

**SUBMISSION OF THE REPUBLIC OF SIERRA LEONE
to the United Nations International Law Commission
on the use of subsidiary means for the determination of rules of international law in
the national courts of Sierra Leone**

18 January 2023

Introduction

1. In reference to paragraph 5 (c) of United Nations General Assembly resolution A/77/103 on the “Report of the International Law Commission on the work of its seventy-third session” adopted on 19 December 2022, wherein the attention of Governments was drawn “to the importance for the International Law Commission of having their views on the various aspects of the topics on the agenda of the Commission, in particular on all the specific issues identified in chapter III of its report”,¹ the Republic of Sierra Leone appreciates the opportunity to submit preliminary or initial views as requested regarding “Subsidiary means for the determination of rules of international law”.
2. The Republic of Sierra Leone reiterates its support for the United Nations International Law Commission’s decision to add “subsidiary means for the determination of rules of international law” to the current work programme in May 2022 and for the appointment of Prof. Charles Chernor Jalloh as Special Rapporteur for the topic.

Information on the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone

3. In view of the request of the Commission in the use of subsidiary means for the determination of rules of international law within the meaning of Article 38, paragraph 1(d), of the Statute of the International Court of Justice, the starting point for Sierra Leone is the Constitution of Sierra Leone, Act No. 6 of 1991 (hereinafter “the Constitution”). The Constitution does not directly address the issue of sources of international law generally nor the place of subsidiary means in the determination of rules of international law.
4. The Constitution, however, does address some questions of international law. This can be said to cover two main aspects. First, fundamental questions of State policy are addressed in Chapter II of the Constitution, and although not justiciable, mandate that all organs of government and persons exercising legislative, executive, or judicial powers must abide by them. These include Sierra Leone’s foreign relations in respect of which Section 10 of Chapter II of the Constitution provides as follows:

¹ UN Doc. A/77/10 at paras. 8-9.

The Foreign Policy Objectives of the State shall be –

- a. the promotion and protection of the National interest;*
- b. the promotion of sub-regional, regional and inter-African co-operation and unity;*
- c. the promotion of international co-operation for the consolidation of international peace and security and mutual respect among all nations, and respect for their territorial integrity and independence; and*
- d. respect for international law and treaty obligations, as well as the seeking of settlement of international disputes by negotiation, conciliation, arbitration or adjudication.*

5. The second aspect addresses more directly the country's relation with international law. The Constitution makes clear that it is the executive branch, and specifically the President, who enters into treaties, agreements or conventions on behalf of Sierra Leone and who also bears the legal duty to ensure respect for treaties and international agreements.² In what has been judicially interpreted as a limitation on the power of the executive branch to execute treaties in the name of Sierra Leone, Parliament also plays an important role under the Constitution. Thus, treaties or agreements that are within the legislative competence of Parliament or that in any way alter the laws of Sierra Leone or that carry financial implications are subject to ratification typically via enactment of a legislative instrument³ or a resolution adopted by no less than half of the members of Parliament.
6. The Constitution does not directly address the status of customary international law or general principles of law in the national law of Sierra Leone. This is also the case for subsidiary means within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice.
7. Sierra Leone, being a dualist system, requires that international agreements and treaties are domesticated in national law. This means that, even when questions of international law arise (whether directly or indirectly), they usually are dealt with by reference to the national law of Sierra Leone or based on judicial decisions from other common law jurisdictions which may provide persuasive authority. Frequent references are found to decisions of United Kingdom courts as well as the courts of other African common law jurisdictions such as Ghana and Nigeria.
8. From an Article 38(1) of the Statute of the International Court of Justice perspective, the treatment of questions of international law by the national courts of Sierra Leone suggest that reliance is often placed on judicial decisions of other national and

² See Chapter V, S. 40 of the Constitution of Sierra Leone, 1991 (as amended).

³ For example, following the conclusion of an agreement between the Government of Sierra Leone and the United Nations to establish a special court for Sierra Leone, Parliament enacted on 29 March 2002 the Special Court Agreement, 2002 (Ratification) Act. No. 7 pursuant to ss. 4 of s. 40 of the Constitution of Sierra Leone, 1991.

international courts addressing the same question. Teachings of publicists may be used to elucidate the relevant points or to confirm the interpretation adopted by the courts.

9. As an illustrative example, in the judgment of the case S.C. NO. 1/2003, *Issa Hassan Sesay et al vs. The President of the Special Court, the Registrar of the Special Court and the Attorney-General and Minister of Justice*, delivered on 14 October 2005 (and annexed to this submission), the Supreme Court of Sierra Leone, which under our Constitution, is the final court of appeal and in relation to whose decisions on questions of law all other national courts are bound to follow under Chapter VII section 122(2), addressed several questions concerning the validity of the agreement between the Government of Sierra Leone and the United Nations establishing the Special Court for Sierra Leone including the question of immunity.
10. The Court, in addressing the aspect of the constitutionality in relation to immunity, relied on both the decisions of other national courts notably from the United Kingdom⁴ and the International Court of Justice⁵ as follows:

A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third States except if has been waived by the State concerned. The principle was applied by the House of Lords in the Pinochet proceedings....

11. The judgment continued with a reference to the decisions of other national courts and international tribunals, and as almost a primary source, referred to the teachings of publicists:

In contrast, where the immunity is claimed by a Head of State before an international court the position to be inferred from the decisions of various national courts and international tribunals, and the writings of international jurists is that there exists no a priori entitlement to claim immunity particularly from criminal process involving international crimes." [Emphasis added].

