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SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

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

Registrar: Robin Vincent

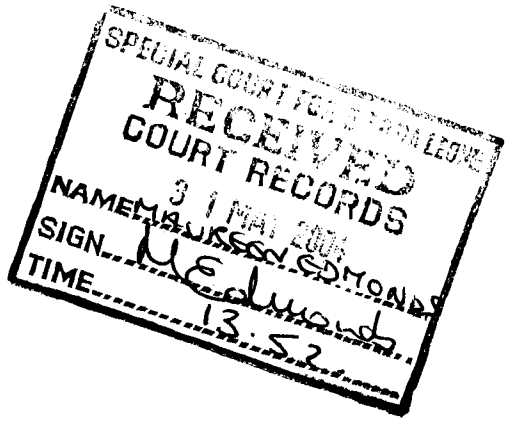
Date: 31 May 2004

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
Case Number SCSL-2003-01-I

DECISION ON IMMUNITY FROM JURISDICTION

Office of the Prosecutor:
Desmond de Silva QC
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel:
Terence Terry



THE APPEALS CHAMBER of the Special Court for Sierra Leone ("the Special Court");

SEIZED of the Applicant's motion made under protest and without waiving of immunity accorded to a Head of State requesting the Trial Chamber quash the indictment and declare null and void the warrant of arrest and order of transfer and detention filed on 23 July 2003 ("Applicant's Motion") on behalf of Charles Ghankay Taylor ("the Applicant");[1]

NOTING that the Prosecution filed its Response on 28 July 2003[2] and that the Defence filed its Reply on 30 July 2003;[3]

NOTING that the Applicant's Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules") on 19 September 2003;[4]

NOTING that Defence Additional Submissions pursuant to Rule 72(G)(i) of the Rules were filed on 1 October 2003,[5] that the Prosecution Rule 72(G)(ii) Response was filed on 14 October 2003,[6] and that the Defence Rule 72(G)(iii) Reply was filed on 11 November 2003;[7]

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[1] '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 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.', 23 July 2003.

[2] 'Prosecution Response to Defence Motion to quash the indictment against Charles Ghankay Taylor', 28 July 2003.

[3] 'Applicant's Reply to Prosecution Response to Applicant's Motion made under Protest and without waiving 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 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.', 30 July 2003.

[4] 'Order Pursuant to Rule 72(E): Defence Motion to quash the indictment and to declare the Warrant of Arrest and all other consequential orders null and void', 19 September 2003.

[5] 'Additional Submissions for and on behalf of the Applicant herein Charles Ghankay Taylor pursuant to pursuant to Rule 72 G (i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone having regard to the order dated the 19th September 2003 of the Trial Chamber of the Special Court for Sierra Leone duly signed by the Presiding Judge Bankole Thompson pursuant to Rule 72(E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone' 1 October 2003.

[6] 'Prosecution Rule 72(G)(ii) Response Relating to the Defence Motion to quash the indictment', 14 October 2003.

[7] 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

NOTING that submissions were filed by *Amici Curiae* Professor Diane F. Orentlicher on 23 October 2003,[8] Professor Philippe Sands Q.C. on 23 October 2003[9], and the African Bar Association on 28 November 2003;[10]

NOTING that the Appeals Chamber heard oral argument on 31 October 2003 and 1 November 2003;

NOTING that the Defence Post-Hearing submissions were filed on 12 November 2003[11] with a further attachment to the additional submissions filed on 12 November 2003,[12] and that the Prosecution Post-Hearing submissions were filed on 21 November 2003;[13]

HAVING CONSIDERED THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES:

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 Thompson 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. This application was filed in the Trial Chamber by counsel for Mr. Taylor and for the state of Liberia on 23 July 2003. The Prosecution responded on 28 July 2003, and to its Response a Reply was filed on 30 July 2003. In August, Mr. Taylor stepped down from the

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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 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', 11 November 2003.

[8] 'Submission of the Amicus Curiae on Head of State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I', 23 October 2003.

