Part I – General

1 Introduction

Head of State who commits murder and other grave crimes is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example.[1]

Under traditional international law governed by the concept of state sovereignty, any alleged responsibility for international wrongdoings used to be attributed to the state alone. Indeed, the role of an individual in traditional international law was marginalized. This position of an individual in international law began to change from the 20th century. Responsibility of individuals for breaches of international law started to be addressed in a relatively new branch of international law: international criminal law.

International criminal law qualifies certain types of conduct as crimes under international law[2] incurring individual criminal responsibility. In this context, the 20th century witnessed development of various international and hybrid judicial mechanisms for prosecution of individuals who commit these crimes. What if these individuals happen to be heads of state?

The principle of individual criminal responsibility for crimes under international law is firmly established.[3] However, the enforcement of this principle can, in some circumstances, be frustrated by operation of another well established principle, immunity of a Head of State based largely on the notions of sovereign equality of states.[4]

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[1] E. de Vattel, quoted in: Q. Wright, 'The Legal Liability of the Kaiser', (1919) 13 *American Political Science Review* 20, p .126.

[2] The term crimes under international law will be used interchangeably with the terms international crimes and core crimes. These crimes include: war crimes, crimes against humanity and genocide.

[3] Issue of individual criminal responsibility is addressed in Chapter 5.1.

[4] C. Damgaard, *Individual Criminal Responsibility for Core International Crimes (Selected Pertinent Issues)*, Springer (2008), pp. 263-357.

Traditionally, heads of states were not subject to the jurisdiction of national courts for whatever acts they may committed and there were no international courts which would have jurisdiction over heads of state. Until recently, the immunity of high ranking state officials who engaged in commission of such crimes was absolute, based on traditional rules safeguarding the sovereignty of states.[5]

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

It is apparent that judgments of the last years of both international and national courts in the context of immunity have turned on whichever of these two divergent interests prevails for judges.[6] Different approaches adopted by judges well characterize this tension of interests and the outcome depends to a large extent on the legal basis of the respective court (i.e. national or international court) and on the status of the high ranking official (i.e. former or incumbent official).[7]

Various cases regarding the issue of the immunity of high ranking officials have recently reached both national and international courts. Following list of cases[8] serves as an illustration of the increasing frequency in attempts to institute prosecutions for international crimes. Main examples include (a) former or incumbent presidents: Manuel Noriega[9] (Panama), Augusto Pinochet[10]

[5] A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in: C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Cambodia and Kosovo*, Oxford University Press (2004).
[6] Chatham House, 'Immunity for Dictators?', A summary of discussion at the International Law Programme Discussion Group at Chatham House, 9 September 2004.
[7] R. Cryer, 'A 'Special Court' for Sierra Leone?' 50 International and Comparative Law Quarterly 435 (2001).
[8] This list is not meant to be exhaustive.
[9] *United States v. Noriega*, 746 F.Supp. 1506, 1511 (S.D.Fla.1990), and *The United States v Manuel Antonio Noriega*, United States Court of Appeals, Eleventh Circuit, Nos.92-4687; 96-4471, (7 July 1997).
[10] *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 61 (H.L. 1998) (Pinochet I); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 119 (H.L. 1999) (Pinochet II); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 147 (H.L. 1999) (Pinochet III).

(Chile), Slobodan Milosevic[11] (the Federal Republic of Yugoslavia), Hissene Habre[12] (Chad), Muammar Qaddafi[13] (Libya), Fidel Castro (Cuba) and last but not least Charles Taylor[14] (Liberia) and (b) other high ranking officials: Abdulaye Yerodia Ndombasi[15] (Minister for Foreign Affairs of the Democratic Republic of the Congo) or Jean Kambanda[16] (Prime Minister of Rwanda).

This thesis will focus on the case of Charles Taylor, who was only the second Head of State in history after Slobodan Milosevic, and the first African head of state to be indicted for crimes under international law at the international level. The *Taylor* case well illustrates collision of the two above mentioned interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from principle of sovereign equality of States.

The case is a fascinating one, and contains many points of major legal interest. This thesis explores some of the implications the case might have in international law. The central issue of this thesis is whether Taylor as an incumbent president of Liberia at the time of issuance of the indictment was entitled to claim immunity before the Special Court for Sierra Leone (SCSL) given the fact that the SCSL had been established by a bilateral treaty between the Republic of Sierra Leone and the United Nations (UN). Liberia was not a party to this agreement.

This legal issue is important also from the practical perspective for similar cases which may arise before other courts. The topicality of this issue can be especially seen in the increased activities of the first permanent criminal court, the International Criminal Court (ICC). The same questions

[11] *Prosecutor v Slobodan Milosevic* (IT-99-37-PT), Decision on Preliminary Motions, 8 November 2001.
[12] Cour de Cassation du Senegal (Premiere chambre statuant en matiere penale), Aff. Habre, Arret n. 14, (20 March 2001).
[13] Chambre Criminelle, Frech Supreme Court, Criminal Division, Paris, Arret n. 1414, Mar. 13, 2001, Gaz. Pal. (2001), 2, somm.
[14] *Prosecutor v Charles Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004.
[15] *Case Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 14 February 2002, I.C.J. 21, (hereinafter 'the *Yerodia* case').
[16] *Prosecutor v Kambanda* (ICTR 97-23-S), Judgment and Sentence, 4 September 1998.

in the context of immunities of third states not parties to the Rome Statute may appear before the ICC.[17]

This thesis consists of three main parts: (1) general part which provides an introductory insight into the topic; (2) identification of the SCSL's legal basis and (3) its implications for immunity of Charles Taylor. The second part of this thesis will focus on identifying the legal basis, which has important implications for the nature and extent of immunity afforded by contemporary international law to, at the time of the issuance of indictment, an incumbent Head of State.

The considerable attention which is given to the legal basis of the SCSL is justified firstly by the fact that the SCSL is a novel and unique mechanism for dealing with prosecution of violations of international criminal law. It represents a development of a new legal basis. It is the first time in a history when the court has been established by the agreement between UN and a state (Sierra Leone).

This development inevitably brings various legal challenges and issues of real juristic doubt and difficulty. Some of them can be turned into following questions: is the SCSL an international, national or hybrid court? What are the implications for the purposes of immunity? Does the SCSL have jurisdiction to try an incumbent head of State of a country other than Sierra Leone even if proved that it is indeed an international court? Does the bilateral agreement suffice for denying immunity to a serving Head of state of a country not party to this bilateral agreement?

Secondly, the issues brought by the Defence counsel for Taylor in the motion challenging the jurisdiction of the SCSL themselves turn to a large extent on the process of the establishment of the SCSL, its legal basis and implications of this legal basis for its international jurisdictional reach. Accordingly, the proper assessment and identification of the SCSL's legal basis is of

[17] *Supra* note 6. See the case of the current President of Sudan, Omar Hassan Ahmad al-Bashir, the situation in Sudan was referred to the ICC by the Security Council. Under Article 13(b) of the Rome Statute, the Security Council acting under Chapter VII, can refer a specific situation "in which one or more of such crimes appears to have been committed" to the Prosecutor. This mechanism can trigger the jurisdiction of the ICC without consent of the concerned State (which is not a party to the Rome Statute). For deeper discussion see, V. Gowlland-Debbas, 'The Relationship between the Security Council and the International Criminal Court', Graduate Institute of International Studies, Weltpolitik (2001), available at http://www.globalpolicy.org/intljustice/icc/crisis/2001relationship.htm (last accessed 17 February 2008).

central importance for drawing conclusions with respect to availability of immunities before such court.

After analyzing the exact legal basis of the SCSL, the third part of the thesis reveals the close interconnection of the legal basis with the issue of withdrawal of immunity for incumbent Head of State. Since the SCSL, relying on the International Court of Justice (ICJ)'s decision in the *Yerodia* case, connected the issue of denying the immunity to Taylor with international legal basis of the SCSL, it was necessary for the judges to determine that the SCSL is indeed an international criminal court.[18] In this context, the impact of the *Yerodia* case on the reasoning of judges in the *Taylor* case with regard to the question of legal basis of the court will be critically assessed.

It goes without surprise that the SCSL found that it is an international court which can, on the basis of its Statute, deny immunity to the president of Liberia while still in the office.[19] While the SCSL's decision to deny immunity *ratione personae* to Taylor may be welcomed, the legal reasoning on the basis of which the SCSL arrived at the conclusion will be subject to criticism. The validity of the SCSL approach in its decision will be critically examined. This examination will assess whether the arguments and reasoning of the SCSL comply with the current state of international law with respect to immunities for crimes under international law.

The SCSL's decision about immunity available to Taylor will be put in the larger context of developments on both personal and functional immunities in international law. Based on these developments, some weaknesses both in the ICJ's and SCSL's reasoning will be subject to a critical review. It is claimed that the SCSL did not appreciate its special legal basis and therefore failed to properly assess what are the implications of its legal basis for the rules of international law on incumbent head of state immunity. However, the aim of this thesis is not just to criticise the SCSL's decision. In a concluding chapter, an attempt will be made to present a cautious way forward by identifying suitable solutions.

[18] M. Frulli, 'The Special Court for Sierra Leone: Testing the Water. The Question of Charles Taylor's Immunity. Still in Search of a Balanced Application of Personal Immunities?'. (2004) 2 *Journal of International Criminal Justice*, pp. 1118–29.
[19] *Ibid.*

The general part of the thesis will firstly present various criminal judicial bodies for prosecution of international crimes and offer an explanation as to why the legal basis matter. Secondly, the events leading to the establishment of the SCSL will be briefly described. Thirdly, the SCSL's *Decision on Immunity from Jurisdiction*[20] in the *Taylor* case will be introduced.

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

Firstly, various mechanisms for prosecuting violations of international criminal law will be introduced. Secondly, a definition of international, national and internationalized courts will be offered. The reason for this approach lies in the fact that the entitlement to immunity for core crimes does not have uniform application within different legal regimes and in front of various judicial bodies.[21] It is therefore necessary to clarify the respective terminology and categorization in order to subsequently determine the SCSL's legal basis for the purposes of lifting immunities to a serving head of state of a country other than Sierra Leone.

This all began with the establishment of the Nuremberg and Tokyo tribunals more than a half a century ago. The beginning of the 1990s then witnessed a new evolution of various mechanisms for prosecuting violations of international criminal law, starting in 1993 with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994.[22] In 1998, the Rome Statute for the ICC was adopted.[23]

At the same time, other models referred to as 'hybrid', 'mixed' or 'internationalised' courts came into being.[24] As examples can serve the Extraordinary Chambers in the courts of Cambodia[25], the

[20] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004.
[21] I. Bantekas, 'Head of Sate Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 *Journal of Conflict & Security Law* 21 (2005).
[22] UN Security Council Resolutions 808, 827 (1993) and 955 (1994) respectively.
[23] The Rome Statute of the ICC, A/CONF.183/9 of 17 July 1998.
[24] For an overview of some practical and legal problems internationalized courts might face, as well as the advantages and disadvantages of such courts, *see* A. Cassese, 'The Role of Internationalized Courts and Tribunals in

Regulation 64 Panels in the courts of Kosovo[26], the District Court of Dili in East Timor[27] or category of national courts with international influence such as the Iraqi Special Tribunal[28], the Ethiopian Special Prosecutor's Office and the War Crimes Chamber in the State Court of Bosnia and Herzegovina.[29]

These various judicial mechanisms dealing with crimes under international law are characterised by different legal regimes and applicable law. Some will apply primarily or only domestic criminal law into which crimes under international law might or might not be incorporated.[30] Other mechanisms might be international ones and applying only international law. These can be either treaty-based such as the ICC or resolution-based (Resolution adopted under Chapter VII powers of the UN Security Council) such as the ICTY and the ICTR. These courts and tribunals are limited by their Statutes.[31] Last but not least, we have a newly emerging trend of so-called hybrid or mixed courts which further complicate the picture. The qualification of the exact legal basis of hybrid courts especially is not always clear cut.

Hence, it is useful to start the discussion by defining the terms 'international court', 'national court' and 'hybrid/mixed/internationalized' court. The term 'international criminal court' is frequently used in academic literature and jurisprudence, without however much consideration given to what it actually means.[32] At the same time, it is necessary to emphasize that the

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the Fight Against International Criminality', in: C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Cambodia and Kosovo*, Oxford University Press (2004).

[25] Also being referred to as 'Extraordinary Chambers of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea'. *See* General Assembly Resolution 57/228 A, 187 December 2002. Orentlicher uses the term 'court, established under Cambodian law but operating with substantial international participation', D. Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transitional Justice', in: S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (2003), at 219.

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

[27] UNTAET, Resolution No. 2000/15, 6 June 2000.

[28] Also named 'Supreme Iraqi Criminal Tribunal'.

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

[30] E.g. Special Tribunal for Lebanon.

[31] See *supra* note 18.

[32] *Supra* note 4.

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

There is no universally accepted definition of an international criminal court in international law and the recent jurisprudence considering this issue has not proved particularly insightful, including for our purposes the important decision of the ICJ in the *Yerodia* case, where the ICJ simply stated that in '*certain* international courts' (ICTY, ICTR, ICC) an incumbent or former Minister of Foreign Affairs could be subject to criminal prosecution, without providing any further guidance whether term 'certain' international courts excludes some *other* international courts.[33]

Nevertheless, the ICJ in the *Yerodia* case held that an international court is a court that is established by two or more states or by a Security Council resolution under Chapter VII mandate of the United Nations Charter.[34] Though the ICJ did not mention the following possibility, it is submitted that a state and an international organization can also establish an international tribunal (as in the case of the Special Court).

Damgaard points to the following factors as important for indication of international nature (a) international court is not part of the judiciary of one single State (b) it applies international criminal law, the fact that it also applies domestic law does not disqualify it being international (c) its jurisdiction *rationae materiae* and *rationae personae* is international (d) its decisions are binding.[35] The first three factors are easy to approve. It is however not clear how does the binding nature of a decision contributes to the international character of the respective court.

[33] *Ibid.*
[34] See *supra* note 15, para 61.
[35] Damgaard at 333. Damgaard also mentions an option of establishing an international criminal court by amendment to the UN Charter.

A hybrid court, according to the *Report of the Secretary-General on the Establishment of the SCSL*, is one that has mixed jurisdiction and composition.[36] This means that the court may have the jurisdictional privileges of applying both municipal and international law and may also have both local and foreign prosecutors and judges participate in its judicial process.[37] Nevertheless, it is submitted that the mixed composition and jurisdiction does not of itself identify/determine the legal basis of the court.[38] Such a description and judicial arrangement can be indeed described as a mixed judicial system. However, the legal basis of any court is rather determined by its constitutive instrument and authority of the body establishing the court.

There is no bar to have local judges, prosecutors and other personnel participating in proceedings of the court whose legal basis is e.g. an international treaty or resolution and which is therefore by its essence international. Equally, the fact that the legislative authorities of a particular state decide to include into the composition of its national court some personnel from other countries does not make "that court any less a 'national court'."[39]

The War Crimes Chamber of the State Court of Bosnia and Herzegovina can serve as a useful example. The Defence in *Stankovic* [40] submitted that the War Crimes Chamber of the State Court is incapable of characterization as a 'national court.' It was assumed that to be a national court it must be composed of judges who are nationals of the State concerned. However, the ICTY held that no authority is offered for this proposition.[41]

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[36] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000, para. 9.
[37] D. Orentlicher, 'International Justice Can Indeed Be Local', *Washington Post*, 21 December 2003.
[38] See a different view, Judge Robertson in his Separate Opinion in *Kondewa* case stated that '[...] the Special Court [...] is not accurately described in the Secretary-General's report as a court of 'mixed jurisdiction and composition'[...] is in reality an international court onto which a few national elements have been grafted.', in: *Kondewa* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution Sierra Leone, (25 May 2004), para. 15.
[39] *Prosecutor v. Stankovic* (IT-96-23/2-PT), Decision on referral of case under rule 11*bis*, Partly Confidential and Ex Parte (17 may 2005).
[40] *Ibid*.
[41] *Ibid*.

The view of the Referral Bench[42] of the ICTY was that in the relevant context, which is Article 9(1)[43] of the Statute of the Tribunal, there is no apparent justification for giving to the phrase 'national court' any meaning other than the normal connotation, which is 'a court of or pertaining to a nation'. The ICTY stated that the State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a 'national court.'
Despite the conclusions made above, the qualification of the exact legal basis of hybrid courts is admittedly not straightforward; there exist considerable uncertainty and diverse views on this topic. For example, Nouwen considers the Extraordinary Chambers in the courts of Cambodia, the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor as all being part of the domestic system and their legal status that of a domestic court.[44] Ambach on the other hand suggests that the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor were set up by the UN Administration, and therefore are by nature international.[45]

Terminological and conceptual difficulties of hybrid courts lay exactly in their combined/hybrid nature. On the one hand, if hybrid courts are incorporated into the domestic judicial structure of the state, they cannot be considered as international institutions "since they lack international legal personality".[46] On the other hand, they cannot be qualified as national courts "since apart from having a considerable amount of international personnel and exercising jurisdiction over

[42] The establishment of the Special War Crimes Chamber of the State Court of Bosnia and Herzegovina enabled cases to be transferred from the ICTY to national judicial authorities. For a case to be referred to the SWCCh pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence, the Referral Bench must be fully satisfied that the accused would be tried in accordance with international standards and that neither the level of responsibility of the accused nor the gravity of the crimes alleged in the indictment were factors that would make a referral to the national authorities inappropriate. According to Rule 11*bis* a referral may be made to a State: (a) in which the crimes were committed; (b) the accused was arrested; (c) or which has jurisdiction and is willing and adequately prepared to accept the case.
[43] Article 9(1) of the ICTY Statute reads as follows: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."
[44] See *supra* note 25 for Nouwen's detailed explanation of this issue.
[45] P. Ambach, 'The Overlapping Jurisdictions between the International Criminal Court and Hybrid International Tribunals', Bofaxe, No. 298E (2006),
available at http://www.ifhv.rub.de/imperia/md/content/publications/bofaxe/2006/x298e.pdf (last accessed 7 May 2007).
[46] *Ibid.*

international crimes,"[47]some of them are established through an international treaty with the UN.[48]

It needs to be borne in mind that these so-called hybrid courts have each a very different legal basis. Yet, they are ultimately established either under national law or international law.[49] Still, the presented views already indicate the uncertainty with regard to finding the origins of their legal basis. This uncertainty may negatively affect the functioning of these courts in many areas,[50] including the area of immunities, as we shall see below.