12. In a later part of the same judgment, the Supreme Court of Sierra Leone, in adverting to the distinction between the treatment of immunity before municipal courts and immunity from process before an international court, also referenced the statutes of other international courts and tribunals going back to the Nuremberg International Military Tribunal through to the ad hoc international tribunals and the Rome Statute of the International Criminal Court which it found, like the Statute of the Special Court for Sierra Leone, did not recognize immunity of any official before the international tribunal.

⁴ See, in the judgement, the references to the rulings of the UK courts in Pinochet.

⁵ The Court cited the Arrest Warrant Judgment delivered by the International Court of Justice.

13. Having referred to the specific provisions, the Supreme Court continued:

“The inclusion of such clause in the charters/statutes of international criminal courts from Nuremberg to the ICC has met with approval in all the relevant case law such as Pinochet in the House of Lords or in the Yerodia judgment of the ICJ. In addition a majority of academic commentary supports the view that an international criminal tribunal or court, 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.” [Emphasis added].

14. A final relevant part of the Supreme Court for Sierra Leone’s *Sesay et al.* judgment, in addressing the question of concurrent jurisdiction between the Special Court for Sierra Leone and the national courts of Sierra Leone, referenced the Statutes of the ICTY and the ICTR before turning to the Rules of Procedure and Evidence and mentioning two judgments of the ICTY in the *Tadic* and *Karadzic* cases to uphold the primacy of the jurisdiction of the international tribunal on the issue before it.

15. Thereafter, after having relied on those authorities to reach its finding that the primacy of the Special Court for Sierra Leone does not contravene section 125 of the Constitution dealing with the supervisory jurisdiction of the country’s highest court, the Supreme Court of Sierra Leone quoted Prof. Yuval Shany’s book on *The Competing Jurisdictions of International Courts and Tribunals*, at p. 140. In this instance, the quoted text appears to supply additional reasons for the position already adopted.

Conclusion

16. The International Law Commission’s study of the *“Subsidiary means for the determination of rules of international law”*, is important and supported since it has offered an opportunity to also examine the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone. Given the timeframe for the call for views and our submission, we have referred to one important case from the highest/constitutional court, to give an example of the practice in Sierra Leone. Sierra Leone hopes that this submission would prove useful to the work of the Commission in relation to our national judicial practice on the use of subsidiary means for the determination of rules of international law.

JUDGMENT

S. C NO. 1/ 2003

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF APPLICATION PURSUANT OT SECTIONS 122, 124, AND 127 OF THE CONSTITUTION OF SIERRA LEONE ACT NO. 6 OF 1991 AND PART XVI, RULES OF 89-98 OF THE SUPREME COURT RULES STATUTORY INSTRUMENT, NO 1 OF 1982 AND

IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE, ACT NO. 6 OF 1991, SECTIONS 122, 124, 127, 171 (15), 120, 108, 40 (4), 125 AND 30 (1)

AND

IN THE MATTER OF THE SPECIAL COURT AGREEMENT 2002 (RATIFICATION) ACT 2002 (RATIFICATION) (AMENDMENT) ACT, 2002- ARTICLE 1 (1) OF THE SCHEDULE AND THE PREAMBLE THERETO, PART III SECTIONS 10, 11 (2) 29 AND ARTICLE 8(1) & (2) OF THE STATUTE OF THE SAID ACT

BETWEEN:

ISSA HASSAN SESAY aka ISSA SESAY

A N D

ALLIEU KONDEWA

A N D

MOININA FOFANA

A N D

THE PRESIDENT OF THE SPECIAL COURT

A N D

THE REGISTRAR OF THE SPECIAL COURT

A N D

THE PROSECUTOR OF THE SPECIAL COURT

A N D

THE ATTORNEY GENERAL & MINISTER OF JUSTICE

- DEFENDANTS

JUDICIAL SIB-TREASURY
PLAINTIFFS
 FOREIGN
 1.600
 DATE 26.10.05
 RECEIPT NO. WS 3703
 SIGNATURE: [Signature]

Certified true c. of Jc

CORAM

HON MR. JUSTICE A.R.D.RENNER-THOMAS
 HON. MR. JUSTICE E.C.THOMPSON-DAVIS
 HON. MRS. JUSTICE V.A.D. WRIGHT
 HON. MR.JUSTICE M.E. TOLLA-THOMPSON
 HON..JUSTICE SIR JOHN MURIA

CHIEF JUSTICE
 J.S.C.
 J.S.C.
 J.SC.
 J.A.

A.F. Serry-Kamal Esq with him C.F.Margai Esq for the Plaintiffs

Attorney-General with him J.G. Kobba Esq. L.Farmar Esq and E. Roberts Esq. for the Defendants

Judgment delivered the 14th day of October 2005

RENNER-THOMAS C.J.

By an Agreement between the United Nations (herein after referred to as "the U N") and the Government of Sierra Leone (herein after referred to as "the Government") dated the 16th day of January 2002 the Special Court for Sierra Leone (herein after referred to as "the Special Court") was established

"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 November, 1996.

The UN entered into the said Agreement pursuant to Security Council resolution 1315 (2000) of 14th August 2000 and on the part of the Government under the authority of the President pursuant to powers vested in him by virtue of the provision of section 40 of the Constitution of Sierra Leone, Act No.6 of 1991 (hereinafter referred to as "the Constitution").

According to Article 1 of the Agreement the Special Court is to function in accordance with the Statute of the Special Court which Statute is annexed to the Agreement and forms an integral part thereof.

On the 29th day of March 2002 the Parliament of Sierra Leone enacted the Special Court Agreement,2002 (Ratification) Act. No.7 of 2002 (hereinafter referred to as "the Ratification Act". In the first preambular paragraph of the Ratification Act it is recited that the Agreement is to be ratified by an Act of Parliament pursuant to by the provision to subsection 4 of section 40 of the Constitution.

