
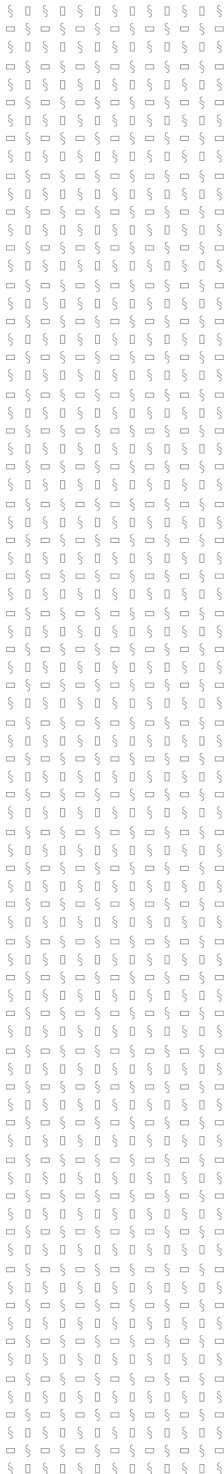




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No 467

HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

**The Charles Taylor Case before the Special
Court for Sierra Leone**

Kateřina Uhlřov

Masarykova univerzita
Brno, 2013

Vzor citace:

UHLÍŘOVÁ, Kateřina. Head of State Immunity in International Law, The Charles Taylor Case before the Special Court for Sierra Leone. 1. vyd. Brno : Masarykova univerzita, Právnická fakulta, 2013. 172 s. Řada teoretická, Ed. S, č. 467. ISBN 978-80-210-6717-2.

Katalogizace v knize – Národní knihovna ČR

Uhlířová, Kateřina

Head of State Immunity in International Law, The Charles Taylor Case before the Special Court for Sierra Leone / Kateřina Uhlířová. – 1. vyd. Brno: Masarykova univerzita, 2013. - 172 s. (Edice S, Řada teoretická Právnické fakulty MU ; č. 467)

ISBN 978-80- 210-6717-2 (brož.)

341.1/.8* 341.4* 343.412* 341.322.5*341.645:343.19* 342.511*341.7/.8+342.53*(664)*

- mezinárodní právo veřejné
- mezinárodní právo trestní
- zločiny proti lidskosti
- válečné zločiny
- mezinárodní trestní soudy
- hlavy států
- imunita (právo)
- Sierra Leone
- monografie

341 – Mezinárodní právo [16]

Tato publikace vznikla a byla financována z prostředků specifického výzkumu Masarykovy univerzity č. MUNI/A/0807/2012 „Publikace vědeckých monografií“.

Recenzoval:

Prof. Ryszard Piotrowicz

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ISBN 978-80-210-6717-2

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List of Abbreviations

AI	Amnesty International
APC	All People's Congress
AU	African Union
CDF	Civil Defence Forces
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institute de Droit International
ILC	International Law Commission
IMT	International Military Tribunal
NGO	Non-Governmental Organization
RUF	Revolutionary United Front
SC	Security Council
SCSL	Special Court for Sierra Leone
SLPP	Sierra Leone People's Party
STL	Special Tribunal for Lebanon
UK	United Kingdom
UN	United Nations
USA	United States of America
WCC	War Crimes Chamber of the Court of Bosnia and Herzegovina
WWII	Second World War

Acknowledgements

During the course of my research and writing, I have received an invaluable support from various persons and institutions. Firstly, I would like to express my gratitude to Professor Ryszard Wilson Piotrowicz for his engagement, dedication, and invaluable academic input I have received from him. I also wish to thank to Professors Colin Warbrick (Emeritus Professor of International Law at Birmingham University) and Christopher Harding (University of Wales Aberystwyth) for challenging questions and vibrant discussion during the defence of my thesis.

I am grateful to all persons from various other institutions for sharing their time, knowledge and experience with me. I have had a great opportunity to work as a judicial intern at the War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC) and at the Office of the President of the International Criminal Tribunal for the former Yugoslavia (ICTY). I wish to thank to both judicial institutions for a very warm welcome and professionally challenging experience. In particular, I wish to thank to Judge Almiro Rodrigues (formerly Judge at the ICTY and at the WCC) and Judge Fausto Pocar (formerly President of the ICTY) for their willingness to discuss with me issues pertaining to individual criminal responsibility. However, I wish to stress that any views expressed in this work remain my own and of course, so are any errors.

I would like to acknowledge the financial support I have received for the purposes of my legal internships, field trips and other research activities. I thank to the Gilbert Murray Trust in Oxford for their scholarship. My great appreciation goes to my home institution, Masaryk University, Faculty of Law for financially supporting my internship at the ICTY.

Finally, I express my deep appreciation to my husband, Jan, and to my whole family for their unconditional support, patience and encouragement.

Part I - General

1 Introduction¹

1.1 Opening Remarks

Head of State who commits murder and other grave crimes is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example.²

Under traditional international law governed by the concept of state sovereignty, any alleged responsibility for international wrongdoings used to be attributed to the State alone.³ Indeed, the role of an individual in traditional international law was

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- 1 This book is based on my LLM thesis submitted to the University of Wales Aberystwyth, rewritten and updated as of 12 October 2013. Select parts of this work contain material that was published in K. Novotna (Uhlírova), ‘Relationship between Crimes under International Law and Immunities: Coexistence or Exclusion?’ in K. M. Sinha (ed.), *International Criminal Law and Human Rights* (New Delhi: Manak Publications Pvt., 2010); K. Novotna (Uhlírova), *Legal Basis for the Establishment of International and Hybrid Criminal Courts and its Impact on Enforcement of International Criminal Law, Days of Law Proceedings* (Brno: Tribun EU, 2009).
 - 2 E. de Vattel, quoted in Q. Wright, ‘The Legal Liability of the Kaiser’, 13 *American Political Science Review* 20 (1919), pp. 120, 126, available at <http://www.amnesty.org/es/library/asset/EUR45/001/1999/es/5dd2ca8b-e35a-11dd-a06d-790733721318/eur450011999en.html> (last visited 27 April 2010).
 - 3 See, e.g. R. Jennings and A. Watts (eds.), *Oppenheim’s International Law* (London: Longman, 1992), pp. 5-7. See also Koskenniemi, who suggests that: “international law fundamentally is a European tradition derived from a desire to rationalize society through law.” He however concludes that “the fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal.” In M. Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’, 16 *European Journal of International Law* (2005), pp. 113-114 and M. Koskenniemi, *The*

marginalized. This position of an individual in international law began to change from the 20th century. Responsibility of individuals for breaches of international law started to be addressed in a relatively new body of international law: international criminal law.⁴

Admittedly, “criminal law in general, and international criminal law in particular, will never be a panacea for the ills of the world.”⁵ Nevertheless, international criminal law is designed to punish ‘extraordinary’ as opposed to ‘ordinary’ crimes.⁶ It should therefore aspire to show that as “those who bear the greatest responsibility”⁷ attempt to place themselves beyond the reach of law, “the law adapts to bring them back within its grasp.”⁸

International criminal law qualifies certain types of conduct as crimes under international law⁹ incurring individual criminal responsibility. In this context, the 20th century witnessed rapid development of various international and hybrid judicial mechanisms for prosecution of individuals who commit these crimes. What if the

Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (2001).

4 For a useful history, see T. L. H. McCormack, ‘From Sun Tzu to the Sixth Committee, the Evolution of an International Criminal law Regime’ in T. L. H. McCormack and G. J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague: Martinus Nijhoff Publishers, 1997), p. 31.

5 P. Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), p.71.

6 International criminal law is said to express something universal, which is deeply rooted in moral philosophy - condemnation of acts of (in Arendt’s phrasing) ‘extreme evil’. See A. M. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007), p. 182.

7 The term is used in the SCSL Statute as guidance for the court regarding its personal jurisdiction. See Article 1 (1) of the Statute, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=70> (last visited 16 August 2013).

8 Sands, *supra* note 5.

9 The term crimes under international law will be used interchangeably with the terms international crimes and core crimes. Previously, the International Law Commission (ILC) used to refer to the term “international crimes” in connection with state responsibility. Although the ILC made clear that use of this term does not imply state *criminal* responsibility, it nevertheless raised some concerns and the ILC rather “decided to abandon this terminology in favour of a more neutral one” when dealing with issue of state responsibility for the most serious international wrongdoings. In B. I. Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes* (Leiden, Boston: Martinus Nijhoff Publishers, 2009), p. 11. See also J. Crawford, ‘Fourth Report on State Responsibility’, UN Doc. A/CN.4/517, paras. 48-49.

proceedings are initiated against Head of State or other high-ranking state officials? On the one hand, the principle of individual criminal responsibility for crimes under international law is firmly established.¹⁰ On the other hand, the enforcement of this principle can, in some circumstances, be frustrated by operation of another well established principle, immunity of Head of State based largely on the notions of sovereign equality of States.¹¹

Traditionally, Heads of State were not subject to the jurisdiction of national courts for whatever acts they may committed and there were no international courts which would have jurisdiction over Heads of State. Until recently, the immunity of high-ranking state officials who engaged in commission of such crimes was absolute, based on traditional rules safeguarding the sovereignty of States.¹² Indeed, immunities have ancient roots and the international law of immunities extends back “not hundreds, but thousands, of years,”¹³ as opposed to international criminal law, which is relatively recent and not yet uniform body of law.

Nevertheless, the interests of the international community in the maintenance of effective and smooth functioning of international relations between states are being increasingly confronted with the interests of bringing alleged perpetrators of international crimes to justice. These two interests are fulfilling different functions of international law. Which interest should prevail if the accused is a Head of State?

10 For the purposes of this work, these crimes include: war crimes, crimes against humanity and genocide. See also Principle 2 of *The Princeton Principles on Universal Jurisdiction*, which reads: 1. For purposes of these Principles, serious crimes under international law include (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture. The Princeton Principles on Universal Jurisdiction, Princetown University, 2001, available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (last visited 10 September 2013).

11 Immunities under international public law are conceptually different from immunities based on domestic law. This work will be limited to the discussion of immunities under international public law. See C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin, Heidelberg: Springer, 2008), pp. 263–357.

12 A. Cassese, ‘The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality’, in C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Cambodia and Kosovo* (Oxford: Oxford University Press, 2004).

13 R. Cryer, H. Friman, D. Robinson, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2011), p. 531.

It is apparent that judgments of the last years of both international and national courts in the context of immunity have turned on whichever of these two divergent interests prevails for judges.¹⁴ Different approaches adopted by judges well characterize this tension of interests and the outcome depends to a large extent on the legal basis of the respective court (i.e. national versus international court) and on the status of the high-ranking official (i.e. former or incumbent official).¹⁵

Various cases regarding the issue of the immunity of high-ranking officials have reached both national and international courts in the past years. Following (non-exhaustive) list of cases serves as an illustration of the increasing frequency in attempts to institute prosecutions for international crimes. Main examples include former or incumbent Heads of State and other high-ranking officials: Manuel Noriega¹⁶ (Panama), Augusto Pinochet¹⁷ (Chile), Fidel Castro¹⁸ (Cuba), Bouterse¹⁹ (Suriname), Ariel Sharon²⁰ (Prime Minister of Israel), Slobodan Milosevic²¹ (the Federal Republic of Yugoslavia), Hissene Habre²² (Chad), Muammar Gaddafi²³ (Libya), Fidel Castro

14 Chatham House, 'Immunity for Dictators?' A summary of discussion at the International Law Programme Discussion Group (9 September 2004).

15 R. Cryer, 'A 'Special Court' for Sierra Leone?' 50 *International and Comparative Law Quarterly* 435 (2001).

16 *United States v. Noriega*, 746 F.Supp. 1506, 1511 (S.D.Fla.1990), and *The United States v. Manuel Antonio Noriega*, United States Court of Appeals, Eleventh Circuit, Nos.92-4687; 96-4471, 7 July 1997.

17 *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 61 (H.L. 1998) (Pinochet I); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 119 (H.L. 1999) (Pinochet II); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 147 (H.L. 1999) (Pinochet III).

18 *Castro* (1999) 32 ILM 596.

19 *Petition numbers R 97/163/12 Sv and R 97/176/12 Sv*, Decision of 20 November 2000. See also L. Zegveld, 'The Bouterse Case', *Netherlands Yearbook of International Law* 32 (2001), pp. 97-118.

20 *Case against Ariel Sharon and Amos Yaron*, in response to Note by Michele Hirsh, Etat d'Israel. Decision of the Investigating Magistrate, Patrick Collignon, Court of First Instance, Brussels, Dossier No. 56/01, 18 June 2001.

21 *Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001.

22 Cour de Cassation du Senegal (Premiere chambre statuant en matiere penale), Aff. Habre, Arret n. 14, 20 March 2001.

23 Chambre Criminelle, Frech Supreme Court, Criminal Division, Paris, Arret n. 1414, 13 March 2001, *Gaz. Pal.* (2001), 2, somm. See also *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27

(Cuba), Laurent Gbagbo²⁴ (Republic of Côte d'Ivoire), Uhuru Kenyatta²⁵ (Republic of Kenya), Omar Al Bashir²⁶ (Sudan), Charles Taylor²⁷ (Liberia), Abdulaye Yerodia Ndombasi²⁸ (Minister for Foreign Affairs of the Democratic Republic of the Congo) or Jean Kambanda²⁹ (Prime Minister of Rwanda).

As noted by the ICC Pre-Trial Chamber in *Al Bashir*, it is therefore clear that, "... there has been an increase in Head of State prosecutions by international courts in the last decade...Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against heads of state have gained widespread

June 2011. *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, 22 November 2011.

24 *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Warrant Of Arrest For Laurent Koudou Gbagbo, 23 November 2011.

25 *Prosecutor v. Francis Kirimimuthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012. See also Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011.

26 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2008. Compare with the statement made by the Ethiopian Prime Minister Hailemariam Desalegn at a summit of African Union (the Assembly of the African Union meets at the level of Heads of States and Governments), attended by Kenyan President Kenyatta and Sudan President Omar al-Bashir. Hailemariam Desalegn stated that it was unanimously agreed that "no charge shall be commenced, or continued, before any international court or tribunal against any serving head of state or government or anybody acting or entitled to act in such a capacity ... during his or her term in office", available at <http://news.yahoo.com/au-icc-cannot-prosecute-sitting-head-state-145354234.ht> (last visited 30 September 2013). See also D. Akande, 'Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case', 4 July 2009, available at <http://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/> (last visited 23 October 2011).

27 *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004.

28 *Case Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 14 February 2002, I.C.J. 21, (the *Yerodia* case).

29 *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998.

recognition as accepted practice.”³⁰ Yet, how far can international law develop in this field when there is also significant State practice that opposes such developments?

The *Taylor* case is a fascinating one, and contains many points of major legal interest. This work focuses on, and is therefore limited in its scope to, the issue of immunity of Taylor for his crimes committed while in the office. In particular, the central issue of this work is whether Taylor as an incumbent President of Liberia at the time of issuance of the indictment was entitled to claim immunity before the SCSL. This inquiry inevitably leads to the assessment of the legal basis of the SCSL, which was established by a bilateral treaty between the Republic of Sierra Leone and the United Nations (UN).

It may be seen as unnecessary to examine the denial of immunity to Taylor once the final judgment was pronounced.³¹ However, the issue of denial of immunity is far from settled and as will be argued, the SCSL decision unfortunately did not contribute to the clarification of principles governing immunities. As the long and non-exhaustive list of high-ranking state officials above indicates, the issue of the immunity for crimes under international law definitely deserves further attention and, given the significance of this issue for current and future prosecutions of other high-ranking state officials, its examination is anything but academic.

The topicality and practical importance of this issue can be supported, *inter alia*, by the recent developments before the ICC. The ICC issued arrest warrants against Al Bashir (President of Sudan), Muammar Gaddafi³² (then acting as the *de facto* Head of State of Libya),³³ and may, in the future, issue an arrest warrant against Bashar

30 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, para. 39. See also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 13 December 2011, para. 39 (in French).

31 The Appeals Chamber of the SCSL upheld Taylor’s conviction only few days before submitting this work to a publisher.

32 On the issue of extradition of Gaddafi to The Hague after the arrest warrant was issued by the ICC Pre-Trial Chamber, see also K. Uhlířová, ‘Haag: zatykač na libyjského vůdce Kaddáfího’, pořad ČT 24, 27 June 2011, available at <http://www.ct24.cz/vysilani/2011/06/27/211411058300627-15:05-studio-ct24/> (last visited 10 July 2012).

33 Questions and Answers in the case of The Prosecutor v. Muammar Mohammed Abu

al-Assad (President of Syria).³⁴ None of these three countries are parties to the Rome Statute³⁵ and the referral of these situations (i.e. Sudan and Libya) to the ICC by the UN Security Council has already raised difficult legal issues regarding the entitlement to immunity of serving Heads of States not parties to the Rome Statute.³⁶ These challenging legal issues include, on the one hand, an obligation to grant immunity *ratione personae* to a sitting Head of State under customary international law and, on the other hand, denial of immunity under treaty law (i.e. the interplay between Articles 27 and 98 of the Rome Statute)³⁷ and connected questions such as the obligation of cooperation with the ICC, execution of arrest warrants by state parties and non-state parties to the Rome Statute³⁸ and legal nature of Security Council referrals to the ICC and its implications for immunities.³⁹

Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 27 June 2011, p. 3, available at <http://www.icc-cpi.int/iccdocs/doc/Q-Gaddafi-Eng.pdf> (last visited 10 August 2013).

- 34 On 14 January 2012, Switzerland coordinated the efforts of 57 UN Member States to petition the UN Security Council to refer the current crisis in Syria to the ICC for investigation and possible prosecution. See “Fifty-Seven Countries Call for Referral of the Syria Situation to the ICC: analysis of the merits of the referral and concerns as to its implementation”, available at <http://opiniojuris.org/2013/01/14/fifty-seven-countries-call-for-referral-of-the-syria-situation-to-the-icc-analysis-of-the-merits-of-the-referral-and-concerns-as-to-its-implementation/> (last visited 20 February 2012).
- 35 The Rome Statute is a multilateral treaty, which established the ICC. The Rome Statute came into force in 9 July 2002 following the 60th ratification.
- 36 The Security Council, acting under Chapter VII of the UN Charter, can refer a specific situation “in which one or more of such crimes appears to have been committed” to the Prosecutor. See Article 13(b) of the Rome Statute. This mechanism can trigger the jurisdiction of the ICC without consent of the concerned State (which is not a party to the Rome Statute). For deeper discussion see, V. Gowlland-Debbas, ‘The Relationship between the Security Council and the International Criminal Court’, Graduate Institute of International Studies, *Weltpolitik* (2001), available at <http://www.globalpolicy.org/intljustice/icc/crisis/2001relationship.htm> (last visited 17 February 2008). See also D. Jacobs, ‘A Sad Hommage to Antonio Cassese: The ICC’s confused pronouncements on State Compliance and Head of State Immunity’, 15 December 2011, available at <http://dovjacobs.blogspot.cz/2011/12/sad-hommage-to-antonio-cassese-iccs.html> (last visited 16 July 2013).
- 37 For comments on the interplay of Articles 27 and 98, see e.g. D. Akande, ‘ICC Issues Detailed Decision on Bashir’s Immunity (...At long Last...) But Gets the Law Wrong’, *EJIL Talk*, available at <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir-s-immunity-at-long-last-but-gets-the-law-wrong/> (last visited 25 May 2013).
- 38 See e.g. P. Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, *Journal of International Criminal Justice* 7 (2) (2009), pp. 315-332.
- 39 D. Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact

As will become apparent below, the SCSL dealt with similar issues in the *Taylor* case, obviously in a different context and legal settings. It remains to be examined whether the decision in *Taylor* can be taken as a well-reasoned decision, which properly reflects and clarifies current rules governing immunities. As regards its possible impact beyond the *Taylor* case, the ICC has indeed already taken an opportunity to refer to this decision. Namely, the ICC Pre-Trial Chamber in *Al Bashir* case (Malawi and Chad decisions) held that Malawi (and Chad) failed to comply with the cooperation requests with respect to the arrest and surrender of Al Bashir.⁴⁰ In summary, the ICC Pre-Trial Chamber in the *Malawi* decision found that: "...customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."⁴¹

The ICC Pre-Trial Chamber supported its findings in the *Malawi* decision also by the reasoning of the SCSL in *Taylor*, where the Appeals Chamber of the SCSL held 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" and further explained that "...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."⁴² The ICC Pre-Trial Chamber adopted this reasoning and concluded that irrelevance of immunity of either former or sitting Heads of State before international courts "is equally applicable to former or sitting Heads of States *not Parties to the Statute* whenever the Court may exercise jurisdiction."⁴³

Nonetheless, the problem is that neither the ICC Pre-Trial Chamber in *Al Bashir* nor the SCSL in *Taylor* supported their reasoning by adequate State practice and/or corresponding *opinio juris*.⁴⁴ Their decisions are problematic and poorly reasoned, not

on Al Bashir's Immunities', *Journal of International Criminal Justice* 7 (2) (2009), pp. 333-352.

40 Malawi decision, *supra* note 30.

41 *Ibid.*, para. 43.

42 Malawi decision, *supra* note 30, para. 35, quoting *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-I-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, paras. 51-52.

43 Malawi decision, *supra* note 30, para. 36 (emphasis added).

44 Similar approach was again taken by the ICC Pre-Trial Chamber I in the *Gaddafi* case: "consistent with its findings in the Al Bashir Case, the official position of an individual, whether he or she is a national of a State party or of a State which is not party to

supported by any thorough legal analysis. It seems that immunity was assumed rather than established. The weakness of the ICC Pre-Trial Chamber reasoning in *Al Bashir*, also in connection with *Taylor*, was well illustrated by Akande:

[...]he precedents referred to by the Pre-Trial Chamber do not establish that the Head of a State not party to (or not bound) by the instruments establishing an international tribunal will not be immune from the jurisdiction of that tribunal. Moreover, the ICJ's decision in the Arrest Warrant case does not say this either. The ICJ only stated that foreign ministers may be subject to criminal proceeding in certain international courts, where they have jurisdiction. The only precedent that makes the point the Pre-Trial Chamber makes is the decision of the Special Court for Sierra Leone in *the Charles Taylor case*. But the logic of that decision is just as *flawed* as that of the ICC Pre-Trial Chamber.⁴⁵

1.2 General Plan: Methodology and Structure

From a methodological point of view, this work examines interplay of two different areas of law, namely international criminal law and its influence on international law immunities. All the above-mentioned developments, recently mainly before the ICC, “have triggered a vigorous international legal debate about the status of immunities”.⁴⁶ This work steps into the current debate and aims to contribute to clarifications of rules on immunity in relation to rules on individual criminal responsibility in modern international law. In particular, it focuses on the legal challenges faced by the SCSL in addressing the availability of immunities for international crimes in the *Taylor* case.

Only immunities in relation to international crimes will be discussed in this work. Immunities in civil proceedings and questions of State immunity⁴⁷ will not be directly addressed as consideration of these immunities is not strictly necessary to answering the question of Taylor's immunity before the SCSL.

the Statute, has no effect on the Court's jurisdiction”, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi, Case No. ICC-01/11, 27 June 2011, para. 9.

45 Akande, *supra* note 37 (emphasis added).

46 Cryer et al., *supra* note 13, p. 556.

47 See e.g. A. Orakhelashvili, ‘State Immunity and International Public Order’, 45 *German Yearbook of International Law* (2002); A. Orakhelashvili, ‘State Immunity in National and International Law: Three Recent Decisions of the European Court of Human Rights’, 15 *Leiden Journal of International Law* 703 (2002).

1.2.1 Normative Hierarchy of *Jus Cogens* Over Immunity?

A reappearing argument, often advanced in the literature,⁴⁸ is that immunity “must give way to the ‘higher value’ of ensuring prosecution”⁴⁹ of international crimes that rise to the level of *jus cogens* (similar arguments were raised with regard to State responsibility for serious human rights violations). It has been asserted that there is no immunity in relation to international crimes both before national or international courts because such crimes amount to violations of *jus cogens* norms. *Jus cogens* norms, as the argument goes, prevail over the international rules on immunity due to its hierarchical superiority that overrides any rules of immunity, which would otherwise apply.⁵⁰

However, State practice does not (yet) confirm the theory of normative hierarchy of *jus cogens* over immunity, “since the practice of according immunity *ratione personae* to certain state officials, even in cases alleging violations of *jus cogens* norms, is extensive”.⁵¹ The normative hierarchy arguments have been so far rejected before

48 See e.g. A. Bianchi, ‘Immunity Versus Human Rights: The Pinochet Case’, 10 *European Journal of International Law* 237 (1999), p. 265 (“As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities.”); H.F. van Panhuys, “In The Borderland Between The Act of State Doctrine and Questions of Jurisdictional Immunities”, *International and Comparative Law Quarterly*, vol. 13 (1964), p. 1213; A. L. Zuppi, ‘Immunity v. Universal Jurisdiction: the Yerodia Ndombasi Decision of the International Court of Justice’, *Louisiana Law Review*, vol. 63 (2003), p. 323 (“It will therefore be difficult to understand that international law recognizes the prohibition of certain hideous crimes as paramount, rising to the level of *jus cogens* but on the other side accepts a shield of sovereign immunity in cases where the perpetrator holds an official position. Consequently, in cases where we speak of practices amounting to one of those categories of crimes against international law, such violations should not be covered by State immunity.”); A. Orakhelashvili, ‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong’, 18 *European Journal of International Law* 5, pp. 955-970. See also arguments of Italy in *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), Judgment (3 February 2012).

49 Cryer et al., *supra* note 13, p. 532.

50 Admittedly, there is some (albeit limited) support for this proposition also at domestic courts. See e.g., civil proceedings initiated in Italy against Germany, where the Court of Cassation held that international crimes must prevail over the rules on State immunity from foreign jurisdiction, because they have a “higher rank”. *Ferrini v. Federal Republic of Germany*, Court of Cassation, p. 547, para. 9.1.

51 D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili’, 22 *European Journal of International Law* 3 (2011), pp. 857-861 (emphasis added).

various national courts,⁵² the European Court of Human Rights (ECtHR)⁵³ and the International Court of Justice (ICJ).⁵⁴ For example, in the *Jones v. Kingdom of Saudi Arabia* case, which involved both immunity of State officials from foreign civil jurisdiction and State immunity, the House of Lords observed that there is no clash of norms, since “the rule on state immunity is not derogation from the prohibition on torture. It is not a rule which authorizes or absolves its perpetrators from liability.”⁵⁵

52 See e.g. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (SDNY, 2001) (USA); *Jones v. Saudi Arabia*, House of Lords, [2007] 1 AC 270; ILR, Vol. 129, p. 629 (United Kingdom); *Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, DLR, 4th Series, Vol. 243, p. 406; ILR, Vol. 128, p. 586 (Canada); *Natoniewski*, Supreme Court, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299 (Poland); Case No. Up-13/99, Constitutional Court of Slovenia (Slovenia); *Fang v. Jiang*, High Court, [2007] NZAR p. 420; ILR, Vol. 141, p. 702 (New Zealand); *Margellos*, Special Supreme Court, ILR, Vol. 129, p. 525 (Greece); Court of Appeals for the District of Columbia Circuit, *Hwang Geum Joo, et al., v. Japan*, Judgment of 27 June 2003, 332 F.3d 679 (USA).

53 See e.g. *Al-Adsani v. United Kingdom* App. No. 35763/97, (2002) 34 EHHR 11; paras. 52-67, in particular para. 61: “[...] Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. [...]” Compare, however, with the joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 4: “[...] It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant State as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him. [...]”. See also *Kalogeropoulou and others v. Greece and Germany*, App. No. 59021/00, 12 December 2002, available at <http://hudoc.echr.coe.int> (last visited 17 October 2012).

54 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment (3 February 2012). See also the *Armed Activities* case, in which the ICJ held that the fact that a rule has the status of *jus cogens* does not confer upon the ICJ a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo* (New Application: 2002), Judgment, I.C.J. Reports 2006, paras. 64 and 125). See also *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, *supra* note 28, p. 3, paras. 58 and 78.

55 *Jones v. Kingdom of Saudi Arabia*, Claim No HQ 02 X01805, para. 19 (2). See also Lord

Akande points out that should the normative hierarchy theory be correct, “there would be no type of immunity in any case alleging violations of *jus cogens* norms,”⁵⁶ which clearly is not the case. This may be illustrated by the reference to Article 27(2) of the Rome Statute of the ICC, which reads: ‘immunities or special *procedural* rules which may attach to the official capacity of a person [...] shall not bar the court from exercising its jurisdiction over such a person.’ It would not have been necessary to insert such express provision if the State parties were of the view that immunities had been removed by virtue of the *jus cogens* status of the crimes.⁵⁷

In terms of the law on State immunity, the ICJ in the *Jurisdictional Immunities of the State* case rejected the effect of *jus cogens* to be such as to automatically displace the State immunity by holding that:

The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.⁵⁸

The ICJ considered that there was no conflict between substantive rules and rules that are procedural in character.⁵⁹ Similarly, Fox explains the false conflict between immunity and *jus cogens* rules as follows:

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of

Hoffmann, especially paras. 45-44: “The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. [...] To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority [of the European Court of Human Rights] in *Al-Adsani*, it is not entailed by the prohibition of torture.”

56 Akande and Shah, *supra* note 51, p. 858 (emphasis added).

57 *Ibid.*

58 *Jurisdictional Immunities of the State*, *supra* note 54, para. 93.

59 *Ibid.*, paras. 92-97. See also arguments in favour of the ICJ judgment, which was otherwise rather heavily criticized, S. Talmon, ‘Jus Cogens after *Germany v. Italy*: Substantive and Procedural Rules Distinguished’, *Leiden Journal of International Law* 25 (2012), pp. 979–1002.

settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.⁶⁰

For these briefly highlighted reasons, this work will not engage in the normative hierarchy debate any further. In order to appreciate this area of law, it is suggested that a more appropriate approach is needed.⁶¹ It is important to understand the underlying principles of immunities and protected values and it is crucial to emphasize that the availability of immunities for international crimes depends to a large extent on the legal basis of the respective court (i.e. national or international court) and on the status of the high-ranking official (i.e. former or incumbent official). The central question is whether this generally accepted dichotomy, which will be used as a point of departure also for our purposes, suffices in case of the SCSL. In other words, does the SCSL have jurisdiction to try an incumbent Head of State of a country other than Sierra Leone even if proved that it is indeed an international court?

1.2.2 Sources

My use of sources follows the generally accepted methodology of international criminal law, which has been already described by several authors.⁶² Primary sources will include, but will not be limited to, constitutive and other instruments related to the establishment of the SCSL (the Statute of the SCSL, the Agreement between the UN and Sierra Leone, the UN Security Council Resolution 1315 (2000), Special Court Agreement (Ratification) Act 2002), Charter of the International Military Tribunal at Nuremberg (IMT Charter), Statutes of two *ad hoc* international criminal tribunals (i.e. the ICTY and ICTR) and, finally, the Rome Statute of the ICC.

Due to the important role of case law for this work, it should be explained that decisions of both national and international courts are not necessarily treated here as “mere” subsidiary means for the determination of rules of law in light of the Article

60 H. Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002), p. 525; see also L. M. Caplan, ‘State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory’, (2003) 97 *American Journal of International Law* 741, pp. 771–772. For the deeper discussion of the dichotomy of substantive and procedural rules in the light of the law of immunities, see Chapter 5.4.1.

61 Cryer et al, *supra* note 13.

62 For details see e.g. I. Bantekas et al., *International Criminal Law* (London: Cavendish, 2001), pp. 2-4, E. v. Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* (The Hague: T.M.C. Asser Press, 2003), pp. 6-9. Inspiration also taken from A. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: T.M.C. Asser Press, 2006).

38 (1) of the ICJ Statute. There is a considerable practical and doctrinal support that case law can serve as an evidence of *opinio juris* or amount to State practice.⁶³ This work adopts this proposition, thereby partly departing from the classical distinction between primary and secondary sources reflected in Article 38 (1) of the ICJ Statute.⁶⁴

As regards secondary sources, its use need not be treated here in detail. In addition to a widely available scholarly literature on the topic, the author could also benefit from the sources offered by the ICTY Library and the Peace Palace Library in The Hague, the WCC Library in Sarajevo and the National Library of Wales in Aberystwyth.

1.2.3 Structure

This work consists of three main parts: general introduction into the topic (Part I); identification of the SCSL's legal basis (Part II) and its implications for immunity of Charles Taylor (Part III). Part I will present various criminal judicial bodies for prosecution of international crimes and offer an explanation as to why the legal basis matter. Next, the events leading to the establishment of the SCSL will be briefly described and the SCSL's *Decision on Immunity from Jurisdiction*⁶⁵ in the *Taylor* case will be introduced.

