Guest Lecture Series of the Office of the Prosecutor

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"Immunities before international courts"

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Summary of lecture

The issue of the entitlement of a serving or former head of state (or other high ranking government official) to claim immunity before national and international courts has arisen with increasing frequency, and may one day come to the International Criminal Court.

Within the past five years cases have reached the Judicial Committee of the House of Lords (*Pinochet*), the International Criminal Tribunal for the former Yugoslavia (*Blaskic*, *Milosevic*) and the International Court of Justice (*Yerodia*). It is not immediately apparent that the approach taken by the various courts is based upon the same premised and foundations. The case currently pending before the Special Court for Sierra Leone (*Taylor*) may present an opportunity for that Court to seek to reconcile differing approaches. By way of background I have attached to this outline the Submission I prepared as Amicus Curiae appointed by the Appellate Chamber.

The Taylor case raises a number of important issues, including:

- Is a claim to immunity to be treated differently before an international court as opposed to a national court?
- Is there ever a right to claim head of state immunity before an international court, or can such a right only be lost where the relevant state has waived immunity (e.g. by treaty) or where the Security Council has acted to remove any entitlement to claim immunity?
- Before an international court does the former head of state have a right to claim immunity in respect of no acts, or only acts which may be treated as official (or governmental acts)?
- Is there a distinction to be drawn between (1) an international court's exercise of jurisdiction (e.g. by issuing an indictment or arrest warrant) only lose a right entitled to claim immunity in respect of public acts and (2) its entitlement to require the cooperation of third states or other parties (e.g. by requiring an indicted person to be transferred)?
- Is the mere issuance of an indictment or an arrest warrant (by an international court) in respect of a serving head of state of a country which is not a party to a treaty establishing the court an affront to the dignity of a state such as to give rise to a violation of its entitlement to immunity?

These and other questions may well arise – at some time in the future – where the ICC is faced with the issuance of an indictment or arrest warrant in respect of a serving (or former) head of state (or other high ranking official) of a country which is not a party to the 1998 Rome Statute. In such circumstances the provisions of Articles 27 and 98 of the ICC Statute may have to be interpreted and applied in the context of the rules of general international law. This in turn gives rise to issues concerning the relationship between the various international courts (including issues of hierarchy, if any) and the nature of the international legal order.

THE SPECIAL COURT FOR SIERRA LEONE
THE APPEAL CHAMBER

THE PROSECUTOR
v
CHARLES GHANKAY TAYLOR

CASE SCSL-2003-01-I

SUBMISSIONS OF THE AMICUS CURIAE ON HEAD OF STATE IMMUNITY

INTRODUCTION

1. These Submissions are addressed in four Parts:

Part I addresses the rules of international law under which a serving head of state may be the subject of an indictment and/or arrest warrant issued in respect of one or more international crimes issued by (a) an international criminal court or tribunal and (b) a national court of another State (paras. 2-57);

Part II considers whether, for the purposes of the rules of international law on head of state immunity, the Special Court for Sierra Leone is to be treated as a national court or as an international court or as a hybrid (paras. 58-77);

Part III addresses, in the light of Parts I and II, whether it was lawful under international law for the Special Court for Sierra Leone to issue an indictment and circulate an international arrest warrant in respect of Charles Taylor

while he was serving as head of state of Liberia, for the offences listed in the indictment (paras. 78-102); and

Part IV considers the consequences for the position under international law arising from the fact that Charles Taylor is no longer the head of state of Liberia (paras. 103-117).

A **summary** of our submissions is set out paragraph 118.

PART I

(A) Head of State Immunity before International Criminal Courts and Tribunals

2. In respect of the jurisdictional immunities[2] of serving heads of state international law and practice has generally distinguished between proceedings before national and international courts. As regards the international courts and tribunals which have been established – all in the 20th century – practice has been consistent,

[2] The term immunity covers two distinct types of immunity, explained by one leading commentator in the following terms: 'There are two categories of immunities. The first embraces the so-called immunities *ratione materiae*, also referred to as functional immunities. They cover activities performed by *every* State official in the exercise of his functions, regardless of where they are discharged. They do not come to an end when the relevant State organ relinquishes his official position […] the rationale behind this rule is that those activities are not performed by the State official in his private capacity but on behalf of the State; hence they are attributable to the State to which he belongs so that – as a matter of principle – the individual cannot be held accountable for them. The other category of immunities, which are only granted to some specific classes of individuals performing State functions abroad, is that of immunities *ratione personae*, also referred to as personal immunities. […] These immunities cover *all* acts performed by the State official, whether or not performed *during* or *prior to* assumption of his official function, *within* or *outside* the territory of the relevant foreign State. […] [T]hese immunities are forfeited when the person enjoying them terminates such functions abroad, with the exception of immunities relating to *official acts* (i.e. immunities *ratione materiae*) that continue even after the State official relinquishes his post.' Paolo Gaeta, 'Official Capacity and Immunities', in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002), pages 975-7, emphasis in original.

in that no serving head of state has been recognised as being entitled to rely on jurisdictional immunities.

3. The Treaty of Versailles (1919) was the first occasion on which a former head of state was indicted to be prosecuted before an international tribunal. Article 227 provides that:

> "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial."

4. Nearly thirty years later, the Statutes of the Nuremburg and Tokyo International Military Tribunals confirmed that no person was entitled to claim immunity before the jurisdiction of those Tribunals. Article 7 of the Charter of the Nuremburg Tribunal provided that:

> "The official position of defendants, whether heads of state or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[3]

In similar terms Article 6 of the Statute of the Tokyo Tribunal provided that:

[3] 82 U.N.T.S. 279.

> "Neither the position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged …"[4]

5. These emerging principles of international criminal law relating to the jurisdiction of international tribunals were restated in the Principles of International Law Recognised in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal, adopted in 1950 by the International Law Commission of the United Nations[5] and approved by the UN General Assembly.[6] Principle III states that:

> "The fact that an author of an act which constitutes a crime under international criminal law has acted in his capacity as head of state or of government does not release him of his responsibility under international law."

The International Law Commission reaffirmed the principle in its Draft Code of Crimes Against the Peace and Security of Mankind, adopted in 1996.[7] Article 7 provides that:

> "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."

The ILC explained the basis for its approach in the following terms:

> "Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its

[4] Proclaimed at Tokyo, 19 January 1946.
[5] *Yearbook of the International Law Commission*, 1950, Volume II.
[6] Resolution 488, 12 December 1950.
[7] http://www.un.org/law/ilc/texts/dcodefra.htm

> judgement, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its judgement, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."[8]

Although the ILC did not indicate which proceedings it considered "appropriate" to the absence of immunities, it did not appear to have in mind proceedings before national courts. At footnote 54 of the Commentary to the 1996 draft Articles, the Commission stated:

> "Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment."

6. The position in international law was summarised by Sir Arthur Watts QC in his 1994 Lectures at the Hague Academy of International Law, "The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers":

> "States are artificial legal persons: they can only act through the institutions and agencies of the state, which means, ultimately, through its officials and other individuals acting on behalf of the state. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that

[8] See Commentary to the 1996 draft Articles (http://www.un.org/law/ilc/texts/dcodefra.htm)

> individuals who commit international crimes are *internationally* accountable for them has now become an accepted part of international law. Problems in this area – such as the non-existence of any standing international tribunal to have jurisdiction over such crimes – have not affected the general acceptance of the principle of individual responsibility for international criminal conduct."[9]

ICTY and ICTR

7. The International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') were established by Security Council Resolutions adopted under Chapter VII.

8. The ICTY was established by Security Council resolution 927 (1993). Article 7(2) of the Statute of the ICTY provides that:

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

The ICTR was established by Security Council resolution 955 (1994). Article 6(2) of the Statute of the ICTR is in identical terms to article 7(2) of the ICTY Statute.

9. The Appeals Chamber of the ICTY has explained the development in the following terms:

> "It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign state to determine its internal structure and in particular to designate the individuals acting as State agents organs. […] The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.

[9] 1994-III 247 *Recueil des Cours*, p. 82, emphasis added.