[9] 'Submissions of the Amicus Curiae on Head of State Immunity', 23 October 2003.

[10] 'Application to appear as an Amicus Curiae in the Prosecutor vs. Charles Ghankay Taylor', 28 November 2003.

[11] 'Additional Submissions filed for and on behalf of the Applicant herein Charles Ghankay Taylor pursuant to the oral pronouncement of Judge Geoffrey Robertson Q.C. (President) of the Appeals Chamber of the 31st October 2003', 12 November 2003 ("Applicant's Additional Submissions").

[12] 'Further attachment in connection with additional submissions filed on 12th November 2003 which was inadvertently omitted', 12 November 2003.

[13] 'Post-Hearing additional written submissions of the Prosecution', 21 November 2003.

Presidency of Liberia and was permitted to take up residence in Nigeria. On 19 September 2003 the judges of the Trial Chamber deemed the application to be a preliminary motion and referred it to this Chamber under Rule 72(E) of the Rules, acceding as they did so to a Prosecution request to strike out the joint application by the Government of Liberia.[14]

2. This court heard oral argument between 30 October and 1 November 2003 from Mr. Terence Terry on behalf of Mr. Taylor and Mr. Desmond de Silva QC for the Prosecutor. In view of the significance of the international law issues we had exercised our power under Rule 74 to appoint Professor Diane Orentlicher and Professor Philippe Sands QC as *amici curiae* and we are grateful for their scholarly submissions, in person as well as in writing. We permitted final submissions from the parties in the month following the hearing.

3. Mr. Taylor was elected President of the state of Liberia in 1997. On 2 August of that year he took his oath of office, a copy of which has been certified for the purpose of these proceedings by Liberia's acting Minister of Foreign Affairs.[15] Article 50 of the Constitution of the Republic of Liberia provides that:

> the executive power of the Republic shall be vested in the President who shall be Head of State, Head of Government and Commander in Chief of the armed forces of Liberia.

4. 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.

5. The Indictment against Mr. Taylor contains seventeen counts.[16] It accuses him of the commission of crimes against humanity and grave breaches of the Geneva Conventions, with

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[14] For this reason, throughout this Decision Charles Taylor is deemed to be the sole Applicant: see discussion below at para 57.

[15] The date of the oath is curious, given the provisions of Article 50 of the Liberian Constitution of 3 July 1984: "The President... shall hold office for a term of six years commencing at noon on the third working Monday in January of the year immediately following the elections."

[16] *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01, Indictment, 3 March 2003.

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 forced 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

6. 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") [17], as an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute 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;

[17] See *Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

d) The Indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution. Further, the timing of the disclosure of the arrest warrant and indictment on 12 June 2003 was designed to frustrate Charles Taylor's peace-making initiative in Ghana and caused prejudice to his functions as Head of State.

7. The Applicant also puts forward a second argument that:

a) Citing the *Lotus* case[18], 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.

8. 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

9. The Prosecution submits in relation to the first argument of the Defence that:

a) The Government of Liberia is not a party and all references to the Government of Liberia should be struck out.

b) The Applicant's Motion is premature and the Special Court should not rule on the substance of the Motion. The Motion deals with immunities whereas under Rule 72 of

[18] S.S. "Lotus" Case P.C.I.J., Series A, No 10 (1927).

the Rules, preliminary motions to be referred to the Appeals Chamber concern jurisdiction and abuse of process.

c) The Accused cannot simultaneously evade the processes of the court by refusing to appear before it and also use the processes of the court by filing motions before it.

d) The *Yerodia* case concerns the immunities of an incumbent Head of State from the jurisdiction of the courts of another state.

e) 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.

f) 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.

10. In response to the Applicant's second argument, the Prosecution assert 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.

C. Defence Reply

11. The Applicant reiterates its argument in its Reply and asserts that:

a) The Government of Liberia has standing in that the attempt to serve the Warrant of Arrest on Charles Taylor prevented Taylor from carrying out his duties.

b) The Preliminary Motion is brought with reference to Rules 47 and 54 of the Rules.

