Justice in the Yerodia case had not been brought to his attention. Here of course the Applicant will rely on the previous submissions made by his Counsel in this regard and particularly so as the application before Judge Bankole Thompson was one made ex parte and that in those circumstances utmost good faith was expected of the prosecutor at the material time he was making the application in the absence of the other party.

B. THE ALLEGED VIOLATION OF TERRITORIAL SOVEREIGNTY OF GHANA

It is submitted that the Violation of the Sovereignty of the State of Ghana has been properly explained and established and in consequence the Special Court for Sierra Leone and/OR through its Registrar OR Agents acted without jurisdiction and/OR in excess of jurisdiction in transmitting the said indictment and Warrant of Arrest and the order of transfer of the accused on the 4th June 2003 to the Government of Ghana without the appropriate Order from a Single Judge of the Trial Chamber OR the Trial Chamber itself.

C. THE ALLEGED VIOLATION OF THE CONSTITUTION OF SIERRA LEONE

Rule 72(G) caters for additional submissions which go to jurisdiction and it is submitted with respect that is what Counsel for the Applicant did simpliciter. Moreover it is trite that jurisdictional issues can be raised at anytime in these proceedings and more so before that Court that is vested specifically with powers to adjudicate on jurisdictional issues. With that said and in answer to rubric 31 at pages 11 to 12 inclusive of the Prosecution's response, Counsel for the Applicant will rely on the additional submissions filed pursuant to Rule 72(G) which dealt specifically with Section 108 (3) of the 1991 Constitution of Sierra Leone and will adopt all the arguments canvassed therein.

As regard rubric 32 at page 12 of the response of the Prosecution, Counsel will rely on his previous additional submissions regarding that matter by adopting the

arguments canvassed under the combined provisions of Sections 64(1), (2), (3) 66(7) and 66(4), (5) and (6) respectively of the 1991 Constitution of Sierra Leone Act No. 6 of 1991.

In response to rubric 33 and 34 to be found at pages 12 to 13 of the Prosecution's response, Counsel for the Applicant submits the following:-

- (1) That once the Appeals Chamber comes to the conclusion that the three (3) questions mentioned in the Applicant's Additional Submissions dated the 26th day of September 2003 filed pursuant to Rule 72(G) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone do raise Constitutional questions for interpretation by the Supreme Court, it is with respect duty bound to remit those questions to the Supreme Court for interpretation as it is the only body charged with the functions to interpret the Constitution.
- (2) A Constitutional question can be raised at any time in any proceeding and need not necessarily take the format of a motion whether in the form of a new motion OR otherwise.
- (3) It is submitted that even if the said three Constitutional questions referred to in the Applicant's Additional Submissions dated the 26th day of September 2003 filed pursuant to Rule 72(G) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone were not raised by Counsel for the Applicant herein, the Appeals Chamber itself OR any adjudicating body could do so suo moto and remit same for the interpretation of the Supreme Court of Sierra Leone. Therefore whether the Defence motion raised only an issue of the alleged violation of the Head of State immunity of the accused, and an issue of the alleged violation of the Sovereignty of Ghana do not detract one iota from the Constitutional questions at any stage of the proceedings be it at the Appeals Chamber OR otherwise.

As regards rubric 35 at page 13 of the Prosecution's response, Counsel for the Applicant submits in passing that the motion of the Applicant was initially considered by the Trial Chamber and by its order of the 19th September 2003 came to the conclusion that serious jurisdictional issues warranted a determination by the Appeals Chamber.

As regards rubric 37 and 38 at page 14 of the Prosecution's response, the Applicant herein will rely on its additional submissions made pursuant to Rule 72(G) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

In response to rubric 39 at page 14 of the Prosecution's motion, it is submitted that the afore-mentioned Special Court Agreement could not be binding on both the United Nations and the Government of Sierra Leone if it can be established that it was validly passed procedurally and otherwise as laid down by the Constitution of Sierra Leone. In so far as the alleged international treaty to wit the Special Court Act is concerned, the matter it is submitted will turn on whether it can persuasively be argued that the alleged treaty can take precedence over an entrenched provision of the Constitution of Sierra Leone without complying with the necessary preliminary procedural requirement as laid down by Law. With the greatest respect to the Prosecution whether OR not Parliament acted under Section 40(4) of the constitution of Sierra Leone OR in any other way to bring about the Special Court's Act, it is beyond dispute that the said Act is captioned Act No. 9 of 2002 and is one which can only be given the necessary imprimatur by specific Constitutional Provisions under the Law of the Land.

As regards rubric 41 at page 15 of the Prosecution's response, Counsel for the Applicant simple response is that the Constitution of the land is supreme and unless it can be established that Section 40(4) of the Constitution of Sierra Leone takes precedence over and/OR expressly OR by necessary implication alters the entrenched provision of Section 108(3) of the constitution of Sierra Leone it is submitted that the procedure adopted in allegedly bring the Special Court Act into existence is ipso facto bad in Law. It is further submitted that at the end of the day it is for the Supreme Court of Sierra Leone to determine whether the State of Sierra Leone may not set aside its treaty obligations by invoking constitutional invalidity OR alleged imperfect

ratification as the case may be. On this issue it is submitted that it will be ill-advised to side step the Constitution in its all important provision of Section 108(3) which is entrenched and creates a regime of its own as against treaty making powers under Section 40(4) of the Constitution of Sierra Leone. Hence the necessity to remit their interpretation to the Supreme Court of Sierra Leone for its determination.