Part II will focus on identifying the exact legal basis of the SCSL, which has important implications for the nature and extent of immunity afforded by contemporary international law to an incumbent Head of State. Considerable attention given to the legal basis of the SCSL is justified by the fact that the SCSL is a novel and unique mechanism for dealing with prosecution of violations of international criminal law. It represents a development of a new legal basis. It is the first time in a history when the court has been established by the agreement between UN and a State (Sierra Leone). This development inevitably brings various legal challenges and issues of real juristic doubt and difficulty.

The issues brought by the Defence counsel for Taylor in the motion challenging the jurisdiction of the SCSL themselves turn to a large extent on the process of the establishment of the SCSL, its legal basis and implications of this legal basis

63 A. Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in: G. Boas and W. A. Schabas (eds.), *International and Criminal Law Developments in the Case law of the ICTY* (Leiden, Boston: Brill, 2003); H. Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', 10 *British Yearbook of International Law* 65 (1929), pp. 78-94.

64 See, similarly, W. N. Ferdinandusse, *supra* note 62, p. 6.

65 *Prosecutor v. Taylor*, *supra* note 27.

for its international jurisdictional reach. Accordingly, the proper assessment and identification of the SCSL's legal basis is of central importance for drawing conclusions with respect to availability of immunities before such court.

Part III then reveals a close interconnection of the legal basis with the issue of withdrawal of immunity for incumbent Head of State. The SCSL in *Taylor* relied on certain passages of the ICJ decision in the *Yerodia* case and of the House of Lords decision in the *Pinochet* case. Both of these decisions made reference to the possibility of prosecuting high-ranking state officials before international courts, where they have jurisdiction.

Not surprisingly, the SCSL thus connected the issue of denying immunity to Taylor with determination of its legal basis and found that it is indeed an international court. In turn, the SCSL held that the consequence of its international legal basis is that Article 6(2) of the SCSL Statute can be opposed to Taylor.⁶⁶ The outcome of this approach was that the SCSL denied immunity *ratione personae* to the incumbent President of Liberia.

While such decision may be welcomed, the validity of the SCSL approach, including the impact of the *Yerodia* and *Pinochet* cases on the reasoning of judges in *Taylor*, will be subject to criticism. This Part will examine whether a classification of a judicial body as an international criminal court automatically mean that a Head of State has no immunity from prosecution before that body. For these purposes, the SCSL's decision in *Taylor* will be put in the larger context of developments on both personal and functional immunities in international law. Based on these developments, this part will critically assess weaknesses in the SCSL's reasoning and will make an attempt to present a cautious way forward by identifying other suitable solution. In sum, the main objective of this work is (i) to explain why the decision in *Taylor* is flawed and in doing so (ii) to make a broader contribution to the clarification of the law governing immunities of high-ranking state officials and indicate how is it developing.

1.3 Legal Basis of Mechanisms for Prosecuting Violations of International Criminal Law

In this Chapter, various mechanisms for prosecuting violations of international criminal law will be introduced and a definition of international, national and

66 See M. Frulli, 'The Special Court for Sierra Leone: Testing the Water. The Question of Charles Taylor's Immunity. Still in Search of a Balanced Application of Personal Immunities?', 2 *Journal of International Criminal Justice* (2004), pp. 1118–1129.

internationalized courts will be offered. The reason for this approach lies in the fact that the entitlement to immunity for core crimes does not have uniform application within different legal regimes and in front of various judicial bodies.⁶⁷ It is therefore necessary to clarify the respective terminology and categorization in order to subsequently determine the SCSL's legal basis for the purposes of lifting immunities to a serving Head of State of a country other than Sierra Leone.

This all began with the establishment of the Nuremberg and Tokyo tribunals more than a half a century ago. The beginning of the 1990s then witnessed a new evolution of various mechanisms for prosecuting violations of international criminal law, starting in 1993 with the establishment of the ICTY and followed by the ICTR in 1994. In 1998, the Rome Statute for the ICC was adopted.

At the same time, other models referred to as 'hybrid', 'mixed' or 'internationalised' courts came into being.⁶⁸ As examples can serve the Extraordinary Chambers in the courts of Cambodia (ECCC),⁶⁹ the Regulation 64 Panels in the courts of Kosovo,⁷⁰ the District Court of Dili in East Timor,⁷¹ and potentially also the Iraqi Special Tribunal⁷²

67 I. Bantekas, 'Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 *Journal of Conflict & Security Law* 21 (2005).

68 For an overview of some practical and legal problems internationalized courts might face, as well as the advantages and disadvantages of such courts, see A. Cassese, *supra* note 12.

69 Also referred to as 'Extraordinary Chambers of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea'. See General Assembly Resolution 57/228 A, 187, December 2002. Orentlicher uses the term 'court, established under Cambodian law but operating with substantial international participation', D. Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transitional Justice', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (Philadelphia: University of Pennsylvania Press, 2004), p. 219.

70 In cases of Kosovo (prior to its independence) and East Timor the UN promulgated regulations on the establishment of the panels. The authority to promulgate these regulations came from the SC Resolution adopted under Chapter VII powers, which therefore served as the legal basis, albeit indirectly. "Nevertheless, these international instruments did not directly establish the courts, but granted the UN administration the authority to promulgate domestic laws. The regulations establishing these courts should be considered as domestic instruments.", in: S.M.H. Nouwen, 'Hybrid courts', The hybrid category of a new type of international crimes courts', 2 *Utrecht Law Review* 2, December, (2006).

71 UNTAET, Resolution No. 2000/15, 6 June 2000.

72 Also named 'Iraqi High Court' or 'Supreme Iraqi Criminal Tribunal'.

and the Ethiopian Special Prosecutor's Office. The WCC⁷³ is also sometimes being included in this category.

These various judicial mechanisms dealing with crimes under international law are characterised by different legal regimes and applicable law. Some will apply primarily or only domestic criminal law into which crimes under international law might or might not be incorporated.⁷⁴ Other mechanisms might be international ones and applying only international law. These can be either treaty-based such as the ICC or resolution-based (Resolution adopted under Chapter VII powers of the UN Security Council) such as the ICTY and the ICTR.⁷⁵ Finally, we have a newly emerging trend of so-called hybrid or mixed courts, which further complicate the picture. The qualification of the exact legal basis of hybrid courts is not always clear-cut.

Hence, it is useful to start the discussion by defining the terms 'international court', 'national court' and 'hybrid/mixed/internationalized' court. The term 'international criminal court' is frequently used in jurisprudence and academic literature, without much consideration given to what it actually means.⁷⁶ At the same time, the legal consequences flowing from this distinction are indeed crucial for an effective functioning of the court. For example, the ICC Pre-Trial Chamber in *Al Bashir* offered no definition of an international court, but as Akande points out "the Pre-Trial Chamber appears to be suggesting that if two States agree to establish by treaty a tribunal to prosecute the officials of a third state, international law would allow this."⁷⁷ This suggestion would certainly have far-reaching consequences.

It is necessary to emphasize that the definition of what constitutes an international court as opposed to national court may vary significantly depending on factors taken into account, on the purposes of this identification and on those who are in charge of such identification. It should be therefore noted that the following definitions are not intended to be conclusive; they will rather serve as guidance for determination of the legal basis of the SCSL in the context of immunities analysis.

73 The High Representative in Bosnia and Herzegovina promulgated the *Law on the Court of Bosnia and Herzegovina* on 12 November 2000. The Parliament of Bosnia and Herzegovina adopted this law on 3 July 2002.

74 E.g. Special Tribunal for Lebanon, for more information see <http://www.stl-tsl.org/> (last visited 27 June 2013).

75 UN Security Council Resolutions 808, 827 (1993) and 955 (1994) respectively.

76 See, however, Damgaard, *supra* note 11.

77 Akande, *supra* note 37.

There is no universally accepted definition of an international criminal court in international law and the recent jurisprudence considering this issue has not proved particularly insightful, including for our purposes the important decision of the ICJ in the *Yerodia* case, where the ICJ simply stated that in ‘*certain* international courts’ (ICTY, ICTR, ICC) an incumbent or former Minister of Foreign Affairs could be subject to criminal prosecution, without providing any further guidance whether term ‘*certain*’ international courts excludes some *other* international courts.⁷⁸

Nevertheless, the ICJ in the *Yerodia* case held that an international court is a court that is established by two or more States or by a Security Council Resolution under Chapter VII of the UN Charter.⁷⁹ Although the ICJ did not mention the following possibility, it is submitted that a State and an international organization can also establish an international tribunal (i.e. the SCSL).

Damgaard points to the following factors as important for indication of international nature (a) international court is not part of the judiciary of one single State (b) it applies international criminal law, the fact that it also applies domestic law does not disqualify it being international (c) its jurisdiction *rationae materiae* and *rationae personae* is international (d) its decisions are binding.⁸⁰ The first three factors are easy to approve. It is however not clear how does the binding nature of a decision contributes to the international character of the respective court.

A hybrid court, according to the *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (Report), is one that has mixed jurisdiction and composition.⁸¹ This means that the court may have the jurisdictional privileges of applying both municipal and international law and may also have both local and foreign prosecutors and judges participate in its judicial process.⁸² Nevertheless, it is submitted that the mixed composition and jurisdiction does not of itself determine

78 Damgaard, *supra* note 11.

79 See *supra* note 28, para 61.

80 Damgaard, *supra* note 11, p. 333.

81 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000, para. 9. For a different view, see Judge Robertson in his Separate Opinion in *Kondewa* ‘[...] the Special Court [...] is not accurately described in the Secretary-General’s report as a court of ‘mixed jurisdiction and composition’ [...] is in reality an international court onto which a few national elements have been grafted.’, Case No. SCSL-2004-14-AR7 2(E), Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution Sierra Leone, 25 May 2004, para. 15.

82 D. Orentlicher, ‘International Justice Can Indeed Be Local’, *Washington Post*, 21 December 2003.

the legal basis of the court. Such a description and judicial arrangement can be indeed described as a mixed judicial system. However, the legal basis of any court is rather determined by its constitutive instrument and authority of the body establishing the court.

There is no bar to have local judges, prosecutors and other personnel participating in proceedings of the court whose legal basis is e.g. an international treaty or Resolution and which is therefore by its essence international. Equally, the fact that the legislative authorities of a particular State decide to include into the personnel composition of its national court non-nationals of that State “does [sic! meant is: ‘not’] make that court any less a ‘national court’.”⁸³

The WCC can serve as a useful example.⁸⁴ The Defence in *Stankovic* submitted that the WCC is incapable of characterization as a ‘national court.’⁸⁵ It was assumed that to be a national court it must be composed of judges who are nationals of the State concerned, but the ICTY held that no authority is offered for this proposition.⁸⁶

The view of the Referral Bench of the ICTY was that in the relevant context (i.e. under Article 9(1) of the ICTY Statute),⁸⁷ there is no apparent justification for giving to the phrase ‘national court’ any meaning other than the normal connotation, which is ‘a court of or pertaining to a nation’.⁸⁸ The ICTY stated that the Court of Bosnia and Herzegovina, of which the WCC is a component, is a court that has been established pursuant to the statutory law of Bosnia and Herzegovina. It follows that it is a court of Bosnia and Herzegovina, a ‘national court.’⁸⁹

83 *Prosecutor v. Stankovic*, Case No. IT-96-23/2-PT, Decision on referral of case under rule 11bis, Partly Confidential and Ex Parte, 17 May 2005.

84 The establishment of the WCC enabled cases to be transferred from the ICTY to national judicial authorities. For a case to be referred to the WCC pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence, the Referral Bench must be fully satisfied that the accused would be tried in accordance with international standards and that neither the level of responsibility of the accused nor the gravity of the crimes alleged in the indictment were factors that would make a referral to the national authorities inappropriate. According to Rule 11bis a referral may be made to a State: (a) in which the crimes were committed; (b) the accused was arrested; (c) or which has jurisdiction and is willing and adequately prepared to accept the case.

85 *Prosecutor v. Stankovic*, *supra* note 83.

86 *Ibid.*

87 Article 9(1) of the ICTY Statute reads as follows: “The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.”

88 *Prosecutor v. Stankovic*, *supra* note 83.

89 *Ibid.*

Despite the conclusions made above, the qualification of the exact legal basis of hybrid courts is admittedly not straightforward; there exist considerable uncertainty and diverse views on this topic. For example, Nouwen considers ECCC, the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor as all being part of the domestic system and their legal status that of a national court.⁹⁰ Ambach on the other hand suggests that the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor were set up by the UN Administration, and therefore are by nature international.⁹¹

Terminological and conceptual difficulties of hybrid courts lay exactly in their combined/hybrid nature. If hybrid courts are implemented into the domestic judicial structure of the forum state, they cannot be considered as international institutions “since they lack international legal personality”, but they cannot be also qualified as purely national courts “since apart from having a considerable amount of international personnel and exercising jurisdiction over international crimes,” some of them are established through an international treaty with the UN.⁹²

It needs to be borne in mind that these so-called hybrid courts have each a very different legal basis. Yet, they are ultimately established either under national law or international law.⁹³ Still, the presented views already indicate the uncertainty with regard to finding the origins of their legal basis. This uncertainty may negatively affect the functioning of these courts in many areas,⁹⁴ including the area of immunities, as we shall see below.⁹⁵

90 See *supra* note 70 for Nouwen’s detailed explanation of this issue.

91 P. Ambach, ‘The Overlapping Jurisdictions between the International Criminal Court and Hybrid International Tribunals’, Bofaxe, No.298E (2006), available at <http://www.ifhv.rub.de/imperia/md/content/publications/bofaxe/2006/x298e.pdf> (last visited 7 May 2007).

92 *Ibid.*

93 Nouwen thus suggests that, “the manner of establishment is what distinguishes these courts from one another, not what unites them.” She is opposing calling hybrid courts ‘hybrid’ because of their hybrid roots as it, according to her, only confuses the picture. In Nouwen, *supra* note 70.

94 For example, Cassese refers to the following issues: “the current hybrid courts, as part of a domestic system or established by an international agreement not binding on third States, do not benefit from compulsory cooperation as does the ICTY or ICTR. Also, there is a question of reconciling the international legal standards to be applied with the local laws and regulations. For example in case of Kosovo, the UN Secretary-General in his Report of 15 December 2000 stated that significant outstanding issues include a lack of clarity among local judges as to whether international human rights standards were supreme law in Kosovo.” In A. Cassese, *supra* note 12.

95 See e.g. C. P.R. Romano, A. Nollkaemper arguing that: “the questions of the international

1.4 Why Does the Legal Basis Matter? International v. National Courts Practice with Respect to Head of State Immunity

The SCSL in *Taylor* stated that '[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity'.⁹⁶ The premise, which will guide our discussion, is that the legal basis of the judicial bodies is crucial for granting or withdrawing immunities to the Head of State. The discussion below serves only as a brief introduction to these issues, which will be analysed in more detail in the following Chapters.

As regards the practice of national courts, scholarly opinions vary significantly. The most important factor appears to be whether the senior official is *servicing* or *former* one. Most of the legal scholars suggest that the operating principle in general international law is that a *servicing* Head of State is entitled to personal (i.e. absolute) immunity from the jurisdiction of national courts, unless it has been waived by the State concerned. This appears to be the dominant view, but it is not the only view.⁹⁷

Some other commentators argue that the discussion about the legal nature of various courts and tribunals, national or international, would not have been necessary if the question of whether immunity applies to officials depended on factors other than the nature of the tribunals, namely, on the nature of the crime.⁹⁸ However, the suggestion about the nature of international crimes prevailing over the nature of the tribunals does not fully reflect the underlying principles and protected values served by two different kinds of immunities, i.e. personal and functional immunity.⁹⁹ In other words, this may be a relevant argument as regards functional immunity, but personal immunity is not depended on the nature of the crime.¹⁰⁰ Yet other commentators

legal status of the SCSL, its obligations under international law and any remaining obligations of the founding entities are complicated by the hybrid nature of the Court." In C. P.R. Romano, A. Nollkaemper, *supra* note 12.

96 *Prosecutor v. Charles Taylor*, *supra* note 27, para. 49.

97 For different views see P. Sands, 'Immunities before international courts', Guest Lecture Serious of the Office of the Prosecutor (18 November 2003); see also A. Cassese, 'Why May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', *European Journal of International Law* 13 (2002), pp. 853-875.

98 See S. M. H. Nouwen, 'Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued', *Leiden Journal of International Law*, 18 (2005), pp. 645-669.

99 For more details see Chapter 5.

100 See Chapter 5.3.

have claimed that neither functional, nor personal immunity is available in response of allegations of war crimes, crimes against humanity or genocide.¹⁰¹

Nevertheless, these views are not supported by current State practice and/or *opinio juris*. Incumbent Heads of State or other senior state officials so far enjoy immunity even with respect of international crimes before national courts.¹⁰² *Serving* officials such as Yerodia Ndombasi, Fidel Castro and Muammar Gaddafi were all said to enjoy personal immunity before national courts. Similarly, all of the Law Lords in the *Pinochet* case agreed that if Augusto Pinochet were an incumbent Head of State of Chile at the time of arriving to the United Kingdom (UK), he would have enjoyed personal immunity as well.¹⁰³ Thus, there is as yet no single case of indicting, prosecuting and convicting a serving Head of State before national courts (i.e. other than courts of the State of the accused).

In order to be able to prosecute international crimes before national courts, the State concerned has to have jurisdiction to start with. On which basis do the foreign courts assert jurisdiction if crimes are not committed on their territory and the accused is not a national of that State? Here comes into play universal jurisdiction, which is regarded by many scholars and non-governmental organizations (NGOs) as indisputable.¹⁰⁴ In contrast, some others, such as Schabas, argue that States rarely initiate prosecution regardless of the seriousness of international crimes, unless there is either territorial or personal nexus, or a treaty obligation to prosecute or extradite.¹⁰⁵

It is however not the aim of this work to deal with universal jurisdiction in detail. Moreover, the consideration of this problem is not strictly necessary to answering the question of Taylor's immunity before the SCSL. Thus, issues such as universal

101 A. Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *European Journal of International Law* 237 (1999). See also the comprehensive study by Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (2001), AI Index IOR 53/2001.

102 See e.g. *Rose v. R.* (1947) 3 DLR 618, p. 645 (Canada); Qaddafi (2001) 125 ILR 456 (France); Castro (1999) 32 ILM 596 (Spain), or case against Mugabe, reproduced in C. Warbrick, 'Immunity and International Crimes in English Law' 53 *International and Comparative Law Quarterly* 769 (2004).

103 Pinochet III, *supra* note 18, 171. See Cryer et al., *supra* note 13, p. 546. For a detailed discussion of the *Pinochet* case, see Chapter 6.1.

104 For deep survey and analysis of universal jurisdiction see For deep survey and analysis of universal jurisdiction see L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (Oxford, New York: Oxford University Press, 2003).

105 *Ibid.*

jurisdiction, together with an inter-connected issue of immunities before national courts will be discussed only in the context of, and to the extent necessary for, the *Taylor* case.

As regards the practice of international courts, *amicus curiae* invited by the SCSL stated that:

both 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, practice has been consistent, in that no serving head of state has been recognised as being entitled to rely on jurisdictional immunities.¹⁰⁶

It is respectfully submitted that the argument that immunity can never be pleaded before international tribunals is an oversimplification of the issue. It is certainly true that there is a significant difference between proceedings before international as opposed to national courts in the context of immunities. Nonetheless, there is no general rule in international law which would provide for immunities, would it be so, there will be little need for international courts and tribunals to justify in their Statutes derogation from immunities.¹⁰⁷

Immunities should serve to prevent foreign states from interference into the affairs of other states and from exercising jurisdiction over another state.¹⁰⁸ As long as the State concerned has not consented to the exercise of the jurisdiction, there is, according to Akande, no difference whether the exercise of this jurisdiction is done unilaterally by a foreign State or through some collective judicial body.¹⁰⁹ He adds that to claim nonexistence of immunities before international tribunals without the consent by the relevant state will allow a subversion of the policy underpinning international law immunities.¹¹⁰

Judge Shahabuddeen equally argued in his Dissenting opinion in *Krstic* that there has to be some indication in the establishing instrument of the international tribunal, which allows for abrogation of immunities existing otherwise under international customary law:

In my view, [...] there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts

106 See Sands, *supra* note 97, pp. 4-5. Compare with p. 117 (fn. 472).

107 R. Cryer et al., *supra* note 13.

108 D. Akande, 'International law Immunities and the International Criminal Court', *American Journal of International Law* 7 (2004).

109 *Ibid.*

110 *Ibid.*

[...].International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where *some element* in the decision to establish such a court shows that *they agreed otherwise*.¹¹¹

The proposition that immunities do not apply before international tribunals depends on the following factors that have to be considered: (i) The manner of the court's establishment and identification of the exact legal basis for denying immunity;¹¹² (ii) the establishing instrument of the court must bind the concerned State.¹¹³ The legal basis of the SCSL and the manner of its establishment is therefore of central importance in determining whether the SCSL can lawfully issue an indictment against a serving Head of State of country other than Sierra Leone, who is alleged to have committed acts which fall within the SCSL's subject matter, temporal and territorial jurisdiction. These above-mentioned factors will therefore guide the analysis in an appropriate Chapter below.¹¹⁴ First, by way of setting the stage, the events leading to the establishment of the SCSL will be briefly described and the SCSL's *Decision on Immunity from Jurisdiction*¹¹⁵ in the *Taylor* case will be introduced in this mostly descriptive part.

1.5 Brief History of the Conflict and Events Leading to the SCSL's Establishment

In 1991, a Liberian rebel group that brought the country into an armed conflict lasting a decade invaded Sierra Leone. The causes of this armed conflict differ depending on those providing explanation. For example, the International Centre for Transitional Justice offered the following factors that likely contributed to the conflict:

1. Sierra Leone had become a 'failed state', or the conflict was a crisis in government mainly driven by years of one-party rule and a small ruling elite's exploitation of the country, widespread corruption and lack of accountability, and the disempowerment and militarization of youth.

111 *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, Dissenting Opinion of Judge Shahabuddeen, 17 September 2003, paras. 11-12 (emphasis added).

112 See Chatham House, *supra* note 14.

113 See Akande, *supra* note 108.

114 See Chapter 4.

115 *Prosecutor v. Taylor*, *supra* note 27.

2. The conflict was driven by various internal factions wanting control of the country's rich diamond mines.
3. The conflict was a war driven by the personal political agendas of Charles Taylor, then-president of Liberia, and Muammar al-Qadhafi, president of Libya.
4. The conflict was a subtle ethnic conflict between the Mende-dominated Sierra Leone People's Party (SLPP) and the Temne-dominated All People's Congress (APC).¹¹⁶

In January 2002 a cease-fire was finally declared and the Lome Peace Agreement was signed.¹¹⁷ Despite the peace agreement, fighting broke out again. It was soon recognized that the Lome Peace Agreement would not bring the conflict to an end. Foday Sankoh, leader of the Revolutionary United Front (RUF), one of the main fighting factions, was ultimately taken into custody. The government was however afraid that any trials of Foday Sankoh and other rebels from the RUF would aggravate the conflict. Therefore, President of Sierra Leone Kabbah wrote on 12 June 2000 to the Secretary-General of the UN and requested the assistance of the international community in order to create a court to try senior RUF officers.¹¹⁸

In 2002, the SCSL was established with the mandate to try those bearing the greatest responsibility for the crimes committed during the conflict in that country. The seat of the SCSL was deliberately established in Freetown, in the country where the crimes occurred so that justice be not only done, but be seen to done, by and for the people of Sierra Leone. Therefore, the SCSL is one of the latest versions of these mechanisms to address crimes under international law, taking place directly in the country where the crimes occurred in contrast with the proceedings in front of the ICTR and the ICTY taking place in Tanzania (Arusha) and The Netherlands (The Hague) respectively.

116 T. Perriello, M. Wierda, 'The Special Court for Sierra Leone under Scrutiny', Prosecution Case Studies Series, *International Center for Transitional Justice* (2006).

117 For a deeper overview of the conflict see: *No Peace Without Justice*, 'Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002' (10 March 2004).

118 Report, *supra* note 81.

2 The SCSL's Decision on Immunity from Jurisdiction in the Taylor Case

2.1 Facts and Procedure

Charles Taylor was elected President of Liberia in 1997. He remained Head of State until August 2003. His tenure of office covered most of the period the SCSL has temporal jurisdiction pursuant to its mandate to try those primarily responsible for war crimes and crimes against humanity committed in Sierra Leone since 30 November 1996.¹¹⁹

The Indictment against the first African incumbent Head of State was approved in March 2003. He was only the second Head of State to be indicted while in the office.¹²⁰ The Indictment initially included 17 counts in which Taylor was accused of planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of crimes such as terrorizing the civilian population and collective punishments, unlawful killings, physical and in particular sexual violence, use of child soldiers, abductions and forced labour, looting and burning and attacks on peacekeepers.¹²¹ The Indictment claims, *inter alia*, that Taylor was acting with intent to gain access to the mineral wealth of Sierra Leone, in particular the diamond wealth and to destabilize the State.¹²²

Subsequently, an international arrest warrant and order for Taylor's transfer and detention were issued by the SCSL. The Prosecutor decided to reveal the indictment and arrest warrant while Taylor was attending and participating in peace negotiations in Ghana in June 2003. Taylor stepped down from office in August 2003, only after strong international pressure.

119 K. Novotna (Uhlírova), 'No Impunity for Charles Taylor', *Aberystwyth Journal of World Affairs* 2 (2004), p. 90.

120 First Head of State indicted while still in the office was Slobodan Milosevic, President of the former Federal Republic of Yugoslavia.

121 *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Indictment, 7 March 2003. The Indictment was amended on 16 March 2006, reducing the number of counts to 11.

122 *Ibid.*

Taylor's subsequent efforts to secure the arrest warrant withdrawal for his resignation were not successful. Therefore, Taylor accepted asylum that was offered by Nigeria. Taylor was offered the asylum on the basis that he will not interfere in Liberian and regional politics while in Nigeria. However, there were growing international concerns about Taylor's activities in Nigeria, from where he allegedly continued to interfere in Liberian affairs, which could have had a destabilizing effect in the Liberian peace process and the West African region as a whole.¹²³

In response, the Nigerian authorities issued a statement warning Charles Taylor that the authorities would not tolerate any violations of the terms of his exile, which forbade all interference in Liberian affairs. According to the statement, Charles Taylor had not been granted immunity and was subject to Nigerian law, indicating that he could be arrested if he continues to violate these terms.¹²⁴

The UN Security Council issued on 9 October 2003 a press statement¹²⁵ expressing concern about attempts by Charles Taylor to influence events in Liberia, noting that his continued interference could threaten the carefully constructed peace agreement in Liberia.¹²⁶ A year later, the UN Security Council adopted Resolution 1532 (2004), which demanded Taylor's assets to be frozen. The Resolution expressed concern that Taylor has continuing access to misappropriated funds and property, which are used by him (and his associates) in order to engage in activities that undermine peace and stability in Liberia and the region.

Except the involvement of the UN Security Council, the European Parliament and the United States of America (USA) were also actively engaged. In 2005, the European Parliament passed a Resolution that called on the European Union and its member States to act immediately in order to secure Taylor's appearance before the SCSL.¹²⁷ The US administration was urged by the US Congress to increase pressure on Nigeria to extradite Charles Taylor to the SCSL.¹²⁸ All these events and international pressure led at the end (after Taylor's attempt to escape) to Taylor's apprehension and extradition to the SCSL.

123 See Novotna (Uhlírova), *supra* note 119.

124 *Ibid.*

125 Press Statement - U-N/Liberia (L-O), No. 2-308435 (by Peter Heinlein). This statement took into account a report presented by Hedi Annabi, the Head of the UN peacekeeping operations in Liberia.

126 *Ibid.*

127 Resolution of EP (2005) is available at <http://www2.europarl.eu.int/omk/> (last visited 21 July 2007).

128 See, *inter alia*, H.CON.RES.127, passed 4 May 2005 in the US House and on 10 May 2005 in the US Senate.

2.2 Defence Submissions on the Preliminary Motion and the Prosecution's Response

The parties' submissions to the SCSL fall into two categories. The first category includes arguments of Defence counsel challenging the SCSL's jurisdiction to try incumbent Head of State and corresponding counterarguments by the Prosecution. In sum, Defence argued that by issuing an indictment and an arrest warrant for Charles Taylor, who was an incumbent President of Liberia at that time, various rules governing jurisdiction, immunity, and sovereign equality under international law were violated.

The second category of arguments deals with the national law of Sierra Leone. In particular it deals with the legality of the actions taken by the Prosecutor and the SCSL and their consistency with provisions of the Sierra Leone Constitution of 1991. This work will discuss only the international law aspects of the case.

The relevant part of Taylor's Defence Motion was summarized in the Appeals Chamber of the SCSL (Appeals Chamber) decision as follows:

1. Citing the judgment of the ICJ in the case between the *Democratic Republic of Congo v Belgium* ('*Yerodia* case'), as an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute immunity from criminal prosecution;
2. Exceptions from diplomatic immunities¹²⁹ can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter ('UN Charter');
3. The Special Court does not have Chapter VII powers; therefore judicial orders from the Special Court have the quality of judicial orders from a national court;
4. The indictment against Taylor was invalid due to his personal immunity from criminal prosecution.¹³⁰

The key submission of the Defence was that 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 attached to Taylor, shielded him from prosecution whether on official business in a foreign State (Ghana) or in office in Liberia.

129 The distinction between 'diplomatic immunity' as opposed to 'Head of State immunity' is explained in Chapter 5.

130 *Prosecutor v. Taylor*, *supra* note 27, para. 6.

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 serious international crimes. According to the Defence, because the SCSL was a Sierra Leonean tribunal that lacked Chapter VII powers, in contrast to the ICTY and ICTR, 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.

The Defence analyzed *Yerodia* and stated that the immunity is more the matter of procedure than substance, with procedural immunity subsisting for as long as the official is in office. The Defence argued that the principles enunciated by the ICJ in *Yerodia* case establish that only an international court may indict a serving Head of State. It also noted that the SCSL does not meet the criteria of an international court and concluded that:

the emphatic nature of the decision and the size of the majority endorsing it send a clear signal that the main judicial organ of the United Nations does not wish to subject the stability of international relations to disturbances originating from the decentralised judicial investigations of crimes, no matter how object they be.¹³¹

It was argued that the SCSL's approval of both the indictment and the arrest warrant failed to account for the ruling of the ICJ in *Yerodia* case. In addition, the Defence submitted that the *Pinochet* case has a restricted impact in international law and only stands as evidence of the practice of the UK in relation to the application and interpretation of the Torture Convention of 1984. 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);
2. Customary international law permits international criminal tribunals, of which the SCSL is an example, to indict serving Heads of State;
3. The lack of Chapter VII powers does not encumber the SCSL'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;
5. In the *Yerodia* case the ICJ enumerated the number of circumstances in which a Minister of Foreign Affairs could be prosecuted for international crimes,

131 *Ibid.*

including international criminal courts where they have the jurisdiction. The Special Court is such an international criminal court and therefore has jurisdiction. Article 6(2) of the Statute clearly envisages that the Special Court has the power to try a Head of State.¹³²

2.3 Decision on Immunity from Jurisdiction: Addressing the Legal Basis of the SCSL

When dealing with the parties' submissions and determining its legal basis, the SCSL focused on reviewing two main instruments. Firstly, the SCSL identified Resolution 1315 (2000) of the UN Security Council authorizing the Secretary General to negotiate an agreement on the Statute with the Government of Sierra Leone. Secondly, the SCSL pointed towards the Report of the Secretary-General submitted to the Security Council pursuant to this Resolution.

Referring to Resolution 1315, the Appeals Chamber noted that the SCSL is given an international mandate and is part of the international justice machinery. It further stated that the SCSL is not part of the domestic judicial system of Sierra Leone. As regards the availability of immunities for an incumbent Head of State, the SCSL first cited the relevant provision of its Statute, i.e. Article 6 (2), which lays down that: “[t]he official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment”.

Next, the SCSL identified and cited the relevant provisions of the IMT Charter and the International Law Commission's *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* and Articles in the Statutes of the ICTY, the ICTR and the ICC. Based on these precedents, the Appeals Chamber concluded that “[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity”.¹³³

The Appeals Chamber then focused on the decision of the ICJ in *Yerodia*, in which the ICJ upheld the personal immunity of the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), Yerodia Ndombasi. The SCSL approved this decision while at the same time emphasizing that the ICJ had confirmed the withdrawal of such immunities in relation to ‘certain international criminal

132 *Ibid.*, para. 9.

