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Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity

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Abstract

On 31 May 2004, the Appeals Chamber of the Special Court for Sierra Leone ruled in a sweeping but brief decision that the Court had jurisdiction over Charles Ghankay Taylor, President of Liberia at the time of his indictment. The judges reached this conclusion finding that the accused could not invoke immunities *ratione personae* before this institution, an international criminal court. As this article demonstrates, the Chamber's argumentation lacks specificity and displays confusion over certain issues related to UN law, the law of international institutions and international immunities. The factual outcome is a welcome one, facilitating the prosecution of international crimes. Yet, the Appeals Chamber's approach is regrettable, especially if one considers that the same result could have been reached through less controversial avenues, without endangering the credibility of the Court and thereby the idea of international criminal justice through internationalized criminal courts.

Key words

Chapter VII powers; Head of State immunity *ratione personae*; internationalized criminal courts; personal jurisdiction; Special Court of Sierra Leone; treaties concluded by the United Nations

1. Introduction

Following the request of the Government of Sierra Leone for assistance,[1] the Special Court for Sierra Leone (SCSL) was set up in accordance with the 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone',[2] signed on 16 January 2002. The Court's Statute[3] – negotiated between the UN Secretary-General (SG) and the Government of Sierra Leone, and approved by the UN Security Council (SC) – is annexed to the Agreement. These documents envisage what has commonly been referred to as a hybrid or mixed

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1. See Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone (31 July 2000), UN Doc. S/2000/751, para. 9.
2. Available online at http://www.sc-sl.org (last visited 13 December 2004).
3. Statute of the Special Court for Sierra Leone, available online at http://www.sc-sl.org (last visited 13 December 2004).

court, with aspects resembling an international court while in other respects still similar to domestic ones. These features determine the status of the SCSL and have a significant impact on its powers and competence.

According to its Statute, the Special Court has jurisdiction to try *inter alia* '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'.[4] Its subject matter jurisdiction extends to crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law,[5] and certain crimes under Sierra Leonean law.[6]

The SCSL officially started operating on 1 July 2002. The first indictments were approved on 7 March 2003. These included a sealed indictment against Liberian President Charles Ghankay Taylor. Taylor was charged with participation in a joint criminal enterprise 'to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas',[7] and to this end to use the local population to commit war crimes, crimes against humanity and serious violations of international humanitarian law, for which Taylor was claimed individually criminally responsible. On 4 June 2003, the indictment was transmitted to Ghanaian authorities together with a warrant to arrest Taylor, who was on an official visit in Ghana for peace talks at that time.[8] However, the authorities of Ghana failed to arrest and surrender Taylor to the SCSL.

Relying on the ruling of the International Court of Justice (ICJ) in the *Arrest Warrant* case,[9] Taylor objected to the indictment and the jurisdiction of the SCSL over him, invoking his immunity as incumbent Head of State. The objections raised questions relating to the *status* and *nature* of the Court, issues of significant impact on the question of the immunity of the accused.[10] In a sweeping – but in the view of the author insufficiently motivated and mistaken – decision of 31 May 2004,

4. Art. 1(1), ibid. Another category of persons that may under certain circumstances be prosecuted by the Court are UN peacekeepers present in Sierra Leone. (Art. 1(2)–(3), ibid.)
5. Arts. 3–5, ibid., respectively.
6. Art. 6, ibid.
7. Indictment against Charles Ghankay Taylor, para. 23, available online at http://www.sc-sl.org (last visited 13 December 2004).
8. The indictment remained formally undisclosed until 12 June 2003. See First Annual Report of the President of the Special Court for Sierra Leone for the Period of 2 December 2002–1 December 2003, 9, available online at http://www.sc-sl.org/specialcourtannualreport2002–2003.pdf (last visited 13 December 2004).
9. *Case concerning Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v.* Belgium), Judgment of 14 February 2002, available online at http://www.icj-cij.org (last visited 13 December 2004).
10. The defence arguments are summarized in *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, 'Decision on Immunity from Jurisdiction', SCSL, Appeals Chamber, Decision of 31 May 2004, available online at http://www.sc-sl.org (last visited 13 December 2004), paras. 6–8. See text accompanying note 21, *infra*.

    In fact, the application to quash the indictment against him was submitted jointly by Taylor and the Government of Liberia but the SCSL Trial Chamber approved the Prosecution's request to strike out Liberia's application, classifying Taylor's objections as a 'preliminary motion' under Rule 72(E) of the SCSL Rules of Procedure and Evidence (available online at http://www.sc-sl.org/scsl-procedure.html (last visited 13 December 2004)). Ibid., para. 1.

the Appeals Chamber[11] found the SCSL competent to exercise jurisdiction over an incumbent foreign president, as was Charles Ghankay Taylor of Liberia at the time of the indictment.[12] For this purpose, the Chamber went considerably beyond finding as in previous cases that the SCSL was a properly constituted international criminal tribunal.[13] Referring to the *Arrest Warrant* judgment it sought to locate the legal basis of the Special Court in Chapter VII of the UN Charter, seemingly attempting to put itself on a footing similar to that of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR). In the alternative, the Chamber argued that as the Court's establishment was initiated by the UN Security Council acting on behalf of the entire UN membership, it is a truly international tribunal, qualifying the SCSL in accordance with the Appeals Chamber's interpretation of the ICJ decision to indict and prosecute Taylor.

The present note aims to subject the relevant parts of the SCSL Appeals Chamber 'Decision on Immunity from Jurisdiction' in *Taylor* to a critical review. It puts the arguments on which the Chamber based its decision under scrutiny from the perspective of UN law, the law of international institutions and the law of international immunities. To this end, this submission starts with a short recollection of the relevant findings of the ICJ in the *Arrest Warrant* case. This is followed by a review of the SCSL Appeals Chamber decision on Taylor's defence motion. The author then reviews these findings first from the perspective of the status of the SCSL and its powers to affect rights of third parties. The conclusions are subsequently applied to the issue of the availability of immunities to an incumbent head of a foreign state before the SCSL. The author argues that whereas the SCSL Appeals Chamber came to the correct conclusion concerning the legality of the Court's establishment from the perspective of the UN, it identified the legal basis for its establishment and the implications thereof mistakenly. Moreover, it interpreted the ICJ ruling in the *Arrest Warrant* case wrongly, leading it to an incorrect conclusion about the of immunities *ratione personae* of an incumbent Head of State before the Special Court.[14]

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11. In accordance with Rule 72(E) of the SCSL's Rules (*supra* note 10), Taylor's defence motion – relating to the jurisdiction of the Court – was directly referred to the Appeals Chamber, without a prior Trial Chamber decision on its substance. Acknowledging Taylor's special status as Head of State at the time of his indictment, the Appeals Chamber deemed it appropriate to grant a discretionary exception and decided on his defence motion in spite of the fact that under the Rules of Procedure and Evidence, the motion was premature due to Taylor having not made his initial appearance before the Court. (*Prosecutor v. Taylor*, *supra* note 10, paras. 20–33.)
12. ibid.
13. See *Prosecutor v. Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara*, Cases Nos. SCSL-2004-15-AR72(E); SCSL-2004-14-AR72(E); SCSL-2004-16-AR72(E), 'Decision on Constitutionality and Lack of Jurisdiction', SCSL, Appeals Chamber, Decision of 13 March 2004, paras. 38–79; *Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72(E), 'Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone', SCSL, Appeals Chamber, Decision of 25 May 2004; ibid., 'Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations', SCSL, Appeals Chamber, Decision of 25 May 2004, respectively; *Prosecutor v. Augustine Gbao*, Case No. SCSL-2004-15-AR72(E), 'Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court', SCSL, Appeals Chamber, Decision of 25 May 2004. These decisions are available online at http://www.sc-sl.org (last visited 13 December 2004).
14. Admittedly, at the time the Appeals Chamber handed down its decision on Taylor's immunities, he had ceased to be a Head of State. Nonetheless, as the indictment was issued prior to his stepping down, the Chamber discussed the immunities available to him at that time. See, however, text accompanying note 34, *infra*.

2. The ICJ Decision on Immunities of Incumbent Ministers for Foreign Affairs

Due to its central role in Taylor's defence motion, in the argumentation of the Appeals Chamber and in the doctrinal debate on immunities which has influenced the decision in this case, it is useful at the outset to recall the relevant parts of the ICJ judgment in the *Arrest Warrant* case. The dispute between Belgium and the Democratic Republic of the Congo (DRC) before the ICJ concerned the legality of the circulation of an international arrest warrant by Belgium concerning Mr Abdulaye Yerodia Ndombasi. Mr Yerodia was the DRC's Minister for Foreign Affairs at the time of the issuance of the disputed warrant. In this context, the ICJ addressed the jurisdictional competence of Belgium over an incumbent Minister of Foreign Affairs of another state under customary international law.

