

Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone

C. Jalloh, October 05, 2004

On May 31, 2004, the Appeals Chamber of the Special Court for Sierra Leone ("the Court"), a UN-backed hybrid criminal tribunal sitting in Freetown, Sierra Leone, ruled unanimously [1] that Charles Taylor does not enjoy any immunity from prosecution by the Court though he was the serving Head of State of Liberia at the time criminal proceedings were initiated. This historic ruling by the Court is a significant contribution to the modern international law norm asserting that Heads of State and other high-ranking governmental officials are not absolved of criminal responsibility for serious international crimes. [2]

I. Background to the Indictment of Charles Taylor

On March 7, 2003, David Crane, the Prosecutor of the Court, issued an indictment [3] against President Charles Ghankay Taylor of Liberia. The indictment alleged that Mr. Taylor had committed serious international crimes in Sierra Leone including crimes against humanity, war crimes and other serious violations of international humanitarian law. The seventeen-count indictment accused President Taylor of responsibility for terrorizing the civilian population of Sierra Leone, unlawful killings, sexual and physical violence, use of child soldiers, abductions, forced labor, looting, burning, and attacks on peacekeepers and humanitarian assistance workers.

However, the indictment was sealed until a warrant [4] for President Taylor's arrest was issued on June 4, 2003 following his arrival in Accra, Ghana, to attend peace talks that had been convened by other West African leaders. The talks were aimed at ending bitter fighting between Taylor's forces and various rebel factions that had led to the deaths of many civilians on the outskirts of Monrovia, Liberia's capital. Because of procedural mistakes by the Office of the Prosecutor, including an apparent lack of prior consultation and coordination with Ghanaian and other West African authorities, Mr. Taylor returned to Monrovia unmolested.

II. Procedural and Factual History of the Case (paras. 1-5 [5])

On July 23, 2003, counsel for President Taylor and Liberia filed a motion before the Trial Chambers of the Court seeking an order 1) to quash the Indictment; 2) to nullify the warrant of arrest; and 3) for provisional measures restraining service of the indictment and arrest warrant on Mr. Taylor. [6] The ground for the motion was that Mr. Taylor should enjoy absolute immunity from criminal proceedings under customary international law as the sitting Head of State of Liberia at the time of his indictment.

As the Prosecution and Defence exchanged briefs before the Court, Mr. Taylor announced that he would resign from the Presidency of Liberia in August of 2003. [7] In return for his resignation, he accepted an offer of sanctuary extended to him by President Olusegun Obasanjo of Nigeria who promised not to hand him over to the Court. [8]

Approximately one month after Taylor's departure from Liberia, the Trial Chamber referred the motion challenging the Court's jurisdiction to the Appeals Chamber on the basis that it raised a fundamental issue of jurisdiction. The Appeals Chamber heard oral arguments on the motion in late fall of 2003. [9]

III. Submissions of the Parties (paras. 6-16)

The parties' submissions to the Court fall into two categories. The first category corresponds to arguments by the Defence and counterarguments by the Prosecution that the Court, by issuing an indictment and a warrant of arrest for President Taylor, had violated various rules governing jurisdiction, immunity, and sovereign equality under international law. The second category hinges on the national law of Sierra Leone and on the legality, or illegality, of the actions taken by the Prosecutor and the Court in respect of the case against Taylor, with particular reference to the consistency of those actions with various provisions of the Sierra Leone Constitution of 1991. This Insight discusses only the international law aspects of the case.

A. Defence Submissions on the Preliminary Motion

The key submission of the Defence was that Mr. Taylor was entitled to absolute personal immunity from criminal prosecution as Liberia's incumbent Head of State at the time of his indictment. The Defence claimed that the immunity which attaches to Taylor shields him from prosecution whether he is on official business in a foreign State (Ghana) or in office in Liberia. Further, the Defence argued that immunity is not nullified by any exceptions arising under other international law rules, such as resolutions enacted by the Security Council pursuant to its Chapter VII powers permitting international criminal tribunals to indict incumbent Heads of State for egregious international crimes. In any event, because the Court was a Sierra Leonean tribunal that lacked Chapter VII powers, in contrast to the International Criminal Tribunals for Yugoslavia and Rwanda ("ICTY" and "ICTR" respectively), it had no authority to assert jurisdiction over President Taylor since its judicial orders had the same (limited) force as those of a national court.