133 *Ibid.*, para. 49.

courts'. The SCSL provided the following rationale for the distinction to be made between international and national courts: "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."¹³⁴

The Appeals Chamber stated that the irrelevance of immunities before international criminal courts and tribunals is in any case an established rule of international law and that Article 6(2) of the SCSL Statute does not violate any *jus cogens* norms. The Appeals Chamber therefore held that personal immunity of Taylor could not constitute a bar to the jurisdiction of the SCSL and noted that as Taylor stepped down as Head of State prior to this decision, "[t]he immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant".¹³⁵

In the context of the Security Council powers, the Appeals Chamber came to the conclusion that:

Although the SCSL was established by treaty, unlike the ICTY and ICTR, which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the SCSL was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315 (2000), the establishment of the SCSL by Agreement with Sierra Leone.¹³⁶

The Appeals Chamber stated that Article 39 empowers the Security Council to determine the existence of any threat to the peace and emphasized that the Security Council in its Resolution 1315 (200) indeed reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.¹³⁷ The Appeals Chamber continued that much issue had been made of the absence of Chapter VII powers in the SCSL, but in its view, a proper understanding

134 *Ibid.*, para. 51. See critically, Cryer, noting that the principle *par in parem non habet iudicium* is the basis for functional immunity, not personal immunity. Cryer et al., *supra* note 13, p. 551.

135 *Ibid.*, para. 59.

136 *Ibid.*, para. 37.

137 *Ibid.*

of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the SCSL.¹³⁸

it is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to ‘decide what measures not involving the use of armed force are to be employed to give effect to its decision;’ and (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures.¹³⁹

The Appeals Chamber underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security; it may or may not, contemporaneously, call upon the members of the UN to lend their cooperation to such court as a matter of obligation.¹⁴⁰ The Appeals Chamber pointed out that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the UN. In this regard the Appeals Chamber held:

the Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.¹⁴¹

The Appeals Chamber also reaffirmed that the SCSL is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone. While determining its own legal basis in a mere six paragraphs, it came to the conclusion that the SCSL is indeed an international criminal court.

2.4 Amicus Curiae Brief: Lack of Chapter VII Powers of the UN Charter

Due to the importance of the classification of the SCSL legal basis, the SCSL invited two *amici curiae*, Professors Sands and Orentlicher, to provide their submissions on these issues. Since the SCSL decided ‘to accept and gratefully adopt the conclusions’ reached by Sands and Orentlicher, it is useful to briefly recall their arguments supporting the international nature of the SCSL.

138 *Ibid.*, para. 38.

139 *Ibid.*

140 *Ibid.*

141 *Ibid.*

Sands submitted that there can be no doubt that Resolution 1315 (2000) is binding, and that it expresses the authoritative view of the Security Council that the situation in Sierra Leone continues to constitute a threat to international peace and security.¹⁴² Sands went on to note that in respect of Chapter VII, the SCSL is in no different position from the ICC and 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. Hence, the possession of Chapter VII powers, in his view, may not be relevant at all to the question of the SCSL's exercise of jurisdiction (including in relation to any immunities). However, he admitted that the SCSL 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, adding that the Chapter VII powers may be relevant in order for the SCSL to be able to legally enforce cooperation with third States, including requests for assistance from third States.¹⁴³

The Secretary-General was requested to address in his Report the possibility of sharing the Appeals Chamber of the ICTY or ICTR with the SCSL.¹⁴⁴ Even though this possibility was not accepted in the end, according to Sands this clearly indicates the intention of the Security Council for the SCSL to have jurisdiction *ratione materiae* and *ratione personae* that would be generally analogous to the ICTY and ICTR jurisdictions. In the same context, Orentlicher stated that because the Secretary General considered that there was no legal obstacle to share the Appeals Chamber of the ICTY or ICTR, the SCSL is correctly considered to be an international court similar to the ICTY and ICTR.¹⁴⁵

Sands argued that the SCSL is neither part of the judiciary of Sierra Leone nor a national court. The SCSL bears, in his view, characteristics usually 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.¹⁴⁶ He refused the Liberia's view that the SCSL is not an international criminal court and

142 P. Sands; D. Orentlicher, 'Submissions of the Amicus Curiae on Head of State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor', available at <http://www.icccpi.int/library/organs/otp/Sands.pdf> (last visited 22 February 2008).

143 *Ibid.*

144 SC/2000/1315 (para. 7 of the operative part).

145 See *supra* note 142.

146 See generally P. Sands, P. Klein, *Bowett's Law of International Institutions* (London: Sweet and Maxwell, 2001), p. 16.

concluded that the SCSL is an international court established by treaty and should be thus treated as such, with all that implies for the question of immunity for a serving Head of State.¹⁴⁷

147 See *supra* note 142.

Part II - Determination of the Legal Basis of the SCSL

3 Legal Instruments: Introducing Their Content

The introduced submissions of the parties; submissions of two *amici curiae* and the *Decision on Immunity from Jurisdiction* relating to the legal basis of the SCSL raise various legal issues. Both the establishment history and the constitutive legal instruments have bearing on the legal basis of the SCSL. They indicate the SCSL's competences and jurisdiction. The SCSL did not pay much attention to elaborating on these constitutive instruments. This is especially regretful when bearing in mind that until the establishment of the SCSL, it had never been considered that the legal basis of an international criminal court could be an agreement between the UN and one or more States.

It is therefore necessary to review these instruments more carefully before concluding whether the SCS is indeed an international court *for the purposes* of denying immunity to Head of State of another country. In the light of the below revision of these instruments related to the establishment of the SCSL, the relevant parts of the SCSL's decision will be critically examined. Only then the availability of immunity from jurisdiction can be properly assessed. A two-part process consists of (i) description of the content of these legal instruments and (ii) analysis of their binding effects.

3.1 UN Security Council Resolution 1315 (2000)

Resolution 1315 was adopted on 14 August 2000 and its preamble, it expressed concerns about the very serious crimes committed within the territory of Sierra Leone and reiterated that “the situation in Sierra Leone continues to constitute a threat to international peace and security in the region.”¹⁴⁸ The Security Council stressed 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.”¹⁴⁹

148 SC/2000/1315.

149 *Ibid.*

The Security Council recognised that “in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace” and further noted “the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone.”¹⁵⁰

In this context, Resolution 1315 mentioned “the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace.”¹⁵¹ In particular, the steps taken by the Secretary-General in order to assist the Government of Sierra Leone in establishing the SCSL were appreciated. The operative part of Resolution 1315 contains request to the Secretary-General to “negotiate an agreement with the Government of Sierra Leone to create an *independent special court* consistent with this resolution...”¹⁵²

As for the personal jurisdiction of the *independent special court*, Resolution 1315 recommended the exercise of 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.¹⁵³

Importantly, Resolution 1315 also requested the Secretary-General to include recommendations on concluding any additional agreements that may be required for the provision of international assistance. Lastly, it requested the Secretary-General to recommend whether the SCSL could receive, as necessary and feasible, expertise and advice from the ICTY and the ICTR.

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*, (operative part), para. 1 (emphasis added).

153 *Ibid.*, para. 3.

3.2 Report of the UN Secretary-General

The UN Secretary-General was requested to submit a Report¹⁵⁴ to the Security Council on the implementation of Resolution 1315, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the SCSL, including recommendations.¹⁵⁵ The UN Secretary-General examined the specificity and nature of the SCSL and expressed views important for the subsequent analysis of its legal basis. It is therefore useful to quote his statement almost in its entirety:

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 or 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.¹⁵⁶

The Report also states that the SCSL is established outside the national court system, which means that it operates “independently of the relevant national system”,¹⁵⁷ along with the ICTY and ICTR.

154 Report, *supra* note 81.

155 SC/2000/1315, para. 6.

156 Part II of the Report, *supra* note 81, paras. 9-11.

157 *Ibid.*, para. 39.

3.3 Agreement between the UN and Sierra Leone

After the breakdown of the Abidjan and the Lome Peace Agreements¹⁵⁸ the President of Sierra Leone sought international assistance with respect to the establishment of the independent court. The Security Council directed the Secretary-General by Resolution 1315 to report on how to implement this idea. The Agreement¹⁵⁹ was subsequently concluded on 16 January 2002, after the adoption of Resolution 1315 and following the subsequent negotiations between the Secretary-General and the Government of Sierra Leone. There was no explicit statement about immunity in the Agreement. Article 1(1) of the Agreement simply provided that: “[t]here 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 Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”¹⁶⁰

The Agreement addressed issues such as the functioning of the SCSL in accordance with its Statute, its composition and appointment of judges,¹⁶¹ expenses of the SCSL (voluntary contributions from the international community), Management Committee, established by interested States in order to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects, the seat of the SCSL¹⁶² and the important issue of juridical capacities in order to be also able to enter into agreements with other States if it is necessary for the exercise of its functions.¹⁶³

158 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lome Accord, 7 July 1999, available at www.sierra-leone.org/lomeaccord.html (last visited 15 March 2007).

159 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002, available at www.sierraleone.org/specialcourtagreement.html (last visited on 6 March 2005). The Agreement was signed by Hans Corell on behalf of the UN and Solomon Berewa, Attorney General, on behalf of the Sierra Leone Government on 16 January 2002.

160 *Ibid.*, Art. 1(1).

161 The Secretary-General shall 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)).

162 Article 10 reads: “The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require”, *supra* note 162. Indeed, this situation has already arisen. The SCSL held the proceedings against Charles Taylor at the premises of the International Criminal Court at The Hague, The Netherlands.

163 *Ibid.*

3.4 Statute of the SCSL

The Statute, which is annexed to the Agreement, describes all the applicable rules pertaining to the SCSL. Article 1(1) of the Statute provides that:

[t]he 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.¹⁶⁴

The SCSL 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), crucial for the treatment of immunity, provides that: “[t]he 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.”¹⁶⁵ This provision is identical to the ICTY and ICTR Statutes, and broadly similar to that of the Nuremberg and Tokyo Tribunals.

Under Article 8 of the Statute, the SCSL has concurrent jurisdiction with the national courts of Sierra Leone and primacy over the national courts of Sierra Leone in prosecution of crimes falling under its jurisdiction. The SCSL can therefore request national courts of Sierra Leone to defer to its jurisdiction in certain cases. Article 14 states that the Rules of Procedure and Evidence of the ICTR are applicable *mutatis mutandis* to the conduct of proceedings before the SCSL. According to Article 25, the President of the SCSL is required to submit an annual report to the UN Secretary-General and to the Government of Sierra Leone.

3.5 Sierra Leonean Law of 2002: Special Court Agreement (Ratification) Act

In 2002, the Parliament of Sierra Leone passed the Special Court Agreement (Ratification) Act.¹⁶⁶ Since Sierra Leone has a dualist system with respect to reception of

164 Statute of the Special Court for Sierra Leone, available at www.sc-sl.org (last visited 28 October 2008).

165 *Ibid.*, Art. 6(2).

166 (Ratification) Act 2002 is the ratification and implementation Bill by the Parliament of

international law into domestic legal system, the Act provides for the implementation of the Agreement into domestic law of Sierra Leone. It includes provisions in relation to inviolability, immunity and personality. Section 11(2) of the Act deals with the position of the SCSL within the domestic judiciary.

The Act clearly states that the SCSL shall not form part of the judiciary of Sierra Leone.¹⁶⁷ The crimes before the SCSL are thus not prosecuted in the name of the Republic of Sierra Leone. In this respect, the SCSL differs from the ECCC, which are established “in the existing court structure” of Cambodia, the same applies for the WCC established within the Court of Bosnia and Herzegovina.

Sierra Leone of the Agreement between the Government and the UN, available at <http://www.sc-sl.org/Documents/scslratificationact.pdf> (last visited 23 June 2007).

167 *Ibid.*

4 Legal Instruments: Analysis of Their Bindings Effects

4.1 Legal Significance of the Lack of Chapter VII Powers of the UN Charter

The considerable attention given to binding effects of Resolution 1315 during this analysis is justified by the fact that the SCSL attempted to establish its legal basis under Chapter VII powers. If it had been indeed the case, it would have had important implications for immunity afforded by contemporary international law to, at the time of the issuance of indictment, an incumbent Head of State.¹⁶⁸

This part will however reveal some shortcomings and inconsistencies in the SCSL's reasoning and prove that the SCSL's findings were not correct. Indeed, arguments of the SCSL relating to the bindings effects of Resolution 1315 were not very convincing, some of them were rather confusing and even contradictory. The following observations made by the SCSL can serve as an illustration of this contradiction.

Firstly, the SCSL underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security, it may or may not, at the same time, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.¹⁶⁹ By invoking the terminology of Chapter VII and terminology used in resolutions establishing the ICTY and ICTR, i.e. by using the phrase '*as a measure to maintain or restore international peace and security*', the SCSL clearly tried to bring its establishment under the umbrella of Chapter VII powers, despite the fact that the language of Resolution 1315 does not support this conclusion.

168 The impact of the legal basis of the court on immunities of Head of State is dealt with in Chapters 5, 6 and 7. In short, it is suggested that a right to claim immunity (as a part of customary international law) preexists also before international courts and can be thus lost only under certain circumstances.

169 *Prosecutor v. Taylor*, *supra* note 27, para. 38.

Secondly, the SCSL at the same time admitted that it was lacking Chapter VII powers by stating that the lack of Chapter VII powers “does not by itself define the legal status of the Special Court.”¹⁷⁰ Similarly, in his *amicus curiae* submission, Sands stated that despite the fact that Resolution 1315 was not adopted under Chapter VII, it however reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region.¹⁷¹

Regarding the SCSL’s status as an international criminal court, the SCSL in its decision focused on the UN’s involvement with the establishment of the SCSL. The main attention of the SCSL was given to the authority of the Security Council to enter into an agreement with the Government of Sierra Leone in order to establish the SCSL. According to the SCSL, this authority could emanate from (i) the general purposes of the UN as expressed in Article 1 of the Charter,¹⁷² as well as (ii) the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security.¹⁷³

When examining Resolution 1315, the SCSL concentrated on the second scenario, i.e. on the Security Council’s specific powers under Article 39 and 41. Resolution 1315 *authorized* the UN Secretary-General *to negotiate* the establishment of the SCSL, while reaffirming in the preamble that the situation in Sierra Leone continued to constitute a threat to international peace and security.¹⁷⁴ Does the mere reaffirmation in the preamble that the situation in Sierra Leone continued to constitute a threat to peace suffice to imply the binding effect of this Resolution?

As opposed to the resolutions *establishing* the ICTY and the ICTR, which specifically invoked Article 41 of the Chapter VII of the UN Charter, the Security Council did not *expressly* state that it was acting under Chapter VII when authorizing the UN Secretary-General to conclude an agreement with the Government of Sierra Leone. Even though the Security Council does not have to expressly refer to Chapter VII when taking mandatory measures, it has become standard practice for the SC to state that it is ‘acting under Chapter VII of the Charter’.¹⁷⁵ At the same time, it is true

170 *Ibid.*

171 P. Sands; D. Orentlicher, *supra* note 142.

172 Article 1 states that one of the main purposes of the UN is to maintain international peace and security.

173 *Prosecutor v. Taylor*, *supra* note 27, para. 37.

174 C. Jalloh, ‘Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone’, *ASIL Insights* (2004), available at <http://www.asil.org/insigh145.cfm> (last visited 4 May 2007).

175 B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford

that the Security Council often determined the existence of a threat to peace without a reference to Chapter VII and thus left the legal basis in doubt.¹⁷⁶

Accordingly, it may be argued that the Resolution 1315 could serve as another example of leaving its legal basis unclear. The Security Council reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security. But it did so only in a preamble, not in the operative part.

According to Simma, “unless other factors indicate that action under Chapter VII is envisaged, such resolutions should, according to the general rule, be interpreted narrowly”.¹⁷⁷ Simma argues that resolutions that cannot be considered as adopted under Chapter VII do not create binding effects for member States.¹⁷⁸ In our case, it is submitted that there were no other factors indicating any intention to adopt Resolution 1315 under Chapter VII, except the terminology similar with Article 39. Indeed, as Racsmany suggests, “instead of using classical Chapter VII verbs such as ‘demands’, or the imperative ‘shall’, the language falls even short of ‘calling upon’ states to undertake certain measures”.¹⁷⁹

In order to further support the above conclusions, one can point to the request of the President of the SCSL to the Security Council to grant the SCSL Chapter VII powers, which has never occurred.¹⁸⁰ There would certainly be no need for this request should Resolution 1315 be already adopted under Chapter VII powers. There would also be little need to arrange any subsequent cooperation agreements as envisaged in paragraph 8 of Resolution 1315.¹⁸¹ In subsequent resolutions regarding the situation in Sierra Leone, the Security Council has called upon all states to ‘cooperate fully’ with the SCSL, but has not resorted to Chapter VII mandatory procedure.¹⁸²

University Press, 2002), p. 727.

176 See e.g., SC Res 502 (1982) (‘breach of the peace’, Falkland conflict), SC Res 393 (1976) (Zambia, ‘armed conflict’ by South Africa), SC Res 1227 (1999) (Eritrea and Ethiopia).

177 Simma, *supra* note 175, p. 727.

178 *Ibid.*, p. 455.

179 Z. Deen-Racsmany, ‘Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity’, *Leiden Journal of International Law*, 18 (2005), quoting from P. C. Szasz, ‘The Security Council Starts Legislating’, 96 *American Journal of International Law* 901 (2002), p. 902.

180 See Report *supra* note 84, para. 10. See also Press Release of the SCSL (11 June 2003), available at www.sc-sl.org (last visited 18 October 2010).

181 Resolution 1315, para. 8: “Requests the Secretary-General to include recommendations on the following: (a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court.”

182 Security Council Resolutions 1478 (2003), 1508 (2003).

The SCSL's conclusions that Chapter VII powers are not determinative of its legal basis (i.e. whether it is an international or a national court) were certainly correct. Still, both the SCSL and Sands were nevertheless trying to imply the binding nature of Resolution 1315. Why, if the international legal basis of the SCSL can be clearly supported by the fact that the SCSL was established by international agreement?

It is suggested that proving the binding effects of Resolution 1315 either under Chapter VII or under other provisions of UN Charter (e.g. Article 25 in connection with Chapter VI) would have crucial implications with respect to issues such as (obligatory) cooperation of states other than Sierra Leone with the SCSL or, more importantly for our purposes, withdrawal of immunities of serving Head of State should the agreement be found unsatisfactory in regulating these issues.¹⁸³ It seems that the SCSL was trying to 'cure' shortcomings of a merely bilateral agreement by trying to imply binding effects of Resolution 1315 in order to justify the denial of immunity of a Head of State of another country.

4.2 No Need for Chapter VII Powers?

The above conclusion that Resolution 1315 was not adopted under Chapter VII powers is further supported by the argument that, at least initially, there was no need for Chapter VII powers. The Security Council can define its involvement in any matter either under Chapter VI or Chapter VII. Involvement under Chapter VII powers allows the Security Council to 'intervene' in the respective state without the consent of that state. It is submitted that, in the case of Sierra Leone, there was actually no need to impose measures under Chapter VII.

The SCSL's establishment was initiated by the President of Sierra Leone. Hence, the Security Council's involvement was based on the invitation and request for international assistance and help from the UN by Sierra Leone itself. The government of Sierra Leone was willing to cede jurisdiction to the SCSL, although its original request was limited to assistance in conducting trials of the RUF.¹⁸⁴ The establishment of the SCSL was thus clearly consensual.¹⁸⁵

183 The agreement and its binding effects will be dealt with in Chapter 4.3.

184 However, the SCSL itself did not approve the delegation of jurisdiction because it would arguably diminish its claim to its international nature. According to the SCSL "the establishment of the Special Court did not involve a transfer of jurisdiction of sovereignty by Sierra Leone... the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community", in *Prosecutor v. Gbao*, Case No. SCSL-04-15-AR72(E), Decision on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, para. 6.

185 It can be nonetheless argued that the fact that Sierra Leone requested the help with

It is the first time that a court has been established on the basis of an agreement between the UN and a member state. Accordingly, there was no need for Chapter VII powers in a sense of imposing the establishment of the SCSL on Sierra Leone, as the situation differed significantly from the situations in the former Yugoslavia or Rwanda, where the two *ad hoc* tribunals were established without the *consent*, or even against the will, of the respective countries.

During the proceedings before the SCSL's Appeals Chamber, the Prosecutor stated that "Chapter VII powers were needed in the case of Yugoslavia and Rwanda because there was no agreement with the States concerned. Here, in Sierra Leone, that is not the case."¹⁸⁶ Thus, the SCSL is a similar creation, but one that is in the Prosecutor's view actually more democratic, because Sierra Leone has explicitly agreed to its establishment. Both the Prosecutor and the Defence in the *Fofana* case acknowledged that the SCSL might not enjoy all of the consequences as if it had been established by the Security Council acting under Chapter VII.¹⁸⁷

While pointing to Chapter VII as the legal basis for concluding the agreement between the UN and Sierra Leone, the SCSL did not elaborate any further on the first scenario, i.e. how (or if) the general purposes of the UN as expressed in Article 1 of the Charter applied to its establishment.

Article 1 states that one of the main purposes of the UN is to maintain international peace and security. Decisions taken under other Articles may be regarded, according to Simma, as "implementing such purposes and principles."¹⁸⁸ In his view, international peace and security can be promoted and achieved through various policies or measures. This can include (1) measures of collective security taken under Chapter VII and (2) adjustment or settlement of international disputes or situations under Chapter VI. Thus, Article 1 identifies another path to maintain international peace and security.¹⁸⁹

establishment of the SCSL and was thus certainly willing to cooperate in all respects, does not mean that other State will be willing to voluntarily cooperate as well. Especially when it comes to requests for arrest and extradition of an incumbent Head of State of another country.

186 *Report on proceedings before the Appeals Chamber of the Special Court for Sierra Leone* (1 November 2003), available online at <http://www.specialcourt.org/documents/WhatHappening/ReportAppealHearings01NOV03.html> (last visited 12 April 2011).

187 *Prosecutor v. Fofana*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 25 May 2004.

188 Simma, *supra* note 175.

189 *Ibid.*

Since international peace and security can be achieved through various policies or measures, there is no need for the UN Charter to anticipate all possibilities to be used. The UN Charter for example also originally did not anticipate peacekeeping missions.¹⁹⁰ Despite the fact the UN Charter does not explicitly mention peacekeeping, it was suggested that it could be implied from the UN's primary purpose as stated in Article 1, i.e. the primary purpose of the UN being to maintain international peace and security.¹⁹¹ The UN therefore must possess powers and means in order to be able to fulfil its primary purpose.¹⁹² Construing the powers of the UN in the Charter too strictly could prevent the UN from acting. The Charter as a flexible legal and political document allows for many possible approaches and interpretations, depending upon the given international situation.¹⁹³

There was consensus among many policymakers that peace could be jeopardized if certain individuals and factions were not neutralized. The peacekeeping mission in Sierra Leone was at that time the largest in history and the international community was already investing huge financial resources. The international community and the government of Sierra Leone both sought to stabilize the country. In this context, the study conducted by *No Peace Without Justice Initiative* stated that:

The government wanted the RUF leadership tried without the instability that would result from national trials. The international community wanted to prosecute those responsible for attacks on UN peacekeepers. While the evaluation criteria have since changed to encompass notions of legacy and promoting the rule of law, the Special Court was originally conceptualized as central to redressing security concerns.¹⁹⁴

190 The UN Charter neither explicitly mentions nor authorizes peacekeeping. As the former UN Under Secretary-General for Political Affairs stated, “[t]he technique of peacekeeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947.” In B. Urquhart, ‘The United Nations, Collective Security, and International Peacekeeping’, quoting from A. K. Henrikson (ed.), *Negotiating World Order: The Artisanry and Architecture of Global Diplomacy* 59 (Wilmington: Scholarly Resources Inc., 1986), p. 62.

191 J. P. Bialke, ‘United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict’, *Air Force Law Review* (2001).

192 “[T]he Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties,” see *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion, 1949 ICJ Rep. 174, para. 182.

193 M. R. Berdal, ‘The Security Council, Peacekeeping and Internal Conflict after the Cold War’, 7 *Duke Journal of Comparative and International Law* 71, 73 (1996).

194 No Peace Without Justice Conflict Mapping in Sierra Leone: Violations of International

Maintaining peace and security was therefore one of the main motivations for establishing the SCSL.¹⁹⁵ The Security Council's role in establishing the SCSL could be thus also justified under the general powers of the Security Council under Article 1 and their subsequent implementation through Chapter VI.¹⁹⁶

It is submitted that none of the two mentioned sources of authorization for the Security Council should be disputed. The power of the Security Council to enter into an agreement for the establishment of the SCSL was clearly derived from the Charter of the UN. There is no reason why the Security Council could not base its authority to act either (1) on the basis of the general purposes of the UN as expressed in Article 1 of the Charter or (2) on the basis of the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security.

What can be nevertheless subject to criticism is an attempt of the SCSL to imply the binding effect of Resolution 1315 based allegedly on specific powers of the Security Council under Articles 39 and 41. Resolution 1315 contains just *recommendations* with respect to the subject matter jurisdiction and personal jurisdiction of the SCSL and *requests* for the Secretary-General to negotiate an agreement with the Government of Sierra Leone, to submit a report to the Security Council on the implementation of this Resolution or to address in his Report the questions of the temporal jurisdiction of the SCSL and other issues pertaining to the establishment of the SCSL. Resolution 1315 should be rather viewed as another path to promote and maintain international peace and security via adjustment or settlement of international disputes or *situations* under Chapter VI.¹⁹⁷

Humanitarian Law from 1991 to 2002 (10 March 2004), at p. 14, available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf> (last visited 17 April 2012).

195 *Ibid.* This holds true especially for the United Kingdom, which led the operations in Sierra Leone.

196 In the *Namibia Advisory Opinion* the ICJ noted that Article 24 of the UN Charter “vests in the Security Council the necessary authority to take action such as that taken in the present case (i.e. the adoption of Resolution 276 (1970)). The reference in paragraph 2 of this Article to *specific powers* of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1.” See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SouthWest Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 14, pp. 52–53, para. 110.

197 Chapter VI actions usually rest in providing assistance to a state in order to help the state to maintain peace and order, but do not include the possibility of enforcement as oppose to actions under Chapter VII powers. Racsmany for example suggests that the

While concluding that Resolution 1315 was not adopted under Chapter VII, the question can still be raised as to its binding effects. In other words, can resolutions adopted under Chapter VI in general, and Resolution 1315 in particular, be nevertheless still binding on the member states? The opinions vary, which might be one of the reasons why the SCSL did not wish to enter into this discussion and instead tried to bring adoption of Resolution 1315 under Chapter VII powers. However, the prevailing view is that under *certain specific* circumstances, *some* Resolutions, even if not adopted under Chapter VII, can still have legally binding effects.

Article 25 of the UN Charter provides that members of the UN “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” It is submitted that Article 25 does not necessarily apply only to decisions taken under Chapter VII (i.e. decisions on enforcement measures). According to Simma “if one followed such a narrow interpretation of Art. 25, the whole system set up for the maintenance of peace would be weakened, and it would clearly run counter to the overall concept of the Charter. Furthermore, Art. 25 would be unnecessary as the binding effect of decisions taken under Chapter VII could already be achieved on the basis of Art. 48 and Art 49.”¹⁹⁸

To further support this view, one can refer to the ICJ’s Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*,¹⁹⁹ where the ICJ held that “the decisions made by the Security Council [...] were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.”²⁰⁰ The decisions are consequently binding on all States Members

establishment of the SCSL “is better compared to classical, consensual peacekeeping operations. These are generally considered as falling under Chapter VI or between Chapters VI and VII of the UN Charter. Their legal basis is in any case commonly located outside of Chapter VII.” See Z. Racsmany, *supra* note 182, p. 308.

198 Simma, *supra* note 175, p. 458.

199 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (for a full citation see *supra* note 196). Compare with statement of Sir Hartley Shawcross in the ICJ *Corfu Channel* case, where he asserted that recommendations “under Chapter VI of the Charter, relating to methods of settling disputes which endanger peace, are binding.” He contested the applicability of Article 25 only to Chapter VII, by stating that such position, in his opinion, “is completely untenable. [Even] if one were to disregard [...] the preparatory work and the commentaries, one could not find in the Charter itself a shred of support for the view that Article 25 is limited in its application to Chapter VII of the Charter”, See *Corfu Channel Case*, Prelim. Objections, Pleadings Vol. III, (1949) ICJ Rep., 72, pp. 76-77.

200 In the *Fofana* case, the SCSL held that Article 24(1) may be invoked as the direct basis

of the UN which are thus under obligation to accept and carry them out.”²⁰¹ By adopting this contextual approach, the ICJ further stated:

It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to “the decisions of the Security Council” adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council...The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.²⁰²

Even if this contextual approach would be adopted and applied to Resolution 1315, it can be still concluded that in the light of interpretation of all circumstances (i.e. language and terms of Resolution 1315, its content and purpose, the discussions leading to its adoption or the UN Charter provisions invoked), Resolution 1315 was not intended to have binding effects. Resolution 1315 contains mere *recommendations* regarding the subject matter jurisdiction and personal jurisdiction of the SCSL and *requests* for the UN Secretary-General to negotiate an agreement with the Government of Sierra Leone.

4.2.1 Summary of the Relevant Findings Relating to Chapter VII Powers

Proving that Resolution 1315 was indeed adopted under Chapter VII would have crucial implications for withdrawal of immunities of serving Head of State should the agreement be found unsatisfactory in regulating these issues. It is however suggested that Resolution 1315, which recommended the establishment of the SCSL, was not adopted under Chapter VII powers despite the attempt of the SCSL to prove otherwise.

for action of the United Nations, i.e. for the establishment of the Agreement pursuant to the Resolution 1315 (2000). The SCSL further stated that Article 24(2), which refers to the specific powers granted to the Security Council is not exhaustive and must be read as fulfilling the function of closing the gaps. It was argued by the Prosecutor that if the Security Council can establish an international tribunal under Article 41, there is no reason why it could not take the same action under Article 24 of the Charter when the state affected has consented. See *supra* note 187.

201 See *supra* note 196, p. 53, para. 115.

202 *Ibid.*

There are some doctrinal opinions²⁰³ and advisory opinions of the ICJ²⁰⁴ suggesting that the resolution can be still binding under certain circumstances even if not adopted under Chapter VII powers, however, it is not a case in the context of Resolution 1315. There was no intention of the Security Council to adopt this resolution as binding for reasons provided above.

Moreover, the SCSL was not even established *by* the SC Resolution, as opposed to the ICTY and ICTR. The SCSL was established by a bilateral agreement *pursuant to* Resolution 1315. For the reasons given, it is not possible to imply binding effects of Resolution 1315 for the purposes of denying immunity to high-ranking state officials as was in the case of the establishment of the ICTY and ICTR. The SCSL should instead direct its attention to the binding effects of Agreement establishing the SCSL. Accordingly, this issue will be addressed next.

4.3 Binding Effects of the Agreement between the UN and the Republic of Sierra Leone

Apart from Resolution 1315, attention needs to be given to the Agreement that *actually* establishes the SCSL.²⁰⁵ Analysis of the Agreement is the next important step in order to identify those who are the parties to the Agreement and thus bound by its provisions. While focusing on the binding effects of Resolution 135, the SCSL did not pay much attention to the Agreement as such.

The SCSL adopted conclusions reached by both *amici curiae*.²⁰⁶ According to one *amicus curiae*, Orentlicher, the Security Council by authorizing the UN Secretary-General to negotiate an Agreement with Sierra Leone was not only carrying out its responsibility to maintain peace and security, but “in doing so, it was acting on behalf of all Members of the United Nations”.²⁰⁷

203 See e.g. Simma, *supra* note 175, p. 458.

204 See the *Namibia* Case, *supra* note 196.

205 The SCSL justified the fact the SCSL is treaty-based by referring to Article 2(1)(a) in connection with Article 31(1) of the Vienna Convention on the Law of the Treaties between States and International Organizations (The 1986 Vienna Convention) and provided a modified version of Article 2(1) by defining international treaty as “an international agreement governed by international law and concluded in written form... between one or more states (in this instance Sierra Leone) and one or more international organizations (in this instance UN).”

206 See *supra* note 142.

207 *Ibid.*, para. 12.

Subsequently, the SCSL developed this argument further by stating that since the Security Council was acting “on behalf of *all* Members of the United Nations”, the Agreement is to be regarded as “between *all* members of the United Nations and Sierra Leone”.²⁰⁸ According to the SCSL “this fact makes the Agreement an expression of the will of the international community”.²⁰⁹ However, it is rather disputable to assert, as the SCSL did, that only by virtue of the fact that States are members of the UN, they are therefore parties to the Agreement and accordingly are bound by its provisions.

Both State practice and scholarly opinions²¹⁰ show that the conclusion of the SCSL was not correct. For example Article 17 of the SCSL Statute states “the Government shall cooperate with all organs of the Special Court at all stages of the proceedings”. Article 17 therefore addresses obligation to cooperate only for the government of Sierra Leone. Are third States also obliged to cooperate with the SCSL and if so, on what legal basis?

It is suggested that the Agreement cannot be interpreted so broadly. For example, Damgaard claims that such consequences of the UN membership were not envisaged when the UN Charter was adopted and further suggests that if the Agreement was indeed between all the UN member States and Sierra Leone, then the UN member States would assume obligations under such Agreement.²¹¹ However, no State expressed that it feels bound by this Agreement. In fact, many States acted otherwise.²¹²

The SCSL itself approved the limitation of the SCSL when it stated that: “[w]hile

208 *Prosecutor v. Taylor*, *supra* note 27, para. 38.