In defence of the legality of the circulation of the disputed arrest warrant, Belgium argued in essence that 'immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity'.[15] The ICJ rejected this categorical statement. In the view of the majority of the judges, the instances in which such immunities are irrelevant are prosecution before the domestic courts of the home state of the officials, in a foreign jurisdiction based on waiver by the home state, or for acts committed while in office in a private capacity after the person ceased to hold office. Clearly, none of these situations applies to Taylor's prosecution before the SCSL. However, the Court added a fourth eventuality, which is indeed central to the *Taylor* case: namely that prosecution may take place before 'certain international criminal courts'. The judgment pointed to the *ad hoc* international criminal tribunals and the International Criminal Court (ICC) as examples of such fora.[16] The applicability of this last exception to the SCSL will be dealt with below, following a summary of the Appeals Chamber's decision concerning the irrelevance of Taylor's immunities.

Admittedly, judgments of the ICJ are binding only between the parties to the relevant dispute. Yet, as the world court based its decision in this case on customary international law, it is clearly of relevance for other disputes related to immunities of high-ranking incumbent state officials governed by the same customary rules. As the SCSL is an international organization possessing an international legal personality,[17] customary international law is binding on it.[18]

In addition, the ICJ's decision admittedly addressed the immunities of an incumbent Minister for Foreign Affairs, rather than that of an incumbent President.

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15. *Arrest Warrant* judgment, *supra* note 9, para. 56.
16. ibid., para. 61.
17. Art. 11 of the UN-Sierra Leone Agreement (*supra* note 2) grants the SCSL 'juridical capacity'. Albeit the first paragraphs do not necessarily indicate whether this capacity is a domestic or international one, Art. 11(d) grants the SCSL the capacity to enter into agreements with states. This competence is generally recognized as an indicator of international legal personality. (E.g., *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Advisory Opinion, 1949 ICJ Rep. 174 at 179.)
18. E.g. H. G. Schermers and N. M. Blokker, *International Institutional Law* (2003), 1002, para. 1579; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996) 240–1; I. Seidl-Hohenveldern and G. Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften* (1996) 216–17, para. 1512.

However, the Court itself drew a comparison between the two functions in the relevant part of the judgment, deriving the immunities of Ministers for Foreign Affairs from those of pertaining to Heads of State.[19] Due to the general nature of the Court's considerations and to the similarity of the two functions with regard to the conduct of foreign affairs of a state (involving, *inter alia*, representation of the state at various meetings abroad, requiring frequent travel), it is commonly acknowledged that the ICJ's conclusions also apply to Heads of State.[20] The even greater importance and higher rank of a President clearly advocate for granting him at least the same immunities as those recognized by the ICJ in the case of the DRC's Minister for Foreign Affairs. Accordingly, it can be concluded that the legal principles pronounced by the Court in its judgment apply to Mr Taylor and his immunities before the SCSL.

3. The SCSL Appeals Chamber decision on Taylor's motion concerning immunity from jurisdiction

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

> (a) Citing the judgment of the International Court of Justice ('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;
> (b) Exceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter ('UN Charter');
> (c) The Special Court does not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court; . . . .[21]

In dealing with these issues, the Chamber substantially relied and further elaborated on the submissions made by two *amici curiae*, Professors Sands and Orentlicher,

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19. *Arrest Warrant* judgment, *supra* note 9, para. 53.
20. E.g., A. Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on *The Congo v. Belgium* Case', (2002) 13 EJIL 853, at 864 (hereinafter 'When May Senior Officials'); A. Cassese, 'The Belgian Court of Cassation *v.* the International Court of Justice: the *Sharon and others* Case', (2003) 1 *Journal of International Criminal Justice* 437, at 437; S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgement in the *Congo v. Belgium* Case', 13 EJIL 877, at 889 (hereinafter 'Immunity for Core Crimes?') (submitting in the reverse that the ICJ was correct in deriving the immunities *ratione personae* of an incumbent Minister for Foreign Affairs from those recognized under international law as pertaining to Heads of State); P. Gaeta, '*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The *Hissène Habré* Case', (2003) 1 *Journal of International Criminal Justice* 186, at 189 (hereinafter '*Ratione Materiae* Immunities') (referring to immunities *ratione materiae*); J. Wouters, 'The Judgment of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks', (2003) 16 LJIL 253, at 265; M. Spinedi, 'State Responsibility *v.* Individual Criminal Respondibility for International Crimes: *Tertium Non Datur*?', (2002) 13 EJIL 895, at 896; S. M. Meisenberg, 'Die Anklage und der Haftbefehl gegen Charles Ghankay Taylor durch den Sondergerichtshof für Sierra Leone', (2004) 17 *Humanitäres Völkerrecht* 30, at 33. The following scholars too proceed on the assumption that the immunities discussed by the ICJ in this case apply to Heads of State: C. P. R. Romano and A. Nollkaemper, 'The Arrest Warrant Against The Liberian President, Charles Taylor', *ASIL Insights*, June 2003, available online at http://www.asil.org (last visited 13 December 2004); P. Sands and A. Macdonald, 'Submissions of the Amicus Curiae on Head of State Immunity', *Prosecutor v. Taylor*, at 22, para. 41, available online at http://www.icc-cpi.int/library/organs/otp/Sands.pdf (last visited 13 December 2004); D. F. Orentlicher, 'Submission of the Amicus Curiae on Head of State Immunity', *Prosecutor v. Taylor*, at 12, on file with the author.
21. *Prosecutor v. Taylor*, *supra* note 10, para. 6.

appointed by the SCSL to advise on the matters dealt with in this decision.[22] In spite of mounting criticism in international legal scholarship of the ICJ's majority conclusion related to immunities in the *Arrest Warrant* case,[23] the judges attempted to defend the SCSL's jurisdiction over Taylor in line with that judgment.

At the outset the Chamber correctly observed that, following the logic of the world court ruling, 'the issues in this motion turn to a large extent on the legal status of the Special Court'.[24] It therefore proceeded to review the establishment of the Court. It identified, *inter alia*, Resolution 1315 (2000) of the UN Security Council authorizing the SG to negotiate an agreement on the Statute with the Government of Sierra Leone and the report of the Secretary-General submitted to the SC pursuant to this resolution as two instruments central to determining the (international) status of the Court.

Turning to the competence of the SC to conclude the Agreement establishing the SCSL with the Government of Sierra Leone, the Chamber came to the following conclusion:

> Although the Special Court was established by treaty, unlike the ICTY and the ICTR which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 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, the establishment of the Special Court by Agreement with Sierra Leone. Article 39 empowers the Security Council to determine the existence of any threat to the peace. In Resolution 1315, the Security Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.[25]

After these efforts apparently aimed at demonstrating that the SC was indeed competent to initiate the establishment of the SCSL and that this power flows from Chapter VII,[26] the Chamber raised an alternative argument in support of the international status of the Court:

> Much issue had been made of the absence of Chapter VII powers in the Special Court. A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court. [. . .] It is to be observed that in carrying out its duties under its responsibility for the maintenance

22. Sands and Macdonald, *supra* note 20; Orentlicher, *supra* note 20. (Cf. *Prosecutor v. Taylor*, *supra* note 9, para. 2.) The third *amicus* brief, that of the African Bar Association, has not been available to the author. It appears from the Appeals Chamber decision that referring to various cases (*Noriega*, *Pinochet* and *Milosevic*) and documents (Rome Statute of the International Criminal Court and the conclusions of the 1993 World Conference of Human Rights) that the relevant part of this submission denied the availability of immunities to Taylor before the SCSL. (*Prosecutor v. Taylor*, *supra* note 10, para. 19.)
23. The relevant part of the judgment has attracted strong criticism in dissenting and separate opinions and in legal doctrine, potentially opening up a way for the SCSL to reject it. See note 99, *infra*.
24. *Prosecutor v. Taylor*, *supra* note 10, para. 34.
25. ibid., para. 37. Emphasis added.
26. Previous SCSL decisions (see Appeals Chamber decisions on defence motions in *Prosecutor v. Fofana*, *Prosecutor v. Gbao, supra* note 13) were less precise in locating the relevant provisions of the UN Charter. They merely emphasized the nearly unlimited nature of the powers of the SC.