In addition, according to the Defence, by purporting to indict the President of Liberia, and by issuing and communicating a warrant for his arrest to Ghanaian authorities at a time when he was performing peace-making functions as Head of State, the Court had violated the sovereignty of Liberia and Ghana as well as the international law rule exempting incumbent Heads of State from criminal prosecution in foreign jurisdictions. Furthermore, it was argued, the Court's approval of both the indictment and the arrest warrant failed to account for the ruling of the International Court of Justice ("ICJ") in Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) ("Yerodia"). [10]

B. Prosecution's Response

The Prosecution's response focused primarily on procedural matters, and in respect of the bulk of substantive issues, wholly on international law. In sum, the Prosecution pleaded that under the Court's Rules, the motion by the Defence should be dismissed because 1) it improperly raised an issue of immunity rather than one of jurisdiction; 2) it was "premature" because Mr. Taylor had not made the mandatory initial appearance before the Court; and 3) Mr. Taylor lacked standing to bring the motion since he was not before the Court. [11]

In response to the substantive issues raised by the Defence, the Prosecution submitted, *inter alia*, that 1) Yerodia concerned "the immunities of an incumbent Head of State from the jurisdiction of the Courts of another state" (which is not the case here); [12] 2) customary international law permits international criminal tribunals, of which the Court is an example, to indict serving Heads of State; 3) the lack of Chapter VII powers does not encumber the Court's jurisdiction over Heads of States because the International Criminal Court, which does not possess Chapter VII powers, similarly denies immunity to Heads of States in respect of international crimes; 4) Taylor's indictment is for crimes committed within Sierra Leone rather than elsewhere; and finally, 5) the mere transmission of the relevant documents to Ghanaian authorities could not violate that country's sovereignty.

IV. The Legal Basis of the Special Court for Sierra Leone (paras. 34-36)

After disposing of the procedural issues, the Appeals Chamber turned to the merits. It explained that the Court is a unique treaty-based criminal tribunal authorized by UN Security Council Resolution 1315 (2000). The various reports, correspondence, briefings and other documents between the Secretary-General and the President of the Security Council, taken together, "demonstrate the high level of involvement of the Security Council in the establishment of the Court including, but not limited to, approving the Statute of the Special Court and initiating and facilitating arrangements" for its funding. [13]

V. Is the Special Court an International Criminal Tribunal? (paras. 37-42)

In the result, the Appeals Chamber held that the Court is an international criminal tribunal with an international mandate exercising jurisdiction over international crimes. In so holding, the Appeals Chamber observed that the "constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable." [20]

VI. The Special Court and Jurisdictional Immunity (paras. 43-59)

The Appeals Chamber explained that pursuant to Article 6(2) of the Court's Statute, the position of any accused as Head of State does not relieve that person of criminal responsibility nor does it mitigate punishment. It noted the similarity of that provision to ICTY Article 7(2), ICTR Article 6(2) and ICC Article 27(2), all of which are traceable to Article 7 of the Charter of the International Military Tribunal for Nuremberg which had become a part of customary international law. Moreover, Article 6(2) of the Court's Statute is consonant with other (including peremptory) norms of international law.

Related to this point, the Court reasoned that the nature of the offences and the character of the tribunal asserting jurisdiction assist in determining the circumstances in which exceptions to immunity would be extended or denied. Thus, in the Yerodia case, the ICJ could not discern a rule denying incumbent foreign ministers immunity from criminal jurisdiction before national courts. On the other hand, the ICJ concluded that under customary international law, incumbent or former foreign ministers may be subject to proceedings before certain international criminal courts, assuming those courts have jurisdiction.

Noting the apparent differences in the treatment of immunities in national and international courts, the Appeals Chamber postulated that this may be because of "the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community." [21]

The Appeals Chamber concluded that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court." [22] Thus, according to the Appeals Chamber, the official position of Taylor as serving Head of State of Liberia at the time of his indictment is not a bar to his prosecution. Taylor was and still is subject to criminal proceedings before the Court. In view of this conclusion, the Court declined to discuss the cases in which immunity was claimed before national courts. [23]

As to whether the issuance and transmission of the arrest warrant for President Taylor infringed the sovereignty of Ghana, the Court ruled that to the extent such a claim could be said to exist, vindication of it rests with Ghana rather than with Mr. Taylor. That said, the Court nevertheless observed that with two exceptions, [24] warrants of arrest are not self-executing; consequently, their implementation would require the cooperation of the receiving state. Therefore, "merely requesting assistance, far from being an infringement of sovereignty of the receiving state is in fact a recognition of sovereignty." [25]

Finally, the Court noted that Taylor had ceased to be Head of State at the time of its decision. Thus, whatever personal immunity he would have been entitled to is already spent. Accordingly, even if his motion had succeeded, the Prosecutor could have validly re-issued a new warrant. The motion was therefore dismissed.