1.2 Why Does the Legal Basis Matter? International v. National Courts Practice with Respect to Head of States

The premise which will guide the following discussion is that the legal basis of the judicial bodies is crucial for granting or withdrawing immunities to heads of State. The discussion below serves only as an introduction to these issues which will be addressed and analyzed in more detail in the following chapters. Accordingly, the SCSL stated that '[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity'. Is a claim to immunity to be treated differently before international courts as opposed to national courts?

As regards the practice of national courts, scholarly opinions vary significantly. The most important factor appears to be whether the senior official is *serving* or *former* one. Most of the legal scholars suggest that the operating principle in general international law is that a *serving* head of state is entitled to absolute immunity from the jurisdiction of national courts, unless it has

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[47] *Ibid.*

[48] E.g. the SCSL or the Special Tribunal for Lebanon.

[49] Nouwen thus suggests that "the manner of establishment is what distinguishes these courts from one another, not what unites them." She is opposing calling hybrid courts 'hybrid' because of their hybrid roots as it, according to her, only confuses the picture. In: S.M.H. Nouwen, ''Hybrid courts', The hybrid category of a new type of international crimes courts', 2 *Utrecht Law Review* 2, December, (2006).

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

been waived by the State concerned. This appears to be the dominant view, but it is not the only view.[51]

Some argue that the discussion about the legal nature of various courts and tribunals, national or international, would not have been necessary if the question of whether immunity applies to serving officials depended on factors other than the nature of the tribunals, for example, on the nature of the crime. In their opinion the focus should be made on the nature of the crime rather than the nature of the respective tribunal. [52]

This might be a relevant argument if one argues that crimes under international law remain crimes under international law regardless of whether they are prosecuted before international or national courts. In other words, international law remains to be equally applicable be it before international or national courts. Nevertheless, two counter-arguments can be raised in this respect.

Firstly and most importantly, it is submitted that the relevant State practice and *opinio iuris* do not yet confirm this argument, specially with respect to prosecution of crimes under international law committed by *serving* Heads of State or senior state officials before national courts. *Serving* officials such as Yerodia Ndombasi, Fidel Castro and Muammar Qaddafi were all said to enjoy immunity before national courts. Arguably were Augusto Pinochet still incumbent president, he would have enjoyed immunity as well. Thus, there is as yet no single case of indicting, prosecuting and convicting a serving Head of State in before national courts.

And why do not State practice and *opinio iuris* confirm the above argument about the nature of the crime under international law prevailing over the nature of the tribunals and courts? In order to be able to prosecute crimes under international law before national courts, the state concerned

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Against International Criminality', in: C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Cambodia and Kosovo,* Oxford University Press (2004).

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

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

has to have jurisdiction to start with. Usually the courts pursuing the prosecution are courts other than courts of the state of the accused. Therefore, on which basis do they assert jurisdiction if crimes are not committed on their territory, and the accused is not a national of that state? Here comes into play universal jurisdiction, which is by no means indisputable.[53] In the view of the shortage of a direct international authority, it is difficult to establish the current international law relating to immunities before national courts.

Many scholars and non-governmental organizations regard universal jurisdiction as uncontroversial and undisputable. It is often regarded as "one of the magic bullets in the campaign against impunity."[54] Still, nobody has been imprisoned recently as a result of the exercise of universal jurisdiction.[55] Regardless of the seriousness of crimes under international law, states usually do not initiate prosecution unless there is either territorial or personal nexus, or a treaty obligation to prosecute or extradite.[56]

It is not the aim of this thesis to deal with universal jurisdiction in detail.[57] Moreover, the consideration of this problem is not strictly necessary to answering the question of Taylor's immunities before the SCSL if the international nature of the SCSL is accepted. Thus, issues such as universal jurisdiction, together with an inter-connected issue of immunities before national courts will be discussed only in the context of, and to the extent necessary in, the *Taylor* case. Only arguments raised by the parties in this context will be addressed more deeply.

As regards the practice of international courts, *amicus curiae* invited by the SCSL stated that "in respect of the jurisdictional immunities of serving heads of state both international law and practice has generally distinguished between proceedings before national and international courts. As regards the international courts and tribunals which have been established, practice has been

[53] As Schabas puts it: "The exercise of universal jurisdiction reminds us of Mark Twain's famous comment about the weather:Everyone talks about it, but nobody does anything about it.". In: L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives,* New York: Oxford University Press (2004).
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] For deep survey and analysis of universal jurisdiction *see* L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives,* New York: Oxford University Press, 2004.

consistent, in that no serving head of state has been recognised as being entitled to rely on jurisdictional immunities."[58]

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

The immunities should serve to prevent foreign states from interference into the affairs of other states and from exercising jurisdiction over another state.[59] As long as the state concerned has not consented to the exercise of the jurisdiction, there is, according to Akande, no difference whether the exercise of this jurisdiction is done unilaterally by a foreign state or through some collective judicial body.[60] He adds that to claim nonexistence of immunities before international tribunals without the consent by the relevant state will allow a subversion of the policy underpinning international law immunities.[61]

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

> In my view, [...] there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts [...].International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only

[58] See Sands *supra* note 48. Moreover, it can be argued that this 'consistent' practice is supported only by one example of *international* court, i.e. the ICTY with respect to indicting then president of the Federal Republic of Yugoslavia Slobodan Milosevic. Yet, at the time of the decision, Milosevic was already a former Head of State. At least to the author's knowledge, there is no other example of what is referred to as a consistent practice.
[59] D. Akande, 'International law Immunities and the International Criminal Court', *American Journal of International Law* 7, (2004).
[60] *Ibid*.
[61] *Ibid*.

> offset where *some element* in the decision to establish such a court shows that *they agreed otherwise*.[62]

The proposition that immunities do not apply before international tribunals depends on the following factors which have to be considered: (i) The manner of the court's establishment and identification of the exact legal basis for denying immunity. In other words, does the Statute of that international court deny immunity to a Head of State?[63] (ii) The establishing instrument of the court must bind the concerned state.[64] These factors will guide the analysis in an appropriate chapter below.

The legal basis of the SCSL and the manner of its establishment is therefore of central importance in determining whether the SCSL can lawfully issue an indictment against a serving Head of State of country other than Sierra Leone who is alleged to have committed acts which fall within the SCSL's subject matter, temporal and territorial jurisdiction.

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

In 1991 Sierra Leone was invaded from Liberia by a rebel group which brought the country into a civil war lasting a decade. The civil war causes differ depending on those providing explanation. The following factors which likely contributed to the conflict were offered by the International Centre for Transitional Justice:

1. "Sierra Leone had become a 'failed state', or the conflict was a crisis in government mainly driven by years of one-party rule and a small ruling elite's exploitation of the country, widespread corruption and lack of accountability, and the disempowerment and militarization of youth.
2. The conflict was driven by various internal factions wanting control of the country's rich diamond mines.
3. The conflict was a war driven by the personal political agendas of Charles Taylor, then-

[62] *Prosecutor v Krstic* (IT-98-33-T), Judgment, Dissenting Opinion of Judge Shahabuddeen, (17 September 2003), paras. 11-12 (emphasis added).
[63] See Chatham House *supra* note 6.
[64] See Akande *supra* note 56.

president of Liberia, and Muammar al-Qadhafi, president of Libya.

4. The conflict was a subtle ethnic conflict between the Mende-dominated Sierra Leone People's Party (SLPP) and the Temne-dominated All People's Congress (APC)."[65]

In January 2002 a cease-fire was finally declared and the Lome Peace Agreement was signed.[66] Despite the peace agreement, fighting broke out again. It was soon recognized that the Lome Peace Agreement would not bring the conflict to an end. Foday Sankoh, leader of the Revolutionary United Front (RUF), one of the main fighting factions, was ultimately taken into custody. The government was however afraid that any trials of Foday Sankoh and other rebels from the RUF would aggravate the conflict. Therefore, President of Sierra Leone Kabbah wrote on 12 June 2000 to the Secretary-General of the UN and requested the assistance of the international community in order to create a court to try senior RUF officers.[67]

In 2002, the SCSL was established with the mandate to try those bearing the greatest responsibility for the crimes committed during the conflict in that country. The seat of the SCSL was deliberately established in Freetown, in the country where the crimes occurred so that justice be not only done, but be seen to done, by and for the people of Sierra Leone.

The SCSL is one of the latest versions of these mechanisms to address crimes under international law, taking place directly in the country where the crimes occurred in contrast with the proceedings in front of the ICTR and the ICTY taking place in Tanzania (Arusha) and The Netherlands (The Hague) respectively.

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

2.1 Facts and Procedure-History of the Case

[65] T. Perriello, M. Wierda, 'The Special Court for Sierra Leone under Scrutiny', Prosecution Case Studies Series, *the International Center for Transitional Justice* (2006).
[66] For a deeper overview of the conflict see: *No Peace Without Justice*, 'Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002' (10 March 2004).
[67] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000.

Charles Taylor was elected President of Liberia in 1997. He remained Head of State until August 2003. His tenure of office covered most of the period the SCSL has temporal jurisdiction pursuant to its mandate to try those primarily responsible for the war crimes and crimes against humanity committed in Sierra Leone since 30 November 1996.[68]

The Indictment against the first African incumbent Head of State was approved in March 2003. He was only the second head of State[69] to be indicted while in office. The Indictment initially included 17 counts in which Taylor was accused of planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of crimes such as terrorizing the civilian population and collective punishments, unlawful killings, physical and in particular sexual violence, use of child soldiers, abductions and forced labour, looting and burning and attacks on peacekeepers.[70] The Indictment claims, inter alia, that Taylor was acting with intent to gain access to the mineral wealth of Sierra Leone, in particular the diamond wealth and to destabilize the state.[71]

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

Taylor's subsequent efforts to secure the arrest warrant withdrawal for his resignation were not successful. Therefore, Taylor accepted asylum that was offered by Nigeria. Taylor was offered the asylum on the basis that he will not interfere in Liberian and regional politics while in Nigeria. However, there was growing international concerns about Taylor's activities in Nigeria, from where he allegedly continued to interfere in Liberian affairs which could have had a destabilizing effect in the Liberian peace process and the West African region as a whole.[72]

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[68] K. Novotna, 'No Impunity for Charles Taylor' (David Davies Prize Winning Article), *Aberystwyth Journal of World Affairs* 2 (2004), p. 90.
[69] First Head of State indicted while still in office was Slobodan Milosevic, President of the former Federal Republic of Yugoslavia.
[70] *Prosecutor v. Taylor* (SCSL-2003-01-I), Indictment, 7 March 2003. The Indictment was amended on 16 March 2006, reducing the number of counts to 11.
[71] *Ibid*.
[72] See Novotna *supra* note 65.

In response, the Nigerian authorities issued a statement warning Charles Taylor that the authorities would not tolerate any violations of the terms of his exile, which forbade all interference in Liberian affairs.[73] According to the statement, Charles Taylor had not been granted immunity and was subject to Nigerian law, indicating that he could be arrested if he continues to violate these terms.

The UN Security Council issued on 9 October 2003 a press statement[74] expressing concern about attempts by Charles Taylor to influence events in Liberia, noting that his continued interference could threaten the carefully constructed peace agreement in Liberia.[75] A year later, the UN Security Council adopted Resolution 1532 (2004), which demanded Taylor's assets to be frozen. The Resolution expressed concern that Taylor has continuing access to misappropriated funds and property, which are used by him (and his associates) in order to engage in activities that undermine peace and stability in Liberia and the region.

Except the involvement of the UN Security Council, the European Parliament and the US were also actively engaged. In 2005, the European Parliament passed a resolution which called on the European Union and its member states to act immediately in order to secure Taylor's appearance before the SCSL.[76] The US administration was urged by the US Congress to increase pressure on Nigeria to extradite Charles Taylor to the SCSL.[77] All these events and international pressure led at the end (after Taylor's attempt to escape) to Taylor's apprehension and extradition to the SCSL.

Submissions of the Parties and the SCSL's Decision

The parties' submissions to the SCSL fall into two categories. The first category includes arguments of Defence counsel challenging the SCSL's jurisdiction to try incumbent Head of

[73] *Ibid*.
[74] Press Statement - U-N/Liberia (L-O), No. 2-308435 (by Peter Heinlein). This statement took into account a report presented by Hedi Annabi, the Head of the UN peacekeeping operations in Liberia.
[75] *Ibid*.
[76] Resolution of EP (2005) is available at http://www2.europarl.eu.int/omk/ (last accessed 21 July 2007).
[77] See, *inter alia*, H.CON.RES.127, passed 4 May 2005 in the US House and on 10 May 2005 in the US Senate.

State and corresponding counterarguments by the Prosecution. In sum, Defence argued that by issuing an indictment and a warrant of arrest for President Taylor, various rules governing jurisdiction, immunity, and sovereign equality under international law were violated.

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

2.2 Defence Submissions on the Preliminary Motion

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

1. Citing the judgment of the ICJ in the case between the *Democratic Republic of Congo v Belgium (*'*Yerodia* case'), as an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute immunity from criminal prosecution;
2. Exceptions from diplomatic immunities[78] can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter ('UN Charter');
3. The Special Court does not have Chapter VII powers; therefore judicial orders from the Special Court have the quality of judicial orders from a national court;
4. The indictment against Taylor was invalid due to his personal immunity from criminal prosecution.[79]

The key submission of the Defence was thus that Taylor was entitled to absolute personal immunity from criminal prosecution as Liberia's incumbent Head of State at the time of his indictment. The Defence claimed that the immunity which attached to Taylor shielded him from prosecution whether on official business in a foreign State (Ghana) or in office in Liberia.

[78] The distinction between 'diplomatic immunity' as opposed to 'Head of State immunity' is explained in Chapter 5.
[79] *Prosecutor v. Taylor*, *supra* note 14, para. 6.

Further, the Defence argued that immunity is not nullified by any exceptions arising under other international law rules, such as resolutions enacted by the Security Council pursuant to its Chapter VII powers permitting international criminal tribunals to indict incumbent Heads of State for serious international crimes.

According to the Defence, because the SCSL was a Sierra Leonean tribunal that lacked Chapter VII powers, in contrast to the ICTY and ICTR, it had no authority to assert jurisdiction over President Taylor since its judicial orders had the same (limited) force as those of a national court.

The Defence analyzed *Yerodia* and stated that the immunity is more the matter of procedure than substance, with procedural immunity subsisting for as long as the official is in office. The Defence argued that the principles enunciated by the ICJ in *Yerodia* case establish that only an international court may indict a serving Head of State.

The Defence noted that the SCSL does not meet the criteria of an international court and concluded that "the emphatic nature of the decision and the size of the majority endorsing it send a clear signal that the main judicial organ of the United Nations does not wish to subject the stability of international relations to disturbances originating from the decentralised judicial investigations of crimes, no matter how object they be."[80] It was argued that the SCSL's approval of both the indictment and the arrest warrant failed to account for the ruling of the ICJ in *Yerodia* case.

Furthermore the Defence submitted that the *Pinochet* case has a restricted impact in international law and only stands as evidence of the practice of the United Kingdom in relation to the application and interpretation of the Torture Convention of 1984.

2.3 Prosecution's Response

In response to the substantive issues raised by the Defence, the Prosecution submitted, *inter alia*, that:

[80] *Ibid*.

1. Yerodia concerned "the immunities of an incumbent Head of State from the jurisdiction of the Courts of another state" (which is not the case here)
2. customary international law permits international criminal tribunals, of which the SCSL is an example, to indict serving Heads of State;
3. the lack of Chapter VII powers does not encumber the SCSL's jurisdiction over Heads of States because the International Criminal Court, which does not posses Chapter VII powers, similarly denies immunity to Heads of States in respect of international crimes
4. Taylor's indictment is for crimes committed within Sierra Leone rather than elsewhere;
5. In the *Yerodia* case the ICJ enumerated the number of circumstances in which a Minister of Foreign Affairs could be prosecuted for international crimes, including international criminal courts where they have the jurisdiction. The Special Court is such an international criminal court and therefore has jurisdiction. Article 6(2) of the Statute clearly envisages that the Special Court has the power to try a Head of State.[81]

2.4 The SCSL's Decision – Legal Basis Part

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

Referring to Resolution 1315, the Appeals Chamber of the SCSL (Appeals Chamber) noted that the SCSL is given an international mandate and is part of the international justice machinery. It further stated that the SCSL is not part of the domestic judicial system of Sierra Leone. The SCSL proceeded to address the availability of immunities for an incumbent Head of State. The SCSL first cited the relevant provision of its Statute, Article 6 (2), 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".

