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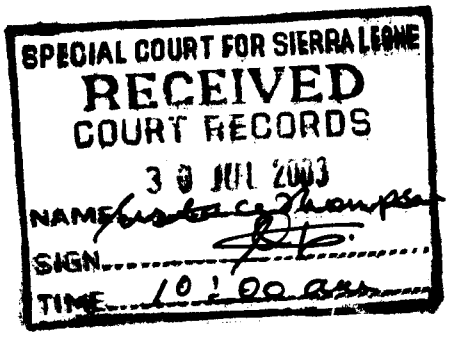
THE SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE



IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr. Robin Vincent

Date filed: 30th July 2003

CASE NO. SCSL-2003-01-PT

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as

CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

AND

THE GOVERNMENT OF THE REPUBLIC OF LIBERIA AND PRESIDENT CHARLES TAYLOR (UNDER PROTEST AND WITHOUT WAIVING OF IMMUNITY ACCORDED TO THE LATTER AS HEAD OF STATE - APPLICANTS

APPLICANTS REPLY TO PROSECUTION RESPONSE TO APPLICANTS 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. Chris Staker, Senior Appellate Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel
Ms Mora Johnson, Appellate Intern

Applicants Counsel:

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Argument in Reply to Prosecution Response to Applicants Motion to quash the Indictment against Charles Ghankay Taylor

As regards what the Prosecution raised as a preliminary matter, the applicants in reply submit the following:-

That it is incorrect for the Prosecution to assert that the "Defence Motion" purports to be filed not only on behalf of the Accused, but also on behalf of the Government of Liberia. The true position it is submitted is that the said Motion was actually and properly filed on behalf of both the Republic of Liberia and President Charles Ghankay Taylor and not as was conceived and wrongly described by the Prosecution as "purported". The reference by the Prosecution that the Government of the Republic of Liberia does not fall within Rule 2 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone is totally misplaced, at best a non issue and with respect without merit. It should be noted that the said section 2 which the Prosecution seeks to rely upon is a definition provision simpliciter and on its true reading that section at its highest only defines the "accused" and "the Prosecution". Nothing more nothing less. It is further submitted that no where does it specifically exclude any other person OR Government from becoming an applicant for the purposes of seeking to set aside and/OR quash the approved indictment and purported Warrant of Arrest of the 7th March, 2003 on the grounds sought for as constituting a bar to any Criminal & Civil proceedings against the person of President Charles Ghankay Taylor.

It is submitted that the Government of Liberia's interest is sufficiently affected in so far as the purported Warrant of Arrest issued by Judge Bankole Thompson on 7th March, 2003 was with respect unlawfully directed at the President of the Republic of Liberia and to the extent that the threat of service of the said purported Warrant of Arrest on President Charles Ghankay Taylor of the Republic of Liberia in Accra - Ghana in June 2003, prevented the President from actually carrying out his duties at the Peace Conference already mentioned in the applicants earlier argument at which he was attending in Accra - Ghana with other Heads of State, and further that unless quashed and/OR set aside will continue to hang over him contrary to all known canons of customary international law. Nothing therefore it is submitted constitute a clog on the Government of Liberia from embarking upon the appropriate procedural step as applicant for and on behalf of its President Charles Ghankay Taylor indeed its lawful President by way of proceedings which hopefully will culminate in quashing and/OR setting aside the approved indictment and purported Warrant of Arrest of the 7th March, 2003.

The Prosecution states in its response that the "Defence Motion" does not relate to any order addressed to the Republic of Liberia OR its Government. In reply it is submitted that the Motion cannot properly be described as "Defence Motion" but one properly taken out by the President Charles Ghankay Taylor and the Government of the Republic of Liberia as applicants seeking the orders prayed for therein. Indeed the said Motion legally raised a procedural bar for the reasons contained therein and do warrant setting aside both the said approved indictment and the purported Warrant of Arrest of the 7th March, 2003 of Judge Bankole Thompson and once again nothing stops the Republic of Liberia from bringing proceedings in that respect for and on behalf of its elected and lawful Executive President.

Assuming without conceding that the Trial Chambers takes the view that the Government of the Republic of Liberia cannot properly constitute one of the applicants herein, as distinct from a 'Party' simpliciter, there is still one applicant remaining namely Charles Ghankay Taylor who with the utmost respect and without a doubt has locus standi to seek the orders prayed for and as contained in his Motion of the 23rd day of July, 2003 to quash and/OR set aside the approved indictment and consequential purported Warrant of Arrest of 7th March, 2003 on the two grounds prayed for therein.