D. Defence Additional Submissions pursuant to Rule 72(G)(i)

12. The Applicant makes the following additional submissions:

a) A distinction should be drawn between the meaning of 'jurisdiction' in its wide and its narrow sense. Consequently, a distinction should be drawn between the confirmation of the indictment and the warrant of arrest and that both were made *per incuraim* without reference to the principles enunciated in the *Yerodia* case.

b) The Special Court Agreement 2002 (Ratification) Act, 2002, was unconstitutional.

c) The establishment of the Special Court violated sections 64(1)-(3), 66(7) and 66(4)-(6) of the Sierra Leone Constitution of 1991.

d) The Special Court had no jurisdiction to issue the arrest warrant and in doing so violated the sovereignty of Ghana. Moreover, the principle of international law providing for immunity from criminal proceedings in foreign jurisdictions of an incumbent Head of State was violated.

e) Following the decision of the International Court of Justice in the *Yerodia* case, it is beyond doubt that a Head of State enjoys immunity from foreign jurisdictions and inviolability whether the Head of State is on foreign territory on an official mission or in office.

f) Certain constitutional questions should be remitted to the Supreme Court of Sierra Leone.

E. Prosecution Rule 72(G) Response

13. The Prosecution supplements its previous arguments with the following main points:

a) In the *Yerodia* case, the ICJ enumerated a number of circumstances in which a Minister for Foreign Affairs could be prosecuted for international crimes, including international criminal courts where they have jurisdiction. The Special Court is such an international

criminal court and therefore has jurisdiction. Article 6(2) of the Statute clearly envisages that the Special Court has the power to try a Head of State.

b) The analysis of the meaning of 'jurisdiction' is irrelevant to the issues at hand.

c) There was no violation of the sovereignty of Ghana as the relevant documents were transmitted to the Government of that state.

d) The questions relating to constitutionality are outside the scope of the Preliminary Motion and a party may not bring a 'new' motion directly before the Appeals Chamber. The Special Court exists in the sphere of international law and does not exercise the judicial power of Sierra Leone.

F. Defence Rule 72(G)(iii) Reply

14. The Applicant replies that there is nothing in the Special Court Agreement[19] or Ratification Act to suggest that the Special Court is an international criminal court of the kind referred to the *Yerodia* case. The Applicant reiterates that the sovereignty of Ghana was violated and that the Special Court acted in excess of jurisdiction in transmitting the indictment and warrant of arrest. It is claimed by the Applicant that a constitutional question can be raised at any time in the proceedings.

G. Defence Post-Hearing Submissions

15. The Applicant submits that the Accused should not be denied the right to approach the court by way of a motion raising jurisdictional questions without appearing before it and in consequence taking the risk of waiving any immunity accorded to him. The Applicant reiterates that the transmission of the Indictment and Warrant of Arrest to the Ghanaian authorities was invalid. The Applicant distinguishes the Special Court from institutions such as the Nuremberg and Tokyo Tribunals, the International Criminal Court, and the International Criminal Tribunals for Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). It is argued that the *Pinochet* case has a

[19] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (Special Court Agreement).

restricted impact in international law and only stands as evidence of the practice of the United Kingdom in relation to the application and interpretation of the Torture Convention of 1984. The Applicant analyses the *Yerodia* case and state that immunity is more a matter of procedure than substance with procedural immunity subsisting for as long as the official is in office. The Applicant concludes that: "the emphatic nature of the decision and the size of the majority endorsing it send a clear signal that the main judicial organ of the United Nations does not wish to subject the stability of international relations to disturbances originating from the decentralised judicial investigations of crimes, no matter how abject they be".[20] The Applicant requests that the Indictment be withdrawn, that service of the Indictment and Warrant of Arrest be withheld until determination of the Preliminary Motion, that the Warrant of Arrest be set aside, and that transmission of these documents to the Ghanaian authorities be declared premature and null and void.