[81] *Ibid.*, para. 9.

The SCSL identified and cited the relevant provisions of the Charter of the International Military Tribunal in Nuremberg and the International Law Commission's 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' and articles in the Statutes of the ICTY, the ICTR and the ICC. Based on these precedents, the Appeals Chamber concluded that "[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity".[82]

The SCSL then focused on the decision of the ICJ in *Yerodia*, in which the ICJ upheld the personal immunity of the incumbent Minister for Foreign Affair of the Republic of Congo, Yerodia Ndombasi. The SCSL approved this decision while stating that the ICJ had on the other hand confirmed the withdrawal of such immunities in relation to 'certain international criminal courts'. The SCSL provided the following rationale for the distinction to be made between international and domestic courts: "the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community." [83]

The SCSL stated that the irrelevance of immunities before international criminal courts and tribunals is in any case an established rule of international law and that Article 6(2) of the SCSL Statute does not violate any *jus cogens* norms. The SCSL therefore concluded that personal immunity of Taylor could not constitute a bar to the jurisdiction of the SCSL.

The Appeals Chamber ended its analysis by noting that as Taylor stepped down as Head of State prior to this decision, "[t]he immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant".[84]

The Appeals Chamber came to the conclusion that:

[82] *Ibid*., para. 49.
[83] *Ibid*., para. 51.
[84] *Ibid*., para. 59.

> Although the SCSL was established by treaty, unlike the ICTY and ICTR, which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the SCSL was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315 (2000), the establishment of the SCSL by Agreement with Sierra Leone.[85]

The Appeals Chamber stated that Article 39 empowers the Security Council to determine the existence of any threat to the peace and emphasized that the Security Council in its Resolution 1315 (200) indeed reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.[86] The Appeals Chamber continued that much issue had been made of the absence of Chapter VII powers in the SCSL. In the Appeals Chamber view, 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 SCSL.[87] The Appeals Chamber stated that:

> it is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to 'decide what measures not involving the use of armed force are to be employed to give effect to its decision;' and (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures.[88]

The conclusion was that the decisions referred to are decisions pursuant to Article 39. On the basis of its reasoning, the Appeals Chamber underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security, it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.[89] The SCSL pointed out that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. In this regard the Appeals Chamber held:

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[85] Ibid., para. 37.
[86] *Ibid.*
[87] *Ibid*., para. 38.
[88] *Ibid*.
[89] *Ibid*.

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.[90]

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

2.5 *Amicus Curiae* Submission - Lack of so-called Chapter VII powers

Since the classification of the SCSL as a national or international criminal court was crucial, the SCSL invited on the basis of its powers two *amici curiae,* Professors Sands and Orentlicher, to provide their submissions on these issues. The SCSL decided 'to accept and gratefully adopt the conclusions' reached by Sands. It is therefore useful to briefly recall Sand's arguments supporting the international nature of the SCSL.

Sands submitted that there can be no doubt that Resolution 1315 (2000) is binding, and that it expresses the authoritative view of the Security Council that the situation in Sierra Leone continues to constitute a threat to international peace and security.[91] Sands went on to note that in respect of Chapter VII the SCSL is in no different position from the ICC and yet all three tribunals - the ICTY, the ICTR, and the ICC - were envisaged by the ICJ in the *Yerodia* case to have jurisdiction over a serving head of state.[92]

Hence the possession of Chapter VII powers in his view may not be relevant at all to the question of the Court's exercise of jurisdiction (including in relation to any immunities). However, he admitted that the SCSL does not enjoy the consequences of powers which it may have had if it had been established by the Security Council acting under Chapter VII of the UN Charter, adding

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[90] *Ibid*.
[91] P. Sands; D. Orentlicher, 'Submissions of the Amicus Curiae on Head of State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor' (SCSL-2003-01-I),
available at http://www.icccpi.int/library/organs/otp/Sands.pdf (last accessed 22 February 2008).
[92] *Ibid.*

that the Chapter VII powers may be relevant in order for the SCSL to be able to legally enforce cooperation with third States.[93]

The Secretary-General was requested to address in his report the possibility of sharing the Appeals Chamber of the ICTY or ICTR with the SCSL.[94] Even though this possibility was not accepted in the end, for Sands this clearly indicates the intention of the Security Council for the SCSL to have jurisdiction *ratione materiae* and *ratione personae* which would be generally analogous to the ICTY and ICTR jurisdictions. In the same context, other *amicus curiae* of the SCSL, Orentlicher, stated that because the Secretary General considered that there was no legal obstacle to share the Appeals Chamber of the ICTY or ICTR, the SCSL is correctly considered to be an international court similar to the ICTY and ICTR.[95]

Sands stated that the SCSL is neither part of the judiciary of Sierra Leone nor a national court. The SCSL bears, in his view, characteristics usually associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).[96] He refused the Liberia's view that the SCSL "is not established as an international criminal court" and concluded that "the Special Court is an international court established by treaty" and should be thus treated as an international criminal court, with all that implies for the question of immunity for a serving head of state. [97]

Part II – Determination of the Legal Basis of the SCSL

3 Legal Instruments

The above description of the submissions of the parties, submissions of *amicus curiae* and the decision of the SCSL raises various legal issues. In this part, issues relating to the legal basis of

[93] Including, for example, requests for assistance from third State.
[94] SC/2000/1315 (Paragraph 7 of the operative part).
[95] See *supra* note 88.
[96] See generally P. Sands, P. Klein, *Bowett's Law of International Institutions*, 5th edition (2001), p. 16.
[97] See *supra* note 88.

the SCSL will be analyzed more carefully before concluding whether the SCS is indeed an international court for the purposes of denying immunity to Head of State of third party.

Both the establishment history and the constitutive legal instruments have bearing on the legal basis of the SCSL. They indicate the SCSL's competences and jurisdiction. The SCSL did not pay much attention to elaborating on these constitutive instruments. This is especially regretful when bearing in mind that until the establishment of the SCSL, it had never been considered that the legal basis of an international criminal court could be an agreement between the UN and one or more states.

It is therefore necessary to review these instruments more carefully in order to determine the SCSL's legal basis. In the light of the revision of the constitutive instruments the relevant parts of the SCSL's decision will be critically examined. Only then the (non)availability of immunity from jurisdiction can be assessed.

3.1 The UN Security Council Resolution 1315 (2000)

UN Security Council Resolution 1315 (Resolution 1315) was adopted on 14 August 2000. The preamble expressed concerns about the very serious crimes committed within the territory of Sierra Leone and reiterated that "the situation in Sierra Leone continues to constitute a threat to international peace and security in the region."[98] The SC stressed the need to bring about peace and security in the region, and to ensure that "persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law."[99]

The SC further recognised in the preamble that "in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration

[98] SC/2000/1315 (Preamble).
[99] *Ibid*.

and maintenance of peace." The SC noted "the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone."[100]

In this context, Resolution 1315 mentioned "the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace."[101] In particular, the steps taken by the Secretary-General in order to assist the Government of Sierra Leone in establishing a special court were appreciated. The operative part of Resolution 1315 contains request to the Secretary-General to "negotiate an agreement with the Government of Sierra Leone to create an *independent special court* consistent with this resolution…".[102]

As for the personal jurisdiction of the *independent special court*, Resolution 1315 recommended the exercise of jurisdiction "over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2 (crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone), including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[103]

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

3.2 The Report of the Secretary-General

[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid*., (Operative part), para. 1 (emphasis added).
[103] *Ibid*., para. 3.

The Secretary-General was requested to submit a Report[104] to the SC on the implementation of Resolution 1315, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations.[105]

The Secretary-General examined and analysed the specificity and nature of the SCSL' legal basis and expressed views important for the subsequent analysis of the legal basis of the SCSL in the following way:

> The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia or for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. […]. As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) […].
>
> The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. […] The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. […].[106]

The Report also states that the SCSL is established outside the national court system and, along with the ICTY and ICTR, operates "independently of the relevant national system…"[107]

3.3 The Agreement between the United Nations and Sierra Leone

[104] Report *supra* note 64.
[105] SC/2000/1315, para. 6.
[106] Part II of the Report *supra* note 64, paras. 9-11.
[107] *Ibid.*, para. 39.

After the breakdown of the Abidjan and the Lome Peace Agreements[108] the President of Sierra Leone sought international assistance with respect to the establishment of the independent court. The SC directed the Secretary-General by Resolution 1315 to report on how to implement this idea. The Agreement[109] was subsequently concluded on 16 January 2002, after the adoption of Resolution 1315 and following the subsequent negotiations between the Secretary-General and the Government of Sierra Leone. There was no explicit statement about immunity in the Agreement. Article 1(1) of the Agreement simply provided that "[t]here is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[110]

The Agreement addressed issues such as the functioning of the SCSL in accordance with its Statute, its composition and appointment of judges,[111] expenses of the SCSL (voluntary contributions from the international community), Management Committee, which will be established by interested States in order to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects, the seat of the SCSL[112] and the important issue of juridical capacities in order to be also able to enter into agreements with other States if it is necessary for the exercise of its functions.[113]

3.4 The Statute of the Special Court

[108] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lome Accord, 7 July 1999, available at www.sierra-leone.org/lomeaccord.html (last accessed 15 March 2007).
[109] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002, available at www.sierraleone. org/specialcourtagreement.html (last accessed on 6 March 2005) (hereinafter, the Agreement). The Agreement was signed by Hans Corell on behalf of the UN and Solomon Berewa, Attorney General, on behalf of the Sierra Leone Government on 16 January 2002.
[110] *Ibid.*, Art. 1(1).
[111] The Secretary-General shall appoint two of the three Trial Chamber judges and three of the five Appeals Chamber judges, (Art. 2(2)(a) and (c)). The UN Secretary-General also appoints the Prosecutor (Art. 3(1)) and the Registrar (Art. 4(1)).
[112] "The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require." In: see *supra* note 106. Indeed, this situation has already arisen. The SCSL is holding the proceedings against Charles Taylor at the premises of the International Criminal Court at The Hague, The Netherlands.
[113] *Ibid.*

The Statute, which is annexed to the Agreement, describes all the applicable rules pertaining to the SCSL. Article 1(1) of the Statute provides that "[t]he Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[114]

The SCSL may prosecute persons who have committed crimes against humanity (Art. 2), violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Art. 3), other serious violations of international humanitarian law (Art. 4), and certain crimes under Sierra Leonean law (Art. 5). Article 6(2), crucial for the treatment of immunity, provides that: "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[115] This provision is identical to the ICTY and ICTR Statutes, and broadly similar to that of the Nuremburg and Tokyo Tribunals.

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

3.5 The Sierra Leonean Law of 2002

[114] Statute of the SCSL, available at www.sc-sl.org (last accessed 28 October 2008).
[115] *Ibid*., Art. 6(2).

The Parliament of Sierra Leone passed the Special Court Agreement (Ratification) Act 2002.[116] Since Sierra Leone has a dualist system with respect to reception of international law into domestic legal system, the Act provides for the implementation of the Agreement into domestic law of Sierra Leone. It includes provisions in relation to inviolability, immunity and personality. Section 11(2) of the Act deals with the position of the SCSL within the domestic judiciary.

The Act clearly states that the Special Court shall not form part of the judiciary of Sierra Leone.[117] The crimes before the SCSL are thus not prosecuted in the name of the Republic of Sierra Leone. In this respect the SCSL differs from the Extraordinary Chambers of Cambodia which are established "in the existing court structure" of Cambodia. The same applies for the Special War Crimes Chamber established within the State Court of Bosnia and Herzegovina.

4 Analysis: Bindings Effects of Resolution 1315 and Agreement

4. 1 Legal Significance of the Lack of so-called Chapter VII powers

The considerable attention given to binding effects of Resolution 1315 is justified by the fact that the SCSL attempted to establish its legal basis under Chapter VII powers. If it had been indeed the case, it would have had important implications for immunity afforded by contemporary international law to, at the time of the issuance of indictment, an incumbent Head of State.[118] This part will however reveal some shortcomings and inconsistencies in the SCSL's reasoning and prove that the SCSL's findings were not correct in this respect.

Arguments of the SCSL relating to the bindings effects of Resolution 1315 were not very convincing. Some of them were rather confusing and even contradictory. The two following conclusions of the SCSL can serve as an illustration of this contradiction. Firstly, the SCSL underlined that where the Security Council decides to establish a court as a measure to maintain

[116] (Ratification) Act 2002 is the ratification and implementation bill by the Parliament of Sierra Leone of the Agreement between the Government and the UN, available at http://www.sc-sl.org/Documents/scslratificationact.pdf (last accessed 23 June 2007).
[117] *Ibid.*
[118] The impact of the legal basis of the court on immunities of Head of State is dealt with in the Chapter 5. In short, it is suggested that a right to claim immunity (as a part of customary international law) pre-exists also before international courts and can be thus lost only under certain circumstances.

or restore international peace and security, it may or may not, at the same time, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.[119]

By invoking the terminology of Chapter VII and terminology used in resolutions establishing the ICTY and ICTR, i.e. by using the phrase '*as a measure to maintain or restore international peace and security*', the SCSL clearly tried to bring its establishment under the umbrella of Chapter VII powers, despite the fact that the language of Resolution 1315 does not support this conclusion.

Secondly, the SCSL at the same time admitted that it was lacking Chapter VII powers by stating that the lack of Chapter VII powers "does not by itself define the legal status of the Special Court."[120] Similarly, in his *amicus curiae* submission Sands stated that despite the fact that Resolution 1315 was not adopted under Chapter VII, it however reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region.[121]

Regarding the SCSL's status as an international criminal tribunal, the SCSL in its decision focused on the UN's involvement with the establishment of the SCSL. The main attention of the SCSL was given to the authority of the Security Council to enter into an agreement with the Government of Sierra Leone in order to establish the SCSL. According to the SCSL, this authority could emanate from: (1) the general purposes of the UN as expressed in Article 1 of the Charter,[122] as well as (2) the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security.[123]

When examining the Resolution 1315, the SCSL concentrated on the second scenario, i.e. on the Security Council's specific powers under Article 39 and 41. The Resolution 1315 *authorized* the UN Secretary-General *to negotiate* the establishment of the SCSL, while reaffirming in the preamble that the situation in Sierra Leone continued to constitute a threat to international peace

[119] *Prosecutor v. Taylor*, para. 38.
[120] *Ibid.*
[121] P. Sands; D. Orentlicher, *supra* note 88.
[122] Article 1 states that one of the main purposes of the UN is to maintain international peace and security.

and security.[124] Does the mere reaffirmation in the preamble that the situation in Sierra Leone continued to constitute a threat to peace suffice to imply the binding effect of this Resolution?

As opposed to the resolutions *establishing* the ICTY and the ICTR, which specifically invoked Article 41 of the Chapter VII of the UN Charter, the Security Council did not *expressly* state that it was acting under Chapter VII when authorizing the Secretary-General to conclude an agreement with the Government of Sierra Leone. Even though the Security Council does not have to expressly refer to Chapter VII when taking mandatory measures, it has become standard practice for the SC to state that it is 'acting under Chapter VII of the Charter'.[125]

At the same time it is however true that the SC often determined the existence of a threat to peace without a reference to Chapter VII and thus left the legal basis in doubt.[126] Accordingly, it may be argued that the Resolution 1315 could serve as another example of leaving its legal basis unclear. The SC reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security. But it did so only in a preamble, not in the operative part.

Simma suggests that "unless other factors indicate that action under Chapter VII is envisaged, such resolutions should, according to the general rule, be interpreted narrowly."[127] Simma concludes that resolutions that cannot be considered as adopted under Chapter VII do not create binding effects for member States.[128] It is submitted that there were no other factors indicating any intention to adopt Resolution 1315 under Chapter VII (except the terminology similar with Article 39). Racsmany notes that "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."[129]

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[123] *Prosecutor v. Taylor*, para. 37.
[124] C. Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights* (2004), available at http://www.asil.org/insigh145.cfm (last accessed 4 May 2007).
[125] B. Simma (ed.),*The Charter of the United Nations: A Commentary* (2002), at p. 727.
[126] See e.g., SC Res 502 (1982) ('breach of the peace', Falkland conflict), SC Res 393 (1976) (Zambia, 'armed conflic' by South Africa), SC Res.1227 (1999) (Eritrea and Ethiopia).
[127] Simma, *supra* note 122, at p. 727.
[128] *Ibid.*, p. 455.
[129] Z. Deen-Racsmany, 'Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity', Leiden Journal of International Law, 18 (2005), quoting from P. C. Szasz, 'The Security Council Starts Legislating', 96 *American Journal of International Law* 901, p. 902.

In order to support the above conclusions, one can further point to the request of the President of the SCSL to the Security Council to grant the SCSL Chapter VII powers, which has never occurred.[130] There would be no need for this request should the Resolution 1315 be already adopted under Chapter VII powers. There would also be little need to arrange any subsequent cooperation agreements as envisaged in paragraph 8 of the Resolution 1315.[131] In subsequent resolutions regarding the situation in Sierra Leone, the Security Council has called upon all states to 'cooperate fully' with the SCSL but has not resorted to Chapter VII mandatory procedure.[132]
The SCSL's conclusions that Chapter VII powers are not determinative of its legal basis (i.e. whether it is an international or a national court) were certainly correct. Still, both the SCSL and Sands were nevertheless trying to imply the binding nature of Resolution 1315(2000). Why, if the international legal basis of the SCSL can be clearly shown by the fact that the SCSL was established by international agreement?