> of international peace and security, the Security Council acts on behalf of the members of the United Nations. 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.[27]

Referring again to Resolution 1315, the Appeals Chamber then noted that the SCSL is given an international mandate and is part of the international justice machinery.[28] It further argued that the SCSL is not part of the domestic judicial system of Sierra Leone, adding that its 'constitutive instruments . . . contain indicia too numerous to enumerate to justify [the] conclusion' that it is an international criminal court.[29]

Having thus settled the first question about the status and nature of the Court in a mere six paragraphs, the Court turned its attention to the issue of the availability of immunities for incumbent Presidents before it. First it cited the relevant provision of its Statute which lays down the rule 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.[30]

It then identified similar articles in the Statutes of the ICTY, the ICTR, the ICC, citing also the relevant provisions of the Charters of the International Military Tribunal in Nuremberg and the ILC's 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal'. Based on these precedents, the 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'.[31]

While noting that the world court had upheld the personal immunities of incumbent Ministers for Foreign Affairs (and by implication arguably of incumbent Heads of State), the Appeals Chamber proceeded by emphasizing that the ICJ had in fact confirmed the irrelevance of such immunities in relation to 'certain international criminal courts'. The Chamber explained the reason for the distinction between domestic and international courts in the following manner:

> 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.[32]

It then added that the irrelevance of immunities before international criminal courts and tribunals is in any case an established rule of international law and

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27. *Prosecutor v. Taylor*, *supra* note 10, para. 38. Emphasis in original, footnotes omitted.
28. ibid., para. 39.
29. ibid., paras 40–2. In its limited substantive reasoning, the Appeals Chamber relied on Sands' *amicus curiae* submissions (*supra* note 20 cited in ibid., para. 41) that the SCSL was not a national court, it was established by a treaty with characteristics of an international organization (e.g. international legal personality) and its competence *ratione materiae* and *ratione personae* (including the provision on the irrelevance of immunities) was similar to those of the ICTY, the ICTR and the ICC.
30. Art. 6(2) of the Statute, *supra* note 3.
31. *Prosecutor v. Taylor*, *supra* note 10, para. 49.
32. ibid., para. 51.

that Article 6(2) of the SCSL Statute does not violate any *jus cogens* norms. These observations led it to conclude that Taylor's immunities *ratione personae* could not constitute a bar to the jurisdiction of the SCSL.[33]

The Appeals Chamber ended its analysis by noting that as Taylor stepped down as Head of State subsequent to the transmission of the arrest warrant but 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'.[34]

The 'Decision on Immunity from Jurisdiction' is likely to become a landmark decision, widely quoted in legal doctrine and jurisprudence. Its significance is mainly attributable to the fact that it is the first application of the ICJ's *Arrest Warrant* judgment to high-ranking incumbent officials, here an incumbent Head of State.[35] This aspect of the case is most likely to be recalled. However, as rightly observed by a commentator, the importance of the decision is further underlined by the – in fact related – discussion of the nature and status of the SCSL.[36] Its expected prominent place in future international and domestic jurisprudence makes it all the more unfortunate that on both central issues (i.e. the status of the SCSL and Taylor's immunities) the conclusions of the Appeals Chamber are at best disputable.

4. Analysis

Taylor's indictment and the Appeals Chamber decision on the immunity motion has not passed daylight without invoking analysis and raising criticism. Some commentators focused on the treatment in the Decision of the Issue of Immunities of Heads of State before international criminal courts.[37] Others emphasized the failure of the Chamber to 'contribute to the jurisprudence defining the unique place of hybrid criminal tribunals in the machinery of international criminal justice'.[38] Yet, to the author's knowledge, no study has so far had as its primary aim to review

33. In relation to the issue of the transmission of an arrest warrant to Ghana, the Chamber was merely concerned with the question whether this violated Ghana's sovereignty. Asserting that such a warrant by one state transmitted to another is not self-executing, and that the state on the receiving end does not have any obligation to comply – at least in the absence of Chapter VII powers or a treaty obligation – the judges concluded that the transmission of the warrant could not be seen as an infringement of the sovereignty of Ghana. (ibid., para. 57.) This position – and the power of the SCSL to issue such a warrant – is far from self-evident. However, the consideration of this problem is not strictly necessary to answering the question of Mr Taylor's immunities before the SCSL itself. It will thus not form part of the present analysis.
34. ibid., para. 59.
35. A recent comment referred to the decision as 'the first application of the ICJ's decision in the *Arrest Warrant* case to a *former* Head of State.' (C. Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights*, October 2004, available online at http://www.asil.org/insights (last visited 13 December 2004), emphasis added.) This submission is, however, incorrect inasmuch as the arrest warrant was transmitted to Ghana while Taylor was still President of Liberia, and in fact the Appeals Chamber decision does not even raise the issue of his loss of office until the very end. Accordingly, the decision is better seen as the first application of the ICJ decision to an *incumbent* Head of State.
36. ibid.
37. See e.g. D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 AJIL 407, at 416–18.
38. Jalloh, *supra* note 35, Sec. VII.

the validity of the findings of the Appeals Chamber in this case.[39] This task will be undertaken below.

4.1. The legal basis of the establishment of the SCSL, its status and powers in relation to states other than Sierra Leone

In accordance with the ICJ's judgment in the *Arrest Warrant* case, the status and nature of the SCSL is highly relevant to the answer on the (ir)relevance of immunities of an incumbent Head of State before it. It is therefore necessary to review the part of the Appeals Chamber decision which dealt with this aspect of the case.

As noted above, the SCSL was established by an Agreement between the Government of Sierra Leone and the United Nations. As the competence of Sierra Leone to conclude such an agreement is a distinct legal issue, influencing the legitimacy of the Court but having no direct impact on the issue of immunities, this question will not be considered here.[40] All the more significant is, however, the question of the source of the competence of the United Nations to conclude such an agreement and of the authority of the Security Council to initiate the conclusion of the agreement.

As rightly observed by the Appeals Chamber, the first concrete step by the Security Council towards the establishment of the SCSL was Resolution 1315 authorizing the SG to negotiate an agreement to set up a special court. Herein, the Council referred to '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'.[41] Still in the Preamble, it moreover 'reiterat[ed] that the situation in Sierra Leone continue[d] to constitute a threat to international peace and security in the region'. However, beyond this resemblance to the terminology of Article 39 of the UN Charter, its language and contents do not in fact indicate any intention to adopt the Resolution under Chapter VII of the United Nations Charter, or in any case to impose binding measures on states. 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. The resolution contains mere requests (addressed to the UN Secretary-General) and recommendations (concerning the Court). Its semantics can hardly be claimed to signal any intention on the part of the SC to act under Chapter VII.[42]

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39. Some authors discussed issues similar to those raised by Taylor's defence motion prior to the Appeals Chamber decision. Referring shortly to the ICJ judgment in the *Arrest Warrant* case, they came to the conclusion that the SCSL is an international court and is competent to adjudge the case due to the irrelevance of Taylor's immunities. (Meisenberg, *supra* note 20; A. Mbata B. Mangu, 'Immunities of Heads of State and Government: A Comment on the Indictment of Liberia's President Charles Taylor by the Special Court for Sierra Leone and the Reaction of the Ghanaian Government', (2003) 28 *South African Yearbook of International Law* 238.) However, in the opinion of this author none of these analyses deals with the issue of the immunities of an incumbent president satisfactorily.
40. See, however, *Prosecutor v. Fofana*, 'Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone' (*supra* note 13) on the competence of Sierra Leone.
41. UN Doc. S/RES/1315 (2000).
42. Cf. P. C. Szasz, 'The Security Council Starts Legislating', 96 AJIL 901, at 902; E. Suy, 'Article 25', in J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article* (Paris: Economica; 1991), 476 on relevant UN terminology.

The Appeals Chamber has not laid too much emphasis on these technicalities beyond emphasizing the resolution's reference to 'threat to peace'. Instead, it seemed keen on nevertheless identifying the powers of the SC to authorize the conclusion of the Agreement under Chapter VII of the UN Charter, implying a binding nature. Yet, it did so without subsequently elaborating on the legal consequences of a possible Chapter VII basis.[43]

As noted above, the Chamber has pointed to Articles 39 and 41 as the legal bases on which the SC's acts towards the conclusion of the UN-Sierra Leone agreement can be justified.[44] It is respectfully submitted that the source of the SC's relevant powers is more accurately sought outside Chapter VII of the UN Charter. The establishment of the SCSL was purely consensual[45] and Resolution 1315 or any other relevant SC resolutions did not contain binding language nor indicate a clear intent to such an effect in the applicable paragraphs. It therefore appears that the setting up 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.[46] Their legal basis is in any case commonly located outside of Chapter VII.[47]

The SC's role in setting up the SCSL can probably even be justified as a pacific means of adjustment which can be recommended by the Security Council under Chapter VI, Article 36 of the UN Charter or under the general powers of the Council to maintain peace and security.[48] Admittedly, Article 2(7) of the UN Charter imposes a pertinent limitation on the powers of the Security Council. This provision namely requires the UN to respect the domestic jurisdiction and sovereignty of its members unless it is resorting to enforcement measures acting under Chapter VII of the Charter. The request for assistance by and voluntary cooperation of the Government of Sierra Leone suggest that the SC involvement in the establishment of the Special Court did not constitute undue interference in Sierra Leone's internal