As regards rubric 43 at page 16 of the Prosecution's response, the issue raised by the Prosecution relating to the ICC Statute is purely hypothetical and is not and cannot amount to any live issue for the purposes of the present proceedings. The argument therefore raised therein does not arise, is totally irrelevant and with respect is at best a red herring.

In response to rubric 44 at 17 of the Prosecution's response, Counsel for the Applicant will rely upon and adopt its submissions in its reply under rubric 41, 42 and 43 respectively herein.

In response to rubric 45 at page 18 of the Prosecution's response based on the foregoing submissions, it is respectfully submitted that there has been a clear violation of the 1991 Constitution of Sierra Leone in the manner and procedure by which the Special Court Agreement was passed into law.

It is further submitted that since the issues relating to the matters complained against regarding the validity of the Special Court Agreement raise serious Constitutional questions for interpretation by the Supreme Court of Sierra Leone to that extent and to that extent along Counsel for the Applicant agrees with the Prosecution that it is not open to the Special Court to decide those Constitutional questions nor does it have the required jurisdiction to so do.

D. ALLEGED VIOLATION OF THE IMPLEMENTING LEGISLATION

In response to rubric 46, 47 and 48 at page 18 of the Prosecution's response, it is submitted by Counsel for the Applicant herein that this additional jurisdictional submission can be raised before the Appeals Chamber as it goes to the very root of the coming into force of the Special Court Agreement itself.

In response to rubric 50 at page 19 of the Prosecution's response, Counsel for the Applicant will adopt the arguments and reasons canvassed earlier on as contained in paragraphs 13 and 32 above in this Reply.

Indeed for the Prosecution to submit that the Special Court exists and operates in the area of international law regardless of the legal position under the municipal law of Sierra Leone with respect unfounded and does violence to the very provisions of the constitution of Sierra Leone which however conceived have been prayed in aid by the Prosecution to give the Special Court Agreement the necessary imprimatur.

In reply to rubric 51 at page 19 of the Prosecution's response, Counsel for the Applicant will once again refer to his earlier argument on Section 17 of the Special Court Act and adopt the reasons contained therein. It is important however, to note that here the Prosecution is relying on the operation of the implementation legislation as a matter of Sierra Leone law on the date of its publication in the gazette regardless of whether OR not the regulations have been made under Section 47 thereof. What a position to take if indeed one considers the earlier submissions made by the prosecution to the effect that the Special Court exists and operates in the sphere of international law, regardless of the legal position under the Municipal Law of Sierra Leone. Here again Counsel for the Applicant agrees entirely with the Prosecution that this is matter of Sierra Leone Constitutional law that the Special Court is not vested with authority OR competent to make any pronouncement upon OR decide as the case may be.

E. ARGUMENT CONCERNING UNIVERSAL JURISDICTION

Counsel for the Applicant reiterates that the International Court of Justice "missed a golden opportunity to case light on a difficult and topical legal issue" and that "this matter is now squarely before the Appeals Chamber for its determination.

In response to rubric 53 at page 20 of the Prosecution's response, the Prosecution once against has missed the point. The universal jurisdiction so referred to by Counsel for the Applicant in this respect relates to the assumption of universal jurisdiction by the Special Court for Sierra Leone sitting in the State of Sierra Leone by the Registry in transmitting to the authorities in the State of Ghana the indictment

and Warrant of Arrest issued on the 7th of March 2003 the Order for transfer and detention of the accused without jurisdiction and in violation of the Sovereignty of the Republic of Ghana whilst President Charles Taylor was attending a Peace conference in Accra, Ghana at the material time. This is the context in which universal jurisdiction was used by Counsel for the Applicant – Nothing more nothing less.

CONCLUSION

- (1) That an Order be directed to the Prosecutor for him to take steps to withdraw the Indictment within the letter and spirit of Rule 51 (B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
- (2) That an interim order be granted restraining service of the Warrant of Arrest and indictment of the 7th March 2003 on the accused pending the determination of the Motion of the 23rd July 2003 and the several jurisdiction issues submitted to the Appeals Chamber.
- (3) A final Order be granted cancelling and/OR setting aside the Warrant of Arrest of the 7th March 2003 on the two grounds stated in the motion of 23rd day of July 2003.
- (4) Further and/OR in the alternative that the request by the Prosecutor to the Registrar on the 4th June 2003 to address the Decision Approving the Indictment and the Warrant of Arrest to the authorities in the State of Ghana and the resulting transmission on the same date the 4th June 2003 of the Indictment, the Decision approving the Indictment and the Warrant of Arrest and Order for Transfer and Detention of the accused by the Registry to the appropriate authorities of Ghana be declared not only premature, but also invalid, and null and void at their inception.

Done in Freetown on this 20th day of October 2003

For the Applicant,


Terence Michael Terry

Counsel for the Applicant