209 *Ibid.*

210 See e.g. “Since the Special Court was set up by treaty between Sierra Leone and the United Nations; no other state is party to this treaty and hence is not bound by it”, in: H. Fox, *The Law of State Immunity* (Preface to Paperback Edition), (Oxford: Oxford University Press, 2004), p. 23.

211 Damgaard, *supra* note 11.

212 For example, we may refer to the Ghana’s failure to arrest Taylor or Nigeria’s refusal to extradite Taylor. Moreover, Liberia initiated proceedings against Sierra Leone before the ICJ. Liberia referred to the *Yerodia* case and argued that the SCSL is not an international court that could deny immunity to its President. Liberia requested the ICJ to declare that: “the issue of the indictment and the arrest warrant of 7 March 2003 and its international circulation, failed to respect the immunity from a criminal jurisdiction and the inviolability of a Head of State which an incumbent President of the Republic of Liberia enjoys under international law.” Nevertheless, Sierra Leone did not accept the jurisdiction of the ICJ pursuant to article 36(2) of the ICJ Statute. See ‘Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President’, ICJ Press Release No. 2003/26 (5 August 2003), available at <http://www.icj-cij.org/icjwww/ipresscom/iprlast.html> (last visited 17 October 2012).

acknowledging that the ICTY and ICTR have Chapter VII powers of the UN Charter ensuring that there is an obligation on all UN members to cooperate, in the case of the Special Court, as the Agreement is between the UN and Sierra Leone, its primacy is limited to Sierra Leone alone, as also the obligation to co-operate with the Special Court.”²¹³

Under these circumstances, it is hard to maintain the position that the Agreement is to be regarded as ‘between *all* members of the United Nations and Sierra Leone’. Becoming a party to a treaty ‘by interpretation’ does not respect principles of State sovereignty.²¹⁴ Furthermore, the UN possesses separate legal personality and such as “is more than a sum of its members and the organization occupies a position in certain respects in detachment from its members.”²¹⁵ As a general matter, treaties concluded by the UN do not bind member States by the virtue of membership alone.

At this point, it is useful to reiterate what led the SCSLs to emphasize the role and involvement of the Security Council in the establishment of the SCSL. As already indicated in Chapter 4.1, the SCSL did so arguably in order to imply binding effects of Resolution 1315 and therefore by implication also binding effects of the Agreement for all member states of the UN. It is nevertheless suggested that individual member States remain third parties and are thus not bound by bilateral agreement (*pacta tertiis nec nocent nec prosunt*). In this respect, Nollkaemper noted that, “the SCSL is not a creature of the Security Council. Its powers derive from a treaty that binds only the UN and the Government of Sierra Leone. All other states, including Ghana and Liberia, are third parties to the treaty, and as such are not bound by it.”²¹⁶

An alternative approach, which was suggested by the UN Secretary-General in his Report, would be the conclusion of a multilateral treaty by all UN member States. On the one hand, this approach would allow the treaty to be opened for signature and ratification by all member States.²¹⁷ The advantage of this approach would be the possibility of a detailed examination and elaboration of all issues relevant to the

213 *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, 3 March 2004, para. 69.

214 See also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (Convention). Article 34 of the Convention provides that a treaty does not create either obligations or rights for a third state without the consent of that State.

215 *Reparation of Injuries Suffered in The Service of the United Nations*, *supra* note 195, p. 174.

216 C. P.R. Romano, A. Nollkaemper, *supra* note 12.

217 Report, *supra* note 81.

establishment of the international tribunal. States participating in the negotiation and conclusion of the treaty could then fully exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.²¹⁸

On the other hand, this approach will admittedly require considerable time to establish the treaty and subsequently to achieve the required number of ratifications for entry into force.²¹⁹ Even then, there could be no guarantee that ratifications will be received from those States, which should be parties to the treaty if it is to be truly effective.²²⁰ Therefore, what sounds as legally more elegant approach, might prove unfeasible from the practical point of view.

The following statements well illustrate the divergence of views on the way of establishment of the SCSL. In the *Fofana* case, applicant argued that the UN illegally delegated its powers in this respect and suggested that, “the situation may have been different if the court had been set up by the agreement involving a wide group of concerned states.”²²¹

In contrast, Judge Robertson expressed his views on the establishment of the SCSL through bilateral treaty by stating:

it cannot in my judgement make any meaningful difference that the Security Council has chosen to authorise the Secretary-General to establish the Court with a similar purpose by agreement with a single state (a state where peace need to be restored) rather than by unilateral action or by action in agreement with many states... multilateral agreement would presumably make it more difficult for the Security Council to e.g. terminate a court, since it would need the agreement of a number of states rather than one.²²²

It is respectfully submitted that there is a ‘meaningful difference’ in establishing the court by bilateral or multilateral treaty. The SCSL’s legal basis is certainly international regardless of the number of parties to the treaty, i.e. whether it is established by bilateral or multilateral treaty.²²³ The difference lies in the fact that the bilateral

218 *Ibid.*

219 *Ibid.*

220 *Ibid.*

221 *Prosecutor v. Fofana, supra* note 187, para. 7.

222 *Prosecutor v. Kallon, Norman and Kamara*, Case No. SCSL 2004-14-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, Separate Opinion of Judge Robertson, 13 March 2004, para. 5.

223 The Secretary-General rightly held that the legal nature of the SCSL is determined by its constitutive instrument. Since the constitutive instrument is an agreement between

agreement is arguably binding only on Sierra Leone; it does not bind any other State. This conclusion has important consequences for the purposes of denying immunity of an incumbent Head of State of a *third* country not party to the treaty, as we shall see in Part III dealing with immunities.²²⁴

By concluding that it is indeed an international court, the SCSL automatically assumed that it could deny immunity to the Head of State of another country.²²⁵ It is however submitted that the SCSL ignored the bilateral treaty nature of the SCSL and therefore did not correctly address the consequences flowing from such legal basis.²²⁶ The situation is further complicated by the special legal nature of the SCSL, whose examination thus follows.

4.4 Hybrid Nature of the SCSL Not Recognised

The SCSL is often referred to as a ‘hybrid court’.²²⁷ Some refer to its hybrid nature due to the fact that under the SCSL Statute, not only crimes under international law, but also certain crimes under Sierra Leonean law can be prosecuted and punished. The mixed composition of both internationals and Sierra Leoneans within the SCSL is often emphasized as another sign of the SCSL’s hybrid nature. However, as already noted in Chapter 1, the legal nature of the court is not determined by the applicable law and/or by the nationality of the staff.²²⁸

a state - Sierra Leone - and an international organization - the UN - the legal nature of the SCSL is international.

224 See Part III, in particular Chapters 7 and 8.

225 See different reasoning provided by Akande in respect to an assertion of jurisdiction over US nationals by the ICC, which can usually be interpreted as “a violation of the well-established principle that a treaty may not impose obligations on non-parties without the consent of those parties.” Akande however suggests that: “there is no provision in the ICC Statute that requires non-party states (as distinct from their nationals) to perform or to refrain from performing any actions. The Statute does not impose any obligations on or create any duties for non-party states. To be sure, the prosecution of non-party nationals might affect the interests of that non-party but this is not the same as saying that obligations are imposed on the non-party.” In: Akande, *supra* note 108, pp. 407-433.

226 Frulli, *supra* note 66.

227 See e.g. S. Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, 14 *Criminal Law Forum* (2001), p. 231, describing the SCSL as a ‘new species of tribunal’ (internationalised domestic tribunals).

228 See differently, Cryer, who argues that the applicable law also determines the legal nature of a court. R. Cryer, ‘A “Special Court” for Sierra Leone’, 50 *International and Comparative Law Quarterly* (2001), p. 437.

The hybrid nature of the SCSL was also emphasized by Richard Holbrooke, who has been an active supporter of the establishment of the SCSL in the Security Council. After Resolution 1315 was passed, Holbrook described the proposed character of the SCSL in the following way:

This court is going to be of a hybrid nature [...]. We have not asked the United Nations to set up another *international* war crimes tribunal such as the ones that exist for Rwanda and Yugoslavia, but rather we have asked the Secretary-General to work with the Sierra Leone Government for what I would call a *mixed* court, although the actual phrase of this resolution is “Special Court.”²²⁹

At the beginning, Resolution 1315 anticipated the possibility for the SCSL to share the Appeals Chamber of the ICTY and the ICTR. However, according to the UN Assistant Secretary-General Office of Legal Affairs Zachlin: “the judges in those two courts were very apprehensive of the legal efficacy of such an arrangement given the different nature of the two court systems” and he further explained that the judges “felt that it would be very difficult for an appeals chamber of the Yugoslavia and Rwanda Tribunals to be sitting as an appeals chamber for a Sierra Leone Court which has its own statute and which is operating on the basis of its own jurisdictional provisions. And they felt very uncomfortable with that. And it seems to us that this was a very legitimate point.”²³⁰

The SCSL’s legal nature, even if international due to its constitutive instrument, is to a large extent different from the two *ad hoc* tribunals or the ICC. The SCSL was labeled a ‘treaty-based *sui generis* court of mixed jurisdiction and composition’.²³¹ The SCSL is indeed Sierra Leone specific including the consequences attached to such legal nature. Many of the legal choices made were intended to address the specificities of the Sierra Leonean conflict. As such, the SCSL has a unique place in international criminal justice system.²³² Nevertheless, the analysis of the SCSL’s legal basis also revealed new legal issues and challenges, including the question of denying immunity to the incumbent Head of State of the country not party to a treaty that established the SCSL.

229 Statement by US Ambassador Richard Holbrooke to the media, following adoption of UN Security Council Resolution concerning the establishment of a Special Court in Sierra Leone at August 14, 2000, available at <http://www.sierra-leone.org/specialcourt081400.html> (last visited 19 September 2012) (emphasis added).

230 Press Briefing by the UN Assistant Secretary-General Office of Legal Affairs, Ralph Zachlin, (September 2000), New York, available at www.sierra-leone.org/specialcourt0900.html (last visited 26 July 2013).

231 Report, *supra* note 81, para. 9.

232 *Ibid.*

It cannot be simply concluded that the SCSL is an international court through an attempt to compare it with the ICTY, ICTR and ICC. Shortcomings in its establishment via bilateral agreement should have been acknowledged and admitted by the SCSL in order not to sacrifice legal clarity and certainty. The SCSL is indeed international as for its legal basis. Nevertheless, it is proposed that the question is not simply whether the court is international as for its legal basis, but rather whether the court's international legal basis allows for abrogation of immunities.²³³

Undeniably, the SCSL possess various international features. Nevertheless, this identification does not precisely define the consequences for the purposes of denying immunity to high-ranking officials of other States.²³⁴ The availability of immunities before international tribunals depends mainly on the manner of the court's establishment and on the fact that the establishing instrument of the court binds the concerned State.²³⁵ The central conclusion of this Chapter is therefore a finding that a classification of a judicial body as an international criminal court does not automatically mean that a State official has no immunity from prosecution before that body.²³⁶

Do these findings suggest that Taylor is completely immune from the exercise of jurisdiction by the SCSL? No, they rather propose that there is a serious legal issue to be discussed in the context of immunities available to a serving Head of State. This complex legal issue will be discussed in Part III in the light of the available State practice, relevant jurisprudence as well as scholarly opinions in order to properly evaluate the SCSL's approach in denying immunity *ratione personae* to a serving Head of State of another country.

233 See e.g. the discussion in Chatham House, one of the questions raised was: "Could state A get around the obligation to provide immunity to the head of state B, by entering into a treaty with state C to set up an "international" court?", *supra* note 14.

234 See e.g. Racsmany "it may thus be concluded that the Sierra Leone-UN Agreement cannot endow the SCSL with a competence to set aside rights pertaining to other international legal persons under customary international law. Accordingly, it does not in and of itself render immunities of foreign officials irrelevant.", *supra* note 182, p. 313.

235 See Akande, *supra* note 108.

236 See Damgaard, *supra* note 11.

Part III - Determination of Immunities Available to Charles Taylor

5 Balancing Competing Legitimate International Values: General Reflections on the Interplay Between Individual Criminal Responsibility and the Law of Immunities

After analysing the first part of the SCSL's decision (i.e. identification of its legal basis) and coming to the conclusion that the SCSL is indeed an international court, the second part of the decision (i.e. the denial of immunity to a serving Head of State due to the SCSL's international legal basis) will be examined. In particular, it will be examined whether the reasoning of the SCSL that immunity *ratione personae* is irrelevant before an international court can be supported and if not, whether there was another route for the SCSL to proceed.

In order to properly contextualize immunities available to Taylor, it is important to understand the underlying principles of immunities and protected values. Moreover, as noted in the introduction, it is crucial to emphasize that the availability of immunities for international crimes depends on the legal basis of the respective court (i.e. national or international court) and on the status of the high-ranking official (i.e. former or incumbent official). The Part III will assess whether this generally accepted dichotomy, which will be used as a point of departure also for our purposes, suffices in case of the SCSL. Before doing so, Chapter 5 provides a historical background and some general reflections on the development and interplay between individual criminal responsibility and the law of immunities.

5.1 Individual Criminal Responsibility for Crimes Under International Law

The principle of individual criminal responsibility for crimes under international law is firmly established. The submission that international law was not construed to punish individuals and is therefore concerned only with acts of States was already rejected by the IMT. In this respect, the IMT also refused the opinion that individuals who carried out acts of State are not responsible due to the protection provided by the doctrine of the State sovereignty.

By stating that “international law imposes duties and liabilities upon individuals as well as upon States has long been recognised”²³⁷, the IMT confirmed the role of individuals as subjects of international law. In its famous quote, the IMT further supported the above proposition holding that: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”²³⁸

Half century later, Watts in his 1994 Lectures at The Hague Academy of International Law emphasized the general acceptance of this principle while at the same time noting the lack of international judicial mechanisms to exercise jurisdiction over international crimes:

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 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.²³⁹

These rules developed in ‘the framework of an international legal order’ where there was no international criminal court and the enforcement was left to national courts.²⁴⁰ By now, the non-existence of any international criminal tribunal is clearly no longer the problem. However, the enforcement of this principle can, in some circumstances, be frustrated by operation of another well-established principle, immunity of a Head of State.²⁴¹

237 See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Proceedings, Vol. 22, p. 466.

238 *Ibid.*

239 A. Watts, ‘The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers’, in: *Recueil des Cours de l’Académie de droit international*, 1994, III, p. 82. For more authorities on this point see also A. Cassese, *supra* note 100 or *Institut de Droit International*, ‘Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law’, Resolution of 26 August 2001, available at www.idi-iil.org (last visited 6 February 2013).

240 P. Sands, ‘International Law Transformed? From Pinochet to Congo...?’, *Leiden Journal of International Law* 16 (2003), pp. 37-53.

241 For example the US Supreme Court has long maintained that the courts of the United

5.2 Immunities - Necessary Evil or Workable Principle?

In order to correctly assess the validity of the SCSLs reasoning in *Taylor*, the fundamental principles of international law governing immunities of Head of State will be first briefly reviewed. The most well defined area of immunities is that of diplomatic immunities, which has always been regulated by its own regime.²⁴²

The contours of Head of State immunity are less clearly delineated.²⁴³ There is no conventional law (as opposed to diplomatic immunities) and limited State practice on this point, although one can notice an increasing tendency to initiate proceedings against incumbent or former Heads of State. The doctrine of Head of State immunity is largely a matter of custom.²⁴⁴ The previous lack of State practice is probably a reflection of the reluctance of States to interfere with Heads of State.²⁴⁵

It is widely accepted that Heads of State enjoy at least the same immunities as diplomats: immunity *ratione personae* while in office and immunity *ratione materiae* for official acts that were carried out while in office.²⁴⁶ Often, Head of State immunity is indeed treated as a diplomatic immunity.²⁴⁷ The Vienna Convention on Diplomatic Relations has been used extensively in order to determine the treatment of Head of

States are bound by suggestion of immunity. The US Supreme Court declared that the Executive Branch suggestion of immunity “must be accepted by the courts as a conclusive determinative by the political arm of the Government that the court’s retention of jurisdiction would jeopardize the conduct of foreign relations.” In *Ex Parte Peru* 318 U.S. (1943), para. 588, available at <http://supreme.justia.com/cases/federal/us/318/578/> (last visited 19 October 2011).

242 R. Cryer; H. Frimain; D. Robinson, *An Introduction to International Criminal Law and Procedure*, Cambridge (2007), p. 424. See e.g. J. C. Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Dartmouth: Aldershot, 1996), pp. 14-31; L. S. Frey and M. L. Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press, 1999); G. V. McLanahan, *Diplomatic Immunity* (New York: St. Martin’s Press, 1989), pp. 18-25.

243 J. L. Mallory, ‘Resolving the Confusion Over Head of State Immunity: The Defined Right of Kings,’ 86 *Columbia Law Review* 169 (1986).

244 This was pronounced, *inter alia*, by the ICJ in *Yerodia*. See also Akande, *supra* note 108; J. Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Martinus Nijhoff, 1997); A. Watts, *supra* note 239.

245 Cryer et al., *supra* note 242.

246 *Ibid.*, p. 425.

247 See e.g. the Defence Submission in *Prosecutor v. Taylor*, *supra* note 27, para. 6.

State.²⁴⁸ Nevertheless, it is suggested that Head of State immunity should be regarded as a separate category as was also confirmed, *inter alia*, by the ICJ in *Yerodia*.

Immunities are needed for maintaining a smooth conduct of international relations and protecting the officials from any possible interference, which could hamper their activities while representing the state in one way or the other. At the same time, the availability of immunities especially for commission of crimes under international law, can lead to serious injustice.²⁴⁹

The justifications for immunities have changed quite significantly over time. At the same time, it is obvious that not all of these justifications directly correspond and address the rationale for Head of State immunity. In addition to that, the rationale differs with regard to personal and functional immunity, which will be illustrated below. As for now, they can be very briefly summarized as follows.

The immunity of rulers originally derives from the seventeenth century when states were ruled by Divine Right or feudal inheritance.²⁵⁰ At this time, the legal fiction of ‘personification’ was created. On this basis the Head of State was personified with the State itself.²⁵¹ Another legal fiction applying to ambassadors was ‘personal representation’, when the ambassador was viewed as an equivalent to his Head of State. Yet another legal fiction was so called ‘extraterritoriality’, when the premises of the mission were regarded as an extension of the sending State’s territory.²⁵² Some commentators also add for consideration the need for political expediency²⁵³ and respect for the dignity of the Head of State as stated in the *Schooner Exchange* case by the ICJ.²⁵⁴

Stern provides the classical rationale for existence of immunities, adding however the different role of immunities before international courts and tribunals:

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

248 E. Denza, *Diplomatic Law* (Commentary on the Vienna Convention on Diplomatic Relations) (Oxford: Oxford, 2008), pp. 1 and 8.

249 Cryer et al., *supra* note 13.

250 G. Robertson, *Crimes Against Humanity* (Allen Lane: Penguin Books, 2006), pp. 332-371.

251 *Ibid.*

252 Cryer et al., *supra* note 13.

253 See *Tabiona v. Mugabe*, 169 F. Supp. 2d 259 (SDNY, 2001) p. 290.

254 See *Schooner Exchange v. M’Fadden* 11 US 116 (1812), p. 137.

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*.²⁵⁵

Koller identifies other explanations for possible irrelevance of immunities in front of international courts:

(i) the 'internationalness' argument, which provides that as the rules governing international immunities are primarily derived from international law, the international community may determine when those immunities are no longer possible; (ii) the 'world order/constitutional' argument, which argues that as the UN Charter is the constitution of the international community, the UN Security Council could bind the entire international community; and (iii) the 'treaty' argument whereby states which each individually possess the right to waive their own immunities, agree by treaty to waive such immunities before an international criminal judicial body.²⁵⁶

Piotrowicz also uses the 'internationalness' argument while explaining the difference between assertion of jurisdiction by international, as opposed to national, courts. Justification of a different approach taken by international courts lies, according to Piotrowicz, in the 'internationalness' of the court and the assertion of jurisdiction by such court "in some way represents an interest so important that it overcomes the objections."²⁵⁷

Traditional rationales such as the indignity of putting a Head of State on trial carry less weight in the twenty-first century.²⁵⁸ The remaining rationale for immunities is their value in facilitating international relations, i.e. functional necessity, which took precedence over previous justifications.²⁵⁹ This rationale remains very important; it

255 B. Stern, 'Immunities for Head of State: Where Do We Stand?', in M. Lattimer and P.Sands (eds.), *Justice for Crimes Against Humanity* (Oxford: Hart Publishing, 2003), p. 126 (emphasis added).

256 See D., S., Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the *Yerodia* judgement as it pertains to the Security Council and the International Criminal Court', 20 *American University International Law Review* 7 (2004), pp. 30-41, quoted from Damgaard *supra* note 12, p. 272.

257 R. Piotrowicz, 'Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction', *Australian Law Journal* 76 (2002), p. 293.

258 Robertson, *supra* note 250.

259 Akande, *supra* note 51, p. 824. "There are two further justifications for immunity ratione

has been described by the ICJ in the case of *United States Diplomatic and Consular Staff in Iran*²⁶⁰ as the most fundamental prerequisite for the conduct of relations between States.²⁶¹

5.3 Immunity *ratione personae*

The term ‘immunity’ covers two distinct types of immunity, i.e. functional (*ratione materiae*) and personal (*ratione personae*) immunity. In short, functional immunity is limited to official acts, but is permanent. In contrast, personal immunity is absolute, but only temporary. While functional immunity is linked to the conduct, personal immunity is linked to the status of a person. They coexist and somewhat overlap as long as the state official is in office. It is important to keep in mind the distinction between the two, and as obvious as it may sound, the courts (as well as some legal literature) often fail to do so.²⁶²

The Vienna Convention on Diplomatic Immunities makes clear (for both types of immunity) that the purpose is not to benefit individuals but to protect official acts (immunity *ratione materiae*) or to facilitate international relations (immunity *ratione personae*).²⁶³ It is the State that is the beneficiary of the immunity, and it is the State that may waive it, irrespective of the wishes of the person claiming the immunity.

Personal immunity is not limited to any particular conduct; it provides complete immunity to the person of certain office holders while they carry out important representative functions. Personal immunity is granted only to a comparatively small set of people, such as Heads of State and diplomats accredited to a host country. It is temporary, in that it lasts only as long as the person is serving in that representative role. There is no exemption based on the seriousness of the alleged crime, or whether the acts were private or official, since the rationale is unconnected to the nature of the act. Personal immunity is therefore absolute and the person covered by this kind of immunity enjoys complete inviolability.²⁶⁴

personae, beyond the ‘functional’ rationale discussed above, which may be of use: (1) symbolic sovereignty and (2) the principle of ‘non-intervention’. It is worth pointing out here that none of these ration-ales can be taken as the sole justification for the rule of immunity *ratione personae*. They must be read together to give a convincing account of why the rule of immunity still exists.”

260 *United States Diplomatic and Consular Staff in Iran*, Merits, 1980 ICJ Rep. 3, para. 91.

261 Cryer et al., *supra* note 13.

262 For example, Cassese argues that the ICJ failed to recognize the important distinction distinguish between the two immunities. See *supra* note 97, p. 862.

263 The Vienna Convention on Diplomatic Relations, Preamble, paras. 2-4.

264 The *Yerodia* case, *supra* note 29, paras. 54-55 and para. 58.

The rationale was stated as long ago as of 1740 by Wicquefort: “[...] if Princess had the Liberty of proceedings against the Ambassador who negotiates with them on any Account, or under any Colour whatsoever, the Person of the Ambassador would never be in Safety, because those who should have a Mind to make away with Him would never want a Pretext.”²⁶⁵ More recently, for example Cryer described that the purpose of personal immunity is “to preclude any pretext for interference with a State representative, in order to allow international relations between potentially distrustful States.”²⁶⁶ Akande, who emphasized the importance of the principle of non-intervention, provides following justification:

The principle is the ‘corollary of the principle of sovereign equality of states’, which is the basis for the immunity of states from the jurisdiction of other states (par in parem non habet imperium). To arrest and detain the leader of a country is effectively to change the government of that state. This would be a particularly extreme form of interference with the autonomy and independence of that foreign state. Were the rule of Head of State immunity relaxed in criminal proceedings so as to permit arrests, such interference right at the top of the political administration of a state would eviscerate the principles of sovereign equality and independence.²⁶⁷

There were repeated attempts to limit personal immunity; all of them were nonetheless rejected “even in situations of great pressure or incentive to prosecute, including cases of espionage, drug smuggling, murder and plots against monarchs.”²⁶⁸ While acknowledging all of the difficulties with immunities, the benefits of upholding the system of immunities always prevailed over the disadvantages so far.²⁶⁹ Recent cases of national courts in the context of serious international crimes confirm this approach. In the *Qaddafi* case, the French *Cour de Cassation* held that a serving Head of State is entitled to personal immunity in domestic courts even with regard to acts of terrorism.²⁷⁰ In the *Castro* case, the *Spanish Audiencia Nacional* reached a similar result²⁷¹ as well as a UK court in the *Mugabe* case.²⁷²

265 A. van Wicquefort, *The Ambassador and his Functions* (2nd edn, London, 1740) (translated into English by John Digby), Ogdon, *Juridical Bases* 128-129, quoted from Cryer; Frimain; Robinson, *supra* note 242, p. 423.

266 Cryer et al., *supra* note 13, p. 546.

267 Akande, *supra* note 51, p. 824.

268 Cryer et al., *supra* note 13, p. 546.

269 Cryer et al., *supra* note 13.

270 Qaddafi (2001) 125 ILR 456.

271 Castro (1999) 32 ILM 596.

272 C. Warbrick, ‘Immunity and International Crimes in English Law’, 53 *International and Comparative Law Quarterly* 769 (2004). Quoted from Cryer et al., *supra* note 13, p. 546.

This practice is illustrated also in the work of the *Institute de Droit International* (IDI), which stated in its Resolution of 2001 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*.”²⁷³ Similarly, eight years later, its Resolution of 2009 entitled “Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes”, confirms: “[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes”.²⁷⁴ Interpretation of the words ‘other than’ leads to the conclusion that while the IDI upholds personal immunity even in respect of international crimes, it clearly rejects the availability of functional immunity for international crimes, which leads us to examine the exact scope of functional immunity.²⁷⁵

5.4 Immunity *ratione materiae*

Functional immunity as a well-established rule of customary international law dating back to the eighteenth and nineteenth centuries, was also restated by the ICTY Appeals Chamber in the *Blaskic* case in the following terms:

[state] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity’.²⁷⁶

Immunity *ratione materiae* attaches to all those who carry out duties of State, which means that it covers official acts of not only *de iure*, but also *de facto* State officials.²⁷⁷

273 Article 2, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Institut de Droit International, Session of Vancouver (2001).

274 Art. III(1), Institut de Droit International, Naples Session (2009). See also Ch. J. Tams and J. Sloan, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013).

275 See also *Advisory Report on the Immunity of Foreign State Officials (Translation)*, Advisory Committee on Issues of Public International Law, Advisory Report No. 20, The Hague (2011), pp. 15-19.

276 *Prosecutor v. Blaskic*, Case No. IT-95-14-AR 108 *bis*, Objection to Issue of *Subpoenae duces tecum*, 29 October 1997, para. 38.

277 In context of *de facto* officials, see e.g. *Prosecutor v. Muammar Gaddafi*, Case No. ICC-01/11-01/11-2, 27 June 2011, para. 17, (“acting as the Libyan Head of State”). See also S. Zappala, ‘Do Heads of State in Office Enjoy Immunity from Jurisdiction for

This kind of immunity is permanent, i.e. it does not cease with the end of office because it is attributable to the State itself. Finally, this immunity may be invoked towards any other State, i.e. is *erga omnes*.²⁷⁸

5.4.1 Immunity *ratione materiae*: Procedural Bar or Substantive Defence?

At this point, it is important to acknowledge the controversy both in practice and among scholars “whether immunities affect substantial responsibility or merely impose a procedural obstacle with regard to criminal proceedings”.²⁷⁹ At the same time, this distinction has a direct impact on the reconciliation of individual criminal responsibility and immunities. Accordingly, the following discussion is framed around the line between substantive and procedural rules.

In general, the line between substantive and procedural rules in international public law may not always be self-evident. Leaving aside the general definition of these categories, no specific criteria seem to exist in domestic law either and it is thus for the courts to determine in which category a certain rule falls in each case.²⁸⁰ This may not be a simple task, for example in *Erie Railroad Co. v. Tompkins*, the court noted that ‘line between procedural and substantive law is hazy.’²⁸¹ The picture is further complicated by the fact that “one and the same rule may qualify as a substantive or a procedural rule”, depending on the circumstances.²⁸²

In the *Yerodia* case, the ICJ observed that individual criminal responsibility and immunity from criminal jurisdiction were quite separate concepts and noted that the former was a question of substantive law, while the latter was procedural in nature.²⁸³ In the *Jurisdictional Immunities* case, Italy and Germany relied in its argumentation

International Crimes? The Ghaddafi Case Before the French Cour de Cassation,’ *European Journal of International Law*, 12:3 (2001), pp. 595-612.

278 Cassese, *supra* note 97.

279 K. Ambos, *Treatise on International Criminal Law: Volume 1: Foundations and General Part*, Oxford: Oxford University Press, p. 410.

280 S. Talmon, ‘Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished’, *Bonn Research Papers on Public International Law*, Paper No 4/2012, 16 June 2012, p. 7.

281 See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 at 91 (1938), quoted from S. Talmon.

282 For example, the rules relating to most-favoured-nation treatment, estoppel or the exhaustion of local remedies have been treated both as procedural and as substantive rules. For a deeper discussion, see Talmon, *supra* note 280, p. 8.

283 See *Arrest Warrant of 11 April 2000*, *supra* note 28, para. 60. Similarly see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, ICJ Reports 2006, para. 34.

on the distinction between procedural and substantive rules,²⁸⁴ with Germany arguing that rules governing immunity “have the nature of substantive rules of international law”.²⁸⁵ Yet, Greece (non-party intervener) argued that this distinction “has no logical or, still less, legal relevance.”²⁸⁶ In fact, the ICJ based its decision in the *Jurisdictional Immunities* case on the distinction between substantive and procedural rules and stated that rules on State immunity as well as the functional and personal immunity of State officials are procedural in nature.²⁸⁷ Nevertheless, it did not provide any criteria for their distinction.²⁸⁸

Procedural effects of immunities were also emphasized by Ambos, who noted that, “the rationale of any immunity, be it functional or personal, is to prevent procedural or judicial measures which impede the respective official from carrying out his functions in an effective way.”²⁸⁹ According to Cryer, the immunities are merely procedural bars, not a ‘defence’ as such.²⁹⁰ He nonetheless approves that:

a claim to functional immunity may also bring with it a claim under the ‘act of State doctrine’, under which national courts of one State may decline to examine the acts of another State. This is a matter of *substantive law* and, along with the fact that it applies only to particular conduct, probably explains why functional immunity is sometimes referred to as a substantive defence.²⁹¹

On the other side of the spectrum, it has been argued that functional immunity constitutes a substantive defence, which means that any breach of national law of

284 *Jurisdictional Immunities of the State*, Counter-Memorial of Italy, 22 December 2009, 54, para. 4.44; Reply of the Federal Republic of Germany, 5 October 2010, 21, para. 37.

285 *Jurisdictional Immunities of the State*, Memorial of the Federal Republic of Germany, 12 June 2009, para. 92.

286 *Jurisdictional Immunities of the State*, Written Statement of the Hellenic Republic, 3 August 2011, para. 54; *ibid.*, CR 2011/19, 14 September 2011, 37, para. 102. The line between substantive and procedural rules may also be sometimes blurred on purpose, which in fact seems to suggest Talmon, by arguing that Germany “probably for tactical reasons” categorized rules on immunity as substantive rules “so that the Court would have had to apply the immunity rules in force at the time of events in 1943–1945. Talmon, *supra* note 280, p. 14.

287 *Jurisdictional Immunities of the State*, *supra* note 48, para. 58.