43. These consequences in terms of the (ir)relevance of immunities will be dealt with in section 4.2, *infra*. Suffice it to mention at this point that had the SCSL been established in a Chapter VII resolution like the ICTY and the ICTR, the provision of its Statute on the irrelevance of official capacity identical to those found in the ICTY and ICTR Statutes could be invoked to justify the irrelevance of Taylor's immunities.
44. See text accompanying note 25, *supra*.
45. The request and consent of Sierra Leone does not, however, necessarily have a bearing on the legal basis of the Courts' establishment. The ICTR too was established following a request by the Government of Rwanda. Yet, Resolution 955 (UN Doc. S/RES/955 (1994)), establishing that Tribunal, explicitly locates the competence of the SC under Chapter VII of the UN Charter. Resolution 1315 (*supra* note 41), in contrast, fails to do so.
46. See e.g. E. Suy, 'Peacekeeping as an Operational Activity of International Organizations' in R.-J. Dupuy (ed.), *A Handbook on International Organizations* (1998), 539, at 544; N. D. White, *The United Nations System: Toward International Justice* (2002), 162.
47. See, e.g., *Case concerning Certain Expenses of the United Nations*, [1962] ICJ Advisory Opinion of 20 July 1962, ICJ Rep. 151, at 177.
48. 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.' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion**,** [1971] ICJ Rep. 14, at 52–3, para. 110, emphases added. Cf. J. Delbrück, 'Article 24', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 442, at 448.)

affairs. Accordingly, the adoption of this measure would be legitimate even outside of Chapter VII of the Charter.

On the other hand, in the absence of their consent, a legal basis other than one under Chapter VII limits the competence of the SCSL in relation to states other than Sierra Leone. While the obligation on UN members to carry out measures adopted by the Security Council is not limited to those taken under Chapter VII of the UN Charter,[49] an interference with their jurisdiction and with the immunities pertaining to high-ranking officials might be considered to constitute a violation of Article 2(7) of the UN Charter, hence an *ultra vires* act of the SC. This fact could be claimed to deprive the measure of any effect on member states.[50]

The failure to endow the Special Court with Chapter VII powers to require cooperation from states other than Sierra Leone[51] – a fact acknowledged by the Appeals Chamber[52] – further advocates against the conclusion that the SC intended to establish the Court under Chapter VII of the UN Charter. Moreover, the Report of the SG and the Statute may be perceived as further negating the conclusion that the SCSL is in relevant respects similar to the *ad hoc* tribunals. As observed by the SG:

> [u]nlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore *a treaty-based sui generis court of mixed jurisdiction and composition.*[53]

It is, moreover, generally recognized that the SCSL is a hybrid or internationalized court, in contrast to the *ad hoc* international tribunals which are UN organs established by the SC acting under Chapter VII of the United Nations. As a consequence, the SCSL cannot invoke powers and competence comparable to that of the *ad hoc* tribunals in relation to third parties.[54]

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49. Ibid., paras. 112–13.
50. Art. 24(2) of the UN Charter namely requires the SC to act 'in accordance with the Purposes and Principles of the United Nations' in exercising its functions. Moreover, the undertaking in Art. 25 of the Charter by Members to carry out decisions of the SC 'in accordance with the present Charter' may be interpreted as referring to decisions so taken, depriving resolutions inconsistent with the Purposes and Principles of the Charter of a binding force. (See e.g. J. Delbrück, 'Article 25', in Simma, *supra* note 48, 452, at 455.)
51. The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (UN Doc. S/2000/915, para. 10, 4 October 2000) states that:

    > [t]he 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 the 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.

    In spite of this explicit recommendation, the SC has not done so.
52. *Prosecutor v. Taylor*, *supra* note 10, para. 38.
53. Report of the Secretary-General, *supra* note 51, para. 9. Emphasis added.
54. Not only is there – in contrast to the resolutions establishing the *ad hoc* tribunals – no clear mention in Resolution 1315 of Chapter VII, even considering the reference to 'threat to international peace and security' as evidence of the SC's intention to adopt this resolution under Chapter VII cannot lead to the conclusion that Taylor's immunities are irrelevant before the SCSL. There is nothing in this resolution that could

However, as rightly observed by the Appeals Chamber, '[a] proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court.'[55] Its place on the domestic-international continuum and its specific characteristics are just as crucial for that determination.

The SCSL is undeniably endowed with international features. Even though it is not a subsidiary organ of the Security Council established under Chapter VII of the Charter, or even an institution within the organizational structure of the United Nations,[56] the Court was from its conception foreseen as a body existing outside of and distinct from the legal system of Sierra Leone. This intention is indicated in the submissions in the SG Report related to the establishment and status of the Court as well as to applicable law. Moreover, certain provisions of its Statute,[57] the UN-Sierra Leone Agreement[58] and the Sierra Leonean Ratification Act[59] clearly deny the conclusion that the SCSL is a domestic court or otherwise forms part of the legal system of Sierra Leone.

This observation does, however, not suffice precisely to identify the status of the Court and the consequences thereof. The Appeals Chamber has recognized this problem and elaborated further on the characteristics of the Agreement. In defending the international nature of the SCSL, the Chamber adopted an argument originally raised by one of the *amici curiae*. According to Orentlicher, in authorizing the SG to negotiate an agreement with Sierra Leone for the establishment of the SCSL the Security Council was not only carrying out its responsibility to maintain peace and security, but '[i]n doing so, [it] was acting on behalf of all Members of the United Nations'.[60]

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affect the immunities of a foreign official in a binding manner. (See text accompanying notes 84–7, *infra*.) Moreover, a parallel with the *ad hoc* tribunals is unjustified in any case due to the failure of the SC to adopt the SCSL Statute in a Chapter VII resolution like it did in the cases of the ICTY and the ICTR. As a consequence, there is widespread consensus in legal doctrine – shared by the Appeals Chamber – that the SCSL does not posses Chapter VII powers or inhibit other features that a Chapter VII basis could imply. Accordingly, following the arguments presented in section 4.2, *infra*, it cannot claim a competence to set aside customary immunities pertaining to high-ranking incumbent officials of states other than Sierra Leone on this ground.

55. *Prosecutor v. Taylor*, *supra* note 10, para. 38. It may be noted that the Appeals Chamber made this statement following its attempt nonetheless to demonstrate a Chapter VII legal basis.

56. Report of the SG on the establishment of the SCSL, *supra* note 51, paras. 9–10; G. Sluiter, 'Assistance to Internationalized Criminal Courts and Tribunals', in C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004), 379 at 386. *Sed contra* decision on defence motion in *Prosecutor v. Gbao*, *supra* note 13, para. 5 (referring to the SCSL as an organ of the SC). Notably, in her *amicus curiae* brief Orentlicher refers to the SCSL as a 'UN institution', submitting that '[a]s with other UN institutions . . . , the immunities of the personnel and property of the SCSL as well as the Court's own legal capacity are governed by a bilateral agreement between the United Nations and the host state, in this case Sierra Leone' (*supra* note 20, at 21). However, the Statute of the SCSL and the UN-Sierra Leone agreement fail to confirm this – unmotivated – submission regarding the status of the Special Court.

57. See e.g. provisions of the Statute (*supra* note 3) related to Concurrent Jurisdiction (Art. 8), *Non bis in idem* (Art. 9(2)), the composition of the Chambers (Art. 12), Rules of Procedure and Evidence (Art. 14), Prosecutor (Art. 15), Registry (Art. 16).

58. See e.g. matters regulated in the Agreement (*supra* note 2) related to the Establishment of the Special Court (Art. 1(2)), the Expenses of the Special Court (Art. 6), Management Committee (Art. 7), Judicial Capacity (Art. 11), Privileges and immunities (Arts. 8–9, 12–13).

59. Special Court Agreement (2002) Ratification Act, available online at http://www.sc-sl.org/documents.html (last visited 13 December 2004). The Act largely confirms the provisions of the Statute and Agreement cited in notes 57–8, *supra*. See, in particular, Arts. 11(2) and 13 on the independence of the SCSL from the judiciary of Sierra Leone.