> The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."[10]

10. The position of the ICTY and ICTR in respect of head of state immunity is considered by Gaeta:

> "Within a vertical framework, that is the relationships between Member States of the United Nations, on the one side, and International Tribunals, on the other, the Statutes of the two *ad hoc* Tribunals provide for a derogation from the legal regulation of personal immunities contained in customary international law. Admittedly, these Statutes do not envisage any such derogation *explicitly*. However, they lay down the obligation of all UN Member States to cooperate with the International Tribunals, in particular by executing arrest warrants. This obligation, being based on a Security Council binding resolution made under Chapter VII of the UN Charter, by virtue of Article 103 of the UN Charter takes precedence over customary and treaty obligations concerning personal immunities. Consequently, whenever a Member State to which the International Tribunal issues an arrest warrant enjoining the detention of the Head of State of another UN member who happens to be on its territory executes the arrest warrant, by doing so it does not breach any customary or treaty obligations vis-à-vis the foreign State concerned."[11]

The International Criminal Court

11. The International Criminal Court ('ICC') was founded by the Statute of Rome, a multilateral treaty which came into force in

[10] ICTY, *Prosecutor v Blaskic (Subpoena),* 29 October 1997, 110 *ILR* 687, at 710.
[11] Paolo Gaeta, 'Official Capacity and Immunities', in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002), page 989, emphasis in original.

July 2002 following the 60th ratification. The ICC was not established pursuant to Security Council Resolution, so the question of Chapter VII powers does not arise.. As a treaty-based organisation it is similar to the Special Court for Sierra Leone (see below at paras. 72-73), although the Special Court does have a connection with the Security Council, having been established pursuant to Resolution.

12. Under Article 12 of the Rome Statute, the Court has jurisdiction over relevant crimes committed either on the territory of a State Party (whether the perpetrator is a national of the State Party or not), and also over crimes committed by nationals of a State Party (whether committed on the territory of a State Party or not). In other words, it exercises global jurisdiction over nationals of States Parties, but only territorial jurisdiction over nationals of non-States Parties.

13. Article 27 of the Rome Statute deals with immunities, and goes further than the provisions of the ICTY and ICTR (and the Special Court). Entitled 'Irrelevance of official capacity,' it provides that:

> "(1) This 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.
> (2) 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."

14. Article 98(1) of the Rome Statute is also relevant:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

15. It is important to note that Article 98 is limited to cooperation, incorporated into Part 9 of the Statute (International Cooperation and Judicial Assistance). It does not appear to govern the procedures relating to the issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear (under Article 58 of the Statute), which procedures are subject to Article 27 of the Statute.[12] The significance of Article 27 of the ICC Statute has been summarised by one commentator as follows:

> "[Article 27] has a considerable impact on international rules on personal immunities. Article 27(2), together with the obligations on cooperation laid down in Part 9 of the Statute, provides a legal regulation aimed at completely *removing* these immunities whenever international crimes are at stake. Thus, an important *derogation* from customary international law is provided for in the Statute. However, this derogation only operates (i) at the *vertical level* (that is, whenever it is necessary to execute an arrest warrant or a request for surrender emanating from the Court), and (ii) by virtue of Article 98(1), only in the reciprocal relationships between *States Parties to the Statute*. In all other cases, in particular when requests for cooperation involve the question of personal immunities of officials of a State *not party* to the Statute, one has to fall back on the traditional legal regulation contained in international customary rules. Consequently, the Court may not make requests for cooperation entailing, for the requested State, a violation of international rules on personal immunities to the detriment of a State not party to the Statute. This of course applies unless the Court obtains a waiver of immunities from the State not party."[13]

[12] For analysis, see Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the *Rome Statute*', 2001, Criminal Law Forum 12, 429.
[13] *Supra* n. 10, page 1000, emphasis in original.

16. The combined effect of the relevant provisions of the ICC Statute, in respect of a head of state, is that:

(1) The ICC has jurisdiction over crimes committed anywhere in the world by the head of state of a State Party.

(2) In respect of the head of state of a non-State Party, the ICC has jurisdiction over crimes committed on the territory of a State Party.

(3) However, the Court cannot proceed with a request for surrender or assistance which would require the requested State (whether or not a party to the ICC Statute) to act inconsistently with that State's obligations under international law with respect to the immunity of head of state of a third State, unless it can obtain the cooperation (by waiver of immunity) of the third State

(B) Head of State Immunity Before National Courts

17. The preceding section has dealt with the absence of head of state immunities before international criminal tribunals and courts. The situation in respect of national criminal courts differs, since the operating principle in general international law is that a serving head of state is entitled to absolute immunity from the jurisdiction of such courts, unless it has been waived by the State concerned. This principle has been confirmed by the *Pinochet* proceedings before the House of Lords in England (which concerned a former head of state) and the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ("the Yerodia case") before the International Court of Justice.[14]

[14] 2002 ICJ Reports.

The *Pinochet* Case

18. The facts of the case are well known. Spain sought the extradition of Senator Pinochet, the former head of state of Chile, for offences including torture, hostage taking and conspiracy to murder, committed largely in Chile, while he was head of state. The House of Lords had to consider on two occasions what, if any, immunities he enjoyed in respect of prosecution in a domestic court. The judgment in the first case ('*Pinochet 1*')[15] was set aside ('*Pinochet 2*')[16] after Lord Hoffmann, a Law Lord who heard the case, was found to have links with Amnesty International, one of the interveners in the case. A different panel of the Judicial Committee then gave the definitive judgment in the case ('*Pinochet 3*').[17]

19. *Pinochet 1*, although no longer binding in domestic law, nevertheless contains discussions by individuals of high authority, and we consider that it is therefore not without a certain significance. In particular, even the Law Lords who formed the minority view (that Senator Pinochet was entitled to immunity before the English courts) accepted that the position would be different before an international court.

20. We address here only the two aspects of the *Pinochet* case which are relevant for present purposes:

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[15] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 61.
[16] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.
[17] *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

(1) The special status of international courts;

(2) The distinction between acts done in an official capacity and acts done in a personal (private) capacity.

(1) International Courts

21. In *Pinochet 1*, Lord Slynn noted the development of the international criminal courts from Nuremberg to the ICC, and the clauses in their charters/statutes which removed immunity to heads of state.[18] Although he was in the minority in the Judgment, he nevertheless appeared to accept that the legal rule in respect of international tribunals differed to that in respect of national courts:

> "That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another. It is significant that in respect of serious breaches of 'intransgressible principles of international customary law' when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved…'[19]

22. Lord Lloyd, also in the minority, considered that

> "The setting up of these special international tribunals for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states. If they could, there would be little need for the international tribunal."[20]

23. In *Pinochet 3*, Lord Browne-Wilkinson explained that "It is a basic principle of international law that one sovereign state (the

[18] *Supra* n.14, pages 78-79.
[19] *Ibid,* page 79.
[20] *Ibid*, page 98.

forum state) does not adjudicate on the conduct of a foreign state."[21] Lord Goff referred to the lecture by Sir Arthur Watts, cited at paragraph [6] above, and emphasised that he was referring to *international* accountability, not accountability in national courts.[22] He also considered that a state's waiver of its immunity by treaty must always be express.[23]

24. Lord Millett went further, holding that national courts did in fact have more extensive powers than the other members of the Judicial Committee envisaged:

> "Every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extraterritorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts."[24]

25. He went on to argue that the creation of international criminal tribunals did not affect this analysis: prosecution before national courts "will necessarily remain the norm even after a permanent international tribunal is established. In future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence."[25]

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[21] *Supra* n. 16, page 209.
[22] *Ibid*, page 211.
[23] *Ibid*, page 217.
[24] *Ibid*, page 276.
[25] *Ibid*, page 279.

(2) Official and Personal Acts

26. In *Pinochet 1*, Lord Slynn considered that "There is no universality of jurisdiction for crimes against international law: there is no universal rule that all crimes are outside immunity ratione materiae."[26] This, of course, leaves open the possibility that *some* crimes are outside the scope of that immunity. For immunity *ratione materiae* to be lost in respect of prosecution in the domestic courts of another state, Lord Slynn considered that there had to be an international convention explicitly denying such immunity, to which both relevant states were parties. Lord Lloyd also noted that former heads of state only enjoy immunity in foreign courts in respect of "public, official or governmental acts" and not private acts.[27] Lord Lloyd took a wide view of the former category:

> "I have no doubt that the crimes of which Senator Pinochet is accused, including the crime of torture, were governmental in nature … it would be unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes. Otherwise one would get to this position: that the crimes of a head of state in the execution of his governmental authority are to be attributed to the state so long as they are not too serious. But beyond a certain (undefined) degree of seriousness the crimes cease to be attributable to the state, and are instead to be treated as his private crimes. That would not make sense."[28]

27. In contrast, Lord Nicholls considered that:

> "International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of

[26] *Supra* n. 14, page 80.
[27] *Ibid,* page 91.
[28] *Ibid*, page 96.