On the issue of Jurisdiction of the Special Court for Sierra Leone that is clearly a matter for determination by the Trial Chamber of the Special Court for Sierra Leone. In so doing it could take guidance from the case of Congo v. Belgium. But with that said the Prosecution cannot deny OR fail to give due regard to the ratio decidendi in that case in so far as it has settled the question of immunity accorded to Heads of State and Foreign Affairs Minister immunity in respect of both Civil and Criminal proceedings against their persons. The applicants Motion can hardly therefore be considered to be premature. Based on the legal position and the several submissions advanced on behalf of the applicants herein, it is submitted that it is rather the Criminal Proceedings set in Motion by the Prosecution in its ex parte application which led to the approval of the indictment by Judge Bankole Thompson and the consequential Warrant of Arrest of 7th March, 2003 that was not only premature but also contrary to customary international law relating to the immunity in both Civil and Criminal Proceedings accorded to Heads of State and the Jurisprudence of the International Court of Justice. But in this connection the Applicants shall revert to in detail later on.

The Motion it is submitted cannot properly be described as "Defence Motion", but that of the Applicants and to that extent without more renders the request by the Prosecution for the Trial Chamber to strike out all parts of the "Defence Motion" in so far as it relates to the Motion by the Republic of Liberia unsustainable and at best misconceived.

In reply to 4 at Page 2 of the Prosecution's response, reference to "Defence Motion" is again misconceived based on the use of the wrong nomenclature "Defence Motion" rather than the applicants Motion.

But assuming that the Trial Chamber is inclined to even consider the reasons proffered by the Prosecution in relation to the accused, the position taken by the accused applicant herein in reply is as follows:-

It is contended that the central question for determination by the Trial Chamber essentially revolves around the vexed issue of **Procedural bar** raised by the applicants herein relating to immunity accorded to Heads of State in respect of Civil OR Criminal Proceedings, and in this instant case against the person of the President of the Republic of Liberia President Charles Ghankay Taylor:-

(i) Firstly to appreciate the central issue in this instant case for determination by the Trial Chamber, it is of great importance for our purposes to draw attention

to the distinction between two categories of immunities laid down in international law, that is functional (OR ratione material OR organic) immunities and personal (OR ratione personal) immunities. It is extremely – important to distinguish between these two - categories of among other things exemptions from foreign jurisdiction.

It is submitted that the first category is grounded on the notion that states must respect other states internal organization and may not therefore interfere with the structure of foreign states OR the allegiance a state official may owe to his own state. Hence no State Agent is accountable to other states for acts undertaken in an official capacity and which therefore must be attributed to the state.

(ii) The second category is predicated on the notion that any activity of a Head of State OR Government, OR Diplomatic Agent OR Senior member of Cabinet, must be **immune from foreign jurisdiction.** This is to avoid foreign states either infringing sovereign prerogatives of states OR interfering with the official functions of a foreign state Agent under the pretext of dealing with an exclusively private act (ne impediatur legatio). This distinction it is submitted is made in the legal literature and is based on state practice.

It is further submitted that the above distinction is relevant for **the first class of immunity**

(i) relates to substantive law, that is it is a substantive defence (although the state agent is not exonerated from compliance with either international law OR the substantive law of the foreign country, if he breaches national OR international law,

(ii) covers official acts of any dejure OR de facto State Agent,

(iii) does not cease at the end of the discharge of official functions by the State Agent, the reason being that the act is legally attributed to the State hence any legal liability for it may only be incurred by the State;

(iv) is erga omnes, that is, may be invoked towards any other State.

In contrast, the **second class of immunity** - which the applicants in this instant case rely upon for the orders prayed for in their Motion dated and filed on the 23rd day of July, 2003

(i) relates to **Procedural Law** that is it renders the State official immune from Civil OR criminal jurisdiction (**it is a procedural defence**);

(ii) it covers official OR private acts carried out by the State Agent while in office, as well as private OR official - acts performed prior to taking office, in other words assures total inviolability;

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(iii) is intended to protect only some categories of State officials, namely Diplomatic Agents, Heads of State, Heads of Government, Foreign Ministers (under the doctrine set out by the International Court of Justice in its judgment in the case concerning the arrest warrant of 11th April, 2000, at PP 51-5) and possibly even other senior members of Cabinet;

(iv) comes to an end after cessation of the official functions of the State Agent;

(v) may not be erga omnes (in the case of Diplomatic Agents it is only applicable with regard to acts performed as between the receiving and the sending State, plus third States through whose territory the diplomat may pass while proceeding to take up, OR to return to his post, OR when returning to his own country so called justransitus innoxii).