60. Orentlicher brief, *supra* note 20, at 19.

The Appeals Chamber took this submission further, arguing that this fact rendered the UN-Sierra Leone agreement one 'between *all* members of the United Nations and Sierra Leone', adding that '[t]his fact makes the Agreement an expression of the will of the international community'.[61] The Chamber failed, however, to specify the legal consequences of this conclusion in relation to states other than Sierra Leone beyond finding that '[t]he Special Court established in such circumstances is truly international'.[62]

Yet, the Appeals Chamber's conclusion may have much further-reaching implications than this – unproblematic – submission. The statement may be interpreted in two ways. First, it may simply be seen as a restatement of the legitimate but not undisputed thesis of international institutional law that a treaty concluded by an organization is binding on its members.[63] The independent international legal personality of the United Nations – and the related notion that it is thus more than the sum of its member states[64] – could be seen as denying the validity of this position. Moreover, one condition of the application of this thesis is that the conclusion of the agreement must be within the powers of the organization.[65] It might, however, be argued that a contractual waiver of immunities pertaining to officials of its member states – arguably a violation of Article 2(7) of the UN Charter – is *ultra vires* the Security Council, unless it is acting under Chapter VII of the Charter.[66] As argued above, a Chapter VII legal basis cannot be demonstrated in this case.[67]

Either way, a strict application of this rule would merely suggest that the Agreement as such – with the provisions expressly stated therein – is binding on UN members. As the Agreement and annexed Statute do not explicitly attempt to modify rights or obligations of third parties (e.g. to waive immunities of high-ranking foreign officials), such a reading would not cause any controversies.[68]

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61. *Prosecutor v. Taylor*, *supra* note 10, para. 38.
62. ibid., para. 38.
63. Schermers and Blokker, *supra* note 18, paras. 1787–8 at 1143. Cassese, however, submitted writing specifically about the UN–Sierra Leone Agreement that it 'is only binding upon the United Nations and Sierra Leone. It is not binding upon third countries, in particular, neighbouring countries.' (A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in Romano, Nollkaemper and Kleffner, *supra* note 56, 3 at 9. Cf. L. Condorelli and T. Boutruche, 'Internationalized Criminal Courts and Tribunals: Are They Necessary', in ibid., 427, at 434; Sluiter, *supra* note 56, at 402 to the same effect.)
64. *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 17, at 180.
65. Schermers and Blokker, *supra* note 18, para. 1787 at 1143.
66. See notes 48–50 and accompanying text, *supra*.
67. Even if one considers that Resolution 1315 (*supra* note 41) was adopted under Chapter VII, the agreement was clearly not concluded under Chapter VII of the United Nations Charter.

    It should, however, be noted that Art. 103 of the UN Charter provides for the primacy of obligations flowing from the Charter over any other (conventional) obligations. While it is sometimes disputed whether Art. 103 renders obligations under the UN Charter capable of overriding obligations incumbent upon states under customary international law (e.g. the duty to respect immunities of an incumbent President), the better view appears to be that – due to the nature of the UN Charter – it is capable of doing so. (See R. Bernhardt, 'Article 103' in Simma, *supra* note 48, 1292, at 1298–9.) Accordingly, a waiver of immunities could flow from this provision, assuming that such an obligation was imposed by a source to which Art. 103 applies. It is, however, submitted that lacking any binding provisions aimed at UN member states, the UN–Sierra Leone Agreement could not be considered as a source of obligations to which Art. 103 applies. (See ibid., at 1296.) In addition, the arguments related to waiver spelled out below (note 83 and accompanying text, *infra*) would apply here too.
68. In the absence of an express provision to that effect, this interpretation could not justify disregard for Taylor's immunities by the SCSL under the Agreement and Statute.

A second possible interpretation is that, being one between all members and Sierra Leone, the Agreement could impose such obligations on members as may be derived from the object and purpose of the agreement, by implication.[69] However, the view – admittedly not expressly voiced or relied on by the Appeals Chamber – that obligations may be *implied* for member states from a treaty concluded by the United Nations and a single member state is not supported in customary international law. In fact, that suggestion appears straight out negated by state practice concerning United Nations status of forces agreements (SOFAs). Such agreements are concluded between the UN and the host state to regulate the status, rights and obligations of UN peacekeeping operations and their personnel. Similarly to the UN–Sierra Leone Agreement, they are negotiated by the Secretary-General upon authorization by the UN Security Council.[70] They further resemble that Agreement considering that, unlike for instance agreements concluded between the UN and its associated agencies, their entry into force does not necessitate approval by the General Assembly. State practice shows a remarkable lack of recognition that SOFAs could impose obligations on all UN members. In fact, the few relevant domestic court decisions known to the author concluded that states other than the host state are not bound by the immunities granted in the agreement.

In *Government of Israel v. Papa Coli Ben Dista Saar*,[71] a case decided in Israel, a member of the Senegalese contingent of the United Nations Interim Force in Lebanon (UNIFIL) was prosecuted for delivering explosives into Israel, to a representative of the Palestine Liberation Organization. As UNIFIL was stationed in Lebanon, and the SOFA had accordingly been concluded with Lebanon, the Israeli Foreign Ministry advised the court that Israel was not a party 'to any international agreement whatsoever which grants immunity to UN soldiers who are not UN officials serving in UN forces in the area, including UNIFIL forces'.[72] The court consequently decided that the Senegalese peacekeeper was not entitled to immunity before the courts of Israel. There is no indication that the UN or Senegal ever contested this finding. This decision and the lack of protest suggest that no obligations corresponding to those stated with regard to the host state derive by implication from these agreements for UN members not parties to it.[73]

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69. This reading could lead to the conclusion that any immunities pertaining to the Liberian President are invalid under the Agreement.
70. See "e.g." UN Doc. S/RES/1509 (2003), para. 7, requesting the Government of Liberia to negotiate a SOFA with the SG for the United Nations Mission in Liberia established under the same resolution.
71. District Court of Haifa, Judgment of 10 May [1979], summary in *United Nations Juridical Yearbook* 1979, 205.
72. Ibid., at 208.
73. The *Marchal* case, in turn, confirms the position with regard to *sending states* – not parties to the relevant SOFA – that a SOFA has no effect on states not parties to it. In this instance, the Military Court of Belgium assumed criminal jurisdiction over a Belgian colonel for death on the grounds of lack of caution or precaution during his service in the Belgian military contingent of UNAMIR, carrying out an order given by UNAMIR commander General Dallaire to escort the Rwandan Prime Minister. (The *Marchal* case, Military Court of Belgium, 4 July 1996, unofficial Dutch translation reproduced in (1997) 90 *Militair Rechtelijk Tijdschrift* 65.) The case clearly related to official functions. Yet, there is no evidence of the UN ever having been approached for a waiver of Marchal's immunity or any UN protests against Marchal's prosecution in Belgium.

    While the decision itself did not deal with the question of immunities, a commentator has noted that even though Art. 46 of the UNAMIR SOFA granted members of the forces immunity for official acts, the sending state retained criminal jurisdiction over military personnel under Art. 47(b) of the same agreement. In other

Similar conclusions may be drawn from the relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[74] 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.

In sum, it is clear that the establishment of the SCSL is *intra vires* and valid and from the perspective of the UN. The Court's jurisdiction as defined in the Statute is therefore not objectionable. However, unlike the *ad hoc* tribunals the Court is not a UN organ endowed with Chapter VII powers. On the other hand, it is not a domestic organ of Sierra Leone. The conclusion of the Agreement between the UN and Sierra Leone establishing the Court was authorized by the SC. This fact and the specific provisions of the Agreement and annexed Statute endow the SCSL with international features. However, despite the fact that the SC authorized the conclusion of the Agreement, its provisions do not have a legal effect on the rights and obligations of states other than Sierra Leone, on the relationship between the SCSL and states other than Sierra Leone, or on the powers of the SCSL in respect to other states. The question thus remains, whether its international features are sufficient to make the SCSL fall under the ICJ's reference to '*certain* international criminal courts'.[75]

4.2. Should immunities of foreign Heads of State prevail before the SCSL?

As the regulation of immunities in international agreements is very limited, no conventional rules offer guidance to the problem at hand. Customary international law, on the other hand, is rich on the subject. First of all, it grants certain high-ranking officials, including Heads of State, immunity from jurisdiction related to acts committed in their official as well as private capacity. Immunities over the second type of acts, immunities *ratione personae*, are absolute and cover even acts committed prior to entering office.[76] However, they cease to apply once the person leaves the relevant function.[77]

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words, the SOFA as such did not impose obligations on the sending state. (N. Keijzer, 'De zaak Marchal: vrijspraak van dood door schuld', (1997) 90 *Militair Rechtelijk Tijdschrift* 73, at 76.)

74. Arts. 34–8 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543. This convention has not yet entered into force. However, the same principles apply to treaties between states under Arts. 34–8 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331. While the author is not aware of these particular provisions having been declared to reflect customary international law, it is logical that the rule that a treaty cannot create obligations for third parties applies to all treaties as a consequence of the sovereign equality of states and/or the functional independence of international organizations possessing an international legal personality.
75. *Arrest Warrant* judgment, *supra* note 9, para. 61.
76. E.g., A. Cassese, *International Criminal Law* (2003) 265–6; S. Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French *Cour de Cassation*', (2001) 12 EJIL 595, at 597–600.
77. This article does not address the issue of the (ir)relevance of immunities *ratione materiae* of state agents (for official acts) in the context of war crimes prosecutions. On these issues, see "e.g." Gaeta, '*Ratione Materiae* Immunities', *supra* note 20, at 186–96; Cassese, *supra* note 20; Akande, *supra* note 37, at 412–15.