288 Talmon, *supra* note 280, p. 7.

289 Ambos, *supra* note 279, p. 410.

290 Cryer, *supra* note 13, p. 534.

291 In Cryer, *supra* note 13, p. 534, referring to H. Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2008), p. 93-97. Compare with Ambos, who notes that the act of State doctrine is not recognized in civil law systems. In Ambos, *supra* note 279, p. 409.

the foreign country or international law by the State official is attributable to the State instead of the State official. Thus, no individual criminal responsibility or civil liability can arise.²⁹² As such, Cassese is of the view that functional immunity relates to substantive law. Van Alebeek even argues for re-conceptualization of State immunity (and immunity of State officials) as imposing not merely procedural limits on the competence of the forum State, but instead set of substantive rules. In this context, she perceives immunity as a lack of jurisdictional competences of the State rather than the non-exercise of existing ones, as commonly believed.²⁹³ As for the difference between personal and functional immunity, she adds:

While personal immunity constitutes a *classic immunity* from jurisdiction, functional immunity constitutes an exemption from the law in a personal capacity. The term “immunity” may in fact not be the most apposite to describe the phenomenon at hand.²⁹⁴

Similarly, Beckett explains that if proceedings are brought against a former Head of State with regard to his official acts “he has a defence to the action (i.e. that he is not personally liable for such acts) but not a claim to immunity.”²⁹⁵

In any event, we agree that the formalism in the substantive/procedural dichotomy “tends to obscure the nature of the dynamic relationship that seems to exist”²⁹⁶ and we argue that law on immunities accommodates both procedural and substantive understanding of *functional* immunity of State officials.

Personal immunity was described above as an absolute, it thus represents a complete procedural bar in a sense that there is no exemption based on the seriousness of the alleged act, or whether the acts were private or official. Functional immunity, however, is limited and connected precisely to the nature of the act. Since there is a different

292 Cassese, A., *International Criminal Law* (New York: Oxford University Press, 2008), p. 303-304. G. Werle, *Principles of International Criminal Law* (T.M.C. Asser Press: 2009).

293 A. Sari, Book Review: ‘The Immunities of States and their Officials in International Criminal Law and International Human Rights Law By Rosanne Van Alebeek’, 79 *British Yearbook of International Law* (2008), p. 389.

294 R. Van Alebeek, *The Immunities of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008), p. 133.

295 *Ibid.*, Van Alebeek quoting E. Lemonon (Rapporteur Institut de Droit International) L’immunité de juridiction et d’exécution force des Etats étrangers, Rapport et project de Résolution définitifs, Observations E. Beckett, (1952) 44-I AIDI 5, 60 (fn. 107).

296 *Immunity of State officials from foreign criminal jurisdiction*, UN General Assembly, Memorandum by the Secretariat at the Request of the International Law Commission, UN Doc. A/CN.4/956, 31 March 2008, p. 39, para. 69.

rationale for their existence, different justification as regards their procedural and/or substantive effects can be offered.

It is acknowledged that personal immunity is clearly procedural, but it is claimed that functional immunity is not *purely* procedural. While it is possible to argue that functional immunity serves as a procedural bar, we suggest that it serves as a ‘limited’ (as opposed to complete) procedural bar, i.e. only with regard to official acts. And, arguably, the qualification of the act as official or not does inevitably enter the realm of substantive law. In other words, the procedural nature of functional immunity does not deprive it of *any* substantive function.²⁹⁷

The ICJ in the *Jurisdictional Immunities of the State* case held that the rules of State immunity are procedural in character and therefore “do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.”²⁹⁸ In terms of immunities of State officials, Ambos similarly notes that, “immunities do not in any way deliver a verdict on criminal responsibility—they have no substantive effect, but merely constitute procedural defence.”²⁹⁹

But we do not argue that immunities have certain substantive effects because they relate to lawfulness or unlawfulness of any act. Clearly, they do not. We rather propose that it is important to mind the difference between personal and functional immunities. And since functional immunity is connected with the nature of the act, the decision about the nature of the respective act (i.e. whether it is official or not) may be seen as a substantive issue, not a procedural one. In other words, functional immunity of State officials bears upon the question whether or not the conduct in respect of which the proceedings are brought is official or not, which means that it indeed has also substantive effect.

Akande and Shah maintain that functional immunity “has both a substantive and a procedural function, in that it gives effect to a defence available to state officials and prevents the circumvention of the immunity of the state.”³⁰⁰ In particular, they focused their explanation on two related policies underlying functional immunity:

297 See e.g. Van Alebeek, *supra* note 294: “The applicability of functional immunity therefore depends on a distinction between ‘acts of State’, that is act performed on behalf of the State, and private acts serving the individual’s own ends”. See also Cryer et al., *supra* note 13, p. 534, fn. 13.

298 *Jurisdictional Immunities of the State*, *supra* note 48, para. 93.

299 Ambos, *supra* note 279, p. 411.

300 Akande and Shah, *supra* note 51, p. 817.

First, this type of immunity constitutes (or, perhaps more appropriately, gives effect to) a *substantive defence*, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state. Secondly, the immunity of state officials in foreign courts prevents the circumvention of the immunity of the state through proceedings brought against those who act on behalf of the state...In this sense, the immunity operates as a *jurisdictional, or procedural*, bar and prevents courts from indirectly exercising control over the acts of the foreign state through proceedings against the official who carried out the act.³⁰¹

Substantive effect of functional immunity was equally stressed by the Italian court in the *Rissmann* case, which held in its response to the German Embassy objections that its Consul Rissman acted in the exercise of his functions and is therefore entitled to consular immunity:

Functional immunity...finds its justification in the general principle according to which the consul's acts, even though they may be valid within the legal system of the receiving State and thus produce legal consequences therein, constitute an activity of the sending State and not of the consul personally, since, in the exercise of his office he is accountable to his government. Such an immunity is *not*, therefore, *merely procedural*. It is based on a *principle of substantive law* and continues even after his tour of office has terminated.³⁰²

And how is the procedural/substantive distinction relevant for our purposes? The above inquiry is particularly relevant in the light of a subsequent analysis of the interplay of immunities and individual criminal responsibility. There exist various approaches how to balance these competing legitimate international values. With regard to availability of *functional* immunity, two main developments in international criminal law in the twenties century had an impact on the law of immunities: "the establishment of international criminal jurisdiction and the development of the substantive law relating to irrelevance of official position, each of which effectively raising the bar of accountability for egregious offences."³⁰³ Both of these interrelated developments are discussed in more detail in the respective Chapters below.³⁰⁴

At this point, however, it is crucial to clarify the relationship between the principle of the irrelevance of official position and functional immunity in the context of

301 *Ibid.*, pp. 826-827 (emphasis added).

302 *Re Rissmann* (Italy, 1970), 71 ILR 577, 581.

303 *Immunity of State officials from foreign criminal jurisdiction*, *supra* note 296.

304 See, in particular, Chapter 6.

procedural/substantive distinction. In fact, many commentators do not engage in this exercise and therefore do not properly justify the denial of functional immunity (with regard to practice before both domestic and international courts).³⁰⁵ Instead, they only seem to mechanically repeat arguments about the irrelevance of official position in case of international crimes, mostly by way of referring to various provisions and their historical development.³⁰⁶

305 See, for example Ambos, who referred to various approaches used to reconcile criminal responsibility and immunity, such as (i) *jus cogens* argument (raised and rejected also in the methodology part of this work), (ii) argument that international crimes cannot be qualified as sovereign or official acts or (iii) conflict between the rule conferring extra-territorial jurisdiction to domestic courts and the rule on functional immunity, when these rules are considered as incompatible because of the *lex posterior derogate legi priori* principle, i.e. newer rule on prosecution of international crimes prevails over older rule on functional immunity (suggested by Akande, *supra* note 51). Ambos found such approaches unconvincing and rejected most of them. What solution Ambos offers then? He distinguishes between so called “vertical immunity” (before international tribunals) and “horizontal immunity” (before domestic courts). As regards practice before international tribunals, Ambos suggests that immunities are not *generally* regarded as a valid defence. This, however, is an oversimplification of the issue, since international legal basis of the respective tribunal is not decisive for the purposes of availability of immunity. Moreover, it is not entirely clear from his reasoning how to reconcile the irrelevance of official capacity with functional immunity if he considers functional immunity merely procedural in nature. As regards practice before domestic courts, Ambos distinguishes between traditional state-oriented approach providing no exception to immunity and more human-rights oriented approach providing that international crimes should not be *in principle* exempted from prosecution, since there is an increasing state practice to regard the official position in such context as irrelevant. Ambos emphasized the need to take into account “*par in parem* principle, function of immunity and the effect of its restriction with regard to the functional sovereignty of the respective state.” However, it seems that Ambos does not provide any direct response as to whether there is any substantive limitation on functional immunity, except offering a “balancing exercise” between functional immunity (procedural in nature, according to Ambos) and substantive rules of international criminal law. Ambos, *supra* note 279, pp. 411-418 (emphasis added). See also Cryer, *supra* note 13, pp. 534 and 542. On the one hand, Cryer claims that both personal and functional immunities are “merely procedural bars”, except the situation when a claim to functional immunity brings with it a claim under the ‘act of State doctrine’. On the other hand, he approves an exception to functional immunity with regard to prosecution for serious international crimes. Yet, it is not entirely clear from his argumentation on which basis is such exception accepted, if functional immunity is considered as a merely procedural bar.

306 Mainly referring to the third Nuremberg Principle (Principle III) and Statutes of international criminal courts and tribunals.

According to the principle of the irrelevance of official position, the official status of the perpetrator of international crimes does not exempt him (or her) from criminal responsibility.³⁰⁷ The above analysis as to whether the functional immunity is of procedural or substantive nature has relevance to our later inquiry since the recognition of functional immunity as purely procedural would conflict with the substantive law relating to irrelevance of official position for international crimes. The UN Secretariat in its Memorandum, prepared at the request of the ILC, summarized this conflict in the following terms:

There could also be some question as to whether the various elements of practice supporting the principle of the irrelevance of the official status of an individual in respect of crimes under international law would necessarily entail the non-applicability, in relation to such crimes, of immunity *ratione materiae* from foreign criminal jurisdiction. This question would seem to remain open if immunity *ratione personae* and immunity *ratione materiae* are both considered as mere *procedural* bars to the exercise of jurisdiction by a foreign State. In contrast, if immunity *ratione materiae* from foreign criminal jurisdiction were considered to be a *substantive defence* predicated on the ground that the official acts of a State organ are to be attributable to the State and not the individual, there would appear to be convincing reasons for holding that such a defence cannot operate in respect of conduct that has been criminalized by the international legal order.³⁰⁸

It follows that it was necessary to examine the nature of rules on functional immunity in order to assess its compatibility with the substantive rules on the irrelevance of official position. Based on this examination, we propose that international criminal law indeed provides for a substantive limitation on functional immunity, which in turn cannot be invoked in respect of crimes under international law. Obviously, any wider normative implications of the irrelevance of official position cannot simply

307 See also the position of the ILC in its Commentary to Article 7 of the 1996 Draft Code of Offences against the Peace and Security of Mankind: "As further recognized by the Nürnberg Tribunal in its judgment, the author of 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*. [Footnote 69: 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." *Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 27, para. (6) (emphasis added).

308 *Immunity of State officials from foreign criminal jurisdiction*, *supra* note 296, p. 134 (footnotes omitted).

be inferred from the principle itself but have to be reflected in the State practice accompanied by *opinio juris*. In order to further support our proposition, the relevant practice (including references to domestic and international case law and to various further instruments) is provided in more detail in the respective Chapters below.³⁰⁹ Before turning to examine this practice, another closely related problem that may arise with respect to characterization of international crimes, needs to be addressed first.

5.4.2 International Crimes as Private or Official Acts: Unanswerable Dilemma?

As repeatedly noted, immunity *ratione materiae* can be invoked in respect of acts performed in an official capacity. At the same time, we have explained that international criminal law provides for a substantive limitation on immunity *ratione materiae* by way of establishing criminal responsibility for international crimes regardless of official position of the person.

Nevertheless, there remain *some* arguments connected with the qualification of international crimes that deserve our attention. These arguments relate to an existing and much debated distinction between private and official acts and the operation of this distinction in the context of international crimes. Where does this distinction leave international crimes? Can international crimes be qualified as official acts and

309 See Chapter 6. In general, various elements of practice can be referred to, including domestic case law (in particular the *Eichmann* and *Pinochet* cases or numerous other cases, in which State officials were denied immunity by (foreign) domestic courts for international crimes, although these cases concerned primarily military officers, for more details see Cassese, *supra* note 100, p. 871); international case law (*Prosecutor v. Karadzic and others*, 16 May 1995, paras. 22-24; *Prosecutor v. Furundzija*, Judgment, 10 December 1998, para. 140; and *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, 8 November 2001, para. 28), but also instruments such as: the London Agreement of 8 August 1945 establishing the International Military Tribunal and the Judgment; the Charter of the International Tribunal for the Far East; the 1945 Control Council Law No. 10; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; Principle III of the Nuremberg Principles, affirmed by the United Nations General Assembly in its resolution 95 (I) of 11 December 1946; the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973; the Statutes of the ICTY, ICTR and the Rome Statute of the ICC. For *Eichmann* case, see *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court (sitting as a Court of Criminal Appeal), Judgment of 29 May 1962, reproduced in *International Law Reports*, vol. 36, pp. 277-343. *Attorney-General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, Judgment of 12 December 1961, reproduced in *International Law Reports*, vol. 36, pp. 5-276.

hence be potentially covered by immunity *ratione materiae*? And is it at all useful to resort to this distinction in the context of international crimes?

The problem of identifying a clear line between what constitutes private, as opposed to official, acts arises in most cases where immunity *ratione materiae* is (or can be) at stake. This will become evident from the analysis of the *Pinochet* and *Yerodia* cases, which were relied on by the SCSL.³¹⁰ The discussion is therefore directly relevant for the *Taylor* case as well.

In the *Yerodia* case, the ICJ held that a national court (providing it has jurisdiction) can try a *former* Minister of Foreign Affairs of another state for acts committed in a *private capacity*. The question is to be raised whether international crimes are to be regarded as committed in a private or official capacity, which is by no means clear-cut.

The origins of this distinction, which emerged historically, can be traced to State immunity.³¹¹ The restrictive approach to State immunity distinguished between governmental actions that remained immune (*acta iure imperii*) and acts of a private or commercial nature, which were justiciable in foreign courts (*acta iure gestionis*). The distinction was never very satisfactory in practice, and national courts attempting to apply it came to different decisions on similar subjects. It is not surprising that the distinction, which proved to cause such confusion in commercial cases, is even less satisfactory when adjusted and invoked within international criminal law.³¹² The following comments prove this point.

Wirth and Ambos are of the view that the distinction between private versus official acts is unworkable in practice.³¹³ According to Cassese, the ICJ's resort in the *Yerodia* case, to the distinction between acts performed 'in a private capacity' and 'official acts', is a distinction that, within the context of international crimes "proves ambiguous and indeed untenable."³¹⁴ Cassese argues that to hold, as the ICJ did, that State officials after leaving office may be prosecuted and punished for international crimes perpetrated while in office only if such crimes are regarded as acts committed in

310 See Chapter 6.

311 Cassese argued that origins of this distinction can be also found in a transposition of this distinction from the Vienna Convention on Diplomatic Relations. Cassese, *supra* note 97, p. 868.

312 Robertson, *supra* note 250.

313 Ambos, *supra* note 279, p. 417. S. Wirth, 'Immunity for Core Crimes? The ICJ's judgement in the Congo v. Belgium Case', 13 *European Journal of International Law* 877 (2002), pp. 90-91.

314 See Cassese, *supra* note 97, p. 867.

their 'private capacity', is "hardly consistent with the current pattern of international criminality and surely does not meet the demands of international criminal justice."³¹⁵

Cassese notes that it is not conceivable that high-ranking state officials (including both Foreign Ministers or Heads of State) may perpetrate crimes such as genocide, torture, war crimes or crimes against humanity in a private capacity. While performing, willingly condoning or ordering those acts, high-ranking state officials rather act, according to Cassese, in the exercise of public functions.³¹⁶ As regards crimes committed in private capacity, he gives examples such as personal offences, which may include killing one's wife (or husband), beating a servant or stealing from a shop.³¹⁷

Wouters, similarly with Cassese, points to the fact that treating international crimes as private acts "ignores the sad reality that in most cases those crimes are precisely committed by or with the support of high-ranking officials as part of a State's policy, and thus fall within the scope of official acts."³¹⁸ Wirth also opposes the categorisation of international crimes as acts committed in a private capacity. He provides a different rationale, explaining that this categorisation would imply that such acts cannot be attributed to the State for the purposes of State responsibility, which would prevent a State being ordered to pay compensation.³¹⁹

It is suggested that the distinction between private and official acts should not be used in the context of international crimes. This terminology has different origins. The original distinction between *acta iure imperii* and *acta iure gestionis* applies to civil (not criminal) proceedings before courts of foreign states. Since it does not have roots in international criminal law, it causes significant problems not only in a theory, but also for domestic and international courts, as will be illustrated in more detail on the *Pinochet* and *Yerodia* cases. This argument can be also supported by the approach followed by the IDI.³²⁰ The IDI refrained from directly addressing this problematic

315 A. Cassese, *International Law* (Oxford: Oxford University Press, 2005), p. 120.

316 *Ibid.*

317 *Ibid.*

318 J. Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks', 16 *Leiden Journal of International Law* 253 (2003), p. 262.

319 Wirth, *supra* note 313.

320 See Article 13 of the 2001 Resolution, which reads: "1. A former Head of State enjoys no inviolability in the territory of a foreign State. 2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried *when the acts alleged*

distinction and instead simply excluded crimes under international law from the operation of immunity *ratione materiae*.

Nevertheless, since courts tend to employ this terminology, it would not be satisfactory to close the discussion simply by referring to unsuitability of this distinction. As was already set out above, courts and scholars have offered various reasoning and propositions in order to support the argument that immunity *ratione materiae* is inapplicable in respect of crimes under international law. Although views and approaches often differ significantly, it is possible to identify two main lines of reasoning and thus offer two possible solutions to the issue at hand.

The first solution could be to avoid the discussion over irrelevance of immunity *ratione materiae* for international crimes by denying the official nature of these acts. International crimes could be then treated as private acts and no immunity *ratione materiae* would arise in this respect. This appears to be an easier way to proceed. However, it is suggested that the legal construct, which would turn international crimes into solely private acts, seems rather artificial.³²¹ Admittedly, there have been arguments advanced by some judges³²² and scholars³²³ that crimes under international

constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources. 3. Neither does he or she enjoy immunity from execution." *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Institut De Droit International, Session of Vancouver (2001), available at http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF (last visited 25 July 2013).

321 See e.g. the case of Reich Minister for Foreign Affairs (1938-1945) Joachim von Ribbentrop, who was convicted for crimes against peace, war crimes and crimes against humanity, which would have to be regarded as his 'private acts' or the Japanese Foreign Minister (1943-1945) Shigemitsu who was convicted for failing 'to secure observance and prevent breaches of the law of war.' In Cassese, *supra* note 97, p. 870.

322 See e.g. the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, *supra* note 28, para. 85. See also arguments by some Law Lords in the *Pinochet* case I, *supra* note 17, with regards to torture and conspiracy to commit torture, in particular Lord Steyn, p. 1337 and Lord Nicholls, p. 1332.

323 See, for example, M. N. Shaw, *International Law*, 5th edition (Cambridge: Cambridge University Press, 2003), p. 658 ("The definition of official acts is somewhat unclear, but it is suggested that this would exclude acts done in clear violation of international law."); M. A. Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity', *Duke Law Journal*, vol. 52 (2002), p. 659 ("While former heads of state still retain immunity for the *official* acts they committed while in power, they enjoy no protection for their international crimes, because such serious abuses cannot fall within the scope of a head of state's *legitimate functions*. Even though Pinochet served as a head

law would not qualify as “official acts” for various reasons, main argument often being that they would not fall within the “legitimate” or “normal” functions of the State. At the same time, views considering crimes under international law as being “private” by their very nature have been subject to much criticism and rejected by various domestic and international courts³²⁴ and other scholars.³²⁵

The second, and it is suggested that a more adequate, solution, is to consider international crimes as most often committed by state officials while holding certain public/official position, therefore in an official capacity. In order to support this view, one may refer to the case of torture. One of the objective elements of the torture (not as a war crime or crime against humanity), in the context of the Torture Convention,

of state at the time, international law deems acts of torture so far outside the bounds of legitimate state action that he must be considered a private actor with respect to such conduct.”); M. White, ‘Pinochet, Universal Jurisdiction, and Impunity’, *Southwestern Journal of Law and Trade in the Americas*, vol. 7 (2000), pp. 216-222; A. Bianchi, ‘Denying State Immunity to Violators of Human Rights’, *Austrian Journal of Public and International Law*, vol. 46 (1994), pp. 227-228 and Liu M. Sears, ‘Confronting the ‘Culture of Impunity’: Immunity of the Heads of State from Nuremberg to *ex parte Pinochet*’, *German Yearbook of International Law*, vol. 42 (1999), p. 126.

324 See e.g. dissenting opinions in the *Pinochet* case I, *supra* note 17, in particular Lord Slynn of Hadley, p. 1309, and Lord Lloyd of Berwick, pp. 1323-1324 or the following cases, although in civil proceedings: *Jane Doe I, et al., Plaintiffs, v. Liu Qi et al., Defendants; Plaintiff A, et al., Plaintiffs, v. Xia Deren, et al., Defendants*, District Court, Northern District of California, pp. 1283, 1285; *Ra'Ed Mohamad Ibrahim Matar, et al., Plaintiffs, v. Avraham Dichter, former Director of Israel's General Security Service, Defendant*, District Court, Southern District of New York, pp. 292-293; *Ali Saadallah Belhas et al., Appellants v. Moshe Ya'alon, Former Head of Army Intelligence Israel Appellee*, No. 07-7009, Court of Appeals for the District of Columbia Circuit, 15 February 2008. See also the position adopted by the ICTY in the *Kunarac* case: [...] there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, *acting in an official capacity* could constitute an aggravating circumstance when it comes to sentencing, because the official *illegitimately used and abused a power* which was conferred upon him or her for legitimate purposes. In *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment, 22 February 2001, para. 494 (emphasis added). See also the dissenting opinion of Judge Al-Khasawneh in the *Arrest Warrant* case, where he noted that international crimes are by definition official acts. The *Arrest Warrant* case, *supra* note 28, Dissenting Opinion of Judge Al-Khasawneh, p. 95.

325 See e.g. Akande, *supra* note 111, p. 414; L. De Smet and F. Naert, ‘Making or breaking international law? An international law analysis of Belgium’s act concerning the punishment of grave breaches of international humanitarian law’, *Revue belge de droit international*, vol. 35 (2002), p. 505.

is “instigation or consent or acquiescence of a *public official* or other person *acting in an official capacity*”.³²⁶ Similarly, the crime of enforced disappearance can be perpetrated only by ‘agents of the State’ or ‘persons or groups of persons acting with the *authorisation, support or acquiescence of the State*’, as defined in the International Convention for the Protection of All Persons from Enforced Disappearance.³²⁷

On the one hand, it is true that most international crimes, according to their definitions in Statutes of international courts and tribunals and in other relevant Conventions, are not limited to acting in an official capacity (as opposed to torture in the context of the Torture Convention or enforced disappearance). On the other hand, “it is clearly the case that these crimes are intended to capture the conduct of those acting in the exercise of official capacity.”³²⁸ Akande further stresses the fact that at the time of creation of most of international crimes, “they were intended, primarily, to cover state action, and it is only more recently that they have been extended to cover private (i.e., non-state) action.”³²⁹

The official position (and means available in such position) in turn allows for breaches of international law on such a scale that they can be qualified as international crimes.³³⁰ It follows that international crimes are seldom perpetrated in a private

326 See Article 1 of the Torture Convention (emphasis added).

327 See Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006), GA Res 61/177, 20 December 2006, A/RES/61/177 (emphasis added).

328 Akande and Shah, *supra* note 51, p. 843.

329 *Ibid.* As regards the crime of genocide see the *Report of the Ad Hoc Committee on Genocide*, UN Doc E/794 (1948), at paras. 29 and 32 (Representatives of states recognized that “in almost every serious case of genocide it would be impossible to rely on the Courts of the States where genocide had been committed to exercise effective repression because the government itself would have been guilty, unless it had been, in fact, powerless”. Moreover, it was observed that “genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime”). See also W. Schabas, ‘State Policy as an Element of International Crimes’, 98 *Journal of Criminal Law and Criminology* 953 (2008).

330 Similarly, Judge ad hoc Van den Wyngaert in her dissenting opinion in the *Arrest Warrant* case: “[The Court] could and indeed should have added that war crimes and crimes against humanity can never fall into [the] category [of private acts]. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, *be anything other than ‘official’ acts.*” The *Arrest Warrant* case, *supra* note 28, Dissenting Opinion of Judge ad hoc Van den Wyngaert, p. 162, para. 36 (emphasis added). Compare with Van Alebeek, who posits

capacity. How to justify the denial of immunity *ratione materiae* for international crimes if they are considered as committed in (the abuse of) an official capacity then? Cryer cogently expressed legal theory underlying inapplicability of functional immunity in respect of international crimes in the following terms:

First, functional immunity protects State conduct from scrutiny, but it would be incongruous for international law to protect the very conduct which it criminalizes and for which it imposes duties to prosecute. Second, the State cannot complain that its sovereignty is being restricted or that a policy is being imposed, when the prohibited conduct is being recognized by all as an international crime. Finally, it is also sound in terms of balancing the underlying values; where an individual possesses only functional immunity, international law already reflects that such an individual is no longer playing a high representative role which necessitates absolute immunity.³³¹

It is claimed that immunity *ratione materiae* does not cover crimes under international law due to an exception established by international law. Customary international law grants immunity *ratione materiae* to the state officials for acts they

that “the rule of functional immunity explicitly regards a presumption of authority.” This presumption of authority may be defeated, claims Van Alebeek, on the basis of a *a priori* (general) defeat. She suggests that States may agree, in the form of a rule of international law, that certain activity may never be cloaked by the authority of a State. It follows that the act is not “in law an act of the state rather than of the official that happened to perform the act.” According to Van Alebeek, the *act is not official in character* and the state official incurs responsibility in his personal capacity. She concludes that the development of the principle of individual criminal responsibility following WWII can be understood from this particular perspective. Van Alebeek, *supra* note 294, pp. 130-132 (emphasis added).

- 331 Cryer et al., *supra* note 13, p. 542-543. Compare with P. Gaeta, ‘Official Capacity and Immunities’, in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 982. For an explanation relating to the possible rationale behind this special rule, Gaeta argues that crimes under international law “amount to attacks on values that the international community has come to consider as being of paramount importance. Consequently it appears to be unjustifiable to permit the prosecution and trial of minor offenders while leaving the leaders unpunishable, the more so because normally such crimes are perpetrated at the instigation, or with the connivance or at least the toleration, of senior State officials. Since under normal circumstances, national authorities do not bring to trial their own senior officials for the alleged commission of the crimes under discussion, those crimes would go unpunished, should the customary rule on functional immunities continue to protect high-ranking State officials against prosecution and trial before foreign courts or international criminal tribunals.” *Ibid.* Compare with Cryer et al., *supra* note 13, p. 552.

perform in their official capacity (*lex generalis*). This rule, as will be further explained, has to give way to a *specific* rule of international customary law (*lex specialis*) that removes immunity *ratione materiae* for state officials committing international crimes.³³²

To put it differently, immunity *ratione materiae* (*lex generalis*) is not compatible with the specific rule on the irrelevance of official position (*lex specialis*) in respect of international crimes that has developed in international criminal law.³³³ We will now seek to confirm this hypothesis by supporting evidence including domestic and international case law, other State practice, relevant treaty provisions and Statutes of international criminal tribunals, in addition to the elements of practice mentioned already above.³³⁴

It is worth repeating that decisions of domestic courts are not necessarily treated here as “mere” subsidiary means for the determination of rules of law in light of the Article 38 (1) of the ICJ Statute. It was noted in the methodology section that there is a considerable practical and doctrinal support that case law can serve as an evidence of *opinio juris* or amount to State practice.³³⁵

The SCSL in *Taylor* relied on certain passages of the House of Lords decision in the *Pinochet* case (functional immunity at stake) and the ICJ decision in the *Yerodia*

332 See Chapter 6.

333 Compare with Akande and Shah, resorting to the justification of inapplicability of functional immunity in respect of international crimes on the basis of the conflict between the rule conferring extra-territorial jurisdiction to domestic courts and the rule on functional immunity. They claim that these rules are considered as incompatible because of the *lex posterior derogat legi priori* principle, i.e. newer rule on prosecution of international crimes prevails over older rule on functional immunity. They argue that while international crimes can be official acts “immunity *ratione materiae* is removed as soon as a rule permitting the exercise of extra-territorial jurisdiction over that crime and contemplating prosecution of state officials develops. Indeed, the very purpose of international criminal law is to attribute responsibility to individuals, including state officials, and to defeat the defence of official capacity or act of state. The newer rule of attribution supersedes the earlier principle of immunity which seeks to protect non-responsibility”. Akande and Shah, *supra* note 51, p. 840.

334 See *supra* note 309. As regards support for this proposition in the legal literature, see e.g. Cassese, who suggests that this customary rule exists regardless of the legal basis of the court. See Cassese, *supra* note 97, pp. 870-874. Equally, Frulli posits that national/international legal basis of the court has no bearing on functional immunity as opposed to personal immunity. Frulli, *supra* note 66. See also Gaeta, *supra* note 331, pp. 979-982; Zappalà, *supra* note 277, pp. 601-602 and Akande, *supra* note 108, p. 414.

335 Nollkaemper, *supra* note 63.

case (personal immunity at stake), since both of these decisions made reference to the possibility of prosecuting high-ranking state officials before international courts, where they have jurisdiction. Accordingly, we shall start our examination with these two decisions.

6 Practice before National and International Courts with Respect to Immunities

6.1 The *Pinochet* Case

The Defence in its submission in *Taylor* referred to the *Pinochet* case. While focusing on the *Pinochet* case, only those areas relevant for drawing conclusions with respect to the *Taylor* case will be addressed, i.e. the status of international courts and the distinction between so-called private and official acts with respect to prosecution of international crimes. It is not necessary to provide a detailed analysis of all aspects of the decision, but the reasoning of the judges in *Pinochet I* and *Pinochet III* well illustrates the difficulties relating to rationale of the decision.

Both theory and practice struggle with proper distinction and qualification of what exactly constitutes and distinguishes private and official acts while this distinction has a significant bearing on the application of immunity *rationae materiae*. Proper analysis and assessment of official versus private acts proved to be a problem in both the *Pinochet* and *Yerodia* cases. Equally, it is suggested that should the SCSL have had to address immunity *ratione materiae* instead of immunity *ratione personae*, the same problem could arise.

The *Pinochet* case became one of the most important precedents for law on immunities since Nuremberg.³³⁶ The facts of the case are well known. Spain requested the extradition of the former Head of State of Chile, Augusto Pinochet, on the basis of his alleged involvement in the commission of crimes including torture, hostage

336 The worldwide impact of the Pinochet case on the issue of immunities was well summarized by Orentlicher: "It took only an instant to reverse centuries of diplomatic practice and unsettle the deepest foundations of international law...For centuries, international law and the practice of states had affirmed a bedrock principle of mutual restraint among nations: courts of one state would not judge the sovereign acts of another. Now, a former Chilean head of state had been arrested by British authorities at the request of a Spanish magistrate on charges that were, at their core, about how the accused had governed Chile a quarter of a century before." In D. F. Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles', *Georgetown Law Journal* (2004), p. 1070.

taking and conspiracy to murder committed in Chile at the time when he was Head of State.³³⁷ We will start an examination of the *Pinochet* case with the reasoning of the Divisional Court and then turn to the reasoning of the House of Lords in *Pinochet I* and *Pinochet III*.

6.1.2 The Divisional Court: Where to Draw a Line Between Ordinary Versus Extraordinary Crimes?

The Divisional Court (Court) as the first instance court in *Pinochet* applied the classical reasoning that a former Head of State is not entitled to immunity for private acts but continues to enjoy functional immunity in respect of public acts performed by him as Head of State. As the Court emphasized, Pinochet was charged 'not with personally torturing or murdering victims or causing their disappearance, but with using the power of the State of which he was head to that end'.³³⁸ The Court thus found that these acts could be hardly described as 'private acts', which is certainly a correct observation. Judge Collins stated that crimes against humanity are committed in the exercise of the official functions because 'history shows that it has indeed on occasions been state policy to exterminate or oppress particular groups'.³³⁹

The Court then concluded with the finding that since these acts had to be treated as official acts; Pinochet was entitled to claim immunity *ratione materiae*. The Court was apparently not ready to approve the possibility of an exception to immunity *ratione materiae* restricted to serious international crimes.³⁴⁰

In this regard, the Court held that the argument about a special nature and seriousness of international crimes has 'some attraction', but it would be unclear 'where to draw a line'.³⁴¹ One can respectfully disagree with Court on this point. There are clear and strict criteria for act(s) to qualify as international crimes (both subjective and objective elements are established in international criminal law with

337 See e.g. C. Warbrick, D. McGoldrick, H. Fox, 'The First Pinochet Case: Immunity of a Former Head of State', 48 *International and Comparative Law Quarterly* 1 (1999), pp. 207-216; C. Warbrick, D. McGoldrick, J. C. Barker, 'The Future of Former Head of State Immunity After *Ex Parte* Pinochet', 48 *International and Comparative Law Quarterly* 4 (1999), pp. 937-949. See also C. Warbrick, D. McGoldrick, E. Denza, 'Ex Parte Pinochet: Lacuna or Leap?', 48 *International and Comparative Law Quarterly* 4 (1999), pp. 949-958.