It is suggested that proving the binding effects of Resolution 1315 either under Chapter VII or under other provisions of UN Charter (e.g. Article 25 in connection with Chapter VI) would have crucial implications with respect to issues such as (obligatory) cooperation of states other than Sierra Leone with the SCSL or, more importantly for our purposes, withdrawal of immunities of serving head of state should the agreement be found unsatisfactory in regulating these issues.[133] It seems that the SCSL was trying to 'cure' shortcomings of a merely bilateral agreement by trying to imply binding effects of Resolution 1315 in order to justify the denial of immunity of a Head of State of another country.

4.2 No Need for Chapter VII powers?

The above conclusion that Resolution 1315 was not adopted under Chapter VII powers is further supported by the argument that, at least initially, there was no need for Chapter VII powers. The

[130] See Report *supra* note 64, para. 10. See also Press Release of the SCSL (11 June 2003), available at www.sc-sl.org (last accessed 18 October 2007).
[131] "Requests the Secretary-General to include recommendations on the following: (a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court", at para. 8 of Resolution 1315.
[132] Security Council Resolutions 1478 (2003), 1508 (2003).

Security Council can define its involvement in any matter either under Chapter VI or Chapter VII. Involvement under Chapter VII powers allows the Security Council to 'intervene' in the respective state without the consent of that state. It is submitted that, in the case of Sierra Leone, there was actually no need to impose measures under Chapter VII.

The SCSL's establishment was initiated by the President of Sierra Leone. Hence, the Security Council's involvement was based on the invitation and request for international assistance and help from the UN by Sierra Leone itself. The government of Sierra Leone was willing to cede jurisdiction to the SCSL, although its original request was limited to assistance in conducting trials of the RUF.[134] The establishment of the SCSL was thus clearly consensual.[135]
It is the first time that a court has been established on the basis of an agreement between the UN and a member state. Accordingly, there was no need for Chapter VII powers in a sense of imposing the establishment of the SCSL on Sierra Leone, as the situation differed significantly from the situations in the former Yugoslavia or Rwanda, where the two *ad hoc* tribunals were established without the *consent*, or even against the will, of the respective countries.

During the proceedings before the SCSL's Appeals Chamber, the Prosecutor stated that "Chapter VII powers were needed in the case of Yugoslavia and Rwanda because there was no agreement with the States concerned. Here, in Sierra Leone, that is not the case."[136] Thus, the SCSL is a similar creation, but one which is in the Prosecutor's view is actually more democratic, because Sierra Leone has explicitly agreed to its establishment. It was nevertheless acknowledged by both

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[133] The agreement and its binding effects will be dealt with in the Chapter 4.3.
[134] However, the SCSL itself did not approve the delegation of jurisdiction because it would arguably diminish its claim to its international nature. According to the SCSL "the establishment of the Special Court did not involve a transfer of jurisdiction of sovereignty by Sierra Leone…the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community", in: *Prosecutor v. Gbao* (SCSL-04-15-AR72(E)), Decision on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court (25 May 2004), at para. 6.
[135] It can be however argued that the fact that Sierra Leone requested the help with establishment of the SCSL and therefore was certainly willing to cooperate in all respects does not mean that other state will be willing to voluntarily cooperate as well. Especially when it comes to requests for arrest and extradition of incumbent Head of State of another country.
[136] *Report on proceedings before the Appeals Chamber of the Special Court for Sierra Leone* (1 November 2003), available online at http://www.specialcourt.org/documents/WhatHappening/ReportAppealHearings01NOV03.html (last accessed 8 April 2006).

the Prosecutor and the Defence in the *Fofana* case[137] that the SCSL may not enjoy all of the consequences which could flow if it had been established by the Security Council acting under Chapter VII.[138]

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

Article 1 states that one of the main purposes of the UN is to maintain international peace and security. Decisions taken under other Articles may be regarded, according to Simma, as "implementing such purposes and principles."[139] In his view, international peace and security can be promoted and achieved through various policies or measures. This can include (1) measures of collective security taken under Chapter VII and (2) adjustment or settlement of international disputes or situations under Chapter VI. Thus, Article 1 identifies another path to maintain international peace and security.[140]

Since international peace and security can be achieved through various policies or measures, there is no need for the UN Charter to anticipate all possibilities to be used. The UN Charter for example also originally did not anticipate peacekeeping missions.[141] Despite the fact the UN Charter does not explicitly mention peacekeeping, it was suggested that it can be implied from the UN's primary purpose as stated in Article 1, i.e. the primary purpose of the UN being to maintain international peace and security.[142] The UN therefore must possess powers and means

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[137] *Prosecutor v. Fofana* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (25 May 2004).
[138] Chapter VII powers are relevant e.g. to the enforceability against third States of acts of the SCSL.
[139] Simma *supra* note 122.
[140] *Ibid*.
[141] The UN Charter neither explicitly mentions nor authorizes peacekeeping. As the former UN Under Secretary-General for Political Affairs stated, "[t]he technique of peace-keeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947." In: B. Urquhart, 'The United Nations, Collective Security, and International Peacekeeping', quoting from A. K. Henrikson (ed.), *Negotiating World Order: The Artisanship and Architecture of Global Diplomacy* 59, at p. 62 (1986).
[142] J. P. Bialke, 'United Nations peace operations: applicable norms and the application of the law of armed conflict', *Air Force Law Review* (2001).

in order to be able to fulfil its primary purpose.[143] Construing the powers of the UN in the Charter too strictly could prevent the UN from acting. The Charter as a flexible legal and political document allows for many possible approaches and interpretations, depending upon the given international situation.[144]

There was consensus among many policymakers that peace could be jeopardized if certain individuals and factions were not neutralized. The peacekeeping mission in Sierra Leone was at that time the largest in history and the international community was already investing huge financial resources. The international community and the government of Sierra Leone both sought to stabilize the country. In this context, the study conducted by *No Peace Without Justice Initiative* noted that "the government wanted the RUF leadership tried without the instability that would result from national trials. The international community wanted to prosecute those responsible for attacks on UN peacekeepers. While the evaluation criteria have since changed to encompass notions of legacy and promoting the rule of law, the Special Court was originally conceptualized as central to redressing security concerns."[145]

Maintaining peace and security was therefore one of the main motivations for establishing the SCSL.[146] The Security Council's role in establishing the SCSL could be thus also justified under the general powers of the Security Council under Article 1 and their subsequent implementation through Chapter VI.[147]

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[143] "[T]he Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties," see *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11), para. 182.

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

[145] No Peace Without Justice Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002 (10 March 2004), at p. 14, available at http://www.ictj.org/static/Prosecutions/Sierra.study.pdf.

[146] *Ibid.* This holds true especially for the United Kingdom, which led the military operations in Sierra Leone.

[147] In the *Namibia Advisory Opinion* the ICJ noted that "Article 24 of the UN Charter vests in the Security Council the necessary authority to take action such as that taken in the present case (i.e. the adoption of Resolution 276 (1970)). The reference in paragraph 2 of this Article to *specific powers* of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1." See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 14, pp. 52–3, para. 110.

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

What can be subject to criticism is nevertheless the attempt of the SCSL to imply the binding effect of Resolution 1315 based allegedly on specific powers of the Security Council under Articles 39 and 41. Resolution 1315 contains just *recommendations* with respect to the subject matter jurisdiction and personal jurisdiction of the SCSL and *requests* for the Secretary-General to negotiate an agreement with the Government of Sierra Leone, to submit a report to the Security Council on the implementation of this resolution or to address in his report the questions of the temporal jurisdiction of the special court and other issues pertaining to the establishment of the SCSL. Resolution 1315 should be rather viewed as another path to promote and maintain international peace and security via adjustment or settlement of international disputes or *situations* under Chapter VI (emphasis added).[148]

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

[148] Chapter VI actions usually rest in providing assistance to a state in order to help the state to maintain peace and order, however do not include the possibility of enforcement as oppose to actions under Chapter VII powers. Racsmany for example suggests that the establishment of the SCSL "is better compared to classical, consensual peacekeeping operations. These are generally considered as falling under Chapter VI or between Chapters VI and VII of the UN Charter. Their legal basis is in any case commonly located outside of Chapter VII." See Z. Racsmany, *supra* note 126, p.308.

Article 25 of the UN Charter provides that members of the United Nations "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." It is submitted that Article 25 of the UN Charter does not necessarily apply only to decisions taken under Chapter VII (i.e. decisions on enforcement measures). According to Simma "if one followed such a narrow interpretation of Art. 25, the whole system set up for the maintenance of peace would be weakened, and it would clearly run counter to the overall concept of the Charter. Furthermore, Art. 25 would be unnecessary as the binding effect of decisions taken under Chapter VII could already be achieved on the basis of Art. 48 and Art 49."[149]

To further support this view, one can refer to the ICJ's Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[150] In this Advisory Opinion, the ICJ held that "the decisions made by the Security Council […] were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24[151] and 25. The decisions are consequently binding on all States Members of the United Nations which are thus under obligation to accept and carry them out."[152] By adopting this contextual approach, the ICJ further stated:

> It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council…The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its

[149] Simma, *supra* note 122, p. 458.
[150] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (for a full citation see n. 144). Compare with statement of Sir Hartley Shawcross in the ICJ *Corfu Channel* case, where he asserted that recommendations "under Chapter VI of the Charter, relating to methods of settling disputes which endanger peace, are binding." He contested the applicability of Article 25 only to Chapter VII, by stating "that position, in my submission, is completely untenable. [Even] if one were to disregard […] the preparatory work and the commentaries, one could not find in the Charter itself a shred of support for the view that Article 25 is limited in its application to Chapter VII of the Charter", See *Corfu Channel Case*, Prelim. Objections, Pleadings Vol. III, (1949) I.C.J.Rep, 72, pp. 76-77.
[151] In the *Fofana* case, the SCSL held that Article 24(1) may be invoked as the direct basis for action of the United Nations, i.e. for the establishment of the Agreement pursuant to the Resolution 1315 (2000). The SCSL further stated that Article 24(2), which refers to the specific powers granted to the Security Council is not exhaustive and must be read as fulfilling the function of closing the gaps. It was argued by the Prosecutor that if the Security Council can establish an international tribunal under Article 41, there is no reason why it could not take the same action under Article 24 of the Charter when the state affected has consented. See *supra* note 134.
[152] See *supra* note 147, p. 53, para. 115.

> binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[153]

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

Relevant findings can be summarized as follows:

1. Proving that Resolution 1315 was indeed adopted under Chaper VII would have crucial implications for withdrawal of immunities of serving head of state should the agreement be found unsatisfactory in regulating these issues.
2. It is however suggested that Resolution 1315, which recommended the establishment of the SCSL, was not adopted under Chapter VII powers despite the attempt of the SCSL to prove otherwise.
3. There are some doctrinal opinions[154] and advisory opinions of the ICJ[155] suggesting that the resolution can be still binding under certain circumstances even if not adopted under Chapter VII powers, it is however not a case in the context of Resolution 1315. There was no intention of the SC to adopt this resolution as binding for reasons provided above.
4. Moreover, the SCSL was not even established *by* the SC Resolution (as opposed to the ICTY and ICTR ad hoc tribunals). The SCSL was established by a bilateral agreement *pursuant to* Resolution 1315. For the reasons given, it is not possible to imply binding effects of the Resolution 1315 for the purposes of denying immunity to high ranking state officials as was in the case of the establishment of the ICTY and ICTR. The SCSL should instead direct its attention to the binding effects of agreement establishing the court. This

[153] *Ibid.*
[154] See e.g. Simma *supra* note 122, p. 458.
[155] See *supra* note 147, the *Namibia* Case.

issue will be addressed next.

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

Apart from Resolution 1315, attention needs to be given to the Agreement which *actually* establishes the SCSL. Analysis of the agreement is the next important step in order to identify for whom the agreement creates obligations under international law, i.e. who is a party to the agreement and thus bound by its provisions. While focusing on the binding effects of Resolution 135, the SCSL did not pay much attention to the Agreement as such.

The SCSL adopted arguments and conclusions of both of the invited *amici curiae*.[156] According to one *amicus curiae*, Orentlicher, the Security Council by authorizing the Secretary-General to negotiate an agreement with Sierra Leone was not only carrying out its responsibility to maintain peace and security, but "in doing so, it was acting on behalf of all Members of the United Nations".[157]

Subsequently, the SCSL developed this argument further by stating that since the Security Council was acting "on behalf of *all* Members of the United Nations", the agreement is to be regarded as "between *all* members of the United Nations and Sierra Leone".[158] According to the SCSL "this fact makes the Agreement an expression of the will of the international community".[159] However, it is rather disputable to assert, as the SCSL did, that only by virtue of the fact that states are members of the UN, they are therefore parties to the Agreement and accordingly are bound by its provisions.

[156] See *supra* note 88.
[157] *Ibid*., para. 12.
[158] *Prosecutor v. Taylor*, para. 38.
[159] *Ibid*.

Both state practise and scholarly opinions[160] show that the conclusion of the SCSL was not correct. For example Article 17 of the SCSL Statute states "the Government shall cooperate with all organs of the Special Court at all stages of the proceedings". Article 17 therefore addresses obligation to cooperate only for the government of Sierra Leone. Are third states also obliged to cooperate with the SCSL? If so, on what legal basis?

It is suggested that the Agreement cannot be interpreted so broadly. For example Damgaard claims that such consequences of UN membership were not envisaged when the UN Charter was adopted and further suggests that if the agreement was between all the UN member states and Sierra Leone, then such member states would assume obligations under such agreement.[161] However, no state expressed that it feels bound by this agreement. In fact, many states acted otherwise.[162]

The SCSL itself approved the limitation of the SCSL when it stated that: "[w]hile acknowledging that the ICTY and ICTR have Chapter VII powers of the UN Charter ensuring that there is an obligation on all UN members to cooperate, in the case of the Special Court, as the Agreement is between the UN and Sierra Leone, its primacy is limited to Sierra Leone alone, as also the obligation to co-operate with the Special Court."[163]

Under these circumstances it is hard to maintain the position that the agreement is to be regarded as 'between *all* members of the United Nations and Sierra Leone'. Becoming a party to a treaty

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

[161] Damgaard, *supra* note 4.

[162] Examples include: Ghana's failure to arrest Taylor. Nigeria's refusal to extradite Taylor. Moreover, Liberia initiated proceedings against Sierra Leone before the ICJ. Liberia referred to the Yerodia case and argued that the SCSL is not an international court that could deny immunity to its President. Liberia requested the ICJ to declare that "the issue of the indictment and the arrest warrant of 7 March 2003 and its international circulation, failed to respect the immunity from a criminal jurisdiction and the inviolability of a Head of State which an incumbent President of the Republic of Liberia enjoys under international law." Nevertheless, Sierra Leone did not accept the jurisdiction of the ICJ pursuant to article 36(2) of the ICJ Statute. See 'Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President', ICJ Press Release No. 2003/26 (5 August 2003), available at http://www.icj-cij.org/icjwww/ipresscom/iprlast.html (last accessed 26 July 2008).

[163] *Prosecutor v. Norman, Fofana and Kondewa* (SCSL-04-14-PT), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, (3 March 2004), para. 69.

'by interpretation' does not respect principles of State sovereignty.[164] Furthermore, the UN possesses separate legal personality and such as "is more than a sum of its members and the organization occupies a position in certain respects in detachment from its members."[165] As a general matter, member states are not bound by treaties concluded by the UN by the virtue of membership *alone.*

At this point it is useful to reiterate what led the SCSL's to emphasize the role and involvement of the Security Council in the establishment of the SCSL. As already indicated in the previous chapter, the SCSL did so arguably in order to imply binding effects of the Resolution and therefore by implication also binding effects of the Agreement for all member states of the UN. It is nevertheless suggested that individual member states remain third parties and are thus not bound by bilateral agreement (*pacta tertiis nec nocent nec prosunt*).

An alternative approach, which was suggested by the Secretary-General in his Report, would be the conclusion of a multilateral treaty by all UN member states. On the one hand, this approach would allow the treaty to be opened for signature and ratification by all member states.[166] The advantage of this approach would be the possibility of a detailed examination and elaboration of all issues relevant to the establishment of the international tribunal. States participating in the negotiation and conclusion of the treaty could then fully exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.[167]

On the other hand, this approach will admittedly require considerable time to establish the treaty and subsequently to achieve the required number of ratifications for entry into force.[168] Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.[169] Therefore, what sounds as legally more elegant approach, might prove unfeasible from the practical point of view.