As correctly noted by the SCSL Appeals Chamber, the traditional justification for these types of immunity is the inviolability of the sovereign and the *par in parem non habet jurisdictionem* maxim. In this sense, even though customary international law is binding even on international organizations endowed with an international legal personality,[78] the logic of the rule would preclude the application of immunities *ratione personae* to international courts.[79]

However, recent scholarship increasingly accepts the view that such immunities are not merely a relic of the personal sovereignty of the ruler but are based on considerations of functional necessity. They namely serve to protect the official – and through him the state – from external interference, and thereby to enable him to carry out his functions.[80] Accordingly, they are just as crucial in relation to international bodies as before domestic courts, unless the status and nature of the international court justifies a different conclusion.

On the other hand, Sands, one of the experts appointed as *amicus curiae*, argued that:

> [t]here is nothing in the Security Council resolutions relevant to the establishment of the Special Court, or the Agreement or Statute establishing the Special Court, which indicates that a rule of immunity was intended to be recognized or declared or otherwise applied in respect of the Special Court for Sierra Leone.[81]

With respect, this approach to the problem is flawed.

In fact, Sands himself has pointed out that 'two States may not establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts'.[82] Accordingly, the presumption should in such cases be in favor of the applicability of immunities. As shown above, the fact that one of the parties is the UN is not material in this context (i.e. the Agreement – whether or not it is accepted as being one between all UN members and Sierra Leone – does not alter the rights and obligations of third parties). Sands latter statement thus negates the necessity of an express provision on the *applicability* of immunities, claimed by him previously.

Moreover, in accordance with the functional necessity argument, customary immunities should be deemed to apply – even before international courts – unless properly waived or otherwise rendered irrelevant (e.g. by an SC resolution adopted under Chapter VII of the UN Charter). To effect a waiver of immunities firmly established under customary international law even a UN instrument would arguably need to display a *clear and unambiguous intention*,[83] one not present in the Agreement

78. *Supra* note 18.
79. See Gaeta, '*Ratione Materiae* Immunities', *supra* note 20, at 194 (raising this argument in the context of immunities *ratione materiae*); Meisenberg, *supra* note 20, at 38.
80. R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1996), 1034; Cassese, *International Criminal Law*, *supra* note 76, at 265; *Arrest Warrant* judgment, *supra* note 9, para. 53.
81. *Supra* note 22, at 43.
82. Ibid., at 43.
83. In *Elettronica Sicula* the ICJ stated that it was 'unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, *in the absence of any words making clear an intention to do so*'. ([1989] ICJ Rep. 15, at 42, para. 50. Emphasis added.) Similarly, Schwarzenberger has submitted that '[i]n . . . a situation of uncertainty it is necessary to give due weight to three relevant

and/or the annexed Statute. Accordingly, in the absence of an express provision to this effect, it would be difficult to argue that the provisions of these instruments render customary international law immunities (*ratione personae*) attaching to the person of certain high-ranking *foreign* officials irrelevant.

Admittedly, one of the operative paragraphs of Resolution 1315 contains a recommendation 'that the special court should have jurisdiction over persons who bear the greatest responsibility for the commission of the crimes . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone'.[84] Yet, following its literal reading, this recommendation falls short of waiving the immunity pertaining to foreign officials. In addition, the SG Report on the establishment of the SCSL[85] does not contain any reference to foreign officials in elaborating on this paragraph of the resolution. Moreover, assuming that the immunities of such officials are established in international law in relation to the SCSL,[86] the Council would have needed to invoke its Chapter VII[87] powers to effectively waive those but it has failed to do so.

On the other hand, the irrelevance of customary immunities pertaining to high-ranking officials is often defended along different lines. The Charter of the International Military Tribunal in Nuremberg,[88] the Charter of the International Military Tribunal for the Far East,[89] the Nuremberg Principles,[90] the Genocide Convention,[91] the 1996 Draft Code of Crimes Against the Peace and Security of Mankind,[92] and

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presumptions: the presumption against any implicit waiver of rights, and those in favour of the minimum restriction of sovereignty and the interpretation of treaties against the background of international customary law.' (G. Schwarzenberger, *International Law* (1957) Vol. 1, 610–11). While both statements dealt with the exhaustion of local remedies in the context of diplomatic protection, they are formulated in such general terms that they may be seen as providing evidence that waivers of any important (international) rights need to be express.

Even more pertinently, it is submitted in *Oppenheim's International Law* (*supra* note 80, at 351–2, notes omitted) that: '[a] state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement'. Admittedly, the treatises recognizes the possibility that '[a] state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case' (ibid., at 352–3, notes omitted). However, as noted by Lord Goff of Chieveley in *Pinochet No. 3* (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, United Kingdom House of Lords, Opinion of the Lords of Appeal for Judgment in the Cause, 24 March 1999, reproduced in (1999) 38 ILM 591, at 602), '[i]t is significant that, in this passage, the only examples given of implied waiver of immunity relate to actual submission by a state to the jurisdiction of a court or tribunal by instituting or intervening in proceedings, or by taking a step in proceedings.' Cf. ibid., at 602–4, (citing, *inter alia*, the International Law Commission's Draft Articles on the Jurisdictional Immunities of States and their Property (*Yearbook of the International Law Commission 1991*, vol. II(2)), with commentary, in support of this position.)

84. *Supra* note 41, para. 2.
85. *Supra* note 51, paras. 29–31
86. Art. 11 of the Agreement (*supra* note 2) endows the SCSL with an international legal personality. Accordingly, it is bound by customary international law (cf. note 18, *supra*). It is thus also bound by the relevant rules of customary international law on immunities of Heads of State. As concluded by the ICJ in the *Arrest Warrant* case (*supra* note 9; cf. section 2, *supra*) these do not provide for a *general* exception applicable to *all* international courts.
87. See note 48–50, *supra* and accompanying text.
88. 82 UNTS 279, Art. 7.
89. TIAS No. 1589, Art. 6.
90. UN Doc. A/1316 (1950), Art. 3
91. Convention on the Prevention and Suppression of the Crime of Genocide, 78 UNTS 277, Art. IV.
92. *Yearbook of the International Law Commission 1996*, vol. II(2), Art. 7.

the Statutes of the ICTY,[93] ICTR[94] and the ICC[95] all contain provisions denying the relevance of official capacity in the context of core crime prosecutions. Based on these provisions, it is often claimed – as it was by the Appeals Chamber – that a rule of customary international law had developed waiving the immunities of even the highest ranking state officials from criminal jurisdiction in such cases.[96]

However, even assuming that this proposition is correct, it is insufficient to justify the Appeals Chamber conclusion in *Taylor*. As clarified in the ICJ judgment in the *Arrest Warrant* case, not all immunities are irrelevant even in the case of the prosecution of international crimes, and not before all courts. Having reviewed the state of international law on the subject, the ICJ noted that:

> [i]t has been unable to deduce from [state] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[97]

The ICJ nonetheless also referred to the fact that:

> an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings *before certain international 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 latter's Statute expressly provides*, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.[98]

The judgment has – understandably – been criticized, *inter alia*, for its lack of specificity including the failure clearly to distinguish between immunities *ratione materiae* and those *ratione personae*, and/or for its restrictive approach regarding exceptions to customary immunities in the case of core crimes prosecutions.[99] However, commentators generally received enthusiastically the recognition that international courts can exercise jurisdiction even over incumbent high-ranking office holders. Some have in fact sought to confirm this position, arguing, like the SCSL did, that the *par in parem non habet jurisdictionem* principle does not apply before international criminal courts.[100]

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93. (1993) ILM 1192, Art. 7(2).
94. (1994) ILM 1598, Art. 6(2).
95. (1998) ILM 999, Art. 27.
96. *Sed contra* text accompanying note 107, *infra*.
97. *Arrest Warrant* judgment, *supra* note 9, para. 58.
98. ibid., para. 61. Emphasis added.
99. E.g., Dissenting Opinion of Judge *Ad Hoc* Van den Wyngaert in the same case, ibid., paras. 26–8; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the same case, ibid., paras. 78, 85; Cassese, 'When May Senior Officials', *supra* note 20 at 862–6; Wouters, *supra* note 20 at 257, 259–61.
100. E.g. Gaeta, *Ratione Materiae* Immunities, *supra* note 20, at 194 (in the context of immunities *ratione materiae*); Meisenberg, *supra* note 20, at 38. Cf. Robert Jennings, 'The Pinochet Extradition Case in the English Courts', in L. Boisson de Chazournes and V. Gowland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), 676, at 693 (raising this argument outside of the context of the *Arrest Warrant* case).

Yet, it is unlikely that this principle – and hence the immunities protected by it – would be irrelevant before all international courts. It is far from obvious that this is what the ICJ had in mind in formulating this paragraph. In this regard, attention should be paid to the italicized parts of the statement. It is submitted that those terms advocate against such a far-reaching, general conclusion and while the list given by the ICJ is not exhaustive, the paragraph cannot reasonably be read to imply the irrelevance of immunities before *all* international criminal courts.