It is further submitted that the above distinction permits us to realize that the two classes of **IMMUNITY CO-EXIST** somewhat overlap – as long as a State official who may also invoke personal OR diplomatic immunity is in office while he is discharging his official functions, he always enjoys personal immunity. In addition he enjoys functional immunity subject to one exception namely in the case of perpetration of international crimes. Nonetheless it is submitted that the personal immunity prevails even in the case of the alleged commission of international crimes, with the consequence that the State official may be prosecuted for such crimes only after leaving office. To that extent it can safely be argued and it is submitted that the Criminal Proceedings so commenced against President Charles Ghankay Taylor whilst he was and still is in office was premature at best and contrary to customary international law and the jurisprudence of the International Court of Justice relating to immunities accorded to sitting Heads of State against Civil OR Criminal Proceedings.

Consequently those proceedings which commenced ex parte that led ultimately to the approval of the indictment and the purported consequential warrant of arrest issued by Judge Bankole Thompson on the 7th March, 2003 were null and void at their inception, and with respect the Trial Chamber ought to quash the said approved indictment and cancel and/OR set aside the consequential purported warrant of arrest issued by Judge Bankole Thompson on the 7th March, 2003 accordingly.

To summarize therefore and at the risk of sounding repetitious even when accused of international crimes, the State Agent OR Head of State entitled to personal immunities is **INVIOLABLE** and immune from prosecution on the strength of the international rules on such personal immunities. This proposition is supported by some case law for instance, see the speech of Lord Browne-Wilkinson in RV Bow Street Stipendiary Magistrate and others ex parte Pinochet, Ugarte, Judgment of 24th March 1999, and Fidel Castro in Spain (See Auto) of 4th March, 1999 (No. 1999/2723) "which relate respectively to a former and an incumbent Head of State") culminating in the Comparatively recent case of Congo v. Belgium.

In reply to II A at page 3 of the Prosecution's response captioned – "Defence Motion" must be rejected as premature", here it seems the Prosecution has failed to appreciate the thrust of the case of the applicants. The applicants' case is geared essentially towards quashing and/OR setting aside both the approved indictment and consequential Warrant of Arrest issued by Judge Bankole Thompson on the 7th March 2003 on the 2 grounds contained in the applicants motion of the 23rd day of July 2003. This it is submitted can be done at any stage of the criminal proceedings, jurisdictional issues notwithstanding.

The submission of the prosecution on jurisdiction under this paragraph barely state the obvious without addressing the core issue for determination. It is submitted that an excursion by the prosecution into the issue of jurisdiction begs the issue and in addition only goes to confirm that the ratio decidendi in the case of Congo V. Belgium on the issue of immunity is not been given any prominence and the respect it deserves by them coming as it does from the International Court of Justice.

In reply to 6 at page 3 of the Response of the Prosecution, the applicants herein will rely on the totality of the submissions – canvassed under the second ground for seeking the Orders prayed for in the motion of the 23rd day of July 2003. Whether the accused has been indicted in accordance with Article 1(i) of the Statute of the Special Court for Sierra Leone for alleged crimes committed within the jurisdiction of Sierra Leone is not of moment and cannot even begin to provide an answer even remotely to the argument adduced on behalf of the applicants to the effect that the Special Court for Sierra Leone is not endowed with powers to exercise universal jurisdiction even by its own very statute. Reference to the botched attempt to serve the approved indictment and the purported Warrant of Arrest on President Charles Ghankay Taylor without the proper legal authority is in flagrant disregard of the territorial sovereignty of the Republic of Ghana and indeed with respect an extension of "prosecution lawlessness" bordering on abuse of process.