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[164] See also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (Convention). Article 34 of the Convention provides that a treaty does not create either obligations or rights for a third state without the consent of that State.
[165] *Reparation of Injuries Suffered in The Service of the United Nations,* I.C.J. Reports, 1949, p. 174.
[166] Report *supra* note 64.
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.*

The following statements well illustrate the divergence of views on the way of establishment of the SCSL. In the *Fofana* case, applicant argued that the UN illegally delegated its powers in this respect and suggested that "the situation may have been different if the court had been set up by the agreement involving a wide group of concerned states."[170] In contrast, Judge Robertson expressed his views on the establishment of the SCSL through bilateral treaty by stating "it cannot in my judgement make any meaningful difference that the Security Council has chosen to authorise the Secretary-General to establish the Court with a similar purpose[171] by agreement with a single state (a state where peace need to be restored) rather than by unilateral action or by action in agreement with many states... multilateral agreement would presumably make it more difficult for the Security Council to e.g. terminate a court, since it would need the agreement of a number of states rather than one."[172]

It is respectfully submitted that there is a 'meaningful difference' in establishing the court by bilateral or multilateral treaty. The SCSL's legal basis is certainly international regardless of the number of parties to the treaty, i.e. whether it is established by bilateral or multilateral treaty.[173] The difference lies in the fact that the bilateral agreement is arguably binding only on Sierra Leone, it does not bind any other state. This conclusion has important consequences for the purposes of denying immunity of an incumbent head of state of a *third* country not party to the treaty as we shall see in the next chapter dealing with immunities.[174]

By concluding that it is indeed an international court, the SCSL automatically assumed that it can deny immunity to the Head of State of another country.[175] It is however submitted that the SCSL

[170] *Prosecutor v. Fofana*, (SCSL-04-14-PT), Defence Reply to The Prosecution Response to the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (30 November 2003), para. 7.
[171] By 'a Court with the similar purpose' is meant the ICTY.
[172] *Prosecutor v. Kallon, Norman and Kamara* (SCSL 2004-14-AR72(E)),),Decision on Constitutionality and Lack of Jurisdiction, (13 March 2004), Separate Opinion of Judge Robertson, para. 5.
[173] The Secretary-General rightly held that the legal nature of the SCSL, as with any other legal entity, is determined by its constitutive instrument. Since the constitutive instrument is an agreement between a state - Sierra Leone - and an international organization - the UN - the legal nature of the SCSL is international.
[174] This issue will be dealt with in more detail in the chapters dealing with immunity.
[175] See however different reasoning provided by Akande in respect to an assertion of jurisdiction over US nationals by the ICC, which can usually be interpreted as "a violation of the well-established principle that a treaty may not impose obligations on non-parties without the consent of those parties." Akande however suggests that "there is no

ignored the bilateral treaty nature of the SCSL and therefore did not correctly address the consequences flowing from such legal basis.[176] To be more precise, the SCSL avoided addressing whether the court established by bilateral treaty indeed can deny immunity to an incumbent Head of State.[177]

4.4 Hybrid Nature of the SCSL Not Recognised

The SCSL is often referred to as a 'hybrid court'.[178] Some refer to its hybrid nature due to the fact that under the SCSL Statute, not only crimes under international law, but also certain crimes under Sierra Leonean law can be prosecuted and punished. The mixed composition of both internationals and Sierra Leoneans within the SCSL is often emphasized as another sign of the SCSL's hybrid nature. However, as already noted in the introductory chapter, the law applied by the Court and the nationality of the staff do not determine the legal nature of the Court.[179]

The hybrid nature of the SCSL was also emphasized by Richard Holbrooke who has been an active supporter of the establishment of the SCSL in the SC. After Resolution 1315 (2000) was passed, Holbrook described the proposed character of the SCSL in the following way "This court is going to be of a hybrid nature […]. We have not asked the United Nations to set up another *international* war crimes tribunal such as the ones that exist for Rwanda and Yugoslavia, but rather we have asked the Secretary-General to work with the Sierra Leone Government for what I would call a *mixed* court, although the actual phrase of this resolution is "Special Court.""[180]

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provision in the ICC Statute that requires non-party states (as distinct from their nationals) to perform or to refrain from performing any actions. The Statute does not impose any obligations on or create any duties for non-party states. To be sure, the prosecution of non-party nationals might affect the interests of that non-party but this is not the same as saying that obligations are imposed on the non-party." In: D. Akande, 'International Law Immunities and the International Criminal Court', *American Journal of International Law*, 98 (3), (2004), pp. 407-433. That might as well be, however this proposition can not be approved for the purposes of immunity of the serving head of state coming into play.

[176] Frulli *supra* note 18.

[177] *Ibid.*

[178] See e.g. S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', (2001) 14 *Criminal Law Forum*, pp. 185–246, at 231, describing the SCSL as a 'new species of tribunal' (internationalised domestic tribunals).

[179] See differently, R. Cryer, 'A "Special Court" for Sierra Leone', (2001) 50 *International and Comparative Law Quarterly*, pp. 435–446, at 437, who argues that the applicable law also determines the legal nature of a court.

[180] Statement by US Ambassador Richard Holbrooke to the media, following adoption of UN Security Council Resolution concerning the establishment of a Special Court in Sierra Leone at August 14, 2000.<http://www.sierra-leone.org/specialcourt081400.html> (accessed September, 2007) (emphasis added).

At the beginning, Resolution 1315 anticipated the possibility for the SCSL to share the Appeals Chamber of the ICTY and the ICTR. However, according to UN Assistant Secretary-General Office of Legal affairs Zachlin "the judges in those two courts were very apprehensive of the legal efficacy of such an arrangement given the different nature of the two court systems." He explained that the judges "felt that it would be very difficult for an appeals chamber of the Yugoslavia and Rwanda Tribunals to be sitting as an appeals chamber for a Sierra Leone Court which has its own statute and which is operating on the basis of its own jurisdictional provisions. And they felt very uncomfortable with that. And it seems to us that this was a very legitimate point."[181]

The SCSL's legal nature, even if international due to its constitutive instrument, is to a large extent different from the two *ad hoc* tribunals or the ICC. The SCSL was labelled a 'treaty-based *sui generis* court of mixed jurisdiction and composition'.[182] The SCSL is indeed Sierra Leone specific including the consequences attached to such a nature. Many of the legal choices made were intended to address the specificities of the Sierra Leonean conflict. As such, the SCSL has a unique place in international criminal justice system.[183] Nevertheless, the analysis of the SCSL's legal basis also revealed new legal issues and challenges, including the question of denying immunity to the incumbent Head of State of the country not party to a treaty which established the court.

It can not be simply concluded that the SCSL is an international court through an attempt to compare it with the ICTY, ICTR and ICC. Shortcomings in its establishment via bilateral agreement should have been acknowledged and admitted by the SCSL in order not to sacrifice legal clarity and certainty. The SCSL is indeed international as for its legal basis. Nevertheless, it

[181] Press Briefing by the UN Assistant Secretary-General Office of Legal Affairs, Ralph Zacklin, (September 2000), New York, available at www.sierra-leone.org/specialcourt0900.html > (last accessed 16 March 2008).
[182] Report, *supra* note 64, para. 9.
[183] *Ibid*.

is proposed that the question is not simply whether the court is international as for its legal basis, but rather whether the court's international legal basis allows for abrogation of immunities.[184]

Undeniably, the SCSL possess various international features. Nevertheless, this identification does not precisely define the consequences for the purposes of denying immunity to high ranking officials of other states.[185] In order to identify whether immunities apply before international tribunals depends, inter alia, on the manner of the court's establishment and on the fact that the establishing instrument of the court binds the concerned state.[186] Do these findings suggest that Taylor is completely immune from the exercise of jurisdiction by the SCSL? No, they rather propose that there is a serious legal issue to be discussed in the context of immunities available to a serving Head of State.

The central conclusion of this chapter is therefore a finding that a classification of a judicial body as an international criminal court does not automatically mean that a state official has no immunity from prosecution before that body.[187] This conclusion will be now applied to the *Taylor* case and will be supported by analysis of available state practice, relevant jurisprudence as well as by scholarly opinions in order to properly evaluate the SCSL's approach in denying immunity *ratione personae* to a serving Head of State of another country.

Part III - Determination of Immunities Available before the SCSL to Charles Taylor

5 General Reflections on the Current Status of International Law with regard to the Relationship Between Individual Criminal Responsibility and the Law of Immunities

After analyzing the first part of the SCSL's decision (i.e. identification of its legal basis) and

[184] See e.g. the discussion in Chatham House, one of the questions raised was "Could state A get around the obligation to provide immunity to the head of state B, by entering into a treaty with state C to set up an "international" court?", *supra* note 5.
[185] See e.g. Racsmany "it may thus be concluded that the Sierra Leone–UN Agreement cannot endow the SCSL with a competence to set aside rights pertaining to other international legal persons under customary international law. Accordingly, it does not in and of itself render immunities of foreign officials irrelevant.", *supra* note 126, p. 313.
[186] See Akande, *supra* note 56.
[187] See Damgaard, *supra* note 4.

coming to the conclusion that the SCSL is indeed an international court, the second part of the decision (i.e. the denial of immunity to a serving head of state on its international legal basis) will be examined. Only immunities in relation to crimes under international law will be discussed in this chapter.[188]

The analysis of this part of the decision aims at addressing the following issues: (1) competing legitimate international values (2) distinction between two kinds of immunities (*immunity ratione personae* and *ratione materiae*) and their availability to *serving* or *former* head of State (3) the distinction between national and international courts in the light of the ICJ decision in the *Yerodia* case and *Pinochet* cases since the SCSL relied on these cases in its reasoning. These findings will serve for drawing final conclusions.

5.1 Individual criminal responsibility for crimes under international law

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

By stating that "international law imposes duties and liabilities upon individuals as well as upon States has long been recognised"[189], the Tribunal confirmed the role of individuals as subjects of international law. In its famous quote, the Tribunal further supported the above proposition holding that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[190]

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[188] Immunities in civil proceedings and questions of State immunity will not be discussed as consideration of these immunities is not necessary to answering the question of Taylor's immunities before the SCSL itself. It will thus not form part of this thesis.
[189] See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Proceedings, Vol. 22, p. 466.
[190] *Ibid.*

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

> States are artificial legal persons: they can only act through the institutions and agencies of the state, which means, ultimately, through its officials and other individuals acting on behalf of the state. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice. The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. Problems in this area – such as the non-existence of any standing international tribunal to have jurisdiction over such crimes – have not affected the general acceptance of the principle of individual responsibility for international criminal conduct.[191]

These rules developed in 'the framework of an international legal order' where there was no international criminal court and the enforcement was left to national courts.[192] By now, the non-existence of any international criminal tribunal is clearly no longer the problem. However, the enforcement of this principle can, in some circumstances, be frustrated by operation of another well established principle, immunity of a Head of State.[193]

5.2 Immunities - A Necessary Evil or Workable Principle?

In order to assess correctly the validity of the SCSL's reasoning in Taylor, the fundamental principles of international law governing immunities of Head of State should be first briefly reviewed. The most well-defined area of immunities is that of diplomatic immunities, which has

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[191] A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', in: *Recueil des Cours de l'Académie de droit international*, 1994, III, p. 82. For more authorities on this point see also A. Cassese 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case', 13 *European Journal of International Law* 853 (2002), *Institut de Droit International*, 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law', Resolution of 26 August 2001, available at www.idi-iil.org (last accessed 27 June 2008).

[192] P. Sands, 'International Law Transformed? From Pinochet to Congo...?', *Leiden Journal of International Law*, 16(2003), pp. 37-53.

[193] This is of course specially so before national courts. For example the US Supreme Court has long maintained that the courts of the United States are bound by suggestion of immunity. The US Supreme Court declared that the Executive Branch suggestion of immunity "must be accepted by the courts as a conclusive determinative by the political arm of the Government that the court's retention of jurisdiction would jeopardize the conduct of foreign relations." In: *Ex Parte Peru* 318 U.S., para. 588.

always been regulated by its own regime.[194] The contours of Head of State immunity are less clearly delineated.[195]

There is no conventional law (as opposed to diplomatic immunities) and very limited state practice on this point. The doctrine of Head of State immunity is largely a matter of custom.[196] The lack of state practice is probably a reflection of the reluctance of states to interfere with heads of state.[197] It is widely accepted that Heads of State enjoy at least the same immunities as diplomats: immunity *ratione personae* while in office, immunity *ratione materiae* for official acts which were carried out while in office.[198] Often, Head of State immunity is indeed treated as a diplomatic immunity.[199] The Vienna Convention on Diplomatic Relations has been used extensively in order to determine the treatment of Head of State.[200] Nevertheless, it is suggested that Head of State immunity should be regarded as a separate category as was also confirmed, *inter alia*, by the ICJ in *Yerodia*.

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

> It is quite clear that the theory of immunity has developed in order to protect a state and its agents from being tried in states' courts, primarily in the jurisdiction of another state. The immunity from arrest as well as the immunity from jurisdiction or execution is based on the sovereign equality of states. But naturally, the sovereign equality of states does not prevent a state's representative from being prosecuted before an international court, *if this court is given jurisdiction over former or acting heads of state*" (emphasis added).[201]

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

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[194] R. Cryer; H. Frimain; D. Robinson, *An Introduction to International Criminal Law and Procedure*, Cambridge (2008), p. 424.
[195] J. L. Mallory, 'Resolving the Confusion Over Head of State Immunity: The Defined Right of Kings,' 86 *Columbia Law Review* 169, 177 (1986).
[196] This was pronounced, inter alia, by the ICJ in Yerodia case. See also Akande, *supra* note 56; J. Bröhmer, *State Immunity and the Violation of Human Rights*, The Hague: Martinus Nijhoff (1997); A. Watts, *supra* note 189.
[197] Cryer; Frimain; Robinson, *supra* note 192.
[198] *Ibid.*, p. 425.
[199] See e.g. the Defence Submission in *Prosecutor v . Taylor*, at para. 6.
[200] E. Denza, *Diplomatic Law* (Commentary on the Vienna Convention on Diplomatic Relations), 3d edition, Oxford (2008), at pp. 1 and 8.

> (i) the 'internationalness' argument, which provides that as the rules governing international immunities are primarily derived from international law, the international community may determine when those immunities are no longer possible; (ii) the 'world order/constitutional' argument, which argues that as the UN Charter is the constitution of the international community, the Un Security Council could bind the entire international community; and (iii) the 'treaty' argument whereby states which each individually possess the right to waive their own immunities, agree by treaty to waive such immunities before an international criminal judicial body.[202]

Piotrowicz also uses the 'internationalness' argument while explaining the difference between assertion of jurisdiction by international, as opposed to national, courts. Justification of a different approach taken by international courts lies, according to Piotrowicz, in the 'internationalness' of the court, then "its assertion of jurisdiction in some way represents an interest so important that it overcomes the objections."[203]

Immunities are needed for maintaining a smooth conduct of international relations and protecting the officials from any possible interference, which could hamper their activities while representing the state in one way or the other. At the same time, the availability of immunities especially for commission of crimes under international law, can lead to serious injustice.[204]

The limits of immunities were rarely tested in the past. In recent years, many states became active in this area, as illustrated by various cases of high-ranking officials reaching both national and international courts.[205] As a consequence, "this emboldened State practice has brought to the fore many hidden or unresolved questions as to the boundaries between principles of accountability and immunity and has engendered a reassessment and restriction of the scope of immunities."[206]

The justifications for immunities have changed quite significantly over time. At the same time, it

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[201] B. Stern, 'Immunities for Head of State: Where Do We Stand?', in: M. Lattimer and P.Sands (eds.), *Justice for Crimes Against Humanity*, Hart Publishing (2003), p. 126.
[202] See D., S., Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia judgement as it pertains to the Security Council and the International Criminal Court', 20 Am. U. Int'l L. Rev. 7 (2004), pp. 30-41, quoted from Damgaard *supra* note 4, p. 272.
[203] R. Piotrowicz, 'Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction, The Australian Law Journal 76 (2002), p. 293.
[204] R. Cryer; H. Frimain; D. Robinson, *supra* note 192.
[205] See the Chapter 1.2.
[206] Cryer; Frimain; Robinson, *supra* note 193, at 422.

is obvious that not all of these justifications directly correspond and address the rationale for Head of State immunity. They can be very briefly summarized as follows. The immunity of rulers originally derives from the seventeenth century when states were ruled by Divine Right or feudal inheritance.[207] At this time, the legal fiction of 'personification' was created. On this basis the Head of State was personified with the State itself.[208]

Another legal fiction applying to ambassadors was 'personal representation', when the ambassador was viewed as an equivalent to his Head of State. Yet another legal fiction was so called 'extraterritoriality', when the premises of the mission were regarded as an extension of the sending State's territory.[209] Some commentators also add for consideration the need for political expediency[210] and respect for the dignity of the Head of State as stated in the *Schooner Exchange* case by the ICJ.[211] Nowadays, the 'functional necessity' argument took precedence over previous justifications.