338 *Ibid.*, para. 58.

339 *Ibid.* (Justice Collins).

340 *Ibid.*, paras. 63-65.

341 *Ibid.*, para. 63. (Chief Justice Bingham).

respect to crimes against humanity, war crimes and genocide). Certain acts are thus either qualified as international crimes and accordingly prosecuted as such or not. It is up to the Prosecutor to prove its case on the basis of the evidence he/she has. The Court then ‘only’ has to draw a line between ‘guilty’ or ‘not guilty’, unless it decides to grant immunity.

The Nuremberg Charter and Statutes of the ICTY and ICTR were recognized not to have any bearing on the proceedings before national courts as ‘these were international tribunals, established by international agreement. They did not therefore violate principle that one sovereign State will not implead another in relation to its sovereign acts.’³⁴² Judges thus unanimously upheld Pinochet’s claim and quashed the warrant.

6.1.3 The House of Lords Hearings

The case in the House of Lords had to be considered twice, as the counsels for Pinochet challenged the first decision on the basis of links of Judge Hoffmann (one of the law lords) with Amnesty International (AI), one of the interveners in the case. The first decision (*Pinochet I*)³⁴³ was thus set aside by the second decision (*Pinochet II*).³⁴⁴ A different judicial panel then gave a different final decision - *Pinochet III*.³⁴⁵ This final decision was not actually different in the outcome; Pinochet was denied immunity *ratione materiae* just as in the *Pinochet I*. However, the legal basis used and the Law Lords’ reasoning differed substantially.

Although the decision in *Pinochet I* is not binding, it contains useful legal arguments by persons of high authority. Therefore, arguments used both in *Pinochet I* and *III* are offered below on the basis of the understanding that only legal arguments in *Pinochet III* are legally binding and certainly carry more weight. The following statements by the law lords reveal how the same court was divided twice on the same issue. In order to illustrate their approach with respect to areas under discussion, the relevant statements will be quoted in their entirety.

342 *R. v. Evans, ex parte Augusto Pinochet Ugarte*, 28 October 1998, Divisional Court (Chief Justice Bingham, Justice Collins and Justice Richard), para. 68.

343 *15 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 61.

344 *16 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 2) [2000] 1 AC 119.

345 *17 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

6.1.3.1 The House of Lords Hearings: The *Pinochet* Case I

Three (out of five) judges found that serious international crimes cannot be covered by functional immunity. The core of the decision was that certain crimes under international law cannot be protected by international law as official functions, because they are at the same time condemned by all States as illegal. Furthermore, commission of some of these crimes including torture constitutes breach of *ius cogens*.³⁴⁶

Let us first start with minority views. After examining the Statutes and case law of international courts from Nuremberg up to the present time, Lord Slynn strictly separated proceedings aiming at the withdrawal of immunity to Head of States before international tribunals and courts as opposed to national courts. Lord Slynn rejected the possibility of universal jurisdiction for commission of international crimes and pointed to the fact that no State practice, general consensus or conventional support has been shown with respect to the fact that:

*all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction . . . 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.*³⁴⁷

Lord Lloyd, the other judge in the minority, added “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.”³⁴⁸ He noted that if the proceedings against Heads of State could be initiated before national courts, there would be little need for the international tribunals.

Being both in the minority, Lord Slynn and Lord Lloyd concluded that Pinochet was entitled to immunity before the House of Lords since it is a national court. Hence, while recognizing the possibility to try Heads of State for crimes under international law, only international criminal tribunals and courts were considered as proper fora for addressing these issues.

346 Cryer et al., *supra* note 13.

347 15 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 61, p. 79 (emphasis added).

348 *Ibid.*, at p. 98 (emphasis added).

The majority was of a different view and held that Pinochet was not entitled to immunity *ratione materiae* before the House of Lords. Nevertheless, all Law Lords agreed that if Pinochet was still an incumbent Head of State, he would have enjoyed immunity *ratione personae*, i.e. immunity both in respect of acts committed in an official and private capacity. Since Pinochet was no longer a Head of State, only immunity *ratione materiae* was available for him to be invoked.

For the immunity *ratione materiae* to be available, the conduct in question has to be qualified as committed in an official capacity, as opposed to immunity *ratione personae*, which is not dependent on the conduct in question being an official act. Accordingly, the legal argumentation turned to the question whether torture could be considered as an official act, giving rise to immunity *ratione materiae*.³⁴⁹

There was some support amongst the law lords in *Pinochet I* for the notion that despite the fact that Head of State can commit certain unlawful acts, serious international crimes cannot be regarded as official acts. Those law lords in the majority (Lords Steyn, Nicholls and Hoffmann) considered that torture cannot by its definition be part of the functions of a Head of State.

They held that Pinochet could claim absolute immunity only while in office (immunity *ratione personae*), but he could no longer claim immunity while out of office (immunity *ratione materiae*), since his acts could not have been regarded as official acts performed in the exercise of his functions. Lord Steyn observed 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.”³⁵⁰

Equally, 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 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.³⁵¹

349 See also the *Yerodia* case, *supra* note 28, para. 85.

350 See *supra* note 347, p. 115.

351 *Ibid.*, p. 109.

It was often claimed that after *Pinochet I*, international law would never be the same again since the majority held that the immunity applied only to those state officials who exercise *legitimate* state functions. “By no stretch of imagination”, it was said, “could widespread torture be regarded as legitimate conduct by anyone, let alone a head of State”.³⁵² That is all very well. However, one may query for what the immunity would be needed, if not for situations when the State official breaches the law?

There would be little need for immunity when the State officials are indeed exercising solely *legitimate* functions of State as suggested by some law lords and approved by some scholars.³⁵³ Therefore, the first part of the argument that certain acts are so unacceptable that they fall outside being protected by functional immunity even if executed on behalf of the State is approved. Those acts would qualify as international crimes for which individual criminal responsibility exists.

Nevertheless, the second part of the argument that torture can accordingly not fall within *legitimate* functions of Head of State is disputed for the following reasons. Torture can certainly not be regarded as legitimate function of Head of State. Yet, nor can be any other breach of law for which immunity exists in the first place. Accordingly, the Law Lords’ line of argumentation is not very convincing in this respect.

The decision of law lords in *Pinochet I* can be approved to the extent that commission of international crimes does not give a rise to functional immunity. In fact, *Pinochet I* represents a revolutionary decision in a sense that functional immunity was denied before *national* court for international crimes on the basis of general international law. But it is also claimed that Law Lords failed to acknowledge that international crimes are most often committed in official capacity. *Pinochet I* shows the reluctance to hold that torture (especially if institutionalized as a part of a State’s policy) is indeed committed in an official capacity.

Some Law Lords suggested that international crimes are not official acts or cannot be regarded as part of the functions of Head of State. It is argued that it is possible to reconcile their approach in the following way. Committing international crimes in an official capacity does not necessarily turn them into ‘official acts’ *for the purposes* of functional immunity.³⁵⁴ They represent an exception to immunity *ratione materiae*,

352 Robertson, *supra* note 250, p. 337.

353 *Ibid.*

354 Similarly, see Van Alebeek arguing that international crimes are not to be attributed to State for the functional immunity purposes since “functional immunity ends where

which is otherwise granted for all other breaches of national or international law that are committed in the name of or on behalf of State.

It is suggested that the holding of office does not metamorphose international crimes committed while in office into the official acts of state to be covered by functional immunity. Moreover, if the State is a party to international treaties such as the Torture Convention or the Genocide Convention, it cannot at the same time recognize acts condemned by these treaties as official functions attracting immunity (as confirmed by the House of Lords in *Pinochet III*).³⁵⁵ These crimes are indeed most often committed in an official capacity; however, they do not qualify as official acts *for the purposes* of immunity. They qualify as international crimes implying the individual criminal responsibility of individuals regardless their position.

In any case, the fact that the State official has acted in his official capacity does not of itself impose functional immunity,³⁵⁶ which was stressed also by De Sena, who provided one of the most comprehensive studies on the functional immunity of (foreign) State officials.³⁵⁷ As was already indicated above, the best solution would be to depart from the ‘false distinction’ between private and official acts.³⁵⁸ It is submitted that international crimes are not private, neither official acts. Yet, international crimes can be committed in an official capacity, usually by abusing that official capacity.

The emphasis should shift from ‘official’ or ‘private’ act, to a ‘criminal activity’ and its nature. It is well acknowledged that the former State official can be prosecuted for criminal activity carried out in a private capacity (e.g. ‘ordinary’ murder), as also confirmed by the *Yerodia* case. It is difficult to see then, why criminal activity carried out on a large scale (e.g. systemic and institutionalized use of torture) could not be subject to prosecution. Especially if such acts are, due to their nature and seriousness, qualified as international crimes and, as increasingly claimed, even give a rise to the exercise of a universal jurisdiction by national courts under certain circumstances.³⁵⁹

individual responsibility begins.” Van Alebeek, *supra* note 294, p. 241.

355 Compare with Article 13 of the Resolution of the 13th Committee of the *Institut Droit International* stating that although a former head of state enjoys immunity for acts committed in the course of his official duties, these do not include acts constituting international crimes, such as genocide, war crimes contrary to the Hague or Geneva Conventions and a single act of state torture contrary to the UN Convention Against Torture.

356 P. De Sena in Van Alebeek, *supra* note 294, pp. 139–140.

357 *Ibid.*

358 See Nouwen, *supra* note 98.

359 See the *Yerodia* case, Separate Opinions of Judges Higgins, Kooijmans and Buergenthal

6.1.3.2 The House of Lords Hearings: The *Pinochet* Case III

At the final hearing of this case, six (out of seven) judges confirmed that a former Head of State could be extradited for commission of torture.³⁶⁰ Each of the judges issued a separate opinion and their reasoning was not always clear.³⁶¹ As Cryer put it “[a]s a result, the judgment is one of those gems of the common law system in which, however important the decision, it is difficult to identify *ratio decidendi*.”³⁶²

In sum, the majority of the judges denied immunity *ratione materiae* on the basis of argumentation that since the Torture Convention requires the torture to be committed in the exercise of official capacity, the functional immunity cannot excuse international crimes (even if committed in an official capacity). It can also not coexist together with the granting of universal jurisdiction in relation to these acts by the Torture Convention. Otherwise, the exercise of universal jurisdiction in the context of the Torture Convention would have no practical meaning.

The Law Lords in *Pinochet III* held that Pinochet would enjoy absolute immunity whilst in office; nevertheless since he was no longer in office, his acts could be subject to scrutiny for their compliance with the Torture Convention. The decision in *Pinochet III* can be characterized by a twist of approach to the question at hand. As opposed to *Pinochet I*, where the Law Lords decided on the basis of international law in general, in *Pinochet III* the attention was turned to the treaty instrument that played a central role, i.e. the Torture Convention. Accordingly, the *ratio decidendi* of *Pinochet III* is much more specific and narrow than *Pinochet I*.³⁶³ It is indeed limited, as also claimed by the Defence in *Taylor*, to the effect of the Torture Convention on claims to immunity *ratione materiae*.³⁶⁴

at paras. 59-60 and 79-85.

360 See further C. Warbrick; D. McGoldrick; H. Fox, ‘The Pinochet Case No. 3’, *International and Comparative Law Quarterly* 48 (1999).

361 Cryer et al., *supra* note 13.

362 *Ibid.*, p. 540.

363 As a result, the law lords dramatically reduced the number of charges against Pinochet and kept only those extraditable under the Torture Convention.

364 Moreover, in *Bouzari v Iran*, it was claimed that *Pinochet III* reasoning applies only with respect to criminal proceedings. It provides no support for damages for alleged torture in civil proceedings. *Bouzari v Iran*, Ontario Superior Court, (2002), 124 IRL 428, at para. 18.

6.1.3.2.1 National versus International Courts

As regards the possibility of prosecution of Heads of State by national courts, some Law Lords were as sceptical as their colleagues in *Pinochet I*. In that respect, Lord Browne-Wilkinson reiterated the classic principle of international law that one sovereign state cannot adjudicate on the conduct of another State.³⁶⁵ Lord Goff stated that if the State intends to waive immunity in any treaty, it has do so expressly. He further referred to Watts while emphasizing that Watts does not mention accountability before national courts, but only “international accountability.”³⁶⁶

In contrast, Lord Millett took the view that national courts in fact can exercise extraterritorial jurisdiction under customary international law when crimes under international law are committed. This requires that courts of the respective State have an extraterritorial jurisdiction, which in turn depends on the constitutional arrangements including the relationship between customary international law and the jurisdiction of its criminal courts.³⁶⁷

He noted that prosecution in national courts will certainly remain important even after the establishment of a permanent international criminal tribunal. With respect to any official position held by the accused he stated that “[i]n 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.”³⁶⁸ The establishment of international criminal courts in his view does not in any way change this conclusion.

6.1.3.2.2 Private versus Official Acts

Where the Law Lords ‘parted intellectual company’ was over whether torture falls outside the characterization as an official act (because they could never be a legitimate functions: *Pinochet I*) or whether they were indeed, as the US Supreme Court in

365 *17 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147., p. 209 (emphasis added).

366 “The idea that 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.” (emphasis added). In Watts, *supra* note 239, p. 82.

367 *17 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.) p. 276.

368 *Ibid.*, p. 279.

Nelson held, “paradigm official acts”.³⁶⁹ As Robertson observed, “If Pinochet I and Pinochet III established anything, it is the unworkability in criminal law of the distinction between ‘public’ (or ‘official’) acts and ‘private’ acts - a distinction which the Court in *US v. Noriega* presciently predicted ‘may prove elusive’.”³⁷⁰

In order to fall within the ambit of the Torture Convention, the conduct in question must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or a person acting in public capacity.”³⁷¹ It is therefore suggested that for the purposes of the definition of torture in the Torture Convention, the approach of some Law Lords in *Pinochet I* of treating torture as a private act is rather unhelpful. Their approach would be hard to reconcile with the definitional criteria set in the Torture Convention, although it is admitted that Law Lords in *Pinochet I* actually did not base their argumentation by relying on the Torture Convention.

In relation to the definitional criteria of torture in the Torture Convention, Lord Browne-Wilkinson emphasized 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.”³⁷² Equally, Lord Saville considered a Head of State to be a person acting in an official capacity for the purposes of the Torture Convention and added that he would consider a Head of State “as a prime example of an official torturer.”³⁷³

In relation to international crimes, Lord Phillips was of the view that there is no established rule of international law, which would require immunity *ratione materiae* to be granted to the accused upon his demonstrating that he was acting in official capacity. While admitting that immunity *ratione materiae* protects all acts of the Head of State which were performed in the exercise of his official functions, Lord Hope emphasized that there are two exceptions recognized by the customary international law “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

369 Robertson, *supra* note 250, p. 366.

370 *Ibid.*, “It is easy to accept that Noriega’s drug trafficking while head of Panamanian government could not constitute public acts done on behalf of the Panamanian state. But compare charges against Pinochet-his alleged direction of systematic torture by army, police and secret service of his political opponents.” See *US v. Noriega*, 746 F. Supp. 1506, 1521-22 (SD Fla. 1990).

371 Article 1 of the Torture Convention.

372 See *supra* note 347, p. 218.

373 *Ibid.*, p. 266.

benefit[...]The second relates to acts the prohibition of which has acquired the status under international law of *ius cogens*.³⁷⁴

Pinochet III represents a unique approach of the majority of judges with regard to the interpretation and application of the Torture Convention. No explicit waiver of the immunity of a Head of State can be found in the Torture Convention. Equally, there is no indication that States parties to the Convention intended to abrogate immunity of its highest State representatives. Yet, this was the way of interpretation of the Torture Convention by the majority of judges.

6.2 Impact of the *Pinochet* Case in the United Kingdom, on the *Taylor* Case and Beyond

The decision of the House of Lords in *Pinochet* was complex, views of the Law Lords were divergent and their legal analysis was partly confusing. It was for this reason that both supporters and opponents of denying immunity to a former Head of State used the decision. While interpretations of this decision vary, the broader reading of the *Pinochet* case confirms the above arguments that international crimes cannot be treated as a type of official conduct, which would attract functional immunity.³⁷⁵

As for the impact of the *Pinochet* decision in the UK, the House of Lords in *Jones v. Kingdom of Saudi Arabia* have subsequently interpreted the *Pinochet* decision rather narrowly.³⁷⁶ Clearly, this does not mean that other States have to consider the *Pinochet* case as “exhaustive of international law on the matter”,³⁷⁷ which is further illustrated on decisions of other domestic courts. Decisions of (or proceedings before) domestic courts, which proceed (implicitly or sometimes explicitly) on the basis of inapplicability of functional immunity in respect of international crimes, include the *Bouterse*, *Sharon*, *Castro*, *Ferrini* and other cases.³⁷⁸ For example, in the *Bouterse* case

374 *Ibid.*, p. 243.

375 Cryer et al., *supra* note 13, p. 542. See also Ch. Chinkin, ‘Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)’, 93 *American Journal of International Law* (1999), p. 703 and S. Wirth, ‘Immunities, Related problems and Article 98 of the Rome Statute’, 12 *Criminal Law Forum* (2001), p. 429.

376 See *Jones v. Kingdom of Saudi Arabia*, *supra* note 55, paras. 19 and 79-81. See also the opinion of Lord Hoffmann, *ibid.*, para. 71.

377 Cryer, *supra* note 13, p. 542.

378 See also the statement made by the Spanish authorities with regard to the request for extradition of Pinochet: “The situation is very different, however, with respect to former heads of State. International law does not require their protection, for the same principles also applicable to the Act of State Doctrine, which does not extend to crimes

concerning the former Head of State of Suriname, the Amsterdam Court of Appeal stated that crimes against humanity are not covered by functional immunity.³⁷⁹

In order to point to other authorities, it is also worth to mention the case of *Habréé*, former President of Chad. The Republic of Senegal was mandated by the African Union to prosecute Habréé “on behalf of Africa”.³⁸⁰ In this respect, the African Union established the Committee of African Jurists, which held that, “Hissène Habréé cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly.”³⁸¹ Similarly, the IDI in its Resolution affirmed that a former Head of State (as well as a former Head of Government) “[...] may be prosecuted and tried when the acts alleged constitute a crime under international law [...]”.³⁸² In sum, majority of current State practice as well as scholarly opinions³⁸³ indicate a trend pointing in the direction of non-applicability of functional immunity for international crimes also before domestic courts.³⁸⁴

under international law. In this regard, all of contemporary international criminal law, whether expressly or implicitly but clearly, rejects defence on the grounds of official acts or based on the immunities of heads of State or similar persons.” *Auto de solicitud de extradición de Pinochet*, Madrid, 3 November 1998, available at <http://www.ua.es/up/pinochet/documentos/auto-03-11-98/auto24.htm>. For international courts, see e.g. *Prosecutor v. Blaskic*, *supra* note 276. See Cassese, *supra* note 97, pp. 870–871, referring to Israeli, French, Italian, Dutch, British, US, Polish, Spanish, and Mexican cases dealing with crimes against humanity, war crimes and genocide.

379 See the *Bouterse* case, Decision of the 5th chamber of 20 November 2000, Petitions nos. R/97/163/12 Sv and R/97/176/12 Sv. See also the decision of the Dutch Supreme Court stating that Bouterse cannot be tried *in absentia*, Judgment of 18 September 2001, no. 00749/01, CW 2323.

380 See *Decision on the Hissène Habréé* case and the African Union, Assembly of the African Union, 1-2 July 2006, Banjul, The Gambia, Assembly/AU/Dec.127(VII), para. 5 (ii), available at http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf (last visited 28 April 2011).

381 See *Report of the Committee of Eminent African Jurists on the case of Hissène Habréé, submitted to the Summit of the African Union*, para. 13 (2006), available at: http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf (last visited 28 April 2011).

382 *Supra* note 276, Article 13, paragraph 2.

383 See e.g. Cassese, *supra* note 97; Watts, *supra* note 239 or the Princeton Principles, *supra* note 10.

384 See also Immunity of State officials from foreign criminal jurisdiction, *supra* note 296, para 240 (fn 589).

However, let us come back to our scenario, in which the Defence in *Taylor* took the opportunity to try to diminish the significance of the *Pinochet* decision by arguing that the case had a restricted impact in international law and stands only as evidence of the practice of the UK in relation to the application and interpretation of the Torture Convention of 1984. Indeed, by focusing solely on the Torture Convention of 1984, the Law Lords did not approve the reasoning of *Pinochet I*, i.e. that national courts can prosecute international crimes under customary international law on the basis of universal jurisdiction. Despite the differing opinions with regard to prosecution of the high-ranking state officials before national courts, there seemed to be a clear agreement (even within the Law Lords being in minority) that the situation would be different before international courts, which is surely a relevant outcome for the purposes of the *Taylor* case.

6.3 Case Concerning the Arrest Warrant of 11 April 2000 (The *Yerodia* Case)

Some scholars have criticized the SCSL's attempt to defend its jurisdiction over Taylor in line with the judgment of the ICJ in the *Yerodia* case. However, the SCSL's reliance on that judgment is simply explained by the fact that the judgment was raised by the Defence in its submission to the SCSL as one of its arguments. The *Yerodia* case was invoked and relied upon by both the Defence and the Prosecution in their submissions.

Therefore, the SCSL had to address the legal arguments brought by the Defence while relying on the judgement in the *Yerodia* case. The way the SCSL did so is another matter, which can certainly be subject to criticism as well as the judgment and reasoning of the ICJ in the *Yerodia* case itself. The fact that the SCSL had to consider the *Yerodia* case does not mean that the SCSL had to follow the outcome of this decision.³⁸⁵ As well known, the judgement in the *Yerodia* case attracted an extensive criticism both in the legal scholarship³⁸⁶ and also in separate and dissenting opinions.³⁸⁷

385 The decisions of the ICJ are binding only for the parties to the dispute and only for the particular case. However, this does not deny the high authority of ICJ decisions and often-strong reliance on its decisions by other international courts, including the SCSL.

386 Cassese, *supra* note 100, p. 864; Wouters, *supra* note 321, pp. 257, 259–61. A. Orakhelashvili, 'Case review on Arrest Warrant', 96 *American Journal of International Law* 677 (2002).

387 See e.g. Dissenting Opinion of Judge ad Hoc Van denWyngaert, paras. 26–8; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 78 and 85. The *Yerodia* case, *supra* note 28.

Since the *Yerodia* case played an important role in the *Taylor* case, it is useful to start with a brief recollection of the ICJ relevant findings in this case. Yet, the *Yerodia* case will be dealt with only in the context of, and to the extent necessary for, drawing conclusions with regard to the *Taylor* case.

On 11 April 2000 a Belgium court issued an international arrest warrant *in absentia* against Yerodia Ndombasi. He was charged with crimes against humanity and acts constituting grave breaches of the Geneva Conventions of 1949 and their Additional Protocols of 1977. The DRC subsequently brought a case to the ICJ. The DRC disputed the legality of the circulation of an international arrest warrant by Belgium with respect to, at the time of the issuance of warrant, its incumbent Minister for Foreign Affairs, Yerodia Ndombasi. The ICJ had to examine whether Belgium had a jurisdiction under customary international law over an incumbent Minister of Foreign Affairs of another state and whether there is any exemption from this jurisdiction on the basis of immunities available to the high ranking officials.

The DRC argued that, while in office, a Minister for Foreign Affairs is entitled to absolute immunity from the criminal jurisdiction of the courts of any other state. According to the DRC, immunity has a functional purpose, i.e. to enable the official to carry out his duties without any interference. Moreover, the DRC suggested that this immunity covers all acts regardless of whether they were committed before the official took office, and also regardless of whether they could be characterized as 'official acts' or not. The DRC nevertheless accepted that:

the fact that 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.³⁸⁸

Belgium argued that despite the existence of immunities of Ministers of Foreign Affairs from jurisdiction to be exercised by the courts of another state, in case of war crimes and crimes against humanity the incumbent Ministers for Foreign Affairs cannot claim immunity.³⁸⁹

388 *Ibid.*, para. 48.

389 See, differently, V. Klingberg, '(Former) Heads of State before international(ized) criminal courts: the case of Charles Taylor before the Special Court for Sierra Leone', *German Yearbook of International Law*, vol. 46 (2003), pp. 552-556.

Majority of judges was however of a different view. At the beginning the ICJ observed 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.”³⁹⁰ The ICJ emphasized that immunities granted to e.g. Ministers for Foreign Affairs “are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.”³⁹¹

As for the argumentation and distinction made by Belgium with regard to private or official acts, the ICJ confirmed the far-reaching approach in regard to personal immunity by stating that:

[t]he 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.³⁹²

The ICJ examined, *inter alia*, decisions of national courts such as the House of Lords (UK) and the Court of Cassation (France), and stated that “the rules concerning the immunity or criminal responsibility of persons having an official capacity...do not enable it to conclude that any such exception exists in customary international law in regard to national courts.”³⁹³ The ICJ also considered the rules concerning immunity in the legal instruments creating international criminal tribunals. It found that the relevant provisions of the Nuremberg and Tokyo Charter³⁹⁴ and of the ICTY³⁹⁵, ICTR³⁹⁶ and ICC³⁹⁷ Statutes denying immunity to high-ranking officials cannot serve as the basis for denying immunity

390 The *Yerodia* case, *supra* note 28, para. 51.

391 *Ibid.*, para. 53.

392 *Ibid.*, para. 54-55.

393 *Ibid.*

394 See Charter of the International Military Tribunal at Nuremberg, Art. 7, Charter of the International Military Tribunal for the Far East, Art. 6.

395 Statute of the ICTY, Art. 7 (2).

396 Statute of the ICTR, Art. 6 (2).

397 Statute of the ICC, Art. 27.

before national courts.³⁹⁸ The ICJ therefore limited the possibility of prosecution of international crimes committed by *servicing* state officials only to international courts.

Despite the criticism in the international legal scholarship, it is suggested that the ICJ's conclusion in this respect is in line with decisions of national courts. Many other national courts have reached similar conclusions, dismissing charges against *servicing* Heads of State on the basis of immunity. State practice so far provides for upholding personal immunity of high-ranking officials before national courts, despite the attempt of some scholars to prove or suggest otherwise.³⁹⁹

Admittedly, not all of the ICJ's statements on the matter were very well reasoned or beyond dispute.⁴⁰⁰ The manner in which the ICJ refers to 'firmly established' rules of customary international law without referring to any examples of State practice or academic commentary, suggests that immunity was assumed rather than established.⁴⁰¹ In sum, the ICJ held that under customary international law a Foreign Minister (and by extension a Head of State) enjoys absolute immunity from "any act of authority of another State" regardless of the gravity of the charges involved, for as long as he or she remains in office.⁴⁰²

The ICJ has in many respects considerably expanded the protection afforded by international law to Foreign Ministers. It has given priority to the need for foreign relations to be conducted unimpaired. The ICJ concluded, by thirteen votes to three, that the issue and circulation of an international arrest warrant: "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."⁴⁰³

398 The *Yerodia* case, *supra* note 28, para. 58.

399 See e.g. Frulli, *supra* note 66.

400 These statements and findings are however not necessary to be examined for the purposes of this work.

401 As Sands has summarized: "The ICJ's judgment is not accompanied by an identification or assessment of the examples which were examined, the process of deduction is not explained. Without knowing what the ICJ looked at, or what it distinguished or applied, it is not possible to form a view as to the basis or merits of the Court's reasoning or conclusion, and in particular its assumption (by way of starting point) that a rule of immunity exists. The overall conclusion, which may be correct, but we cannot know on the basis of what is presented, is more of an *ex cathedra* declaration than a reasoned judgment", in Sands, *supra* note 240, p.49.

402 *Ibid.*

403 The *Yerodia* case, para. 78 (2).

Three votes against the majority decision came from Judges Higgins, Kooijmans and Buergenthal in a joint Separate Opinion. The concurring minority considered some of the issues more deeply and indeed differently from the majority. Their findings well illustrate the tension that the SCSL was also faced with:

One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights...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.⁴⁰⁴

This statement can certainly be approved, but it remains to be seen how far, how fast and which direction the State practice evolves. Moreover, it is suggested that international criminal tribunals have a different “part to play” than national courts. This was emphasized in the Separate Opinion of Judge Guillaume. Judge Guillaume referred to Belgium’s citation of the development of international criminal courts and opined that “this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts.”⁴⁰⁵

Importantly for our purposes, in the majority decision the judges also pronounced on situations when immunities might be actually irrelevant:

- (1) ‘First, such persons enjoy no criminal immunity under international law in their 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 before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established

404 *Ibid.*, para. 51.

405 *Ibid.*, Separate Opinion of Judge Guillaume, para. 11 (emphasis added).

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.⁴⁰⁶

Let us now consider these assessments:

(1) It is suggested that the first scenario is a rather theoretical option, especially considering that international crimes are mostly committed in countries with oppressive regimes. Lord Brown-Wilkinson supports this view by the following reasoning:

the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed.⁴⁰⁷

(2) The second scenario is possible but exceptional. For example, the Philippines government waived the immunity of the former President Marcos. Still, it is difficult to see many circumstances, if any, in which a state will waive immunity for a serving Foreign Minister.

(3) In the third scenario, the ICJ is referring to the possibility to prosecute a *former* Foreign Minister of another state for acts committed in *private capacity*. However, the ICJ provides no assistance as to what would or would not be a private act. Would the court treat international crimes as private acts? If so, it would not reflect the reality in which international crimes are usually committed.⁴⁰⁸

When commenting on the decision, Cassese criticized that the ICJ did not refer “to the customary rule lifting functional immunities for State officials accused of international crimes”.⁴⁰⁹ Similarly, Cryer noted that the ICJ failed to mention this

406 *Ibid.*, para. 61.

407 The *Pinochet* case III, Lord Brown-Wilkinson p. 199.

408 It is also important to refer to the fact that DRC explicitly admitted that even if international crimes are committed by state official while in office, there still exists individual criminal responsibility for such acts. The DRC stated that there was no disagreement with Belgium on this point, *Mémoire* of 15 May 2001, at 39, para. 60, quoted from Cassese, *supra* note 97, p. 871.

409 Cassese, *supra* note 97, p. 870. Similarly, Gaeta, *supra* note 331, pp. 979-983. See also Koller, *supra* note 256 and Ch. Wickremasinghe, ‘Arrest Warrant of 11 April 2000’, 52

exception, according to which “former officials can also be tried for any acts which constitute serious international crimes, whether in a ‘private capacity’ or not...The omission was also puzzling in that both parties to the dispute-DRC and Belgium-agreed that functional immunity is not a bar to prosecution for international crime.”⁴¹⁰ Yet, the ICJ perhaps did not address that issue directly or in more detail simply because the case concerned personal immunity of incumbent Minister, not functional immunity of former Minister. Moreover, the concerned paragraph was merely *obiter dicta*, therefore referring to possible examples rather than representing a closed list.⁴¹¹

Akande considers the failure of the ICJ to specifically refer to immunities of former officials to be a significant omission, but offers a concise summary of the possible views taken by the ICJ:

First, the Court may have taken the view that international crimes are to be regarded as private acts and that, in line with the third circumstance in the Court’s list, there is therefore no immunity with respect to such acts. However, as argued above, the categorization of international crimes as always being private acts is wrong. Secondly, the Court may have taken the view that international crimes committed by state officials are official acts and may be regarded as suggesting that immunity *ratione materiae* continues to exist in proceedings before foreign national courts relating to those crimes. *This would be contrary to extensive post-World War II practice...*A further possibility, however, is that the Court’s list is non-exhaustive and does not preclude the possibility that there is a rule removing immunity *ratione materiae* in relation to prosecutions for acts amounting to international crimes.⁴¹²

Indeed, it seems unlikely that the ICJ intended to prevent possible prosecutions of international crimes by trying to label them as official acts being covered by functional immunity. Nevertheless, by failing to provide much needed explanation and guidance in this area, the ICJ prolongs the controversy over the distinction between private and official acts.

(4) The fourth scenario is crucial for our purposes. Accordingly, it will be dealt with separately and extensively in Chapter 6.4 in order to examine whether the SCSL could actually do what Belgium was not allowed to do under current international law on immunities.⁴¹³

International and Comparative Law Quarterly 775 (2003).

410 Cryer et al., *supra* note 13, p. 544.

411 *Ibid.*

412 Akande, *supra* note 51, p. 839 (emphasis added).

413 Nollkaemper and Romano, *supra* note 12.

To conclude, whatever the various views on the outcome of the *Pinochet* and *Yerodia* judgments may be, both of them undeniably confirm that serving high-ranking officials cannot claim immunity before *certain* international criminal courts and tribunals. Yet, both cases were concerned with immunities before national courts. Their reasoning thus does not provide us with a sufficient basis in order to draw conclusions with respect to immunities claimed before international courts and, in particular, before the SCSL in the *Taylor* case.