> other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."[29]

28. Lord Steyn considered that:

> "the concept of an individual acting in his capacity as head of state involves a rule of law which must be applied to the facts of a particular case. It invites classification of the circumstances of a case as falling on a particular side of the line. It contemplates at the very least that some acts of a head of state may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a head of state. If a head of state kills his gardener in a fit of rage that could by no stretch of the imagination be described as an act performed in the exercise of the functions of a head of state…"[30]

29. In *Pinochet 3*, the precise terms of the Torture Convention were more central to the Judicial Committee's reasoning. Lord Browne-Wilkinson emphasised that the definition of torture in the Convention involved a public official or someone acting in an official capacity, and that "As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chief of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention."[31] Lord Goff, on the other hand, considered that if "a limit is to be placed on governmental functions so as to exclude from them acts of torture within the Torture Convention, this can only be done by means of an implication arising from the

[29] *Ibid*, page 109.
[30] *Ibid*, page 115.
[31] *Supra* n. 16, page 205.

Convention itself."[32] He considered that such a waiver could not be implied from the use of the words "public official" and "official capacity" in the Convention.[33]

30. Lord Hope considered that, "In my opinion the functions of the head of state are those which his own state enables or requires him to perform in the exercise of government. He performs these functions wherever he is for the time being as well as within his own state."[34] Lord Hope went on to say that:

> "The principle of immunity ratione materiae protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit … The second relates to acts the prohibition of which has acquired the status under international law of ius cogens … But even in the field of such high crimes as have achieved the status of ius cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts."[35]

31. Lord Hutton considered that the wording of the Torture Convention excluded immunity on the part of a head of state.[36] He considered, further, that there is a "distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the

[32] *Ibid*, page 218.
[33] *Ibid*, page 222.
[34] *Ibid*, page 241.
[35] *Ibid*, page 243.
[36] *Ibid*, page 261.

individual responsibility of that official in criminal proceedings for an international crime."[37]

32. Lord Saville considered, again with reference to the provisions of the Torture Convention, that a head of state would be a person acting in an 'official capacity' for the purposes of the Convention: "He would indeed to my mind be a prime example of an official torturer."[38] He considered that the Convention removed immunity *ratione materiae* for torture from the former heads of state of the States Parties.

33. Considering the crime of genocide, Lord Phillips asked:

> "Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in his official capacity? In my view plainly it would not. I do not reach that conclusion on the simple basis that no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity ratione materiae can coexist with them."[39]

Commentary

34. One leading commentator has summed up the most important outcome of the Pinochet case, for present purposes, in the following terms: "Whatever the restrictions in the reasoning used by the Lords, it seemed that what emerged is that 'international

[37] *Ibid*, page 264.
[38] *Ibid*, page 266.
[39] *Ibid*, page 289.

crimes in the highest sense' cannot per se be considered as official acts".[40]

The *Yerodia* Case

35. The principal authority, relied upon by both the Prosecution and the Defence in their submissions in the present proceedings is the decision of the International Court of Justice ("ICJ") in the *Case Concerning the Arrest Warrant of 11 April 2000* ("the Yerodia case"). It is important to recall that this case was concerned with the question of immunity before national courts. The Court did, however, indicate views on immunities before certain international courts and – in *obiter dicta* – on immunities in respect of former high ranking state officials.

36. On 11 April 2000, an investigating judge of the Brussels *tribunal de premiere instance* issued "an international arrest warrant *in absentia*" against Mr Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and their Additional Protocols, and with crimes against humanity. At the time when the arrest warrant was issued, Mr Yerodia was the Minister for Foreign Affairs of the Democratic Republic of Congo (DRC). The ICJ had to consider whether the courts of one state could issue an arrest warrant for the arrest of the serving Minister for Foreign Affairs of another state.

The arguments of the DRC

[40] Brigitte Stern, "Immunities for Head of State: Where Do We Stand?", in M. Lattimer and P.Sands (eds.), *Justice for Crimes Against Humanity* (Hart Publishing, forthcoming, November 2003), page 103.

37. The DRC argued that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to absolute immunity from the criminal jurisdiction of the courts of any other State. Such absolute immunity has a functional purpose, namely to allow the office holder to carry out his or her duties without hindrance. This immunity covers *all* acts of the office holder, whether or not they were committed before they took office, and whether or not they could be characterised as 'official acts'.

38. The DRC recognised that – flowing from the decisions of the International Military Tribunals in Nuremberg and Tokyo – the accused's official capacity at the time of the acts does not act as a ground of exemption from his criminal responsibility. The DRC also accepted that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution could not be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity no longer exists.[41]

The arguments of Belgium

39. Belgium argued that, while Ministers of Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and not to private acts. At the time of the acts of which Mr Yerodia was accused, he was not immune, there was no evidence that he was acting in an official capacity, and the arrest warrant was issued against him personally.

[41] Judgment of the Court, para 48.

The Court's Judgment

40. The Court began its analysis by observing "that in international law it is firmly established that, as diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[42] It is clear that the Court's statement does not extend to immunities from jurisdictions which are not "in other States".

41. The Court went on to note that the immunities accorded to Ministers for Foreign Affairs (and, by extension, a head of state) "are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States".[43] An analysis of the requirements of an effective exercise of those functions led the Court to conclude that:

> "the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of their duties.
>
> In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office … and acts committed during the period of office".[44]

42. On this basis the Court concluded, by 13 votes to 3, that the issue and circulation of an international arrest warrant

[42] Para 51, emphasis added.
[43] Para 53.
[44] Paras 54-55, emphasis added.

> "constituted violations of a legal obligation of the Kingdom of Belgium towards the [DRC], in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the [DRC] enjoyed under international law".[45]

43. It is perfectly apparent, however, that the Court was only addressing the question of immunities before national courts of serving high-ranking State officials (there can be no doubt that the finding in relation to a serving Foreign Minister applies equally to a serving head of state). In reaching its judgment the majority concluded, on the basis of a careful examination of State practice (such as the House of Lords and the Court of Cassation)[46], that it was unable to deduce "any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity".[47] The Court went on to state that it:

> "has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremburg, Art. 7); Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such exception exists in customary international law in regard to national courts."[48]

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[45] Para 78(2).
[46] The Court also cited the decision of the French *Cour de Cassation* in *Re Qaddafi*, Arret no 1414, (Unreported, 13 March 2001), in relation to the universal jurisdiction of national courts.
[47] Para 58.
[48] Para 58, emphasis added.

It appear that the Court proceeded on the basis that a distinction was to be drawn between immunities in relation to the exercise of criminal jurisdiction by national courts, on the one hand, and by certain international courts or tribunals, on the other hand.

44. The Court re-emphasised this point when it summarised the four situations in which international law immunities enjoyed by holders of high political office do not bar prosecution:

(1) 'First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law';
(2) 'Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity';
(3) 'Thirdly, after a person ceases to hold the office … he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period in a private capacity';
(4) 'Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings <u>before certain international criminal courts</u>, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.'[49]

The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal

45. While concurring in the Court's conclusions, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal ('the Separate Opinion') considers some of the issues in the case in greater detail. The Joint Separate Opinion may provide some

[49] Para 61, emphasis added.

clarification to the main judgment of the Court as its three authors joined in the majority.

46. The Separate Opinion makes clear the tension with which the Special Court is presented: "One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while as the same time guaranteeing respect for human rights."[50]

47. The judges go on to argue that "the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts all have their part to play."[51] They note that

> "The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognised that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office."[52]

48. The Separate Opinion urges that "In view of the worldwide aversion to these crimes, such immunities have to be recognised with restraint, in particular when there is reason to believe that

[50] Separate Opinion, para 5.
[51] Para 51.
[52] Para 74.

crimes have been committed which have been universally condemned in international conventions."[53]

49. Notably, the Joint Separate Opinion disagreed with the Court's view that the warrant had to be cancelled, since

> "the Court's finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased."[54]

Commentary

50. The recent case law – in particular *Pinochet* and *Yerodia* – has attracted considerable academic commentary. The great majority of this commentary has addressed the ICJ's approach to the question of immunities before national courts. Some commentators have been approving,[55] others less so.[56] But there appears to be a broad consensus with the view suggested by Sir Arthur Watts in his 1994 Hague lectures (see above at para. 6), and that these judgments confirm that jurisdictional immunities may not be claimed by serving high ranking officials before certain international criminal courts and tribunals. One leading commentator has summarised the position in the following terms:

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[53] Para 79.
[54] Para 89.
[55] See e.g. Joe Verhoeven, 35 Rev. Belge de Droit International (2002) 531.
[56] See e.g. Campbell McLachlan, '*Pinochet* Revisited', 51 ICLQ 959 (2002) ("the Court's conservative approach on what it did adjudicate, and its evident disarray on the larger issues beyond, will do little to assist the progressive development of customary international law. There have been recent occasions in international law – just as in politics – where the erection of an impregnable wall around the *status quo* has proved the final act in provoking a revolution in approach. One must hope that *Congo v Belgium* will prove to be one such case.") (at 966).