Under 7 at page 3 the Prosecution with respect in true form has once again missed the point. Indeed it is obvious even on cursory glance that the applicants' motion is not grounded under any of the Rules suggested therein by the Prosecution. It is one brought on behalf of the applicants having regard particularly to Rules 47 and 54 respectively of the Rules of Procedural & Evidence of the Special Court for Sierra Leone and where need be in addition to the Courts inherent Jurisdiction. Reference to Rule 73(A) is therefore a non issue and that being the case the prosecution's submission that the motion can only be brought "after initial appearance of the accused" is totally misconceived. Indeed their argument in that regard if taken to its logical conclusion underscore the fallacy of their argument as that would tantamount to the accused submitting himself to the arrest process in the first instance which is the very issue complained against and in respect of which the procedural bar is sought on the grounds canvassed in the applicants' motion.

It is further submitted that since the applicants did not characterize their motion under rule 72, the question of its dismissal does not therefore arise under that rule and to that extent the prosecutions submission is untenable and not of moment. The fact that the issuing of the arrest warrant under Rule 47 of the said Rules were inherently exparte

proceedings make it all the more important that relevant considerations and the state of the law regarding the ratio decidendi of the case of Congo .V. Belgium ought to have been brought to the attention of Judge Bankole Thompson which would have constituted full and frank disclosure of all the issues before the Judge at the time in the absence of the Accused before he wrongfully and with respect unlawfully proceeded to approve both the indictment and the purported Warrant of Arrest against the person of Charles Ghankay Taylor who according to International Customary Law and the jurisprudence of the International Court of Justice was entitled to immunity in respect of criminal proceedings as the lawful President and Head of State of the Republic of Liberia. For the Prosecution to suggest as it has done that it is only when the accused appears before the Court that the proceedings become inter parties suggest that the Prosecution have once again failed to appreciate that the Appearance entered under Protest is limited to the procedural bar canvassed in the applicants' motion which chronologically speaking takes precedence for determination in the instant adjudication process. It is submitted that it is the Prosecution that has woefully failed to serve the said purported Warrant of Arrest and the approved indictment on the accused, and there is no evidence before the Court either remotely OR otherwise that the accused has evaded the processes of the Court by refusing to appear before it. Indeed service is the fountain from which all proceedings spring and even in the absence of such service on the accused President Charles Ghankay Taylor he has not slept on his right but has properly invoked the procedural bar - he is perfectly entitled to raise regarding the immunity accorded to him as a sitting Head of State in respect of Criminal Proceedings against his person. The submission by the Prosecution that the preliminary motion can only be filed following the transfer of the Accused to the Special Court not only will amount to submitting to the jurisdiction of the Special Court in circumstances wherein the thrust of the applicants complaint is that the said approved indictment and purported Warrant of Arrest ought not to have been issued by Judge Bankole Thompson in the first instance.

Indeed any reference to a prima facie case warranting the approval of the indictment which resulted in his consequential purported Warrant of Arrest and further order could have properly arisen only after taken the position in the first instance that such indictment could be approved against a sitting Head of State Charles Ghankay Taylor. To hold otherwise it is submitted with the greatest respect makes nonsense of and will invariably turn upside down the whole legal basis for according criminal immunity to a sitting Head of State in this instant case Charles Ghankay Taylor. To that extent therefore any submission by the Prosecution relating to the question of the transfer of the accused becomes academic, is a non-issue in the absence of effecting proper service on the accused till date.

For the foregoing reasons the submission that the "Defence Motion" (wrongly described) should be rejected as premature is untenable irrelevant at best and with respect without merit.

In reply to B at page 5 of the Prosecution's response captioned "An accused is not able to invoke Head of State immunity before the Special Court, it is submitted that the Yerodia – case is directly in point and the Prosecution itself concedes the point that it concerns the immunities of a Head of State from the jurisdiction of the Courts

of another State, although the ratio decidendi in that case is not so limited in its extent and scope. Indeed reference to the International Court of Justice judgment in the Yerodia case where the Prosecution submits that the International Court of Justice stated that even an incumbent Minister of Foreign Affairs may be subject to criminal proceedings before criminal courts were they have jurisdiction. In reply to that submission it is clear that on its true reading, it limits itself to Minister of Foreign Affairs and nowhere does a Head of State appear which is the thrust of the applicants complaint in their motion. Moreover the words "may be subject" and before criminal Courts where they have jurisdiction put a different slant on the Prosecution's submission in that connection.