In order to consider this matter further, the next Chapter provides an overview of international courts and tribunals and their respective legal basis, including those courts mentioned by the ICJ in the *Yerodia* case (the fourth scenario).⁴¹⁴ International courts and tribunals are introduced together with the relevant provisions of their Statutes relating to immunities, from which some conclusions for the *Taylor* case may be drawn. Other legal instruments, judicial decisions and scholarly opinions will serve to develop the analysis.

6.4 The History of International Criminal Prosecutions: Practice Before International Tribunals

6.4.1 Practice Before Nuremberg

It has been asserted that there is no entitlement to rely on immunities before international tribunals and courts.⁴¹⁵ The introductory part of this work however suggested that this proposition is oversimplification of an issue. Let us now turn to examine the consistency of this practice with respect to immunities before such tribunals and courts.

The first effort to try a former Head of State occurred during the peace negotiations after the First World War. The Commission on Responsibility of the Authors of the War and Enforcement of Penalties (Commission) in its recommendations to prosecute Kaiser William II stated: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States,

414 "Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention". The *Yerodia* case, *supra* note 28, para 61.

415 Sands, *supra* note 142.

who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution...”⁴¹⁶

The US representative at the Commission expressed disagreement with these recommendations and did not approve the possibility to charge persons of offenses “against the laws of humanity.”⁴¹⁷ Moreover, he held that there are no precedents to be found in the modern practice of nations for subjecting a Head of State to such criminal proceedings that could, according to him, result into a degree of responsibility unknown to municipal or international law.⁴¹⁸ As a result of complicated negotiations, charges against the German emperor Kaiser William II under the Treaty of Versailles (1919) were framed as “a supreme offence against international morality and the sanctity of treaties”, instead of breaches of international law.⁴¹⁹

This first attempt to punish a former Head of State failed due to refusal of the Government of Netherlands to surrender German ex-emperor. The idea of providing for the establishment of a first special Tribunal expressed in Article 227 of the Treaty of Versailles was thus not fulfilled at that time. Nevertheless, this first attempt to punish a Head of State was an important step ahead in the area of responsibility of high-

416 *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference* (29 March 1919), reprinted in *14 American Journal of International Law* 95 (1920), p. 117, quoting from M. A. Summers, ‘Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to The Statute of The International Criminal Court’, *Brookland Journal of International Law* 31 (2) (2006), p. 482.

417 This can be viewed as an emergence of the category ‘crimes against humanity’ as later confirmed by the Nuremberg Tribunal.

418 S. S. Gregory, ‘Criminal Responsibility of Sovereigns for Wilful Violations of the Laws of War’, *6 Virginia Law Review* 400, p. 414 (1920), available at <https://archive.org/details/jstor-1064270> (last visited 26 November 2011).

419 Article 227 of Treaty of Versailles explicitly provided 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. 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.” In *Treaty of Peace with Germany (Treaty of Versailles)*, 28 June 1919, 2 Bevans 43, quoted from Summers, *supra* note 416, p. 482.

ranking state officials. Since then, the notion of individual criminal responsibility for serious crimes before international courts started to emerge.

6.4.2 The Nuremberg International Military Tribunal

Time passed. Yet another war initiated by Germany broke out. And yet another attempt to prosecute those responsible was made. The next opportunity to ‘test’ the existence of individual criminal responsibility of high-ranking state officials for international crimes arose after the WWII. The Nuremberg and Tokyo Tribunals were established.

These tribunals were the first ever courts of law tasked with the difficult aim “to overcome the confusion of many tongues and the conflicting concepts of just procedure among divers systems of law, so as to reach a common judgment.”⁴²⁰ The IMT for the Far East was established by the military order⁴²¹ as opposed to the IMT at Nuremberg, which was established by treaty.⁴²²

The Nuremberg Charter explicitly confirmed the principle that no accused was entitled to claim his official position for purposes of relieving him of individual criminal responsibility before those Tribunals. Article 7 of the Charter expressly declared 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.”⁴²³

Article 6 of the Tokyo Charter, similarly to Article 7 of the Nuremberg Charter, provided that:

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 but

420 *Opening Statement before the International Military Tribunal of Justice Robert H. Jackson*, in: *II Trial of the Major War Criminals Before the International Military Tribunal 98-155 (Nuremberg: IMT, 1947) (‘the Blue Set’)* available at <http://www.roberthjackson.org/Man/theman2-7-8-1/> (last visited 26 May 2012).

421 Established by command of General MacArthur, the Supreme Commander of Allied Forces in the South Pacific.

422 See e.g. Lauterpacht, who explained that the tribunal was: “the joint exercise, by the four states which established the tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law.” In H. Lauterpacht (ed.), *Oppenheim’s International Law*, vol. II (London: Longmans, 1952), pp. 580–581.

423 *United Nations Treaty Series*, vol.82, p. 279, London (8 August 1945), quoted from Summers, *supra* note 416.

such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.⁴²⁴

The Nuremberg Charter was an expression of the fact “that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”⁴²⁵ Even though the IMT admitted that international law provides under certain circumstances for protection of State representatives, it was at the same time emphasized that this does not apply to acts declared as criminal by international law.⁴²⁶ It was held that the official position in such cases should in no way be serving as a shelter against punishment.⁴²⁷ The IMT repeated the same idea in the following part of its findings: “He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”⁴²⁸

While the Nuremberg Charter was an outcome of the practical effort of four victorious states,⁴²⁹ standards set up in the Nuremberg Charter (Charter) did not reflect only the views of signatories. Seventeen other States including Belgium, The Netherlands,

424 Charter of the International Military Tribunal for the Far East, proclaimed at Tokyo, 19 January 1946, T.I.A.S. 1589, quoted from Summers, *supra* note 416.

425 Trial of the Major War Criminals before the International Military Tribunal, vol. I. (1947), p. 223. Text of the Nürnberg Principles Adopted by the International Law Commission, Extract from the *Yearbook of the International Law Commission* (1950), Vol. II, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_l2.pdf. (last visited 10 December 2011).

426 *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, The Blue Series (the official record of the trial of the major civilian and military leaders of Nazi Germany), p. 223, available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html ((last visited 10 December 2011).

427 *Ibid.*

428 *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), pp. 41-42. Quoted from ‘Universal jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings’, available at <http://www.amnesty.org/en/library/asset/IOR53/001/2002/en/dom-IOR530012002en.html> (last visited 25 October 2008).

429 Following the decision of the Yalta conference, President Truman requested representatives of the U.S. to propose an International Agreement. This proposal was submitted during the San Francisco Conference to Foreign Ministers of the United Kingdom, the Soviet Union, and the Provisional Government of France. This proposal has become London agreement with the Charter forming an integral part of this agreement.

Denmark, Norway, Czechoslovakia, Luxembourg, Poland, Greece, Yugoslavia, Ethiopia, Australia, Haiti, Honduras, Panama, New Zealand, Venezuela, and India supported the content of the Charter. The Charter and its principles therefore represented the will of twenty-one States and the shared sense of justice of most of the world.

At the time the acts were committed, there was no judicial precedent for the Charter and for principles it incorporated. At the same time, the broad acceptance of the Charter by the action of the above mentioned States was perceived as an agreement by the majority of the nations to adapt settled principles to new situations. According to Justice Jackson, the Charter was not *ex post facto* legislation but recognition and expression of already existing international law.⁴³⁰ Nonetheless, it can be also said that international law has been partly revisited in order to meet a change in circumstances.

Justice Jackson emphasized in his Report to the US president an incorporation of Charter principles into a judicial precedent. While quoting Justice Cardozo's comment that: "The power of the precedent is the power of the beaten path", Justice Jackson went on to say that:

one of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction.⁴³¹

In December 1946, the UN General Assembly adopted Resolution 95(1), affirming the *Principles of International law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal*.⁴³² In addition, the UN General Assembly

430 See e.g. citation of the UK Supreme Court of Judicature: "The recognition that individuals may be held criminally responsible for offences against international law goes back at least to principles stated in the Charter of the International Military Tribunal of Nuremberg...". Quoted from *R. G. Jones v The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor* (28 October 2004), available at <http://www.hrothgar.co.uk/YAWS/refs/04a1394.htm> (last visited 28 November 2008).

431 *Report to the President by Justice Jackson*, International Conference on Military Trials: London, 1945 (7 October 1946), available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack63.htm> (last visited 17 November 2008).

432 G.A. Resolution 95(I), 11 December 1946.

by Resolution 177(II)⁴³³ directed the ILC to “treat as a matter of primary importance plans for their formulation.”⁴³⁴

The ILC in 1950 indeed formulated these principles in its Report. The key provision for our purposes, Principle III, which is actually based on Article 7 of the Nuremberg Charter, declares that: “The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law.”⁴³⁵

The Principle III was also supported by the General Assembly’s acceptance of the ILC Report. The ILC further reaffirmed the Principle III, for the first time in 1954, in its Article 3 of the Draft Code of Offences against the Peace and Security of Mankind (Draft Code): “The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.”⁴³⁶

For the second time, in 1991, Article 13 of the Draft Code similarly provided: “The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.”⁴³⁷ In 1996, Article 7 of the Draft Code basically reiterated the same.⁴³⁸

433 G.A. Resolution 177(II), ‘Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal’, 21 November 1947.

434 *Ibid.*

435 Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *Yearbook of International Law Commission*, 1950, vol. II. This principle was quoted e.g. by Lord Hutton in *Pinochet III*, p. 258.

436 *Draft Code of Offences against the Peace and Security of Mankind* (28 July 1954), International Law Commission, 9 U.N. G.A.O.R. (Supp. No. 9) p. 11, U.N. Doc. A/2693 (1954).

437 *Report on the Draft Code of Crimes against the Peace and Security of Mankind*, (19 July 1991), International Law Commission, 46 U.N. G.A.O.R. (Supp. No. 10) p. 238, U.N. Doc. A/46/10 (1991).

438 Article 7 reads: “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.” *Report on the Draft Code of Crimes against the Peace and Security of Mankind* (6 May - 26 July 1996), International Law Commission, 51 U.N. G.A.O.R. (Supp. No. 22), U.N. Doc. A/51/22 (1996).

Accordingly, all these steps led to the recognition that the Nuremberg principles are nowadays firmly established in international law.⁴³⁹ Yet, what did these principles *exactly* establish? What is the real meaning of Article 7? Does Article 7 of the Nuremberg Charter actually remove personal immunity? Arguably, the content of the Article 7 relates “only” to the fact that a person who committed international crimes can be held responsible even if acting in an official capacity. In other words, it can be argued that there is no immunity *ratione materiae* for such crimes.⁴⁴⁰

6.4.3 After Nuremberg

We will now proceed to assess further developments in the area of jurisdictional immunities before international courts. These developments will then be compared with the approach taken by the SCSL in the *Taylor* case. The examination of relevant practice of other international tribunals starts with the constitutive instruments of those tribunals, i.e. their Statutes. The Statutes as the most important constitutive instruments determine the scope of legitimate action exercised by tribunals since they govern jurisdiction and functioning of the tribunals as such. Therefore, the below analysis is helpful in order to assess the correctness of the SCSL approach in terms of a larger theoretical and practical framework.

6.4.3.1 *Ad hoc* International Criminal Tribunals

Almost a half century after the Nuremberg and Tokyo trials, two *ad hoc* international criminal tribunals were established. Both the ICTY and ICTR were established pursuant to Security Council resolutions under the Chapter VII of the UN Charter.

The provision relevant for our purposes is the Article 7(2) of the Statute, which states 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

439 See the decision of the Supreme Court of Israel in the *Eichmann* case, where it held that Article 7 of the Charter of the IMT at Nuremberg ‘reflect[s] a rule of customary international law’, in Cassese, *supra* note 100. See also King stating that: “Number of the Nuremberg principles have been incorporated into the army fields manuals of the major political powers. National attitudes have been influenced and altered constructively by the Nuremberg proceedings and certainly have bearings on subsequent state practice in this field.” In H., T., King, ‘The Limitations of Sovereignty from Nuremberg to Sarajevo’, 20 *Canadian-U.S. Law Journal* 173 (1994), p. 173.

440 See also the *Yerodia* case, para. 60.

criminal responsibility nor mitigate punishment.”⁴⁴¹ The Article 6(2) of the Statute of the ICTR is taken verbatim from the Article 7(2) of the ICTY Statute.

The ICTY in the *Blaskic* case confirmed that there are some exceptions to the rule of general international law based on sovereign equality of States (*par in parem non habet imperium*), which otherwise provides for immunity of high-ranking state officials.⁴⁴² On the one hand, acts committed in official capacity are usually attributed solely to the State, so the individual could not be held responsible for these acts. On the other hand, there are norms of international criminal law, which prohibit genocide, crimes against humanity and war crimes. These norms provide, according to the ICTY, for exception to the rule based on sovereign equality, i.e. these acts attract individual criminal responsibility.⁴⁴³ The ICTY in the *Blaskic* case held that “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.”⁴⁴⁴

But again, same question as with respect to the Article 7 of the Nuremberg Charter can be raised. What kind of immunity does Article 7(2) of the ICTY Statute address? Article 7(2) of the ICTY Statute is apparently similar to the wording of the Nuremberg Charter. It arguably relates only to the fact that the accused cannot claim its official position as a substantial defence. Therefore, it can be argued that there is indeed criminal responsibility for such acts (Article 7(2) of the ICTY Statute

441 Trial Chambers of the ICTY have held that the Article 7(2) of the Statute of the ICTY ‘reflect[s] a rule of customary international law’, in cases of *Karadzic* and others, *Furundzija*, and *Slobodan Milosevic*. See *Prosecutor v. Karadzic*, 16 May 1995, para. 24; *Prosecutor v. Furundzija*, 10 December 1998, para. 140; *Prosecutor v. Milosevic*, 8 November 2001, para 28.

442 *Prosecutor v. Blaskic*, Case No. IT-95-14/1, Subpoena, 29 October 1997, p. 710.

443 See the ICJ observation in the *Yerodia* case: “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”, *supra* note 28, para. 7.

444 *Blaskic*, *supra* note 442 (emphasis added). See also the *Karadzic* case, where the ICTY stated: “According to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals”, para. 17. The ICTY noted further that: “any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid under international law”, *Prosecutor v. Radovan Karadzic*, Case No. IT-95-5/18-PT), Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, para. 25.

removes functional immunity which cannot coexist with this responsibility), however for so long as the Head of State is in power, there is a procedural bar to the exercise of jurisdiction over these acts (Article 7(2) of the ICTY Statute preserves personal immunity). For example Cassese argued that the indictment of Milosevic was not supported by the letter of the ICTY Statute.⁴⁴⁵ Admittedly, this is not the only view.

For example Gaeta argues that “...the Statutes of the two ad hoc Tribunals provide for a derogation from the legal regulation of *personal immunities contained in customary international law*.”⁴⁴⁶ While she admits that these Statutes do not envisage any such derogation explicitly, all UN member States are obliged to cooperate with the ICTY on the basis of the Chapter VII powers. By virtue of Article 103 of the UN Charter, these obligations take precedence over customary and treaty obligations relating to personal immunity.⁴⁴⁷ In this respect, she held that, “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.”⁴⁴⁸ Some other scholars, such as Koller, emphasized the fact that no State objected to the indictment and prosecution of Milosevic, which therefore “seems to indicate that the current interpretation of the ICTY Statute removes any procedural immunity as well.”⁴⁴⁹

In the *Milosevic* case, it was assumed that the Security Council Resolutions had removed any immunity, but the ICTY actually never pronounced on immunity of serving Head of State.⁴⁵⁰ If the ICTY would have to do so, it would have to interpret Article 7(2) as removing also personal immunity. Moreover, the ICTY would have to either find that such an interpretation “would be compatible with customary international law, like the rules on criminal responsibility, or acknowledge that it is a deviation from customary international law, but authorized because of its Chapter VII legal nature.”⁴⁵¹

While the ICTY never decided upon the exact scope of Article 7(2), it nevertheless confirmed the general validity of the Article and implicitly interpreted Article 7(2)

445 See Cassese, *supra* note 97, p. 866.

446 Gaeta, *supra* note 331, p. 989.

447 *Ibid.*

448 *Ibid.* See also Cryer et al., *supra* note 13, pp. 552-554.

449 Koller, *supra* note 256, p. 33.

450 *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001.

451 Nouwen, *supra* note 98, p. 665.

as not only the attribution of criminal responsibility, but also referring to immunity *ratione personae*.⁴⁵² Even if such a broad interpretation is accepted, the ICTY could arguably adopt a rather flexible interpretation of its Statute with Chapter VII backing. It is well known that when the Security Council takes measures under Chapter VII it deems necessary for the maintenance of international peace and security, it can affect the rights of all member states, even against their will or without their consent.⁴⁵³

6.4.3.2 The International Criminal Court

As opposed to the two *ad hoc* tribunals that were established by the Security Council Resolutions, the ICC was established by the Rome Statute, which is multilateral treaty. Article 27 of the Rome Statute, entitled 'Irrelevance of official capacity', 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.

If compared with the Nuremberg Charter and the ICTY and ICTR provisions, it is obvious that Article 27 is the most far-reaching and has a considerable impact on international rules on personal immunities. The Rome Statute is innovative as it added to the criminal responsibility in paragraph 1 of Article 27, a paragraph 2 that explicitly denies procedural immunity. It thus represents a clear derogation from customary international law by complete removal of both immunities.⁴⁵⁴

452 *Ibid.*

453 D. Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?', *Oxford Transitional Justice Research Working Paper Series* (30 July 2008), available at <http://www.csls.ox.ac.uk/documents/Akande.pdf> (last visited 18 April 2009). For an argument that any derogation from existing customary international law by the UN Security Council has to be explicit, see M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative & International Law*, 20:1 (2009), p. 97.

454 Article 27 of the ICC Statute was also mentioned by the ICTY in the *Karadzic* case. See *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008.

However, this derogation operates 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.⁴⁵⁵

Article 27 is only effective regarding Heads of States that are parties to the Statute, while:

non-parties remain entitled to the immunities that they would possess under customary international law. This is because the immunity is a right of the State and not that of the individual. Other States cannot remove that immunity or affect the right of that non-party by a treaty to which the State possessing the immunity is not a party.⁴⁵⁶

This observation has important implications for the SCSL and its powers to affect rights of third parties, as we shall see in Chapters 7 and 8.⁴⁵⁷ In sum, the Nuremberg Principles, the relevant Articles in the Statutes of the ICTY and ICTR, and Article 27 (1) of the Rome Statute do not explicitly address the issue of personal immunity. Yet, the ICTY and ICTR can benefit from the Chapter VII powers and the ICC has Article 27 (2). Where does the SCSL Statute stand in relation to personal immunities?

⁴⁵⁵ Gaeta, *supra* note 331 (emphasis added). Compare with the recent decision of the ICC Pre-Trial Chamber in the *Al Bashir* case. This decision was subject to much criticism. For example, Akande stated that: “The biggest weakness in the Pre-Trial Chambers decision is that it fails to explain why Art. 98 is there at all. If under international law, there can be no immunities when an international court wants someone from prosecution, why did the parties to the Rome Statute insert Art. 98? The Chamber even goes on to say that it “is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by states which forms an integral part of those prosecutions.” (para. 44) In short national authorities may never raise the immunity of a State as an obstacle to cooperation with the ICC. Article 98 has been made redundant by the Pre-Trial Chamber’s decision! This is contrary to a basic principle of treaty interpretation.” Akande, *supra* note 37.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ See also Article 13 lit. b or 15^{ter} of the Rome Statute.

7 The Taylor Case: Submissions of Parties and the SCSL Decision with Respect to Immunities

The first three possibilities mentioned by the ICJ in the *Yerodia* case with respect to the irrelevance of immunities evidently do not apply to Taylor's case.⁴⁵⁸ However, in the fourth scenario, the ICJ indicated its views on the possibility of prosecuting crimes under international law before 'certain international criminal court'. As regards the phrase 'certain international criminal court', the ICJ explicitly referred to all the international courts and tribunals described above. Can the SCSL be also qualified as such an international criminal court for the purposes of denying immunity to Taylor?

The arguments of the parties and of the SCSL were already outlined in Chapter 2. Therefore, they will be only briefly recalled for the clarity of the analysis that will follow. The Defence analysed the *Yerodia* case and stated that the immunity is more a matter of procedure than substance with procedural immunity subsisting for as long as the official is in the office. According to the Defence, the indictment against Taylor was invalid due to his personal immunity from criminal prosecution. The principal argument of the Defence was that Taylor enjoyed absolute immunity from criminal prosecution.

The Defence argued that the principles enunciated by the ICJ in the *Yerodia* case establish that only an international court may indict a serving Head of State, while the SCSL does not meet the criteria of an international court. The Defence emphasized that exceptions from diplomatic immunities can only derive from other rules of international law such as Security Council Resolutions under Chapter VII of

458 See the *Yerodia* case, para 61: "(1) First, such persons enjoy no criminal immunity under international law in their 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."

the UN Charter. Since the SCSL does not have Chapter VII powers; judicial orders from the SCSL have therefore the quality of judicial orders from a national court.

The Defence concluded that “the emphatic nature of the decision and the size of the majority endorsing it send a clear signal that the main judicial organ of the United Nations does not wish to subject the stability of international relations to disturbances originating from the decentralised judicial investigations of crimes, no matter how object they be.”⁴⁵⁹

According to the Prosecution the *Yerodia* case concerned “the immunities of an incumbent Head of State from the jurisdiction of the Courts of another state which is not the case here”.⁴⁶⁰ The Prosecution maintained that the SCSL is such an example of international criminal tribunal for which customary international law permits to indict a serving Head of State.

The lack of Chapter VII powers was not viewed by the Prosecution as an obstacle. The Prosecution argued that the ICC equally lacks Chapter VII powers, yet it denies immunity to Heads of States in respect of international crimes. The Prosecution concluded that in the *Yerodia* case, the ICJ enumerated the number of circumstances in which a Minister of Foreign Affairs could be prosecuted for international crimes, including international criminal courts where they have the jurisdiction. In the Prosecution’s view, the SCSL is such an international criminal court and Article 6(2) of the Statute clearly envisages that the SCSL has the power to try a Head of State.

The SCSL started its examination by identifying and citing the relevant provisions of the IMT Charter, the ILC *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* and relevant provisions of the Statutes of the ICTY, the ICTR and of the ICC. Based on these precedents, the SCSL concluded that “[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity”.⁴⁶¹

The SCSL then addressed the *Yerodia* case and noted that the ICJ confirmed personal immunity of incumbent Ministers for Foreign Affairs before national courts. At the same time, the SCSL interpreted the ICJ’s reasoning in terms of confirming the irrelevance of immunities in relation to ‘certain international criminal courts’. The

459 *Prosecutor v. Taylor*, para. 15.

460 *Ibid.*, para. 9 (d).

461 *Ibid.*, para. 49.

SCSL justified a different approach on the basis of distinction between international and national courts by stating that, “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.”⁴⁶²

It further stated that it is in any case an established rule of international law, which confirms the irrelevance of immunities before international criminal courts, and that Article 6(2) of its Statute does not violate any *jus cogens* norms. On the basis of the above arguments, the SCSL held that there is no bar to the jurisdiction of the SCSL in relation to Taylor’s personal immunity. Finally, the SCSL concluded that since Taylor ceased to be a Head of State prior to this decision, “[t]he immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant”.⁴⁶³

The findings of the SCSL in line with the *Yerodia* case are hardly surprising. It was in the very interest of the SCSL to define itself as an international criminal court with all ‘the belongings’ necessary for denying the immunity. Were these findings actually correct?

7.1 Jurisdiction As a Precondition For Withdrawal of Immunity

Any immunity analysis is necessarily interconnected with establishing the jurisdiction of that particular judicial body in the first place. Logically, the question of jurisdiction must be decided first before considering the availability of any immunity. In other words, jurisdiction precedes immunity.

The Statute of the SCSL provides the basis for jurisdiction in the Article 1 that states:

The Special Court shall . . . 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.

Originally, the previous version of the Security Council Resolution drafted by the US contained a phrase that restricted jurisdiction only to ‘senior Sierra

462 *Ibid.*, para 51.

463 *Ibid.*, para 59.

Leone nationals'; this was later changed to encompass 'those who bear the greatest responsibility'. Moreover, Taylor was accused of crimes committed within Sierra Leone rather than elsewhere.⁴⁶⁴ The SCSL primarily exercises jurisdiction over relevant crimes committed on the territory of Sierra Leone regardless of whether these crimes were committed by nationals or non-nationals. Accordingly, Charles Taylor can fit both in the category of 'those who bear the greatest responsibility' as well as in the category of crimes 'committed in the territory of Sierra Leone'.

Accordingly, the jurisdiction of the SCSL was clearly established, unlike in the *Yerodia* case, where the ICJ did not actually properly examine the jurisdiction of the Belgian court over Yerodia, but rather simply assumed. In this respect, there was no controversy. To conclude, despite the fact that the SCSL did not examine whether it has a jurisdiction in order to proceed with addressing any exemption from such jurisdiction, its jurisdiction was not objectionable and was not actually disputed by the Defence counsel. As Akande has noted:

Although Liberia has instituted proceedings before the International Court of Justice (ICJ), arguing that the indictment and arrest warrant issued against its Head of State do not respect the immunity that international law confers on heads of states, neither Liberia nor any other state appears to have argued that Sierra Leone is not able to delegate its criminal jurisdiction to an international court or that the Court is not entitled to exercise Sierra Leone's territorial jurisdiction over foreign nationals.⁴⁶⁵

However, the possibility to exercise territorial jurisdiction over foreign nationals is one thing, it is quite another to assert the jurisdiction over foreign national who is the serving Head of State. Chapter 7.2 therefore turns to the SCSL's reasoning relating to immunities and subjects the *Decision on Immunity from Jurisdiction* to a critical analysis.

464 The *Yerodia* case, *supra* note 28, Dissenting Opinion of Judge Guillaume, para. 4: "The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental"."

465 D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice* 1 (2003), p. 631.

7.2 Analysis of the *Decision on Immunity from Jurisdiction: Addressing Immunities*

It is well known that the decisions of the ICJ are binding only for the concrete case and only between the parties to the dispute. Still, the ICJ's decision in the *Yerodia* is relevant to other cases relating to immunities. Indeed, as Piotrowicz put it "the reality is that whatever it says, whether in the operative part of the judgment or not, is going to be scrutinized and used to support claims about the state of law."⁴⁶⁶ That is exactly what happened in the *Taylor* case.⁴⁶⁷

As illustrated above, the ICJ's fourth scenario in the *Yerodia* case was used by both parties as well as by the SCSL. The Defence used it in order to demonstrate that the SCSL is not an international court and therefore not entitled to deny immunity to a serving Head of State. The Prosecution used it to prove that the SCSL is indeed a 'certain international criminal court' entitled to withdraw immunity from a serving Head of State. The SCSL approved the Prosecution's arguments in this respect. Was that a correct conclusion?

It is submitted that the immunity from jurisdiction may be claimed not only before national courts, but also before international courts, depending on the nature and extent of powers and attributes each court possesses. This possibility was entirely excluded by the SCSL, which understandably rather adopted the argumentation of *amicus curiae* that, "in respect of the jurisdictional immunities of serving heads of state both 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, practice has been consistent, in that no serving head of state has been recognized as being entitled to rely on jurisdictional immunities."⁴⁶⁸

This is all well, but to which consistent practice was the *amicus curiae* referring to? As indicated in Chapter 1, Taylor is only the second in history behind Slobodan Milosevic, and the first African Head of State to be indicted for crimes under international law at the international level. Furthermore, Taylor is the first Head

466 Piotrowicz, *supra* note 257, p. 291.

467 It is of course important to note that the facts of the *Yerodia* case differ in many respects significantly in comparison with the *Taylor* case. The *Yerodia* case dealt with immunity of incumbent Minister for Foreign Affairs before national courts as opposed to immunity of incumbent Head of State before international court. The ICJ's primarily focus was on the practice before national courts.

468 Sands, *supra* note 142.

of State to be also convicted of crimes under international law since Karl Dönitz's conviction at the Nuremberg Trials following the WWII. This 'consistent' practice is thus supported by example of an international court that actually never pronounced on the immunity of a *servant* Head of State, i.e. the ICTY with respect to indicting the President of the Federal Republic of Yugoslavia, Slobodan Milosevic.⁴⁶⁹

7.2.1 Significance of the Phrase 'Involvement of the International Community'

The central part of the SCSL's decision for the purposes of denying the immunity to Taylor was the distinction between international and national courts. In his respect, the SCSL relied on 'the involvement of a whole international community' in the establishment of the SCSL in order to justify its categorisation as 'certain international criminal tribunal'. The SCSL emphasized that it derives its mandate from the international community and therefore the principle of immunity based on the sovereign equality of States has no relevance before international criminal courts.

After establishing its international legal basis, the SCSL proceeded to emphasize the role of international community also in the context of the Agreement and its binding effects for all UN member States. The SCSL's argued that the Agreement is actually an expression of the will of the international community, because in maintaining the international peace and security, the UN acts on behalf of all member states.⁴⁷⁰

The issue of the Agreement and its binding effects for third parties was dealt with extensively in Chapter 4. Hence, it suffices to repeat that the UN possesses a separate legal personality. It is then rather disputable to assert, as the SCSL did, that simply by virtue of the fact that States are members of the UN, they are therefore parties to the Agreement and accordingly are bound by its provisions. As a general matter, member States are not bound by treaties concluded by the UN by the virtue of membership alone.

To conclude, it is submitted that the undeniable involvement of the whole international community (i.e. the UN) is not a sufficient criterion in order to determine whether the SCSL can ignore the immunities of the Head of State of a country non-party to the Agreement. Either a consent of the States (including

469 At least to the knowledge of this author, there is no other example of what is referred to as a consistent practice.

470 See Orentlicher, *supra* 142, p. 12. Orentlicher stated that the Security Council by authorizing the Secretary General to negotiate an agreement with Sierra Leone was not only carrying out its responsibility to maintain peace and security, but "in doing so, it was acting on behalf of all Members of the United Nations."

the affected State) to be bound by the Agreement or some form of the Chapter VII powers involvement of the Security Council would be needed. None of these grounds were clearly present in *Taylor* case, yet the SCSL “tried to find a ground for lifting the immunity by combining the two grounds for as far as they were present.”⁴⁷¹

7.2.2 Significance of the Phrase ‘Certain International Courts’

The ICJ in the *Yerodia* case confirmed the authority of a suitably constituted international tribunal to issue an arrest warrant in respect of a serving or former Head of State. The phrase ‘certain international criminal courts,’ used by the ICJ, explicitly referred to the ICTY, ICTR and the ICC.⁴⁷² The central issue is whether the SCSL can qualify as such a ‘certain international criminal court’, which is capable of derogating from the principle of immunity.

With regard to the absence of the SCSL in the list of certain international courts mentioned by the ICJ, two observations can be advanced. Firstly, it is important to note – as a matter of chronology - that the SCSL was not established at the time of the ICJ’s decision in the *Yerodia* case. The ICJ delivered its decision on 14 February 2002. It is therefore understandable that it does not mention the SCSL as another example of ‘certain international courts’. The Agreement establishing the SCSL was concluded only a few weeks before and had not been implemented at that stage.⁴⁷³ Secondly, as already set out above, the concerned paragraph was merely *obiter dicta*, referring to possible examples rather than representing an exhaustive list.

Still, there are crucial differences between the SCSL, on the one hand, and the ICTY, ICTR and the ICC on the other hand. All international courts cited by the ICJ (i.e. ICTY, ICTR and ICC) bind more than one State. All members of the UN are obliged to cooperate with both the ICTY and ICTR by virtue of their establishment under Chapter VII powers, including arrests and surrendering of any alleged perpetrators including Heads of States who are within their jurisdiction.⁴⁷⁴ As was clearly established in the Part II, the SCSL, unlike both *ad hoc* tribunals, does not possess Chapter VII powers.

The third court mentioned by the ICJ was the permanent court – the ICC. Since the ICC is a treaty-based court similar to the SCSL, it can actually serve as a very useful example for illustrating why the SCSL in the Taylor decision ‘got it wrong’.

471 Nouwen, *supra* note 98 p. 657.

472 The *Yerodia* case, *supra* note 28, para. 61.

473 Robertson, *supra* note 250.

474 *Ibid.*

The SCSL was established by bilateral treaty between the UN and the Government of Sierra Leone. The ICC was also established by international treaty, a multilateral one. States parties to this multilateral treaty agreed to deny any potential immunity to their high-ranking officials including the Head of State in case they commit certain crimes under international law.

Even though the Rome Statute establishing the ICC binds more than one State, it cannot bind those States not parties to the treaty without else. It is a well-established principle that a treaty can create neither obligations nor rights for third parties without their consent (*pacta tertiis nec nocent nec prosunt*).⁴⁷⁵ This is reflected in Article 98, which states: “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.”