H. Prosecution Post-Hearing Reply

16. The Prosecution submits that as a general proposition, an accused does not have standing to file motions before the Special Court until he has been transferred to its custody or appeared before it and that there is no exception where an accused claims immunity since according to the Special Court Statute, an accused has no immunity by reason of his status as acting or former Head of State. For this reason, it is submitted, the substantive issue relating to Head of State immunity needs to be decided in order for the Preliminary Motion to be dismissed on the basis of lack of standing. The Prosecution argues that the Special Court is an international court of the type referred to in the *Yerodia* case. It is also submitted that the position of the Government of Liberia on the issue of immunity is immaterial as the Prosecution position is that the Accused does not have any immunity that he can invoke before the Special Court. The Prosecution states that it is not the essence of its argument that the crimes allegedly committed by the Accused were committed in a private capacity and that the question whether the Special Court is an international court would need to be decided if the Accused were to be convicted of crimes committed in an official capacity.

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[20] Applicant's Additional Submissions, p. 14.

I. Submissions of the *Amici Curiae*

(i) *Professor Philippe Sands*

17. Professor Sands divides his submissions into four main parts. Part I deals with the rules of international law according to which a serving Head of State may be the subject of an indictment alleging international crimes issued by an international court or a national court of another state. Part II considers whether the Special Court is an international court. Part III addresses the question whether it was lawful for the Special Court to issue and indictment and circulate an arrest warrant while Taylor was serving as Head of State. Part IV considers the position now that Taylor is no longer Head of State of Liberia. 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 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

18. The amicus brief of Professor Orentlicher addresses two main questions: (i) Was the indictment against Taylor as an incumbent Head of State invalid on the ground that it violated the procedural immunities accorded heads of state under international law? (ii) Does Taylor have immunity *ratione materiae* from prosecution for the specific crimes charged, an immunity which would shield him even as former Head of State from prosecution? Both questions are answered in the negative for the following main reasons:

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

19. 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*, the *Pinochet* case, the *Milosevic* case, the 1993 World Conference of Human Rights and the Rome Statute of the ICC, 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

20. 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. If it was unlawful and the warrant is quashed, the question may then arise as to the extent of Mr. Taylor's immunity as a former Head of state. The Applicant takes a further point that the attempt to have him arrested in Ghana was a breach of the principle of sovereign equality. Before we embark upon these substantive questions, however, we must deal with three Prosecution objections to entertaining this application before Mr. Taylor has surrendered to or otherwise been brought into the custody of the Court. These raise procedural and conceptual questions about the relationship between immunity and jurisdiction. The Prosecution submits that:

(i) The application does not raise a jurisdictional issue;

(ii) The application is premature as the accused has not made an initial appearance; and

(iii) The applicant does not have standing to bring the motion in any event as he is not before the Court;

IV. IMMUNITY AND JURISDICTION

21. The first objection is that this application is not a preliminary motion under Rule 72 at all, because it does not raise 'an issue relating to jurisdiction' which can be referred to the Appeals

Chamber under Rule 72(E) for a final decision.[21] It raises, instead, an 'issue relating to immunity', which should be decided by the Trial Chamber once Mr. Taylor is before it in person.

22. The Prosecution further submitted that the Applicant's Motion therefore must be a motion under Rule 73(A) which can only be brought after the initial appearance of the Accused.

23. However, both Rules 72 and 73 appear to require an initial appearance. It is expedient to deal with these procedural questions first, before returning to the relationship between immunity and jurisdiction. If the Applicant's Motion is not properly before the court it will not be necessary to embark upon a consideration of the merits of the matter.

24. By virtue of Rule 72(A), a preliminary motion shall be brought within 21 days following disclosure by the Prosecutor of all material envisaged by Rule 66(A)(i).[22] It is evident from the provision of Rule 72(A) read with Rule 66(A)(i) that the Rules do not permit an accused to bring a preliminary motion until the accused has made an initial appearance. Even if Rule 73(A) were to apply, it is clear that that rule permits either party to move before the designated judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused.

25. By virtue of Rule 61, an initial appearance takes place when the accused is transferred to the custody of the court and brought before the designated judge for him to be formally charged.