> "Strictly speaking, [in relation to international courts] one does not deal here with immunity, but rather with impunity. It is quite clear that the theory of immunity has developed in order to protect a state and its agents from being tried in states' courts, primarily in the jurisdiction of another state. The immunity from arrest as well as the immunity from jurisdiction or execution is based on the sovereign equality of states. But naturally, the sovereign equality of states does not prevent a state's representative from being prosecuted before an international court, if this court is given jurisdiction over former or acting heads of state.
> Before an international tribunal, no procedural bar exists and it has also been asserted, so that things are unambiguous that no excuse can exist on the merits, because of the official position of a defendant. In other words, immunity is not an issue before the international tribunals and irresponsibility has been clearly swept out."[57]

51. This appears to be the dominant view, but it is not the only view. Another commentator has written in relation to paragraph 58 of the Yerodia Judgement (see above para. 43):

> "On notera en passant que cette position de la Cour signifie implicitement, contrairement a ce qui est parfois soutenu en doctrine, que l'immunité de juridiction n'est pas seulement affaire de jurisdictions nationales, mais est aussi invocable devant une juridiction internationale, quitte a ne pas etre retenu devant celles-ci du fait de dispositions conventionelles."[58]

And another commentator has written:

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[57] Brigitte Stern, "Immunities for Head of State: Where Do We Stand?", in M. Lattimer and P.Sands (eds.), *Justice for Crimes Against Humanity* (Hart Publishing, forthcoming, November 2003). The author refers to the Treaty of Versailles (Art. 227), the Statutes of the Nuremburg Tribunal (Art 7) and the Tokyo Tribunal (Art. 6), the Statute of the ICTY (Art. 7(2), the Statute of the ICTR (Art. 6(2), and the Statute of the International Criminal Court (Art. 27). See also Antonio Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case', 13 EJIL 853 (2002), at 865.

[58] Jean Salmon, "Libres Propos sur l'Arret de la CIJ du 14 Fevrier 2002", 35 Revue Belge de Droit International 512 at 515 (Informal translation: "We note in passing that this position adopted by the Court signifies implicitly, contrary to what is sometimes said in commentary, that the immunity from jurisdiction is not only a matter for national courts, but may also be invoked before an international court, subject to its not being retained before these bodies by reason of treaty provisions.").

> "[T]he possibility of relying on international law immunities to avoid prosecutions by international tribunals depends on the nature of the tribunal: how it was established and whether the State of the official sought to be tried is bound by the instrument establishing the tribunal. In this regard, there is a distinction between those tribunals established by Security Council Resolution (i.e. the ICTY and ICTR) and those established by treaty. Because of the universal membership of the UN and because decisions of the Council are binding on all UN members, the provisions of the Statutes of the ICTY and ICTR are capable of removing immunity with respect to practically all states. On the other hand, since treaties are only binding on the parties, a treaty establishing an international tribunal is not capable of removing an immunity which international law grants to officials of States that are not party to the treaty. These immunities are rights belonging to the non-party States and those States may not be deprived of their rights by a treaty to which they are not party."[59]

52. This approach may also be reflected in the approach taken by the *Institut de Droit International*, in its Resolution of 26 August 2001, on 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law.' Part 1 deals with serving heads of state, and Article 2 provides that 'In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.' Article 11 of the Institut's Resolution provides:

> (1) Nothing in this Resolution may be understood to detract from:
>
> (a) obligations under the Charter of the United Nations;
>
> (b) the obligations under the statutes of the international criminal tribunals as well as the obligations, for those States that have become

[59] Dapo Akande, "The Application of International Law Immunities in Prosecutions for International Crimes", unpublished paper (1 July 2003), accepted for publication in the International and Comparative Law Quarterly, on file with the authors, at page 3.

parties thereto, under the Rome Statute for the International Criminal Court.'

(2) This Resolution is without prejudice to:
   (a) the rules which determine the jurisdiction of a tribunal before which immunity may be raised;
   (b) the rules which relate to the definition of crimes under international law;
   (c) the obligations of cooperation incumbent upon States in these matters.

(3) Nothing in this Resolution implies nor can be taken to mean that a Head of State enjoys an immunity before an international tribunal with universal or regional jurisdiction.'[60]

Conclusions

53. This Part of our submissions addressed the question of the circumstances under international law in which a serving head of state of one State may be the subject of an indictment and/or arrest warrant issued in respect of one or more criminal offences issued by the national courts of another State or an international court.

54. The position in respect of national courts is now clear, following the Judgment in the *Yerodia* case.

55. That case was not, however, concerned directly with the situation before international courts. In respect of these courts the position falls to be inferred from State practice (in particular in relation to the establishment of existing international courts), the decisions of various national and international courts, and the writings of academic commentators. The general tendency points towards the view that in respect of international courts there exists no *a priori* entitlement of a State to claim immunity. The opposite view (see above at paras. 51 and 52) relies on a particular reading of the

[60] Available at www.idi-iil.org.

Yerodia judgment, and on an assumption – that international law grants immunities in relation to international courts – which does not appear to rest on established or identified state practice. The approach is also not supported by the Statute of the ICC, which implies a distinction between the right to exercise jurisdiction, on the one hand, and the right to expect cooperation from a Party to the Statute or a third State, on the other hand (see further below at paras. 90-97) That distinction (which is reflected also in the instruments establishing the Special Court for Sierra Leone) is one to which the signatories of the ICC Statute (including Sierra Leone, Liberia, Ghana and Nigeria) did not appear to object to in principle.[61]

56. We consider that an analysis of the relevant case law, and in particular the *Yerodia* judgment of the ICJ, leads to the following general conclusions:

(1) Before a national criminal court a serving head of state is entitled to immunity under customary international law even in respect of international crimes;

(2) One State may not issue and circulate internationally an arrest warrant in respect of a serving head of another state, unless the State of which that person is head has waived immunity;

(3) International practise and a majority of academic commentary supports the view that before an international criminal court or tribunal (whether or not it has been established under Chapter VII of the UN Charter) may exercise jurisdiction over a serving head of state and that such person is not entitled to claim immunity under

[61] All four States are signatories to the Statute, and only Liberia is not a party.

customary international law in respect of international crimes;

(4) Whether an international criminal court is entitled to (a) issue and (b) circulate internationally an arrest warrant for a serving head of state turns on the actual effect of such issuance and circulation, the legal basis upon which the international criminal court has been established, and the terms and provisions of its governing instruments, including those relating to jurisdiction.

57. Nothing in the *Yerodia* judgment expresses doubt on the authority of a suitably constituted international tribunal to issue an arrest warrant in respect of a serving or former head of state. Whether the Special Court for Sierra Leone has the authority to do that depends on the basis, nature and extent of its powers and attributes, and whether these powers and attributes bring it within the class of "certain international tribunals" envisaged by the ICJ to have such power. It is this issue to which we now turn.

PART II

The Formation of the Special Court for Sierra Leone

58. Given the above conclusions, the nature of the Special Court is of central importance in determining whether it can lawfully issue and then circulate internationally an indictment or international arrest warrant against a serving head of state who is alleged to have committed an act which falls within the Court's subject matter, temporal and territorial jurisdiction. In order to determine its nature, it is necessary to review the basis upon which the Special Court was established, before comparing the legal basis and capacities of the Special Court with other international criminal tribunals.

Security Council Resolution 1315

59. On 14 August 2000 the United Nations Security Council adopted Resolution 1315. The preamble sets out the Security Council's concerns at the serious crimes committed within the territory of Sierra Leone, the need to bring about peace and security in the region, and to ensure 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".

While this resolution was not adopted under Chapter VII of the Charter of the United Nations (see para 75 below), it nevertheless reiterated "that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region".