The Special Court, acting in accordance with provisions of Part VI of the Ratification Act which deals with the arrest and delivery of persons, caused the 1st 2nd and 3rd Plaintiffs herein (hereinafter collectively referred to as "the Plaintiffs") to be arrested and detained at the Special Court Detention Centre at Jomo Kenyatta Road, New England Freetown where they are still being detained.

The Plaintiffs were subsequently indicted on various charges pursuant to the Statute of the Special Court details of which charges are contained in Exhibits CFM 2¹⁻³ respectively attached to the affidavit of Charles Francis Margai in support of the Originating Notice of Motion herein sworn to on the 28th day of November 2003 and filed herein. I need not set out the details of these charges for the purposes of this Judgment.

The Originating Notice of Motion which was filed on the 28th day of November 2003 was subsequently amended pursuant to an Order of this Court and is dated 4th March 2005. According to the amended Originating Notice of Motion the Plaintiffs relying on Sections 122 and 127 of the Constitution, seek from this Court the following:

- "(A) Interpretation of Sections 122, 124, 127, 171(15), 120, 108, 40(4), 48(4), 125 and 30(1) of the Constitution of Sierra Leone, Act No.6 of 1991.*
- (2) Interpretation of the Special Court, Agreement, 2002 (Ratification) Act, 2002 as amended by the Special Court Agreement, 2002, (Ratification) (Amendment), Act, 2002; to wit – Article 1(1) of the schedule and the preamble thereto, Sections 10, 11(2) and 29 and Article 8(1) & (2) of the Statute thereof by the determination of the following questions:*
- (i) whether by creating the Special Court for Sierra Leone pursuant to Article 1(1) of the schedule and the preamble to the Special Court Agreement 2002 (Ratification) Act 2002 as amended by the Special Court Agreement 2002 (Ratification) (Amendment) Act 2002 is not a transgression of Sections 120(4), 30(1) and 108 of Act No.6 of 1991?*
- (ii) Whether part III Section 11(2) of the Special Court Agreement 2002 (Ratification) Act 2002 as amended which provides that **"the Special Court shall not form part of the Judiciary of Sierra Leone"** does not seek to clearly amend the Judicial framework and court structure in Sierra Leone and therefore contravenes Sections 120(4), 30(1) and 108 of Act 6 of 1991?*
- (iii) Whether section 29 of the Special Court Agreement, 2002 (Ratification) Act 2002 as amended, is not a contravention of section 48(4) OF Act No.6 of 1991?*
- (iv)(a) whether Article (8)(1) & (2) of the said Statute to the Special Court Agreement, 2002 (Ratification) Act, 2002 as amended are not contradictory?*
- (iv)(b) And whether Article 8(2) of the said Statute is not in contravention of Section 125 of Act No.6 of 1991?*

DECLARATIONS SOUGHT.

- (B) (1) *A declaration that Article 1(1) of the schedule and preamble thereto of the Special Court Agreement, 2002 (Ratification) Act, 2002 as amended contravene Sections 120 & 30(1) of the Constitution of Sierra Leone Act No.6 of 1991 in that it seeks to alter the Judicial framework and court structure envisaged and created by Sections 120 & 30(1) of the said Constitution Act No. 6 of 1991 and is therefore void and of no effect pursuant to Section 171(15) of Act No.6 of 1991.*
- (2) *A declaration that Sections 10, 11(2) and 29 of the Special Court Agreement 2002 (Ratification) Act 2002 as amended contravene Sections 120(1), 30(1) 120(4) and 122(1), 48(4) and 108 of the Constitution of Sierra Leone Act No.6 of 1991 and therefore void and of no effect by virtue of Section 171(15) of the Constitution of Sierra Leone Act No.6 of 1991.*
- (3) *A declaration that Article 8(1) & (2) of the Statute (which is an integral part of the Act) of the Special Court Agreement 2002 (Ratification) Act as amended are not only contradictory but that Article 8(2) contravenes Sections 120(4), 122(1) 30(1) and 125 of the Constitution of Sierra Leone Act No.6 of 1991 and is therefore void and of no effect pursuant to Section 171(15) of Act of No.6 of 1991.*
- (4) *A declaration that Section 29 of the Special Court Agreement 2002 (Ratification) Act 2002 as amended is in contravention of Section 48(4) of Act No.6 of 1991.*

(C)

RELIEFS SOUGHT

1. *To declare the creation of the Special Court as unconstitutional and therefore null and void and is of no legal effect.*
2. *To order that the arrest and detention of the Plaintiffs herein by the Special Court is unconstitutional and therefore illegal.*
3. *To order the immediate release of the Plaintiffs from the custody of the Special Court Detention Unit.*
4. *Any further order or other relief as this Honourable Court may deem fit and just."*

On the 10th day of December 2003 a Statement of the Plaintiffs' case signed by Counsel for the Plaintiffs was filed pursuant to the Rules of this Court together with an affidavit in verification of the Plaintiffs' case sworn to on the 10th day of December 2003 by Charles Francis Margai Esquire. Thereafter, on the 7th day of July 2004, Joseph G, Kobba, Senior State Counsel acting a Solicitor for all four Defendants entered a Conditional Appearance for the Defendants which was to stand as unconditional after ten days unless in the meantime the Defendants had applied for and obtained an order setting aside "the proceedings herein for irregularity".