In the last century, and especially in recent decades, 'there has been a considerable 'demystification' in this area'.[212] Traditional rationales such as the indignity of putting a head of State on trial carry less weight in the twenty-first century.[213] The one remaining rationale for immunities is their value in facilitating international relations, i.e. functional necessity. This rationale remains very important; it has been described by the ICJ in the case of *United States Diplomatic and consular Staff in Iran*[214] as the most fundamental prerequisite for the conduct of relations between States.[215]

5.3 Immunity *ratione materiae*

The term 'immunity' covers two distinct types of immunity, i.e. functional (*ratione materiae*) and personal (*ratione personae*) immunity. They coexist and somewhat overlap as long as the state

[207] G. Robertson, *Crimes Against Humanity*, Penguin Books, Allen Lane (2006), pp. 332-371.
[208] *Ibid*.
[209] Cryer; Frimain; Robinson, *supra* note 192.
[210] See *Tahiona v. Mugabe*, 169 F. Supp. 2d 259 (SDNY, 2001) at 290-1.
[211] See *Schooner Exchange v. M' Fadden* 11 US 116 (1812), p. 137.
[212] Cryer; Frimain; Robinson, *supra* note 192, p. 426.
[213] Robertson, *supra* note 205.
[214] *United States Diplomatic and Consular Staff in Iran*, Merits, 1980 ICJ Rep. 3, para. 91.

official is in office. It is important to distinguish between functional and personal immunity, and as obvious as it may sound, the courts often fail to do so.[216]

Immunity *ratione materiae* attaches to all those who carry out duties of state. This immunity constitutes a substantive defence (i.e. it relates to substantive law), which means that any breach of national law of the foreign country or international law by the state official is attributable to the state instead of the state official. Thus, no individual criminal responsibility or civil liability can arise.[217]

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

> [state] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'.[218]

Moreover, functional immunity covers official acts of not only *de iure*, but also *de facto* state officials. This kind of immunity is permanent, i.e. it does not cease with the end of office because it is attributable to the state itself. Finally, this immunity may be invoked towards any other state, i.e. is *erga omnes*.[219]

5.4 Immunity *ratione personae*

Personal immunity is not limited to any particular conduct; it provides complete immunity to the

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[215] Cryer; Frimain; Robinson, *supra* note 192.
[216] See *supra* note 5, p. 862: Cassese argues that the ICJ failed to recognize the important distinction distinguish between the two immunities.
[217] Cassese *supra* note 48.
[218] *Prosecutor v. Blaskic* (IT-95-14-AR 108 *bis*), Objection to Issue of *Subpoenae duces tecum*, (29 October 1997), para. 38.
[219] Cassese, *supra* note 48.

person of certain office holders while they carry out important representative functions. Personal immunity is granted only to a comparatively small set of people, such as heads of state and diplomats accredited to a host country. It is temporary, in that it lasts only as long as the person is serving in that representative role. There is no exemption based on the seriousness of the alleged crime, or whether the acts were private or official, since the rationale is unconnected to the nature of the act.

The rationale was stated as long ago as of 1740 by Wicquefort: "[…] if Princess had the Liberty of proceedings against the Embassador who negotiates with them on any Account, or under any Colour whatsoever, the Person of the Embassador would never be in Safety, because those who should have a Mind to make away with Him would never want a Pretext."[220]

The Vienna Convention on Diplomatic Immunities makes clear (for both types of immunity) that the purpose is not to benefit individuals but to protect official acts (immunity *ratione materiae*) or to facilitate international relations (immunity *ratione personae*).[221] It is the state which is the beneficiary of the immunity, and it is the state which may waive it, irrespective of the wishes of the person claiming the immunity.

However, the significant problem may arise with respect to a distinction between private or official acts in the context of international crimes. Where does this distinction leave international crimes? And is it useful at all to resort to this distinction in the context of international crimes?

5.5 Private Versus Official Acts – Unanswerable Dilemma?

Immunity *ratione materiae* can be invoked in respect of acts performed in an official capacity. Can international crimes be qualified as committed in an official capacity and hence be potentially covered by immunity *ratione materiae*?[222] The problem of identifying a clear line

[220] A. van Wicquefort, *The Embassador and his Functions* (2nd edn, London, 1740) (translated into English by John Digby), Ogdon, *Juridical Bases* 128-129, quoting from Cryer; Frimain; Robinson, *supra* note 192, p. 423.
[221] The Vienna Convention on Diplomatic Immunities, Preamble, paras. 2-4.
[222] It has also been asserted that there is no functional immunity in relation to international crimes before either national or international courts because such crimes amount to violations of *jus cogens* norms which prevail over the international rules on immunity because of its hierarchical superiority which overrides any rules of state immunity

between what constitutes private, as opposed to official, acts arose in both cases relied on by the SCSL (i.e. the *Pinochet* and *Yerodia* cases) as well as in the Taylor case as such.

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

The origins of this distinction, which emerged historically, can be traced to State immunity.[223] The restrictive approach to state immunity distinguished between governmental actions which remained immune (*acta iure imperii*) and acts of a private or commercial nature, which were justiciable in foreign courts (*acta iure gestionis*). The distinction was never very satisfactory in practice, and national courts attempting to apply it came to different decisions on similar subjects. It is not surprising that the distinction which proved to cause such confusion in commercial cases is even less satisfactory when adjusted and invoked within international criminal law.[224] The following comments prove this point.

According to Cassese, the ICJ's resort in the *Yerodia* case, to the distinction between acts performed 'in a private capacity' and 'official acts', is a distinction that, within the context of international crimes "proves ambiguous and indeed untenable."[225] Cassese argues that to hold, as the ICJ did, that state officials after leaving office may be prosecuted and punished for international crimes perpetrated while in office only if such crimes are regarded as acts committed in their 'private capacity', is "hardly consistent with the current pattern of

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which would otherwise apply. In the view of the author of this thesis, such arguments are erroneous. As was rightly observed in *Jones v. Kingdom of Saudi Arabia* "the rule on state immunity is not derogation from the prohibition on torture. It is not a rule which authorizes or absolves its perpetrators from liability. There is no clash of norms." See *Jones v. Kingdom of Saudi Arabia* (Claim No HQ 02 X01805), para. 19 (2). See also, "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict the prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State Immunity upon which a *jus cogens* mandate can bite:" In: H. Fox *supra* note 158, p. 525. However, compare with Robertson arguing that "the rule against torture overrides and dissolves the sovereign immunity which customary law granted to officials and heads of state", in: Robertson *supra* note 205, p. 337.

[223] Compare however Cassese *supra* note 48, p. 868, arguing that origins of this distinction can be also found in a transposition of this distinction from the Vienna Convention on Diplomatic Immunities.

[224] Robertson *supra* note 205.

international criminality and surely does not meet the demands of international criminal justice."[226]

Cassese notes that it is not conceivable that high ranking state officials (including both Foreign Ministers or Heads of State) may perpetrate crimes such as genocide, torture, war crimes or crimes against humanity in 'a private capacity'. While performing, willingly condoning or ordering those acts, high ranking state officials rather act, according to Cassese, in the exercise of public functions. As regards crimes committed in private capacity, he gives examples such as personal offences which may include killing one's wife (or husband), beating a servant or stealing from a shop.[227]

Wouters, similarly with Cassese, points to the fact that treating international crimes as private acts "ignores the sad reality that in most cases those crimes are precisely committed by or with the support of high- ranking officials as part of a State's policy, and thus fall within the scope of official acts."[228] Wirth also opposes the categorisation of international crimes as acts committed in private capacity. He provides a different rationale, explaining that this categorisation would imply that such acts cannot be attributed to the State for the purposes of State responsibility, which would prevent a State being ordered to pay compensation.[229]

Firstly, it is suggested that the distinction between private and official acts should not be used in the context of international crimes. This terminology has different origins. It does not have roots in international criminal law[230] and therefore causes significant problems not only in a theory, but also for national and international criminal courts, as will be illustrated in more detail on the *Pinochet* and *Yerodia* cases below.

Nevertheless, since courts tend to employ this terminology, it would not be satisfactory and

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[225] See Cassese *supra* note 48, p. 867.
[226] A. Cassese, *International Law*, Oxford University Press (2005), p. 120.
[227] *Ibid.*
[228] J. Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks', 16 *Leiden Journal of Intenational Law* 253 (2003), p. 262.
[229] S. Wirth, S. 'Immunity for Core Crimes? The ICJ's judgement in the Congo v. Belgium Case', 13 European Journal of International Law 877 (2002).

useful to close the discussion simply by referring to unsuitability of this distinction. Two possible solutions are offered to the issue at hand. The first solution could be to avoid the discussion over irrelevance of immunity *ratione materiae* for international crimes by denying the official nature of these acts. International crimes could be then treated as private acts and no immunity *ratione materiae* could arise in this respect. Admittedly, this would be an easier way to proceed. At the same time, the legal construct which would turn international crimes into solely private acts seems rather artificial.[231]

The second solution, and it is suggested that a more adequate one, is to consider international crimes as most often committed by state officials while holding certain public/official position, therefore in an official capacity.[232] This position (and means available in such position) in turn allows for breaches of international law on such a scale that they can be qualified as international crimes. It follows that international crimes are seldom perpetrated in a private capacity. How to justify the denial of immunity *ratione materiae* for international crimes if committed in official capacity then?

It is claimed that there exists a customary rule which removes immunity *ratione materiae* for state officials committing international crimes before international courts.[233] This hypothesis will seek to be confirmed by supporting evidence such as relevant treaty provisions, Statutes of international criminal tribunals and also decisions of both international and national courts.[234]

6 Practice before National and International Courts with Respect to Immunities

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[230] The original distinction between *acta iure imperii* and *acta iure gestionis* applies to civil (not criminal) proceedings before courts of foreign states.

[231] Cassese is giving useful examples of this artificiality: Reich Minister for Foreign Affairs (1938-1945) Joachim von Ribbentrop was convicted for crimes against peace, war crimes and crimes against humanity, which would have to be regarded as 'private acts'. The Japanese Foreign Minister (1943-1945) Shigemitsu was convicted for failing 'to secure observance and prevent breaches of the law of war.' In: Cassese, *supra* note 48, p. 870.

[232] In order to support this view, one may refer to the case of torture. One of the objective elements of the torture (not as a war crime or crime against humanity), but in the context of the Torture Convention, is "instigation or consent or acquiescence of a *public official* or other person *acting in an official capacity*"(emphasis added). See Article 1 of the Torture Convention.

[233] On the other hand, immunity *ratione personae* proves to be more resilient. So far, this immunity was always upheld by national courts. The situation is different before international criminal courts, however, it is claimed that this immunity is not denied automatically simply on the international legal basis of the court

6.1 Practice before National Courts – The *Yerodia* Case

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

Therefore, the SCSL had to address the legal arguments brought by the Defence while relying on the judgement in the *Yerodia* case. The way the SCSL did so is another matter, which can certainly be subject to criticism as well as the judgment and reasoning of the ICJ in the *Yerodia* case itself. The fact that the SCSL had to deal with the judgment in the *Yerodia* case does not mean that the SCSL had to follow this judgment.[235] As well known, the judgement in the *Yerodia* case attracted an extensive criticism both in the legal scholarship[236] and also in separate and dissenting opinions.[237]

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

On 11 April 2000 Belgium court issued an international arrest warrant in absentia against Yerodia Ndombasi. He was charged with crimes against humanity and acts constituting grave breaches of the Geneva Conventions of 1949 and their Additional Protocols of 1977. A case was subsequently brought to the ICJ by the Democratic Republic of the Congo (DRC). The DRC

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[234] Cassese suggests that this customary rule exists also in respect of national courts. See Cassese supra note 48, pp. 870-874. Equally, Frulli posits that national/international legal basis of the court has no bearing on functional immunity as oppose to personal immunity. See Frulli *supra* note 17.

[235] The decisions of the ICJ are binding only for the parties to the dispute and only for the particular case. This does not however deny the high authority of ICJ decisions and often strong reliance on it by other international courts including the SCSL.

[236] Cassese, *supra* note, p. 864 ; Wouters, *supra* note, pp. 257, 259–61.

disputed the legality of the circulation of an international arrest warrant by Belgium with respect to, at the time of the issuance of warrant, its incumbent Minister for Foreign Affairs, Yerodia Ndombasi. The ICJ had to examine whether Belgium has a jurisdiction under customary international law over an incumbent Minister of Foreign Affairs of another state and whether there is any exemption from this jurisdiction on the basis of immunities available to the high ranking officials.

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

The DRC nevertheless accepted that "the fact that immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution could not be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity no longer exists."[238]

Belgium argued that despite the existence of immunities of Ministers of Foreign Affairs from jurisdiction to be exercised by the courts of another state, in case of war crimes and crimes against humanity the incumbent Ministers for Foreign Affairs cannot claim immunity. Majority of judges was however of a different view. At the beginning the ICJ observed that "in international law it is firmly established that, as diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[239] The ICJ emphasized that immunities granted to e.g. Ministers for Foreign Affairs "are not granted for their personal benefit, but to ensure the effective performance of their functions on

[237] See e.g., the *Yerodia* case *supra* note 15, Dissenting Opinion of Judge ad HocVan denWyngaert, paras. 26–8; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal paras. 78 and 85.
[238] *Ibid*., para. 48.
[239] *Ibid*., para. 51.

behalf of their respective States."[240]

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

> [t]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of their duties. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office and acts committed during the period of office.[241]

The ICJ examined, inter alia, decisions of national courts such as the House of Lords (UK) and the Court of Cassation (France), and stated that "the rules concerning the immunity or criminal responsibility of persons having an official capacity…do not enable it to conclude that any such exception exists in customary international law in regard to national courts."[242] The ICJ considered also the rules concerning immunity in the legal instruments creating international criminal tribunals. It found that the relevant provisions of the Nuremberg and Tokyo Charter[243] and of the ICTY[244], ICTR[245] and ICC[246] Statutes denying immunity to high ranking officials can not serve as the basis for denying immunity before national courts.[247] The ICJ therefore limited the possibility of prosecution of international crimes committed by *serving* state officials only to international courts.

Despite criticism in the international legal scholarship, it is suggested that the ICJ's conclusion is in this respect in line with decisions of national courts. Many other national courts have reached similar conclusions, dismissing charges against *serving* Heads of State on the basis of immunity.

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[240] *Ibid*., para. 53.
[241] *Ibid*., para. 54-55.
[242] *Ibid.*
[243] See Charter of the International Military Tribunal of Nuremburg, Art. 7, Charter of the International Military Tribunal of Tokyo, Art. 6.
[244] Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7 (2).
[245] Statute of the International Criminal Tribunal for Rwanda, Art. 6 (2).
[246] Statute of the International Criminal Court, Art. 27.
[247] The *Yerodia* case, *supra* note 15, para. 58.

State practice, one may add unfortunately, so far provides for upholding personal immunity of high ranking officials before national courts, despite the attempt of some scholars to prove or suggest otherwise.[248]

Nevertheless, not all of the ICJ's statements on the matter were very well reasoned or beyond dispute.[249] The manner in which the ICJ refers to 'firmly established' rules of customary international law without referring to any examples of state practice, judicial authority (whether national or international), or academic commentary suggests that immunity was assumed rather than established.[250]

In sum, the ICJ held that under customary international law a foreign minister (and by extension a head of state) enjoys absolute immunity from 'any act of authority of another State' regardless of the gravity of the charges involved, for as long as he or she remains in office.[251]

The ICJ has in many respects considerably expanded the protection afforded by international law to foreign ministers. It has given priority to the need for foreign relations to be conducted unimpaired. The ICJ concluded, by 13 votes to 3, that the issue and circulation of an international arrest warrant: "constituted violations of a legal obligation of the Kingdom of Belgium towards the DRC, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the DRC enjoyed under international law."[252]

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

[248] See e.g. Frulli *supra* note 17, Nouwen *supra* note 49.
[249] These conclusions are however not necessary to be examined for the purposes of this thesis.
[250] As Sands has summarized: "The ICJ's judgment is not accompanied by an identification or assessment of the examples which were examined, the process of deduction is not explained. Without knowing what the ICJ looked at, or what it distinguished or applied, it is not possible to form a view as to the basis or merits of the Court's reasoning or conclusion, and in particular its assumption (by way of starting point) that a rule of immunity exists. The overall conclusion, which may be correct, but we cannot know on the basis of what is presented, is more of an ex cathedra declaration than a reasoned judgment", in: Sands supra note 88, p.49.
[251] *Ibid.*
[252] The *Yerodia* case, para. 78 (2).

SCSL was also faced with: "One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while as the same time guaranteeing respect for human rights." They further add "the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts all have their part to play."[253]

This statement can certainly be approved. However, it is suggested that international criminal tribunals have a different "part to play" than national courts. This was emphasized in the Separate Opinion of Judge Guillame. Judge Guillame referred to Belgium's citation of the development of international criminal courts and opined that "this development was *precisely in order to provide a remedy for the deficiencies of national courts*, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts."[254]

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

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

[253] *Ibid*., para. 51.

Charter, and the future International Criminal Court created by the 1998 Rome Convention.'[255]

Let us consider these assessments:

(1) It is suggested that the first scenario is a rather theoretical option, especially considering that international crimes are mostly committed in countries with totalitarian regimes. Lord Brown-Wilkinson supports this view by reasoning that "the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed."[256]

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

(3) In the third scenario, the ICJ is referring to the possibility to prosecute a *former* Foreign Minister of another state for acts committed in *private capacity*. However, the ICJ provides no assistance as to what would or would not be a private act. Would the court treat international crimes as private acts? If so, it would not reflect the reality in which international crimes are usually committed. On the other hand, if the ICJ would admit that international crimes can indeed be committed in official capacity, how would this finding be reconciled with immunity *ratione materiae* to be claimed before national courts for official acts?[257]

It seems unlikely that the ICJ intended to prevent possible prosecutions of international crimes by

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[254] *Ibid*., Separate Opinion of Judge Guillame, para. 11 (emphasis added).
[255] *Ibid*., para. 61.
[256] The Pinochet case III, Lord Brown-Wilkinson p. 199.
[257] Cassese suggests that there exists a customary rule which removes immunity *ratione materiae* for state officials committing international crimes not only before international courts, but also before national courts. In this respect, he provides an extensive summary of the national case-law from the United Kingdom, Israel, France, Italy, the Netherlands, Poland, the United States, Spain and Mexico. For more see Cassese *supra* note 48, pp. 870-871. Cassese also points to a further element supporting the existence of such a customary rule, i.e. the pleadings of DRC and Belgium before the ICJ. The DRC explicitly admitted in the pleadings that there exists individual criminal responsibility for international crimes even if committed by state official while in office. The DRC stated that on this point there was no disagreement with Belgium, *Mémoire* of 15 May 2001, at 39, para. 60, quoting from Cassese supra note 48, p. 871.

trying to label them as official acts being covered by functional immunity. Nevertheless, by failing to provide much needed explanation and guidance in this area, the ICJ prolongs the controversy over the distinction between private and official acts.