In reply to 12 at page 5 of the Prosecution response to the applicants' motion it is submitted slightly differently that it is only since the Second World War that new categories of crimes have developed, while that of War crimes have been re-stated in 1945 and 1946, the statutes of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) respectively were adopted, laying down new classes of international criminality. Thus in 1945, crimes against humanity and against peace were added, followed in 1948 by genocide as a special sub-category of crimes against humanity (soon to become an autonomous class of crimes), and then in the 1980s, by TORTURE as a distinct crime. Recently international terrorism has been criminalized subject to certain conditions.

As for rules on international criminal proceedings, they were first laid down in the statutes of the IMT and the IMTFE, then in those of the ICTY and the ICTR, and more recently in the Rome statute of the ICC. Nonetheless what is important is that they are still scant, and what is even more important, it is submitted is that they only pertain to the specific criminal Court for which they have been adopted, that is, they have no general scope. It is submitted that a full-fledged – corpus of generally applicable international procedural rules is only gradually evolving.

In reply to 15 at page 7 of the Prosecution's response to the applicants motion, nowhere in the submissions made on behalf of the applicants, was it expressly stated that the Special Court is a national Court and that it forms part of the judiciary of the Republic of Sierra Leone. That is clearly with respect a figment of the imagination of the Prosecution and true to form and is a clear demonstration of its rather unfortunate habit of raising issues and wrongly attributing them to the applicants when on the facts they were never in the first instance raised by the applicants anywhere in their several submissions. Although it is submitted that it was an Act of the Sierra Leone Parliament described as Special Court Agreement 2002 Ratification Act 2002 which gave the Special Court for Sierra Leone its imprimatur. Whether OR not the provisions of the Constitution of Sierra Leone do warrant the holding of a referendum for the establishment of such a Court under its entrenched provisions may well wait for a determinations by the Supreme Court of Sierra Leone at some later date and at the proper time and this is only by way of distant early warning.

As regards reference to Security Council Resolution under Chapter VII, the applicants shall rely on the previous submissions made on their behalf in the early written submissions contained in their motion of the 23rd day of July 2003.

The submission by the Prosecution that in the Yerodia Case, the International Court of Justice did not expressly articulate the criteria for determining whether an international court is one before which Head of State immunity will not apply is not of moment is totally irrelevant for the consideration of the application before the Trial Chamber based on the Orders sought therein. Looking at the text of the statute and its related powers it is further submitted that the Special Court for Sierra Leone either by its statute OR otherwise can hardly claim to be vested with powers to enable it to exercise judicial power of the international community in so far as incumbent Head of State OR High Officials are concerned. Whether the ICC satisfies such a criteria is not relevant to the instant case. To suggest that the Special Court for Sierra Leone satisfies such a criteria is at best a fallacy however ingeniously conceived by the Prosecution. Indeed if the submissions on behalf of the applicants are so far sustainable, the claim by the Prosecution that the Special Court for Sierra Leone is necessarily exercising the Judicial power of the international community is not only far fetched but equally has no legal basis whatsoever.

With regard to the violation of the sovereign immunity of Ghana, the prosecution has missed the point once again. Indeed on a true reading of the written submissions made on behalf of the applicants they are essentially confined and limited to the attempt albeit – unjustifiably to give the arrest warrant and the approved indictment an international dimension when the Special Court for Sierra Leone attempted to effect service of both documents extra territorially. Furthermore it is not a question of the indictment of the accused in accordance with Article 1(i) of the Special Court statute for crimes committed in the territory of Sierra Leone.

To suggest however vaguely disguised by the prosecution that the burden is thrust on the applicants to explain away how the transmission of "documents" without specifically spelling out the particular documents referred to by them is at best wholly untenable and does not add up whatever way one looks at their submission in this regard.

It is however submitted on behalf of the applicants that the issues raised in their motion, the response of the prosecution and the reply thereto are indeed matters of serious Public and International dimension as to warrant the grant of a Oral hearing of the parties herein subject to time limits to be fixed by the Trial Chamber if it is so inclined.

Conclusion

In reply to 10 – Miscellaneous at page 10 of the Prosecution's response, the applicants most respectfully submit that the Trial Chamber graciously proceed to grant the Orders prayed for in their motion of the 23rd of July 2003.

Done in Freetown the 30th day of July 2003

For the Applicants

Terence Michael Terry

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