On the same date 7th July 2004 the Solicitor for the Defendants filed what he termed a "Notice of Intention to Raise a Preliminary Objection" on the following grounds:

1. *That the first Defendant, the second Defendant, the third Defendant and the Special Court for Sierra Leone as an entity are immune from any form of legal process under Article 9 and Article 12 of the Schedule of the Special Court Agreement 2002 (Ratification) Act, 2002 Act No.7 of 2002 to wit agreement between (the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and also section 8 (1) of the Special Court Agreement 2002 Ratification Act 2002.*
2. *That this Honourable Court therefore has no jurisdiction to inquire into matters raised in this motion before this court in the light of the Special Court Agreement 2002 Ratification Act No. 7 of 2002 as amended.*

No application was made to this Court to set aside the proceedings within the ten days stipulated in the Conditional Appearance. Rather, on the 16th day of July 2003 the same Solicitor filed a Statement of the 1st, 2nd and 3rd Defendants' case together with an affidavit in verification of the said case. On the same date, i.e., 16th July 2003, a Statement of the 4th Defendant's case was filed by the Solicitor for the Defendants.

On the 31st day of March 2005 the 1st, 2nd and 3rd Defendant applied by Notice of Motion to this Court for an Order that their names be struck out as parties/defendants in the instant case as they were immune from any legal proceedings in any court in Sierra Leone by virtue of the following:

" a) Article 12 (1)(b) of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone signed on the 16th of January 2002;

b) The Special Court Agreement 2002 (Ratification) Act 2002 Act No.7 of 2002;

c) Diplomatic Immunities and Privileges Act 1961 Act No. 35 of 1961;

d) Vienna Convention on Diplomatic Relation 1961;

e) Section 12 of the Special Court Agreement (Ratification) Regulation of 2004 Public Notice No.5 of 2004."

The application was supported by the affidavit of Joseph Gomoï –Vandi Kobba sworn to on the 31st day of March 2005 to which was annexed several documents including one headed

International Cooperation to the Registrar of the Supreme Court and marked as Exhibit "JGK4". By that certificate of acting Director of the International/ legal and Research Division of the Ministry confirmed that:

"pursuant to Article 12(1) (b) of the Agreement entered into between the Government of Sierra Leone on the one part and the United Nations in the other part signed on the 10th January 2002 and ratified by Parliament by the Special Court Agreement 2002 (Ratification) Act 2002 establishing the Special Court for Sierra Leone, the judges, prosecutors and the Registrar together with their families forming part of their households enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic in accordance with the 1961. Vienna Convention on Diplomatic Relations"

No affidavit in opposition was filed on behalf of the Plaintiffs. The application was heard on the 26th day of April 2005 and a Ruling was delivered on the 10th day of May 2005. In delivering the Ruling of the Court I said that I was satisfied, based on the said Exhibit "JGK", that the 1st, 2nd and 3rd Defendant were immune from suit.

However, for reasons which were not given at the time of the Ruling I refrained from making an Order that the names of the 1st, 2nd and 3rd Defendants be struck out of the instant proceedings.

I now turn to the reasons for that decision. It is clear from Article 12(1) of the Agreement that Judges, the Prosecutor and the Registrar of the Special Court are entitled to enjoy *"the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations"*. In particular, they enjoy immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention.

The Agreement, as has been shown earlier in this Judgment, became part of the municipal law of Sierra Leone by the enactment of the Ratification Act. The relevant provisions of the Vienna Convention in Diplomatic Relations dealing with the immunity from suit of diplomatic agents is contained in Article 31 of the Convention. It expressly provides that a *"diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction"* subject to earlier exceptions which I hold are not relevant in the instant case.

Since the 1st, 2nd and 3rd Defendants were sued in their respective capacities of Judge, Registrar and Prosecutor of the Special Court I had no alternative but to hold that they were each immune from suit.

In the light of the above finding, it is my view that the 1st, 2nd and 3rd Defendants need not have submitted to the jurisdiction of this Court. But they did so and went even as far as filing a statement of their case. In the circumstances it was too late to apply for their names to be

struck out as parties/ defendant. In my view the proper course should be to dismiss the action brought against them. The action against them is accordingly dismissed.

Having thus disposed of the issue of the immunity from suit of the 1st, 2nd and 3rd Defendants I now proceed to determine whether this Court's original jurisdiction has been properly invoked to enable us to entertain the Plaintiffs' claim as against the 4th Defendant, to wit, the Attorney-General and Minister of Justice.

The Plaintiffs' contention on the face of the Originating Notice of Motion is that they are relying on sections 122, 124 and 127 of the 1991 Constitution as well as Rules 89-98 of the Rules of this Court contained a Constitutional Instrument No. 1 of 1982.

For purpose of clarity I shall set out the provisions of sections 122, 124 and 127 in so far as they are relevant to the instant case. Section 122(1) provides as follows:

“ The Supreme Court shall be the final Court of Appeal in and for Sierra Leone and shall have such appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law”

In my view, the expression “other jurisdiction” clearly includes original jurisdiction as well as supervisory and advisory jurisdiction. What is of relevance here is this Court's original jurisdiction. In the search for such jurisdiction one is referred to the Constitution itself or any other law. It is my considered view that only the Constitution is relevant for the conferring of original jurisdiction in this Court to entertain the instant case.