60. In paragraph 1 of the operative part of the Resolution, the Security Council "requests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution…".[62]

61. Notably, in paragraph 3 of Resolution 1315 the Security Council

> "recommends further that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2 [crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone], including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

It does not appear to have been the intention of the drafters of the resolution to limit the jurisdiction of the Special Court to persons of Sierra Leonean nationality, or only to "leaders" of certain organizations (as opposed to any persons holding official state positions) (see below at paras. 81-87). Further, in paragraph 7 it requested the Secretary-General to *inter alia* address in his report the advisability, feasibility, and appropriateness of the Special Court sharing the Appeals Chamber of the ICTY or ICTR. Although a decision to link the Special Court with the ICTY and the ICTR did not in the end occur, the paragraph may be seen as an indication of the extent to which the Security Council intended the Special Court to have a jurisdiction which was generally analogous to that of the ICTY and ICTR.

The Report of the Secretary-General

62. Pursuant to paragraph 6 of Resolution 1315, on 4 October 2000 the Secretary-General submitted his Report to the Security

[62] Emphasis added. Paragraph 6 requested the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiation with the Government of Sierra Leone concerning the special court, including recommendations, no later than 30 days from the date of this resolution.

Council.[63] Part II of the Report, entitled 'Nature and specificity of the Special Court', sets out the views of the Secretary-General as to the Special Court's legal nature and specificity:

> "The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for 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, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. […]. As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) […].
>
> The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. […] The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.
>
> Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. […]."[64]

63. Part III of the Report addresses the Special Court's competence, including in relation to personal jurisdiction. The Secretary-

[63] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915.
[64] *Ibid*, paras 9-11.

General addresses the concept of persons 'most responsible', a concept which was subsequently included in the Statute of the Court.

> "While those 'most responsible' obviously include the political or military leadership, others in command authority down the chain of command may also be regarded as 'most responsible' judging by the severity of the crime or its massive scale. 'Most responsible', therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases."[65]

On the organisational structure of the Special Court, the report states *inter alia* that Special Court, l "[l]ike the two [ad hoc]International Tribunals, the Special Court for Sierra Leone is established outside the national court system" and, along with the two ad hoc tribunals, operates "independently of the relevant national system…"[66]

The Agreement between the United Nations and Sierra Leone

64. Following the adoption of Security Council Resolution 1315 and subsequent negotiations between the Secretary-General and the Government of Sierra Leone, the United Nations and the Government of Sierra Leone concluded the Agreement on the Establishment of a Special Court for Sierra Leone on 16 January 2002.

65. The Agreement does not refer expressly to the issue of immunity. However, Article 1(1) of the Agreement provides that

> "There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and

[65] *Ibid*, para 30.
[66] *Ibid*, para 39.

> Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."

Article 1(2) provides that the Court shall function "in accordance with the Statute of the Special Court".

66. The Agreement provides that the UN Secretary-General will appoint two of the three Trial Chamber judges and three of the five Appeals Chamber judges (Art. 2(2)(a) and (c)). The UN Secretary-General also appoints the Prosecutor (Art. 3(1)) and the Registrar (Art. 4(1)). The expenses of the Court are to be "borne by voluntary contributions from the international community" (Art. 6). The Special Court is assisted by a Management Committee, including representatives of States which contribute voluntarily to the Special Court (Art. 7). The Special Court's premises and archives are inviolable, and its property funds and assets are immune from interference (Art. 8). The Special Court has the juridical capacity to enter "into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court" (Art. 11). The Judges, Prosecutor and Registrar enjoy privileges and immunities in accordance with the 1961 Vienna Convention on Diplomatic Relations (Art. 12).

The Statute of the Special Court

67. The Statute of the Special Court ('the Statute') is annexed to the Agreement. Article 1(1) of the Statute provides that

> "The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.'

68. The Special Court may prosecute persons who have committed crimes against humanity (Art. 2), violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Art. 3), other serious violations of international humanitarian law (Art. 4), and certain crimes under Sierra Leonean law (Art. 5). Article 6(2) provides that:

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

This language is identical to that of the ICTY and ICTR, and broadly similar to that of the Nuremburg and Tokyo Tribunals.

69. For the purposes of these proceedings, other provisions of note include those in relation to the concurrent jurisdiction of the Special Court and the national courts of Sierra Leone (with the former having primacy) (Art. 8) and the determination that the Rules of Procedure and Evidence of the ICTR are to apply *mutatis mutandis* to the conduct of proceedings before the Special Court (Art. 14). Finally, by Article 25 the President of the Special Court is required to submit an annual report to the UN Secretary-General and to the Government of Sierra Leone (Art. 25).

The Sierra Leonean Law of 2002

70. The Parliament of Sierra Leone subsequently passed the Special Court Agreement, 2002 (Ratification) Act 2002. The Act provides for the implementation in Sierra Leone of the Agreement, including the provisions in relation to inviolability, immunity and personality. Section 11(2) of the Act leaves no room for ambiguity in providing that

"The Special Court shall not form part of the Judiciary of Sierra Leone".

71. In this respect the Special Court differs from both the Extraordinary Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, which are to be established "in the existing court structure" of Cambodia,[67] and from the Panels within the District Court in Dili established by the UN Transitional Administration in East Timor "to deal with serious criminal offences".[68]

Further Security Council Resolutions

72. Since the establishment of the Special Court a number of other relevant Security Council resolutions have been adopted. The preamble to Security Council Resolution 1408 (2002) "calls on the Government of Liberia to cooperate fully with the Special Court for Sierra Leone when it is established". The body of that Resolution is adopted under Chapter VII, but makes no mention of the Special Court, dealing instead with monitoring and the cessation of violence.

73. The most recent relevant Security Council Resolution, 1478, was adopted on 6 May 2003. The preamble contains the same exhortation, but again, the body of the resolution, which is adopted under Chapter VII, deals with cessation of violence and not

[67] See General Assembly Resolution 57/228 A, 187 December 2002, and the Law, available at: http://www.derechos.org/human-rights/seasia/doc/krlaw.html.

[68] UNTAET, Resolution No. 2000/15, 6 June 2000, at section 1.1. The UNTAET was established by Security Council resolution 1272 (1999) of 25 October 1999, under Chapter VII of the Charter of the United Nations, and given overall responsibility for the administration of East Timor empowered to exercise all legislative and executive authority, including the administration of justice. Section 15 of Resolution 2000/15 generally reproduces Article 27 of the ICC Statute, so that serving head of state will not be able to claim immunity before such panels.

specifically with the Special Court. Accordingly – and this appears to be common ground between the Prosecutor and the Defence – the Special Court may not enjoy all of the consequences which could flow if it had been established by the Security Council acting under Chapter VII. As indicated below (see para. 75), Chapter VII powers may be relevant to the enforceability against third States of acts of the Special Court, but not necessarily to the exercise of jurisdiction on which such acts may be based.

Conclusions

74. The critical question is whether the Special Court is within the class of appropriate tribunals envisaged by the ILC in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind (see para. 5 above) as not being subject to any customary international law rule providing for *a priori* immunity.

75. Unlike the ICTY and the ICTR, the Special Court does not enjoy the consequences of powers which it may have had if it had been established by the Security Council acting under Chapter VII of the UN Charter.. If it had been established under Chapter VII then undoubtedly its acts – including requests for assistance from third State – would be legally enforceable to the extent that it could be said that they were giving effect to the will of the Security Council. That said, Chapter VII is a not a *sine qua non* for obligations to arise from Security Council action: in our submission Chapter VII powers may not be relevant at all to the question of the Court's exercise of jurisdiction (including in relation to any immunities), or that such a Chapter VII basis is necessarily required in order for the Special Court to be able to

enforce cooperation with third States. Article 24(1) of the UN Charter provides that

> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

Article 25 provides that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". There can be no doubt that Security Council resolution 1315 is binding, and that it expresses the authoritative view of the Council that "the situation in Sierra Leone continues to constitute a threat to international peace and security" and that the "Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court" which would have the power to prosecute "leaders". Other resolutions calling on all states, and in particular the government of Liberia, to cooperate fully with the Special Court are also binding.[69] In respect of Chapter VII the Special Court is in no different a position from the ICC. Yet all three tribunals – the ICTY, the ICTR, and the ICC – were envisaged by the ICJ in the *Yerodia* case to have jurisdiction over a serving head of state (see para 43 above). This confirms that the possession of Chapter VII powers cannot be essential for the question of immunity. As we indicate below, however, Chapter VII powers may be relevant to the issue of cooperation with third States.