(4) The fourth scenario is crucial for our purposes. Accordingly, it will be dealt with extensively below.

6.2 The *Pinochet* Case - Special Status of International Courts With Respect to Prosecution of International Crimes and Status of International Crimes (Official versus Private Acts)

The Defence in its submission in Taylor also referred to another case in which immunity was invoked – the Pinochet case. While focusing on the Pinochet case, only those areas relevant for drawing conclusions with respect to the Taylor case will be addressed, i.e. the special status of international courts and the distinction between so-called private and official acts. This distinction has a significant bearing on the application of immunity *ratione materiae.*

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

The Pinochet case became one of the most important precedents for law on immunities since Nuremberg.[258] The facts of the case are well known. Spain requested the extradition of the former head of State of Chile, Augusto Pinochet, on the basis of his alleged involvement in the commission of crimes including torture, hostage taking and conspiracy to murder committed in

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

Chile at the time when he was Head of state.[259]

6.2.1 The Divisional Court's Reasoning – Where to Draw a Line between Ordinary Versus Extraordinary Crimes?

The Divisional Court as the first instance court in Pinochet applied the classical reasoning that a former head of State is not entitled to immunity for private acts but continues to enjoy functional immunity in respect of public acts performed by him as Head of State. The Nuremberg Charter and Statutes of the ICTY and ICTR were recognized not to have any bearing on the proceedings before national courts as 'these were international tribunals, established by international agreement. They did not therefore violate principle that one sovereign State will not implead another in relation to its sovereign acts.'[260]

As the court emphasized, Pinochet was charged 'not with personally torturing or murdering victims or causing their disappearance, but with using the power of the State of which he was head to that end'.[261] The Divisional Court thus found that these acts can be hardly described as 'private acts', which is certainly a correct observation. Judge Collins stated that crimes against humanity are committed in the exercise of the official functions because 'history shows that it has indeed on occasions been state policy to exterminate or oppress particular groups.'[262] The court then concluded with the finding that since these acts had to be treated as official acts, Pinochet was entitled to claim immunity *ratione materiae*. Unfortunately, the court did not approve the possibility of an exception to immunity *ratione materiae* restricted to serious international crimes.[263]

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[259] See e.g. Warbrick, C., McGoldrick, D., Fox, H., 'The First Pinochet Case: Immunity of a Former Head of State', *International and Comparative Law Quarterly* 48 (1999). Warbrick, C.; McGoldrick; D., Barker, J., C. 'The Future of Former Head of State Immunity after ex parte Pinochet', *International and Comparative Law Quarterly*, Vol. 48, No.4 (1999). Also Warbrick, C.; McGoldrick; D.; Denza, E., 'Ex parte Pinochet: Lacuna or Leap?', *International and Comparative Law Quarterly*, Vol. 48, No. 4 (1999).
[260] *R. v. Evans, ex parte Augusto Pinochet Ugarte* (28 October 1998), Divisional Court (Chief Justice Bingham, Justice Collins and Justice Richard), para. 68.
[261] *Ibid*., para. 58.
[262] *Ibid*. (Justice Collins).
[263] *Ibid*., paras. 63-65.

In this regard, the court held that the argument about a special nature and seriousness of international crimes has 'some attraction', but it would be unclear 'where to draw a line'.[264] One can respectfully disagree with court on this point. There are clear and strict criteria for act(s) to qualify as international crimes (both subjective and objective elements are established in international criminal law with respect to crimes against humanity, war crimes and genocide). Certain acts are thus either qualified as international crimes and accordingly prosecuted as such or not. It is up to the Prosecutor to prove its case on the basis of the evidence he/she has. The Court then 'only' has to draw a line between 'guilty' or 'not guilty' unless it decides to grant immunity.

The House of Lords Hearings

The case in the House of Lords had to be considered twice, as the counsels for Pinochet challenged the first decision on the basis of links of Judge Hoffmann (one of the law lords) with Amnesty International, one of the interveners in the case. The first decision (Pinochet I)[265] was thus set aside by the second decision (Pinochet II)[266]. A different judicial panel then gave a different final decision - Pinochet III.[267] This final decision was not actually different in the outcome as such, Pinochet was denied immunity *ratione materiae* just as in the Pinochet I. However, the legal basis used and the law lords' reasoning differed substantially.

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

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[264] *Ibid*., para. 63. (Chief Justice Bingham).
[265] 15 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 61.
[266] 16 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 2) [2000] 1 AC 119.
[267] 17 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.).

6.2.2 The Pinochet Case I

Three (out of five) judges found that serious international crimes cannot be covered by functional immunity. The core of the decision was that certain crimes under international law cannot be protected by international law as official functions, because they are at the same time condemned by all States as illegal. Furthermore, commission of some of these crimes including torture constitutes breach of *ius cogens*.[268]

After examining the statutes and case-law of international courts from Nuremberg up to the present time, Lord Slynn strictly separated proceedings aiming at the withdrawal of immunity to head of states before international tribunals and courts as opposed to national courts. Lord Slynn pointed to the fact that no State practice, general consensus or conventional support has been shown with respect to the fact that "*all* crimes against international law should be justiciable in *National Courts* on the basis of the universality of jurisdiction . . . That international law crimes should be tried before *international tribunals* or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the courts of other states is another"(emphasis added).[269] He strictly rejected the possibility of universality of jurisdiction for commission of international crimes.

Lord Lloyd, the other judge in the minority, added "the setting up of these *special international tribunals* for the trial of those accused of genocide and other crimes against humanity, including torture, shows that such crimes, when committed by heads of state or other responsible government officials cannot be tried in the ordinary courts of other states"(emphasis added).[270] He noted that if the proceedings against heads of state could be initiated before national courts, there would be little need for the international tribunals.

Being both in the minority, Lord Slynn and Lord Lloyd concluded on the basis of the above arguments that Pinochet was entitled to immunity before the House of Lords since it is a national

[268] Cryer; Frimain; Robinson, *supra* note 192.
[269] 15 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 AC 61, at p. 79.
[270] *Ibid*., at p. 98.

court. Hence, while recognizing the possibility to try heads of state for crimes under international law, only international criminal tribunals and courts were considered as proper fora for addressing these issues.

On the other hand the majority held that Pinochet was not entitled to immunity *ratione materiae* before the House of Lords. Nevertheless, the law lords agreed that if Pinochet was still an incumbent head of state, he would have enjoyed immunity *ratione personae*, i.e. immunity both in respect of acts committed in an official and private capacity. Since Pinochet was no longer a head of state, only immunity *ratione materiae* was available for him to be invoked.

For the immunity *ratione materiae* to be available, the conduct in question has to be qualified as committed in an official capacity, as opposed to immunity *ratione personae*, which is not dependent on the conduct in question being an official act. Accordingly, the legal argumentation turned to the question whether torture could be considered as an official act giving rise to immunity *ratione materiae*.[271]

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

They held that Pinochet could claim absolute immunity only while in office (immunity *ratione personae*), but he could no longer claim immunity while out of office (immunity *ratione materiae*), since his acts could not have been regarded as official acts performed in the exercise of his functions. Lord Steyn observed that: "some acts of a head of state may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a head of state."[272]

[271] Similar discussion arose in the *Yerodia* case, where the minority gave the following explanation in their Separate Opinion "serious international crimes cannot be regarded as official acts because they are neither normal state functions nor functions that a state alone (in contrast to an individual) can perform", para. 85.
[272] See *supra* note 266, p. 115.

Equally, Lord Nicholls considered that: "International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."[273]

It was often claimed that after Pinochet I, international law would never be the same again since the majority held that the immunity applied only to those state officials who exercise *legitimate* state functions. 'By no strech of imagination', it was said, 'could widespread torture be regarded as legitimate conduct by anyone, let alone a head of state'.[274] That is all very well. However, one may query for what the immunity would be needed, if not for situations when the state official breaches the law?

There would be little need for immunity when the state officials are indeed exercising solely *legitimate* functions of state as suggested by some law lords and approved by some scholars.[275] Therefore, the first part of the argument that certain acts are so unacceptable that they fall outside being protected by functional immunity even if executed on behalf of the state is approved. Those acts would qualify as international crimes for which individual criminal responsibility exists.

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

The decision of law lords in Pinochet I can be approved to the extent that commission of international crimes does not give a rise to functional immunity. In fact, *Pinochet I* represents a revolutionary decision in a sense that functional immunity was denied before *national* court for

[273] *Ibid*., p. 109.
[274] Robertson *supra* note 205, p. 337.
[275] *Ibid.*

international crimes on the basis of general international law. But it is also claimed that law lords failed to acknowledge that international crimes are most often committed in official capacity. Pinochet I shows the reluctance to hold that torture (especially if institutionalized as a part of a State's policy) is indeed committed in official capacity.

Some law lords suggested that international crimes are not 'official acts' or 'can not be regarded as part of the functions of head of state'. It is argued that it is possible to reconcile their approach in the following way. Committing international crimes in an official capacity does not necessarily turn them into 'official acts' for the purposes of functional immunity. They represent an exception to immunity *ratione materiae*, which is otherwise granted for all other breaches of national or international law which are committed in the name of or on behalf of state.[276]

It can not be concluded that the holding of office metamorphoses international crimes committed while in office into the official acts of state. Moreover, if the state is a party to international treaties such as the Torture Convention or the Genocide Convention, it can not at the same time recognize acts condemned by these treaties as official functions attracting immunity (as confirmed by the House of Lords in Pinochet III).[277] These crimes are indeed most often committed in an official capacity, however, they do not qualify as official acts. They qualify as international crimes implying the individual criminal responsibility of individuals regardless their position.

As was already indicated above, the best solution would be to depart from the 'false distinction'[278] between private and official acts. International crimes are nor private, neither officials acts. They are simply international crimes. Yet, international crimes can be committed in official capacity, usually by abusing that official capacity.

[276] For example, a breach of law which would qualify as an official act for which functional immunity would arise: if a state official signs abroad, on behalf of his state, a contract for a purchase of a building (for state's purposes) and then fails to pay, he may not be sued because he will be covered by functional immunity once he leaves the office (while in office, he is covered by personal immunity). Cassese *supra* note 48, p. 869 (fn. 42).
[277] Compare also Article 13 of the Resolution of the 13th Committee of the *Institut Droit International* stating that although a former head of state enjoys immunity for acts committed in the course of his official duties, these do not include acts constituting international crimes, such as genocide, war crimes contrary to the Hague or Geneva Conventions and a single act of state torture contrary to the UN Convention Against Torture.

The emphasis should shift from 'official' or 'private' act, to a 'criminal activity' and its nature. It is well acknowledged that the former state official can be prosecuted for criminal activity carried out in a private capacity (such as 'ordinary' murder).[279] It is difficult to see then, why criminal activity carried out on a large scale (such as 'extraordinary' crimes, e.g. systemic and institutionalized use of torture) could not be subject to prosecution. Especially if such acts are, due to their nature and seriousness, qualified as international crimes under customary international law and, as some claim, even give a rise to the exercise of a universal jurisdiction by domestic courts under certain circumstances.[280]

6.2.3 The Pinochet Case III

Six (out of seven) judges confirmed that a former head of State can be extradited for commission of torture.[281] Each of the judges issued a separate opinion. Their reasoning was not always clear.[282] As Cryer put it "As a result, the judgment is one of those gems of the common law system in which, however important the decision, it is difficult to identify ratio decidendi."[283]

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

The law lords in *Pinochet III* held that Pinochet would enjoy absolute immunity whilst in office; nevertheless since he was no longer in office, his acts could be subject to scrutiny for their compliance with the Torture Convention. The decision in *Pinochet III* can be characterized by a

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[278] See Nouwen *supra* note 49.
[279] As confirmed by the *Yerodia* case.
[280] See the *Yerodia* case, Separate Opinions of Judges Higgins. Kooijmans and Buergenthal at paras. 59-60 and 79-85.
[281] See further C. Warbrick; D. McGoldrick; H. Fox, 'The Pinochet Case No. 3', *International and Comparative Law Quarterly* 48 (1999).
[282] Cryer; Frimain; Robinson, *supra* note 192.
[283] *Ibid*., p. 430.

twist of approach to the question at hand. As opposed to *Pinochet I*, where the law lords decided on the basis of international law in general, in *Pinochet III* the attention was turned to the treaty instrument which played a central role-the Torture Convention. Accordingly, the *ratio decidendi* of *Pinochet III* is much more specific and narrow than *Pinochet I.*[284] It is indeed limited, as also claimed by the Defence in the *Taylor* case, to the effect of the Torture Convention on claims to immunity *ratione materiae*.[285]

6.2.4 National versus International Courts

As regards the possibility of prosecution of heads of state by national courts, some law lords were as sceptical as their colleagues in Pinochet I. In that respect, Lord Browne-Wilkinson reiterated the classic principle of international law that one sovereign state can not adjudicate on the conduct of another state.[286] Lord Goff stated that if the state intends to wave immunity in any treaty, it has do so expressly. He further referred to the above-mentioned statement by Watts[287] while emphasizing that Watts does not mention accountability before national courts, but only "international accountability."

On the other hand, Lord Millett took the view that national courts in fact can exercise extraterritorial jurisdiction under customary international law when crimes under international law are committed. This requires that courts of the respective state have an extraterritorial jurisdiction, which in turn depends on the constitutional arrangements including the relationship between customary international law and the jurisdiction of its criminal courts.[288]

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

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

[286] *17 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.), p. 209 (emphasis added).

[287] "The idea that individuals who commit international crimes are *internationally accountable* for them has now become an accepted part of international law. Problems in this area – such as the non-existence of any standing *international tribunal* to have jurisdiction over such crimes – have not affected the general acceptance of the principle of individual responsibility for international criminal conduct." (emphasis added). In: Watts *supra* note 189, p. 82.

He noted that prosecution in national courts will certainly remain important even after the establishment of a permanent international criminal tribunal. With respect to any official position held by the accused he stated that "[i]n future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence."[289] The establishment of international criminal courts in his view does not in any way change this conclusion.

6.2.5 Private versus Official acts

Where the law lords 'parted intellectual company' was over whether torture falls outside the characterization as an official act (because they could never be a legitimate functions: *Pinochet I*) or whether they were indeed, as the US Supreme Court in Nelson held, 'paradigm official acts'.[290] As Robertson observed, "If Pinochet I and Pinochet III established anything, it is the unworkability in criminal law of the distinction between 'public' (or 'official') acts and 'private' acts - a distinction which the Court in US v. Noriega presciently predicted 'may prove elusive'."[291]

In order to fall within the ambit of the Torture Convention, the conduct in question must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or a person acting in public capacity."[292] It is therefore suggested that for the purposes of the definition of torture in the Torture Convention, the approach of some law lords in *Pinochet I* of treating torture as a private act is rather unhelpful. Their approach would be hard to reconcile with the definitional criteria set in the Torture Convention, although it is admitted that law lords in *Pinochet I* actually did not base their argumentation by relying on the Torture Convention.

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[288] *17 R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.) p. 276.
[289] *Ibid*., p. 279.
[290] Robertson *supra* note 205, p. 366.
[291] *Ibid.*, "It is easy to accept that Noriega's drug trafficking while head of Panamian government could not constitute public acts done on behalf of the Panamian state. But compare charges against Pinochet-his alleged direction of systematic torture by army, police and secret service of his political opponents." See US v. Noriega, 746 F. Supp. 1506, 1521-22 (SD Fla. 1990).

In relation to the definitional criteria of torture in the Torture Convention, Lord Browne-Wilkinson emphasized that: "…as a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chief of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention."[293] Equally, Lord Saville considered a head of state to be a person acting in an 'official capacity' for the purposes of the Torture Convention and added that he would consider a head of state 'as a prime example of an official torturer.'[294]

In relation to international crimes, Lord Phillips was of the view that there is no established rule of international law which would require immunity *ratione materiae* to be granted to the accused upon his demonstrating that he was acting in official capacity.

While admitting that immunity *ratione materiae* protects all acts of the head of state which were performed in the exercise of his official functions, Lord Hope emphasized that there are two exceptions recognized by the customary international law "the first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit … The second relates to acts the prohibition of which has acquired the status under international law of ius cogens."[295]

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

6.2.6 Impact of the *Pinochet* case on the *Taylor* case

[292] Article 1 of the Torture Convention.
[293] See *supra* note 286, p. 218.
[294] *Ibid*., p. 266.
[295] *Ibid*., p. 243.