With regard to the *ad hoc* Tribunals set up by the UN Security Council, it is their Chapter VII mandate and the provision on the irrelevance of immunities in the Statute adopted under Chapter VII which appear to justify the conclusion that even high-ranking incumbent officials are not immune from their jurisdiction.[101] The ICJ's conclusions with regard to the unavailability of immunities before these tribunals appear accordingly to rest on the fact that – as observed by the Court – those bodies are subsidiary organs of the UN Security Council, set up under and possessing themselves Chapter VII powers in relation to their function. It is due to these powers that they can supersede immunities of even incumbent Ministers for Foreign Affairs – and arguably other high-ranking state officials such as Presidents.[102] The SCSL, in contrast, lacks a Chapter VII basis.

However, the ICJ referred also to the ICC as an example of an international criminal court before which immunities of incumbent or former Ministers for Foreign Affairs are of no avail. This prompts the question whether the SCSL could negate the immunities pertaining to a Head of State other than that of Sierra Leone,

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101. In this case, due to the Chapter VII mandate, this conclusion is arguably valid even with regard to officials of states not predecessors of the former Yugoslavia.

102. See "e.g." Romano and Nollkaemper, *supra* note 20; S. Wirth, 'Immunities, Related Problems, And Article 98 of the *Rome Statute*', (2001) 12 *Criminal Law Forum* 429, at 442 (hereinafter 'Immunities, Related Problems'); Meisenberg, *supra* note 20, at 37. *Sed contra* Sands' *amicus curiae* brief, *supra* note 20, at 29–30, paras. 55–6; at 39–40, para. 75 (arguing that as the ICC is mentioned by the ICJ, Chapter VII powers are not 'essential for the question of immunity.')

It may, nevertheless, be noted that in defending its jurisdiction over President Milošević the ICTY invoked Art. 7(2) of its Statute and argued that the provision reflected customary international law, rather than referring to the establishment of the Tribunal under Chapter VII of the UN Charter. However, it expressly qualified the status of the accused as 'former President', seemingly rendering a discussion of immunities *ratione personae* irrelevant (*Prosecutor v. Slobodan Milošević*, ICTY, Trial Chamber, Decision on Preliminary Motions, 8 November 2001, para. 28 (cf. paras. 26–34), available online at http://www.un.org/icty/milosevic/trialc/decision-e/111108735168 29.htm (last visited 13 December 2004)). Mr Milošević had indeed ceased to be President of the Federal Republic of Yugoslavia at the time of his arrest and was surrendered by the authorities of his own state. Hence he no longer enjoyed immunities *ratione personae* at the time of the decision (nor, arguably, those *ratione materiae* due to surrender by his own national authorities which may be construed as a waiver). Yet, as Milošević was indicted when he was still Head of State, the preliminary motion forming the basis of this decision in fact concerned both types of immunity. The ICTY failed explicitly to address this matter.

As former Prime Minister Kambanda did not raise the issue of immunities in the proceedings and pleaded guilty to all six counts contained in the indictment against him, subjecting himself to the ICTR's jurisdiction, the ICTR did not need to deal with the (ir)relevance of his immunities *ratione materiae* (*Prosecutor v. Jean Kambanda*, Case no.: ICTR 97-23-S, Trial Chamber, Judgment and Sentence of 4 September 1998; *Jean Kambanda v. Prosecutor*, Case No. ICTR 97-23-A, Appeals Chamber, Judgment of 19 October 2000. Both judgments are available online at http://www.ictr.org (last visited 13 December 2004)). Moreover, he ceased to be Prime Minister prior to his indictment by the ICTR (*Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-DP, Indictment of 16 October 1997, available online at http://www.ictr.org (last visited 13 December 2004)), so he clearly did not enjoy immunities *ratione personae*. Additionally, Mr Kambanda had been Prime Minister of Rwanda and Mr Milošević of was President of Yugoslavia so the question of consistency with rights of third states did not arise in these cases.

thanks to substantial similarities in relevant aspects with the ICC. While established by different and a more limited number of parties, the SCSL, like the ICC, is a court based on an international treaty. It too is an international or at least internationalized body.

Significantly, however, it is increasingly recognized in recent scholarship on the subject that the ICC Statute's waiver of official immunities applies – at least regarding immunities *ratione personae* – only to officials of the contracting parties (unless the case has been referred to the Court by the SC under Chapter VII of the UN Charter).[103] In the absence of clear evidence of a rule of customary international law waiving such immunities and against the background of rules of treaty law on the subject[104] this indeed appears the only correct interpretation – one the SCSL failed even to mention. It thus appears to be not the ICC's international nature as such but the conventional waiver (in Article 27) expressed by the parties upon ratifying the Statute that motivated the ICJ's choice to include the ICC among the international criminal courts before which prosecution may be possible in certain cases irrespective of immunities.[105] Beyond the explicit reference by the ICJ to Article 27(2) of the ICC Statute (rather than to customary international law), this conclusion is borne out by the consideration that such immunities exist as a matter of functional necessity even before international courts unless waived or rendered irrelevant by another applicable rule of international law (conventional or customary).[106] The ICC Statute is a multilateral treaty, hence it cannot waive rights pertaining to states not parties thereto.

The view that the ICC does not have jurisdiction over incumbent officials of non-states parties who are entitled to immunities *ratione personae* under international law appears thus to be the best reflection of international law on the subject. This argument rests on the assumption that it is not the international nature of the court as such but the waiver by the parties (and the SC's Chapter VII powers invoked in relation to the ICTY and ICTR in those cases) that accounts for the irrelevance of immunities before it, cited by the ICJ. Such a waiver is not effected by the SCSL Statute or related instruments.

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103. Akande, *supra* note 37, at 421; Wirth, 'Immunities, Related Problems', *supra* note 102, at 452–3. Cf. P. Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute for an International Criminal Court* (2002), 975, at 994–5 (submitting that while Art. 27(2) gives the ICC jurisdiction even over officials of third parties who enjoy personal immunities in foreign states under customary international law, due to Art. 98(1) the ICC Statute does not violate the personal immunities of officials of non-party states under international criminal law); D. Robinson, 'The Rome Statute and its Impact on National Law', in ibid., 1849, at 1856–7 (acknowledging opinions to this effect but denying their validity in the context of SC referrals under Chapter VII).
104. *Supra* note 74 and accompanying text.
105. This position admittedly fails to account for the Statutes of the Nuremberg and Tokyo Tribunals and their jurisprudence. However, it is notable that even proponents of the ICC's jurisdiction over incumbent officials of non-party states acknowledge that two (or a couple) of states cannot contract to establish a – thus international – court to exercise jurisdiction over incumbent officials of third states. This conclusion applies even to the prosecution of international crimes. (Sands, *supra* note 20, at 43, para. 78.) Moreover, the Nuremberg and Tokyo Tribunals, often seen as 'victors' justice', may not constitute the best precedents in this regard. It should also be recalled that the Tokyo Tribunal failed to hold Emperor Hirohito accountable. As Hitler committed suicide prior to the setting up of the Nuremberg Tribunal, no Heads of State were thus in fact prosecuted by these Tribunals. Cf. text accompanying note 107, *infra*.
106. See note 80, *supra*, and accompanying text.

Moreover, according to a newly emerging school of thought the source of the waiver of immunities *ratione personae* in the case of the ICC is the very provision cited by the ICJ, namely Article 27(2). This provides that

> [i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

It is considered that the classical formulation on the irrelevance of official capacity found in the Statutes of the ICTY, the ICTR and the SCSL, covering merely immunities *ratione materiae*, falls short of rendering immunities *ratione personae* irrelevant.[107] For such an effect, a rule similar to that contained in Article 27(2) of the ICC Statute – absent in the SCSL Statute – is then argued to be necessary.

Adopting this interpretation of the scope and implications of paragraph 61 of the *Arrest Warrant* decision it is difficult to defend the view that incumbent President Taylor was not immune from the jurisdiction of the SCSL under its Statute. As it has been demonstrated above, any claims that the SCSL's authority to consider such immunities irrelevant could flow from Chapter VII powers do not stand up to scrutiny as the SCSL does not have a Chapter VII mandate. Moreover, even accepting that not only those adopted under Chapter VII of the United Nations Charter but all resolutions of the Security Council adopted in pursuit of the fulfilment of its responsibility to maintain international peace and security are binding on UN members cannot in and of itself lead to the conclusion that the SCSL Statute contains provisions binding on all UN members.[108] The fact that, when authorizing the SG, the Security Council acted on behalf of the entire UN membership does not have any relevant legal effect. On the other hand, the identified similarities between the ICC and the SCSL are not sufficient to justify the irrelevance of Taylor's immunities before the latter.