To the extent that the Plaintiffs are seeking to have certain provisions of the Constitution enforced or interpreted this Court is vested not only with original jurisdiction but it is so vested to the exclusion of all other courts by the provisions of section 124 (1) of the Constitution which state as follows:

“ The Supreme Court shall save as otherwise provided in section 122 of the Constitution, have original jurisdiction, to the exclusion of all other courts-

- a) *“in all matters relating to the enforcement or interpretation of this Constitution, and*
- b) *“where any question arises whether an enactment was made in excess of the power conferred upon parliament or any other authority or person by law or under the Constitution”*

The first limb of this provision dealing with matters relating to the enforcement or interpretation of the Constitution, was considered and applied by this Court in the case of Hinga Norman Vs Dr. Sama Banya and Others , (S.C 2/2005, Judgment delivered on the 31st day of August 2005, unreported) where I had this to say:

Dr. Sama Banya and Others , (S.C 2/2005, Judgment delivered on the 31st day of August 2005, unreported) where I had this to say:

"This subsection not only confers original jurisdiction on the Supreme Court but it also stipulates that in respect of those matters for which original jurisdiction is thus conferred no other court shall exercise original jurisdiction. What then are those matters? According to section 124(1)(a) these are "all matters relating to the enforcement or interpretation of any provision of" the National Constitution." Giving the words in this provision their plain and natural meaning, as I am obliged to do, since I perceive no ambiguity in the provision, as long as the matter in question relates to the enforcement or interpretation of any provision of the National Constitution original jurisdiction is vested in the Supreme Court to hear and determine it.

The first test is that the Plaintiff seeking to invoke this original jurisdiction must be able to point to some provision, any provision, of the National Constitution that is to be enforced or interpreted. The next test is to show, in addition, what act or omission makes it necessary for the provision to be enforced. The third test, in my opinion, is an alternative to the second test. The Plaintiff must otherwise show that an interpretation of the particular provision of the National Constitution identified under the first test is required as a matter of law."

Applying the test in the Hinga Norman's case to the reliefs sought under A and B in the Originating Notice of Motion I can safely state that this Court has original jurisdiction to entertain the Plaintiffs' claim herein.

The Plaintiffs' are also relying on Section 127 of the Constitution. This section was also considered by this Court in the Hinga Norman case. As I stated in that case section 127 does not by itself confer any original jurisdiction upon this Court but merely lays down the procedure for the enforcement of the Constitution in certain specific circumstances. For all the above reasons I hold that this Court has original jurisdiction to entertain the Plaintiffs' claim by interpreting and enforcing the several provisions of the Constitution set out in the Originating Notice of Motion. This Court can also properly grant the declarations and orders sought under B and C in the Originating Notice of Motion under powers vested in it by section 127 of the Constitution.

I shall now proceed to deal with the several matters raised in the Originating Notice of Motion but not necessarily in the order in which they are presented as, with the greatest respect to Counsel for the Plaintiffs, there is a certain amount of overlap and duplication in the said presentation.

Under A(1) the Plaintiffs invite this Court to interpret the following sections of the Constitution:

- i) 122;
- (ii) 124;
- (iv) 127;
- (v) 171(15);
- (vi) 120;
- (vii) 108;
- (viii) 40;
- (ix) 48;
- (x) 125; and
- (xi) 30 (1)

Let me repeat what I stated in the Hinga Norman case in the passage cited earlier in this Judgment, i.e., in order to invoke this Court's original jurisdiction under section 124(1) of the Constitution, the Plaintiff must satisfy this Court that the interpretation sought is required as a matter of law, for example, to clarify any ambiguity or to determine the legal effect of a particular provision.

In the light of this qualification I think I need not add anything more to what I have already said about sections 122, 124 and 127 of the Constitution in the context of the instant case.

I now turn to 171 (15) of the Constitution. Again this Court had the opportunity to consider the provision of this section in the Hinga Norman case. The view this court took of section 171 (15) of the Constitution is that it is a substantive provision which declares the Constitution to be the Supreme Law of Sierra Leone and emphasizes that status by providing that any other law which is found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void and of no effect. The procedure to be adopted where it is alleged that an enactment is invalid because of the provision of section 171 (15) of the Constitution is that laid down in section 127 of the Constitution

Section 120 of the Constitution deals with the establishment of the Judiciary in Sierra Leone. It provides for various matters relating to the jurisdiction of the Judiciary, its composition, hierarchy, independence, immunity of judges of the Superior Court of Judicature and the general functioning of the Judiciary. However, section 120 (1) sets the tone and the context in which all these matters are dealt with. According to this subsection the section is dealing with the exercise of judicial power in Sierra Leone and I comprehend that to mean within the municipal or domestic context of Sierra Leone.

- such inferior and traditional Courts as Parliament may by law establish

In my opinion any other Court in Sierra Leone exercising jurisdiction apart from those listed as constituting the Judicature cannot be considered as part of the Judiciary of Sierra Leone. So the definition of a Court in section 30(1) of the Constitution as "any court of Law of Sierra Leone other than a local Court or a Court constituted by or under service law" expressly excludes local courts from being part of the Judiciary as established under section 120 of the Constitution. This is so despite the fact that local courts are established by an Act of Parliament as envisaged by section 120(4) of the Constitution.

It is in the same manner that section 11(2) of the Ratification Act expressly provides that the Special Court shall not form part of the Judiciary of Sierra Leone. I therefore hold that the Special Court is not part of the Judiciary of Sierra Leone as established by the Constitution.

I turn next to section 108 of the Constitution. This section deals with amendments of the Constitution. Section 108 (1) is an enabling provision vesting in Parliament the power to alter the Constitution. Section 108 (2) lays down the procedure generally for amendments of the Constitution whilst sections 108 (3) (4) (5) and (6) lay down the special procedure that must be followed where the amendment relates to the provisions of certain sections listed in section 108 (3) of the Constitution. These sections are commonly referred to as "entrenched clauses." Of particular relevance to the instant case are sections 120 and 122 of the Constitution .