[69] The legal effect of Security Council Resolutions for *inter alia,* the maintenance of international peace and security, under Article 24(1) was discussed in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16 at paras 110, 113.

76. The instruments establishing the Special Court therefore allow the following general conclusions to be reached:

(1) The Special Court is not part of the judiciary of Sierra Leone and is not a national court.

(2) 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).[70]

(3) The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of the ICTY, the ICTR and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim immunity.

(4) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international criminal tribunal or court, with all that implies for the question of immunity for a serving head of state.

77. Whether or not, as the Government of Liberia claims, "the Special Court for Sierra Leone is not an organ of the United Nations"[71] is not relevant to the present issues. More pertinent is the Government of Liberia's view that the Special Court "is not established as an international criminal court". In our submission

[70] See generally P. Sands & P. Klein, *Bowett's Law of International Institutions*, 5th edition 2001, at page 16, para. 1-028.

[71] See ICJ Press Release 2003/26, 5 August 2003 ("Liberia applies to the ICJ in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President".)

that view is not correct. The Special Court is an international court established by treaty.

PART III

The legality under international law of issuing and circulating an arrest warrant against Charles Taylor while he was Head of State

78. In light of the above conclusion, our submission is that although an argument can be made to the contrary (see above at paras. 51 and 52), on balance the more compelling view (having regard to the totality of international practice since Nuremburg) is that the principle of the absolute immunity of a serving head of state is not *a priori* applicable in the case of an international criminal court or tribunal. Moreover, there is nothing in the Security Council resolutions relevant to the establishment of the Special Court, or the Agreement or Statute establishing the Special Court, which indicates that a rule of immunity was intended to be recognised or declared or otherwise applied in respect of the Special Court for Sierra Leone. UN Security Council resolution 1315 suggests that the Special Court was not intended to have characteristics which distinguished it from the "certain international criminal courts" referred to by the ICJ (see above at para. 44), whether in relation to the law to be applied, the extent of its jurisdictional, and the applicable rules as regards immunities from its jurisdiction. If the Special Court had not been established pursuant to Security Council resolution the situation may be materially different: for example, two States may not be establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts as adjudged by the ICJ in the *Yerodia* case.

Jurisdiction to indict Charles Taylor

79. A related question is whether, regardless of any conclusions as to immunity, the Special Court had jurisdiction to issue the

indictment (and to circulate the arrest warrant) in respect of Mr Taylor whilst he was serving head of state. This depends on the terms of the Statute and the Agreement establishing the Special Court. Since these instruments are in the form of a treaty between State and the United Nations they are covered by the rules on treaty interpretation set forth in Articles 31 to 33 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations ("the 1986 Vienna Convention").[72] Although this Treaty is not yet in force, these provisions are identical to those of the 1969 Vienna Convention on the law of Treaties (Articles 31-32), which are generally recognised to reflect customary international law.

80. Like the ICTY and ICTR, the Statute of the Special Court does not contain an equivalent provision to Article 27(2) of the Rome Statute (see above at para. 13). However, the practice of the ICTY makes it clear that the Statute of that Court (Article 7(2) of which is identical to Article 6(2) of the Statute of the Special Court) is sufficient to permit the indictment of a serving head of state such as Milosevic.[73]

81. As discussed above (at para. 65), the object and purpose of the Agreement is said in the Preamble to be to create an "independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law". Article 1(1) of the Statute of the Special Court similarly states that the Court has power "to prosecute persons

[72] 25 ILM 543 (1986).
[73] See *Prosecutor v Milosevic* ICTY-99-37 (Kosovo); ICTY 01-51 (Bosnia); ICTY 02-50 (Croatia): *Decision on Preliminary Motions*, Trial Chamber, 8 November 2001.

who bear the greatest responsibility … including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

82. Do the Agreement and the Statute exclude from the jurisdiction of the Court certain persons, in particular those who hold (or held) high government office or those who are leaders who have the nationality of a third State or who reside outside the territory of Sierra Leone? The answer to this question turns on the interpretation of the words "persons who bear the greatest responsibility … including … leaders". These words are to be interpreted in accordance with Article 31 of the 1986 Vienna Convention, which provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

83. The ordinary meaning of the words cannot readily be said to exclude those holding high Government office, including a serving head of state. This is confirmed by the context in which the Agreement was adopted, including the Secretary-General's report of 2000 to the Security Council (see above, paras. 62-63). The Report was accepted by the Security Council and by Sierra Leone, and we are not aware that at any member of the United Nations (including Liberia) expressed any objection to this part of the Report. In his Report the Secretary-General made it clear that "persons most responsible" includes "the political or military leadership". He stated that the concept of "persons most responsible" should not be taken as a jurisdictional definition, but

rather as a guide to the Prosecutor in structuring its priorities. There was, therefore, a clear intention on the part of the United Nations that the Special Court was established with the clear purpose of bringing to justice "the political or military leadership".

84. In our submission there can be little doubt, therefore, that by the terms of the Agreement and the Statute a serving high-ranking Government official of Sierra Leone, including a head of state, would be within the jurisdiction of the Special Court. Moreover, such person would not be entitled to claim immunity before the Special Court.

85. Do the terms of the Agreement and Statute establish jurisdiction over a serving high-ranking Government official (including head of state) of a country other than Sierra Leone? Assuming that the temporal, geographical and subject matter conditions are satisfied we see no reason why the terms of the Agreement and Statute should be construed to exclude that possibility. By analogy, there is no reason of principle why the ICTY could not exercise jurisdiction over high-ranking serving officials of States (including heads of state) outside the former Federal Republic of Yugoslavia, or why the ICC could not exercise jurisdiction over a head of state of a country not party to the ICC who was alleged to have carried out an international crime on the territory of a State Party (although in the latter case (where there are no Chapter VII powers) it may not be possible to arrest such a person, having regard to Article 98(1) of the ICC Statute: see further below at paras. 91-92).

86. It appears consistent with the object and purpose of the Special Court that the aim of prosecuting those persons (including

leaders), which are most responsible would be undermined by an interpretation of Article 1(1) which excluded a head of state.[74] Moreover, the indictment in the present case concerns the (now former) head of state of Liberia – a state which the Security Council has referred to expressly on several occasions in resolutions connected to the Special Court and the situation in Liberia and Sierra Leone – and relates to offences which were allegedly committed on the territory of Sierra Leone.

87. In sum, our view is that there is nothing in the Agreement or Statute (or in their context) to preclude the Special Court from seeking to exercise jurisdiction over offences committed on the territory of Sierra Leone by the head of state of Liberia (it is not necessary for present purposes to discuss the position in relation to other states).

88. This appears to be confirmed by Rule 47 of the Special Court's Rules of Procedure, which deals with the indictment. Rule 47(B) requires the Prosecutor, "if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court", to "prepare and submit to the Registrar an indictment for approval" by a Judge of the Court. The Registrar then passes the indictment to the Judge, who, under Rule 47(E), "shall approve the indictment if he is satisfied that:

> '(i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
> (ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment."

[74] See, in an analogous context, the reasoning of Lord Browne-Wilkinson in *Pinochet 3*, at para 29 above.

The language is broadly similar to that of the ICC, where the same analysis would apply.

89. For the reasons given above, we consider that Charles Taylor cannot by reason of his status be excluded from the jurisdiction of the Special Court (Subparagraph (i) in Rule 47(E), above). Subparagraph (ii) is a factual question for the reviewing Judge to determine, and is not affected by any issues of immunity.

Issue and transmission of the arrest warrant to Ghana

90. The Defence motion argues, citing the *Lotus Case*,[75] that:

(1) The principle of sovereign equality prohibits one state from exercising its authority on the territory of another;

(2) A state may, exceptionally, 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 states;

(3) Accordingly, 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 as between Sierra Leone and Ghana.

91. In addressing the issuance and international circulation of the arrest warrant by the Special Court, it is important to bear in mind that States which are not party to the Agreement establishing the Special Court (including Ghana and Liberia) are not legally obliged by that treaty to comply with request from the Court, since the treaty cannot bind non-parties (see Article 34 of the 1986 Vienna Convention). The possibility cannot be excluded, however,

[75] *Lotus S.S, The Case of*, Judgment No 9 of 7 September 1927, PCIJ, Series A, No 10.

that these States may be required to cooperate with Court pursuant to Security Council resolutions, even those not adopted pursuant to the Council's Chapter VII powers. Chapter VII Resolutions would make it clear beyond doubt that third States could not lawfully ignore a request of the Special Court for co-operation in relation to its functioning. In this regard we note that resolution 1478 (2003) of the Security Council calls "on all States, in particular the Government of Liberia, to cooperate fully with the Special Court for Sierra Leone". Although that call is directed in particular to Liberia and made in the preamble to the resolution, the operative part of the resolution is binding on all states pursuant to Article 25 of the Charter.