26. Rules 61, 66(A)(i), 72(A) and 73(A) are straightforward provisions of the Rules adopted from the International Criminal Tribunal for Rwanda ("ICTR") rules of the same number. For an ordinary accused the workability of the Rules is not in doubt and occasions no problem. It is because the Accused in this case was at the time a warrant was issued for his arrest a Head of State that the application of the Rules becomes controversial, in that it may sound incongruous that a Head of State in strict compliance with the provisions of the Rules submits himself to the Court before he can raise the question of his immunity.

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[21] Prosecution Response, para. 7.

[22] Rule 66(A)(i) provides that: "within 30 days of the initial appearance of an accused the Prosecution shall disclose to the Defence copies of the statement of all witnesses whom the Prosecution intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial".

27. The question of sovereign immunity is a procedural question. Shaw is of the opinion that it is one to be taken as a preliminary issue.[23] It may with some plausibility be argued that the fact that it could be taken as a preliminary issue does not contradict the requirement that it should be taken after initial appearance if 'preliminary' means 'before trial'.

28. On a combined reading of Article 1 and Article 6 of the Statute of the Special Court in which it is clear that the court has competence to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law (Article 1) and the official position (including as Head of State) of such persons shall not relieve them of criminal responsibility nor mitigate punishment (Article 6(2)). In the *Yerodia* case similar provisions in the ICTY Statute and the Statute of the International Criminal Court ("ICC") were interpreted as making persons holding high office, including Heads of State, subject to criminal proceedings for certain offences "before certain criminal courts". But, then, to begin to apply that interpretation of the law as contained in the *Yerodia* case may indeed be tantamount to applying an interpretation that is challenged without first deciding the substance and merit of the application.

29. In the *Yerodia* case, the ICJ held that the mere issuance of a warrant of arrest by Belgium against the then incumbent Minister for Foreign Affairs of the Democratic Republic of Congo constituted a violation of an obligation of Belgium towards the DRC and ordered Belgium to cancel the warrant. The matter was not raised as a jurisdictional issue in a Belgian court.

30. Technically, an accused who has not made an initial appearance before this court cannot bring a preliminary motion in terms of Rule 72(A), nor a motion under Rule 73 of the Rules and in a normal case such application may be held premature and accordingly struck out. However, this case is not in the normal course. To insist that an incumbent Head of State must first submit himself to incarceration before he can raise the question of his immunity not only runs counter, in a substantial manner, to the whole purpose of the concept of sovereign immunity, but would also assume, without considering the merits, issues of exceptions to the concept that properly fall to be determined after delving into the merits of the claim to immunity. Although the present

[23] M. Shaw, *International Law* (5th ed, Cambridge University Press, 2003), p. 623.

Applicant is no longer an incumbent Head of State, a statement of general principles must embrace situations in which an Applicant remains an incumbent Head of State. The application with which this decision is concerned was made when the Applicant was a Head of State. The Appeals Chamber exercises its inherent power and discretion to permit the Applicant to make this application notwithstanding the fact that he has not made an initial appearance. To this end, that aspect of the first and second preliminary objections are rejected.

31. The remaining aspect of the Prosecution's first objection is that the Applicant's Motion must be rejected as premature because the first argument of the Applicant did not challenge the jurisdiction of the court but merely asserted that the Accused had personal immunity from jurisdiction. It was argued by the Prosecution that the question whether there was any immunity from the exercise of jurisdiction must be distinguished from the question whether jurisdiction existed. The Prosecution submitted that in a case where jurisdictional immunity applied, a court had jurisdiction but was barred from exercising it. The Prosecution submitted that none of the issues raised by the Applicant in the motion raised objections 'based on the lack of jurisdiction' and therefore the motion could not be a preliminary motion within the meaning of Rule 72(B)(1).