It is contended on behalf of the Plaintiffs that by providing in section 11(2) that the Special Court shall not form part of the Judiciary of Sierra Leone the Ratification Act has in fact amended section 120 of the Constitution without following the procedure laid down by sections 108 (3) to (6) inclusive of the Constitution. Giving the latter provisions their plain and ordinary meaning there is no doubt whatsoever that the procedure laid down therein was not adhered to in enacting the Ratification Act.

Having said this, the next issue that comes up for determination is whether the enactment of section 11(2) of the Ratification Act constitutes an amendment of section 120 (1) and 120 (4) of the Constitution. According to the editors of Halsbury's Law of England:

"To amend an Act or enactment is to alter its legal meaning, whether expressly or by implication, express amendment may be textual, where the actual wording is altered or indirect" (see Halsbury's Laws of England, 4th edition, Vol.44 (1) paragraph 1289).

Clearly, this is not a case of an express textual amendment as the words contained in the said section of the Ratification Act do not in any way alter the wording of the two subsections of the Constitution earlier referred to. Could it then be said to be an indirect amendment? In my opinion, this contention could not be tenable for, clearly, the legal effect of the provision of section 11(2) of the Ratification Act is to make the Special Court a separate and distinct entity operating outside the confines of the Judiciary of Sierra Leone and therefore not forming part of the internal structure or hierarchy of the Judiciary.

Furthermore, I am obliged to discountenance any suggestion that if the amendment is not express then it must be implied because section 108 (7) of the Constitution makes it plain that no Act of Parliament shall be deemed to amend, add to or repeal or in any way alter any provisions of the Constitution unless it does so in express terms.

The next provision that the Plaintiffs are seeking to have this Court interpret is contained in section 40(4) of the Constitution which states *inter alia* as follows:-

“ Notwithstanding any provisions of the Constitution or any other law to the contrary, the President shall, without prejudice to any such law as may for the time being be adopted by Parliament, be responsible, in addition to the functions conferred upon him by this Constitution for-

- a) *all constitutional matters concerning legislation;.....*
- d) *the execution of treaties, agreement, conventions in the name of Sierra Leone;*

provided that any Treaty, Agreement, or Convention executed by or under the authority of the President which relates to any matters within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorizes any expenditure out of the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament-

- (1) by an enactment of Parliament; and*
- (2) by a resolution supported by the votes of not less than one-half of the members of Parliament”*

What then is the legal meaning of this provision? To fully appreciate the legal meaning of the provision in section 40 (4) of the Constitution the section should be read as a whole. The section establishes the office of the President of Sierra Leone as, *inter alia*, the supreme executive authority in the country. The section then goes to outline some of the powers vested in the President in his capacity as such executive leader.

The provision then lays down certain limitations on the manner of exercise of the executive power where the action taken involves the execution of treaties, agreements and convention in the name of Sierra Leone. The limitation on the exercise by the President of the executive powers listed in the main provision of section 40(4) consists in the requirement to have the action taken by the President ratified by Parliament if the treaty, agreement or convention relates to :-

- a. any matter within the legislative competence of parliament;
- b. any matter which in any way alters the laws of Sierra Leone;
- c. any matter which imposes any charge on; or authorizes any expenditure out of the Consolidated Fund or any other fund in Sierra Leone; and
- d. the declaration of war by the President

The process of ratification by Parliament involves the enactment of a ratification statute (as happened in this case) or the passing of resolution supported by the votes of not less than one-half of the members of Parliament.

The question that arises for determination flowing from the legal meaning I have ascribed to the provision in section 40(4) is whether the procedure for ratification is to be read subject to the provisions of section 108(3) to 108(6) inclusive of the Constitution. Counsel for the Plaintiffs contend that where treaty, agreement or convention executed by the President in any way alters the law of Sierra Leone, and more particularly where the law that is altered happens to be one of the so-called entrenched clauses listed in section 108(3) of the Constitution then the procedure for ratification laid down in section 40(4) should be read subject to the provisions of section 108 (3) to 108(6) inclusive.

On the other hand, the learned Attorney-General submitted that there is no such requirement to be gleaned from the provision of section 40(4). He contends that as long as one or other of the procedures for obtaining Parliament's ratification laid down in the proviso to section 40(4) is followed there is nothing more to be done.

With the greatest respect to Counsel for the Plaintiffs, I cannot accept this contention for several reasons. First, there is nothing in the wording of the main provision of section 40(4) of the Constitution or in the proviso thereto which suggests that either is to be read subject to section 108.

Secondly, section 108 (3) deals with a bill for the an Act of Parliament enacting a new Constitution or altering certain provisions of the Constitution. In the case of the ratification envisaged by the proviso to section 40(4) of the Constitution there is no such restriction. The ratification envisaged could be done either by means of an enactment or by means of a simple resolution.

Thirdly, where ratification is done by means of a resolution it is expressly stated in the provision what is required for the resolution to be deemed validly passed. All that is needed is the vote of not less than one-half of the members of Parliament. This is in stark contrast to the provision of section 108(2) (b) which requires a bill for an Act of Parliament under this section of the Constitution to be supported on the second and third reading by the votes of not less two-thirds of the Members of Parliament.

For all the above reasons, I hold that for the purposes of ratification required under the provision of section 40(4) of the Constitution an enactment referred to in the said provision is to be deemed duly passed if it complies with the mode of exercising legislative power set out in section 106 of the Constitution rather than that laid down in section 108 (3) to (6) inclusive.