92. In short, the international circulation of the arrest warrant did not *per se* require Ghana to give effect to it. We do not know by which method the Special Court communicated the arrest warrant to the authorities in Ghana in June 2003, or whether it was circulated more widely. Rules 54 and 55 of the Special Court's Rules of Procedure provide for the issuing and execution of arrest warrants. Rule 56, 'Warrant of Arrest to Third States', provides that 'a Judge may address a warrant of arrest to any third State, as well as any relevant international body including the International Criminal Police Organisation (INTERPOL).' In accordance with Article 14(1) of the Statute of the Special Court the approach generally follows that set forth in the Statute of the ICTR.

93. The strongest form of international mechanism available to Interpol for circulating a warrant is the Red Notice. However, Interpol makes it quite clear that, in itself, such a notice has no legal effect:

> "The legal basis for a red notice is the arrest warrant or court order issued by the judicial authorities in the country concerned and therefore serves the purposes of both police and judicial officials.
> Many of the Organisation's member countries consider a red notice a valid request for provisional arrest, especially when the requested country is linked to the requesting country via a bilateral extradition treaty or an extradition convention. This is particularly true when the legal instruments on extradition (national law, treaty or convention) allow for the use of Interpol channels to forward such requests.
> Furthermore, Interpol is recognized as an official channel for transmitting requests for provisional arrest in a number of bilateral and multilateral extradition treaties, such as the European Convention on Extradition, the Economic Community of West African States (ECOWAS) Convention on Extradition, and the United Nations Model Treaty on Extradition.
> If a red notice is considered to be a valid request for provisional arrest, the appropriate judicial authority in a country receiving the notice can decide, on the basis of the information contained in the notice, that the wanted person should be provisionally arrested. In that case, the requesting country will be informed that the wanted person has been provisionally arrested and that the extradition process can be launched. It will also have an assurance that the person concerned will be detained for an adequate length of time.
> If, on the other hand, a fugitive is traced in a country where a red notice is not considered to be a valid request for provisional arrest, the requesting country will have to issue a request for provisional arrest after it has been informed that the wanted person has been located. There is then an obvious risk that the individual will have time to escape to another country or that he will have to be released before extradition proceedings can be initiated. Consequently, the recognition of a red notice as a valid request for provisional arrest both simplifies and speeds up the extradition process."[76]

94. This makes it clear that such a notice merely alerts the States which receive the notice to the fact that the requesting State wishes them to arrest the subject of the notice. The State which

[76] See http://www.interpol.int/Public/ICPO/FactSheets/FS200105.asp

receives the notice remains free to choose whether – and how – to act on it, subject to its own obligations under international law vis-à-vis the requesting State and any third States (including in relation to any immunities). Article 98(1) of the ICC Statute expressly provides for such a situation.

95. Against this background, does the issuance and international circulation of the arrest warrant to Ghana (and perhaps also to other States) violate the immunity of a serving head of state of a State which is not a party to the Agreement and Statute establishing the Special Court?

96. In its Judgment, the majority in the *Yerodia* case answered that question in the affirmative: "the mere international circulation of the of the warrant, even in the absence of 'further steps' by Belgium, could have resulted, in particular, in his arrest while abroad' (at para. 71). It should be recalled, however, that in the *Yerodia* case the indictment and arrest warrant had been issued by a national court before which Mr Yerodia was entitled to immunity. The Court expressly stated that immunities enjoyed under international law did not represent a bar to criminal prosecution "before certain international criminal courts, where they have jurisdiction" (paragraph 61 of the Judgment).

97. Does the approach of the ICJ apply equally where the arrest warrant is issued and circulated by an international criminal tribunal before which the person concerned may not be able to claim immunity? This question is addressed by the Statute of the ICC in Article 98(1) (see above, para. 15). As we argued above, the effect of Article 98 of the Rome Statute is that the ICC cannot enforce a request for the transfer to it of a head of state of a non-

State Party (other than if that State waives immunity), since that State is not bound to comply with the orders of the ICC (not being a party to its Statute), and Article 98 expressly preserves the customary law obligations of States Parties to respect their customary international law obligations to recognise the immunity of third States.

98. Whatever view the Special Court may take on this point, it may also wish to consider the underlying rationale of the approach taken by the ICJ in *Yerodia*, to the effect that the international circulation of an arrest warrant is inconsistent with an immunity deriving from the sovereign equality of States. The essence of the sovereign equality rule is that states should not interfere in the internal affairs of another state: see the UN General Assembly Declaration on Friendly Relations.[77] The aim of the non-interference rule is to prevent one state from coercing another.

99. The Court's approach was criticised by Judge Oda in his Dissenting Opinion in the *Yerodia* case:

> "It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the requesting State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal effect. The crucial point in this regard is *not* the issuance or international circulation of an arrest warrant but the response of the State receiving it."[78]

[77] 'Declaration of Principles of International Law concerning Friendly Relations and Co-operation between States adopted by consensus on 24 October 1970, Resolution 2625 (XXV).
[78] Dissenting Opinion of Judge Oda, para 13, emphasis in original.

100. A similar argument was made by Judge Van den Wyngaert in her Dissenting Opinion: see paragraphs 78-80. Applying these principles to the issuing of an arrest warrant, one commentator argues that:

> "Such a warrant is in effect a request for other states to co-operate and to act according to their own national law. There is no order, no obligation, and no imposition of one national legal system on another state. Even if the crime for which the warrant had been issued could not be punished under the law of the requested state then the warrant on its own could not be described as amounting to an act which has the effect of bending the will of state and coercing it to act. To constitute an unlawful interference the concern would have to be coupled with some sort of sanctions capable of forcing a state to abandon its political, economic or cultural elements."[79]

101. In our submission these arguments are powerful and should be considered by the Special Court. We have not been provided with a copy of the "international arrest warrant" issued in respect of Mr Taylor. In this respect it is to be recalled that the Judgment in *Yerodia* is premised on different facts, and is subject to Article 59 of the Statute of the ICJ. This article states:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

102. There is an additional point arising from the Defence argument, that the mere issuing and circulation of an arrest warrant, violates the sovereignty of third states which receive the warrant, which is not immediately apparent to us. This would mean, in the *Yerodia* case for example, that States which had no connection with Mr Yerodia, but which had merely received the arrest warrant through Interpol, would have been subject to a violation of their

[79] Andrew Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in Lattimer and Sands (eds), *supra* n. 39, page 308.

sovereignty. We are not aware of any authority for that proposition. Further, any such violation in the present case could only be raised by Ghana, and not by the national of a third State, such as Mr Taylor.

PART IV

The consequences of Charles Taylor ceasing to be Head of State

103. In this Part, we consider the implications of the fact that Charles Taylor is no longer the head of state of Liberia.

104. The fact that Mr Taylor is no longer head of state may be relevant if the Special Court concludes that as serving head of state he was entitled to immunity *ratione personae*. This would arise if the Special Court finds that (a) it has the character of a national court or (b) even as an international court it is subject to a customary international law immunity rule which has not been removed by operation of treaty obligation binding on Liberia or by the Security Council acting under Chapter VII. It may also be that the Special Court considers that it is not necessary to decide upon the serving head of state issue in light of the new factual circumstances.

Validity of the Indictment

105. By a majority of 10 votes to 6 the Court in the *Yerodia* case concluded that, although Mr Yerodia was no longer the Minister for Foreign Affairs (and thus the procedural bar to prosecution had disappeared), Belgium was required to cancel the arrest warrant.[80] It appears that the Court considered that:
    (1) This was an appropriate remedy for the violation of the sovereignty of the Democratic Republic of Congo, and that it had a symbolic reparatory effect;
    (2) Belgium would not have been prevented from reissuing the arrest warrant, in light of the fact that Mr Yerodia was no longer entitled to the absolute immunity of an office holder.

[80] Judgment of the Court, paras 76-77

106. The majority's logic in requiring Belgium to cancel the arrest warrant was questioned in the Dissenting Opinions of Judges Oda, Al-Khasawneh and van den Wyngaert, as well as the Joint Separate Opinion of Judges Buergenthal, Higgins and Kooijmans. As the authors of the Joint Separate Opinion argued, as soon as Mr Yerodia "ceased to be Minister of Foreign Affairs, the illegal consequences attaching to the arrest warrant also ceased" (at para. 89).