In sum, even though the author agrees with Orentlicher's submission that,

> [w]hile the developments reflected in . . . texts and precedents have significantly eroded principles of immunity formerly accorded foreign heads of state, their implications have not yet been fully established,[109]

it is proposed that the SCSL should have confirmed the immunities *ratione personae* enjoyed by Taylor while in office. Such recognition would have been more consistent with the views expressed by the ICJ in the *Arrest Warrant* case – restrictive as those may be – based on customary international law. Moreover, such an outcome would better reflect the realities and facilitate the unimpaired conduct of international

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107. See "e.g." Gaeta, 'Official Capacity and Immunities', *supra* note 103, at 990–2; cf. Akande (considering rather that Art. 27(2) is merely included as a safety precaution to remove all doubts as to the irrelevance of personal immunities), *supra* note 37, at 420. Under this interpretation, possibly even the prosecution of President Slobodan Milošević by the ICTY may be difficult to justify. (See, however, Gaeta, ibid., at 989.)

108. This is due to the absence of express stipulation to such effect *and* to the fact that the resolution was not adopted and/or the SCSL was not set up under Chapter VII of the United Nations, hence requiring compliance with Art. 2(7) of the Charter. See notes 83 and 48–9, *supra*, and accompanying text.

109. Orentlicher, *supra* note 20, at 7.

relations.[110] Consequently, it could better serve the main purpose of the UN Charter and the responsibility of the Security Council to maintain peace and security, which was a central motive behind the setting up of the Special Court.

5. Conclusion

Moral considerations urge the author to advocate the prosecution of Charles Taylor by a fair and impartial forum, possibly the Special Court for Sierra Leone, now that he is not a Head of State any more. However, judicial activism and a resulting too ready justification of the irrelevance of immunities are not the best method to promote international justice. Rather than strengthening the rule of law and trust in international criminal jurisdiction, the violation of the rights of the accused and of his state together with the resulting dissatisfaction with the means resorted to by the SCSL can easily lead to a disapproval of the general premise of international criminal justice.

Admittedly, impunity may lead to the same type of disappointment in international criminal justice and eventually to its failure. However, in this case the SCSL possibly did not even need to argue that it had jurisdiction irrespective of the personal immunities of Mr Taylor. As the Chamber correctly noted:

> [b]efore this matter is concluded, it is apt to observe that the Applicant had at the time the Preliminary Motion was heard ceased to be a Head of State. The immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant.[111]

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110. 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 20, at 888, note omitted. Cf. Wirth, *supra* note 102, at 444–5.)
In contrast, Kleffner poses the question:

> 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'.

(J. K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* 86, at 105.)

In the view of this author, the danger to international justice and peace posed by temporary immunity afforded to the highest state officials is in no way comparable to the risk posed by an armed conflict, the seedbed of the most severe crimes. In fact, the transmission of the indictment concerning President Taylor – present to conduct peace talks – to the Ghanaian authorities appears to have impeded rather than fostered peace.

111. *Prosecutor v. Taylor*, *supra* note 10, para. 59.

The irrelevance of immunities *ratione materiae* which pertain even to former Heads of State is considerably less controversial in the context of the prosecution of international crimes.[112] Accordingly, it appears that the confirmation of Taylor's immunities *ratione personae* at the time of his initial indictment while recognizing that he would not enjoy exemption from the Court's jurisdiction should a new indictment be issued would have been a safer way to proceed. With the highly problematic issue of immunities *ratione personae* out of the way, it could have set aside any arguments related to immunities *ratione materiae* with ease in subsequent proceedings. Alternatively, had the Chamber not wished to enter the debate on the (ir)relevance of immunities *ratione materiae* for core crimes, the Court could have denied the official nature of the acts. It could thus have argued that as Mr Taylor's alleged crimes arose from his wish to increase his private wealth through obtaining control over Sierra Leone's diamond resources, the relevant acts did not constitute official acts and were in any case not covered by immunities *ratione materiae*.[113]

Finally, the UN Security Council urged Liberia on several occasions to cooperate with the SCSL.[114] While the relevant provisions were in the preambles of Chapter VII resolutions, hence not possessing a Chapter VII basis themselves, they indicate another viable avenue to ensuring the prosecution of President Taylor prior to his resignation: a UN resolution adopted under Chapter VII of the UN Charter, extending the jurisdiction of the SCSL to Taylor or clarifying the irrelevance of (his) immunities *ratione personae*.

In conclusion, it appears that the Chamber took a very risky road while there was no need for it to do so and while it has recognized the availability of other avenues that opened up when Taylor ceased to be President of Liberia. It may only be hoped that this controversial, possibly even hazardous, judicial exercise on the part of the Appeals Chamber was motivated by better reasons than a failure to review the state of the law on the subject beyond the submissions of the *amici curiae* or possibly even a wish to place itself – and its jurisprudence – on similar footing with those of the ICTY, the ICTR and the ICC.

Internationalized courts (of East Timor and Kosovo) have been criticized for 'show[ing] very little jurisprudential development' and for passing 'judgments

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112. *Pinochet No. 3*, *supra* note 83; Cassese, *International Criminal Law*, *supra* note 76, at 267–73; Cassese, 'When May Senior Officials', *supra* note 20, at 864–70; Gaeta, '*Ratione Materiae* Immunities', *supra* note 20; Akande, *supra* note 37 at 412–15; Wirth, *supra* note 20, at 888–9; Zappalà, *supra* note 76, at 601–5.

113. In the alternative, wishing nonetheless to confirm the validity of the indictment, the Chamber could have referred to the fact that Taylor has, since 2001 (See UN Docs. S/RES/1343 (2001), para. 7; S/RES/1408 (2002), para. 10; S/RES/1478 (2003), para. 10.), been subject to a travel embargo imposed by the UNSC acting under Chapter VII of the Charter. In this sense, since he could not travel, his immunities *ratione personae* were immaterial to the question whether or not he could effectively fulfil his functions, hence not justifiable under the functional necessity theory.

However, even this option would have had its drawbacks. As the travel embargo imposed in paragraph 7(a) of Resolution 1343 – which the relevant provisions of the subsequent two resolutions merely extended for periods of 12 months – exempted, *inter alia*, travel for the purposes of 'the participation of the Government of Liberia in the official meetings of the Mano River Union, ECOWAS and the Organization of African Unity'. Significantly, the Accra peace talks at which Taylor was present in Ghana at the time his indictment and warrant of arrest was served on the authorities of Ghana had in fact been brokered by ECOWAS, thus potentially falling under the stated exception.

114. UN Docs. S/RES/1408 (2002); S/RES/1478 (2003).

[which] contain little legal reasoning'.[115] The SCSL does not appear to have done much better in the present case. Nonetheless, *Taylor* is a seminal decision, being the first one rendered by an international court since the ICJ gave its ruling in the *Arrest Warrant* case. It is thus an obvious – but ever so dangerous – precedent for future jurisprudence on the immunities of internationalized criminal courts[116] and the ICC itself. The author pleads that other international(ized) criminal courts facing similar matters undertake a critical review and analysis of this judgment along the above lines rather than blindly following it.[117]

115. S. de Bertodano, 'Current Developments in Internationalized Courts', (2003) 1 *Journal of International Criminal Justice* 226 at 244.

116. The other internationalized or hybrid courts presently in existence have fewer international features than the SCSL (see, e.g., S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', (2001) 12 *Criminal Law Forum* 185; D. Turns, '"Internationalized" Or *Ad Hoc* Justice for International Criminal Law in Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia', (2001) 6 *Austrian Review of International and European Law* 123; C. P. R. Romano, 'Mixed Jurisdictions for East Timor, Kosovo, Sierra Leone and Cambodia: The Coming of Age of Internationalized Criminal Bodies?', (2002) 1 *The Global Community: Yearbook of International Law and Jurisprudence* 97; Meisenberg, *supra* note 20, at 36), hence they could not apply this reasoning without some adaptation. In contrast, the ICC could easily rely on this judgment. It could thus argue that if the SCSL can legitimately bypass immunities, the ICC may do so even with regard to officials of non-party states, provided it can obtain custody over them.

117. Liberia has brought a complaint to the ICJ against Sierra Leone requesting the Court, *inter alia*, 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.' (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 of 5 August 2003, available online at http://www.icj-cij.org/icjwww/ipresscom/iprlast.html (last visited 13 December 2004).) However, Sierra Leone has not accepted the compulsory jurisdiction of the Court either in general or over this case in particular. In accordance with Art. 38(5) of the ICJ's Rules (available online at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html (last visited 13 December 2004)), Liberia's complaint has thus not been entered in the General List. Even if Sierra Leone were to consent to the proceedings, the independent international legal personality of the SCSL and the fact that it is not an organ of Sierra Leone would prevent the ICJ from addressing the merits of the case. On the other hand, as an international organization, the SCSL cannot be sued before the World Court.