The next provision of the Constitution to be interpreted is that contained in section 48(4) of the Constitution. It deals with the immunity from civil and criminal process enjoyed by the President for anything done or omitted to be done by him either in his official or private

The next provision of the Constitution to be interpreted is that contained in section 48(4) of the Constitution. It deals with the immunity from civil and criminal process enjoyed by the President for anything done or omitted to be done by him either in his official or private capacity. Let me hasten to state that a distinction ought to be made between immunity from suit under domestic law on the one hand and under international law on the other hand.

A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third States except it has been waived by the State concerned. The principle was applied by the House of Lords in the Pinochet proceedings (see *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [2002] 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* at [2002] 1 AC 119 and *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)* at [2000] 1AC 147) and *The Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium before the International Court of Justice (2002 ICJ Reports)* In contrast, where the immunity is claimed by a Head of State before an international court the position to be inferred from decisions of various national courts and international tribunals, and the writings of international jurists is that there exists no *a priori* entitlement to claim immunity particularly from criminal process involving international crimes.

It is important to make this distinction at this stage because one of the declarations being sought by the Plaintiffs is to the effect that Section 29 of the Ratification Act which provides that the existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court is in contravention of section 48(4) of the Constitution.

Suffice it to say for now that in as much as section 48(4) relates only to immunity of the Head of State before our municipal courts it is not inconsistent with the provision of section 29 of the Ratification Act which deals with immunity before the Special Court

I turn next to section 125 of the Constitution dealing with the supervisory jurisdiction of the Supreme Court over all courts and adjudicating authorities in Sierra Leone provides as follows:

"The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority: and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers."

Again, the distinction between domestic courts and adjudicating authorities on the one hand and international courts and tribunals is relevant. In my opinion, it could not have been the intention of the legislature when it enacted that provision in 1991 that it should extend to a treaty-based tribunal such as the Special Court established for a specific and limited purpose.

Finally, the Origination Notice of Motion refers to the section 30(1) of the Constitution. This section seeks to define certain words used in the context of Chapter III of the Constitution

dealing with the recognition and protection of the fundamental human rights and freedoms of the individual. The only word of relevance to the instant case is "court" which is stated to mean "any court of law in Sierra Leone other than a local court or a court constituted by or under service law". In my opinion, the phrase "any court of law in Sierra Leone" could only mean any domestic court established to administer law in Sierra Leone subject to the limitation imposed by the definition itself.

The plaintiffs then seek the determination of certain specific questions in so far as they relate to certain provisions of the Agreement and the Statute of the Special Court. I shall deal with these questions in the order in which they are set out in the Originating Notice of Motion.

The first question to be answered by this Court is *"whether by creating the Special Court for Sierra Leone pursuant to Article 1(1) of the schedule and the preamble to the Special Court Agreement 2002 (Ratification) Act 2002 as amended by the Special Court Agreement 2002 (Ratification) Amendment Act 2002 is not a transgression of sections 120(4), 30(1) and 108 of Act No.6 of 1991."*

In the light of what I have already said about the legal meaning of sections 30(1), 108(3) to 108(6) and 120(4) of the Constitution as well as that of section 11(2) of the Ratification Act which expressly states that the Special Court shall not form part of the Judiciary of Sierra Leone the question must be answered in the negative.

Besides, I see nothing in the provisions of sections 30(1), 108 and 120(4) of the Constitution which detracts from the powers vested in the President by Section 40(4) of the Constitution to enter into such an agreement as that concluded with the United Nations to establish the Special Court.

The second question must also be answered in the negative as it is not much different from the first which I have just answered in the negative. Besides, earlier in this judgment I had held that the provision of section 11(2) of the Ratification Act that the Special Court shall not form part of the Judiciary of Sierra Leone "puts beyond all doubt that the intention of Parliament was that the Special Court was to be independent of the Judiciary and its establishment could not therefore be said to have altered in any way the hierarchy and structure of the Judiciary set out in section 120(4) of the Constitution. It follows therefore that if there is no amendment of section 120(4) as a result of the enactment of section 11(2) of the Ratification Act then the question of invoking the provisions of section 108 of the Constitution simply does not arise.

The third question is whether section 29 of the Ratification Act providing that the official status of an accused could not be a bar to criminal process before the Special Court is in contravention of section 48(4) of the Constitution which makes the Head of State of Sierra Leone immune from both civil and criminal process.

The answer lies in the distinction I had earlier sought to make between immunity from process before a municipal court and immunity from process before an international court. Indeed the wording of section 29 of the Ratification Act is not dissimilar from that dealing with the same subject-matter found in the statutes of other international courts and tribunals set up

Nuremberg Tribunal, Article 6 of the Statute of the Tokyo Tribunal, Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") which is in identical terms to Article 7(2) of the ICTY statute. But of much more direct relevance is Article 27(2) of the Rome Statute setting up the International Criminal Court ("ICC") which Statute Sierra Leone has adhered to and ratified. Like the Special Court the ICC is treaty-based and it is not surprising that the wording of section 29 of the Ratification Act and Article 27(2) of the Rome Statute is virtually identical.

The inclusion of such clause in the charters/statutes of international criminal courts from Nuremberg to the ICC has met with approval in all the relevant case law such as Pinochet in the House of Lords or in the Yarodia judgment of the ICJ. In addition a majority of academic commentary supports the view that an international criminal tribunal or court, 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.

For the above reasons I hold that section 29 of the Ratification Act as amended does not contravene section 48(4) of the Constitution.

The fourth question is in two parts: first, whether Articles 8(1) and 8(2) of the Statute of the Special Court are not contradictory, and secondly whether Article 8(2) of the Statute does not contravene section 125 of the Constitution.

Article 8(1) of the Statute of the Special Court states that the Special Court and the National Courts shall have concurrent jurisdiction. Article 8(2) thereof provides that the Special Court shall have primacy over the national courts of Sierra Leone.