32. The Prosecution contended that the Preliminary Motion did not raise an issue of jurisdiction in terms of Rule 72 because the claim to immunity, rather than raising 'a serious issue relating to jurisdiction', raised an issue of defence. That was a narrow view of jurisdictional immunity of the type claimed by the Applicant. Such immunity connoted immunity from the jurisdiction of the court. Professor Shaw succinctly put it when he wrote that: "the principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising the jurisdiction that it possesses."[24] In that sense it cannot be rightly said that the question of immunity raised by the Applicant does not raise a serious issue relating to jurisdiction. An objection to the proceedings on the ground that in the particular situation the court is prevented from exercising its jurisdiction raises an issue *relating to* jurisdiction.

[24] Shaw, *International Law*, p. 623.

33. The final aspect of the Prosecution's objection, raised in its post-hearing argument (which differs slightly from the pre-hearing argument) is that as a general proposition, an accused does not have standing to file motions before the Special Court until he has been transferred to its custody or appeared before it and that there is no exception where an accused claims immunity since according to the Special Court Statute, an accused has no immunity by reason of his status as acting or former Head of State. For this reason, it is submitted, the substantive issue relating to Head of State immunity needs to be decided in order for the Preliminary Motion to be dismissed on the basis of lack of standing. As we have already found that a) the nature of a claim of immunity constitutes a discretionary exception to the ordinary requirements of an accused first submitting himself to the jurisdiction of the court; and that b) jurisdiction and immunity are closely related, it is not necessary to determine this final objection.

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

34. As raised in the submissions of the parties and those of the *amici curiae*, the issues in this motion turn to a large extent on the legal status of the Special Court. The background to the establishment of the court has been amply narrated in several of the decisions of this Chamber, including the Decision on Constitutionality[25] and the Lomé Amnesty Decision[26], an exhaustive narration is not now necessary.

35. The Special Court is established by the Agreement between the United Nations and Sierra Leone which was entered into pursuant to Resolution 1315 (2000) 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.[27] Subsequent to that resolution, the Security Council sent a mission to Sierra Leone from 7 - 14 October 2000. In its report, the mission, apart from recommending that '[i]n the context of the peace process, the Security Council and the Sierra Leonean authorities will need to reflect

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[25] *Prosecutor v Norman, Kallon and Kamara,* Case Numbers SCSL-2004-14-AR72(E), SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004 ("Constitutionality Decision").
[26] *Prosecutor v Kallon and Kamara,* Case Numbers SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 ("Lomé Amnesty Decision").
[27] Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc S/RES/1315.

carefully before taking any final decisions on the scope of the Special Court', refrained from making a direct recommendation on the establishment of the Special Court, 'since this requires further discussion by the Security Council.'[28] In the meantime, on 4 October 2000, the Secretary-General submitted a report on the implementation of Resolution 1315.[29] In the report, the Secretary-General proposed a Special Court that is unlike the International Tribunals for the former Yugoslavia and Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law; rather, he proposed a treaty-based organ not anchored in any existing system.[30]

36. Correspondence and briefings between the Secretary-General and the President of the Security Council demonstrate the high level of involvement of the Security Council in the establishment of the court including, but not limited to, approving the Statute of the Special Court and initiating and facilitating arrangements for the funding of the Court. The commencement of the operations of the Special Court was authorized by the Secretary-General who notified his intention so to do to the President of the Security Council in a letter dated 2 March 2002.

VI. IS THE SPECIAL COURT AN INTERNATIONAL CRIMINAL TRIBUNAL?

37. 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 I 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

[28] Report of the Security Council Mission to Sierra Leone, 16 October 2000, UN Doc S/2000/992, para 54(b)
[29] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915.
[30] *Ibid*, para 9.

Security Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.

38. 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;' and (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 the 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.[31] 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.[32] The Special Court established in such circumstances is truly international.

39. 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 and 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*',[33] it has

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[31] See Article 24(1) UN Charter.

[32] See the discussion by this Chamber in its earlier decision *Prosecutor v Moinina Fofana*, Case No SCSL-2004-14-AR72(E), Decision On Preliminary Motion On Lack Of Jurisdiction Materiae: Illegal Delegation Of Powers By The United Nations, 25 May 2004.