In the light of the above, it is clear that the ICC can also come under the pressure of how to proceed in the case of immunity invoked by the Head of State of a non-party to the treaty. As summarized by Romano and Nollkaemper: “While the Statute of the ICC denies immunity to Heads of State, in principle, it cannot affect the immunity of Heads of States of non parties. States that are parties to the Statute would violate international law if they hand over a Head of State of a non-party to the ICC.”⁴⁷⁶ In applying the above findings regarding the ICC to the similar context of the SCSL, it can be argued that States not parties to the Agreement establishing the SCSL cannot arrest and/or extradite an incumbent President to the SCSL without some further authority.⁴⁷⁷

If an international organization, in this case the UN and a State, in this case Sierra Leone, decide to establish an international criminal court by bilateral agreement, its classification as an international criminal court does not automatically mean that a state official of another country has no immunity from prosecution before that body. Were that the case, it would arguably be an easy way to get around international obligations.⁴⁷⁸ It might be argued that what Sierra Leone could not have done unilaterally, it cannot do by participating in the creation of an international court.

475 See also Art. 34 of the Vienna Convention on the Law of Treaties, which reads: “A treaty binds the parties and only the parties; it does not create obligations for a third State without its consent”.

476 Nollkaemper and Romano, *supra* note 12.

477 *Ibid.*

478 Nouwen, *supra* note 98.

In sum, while the jurisdiction (which precedes immunity) of the SCSL was established, the possibility to disrespect personal immunity of serving Head of State of another country merely on the international legal basis of the SCSL is disputed.

Article 6(2) of the SCSL Statute, which is a crucial provision for the purposes of immunities, is taken verbatim from Article 7 (2) of the ICTY Statute. These provisions were interpreted as relating 'only' to immunity *ratione materiae*. Even if a more extensive interpretation of the ICTY and ICTR Statutes is accepted, the important difference is that the *ad hoc* tribunals were established by Resolution under Chapter VII as opposed to the SCSL, which was established by a bilateral agreement.

It is therefore submitted that (1) the SCSL cannot oppose the provision denying personal immunity in its Statute towards a sitting head of a third state, i.e. Liberia; (2) Even if it could deny immunity to a Head of State of another country, such a broad interpretation of Article 6(2) would only be valid if the rule denying personal immunity reflects customary international law, as has already been established for the rule on criminal responsibility; (3) If the SCSL would not be able to establish such a rule, a provision similar to that contained in Article 27(2) of the Rome Statute is then argued to be necessary.⁴⁷⁹ The next, final Chapter will suggest a more cautious way forward with respect to two kinds of immunities available to a Head of State.

479 *Ibid.*

8 The *Taylor* Case: Head of State Immunity

8.1 Denying Personal Immunity to Charles Taylor?

The fundamental question for our purposes is whether all immunities are irrelevant before any court that may be characterized as ‘international’. As shown by State practice (including national case law), Statutes of international criminal courts, international case law and scholarly opinions, not all immunities before all courts can be overcome even for prosecution of crimes under international law.⁴⁸⁰

This proposition was also confirmed by the ICJ in *Yerodia*, which proved to be central for analysis of the *Taylor* case. Both *Yerodia* and *Taylor* were incumbent state officials at the time of the issuance of arrest warrants; therefore they invoked immunity *ratione personae*. Immunity *ratione personae* applies irrespective of the nature of the acts committed, it is so called absolute immunity. The underlying justification for immunity *ratione personae* is the functional necessity argument, i.e. in order to carry out its functions smoothly; the state official (representing a State itself) needs to be protected from *any* external interventions. Denial of this kind of immunity could be said to negatively affect the fulfilment of the functions of the state official.⁴⁸¹

Courts and scholars recognize this immunity not as ‘merely a relic of the personal sovereignty of the ruler.’⁴⁸² Indeed, immunity *ratione personae* constitutes a general rule of customary international law.⁴⁸³ It has therefore relevance not only before domestic courts, but also before international tribunals “unless the status and nature of the international court justifies a different conclusion”.⁴⁸⁴ Any exception to this

480 Racsmány, *supra* note 179.

481 Nouwen, *supra* note 98.

482 A. Cassese, *International Criminal Law* (New York: Oxford University Press, 2008), p. 265; see also the *Yerodia* case, *supra* note 28, para. 53.

483 Cassese, *supra* note 97.

484 Racsmány, *supra* note 179, p. 314.

general rule, which remains so far fully applicable before domestic courts,⁴⁸⁵ must be legally justified in the case of international courts.⁴⁸⁶

As was shown in Chapter 6.4, both *ad hoc* criminal tribunals and the ICC provides for this exception. The legal basis for this exception is either a Security Council Chapter VII resolution or an international treaty. Moreover, even if there is an explicit exception in the form of waiver of immunity by States parties to the treaty, that immunity arguably applies only to contracting parties. A summary by a leading commentator well defines the position of the SCSL in relation to denial of immunities to a serving Head of State of another country:

[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.⁴⁸⁷

Lasting entitlement to immunities *ratione personae* granted by customary international law to incumbent Head of States of non-state parties to the ICC Statute seems to be the best reflection of the current state of law on immunities. Hence, it is submitted that the agreement between Sierra Leone and the UN establishing the SCSL can not take away from the incumbent President of another country the immunity *ratione persone* granted under customary international law without more (e.g. the consent of Liberia).

It is submitted that the SCSL's interpretation of the *Yerodia* case led to an incorrect conclusion about immunity *ratione personae* of an incumbent Head of State. The SCSL's decision neither adequately interpreted nor usefully applied the criterion of 'certain international courts'. This decision was more of a declaration than the result of a well-considered judicial deliberation.

485 See confirmation of immunity *ratione personae* by all national courts so far, Chapter 6.

486 Racsmany, *supra* note 179.

487 Akande, quoted in Sands, *supra* note 97, p. 28 (emphasis added).

Admittedly, the SCSL was not in an easy position as its legal basis and any obligations under international law are complicated by the hybrid nature of that body. Still, as restrictive as it may be, it is proposed that the SCSL should have confirmed the immunity *ratione personae* enjoyed by Taylor while in office.⁴⁸⁸

8.2 Another Route to Proceed: Functional Immunity

The legal assessment relating to withdrawal of personal immunities in *Taylor* has been, as also noted by Cryer, “accepted by some⁴⁸⁹ and doubted by many.”⁴⁹⁰ Nevertheless, there was another route for the SCSL to take in order to be legally consistent with the current state of law on immunities and at the same time to address the responsibility of Taylor for international crimes. The SCSL already anticipated this holding at the end of its decision in the *Taylor* case, “...it is apt to observe that the Applicant had at the time the Preliminary Motion was heard ceased to be a Head of State. The immunity *ratione personae*, which he claimed, had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant”.⁴⁹¹

Due to the different rationales for the two kinds of immunity international law recognizes that once a state official is out of office there is no longer a need for absolute immunity since he or she is no longer representing a State as such. It follows that the only immunity, which Taylor would be left with after he stepped down from

488 As submitted by Wirth: “Whereas some precedents could be interpreted as . . . allowing prosecutions even against persons protected by immunity *ratione personae*, it remains doubtful whether these precedents are in accordance with the hierarchy of values recognized by modern international law. The highest of these values is the maintenance of peace, and immunity *ratione personae*, protecting the most important representatives and decision-makers of a state, helps to safeguard the ability of a state to contribute to the maintenance of international and internal peace. In fact, in a situation where the highest functionaries of a state were arrested or otherwise seriously constrained in the exercise of their functions by a foreign state, the risk of war would be obvious.” Wirth, *supra* note 316, p. 888. In contrast, Kleffner argues that: “is it not as obvious as suggested that granting immunity to those who are likely to be most responsible . . . is unsettling orderly international relations any less than hampering the conduct of a State on the international plane. After all, these crimes are recognized by the international community to ‘threaten the peace, security and well-being of the world’.” In J. K. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* 86 (2003), p. 105.

489 Gaeta, *supra* note 38.

490 Racsmany, *supra* note 179; Koller, *supra* note 256. See Cryer et al., *supra* note 13, p. 551.

491 *Prosecutor v. Taylor*, *supra* note 27, para. 59.

the Presidency, is immunity *ratione materiae*. This brings us back to the distinction between private and official acts.

The Indictment stated that Taylor's support of the rebels in Sierra Leone was motivated by the desire to obtain access to the mineral wealth (in particular the diamond wealth) of Sierra Leone.⁴⁹² The SCSL inquired during the proceedings whether acts so motivated are, acts in an official capacity. Interestingly, the Prosecutor replied that Taylor is charged in his private capacity, in which 'he embarked on a common aim with others to steal diamonds and begin a war to that end.'⁴⁹³ The Prosecutor further stated that functional immunity could not apply and that Taylor was not acting as Head of State but privately through agents in Sierra Leone.

Even though one may accept that one of the Taylor's motives or wishes was to increase his private wealth through obtaining control over Sierra Leone's diamond resources, it is hard to maintain that Taylor committed the alleged war crimes and crimes against humanity solely in a 'private capacity'.⁴⁹⁴ Indeed, he has been accused of using his powerful position in Liberia and the region for aiding and abetting in (and profiting from) the armed conflict in Sierra Leone.

492 Specific charges contained in the indictment against Charles Taylor are (1) Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II including acts of terrorism; collective punishments; violence to life, health and physical or mental well-being of persons, in particular murder; outrages upon personal dignity; violence to life, health and physical or mental well-being of persons. (2) Crimes against humanity including extermination; murder; rape; sexual slavery and any other form of sexual violence; other inhumane acts. (3) Other serious violations of international humanitarian law including conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Indictment, 7 March 2003.

493 See Response by Desmond de Silva, QC for the Prosecution, Report on Proceedings before the Appeals Chamber of the Special Court for Sierra Leone (1 November 2003), available at <http://www.specialcourt.org/documents/WhatHappening/ReportAppealHearings01NOV03.html> (last visited 27 April 2012). The author of this work conducted questioning of several scholars and practitioners, with answers to the examined question going both ways. For example the response to the question whether Taylor is prosecuted for crimes committed in private or official capacity by David Crane (who acted as the Chief Prosecutor in the Taylor case) was "for both" (i.e. for abuse of the state power and for his private criminal enterprise). The indictment nevertheless alleged that Taylor committed the crimes alleged "rather in a private capacity".

494 In this respect, Barker noted that denying the official character of such crimes "is to fly in the face of reality". Barker, *supra* note 337, p. 943.

The better explanation, which was already presented in Chapter 5 dealing with distinction between official and private acts, would be that international crimes could be indeed committed in an official capacity. This is however not to say that they qualify as official acts to be accordingly covered by functional immunity. The State sovereignty inspiring the immunity *ratione materiae* cannot prevail in cases of prosecution of international crimes, because international law at the same time establishes individual criminal responsibility for those crimes.⁴⁹⁵ Importantly, the Defence in the Taylor case explicitly recognized and accepted this by stating that Taylor's entitlement to enjoy "functional immunity [is] subject to one exception, namely in the case of perpetration of international crimes."⁴⁹⁶

By correctly applying the law as it currently stands, both sets of requirements could have been protected in a more balanced way. With these arguments, we can move to conclude that the SCSL should confirm Taylor's immunity *ratione personae* at the time of his initial indictment while recognizing that he would not enjoy exemption on the basis of immunity *ratione materiae* from the SCSL's jurisdiction, should a new indictment be issued.

495 Nouwen, *supra* note 98. See also Chapter 5.4.2, fn. 312.

496 See *Prosecutor v. Taylor*, Applicants Reply to Prosecution Response to Applicants Motion, p. 4, 30 July 2003.

9 Conclusion

9.1 Concluding Remarks for the *Taylor* Case

In the past, the scope of immunities was rarely tested. In recent years, states became active in this area, as illustrated in Chapter 1 by list of various cases of high-ranking officials reaching both national and international courts.⁴⁹⁷ As a consequence, “this emboldened State practice has brought to the fore many hidden or unresolved questions as to the boundaries between principles of accountability and immunity.”⁴⁹⁸

The *Taylor* case clearly illustrated some of these unresolved questions (e.g. impact of a hybrid nature of the SCSL on immunity) and a collision of the two competing interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from the principle of sovereign equality of States. Which interest should prevail? It will be always difficult to reach a proper balance between the two.

There is little doubt that *Taylor* case before the SCSL could have presented an opportunity to elaborate on the current state of law on immunities and to clarify or justify different approaches taken by national and international courts on which the SCSL relied. Has it done so, or has it perhaps wasted an opportunity?

The central issue of this work was whether Taylor, as President of Liberia at the time of issuance of the indictment, was entitled to claim immunity before the SCSL in light of the fact that the SCSL had been established by a bilateral treaty between the UN and Sierra Leone, to which Liberia was not a party. This legal issue is important also from the practical perspective for similar cases that may arise, or has already arisen, before other courts. The topicality of this issue can be especially seen in the increased activities of the first permanent criminal court - the ICC.

Similar questions in the context of immunities of third states not parties to the Rome Statute have already appeared before the ICC. Even when there is a referral of

497 See Chapter 1.1.

498 Cryer et al., *supra* note 13, p. 531.

the situation by the UN Security Council, as is the case with the current President of Sudan, Al-Bashir, some authors argue that there must be *explicit* removal of immunity in the respective Resolution adopted under Chapter VII powers in order to deny immunity *ratione personae* to a serving President of a State which is not a party to the Rome Statute.⁴⁹⁹ The aim of this work was also to contribute to the discussion on the emergence of various aspects of procedure in this area.

Part II of this work focused on identifying the legal basis and manner of the establishment of the SCSL, which had important implications for the nature and extent of immunity. Part III revealed the close interconnection between the legal basis and the issue of withdrawal of immunity for incumbent Heads of State. It was argued that the SCSL did not fully take account of its special legal basis. By ignoring its bilateral treaty nature, the SCSL failed to properly assess what are the implications of its legal basis for the rules of international law on incumbent Head of State immunity.

Since the SCSL, inspired by the ICJ reasoning in the *Yerodia* case, connected the issue of denying the immunity to Taylor with the international legal basis of the SCSL, it came as no surprise that the Appeals Chamber of the SCSL determined that the SCSL is indeed an international criminal court. As the consequence of its international legal basis, the SCSL held that it can invoke Article 6 (2) of its Statute in order to deny personal immunity to Taylor.

While this work approved the international legal basis of the SCSL, the legal reasoning on the basis of which the SCSL arrived at the conclusion was found disputable. Moreover, the consequences it attached to its legal basis from the immunity perspective were subject to criticism and found to be incorrect. More elaborate reasoning and judicial clarification of contentious issues were needed, bearing in mind that until the establishment of the SCSL, it had never been considered that the legal basis of an international criminal court could be an agreement between the UN and one or more States.

The considerable attention given to the binding effects of Resolution 1315 was justified by the fact that the SCSL attempted to establish its international legal basis under Chapter VII powers. It seems that the SCSL was trying to 'cure' the shortcomings of a merely bilateral agreement by trying to imply binding effects of Resolution 1315 in order to justify the denial of immunity of a Head of State of another country. If the SCSL could indeed prove its legal basis under Chapter VII powers, it would have had important implications for immunity afforded by contemporary international law to serving Heads of State.

499 Nouwen, *supra* note 98.

This argument is supported by the approach adopted by the ICTY with respect to Article 7 (2) of its Statute. This provision arguably relates only to the fact that the accused cannot claim its official position as a substantial defence, which would in turn mean that there is criminal responsibility for such acts (in that sense Article 7 (2) removes immunity *ratione materiae*); however for so long as the Head of State is in power, there is a procedural bar to the exercise of jurisdiction over these acts (in that sense Article 7(2) preserves immunity *ratione personae*).

Nevertheless, the ICTY implicitly interpreted Article 7(2) not only as the attribution of criminal responsibility but also as referring to immunity *ratione personae*. Even if such a broad interpretation would be accepted, the crucial difference is that the ICTY was established by Resolution under Chapter VII as opposed to the SCSL, which was established by a bilateral agreement. It follows that the ICTY could be perhaps more relaxed by adopting a rather flexible interpretation of its Statute with Chapter VII backing, which allows to affect the rights of all member States, even against their will or without their consent. While it is true that Article 6(2) of the SCSL Statute is taken verbatim from Article 7 (2) of the ICTY Statute, the SCSL was not in the position to interpret this provision as affecting rights of thirds parties, as opposed to the ICTY.

Resolution 1315, which recommended the establishment of the SCSL, was not adopted under Chapter VII powers despite the attempt of the SCSL to prove otherwise. Moreover, the SCSL was not even established *by* any SC Resolution (in contrast to the ICTY and ICTR). The SCSL was established by a bilateral agreement *pursuant to* Resolution 1315. It is therefore not possible to imply binding effects of Resolution 1315 for the purposes of denying immunity to high-ranking state officials as was in the case of the establishment of the ICTY and ICTR. The SCSL should instead direct its attention to the Agreement establishing the SCSL, whose binding effects for third parties were harder to prove.

Moreover, it is surprising that despite the attempt to establish its international legal basis under Chapter VII powers, the SCSL has not subsequently relied on this argument for purposes of denying immunity *ratione persoane* to Taylor. The SCSL rather focused its attention to the distinction between national and international criminal courts made by the ICJ in the *Yerodia* case.⁵⁰⁰

By attempting to fit itself into a category of ‘certain international criminal courts’, a phrase used by the ICJ in the *Yerodia* case, the SCSL limited its legal argumentation

500 Frulli, *supra* note 66.

to the finding that it is indeed an international court with powers to deny immunity to serving Heads of State. Yet, the mere fact that the legal basis of a certain judicial body is characterized as international does not automatically mean that *any* Head of State should be denied immunity before such a court.

Not all immunities are irrelevant before any court that may be characterized as 'international'. A claim to immunity is indeed to be treated differently not only before national courts as opposed to international courts, but, importantly for our purposes, also before *some* international courts as opposed to *other* international courts. Similarly, Schabas notes that there may be "various types of *international* tribunal, and that rules of immunity apply differently depending upon the type of tribunal."⁵⁰¹ The SCSL in *Taylor*, as well as the ICC Pre-Trial Chamber in *Al Bashir*, was therefore wrong to submit that for the purposes of proceedings before international courts, there is a general exception to Head of State immunity.⁵⁰²

Clearly, the approach of the court depends also on the kind of immunity the state official may invoke. As for the immunity *ratione personae*, this immunity constitutes a general rule of customary international law and is therefore relevant not only before domestic courts, but also before international courts "unless the status and nature of the international court justifies a different conclusion".⁵⁰³ Any exception to this general rule, which remains so far applicable before domestic courts, must be legally justified in the case of international courts.⁵⁰⁴

The proposition that immunities *ratione personae* do not apply before international tribunals depends on the manner of the court's establishment as well as identification of the exact legal basis for denying immunity. In addition, the establishing instrument (which should include explicit provision on denial of personal immunities) of the court must bind the concerned state.⁵⁰⁵

As was shown in Chapter 6, both *ad hoc* criminal tribunals and the ICC provide for the exception to the general rule. The legal basis for this exception is either a Security

501 W. Schabas, 'Obama, Medvedev and Hu Jintao may be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes', 15 December 2011, available at <http://humanrightsdoctorate.blogspot.cz/2011/12/obama-medvedev-and-hu-jintao-may-be.html> (last visited 16 August 2012).

502 See also Akande, *supra* note 37.

503 Cassese, *supra* note 97.

504 *Ibid.*

505 Akande, *supra* note 108.

Council Chapter VII Resolution or an international treaty. Moreover, even if there is an explicit exception to immunity to which states agreed by becoming a party to the ICC Rome Statute, it applies only to contracting parties.

Lasting entitlement to immunities *ratione personae* granted by customary international law to incumbent Heads of State of non-state parties before the ICC seems to be the best reflection of the current state of law on immunities.⁵⁰⁶ By analogy, the Agreement between Sierra Leone and the UN establishing the SCSL cannot, without more or of itself, take away from the incumbent President of another country the immunity *ratione personae* granted under customary international law.

In sum, neither the Agreement, nor the Statute of the SCSL should be made opposable towards Liberia for the purposes of denying immunity *ratione personae*. Even if they were, an additional argument can be raised, i.e. that Article 6 (2) fails to explicitly address immunity *ratione personae*. Furthermore, as already mentioned above, the SCSL is not in the same position as the ICTY with respect to Chapter VII powers, which could arguably justify the broad interpretation of the Article 7 (2) of the ICTY Statute.

Despite the fact that the following conclusion may appear too restrictive, it is proposed that, under given circumstances, the SCSL should have confirmed the immunities *ratione personae* enjoyed by Taylor while in office as this approach best reflects the current state practise.

Nevertheless, there was another route for the SCSL to take in order to be legally consistent with the current state of law on immunities and at the same time address the alleged responsibility of Taylor for international crimes. International law recognizes that once a state official is out of office there is no longer a need for absolute immunity since he or she is no longer representing a State as such. The only protection, which remains, is for acts committed in an official capacity. It follows that the only immunity that Taylor could invoke while out of office is immunity *ratione materiae*, which is based on different rationale than immunity *ratione personae*.

On the one hand, there is an immunity *ratione personae* granted to state officials irrespective of the nature of the acts. It can thus be invoked, one may add unfortunately, even in the case of international crimes. On the other hand, immunity *ratione materiae* is precisely concerned with the nature of the acts. It applies only to acts which can be qualified as official acts. At the same time, international criminal law establishes individual criminal responsibility for international crimes. Therefore,

506 *Ibid.*

there cannot simultaneously coexist both individual criminal responsibility for international crimes and immunity *ratione materiae* for international crimes, even if these crimes were committed in an official capacity, or to be more precise, in the abuse of official capacity.

While it was found that the SCSL was not authorized to set aside immunity *ratione personae*, it could later on declare immunity *ratione materiae* as incompatible with international crimes (this justification is not possible with regard to immunity *ratione personae*). National case law⁵⁰⁷ together with international case law and relevant international instruments, many of which can be seen as a reflection of State practice and/or *opinion juris*, indicate that there exists a rule of customary international law removing immunity *ratione materiae* in the context of international crimes.⁵⁰⁸ Importantly for our purposes, this was also recognized by the Defence in the Taylor case when stating that Taylor's entitlement to enjoy "functional immunity [is] subject to one exception namely in the case of perpetration of international crimes."⁵⁰⁹

By correctly applying the norms forming the current international law, both sets of requirements could have been protected in a more balanced way. In addition, the SCSL would not risk losing some of its credibility. Based on the above, we can conclude that the SCSL should confirm Taylor's immunity *ratione personae* at the time of his initial indictment while recognizing that he would not enjoy exemption on the basis of immunity *ratione materiae* from the SCSL's jurisdiction should a new indictment be issued.

Some argue that the manner in which the SCSL was established was completely unrelated to the issue of immunity: instead, the initial desire was to separate the proceedings from domestic criminal law and the legal system of Sierra Leone.⁵¹⁰ This may well be so. It can even explain some of the difficulties with which the SCSL was confronted. Unfortunately, it does not justify in some respects unfounded reasoning of the SCSL in the *Taylor* case.

Any constitutive instruments of international criminal tribunals should preferably anticipate problems and try to address principal issues such as jurisdiction and immunities beforehand in order to avoid the uncertainty, which often makes the

507 See Chapter 6, see also fn. 312.

508 *Ibid.*

509 See *Prosecutor v. Taylor*, Applicants Reply to Prosecution Response to Applicants Motion, 30 July 2003, p. 4.

510 Chatham House, *supra* note 14.

court adopt too creative reasoning, which is hard to justify even by employing a teleological interpretation of certain provisions. This is surely a lesson to be learned for establishing a similar forum for the prosecution of international crimes elsewhere.

9.2 Rethinking Immunity? Old Doctrines Die Hard

Laws are like the spider's webs: they stand firm when any light and yielding object falls upon them, while a larger thing breaks through them and makes off.⁵¹¹

By way of a more general conclusion, some of the following remarks are admittedly departing from the current law into the realm of what might be termed “wishful legal thinking”,⁵¹² to trends in international law pointing towards recognition of the rights of victims of international crimes, even if punishing the highest representative of the State can threaten the norm of sovereignty.⁵¹³

State sovereignty, in Kofi Annan's view, is being redefined and “States are now widely understood to be instrument at the service of their peoples, and not vice versa... When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”⁵¹⁴ For Kofi Annan, “sovereignty is not becoming less relevant; it remains the ordering principle of international affairs. However, it is “the peoples' sovereignty rather than the sovereign's sovereignty.”⁵¹⁵

The highest State representatives should be held to the very highest standards of international law, not the lowest.⁵¹⁶ In past, the respect for the ‘dignity’ of the Head of State has been considered as traditional rationale for precluding accountability, as

511 Solon c. 630- 560 B.C., quoted from ‘Philosophy and Catholic Christian’, *Diocesan Circular* (September 2007), p. 2, available at <http://www.anglican catholic.ca/diocirc/200709circ.pdf> (last visited 26 June 2008).

512 R. Piotrowicz, *supra* note 257, quoted from K. Hailbronner, ‘Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking’, 26 *Virginia Journal of International Law* 857 (1986), p. 872.

513 See Cassese arguing that: “One still has to strive to replace the Westphalian model of international society, geared to reciprocity and largely based on mutual respect among sovereign states, with the Kantian model, which hinges on a set of universal values transcending the immediate interests of each state, and which therefore moves pride of place to community interests.” Cassese, *supra* note 12, p. 1.

514 K. Annan, *The Economist*, 1999.

515 E. Larking, ‘Human rights and the principle of sovereignty: a dangerous conflict at the heart of the nation state?’, *Australian Journal of Human Rights* 15 (2004).

516 *Ibid.*

stated also by the ICJ in the *Schooner Exchange* case.⁵¹⁷ With the recognition of the weight of the human rights paradigm, this reason carries less weight nowadays⁵¹⁸ and dignity is not considered as a compelling reason to prevent *a priori* accountability for international crimes.⁵¹⁹ One may argue that there is no need for ‘respect’ or ‘dignity’ of the Head of State who suppresses its own people and abuses its official capacity in order to engage in commission of worse crimes such as genocide, war crimes or crimes against humanity.⁵²⁰

Accordingly, “the moral and legal weight behind individual accountability for international crimes regardless of official capacity” was considered by the Commission on Human Rights of the Philippines to be “of such substance that it mandates an evaluation of the trade-offs involved in accepting the risks of impunity in order to preserve comity.”⁵²¹ Similarly, the ILC recently emphasized that immunity and sovereignty should no longer be regarded as mutually exclusive.⁵²²

In fact, the notion and scope of sovereignty is increasingly being challenged in many inter-related areas.⁵²³ All these developments can be viewed as an expression of a “struggle between international law as primarily state and sovereignty based regime and international law reaching beyond the state and defining justice by taking into account not only the interests of the sovereign state, but also the individual human being.”⁵²⁴ The status of Head of State immunity is certainly one of the parts of this struggle.

More than ten years ago, the *Princeton Principles on Universal Jurisdiction Study* stated that in the future “procedural immunities for sitting heads of state, diplomats,

517 See *Schooner Exchange v. M’Fadden* 11 US 116 (2812).

518 See Robertson, *supra* note 250.

519 Cryer et al., *supra* note 13, p. 537.

520 Sands, *supra* note 142.

521 Philippine Statute on Crimes Against International Humanitarian Law and Other Serious International Crimes, Comment on House Bill No. 4998 (22 June 2006), available at http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/position%20papers/abthr_pos066-067.htm. (last visited 23 August 2007).

522 *Immunity of State officials from foreign criminal jurisdiction*, International Law Commission, A/CN.4/SR.3165, 25 September 2013, p. 3.

523 See e.g. the emergence of the concept of *The Responsibility to Protect*, Report of The International Commission on Intervention and State Sovereignty, available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited 5 May 2011).

524 J. Bröhmer, ‘Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three’, *Leiden Journal of International Law* 13 (2000), p. 234.

and other officials may be called increasingly into question, a possibility prefigured by the ICTY's indictment of Slobodan Milosevic while still a sitting head of state. Whether this unprecedented action will become the source of a new regime in international law remains to be seen.⁵²⁵ Since then, there have been many developments in this area, including indictments against Taylor or Al-Bashir.

At the same time, it is clear that moral rather than legal arguments can be found in support of the reduction of immunity *ratione personae* before domestic courts so far. Indeed, old doctrines die hard.⁵²⁶ States fear that by rejecting immunity, domestic courts could be overloaded with cases brought against Heads of State by former victims, human rights organizations, or anyone with a 'cause'.⁵²⁷ Another fear is that prosecutions can be abused for political purposes or that they can lead to instability or even armed conflict between states.⁵²⁸ Admittedly, these fears are real. State practice that opposes removal of personal immunity is significant and cannot be simply reconceptualised.

This is illustrated also in the very recent work of the ILC (as of 2013), which currently focuses on the immunity of State officials from foreign criminal jurisdiction. The Drafting Committee of the ILC adopted Articles on immunity of State officials, which so far deal only with immunity *ratione personae*. Draft Article 3 confirms the still strong position of personal immunities before domestic courts of other states by providing that: "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction."⁵²⁹

In general, the scope of immunities is being increasingly contested, but it is still far from settled. Further evolution of State practice is needed before a straightforward consensus may emerge, especially before domestic courts.⁵³⁰ On the one hand, there is a visible shift in favor of justice and accountability. On the other hand, to suppose that international criminal law has simply superseded international law immunities would be an oversimplification of the complex interplay of these two areas.⁵³¹

525 The Princeton Principles on Universal Jurisdiction, *supra* note 10, p. 51.

526 Robertson, *supra* note 250.

527 Philippine Statute on Crimes Against International Humanitarian Law and Other Serious International Crimes, *supra* note 521.

528 *Ibid.*

529 *Immunity of State officials from foreign criminal jurisdiction*, International Law Commission, A/CN.4/SR.3174, 2 August 2013, p. 3.

530 Racsmany, *supra* note 179.

531 Cryer et al., *supra* note 13, p. 531.

The rules emerging from interplay of these two areas have been often described as confusing, inconsistent or ambivalent.⁵³² However, if one applies the generally accepted dichotomy used in this work, i.e. personal versus functional immunity before domestic versus international courts, it becomes clear that while there have been “inroads into functional immunity” even before domestic courts, personal immunities proved to be more resistant and so far remain intact.⁵³³ Of course, this current balance may change over time together with shifting priorities and may lead to further development of international law in this area.

532 See e.g. R. Van Alebeek, ‘The Pinochet case: International Human Rights Law on Trial’, 71 *British Yearbook of International Law* 29 (2001), p. 47; Warbrick, McGoldrick, Barker, *supra* note 337, p. 938. Cryer et al., *supra* note 13, pp. 532-533.

533 *Ibid.*, p. 545.

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Abstrakt: Práce se zaměřuje na střet dvou zájmů v soudobém mezinárodním právu veřejném, tj. na vzrůstající tendenci potrestat pachatele zločinů podle mezinárodního práva a zároveň na možnost vysokých státních představitelů nárokovat za své jednání imunitu. Cílem práce je poukázat na to, jaký vliv má způsob založení soudu na dostupnost imunity *ratione personae* a *ratione materiae*, což je konkrétně ilustrováno na případu bývalého liberijského prezidenta Charlese Taylora před Zvláštním soudem pro Sierra Leone.

Klíčová slova: imunita hlavy státu, imunita *ratione materiae*, imunita *ratione personae*, mezinárodní trestní soudy a tribunály, smíšené (hybridní) trestní soudy, mezinárodní trestní právo, zločiny podle mezinárodního práva, Zvláštní soud pro Sierra Leone, bývalý prezident Libérie Charles Taylor, Mezinárodní trestní soud (případ Al-Bašír).

Abstract: This work focuses on the case of former Liberian President Charles Taylor before the Special Court for Sierra Leone. The Taylor case well demonstrates collision of the two interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities. The aim of this work is to illustrate how the legal basis of the court may affect availability of immunity *ratione personae* and *ratione materiae*.

Keywords: Head of State immunity, immunity *ratione personae*, immunity *ratione materiae*, international criminal courts and tribunals, mixed (hybrid) criminal courts, enforcement of international criminal law, crimes under international law, Special Court for Sierra Leone, former President of Liberia Charles Taylor, International Criminal Court (Al-Bashir case).

Vědecká redakce MU

prof. PhDr. Ladislav Rabušic, CSc., Mgr. Iva Zlatušková,
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HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW The Charles Taylor Case before the Special Court for Sierra Leone

Mgr. Kateřina Uhlířová, Ph.D., LL.M.

Vydala Masarykova univerzita roku 2013
Spisy Právnické fakulty MU č. 467 (řada teoretická, Edice S)

Ediční rada:

J. Kotásek (předseda), J. Bejček, V. Kratochvíl,
N. Rozehnalová, P. Mrkývka, J. Hurdík, R. Polčák, J. Šabata

Tisk: Point CZ s.r.o., Milady Horákové 890/20, 602 00 Brno
1. vydání, 2013

ISBN 978-80-210-6717-2