The concepts of concurrent criminal jurisdiction and primacy of an international tribunal over national Courts are both recent developments of international law. They first made their appearance in Articles 9(1) and 9(2) of the Statutes of the ICTY and Article 8(1) and 8(2) of the Statute of the ICTR respectively.

However, in the case of the Special Court the provision relating to the concurrent jurisdiction of the two court systems is silent on the extent of the concurrence. Whereas in the case of ICTY and ICTR the international tribunals and the national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, in the case of the Special Court, only the Special Court has jurisdiction in respect of serious violations of international law crimes and crimes against humanity and the concurrent jurisdiction shared by the national Courts of Sierra Leone with the Special Court is implication only in respect of crimes under Sierra Leone Law relating to sexual violence against children contrary to the provisions of the Prevention of Cruelty to Children Act, Cap 31, and malicious damage to property contrary to the provisions of the Malicious Damage Act 1861.

In contrast, the provision of Article 8(2) of the Statute of the Special Court dealing with the primacy of the Special Court over the national courts and the power of the Special Court to

In contrast, the provision of Article 8(2) of the Statute of the Special Court dealing with the primacy of the Special Court over the national courts and the power of the Special Court to formally request a national court to defer to its competence is almost identical to that found in Articles 9(2) and 8 (2) of the Statutes of the ICTY and the ICTR respectively.

To be able to answer the question whether the provision for concurrent jurisdiction in the Statute of the Special Court is inconsistent with the provision conferring primacy in the Special Court over the national courts one has got to examine the circumstances in which and the reasons advanced for the insertion of primacy clauses generally in the Statutes of other international tribunals such as the ICTY and the ICTR and the Special Court .

According to the Rules of Procedure and Evidence of the ICTY, ICTR and the Special Court their Prosecutors may request a deferral in the following circumstances: (i) if proceedings already started in national Courts are regarded as in appropriate, e.g if an international crime is characterized as an ordinary crime; (ii) if the crimes before the national court raises questions of law or facts closely related to investigations on proceedings before the international tribunal.

As far as justification for the primacy concept is concerned in *In re Tadic* 1 ICTY Judicial Reports 3,19(1994) and *In re Karadzic* 1 ICTY Judicial Reports (1994-95) 851 the prosecutors placed special reliance upon the appropriateness of trying major war criminals in an international forum, and on the deleterious implications of simultaneous proceedings before multiple jurisdictions, on the availability of evidence and the willingness of witnesses to co-operate with the international prosecution authorities.

According to Yuval Shany in his book "*The Competing Jurisdictions of International Courts and Tribunals*" published by Oxford University Press at P.140 :

" The bestowing of primacy upon the ad hoc tribunals may be explained through reference to the strong interest of the international community in collective law-enforcement: in punishing war criminals and creating an effective deterrent against the commission of further atrocities....."

In addition, there existed a perception that domestic courts in former Yugoslavia and Rwanda would be either unwilling or unable to bring war criminals to justice effectively, or might treat the defendants in a hostile and vindictive manner.

In sum , it is arguable that the prominent nature of international use criminal tribunals and their guarantees of procedure fairness and impartiality have created a presumption, which was valued at least at the point in time in which they were established that then national Courts to by war criminals. The Statutes of the ad hoc tribunals have thus adopted what is essentially a "most- appropriate forum rule", which uphold the predominance of the international tribunals over their domestic counterparts (whenever primacy is insisted upon by the international prosecutors)".

For all the above reasons, I hold that the primacy provision contained in Article 8(2) of the Statute of the Special Court does not contradict the provision relating to concurrent jurisdiction contained in Article 8(1) of the said Statute.

The final question posed by the Plaintiffs is whether Article 8(2) dealing with primacy of the Special Court does not contravene Section 125 of the Constitution dealing with the Supervisory Jurisdiction of the Supreme Court. Having held that the Special Court is not part of the Judiciary of Sierra Leone it cannot be subject like other domestic courts to the supervisory jurisdiction of the Supreme Court. The primacy provision in Article 8(2) in no way detracts from the supervisory jurisdiction of the Supreme Court. Besides the request for deferral is not made to the domestic court directly but through the Attorney-General.

In my opinion, just as the power vested in the Attorney-General by section 66 (4) (c) of the Constitution to discontinue any criminal proceedings at any stage before judgment does not detract from the jurisdiction of the court before which the matter was pending a request from the Special Court for deferral by any of our national courts, if acted upon by the Attorney-General, will not detract from any of the jurisdiction of the court involved.

For this reason, I hold that the provision of Article 8(2) of the Statute of the Special Court does not contravene section 125 of the Constitution.

In the light of the several negative answers given to the questions posed by the Plaintiffs I am unable to make the various declarations and the reliefs sought in the Originating Notice of Motion.

As a result the action is hereby dismissed.

I make no order as to costs.

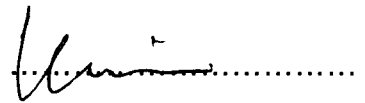
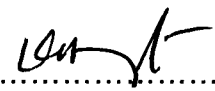
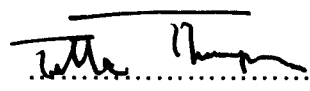


ADE RENNER-THOMAS
CHIEF JUSTICE

HON. MR. JUSTICE E.C.THOMPSON-DAVIS J.S.C.

HON. MRS. JUSTICE V.A.D. WRIGHT J.S.C.

HON. MR.JUSTICE M.E. TOLLA-THOMPSON J.SC.

HON.JUSTICE SIR JOHN MURIA J.A.


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