[33] Resolution 1315 (2000), emphasis added.

been made clear that the Special Court was established to fulfil an international mandate and is part of the machinery of international justice.

40. 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.

41. For the reasons that have been given, it is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assisted the court as *amicus curiae* as follows:[34]

    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.

42. 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

[34] *Amicus Curiae* Submissions, paras 118(5)-(8).

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

43. The path of enquiry into the merit of the claim made by the Applicant essentially starts from the constitutive instruments of the Special Court and, particularly, the Statute. The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law.

44. 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 a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.

45. 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) which entered into force on 1 July 2002 provides that:

> The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 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 a person.

46. 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[35] ("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.

47. 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."[36] 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.[37]

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. [38]

48. Mitigation of punishment mentioned in Article 7 was not mentioned in the formulation of principles because the Commission was of the opinion that the question of mitigation of punishment was a matter for the competent court to decide.[39] It should go without saying that

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[35] London, 8 August 1945, United Nations Treaty Series, vol. 82, 279.
[36] General Assembly, Resolution 177(II), Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, 21 November 1947.
[37] International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, submitted to the General Assembly as part of the Commission's report which appears in *Yearbook of the International Law Commission*, 1950, vol. II.
[38] *Ibid*, pp. 374-75.
[39] *Ibid.*

mention of punishment implies a trial. This point is here emphasized to show that the omission of mention of sentence was not intended to support any argument that would separate responsibility from punishment.

49. The nature of the offences for which jurisdiction was vested in these various tribunals is instructive as to the circumstances in which immunity is withheld. The nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity.

50. More recently in the *Yerodia* case, 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",[40] 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."[41] 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.[42]

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,

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[40] *Yerodia* case, para 58.
[41] *Ibid.*
[42] *Ibid.*, para 59.

> 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 '[I]mmunities 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'.[43]

51. 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 the 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.[44]

52. 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]

53. 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

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[43] *Ibid*, para 61 (emphasis added).
[44] Brief, above note at , p. 15.
[45] See *R v Bartle and the Commissioner of Police for the Metropolis and others, Ex parte Pinochet*, House of Lords, 25 November 1998.

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.

54. Since we have found that the Special Court is not a national court, it is unnecessary to discuss the cases in which immunity is claimed before national courts.

55. The conclusion having been reached as above, the remaining issues can be disposed of very shortly.

56. Initially, the Government of Liberia was a co-applicant with Mr. Taylor. On an objection raised by the Prosecutor, the Government was struck out as an applicant by the Trial Chamber before the Preliminary Motion was referred to the Appeals Chamber.[46] In the result, by the time this matter came before the Appeals Chamber, the Government of Liberia had ceased to be an applicant in the Preliminary Motion. Consequently, the Government of Liberia cannot be said to be claiming before this court that Mr. Taylor is not subject to criminal proceedings before the Special Court.

57. 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. In the result, merely requesting assistance, far from being an infringement of sovereignty of the receiving state is in fact a recognition of sovereignty. In other words, Ghana's sovereignty could

[46] See Order Pursuant to Rule 72(E): Defence Motion to quash the indictment and to declare the Warrant of Arrest and all other consequential orders null and void, 19 September 2003.

not be in question as it was merely the receiving state. A successful claim of sovereign immunity may lead to a claim by *Liberia* of a violation of its sovereignty, as the immunity attaches to the state concerned, not to a third state. However, Liberia is not before this court and in any event we have held that this court is an international court rather than the court of another sovereign state.

58. Since the Applicant is the subject of criminal proceedings before this court, processes issued in the course of, or for the purpose of, such proceedings against the Applicant cannot be vitiated by a claim of personal immunity.

59. Before this matter is concluded, it is apt to observe that the Applicant had at the time the Preliminary Motion was heard ceased to be a Head of State. The immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant.

VII. DISPOSITION

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

Done at Freetown this thirty-first day of May 2004

Justice Ayoola
Presiding

Justice King

Justice Winter

[Seal of the Special Court for Sierra Leone]