107. Having regard to the points made at paragraph 100 above, the Special Court may wish to consider whether the approach taken by the ICJ is applicable to it. In our submission it is far from evident that the existence of a purely procedural bar to prosecution (arising under any entitlement to claim immunity) at the time that an arrest warrant (or indictment) is issued should render that arrest warrant (or indictment) invalid for all time, even after the lapse of that procedural bar. It may also be that the reparatory justification for the ICJ's approach (in inter-State proceedings) may not be applicable in criminal proceedings.

Offences in respect of which immunity may be claimed by a former head of state

108. The *Pinochet* and *Yerodia* cases addressed the conditions under which a former head of state may not be entitled to claim immunity. Once a head of state is no longer in office, any claim to immunity which he or she may make is based not on immunity *ratione personae* but rather immunity *ratione materiae*: the acts in respect of which immunity is claimed are governmental in character and cannot therefore be impugned before the national courts of another State.

109. In the *Yerodia* case the majority of the ICJ stated:

> "Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period in a private capacity."[81]

110. Once again, it is important to note that this conclusion applies in respect of immunities before national courts, not international courts (assuming they exist), that it is in the nature of *obiter dicta*, and that it is not binding on the Special Court. Moreover, this part of the Judgment has been subject to particularly intense criticism.[82] According to Salmon:

> "La formule adoptée par la Cour – don't il faut ésperé qu'elle fut le fruit d'une inadvertance – est donc particulièrement regrettable. C'est l'éléphant dans le magasin de porcelaine. Il est certain, en tout état de cause, qu'elle ne représente en rien le droit coutumier international. Si elle estimait que des crimes de guerre et contre l'humanité devaient être considerés comme des actes privés, elle se devait de le dire. En s'abstenant, elle prolonge et envenime la controverse."[83]

111. And as another commentator puts it:

> "There is no explanation as to what sort of crimes are committed in a 'private capacity' but it seems unlikely that the Court wants to protect those accused of the most serious crimes under international law. It would be odd if a former minister could be tried for something clearly private, such as shop-lifting during an official visit, but not tried for war

[81] *Ibid,* para 61. See paras 27 - 34 above with regard to *Pinochet.*

[82] See Campbell Mclachlan, *supra* n. 55 at pages 961-3; Antonio Cassese, "When may Senior State Officials be Tried for International Crimes", 13 EJIL 853 at pages 866-874.

[83] *Supra* n. 57, at page 517 (informal translation: The formula adopted by the Court – which one must hope is a matter of inadvertence – is therefore especially regrettable. It puts the elephant in the china shop. It is certain, in any case, that the statement does not in any way reflect customary international law. If the Court considered that war crimes and crimes against humanity should be considered as private acts it should have said so. By failing to do so it prolongs the controversy". See also Maurice Kamto, "Une troublante 'immunité totale'. 35 Rev. Belge de Droit International 518 (2002).

> crimes involving grave breaches of the Geneva Conventions.[84]

112. This approach is reflected also in the Joint Separate Opinion of Judges Buergenthal, Higgins and Kooijmans, referring to the literature and case-law to the effect that "serious international crimes cannot be regarded as official acts because they are neither formal State functions nor functions that a State alone (in contrast to an individual) can perform."[85]

113. It is not clear what the Court meant to say when it referred to "private acts". We do not assume that the Court intended to depart from modern international practice in relation to international crimes, in particular as described at paragraphs 2 to 15 of these Submissions. To the extent that it did wish to depart from that practise, the approach would also fail to take account of practise before national courts, which has been summarised by Professor Antonio Cassese in relation to Israel, France, Italy, the Netherlands, the United Kingdom, Poland, the United States, Spain and Mexico (and the ICTY):

> "On the question of the amenability to trial of former state agents accused of committing international crimes while in office, the Court, instead of relying upon the questionable distinction between private and official acts, should clearly have adverted to the customary rule that removes functional immunity. National case law proves that a customary rule with such content does in fact exist."[86]

The logic underlying this approach was summarised by Lord Phillips in *Pinochet 3* (see above at para. 33)

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[84] Andrew Clapham, s*upra* n. 78, at page 312.
[85] Judgment of the Court, para 85
[86] *Supra* n. 39, at page 870 *et seq*.

114. Against this background, it is appropriate to focus on the specific charges contained in the indictment against Charles Taylor. These are:

(1) Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II: acts of terrorism (Count 1); collective punishments (Count 2); violence to life, health and physical or mental well-being of persons, in particular murder (Count 5); outrages upon personal dignity (Count 8); violence to life, health and physical or mental well-being of persons, in particular cruel treatment (Count 9); pillage (Count 13); violence to life, health and physical or mental well-being of persons, in particular murder (Count 16); taking of hostages (Count 17).

(2) Crimes against humanity: extermination (Count 3); murder (Count 4); rape (Count 6); sexual slavery and any other form of sexual violence (Count 7); other inhumane acts (Count 10); enslavement (Count 12); murder (Count 15).

(3) Other serious violations of international humanitarian law: conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Count 11); intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission (Count 14).

115. It is not for us to examine how the charges and the case against Charles Taylor are framed. However, it is clear that all of the counts relate to international crimes (either serious violation of humanitarian law amounting to war crimes, crimes against humanity or other serious violations of international humanitarian

law).[87] As we have indicated above, national and international practise tends to confirm that a former head of state can no longer claim immunity before national courts in respect of these crimes.

116. That which cannot be claimed before national courts can also not be claimed before an international criminal court such as the Special Court for Sierra Leone.

Conclusions

117. In our submission two conclusions may be drawn in respect of this Part of our Submissions:

(1) It not apparent to us why legal or policy considerations require that the existence of a purely procedural bar to prosecution (arising under any entitlement to claim immunity) at the time that an arrest warrant (or indictment) is issued should render that arrest warrant (or indictment) invalid for all time after the procedural bar has lapsed or been removed.

(2) A former head of state is not entitled to claim immunity *ratione materiae* before an international criminal court in respect of a charge relating to an international crime.

[87] The defence accepts that Mr. Taylor's right to enjoy "functional immunity [is] subject to one exception namely in the case of perpetration of international crimes." *See* Prosecutor v. Charles Ghankay Taylor, Applicants Reply to Prosecution Response to Applicants Motion, p. 4 (30 July 2003).

SUMMARY OF SUBMISSIONS

118. For the reasons set out above, our Submissions may be summarised as follows:

(1) Before a national criminal court, a serving head of state is entitled to immunity under customary international law, even in respect of international crimes.

(2) One State may not issue and circulate internationally an arrest warrant in respect of the serving head of another state, unless the State of which that person is head has waived immunity.

(3) International practise and a majority of academic commentary supports the view that before an international criminal court or tribunal (whether or not it has been established under Chapter VII of the UN Charter) may exercise jurisdiction over a serving head of state and that such person is not entitled to claim immunity under customary international law in respect of international crimes.

(4) Whether an international criminal court is entitled to (a) issue and (b) circulate internationally an arrest warrant for a serving head of state turns on the actual effect of such issuance and circulation, the legal basis upon which the international criminal court has been established, and the terms and provisions of its governing instruments, including those relating to jurisdiction.

(5) The Special Court is not part of the judiciary of Sierra Leone and is not a national court.

(6) 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).

(7) The Special Court's competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of the ICTY, the ICTR and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim immunity.

(8) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international criminal tribunal or court, with all that implies for the question of immunity for a serving head of state.

(9) In sum, our view is that there is nothing in the Agreement or Statute (or in their context) to preclude the Special Court from seeking to exercise jurisdiction over offences committed on the territory of Sierra Leone by the head of state of Liberia.

(10) The Special Court did not violate the sovereignty of Ghana by transmitting to it the arrest warrant for Mr Taylor.

(11) However, in the absence of agreements requiring otherwise, Ghana was not obliged under international law to give effect to such a warrant.

(12) It not apparent to us why legal or policy considerations require that the existence of a purely procedural bar to prosecution (arising under any entitlement to claim immunity) at the time that an arrest warrant (or indictment) is issued should render that arrest warrant (or indictment) invalid for all time after the procedural bar has lapsed or been removed.

(13) A former head of state is not entitled to claim immunity *ratione materiae* before an international criminal court in respect of a charge relating to an international crime.

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