VII. Conclusion

Prosecutor v Charles Ghankay Taylor is an addition to the small but growing body of jurisprudence from national and international tribunals delineating the contours of the immunity accruing to Heads of State and other senior governmental officials. While the trend in the jurisprudence suggests that the scope of immunity is highly contested and will therefore continue to evolve, [26] this decision is significant because it is the first application of the ICJ's decision in Yerodia to a former Head of State.

Though Taylor is not in the custody of the Court, the decision reaffirms the idea that the long arm of international criminal law would extend to reach the most powerful state official, so long as that person commits crimes that shock the conscience of the international community.

There is the additional question of the nature and status of the Court. The Court concluded that it is an international court and that there are numerous indicia to support that conclusion. However, an examination of the Court's constitutive instruments reveals that the Court also has the trappings of a national court. As the Court is distinct in its national and international character, the Secretary-General of the UN described it as a unique Court "of mixed jurisdiction and composition." [31] By focusing purely on the factors that make the Court international, [32] the Appeals Chamber may have missed an important opportunity to contribute to the jurisprudence defining the unique place of hybrid criminal tribunals in the machinery of international criminal justice.

Why is Diplomatic Relations Important?

- Critical to the effective cooperation and relations between states and between states and international organisations.
- Some of the oldest customary rules at int'l law deal with diplomatic protection/immunities and privileges.
- Why protection? – diplomacy is at the core of effective negotiations, thus protection of representatives is essential to establishing a network of relations and the success of negotiations.
- The customary rules of diplomatic relations have been codified in the 1961 Vienna Convention on Diplomatic Relations (refer to page 486 articles 29 and 31 of the Convention).

Terms

- Diplomats are often referred to as emissaries, ambassadors or representatives.
- Embassies are the official residences and offices of diplomatic staff.
- Consulates are official offices of diplomatic staff located in major cities within any given state.

Diplomatic Immunity

- Immunity is a privilege of the state and not any given diplomat.
- Article 29 – "The person of a diplomatic agent shall be inviolable." This means that a diplomat is:
 - Entitled to protection from physical harm.
 - Not subject to arrest, detention or any other suspension of liberty.
 - Granted recourse to the rules of int'l protocol in the Convention.
- Article 22 – "The premises of the mission shall be inviolable." This means the mission is:
 - Free from unauthorised entry by the host state (although not foreign territory).
 - Protected under the doctrine of *non-interference*, which extends to files, documents, diplomatic bags, and diplomatic couriers as a means of communication between diplomats and the home state.
 - Libyan Embassy situation – a UK police officer shot outside the embassy in London. The shot originated from within the premises. There was no investigation or charges to follow. The weapon entered via a diplomatic bag. Ability to enter because premises no longer being used for diplomatic purposes?
- It is the responsibility of the host state to protect embassies and uphold immunities as an act of reciprocity.
- US Diplomatic and Consular Staff in Tehran Case (487) – Iran failed to uphold its responsibilities to ensure the protection of the United States' embassy and consulates, their staffs, their documents, their means of communication, and their staffs' freedom of movement. Additionally, Iran failed to take every necessary and appropriate step to end the attack and occupation, restore order and offer reparations.

Abuse of Special Status

- Smuggling illegal commodities, debt avoidance, escaping criminal charges, etc.
- Palacios situation (1983) – Nicaraguan diplomat doubles as drug dealer.
- Typically punishment of diplomats carried out by home state.
- The general rule is that diplomats are immune to prosecution (Knyazev situation – Russian diplomat in Canada). A home state may waive immunity in cases of serious crimes unconnected with the individual's diplomatic role.
- Issue of intelligence agents operating from embassies and the ubiquitous practice of wiretapping (technically against the spirit of the Convention).

Diplomatic Asylum

- Protection sought in embassies of other countries by individuals fearing for their safety.
- Asylum often revolves around citizenship and its political value.
- The embassy may grant or refuse asylum based on the factors at hand (questionable interference in another state's political affairs and likelihood of strain on relations).
- Convention on Diplomatic Asylum governs the international rules surrounding asylum.

Consular Relations

- Non-diplomats may also be charged with consular duties (e.g., advocating and protecting nationals in host state, obtaining legal representation for nationals, liaising with local authorities on behalf of home state, and applying pressure / protest if a host state is violating rights of a national).
- Issue – access to prisoners –
 - Upon detention of a foreign national, the host gov't must advise the consular post of the detention.
 - The arresting gov't must assist the detainee to contact their consulate.