The decision of the House of Lords was complex and the reasoning of the law lords varied significantly. It was for this reason that the decision was used by both supporters and opponents of denying immunity to a former head of state. The Defence in *Taylor* took the opportunity to try to diminish the significance of the Pinochet decision by arguing that the case had a restricted impact in international law and stands only as evidence of the practice of the United Kingdom in relation to the application and interpretation of the Torture Convention of 1984.

Indeed, by focusing solely on the Torture Convention of 1984, the law lords did not approve the reasoning of Pinochet I, i.e. that crimes under international law can be prosecuted by national courts under customary international law on the basis of universal jurisdiction. But what is important for the purposes of Taylor case, despite the significantly differing opinions with regard to prosecution of the high ranking state officials before national courts, there seemed to be a clear agreement (even within the law lords being in minority) that the situation would be different before international courts.

To conclude, whatever the various views on the outcome of the *Pinochet* and *Yerodia* judgments may be, both of them undeniably confirm that jurisdictional immunities may not be claimed by serving high ranking officials before certain international criminal courts and tribunals as opposed to national courts. However, since both cases were concerned with immunities before national courts, their reasoning does not provide us with sufficient basis in order to draw conclusions with respect to immunities claimed before international courts.

To consider this matter further, an overview of existing international courts and tribunals and their respective legal basis for denial of immunities is undertaken here, from which conclusions for the SCSL may be drawn. International criminal courts and tribunals mentioned by the ICJ in the *Yerodia* case (the fourth scenario)[296] will be briefly introduced together with the relevant provisions of their Statutes relating to immunities. Scholarly opinions and judicial decisions will further serve to develop the analysis.

[296] 'Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to

6.3 Practice before International Tribunals

6.3.1 Before Nuremberg

It has been asserted that it is well established practice that there is no entitlement to rely on immunities before international tribunals and courts.[297] The introductory part of this thesis however suggested that this proposition is oversimplification of issue of immunities. Let us now turn to examine the consistency of this claimed practice with respect to immunities before such tribunals and courts.

The first effort to try a former head of state occurred during the peace negotiations after the First World War. The Commission on Responsibility of the Authors of the War and Enforcement of Penalties ("Commission") in its recommendations to prosecute Kaiser William II stated: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution…".[298]

The U.S. representative at the Commission expressed disagreement with these recommendations; he did not approve the possibility to charge persons of offenses 'against the laws of humanity.'[299] Moreover, he held that there are no precedents to be found in the modern practice of nations for

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Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.', See the *Yerodia* case *supra* note 15, para 61.

[297] Sands *supra* note 88.

[298] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), *reprinted in* 14 AM. J. INT'L. L. 95, 95–104 (1920) at 117, quoting from M., A., Summers, Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to The Statute of The International Criminal Court, (2006) *Brookland Journal of International Law* 31 (2), p. 482.

[299] This can be viewed as an emergence of the category 'crimes against humanity' as later confirmed by the Nuremberg Tribunal.

subjecting a Head of State to such criminal proceedings which could result into a degree of responsibility unknown to municipal or international law.[300] As a result of complicated negotiations, charges against the German emperor Kaiser William II under Treaty of Versailles (1919) were framed as "a supreme offence against international morality and the sanctity of treaties" instead of breaches of international law.[301]

This first attempt to punish a former head of state failed due to refusal of the Government of Netherlands to surrender German ex- emperor. The idea of providing for the establishment of a first special Tribunal expressed in Article 227 of the Treaty of Versailles was not fulfilled at that time due to a refusal of the Dutch government. Nevertheless, this first attempt to punish a Head of State was an important step ahead in the area of responsibility of high ranking state officials. Since then, the notion of individual criminal responsibility for serious crimes before international courts started to emerge.

6.3.2 The Nuremberg Trials

Time passed. Yet another war initiated by Germany broke out. And yet another attempt to prosecute those responsible was made. The next opportunity to 'test' the existence of individual criminal responsibility of high ranking state officials for international crimes arose after the Second World War. The Nuremberg and Tokyo International Military Tribunals were established. These tribunals were the first ever courts of law tasked with the difficult aim "to overcome the confusion of many tongues and the conflicting concepts of just procedure among

[300] S.S. Gregory, 'Criminal Responsibility of Sovereigns for Wilful Violations of the Laws of War', 6 VA. L. REV. 400, 414 (1920). In: Summers *supra* note 295, p. 482.

[301] Article 227 of Treaty of Versailles explicitly provided that: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial." In Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43, 136, quoted from Summers *supra* note 295, p. 482.

divers systems of law, so as to reach a common judgment."[302] The International Military Tribunal for the Far East was established by the military order[303] as opposed to the Nuremberg Tribunal, which was established by treaty.[304]

The Nuremberg Tribunal (Tribunal) rejected the submission that international law was not construed to punish individuals and is therefore concerned only with acts of States. In this respect the Tribunal also rejected the notion that individuals who carried out acts of State are not responsible due to the protection provided by the doctrine of State sovereignty.[305]

By stating that "international law imposes duties and liabilities upon individuals as well as upon States has long been recognized"[306], the Tribunal confirmed the capacity of individuals as subjects of international law. In a famous dictum, the Tribunal further reiterated the need for the concept of individual criminal responsibility by holding that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[307]

The Nuremberg Charter (Charter) explicitly confirmed the principle that no accused was entitled to claim his official position for purposes of relieving him of individual criminal responsibility before those Tribunals. Article 7 of the Charter expressly declared that: "The official position of defendants, whether heads of state or responsible officials in Government Departments, shall not

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[302] *Opening Statement before the International Military Tribunal of Justice Robert H. Jackson*, in: II Trial of the Major War Criminals Before the International Military Tribunal 98-155 (Nuremberg: IMT, 1947) ('the Blue Set') available at http://www.roberthjackson.org/Man/theman2-7-8-1/ (last accessed 22 September 2007).
[303] Established by command of General MacArthur, the Supreme Commander of Allied Forces in the South Pacific.
[304] See e.g. Lauterpacht explanation of the tribunal's competence, according to him, the tribunal was: "the joint exercise, by the four states which established the tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law." In: H. Lauterpacht (ed.), *Oppenheim's International Law*, vol. II, (7th edn. 1952), pp. 580–581.
[305] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Judgement - The Law of the Charter, The Avalon Project at Yale Law School, available at http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm (last accessed 24 September 2007).
[306] *Ibid*.
[307] See *supra* note 303.

be considered as freeing them from responsibility or mitigating punishment."[308]

Article 6 of the Tokyo Charter similarly to Article 7 of the Nuremberg Charter provided that: "Neither the position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[309]

The Charter is an expression of the fact "that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."[310] Even though the Tribunal admitted that international law provides under certain circumstances for protection of state representatives, it was at the same time emphasized that this does not apply to acts declared as criminal *by international law* (emphasis added). The official position in such cases should in no way be serving as a shelter against punishment.[311] The Tribunal expressed the same idea in the following part of its findings "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[312]

The Charter was an expression of the practical effort of four victorious states.[313] Nevertheless, standards set up in the Charter did not reflect only the views of signatories. Seventeen other states

[308] *United Nations Treaty Series*, vol.82, p. 279, London (8 August 1945), quoted from Summers *supra* note 295.
[309] Charter of the International Military Tribunal for the Far East, proclaimed at Tokyo, 19 January 1946, T.I.A.S. 1589, from Summers *supra* note 295.
[310] Trial of the Major War Criminals before the International Military Tribunal, vol. I,(1947), p. 223. Quoted from 'Document: A/CN.4/L.2, Text of the Nürnberg Principles Adopted by the International Law Commission', Extract from the *Yearbook of the International Law Commission* (1950), Vol. II, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_l2.pdf. (last accessed 10 October 2008).
[311] See *supra* note 302.
[312] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), pp. 41-42. Quoted from 'Universal jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings', available at http://www.amnesty.org/en/library/asset/IOR53/001/2002/en/dom-IOR530012002en.html (last accessed 25 October 2008).
[313] Following the decision of the Yalta conference President Truman requested representatives of the U.S. to propose an International Agreement. This proposal was submitted during the San Francisco Conference to Foreign Ministers

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

At the time the acts were committed, there was no judicial precedent for the Charter and for principles it incorporated. At the same time, the broad acceptance of the Charter by the action of the above mentioned states was perceived as an agreement by the majority of the civilized nations to adapt settled principles to new situations. According to Justice Jackson, the Charter was not *ex post facto* legislation but recognition and expression of already existing international law.[314] Nonetheless, it can be also said that international law has been partly revisited in order to meet a change in circumstances.

Justice Jackson emphasized in his report to the U.S. president an incorporation of Charter principles into a judicial precedent. While quoting Justice Cardozo's comment that "[t]he power of the precedent is the power of the beaten path", Justice Jackson went on to say that "one of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction."[315]

In December 1946 the General Assembly of the United Nations adopted Resolution 95(1), affirming "the principles of International law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." [316] In addition, the General Assembly by Resolution

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of the United Kingdom, the Soviet Union, and the Provisional Government of France. This proposal has become London agreement with the Charter forming an integral part of this agreement.

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

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

[316] G.A. Resolution 95(I) (11 December 1946).

177(II)[317] directed the International Law Commission (ILC) to "treat as a matter of primary importance plans for their formulation."[318]

The ILC in 1950 indeed formulated these principles in its report. The key provision for our purposes, Principle III, which is actually based on Article 7 of the Charter, declares that: "The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law."[319] The Principle III was also supported by General Assembly's acceptation of the ILC report.

The ILC further reaffirmed the Principle III, for the first time in 1954, in its Article 3 of the Draft Code of Offences against the Peace and Security of Mankind (Draft Code) providing "The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code."[320] For the second time, in 1991, the Article 13 of the Draft Code similarly provided "The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility."[321] Finally, in 1996 the article 7 of the Draft Code stated "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."[322]

Accordingly, all these steps led to the recognition that the Nuremberg principles are nowadays

[317] G.A. Resolution 177(II), Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (21 November 1947).
[318] *Ibid.*
[319] Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Yearbook of International Law Commission, 1950, vol. II, available also at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf. This principle was quoted e.g. by Lord Hutton in Pinochet III, p. 258.
[320] International Law Commission, *Draft Code of Offences against the Peace and Security of Mankind* (28 July 1954), 9 U.N. G.A.O.R. Supp. (No. 9) p. 11, U.N. Doc. A/2693 (1954).
[321] International Law Commission, *Report on the Draft Code of Crimes against the Peace and Security of Mankind*, (19 July 1991), 46 U.N. G.A.O.R. (Supp. No. 10) p. 238, U.N. Doc. A/46/10 (1991).

firmly established in international law.[323] Yet, what did these principles *exactly* establish? What is the real meaning of Article 7? Does Article 7 of the Nuremberg Charter actually remove personal immunity? The content of the Article 7 relates to the fact that a person who committed the crimes can be held responsible even if acting in official capacity (in other words, there is no immunity *ratione materiae* for such crimes). Arguably, the focus is on the attribution of criminal responsibility only.[324]

6.3.3 After Nuremberg

We will now proceed to assess further developments in the area of jurisdictional immunities before international courts. These developments will then be compared with the approach taken by the SCSL in the *Taylor* case.

The examination of relevant practice of other international tribunals starts with the constitutive instruments of those tribunals, i.e. their statutes. The Statutes as one of the most important constitutive instruments determine the scope of legitimate action exercised by tribunals. The Statutes govern jurisdiction and functioning of the tribunals as such. Therefore, the below analysis is helpful in order to assess the correctness of the SCSL approach in terms of a larger theoretical and practical framework.

6.3.3.1 *Ad hoc* international criminal tribunals

Almost a half century after the Nuremberg and Tokyo trials, two ad hoc international criminal

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[322] International Law Commission, *Report on the Draft Code of Crimes against the Peace and Security of Mankind*, Report of the International Law Commission on the work of its forty-eighth session 6 May - 26 July 1996, 51 U.N. G.A.O.R. Supp. (No. 22), U.N. Doc. A/51/22 (1996).

[323] See *supra* note 318, pp. 374-75. See also, the Supreme Court of Israel in Eichmann held that Article 7 of the Charter of the IMT at Nuremberg 'reflect[s] a rule of customary international law', in Cassese *supra* note 48. "Number of the Nuremberg principles have been incorpotrated into the army fields manuals of the major political powers. National attitudes have been influenced and altered contructively by the Nuremberg proceedings and certainly have bearings on subsequent state practice in this field." In: H., T., King, 'The Limitations of Sovereignty from Nuremberg to Sarajevo', 20 *Canadian-U.S. Law Journal* 173 (1994), p. 173.

[324] "Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility", in the *Yerodia* case, para. 60.

tribunals were established. Both the ICTY and ICTR were established pursuant to Security Council resolutions under the Chapter VII of the UN Charter.

The provision relevant for our purposes is the Article 7(2) of the Statute, which states that "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[325] The Article 6(2) of the Statute of the ICTR is taken verbatim from the Article 7(2) of the ICTY Statute.

The ICTY in the *Blaskic* case confirmed that there are some exceptions to the rule of general international law based on sovereign equality of States (*par in parem non habet imperium*), which otherwise provides for immunity of high-ranking state officials.[326] On the one hand, acts committed in official capacity are usually attributed solely to the State, so the individual could not be held responsible for these acts.

On the other hand, there are norms of international criminal law which prohibit genocide, crimes against humanity and war crimes. These norms provide, according to the ICTY, for exception to the rule based on sovereign equality, i.e. these acts attract individual criminal responsibility.[327] The ICTY in the *Blaskic* case held that "under these norms, those responsible for such crimes cannot invoke immunity from *national* or *international* jurisdiction even if they perpetrated such crimes while acting in their official capacity"[328] (emphasis added).

But again, same question as with respect to the Article 7 of the Nuremberg Charter can be raised.

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

[326] *Prosecutor v. Blaskic* (110 ILR 687), Subpoena (29 October 1997) p.710.

[327] See the ICJ observation in the *Yerodia* case: "Now it is generally recognised that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility", at para. 7.

[328] See *supra* note 325. More recently see the *Karadzic* case, "According to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals", para. 17. The ICTY considered "it well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/or crimes against humanity before an international tribunal would be invalid under international

What kind of immunity is addressed by Article 7(2) of the ICTY Statute? Article 7(2) of the ICTY Statute is apparently similar to the wording of the Nuremberg Charter. It arguably relates only to the fact that the accused can not claim its official position as a substantial defence. Therefore, it can be argued that there is indeed criminal responsibility for such acts (Article 7(2) of the ICTY Statute removes functional immunity which cannot coexist with this responsibility), however for so long as the Head of State is in power, there is a procedural bar to the exercise of jurisdiction over these acts (Article 7(2) of the ICTY Statute preserves personal immunity). Admittedly, this is not the only view.

For example Gaeta argues that "...the Statutes of the two ad hoc Tribunals provide for a derogation from the legal regulation of *personal immunities contained in customary international law*."[329] While she admits that these Statutes do not envisage any such derogation explicitly, all UN member states are obliged to cooperate with the ICTY on the basis of the Chapter VII powers. By virtue of Article 103 of the UN Charter, these obligations take precedence over customary and treaty obligations relating to personal immunity.[330] "Consequently, whenever a Member State to which the International Tribunal issues an arrest warrant enjoining the detention of the Head of State of another UN member who happens to be on its territory executes the arrest warrant, by doing so it does not breach any customary or treaty obligations vis-à-vis the foreign State concerned."[331]

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

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law", *Prosecutor v. Radovan Karadzic* (IT-95-5/18-PT), Decision on Accused's Second Motion fro Inspection and Disclosure: Immunity Issue, (17 December 2008), para. 25.

[329] P. Gaeta, 'Official Capacity and Immunities', in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Oxford, p. 989.

[330] *Ibid.*

[331] *Ibid.*

Chapter VII legal nature."[332]

While the ICTY never decided upon the exact scope of Article 7(2), it nevertheless confirmed the general validity of the Article and implicitly interpreted Article 7(2) as not only the attribution of criminal responsibility, but also referring to immunity *ratione personae*.[333] Even if such a broad interpretation is accepted, the ICTY could arguably adopt a rather flexible interpretation of its Statute with Chapter VII backing. It is well known that when the Security Council takes measures under Chapter VII it deems necessary for the maintenance of international peace and security, it can affect the rights of all member states, even against their will or without their consent.[334]

6.3.3.2 The ICC

As opposed to the two *ad hoc* tribunals established by the SC resolutions, the ICC was established by a multilateral treaty.[335] 'Irrelevance of official capacity' is the exact title of Article 27 dealing with immunities and provides that:

> "(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

It is obvious that if compared with the Nuremberg Charter, the ICTY and ICTR provisions, Article 27 is the most far-reaching and has a considerable impact on international rules on personal immunities. To that extent the Rome Statute is innovative as it added to the criminal responsibility in paragraph 1 of Article 27, a second paragraph explicitly denying procedural

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[332] Nouwen *supra* note 49, p. 665.
[333] *Ibid.*
[334] D. Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?', *Oxford Transitional Justice Research Working Paper Series* (30 July 2008), available at http://www.csls.ox.ac.uk/documents/Akande.pdf (last accessed 24 May 2007).
[335] The Rome Statute came into force in 9 July 2002 following the 60th ratification.

immunity. It represents a clear derogation from customary international law by complete removal of both immunities.[336]

However, this derogation operates by virtue of Article 98(1) "*only in the reciprocal relationships between States Parties to the Statute.* In all other cases, in particular when requests for cooperation involve the question of personal immunities of officials of a State not party to the Statute, one has to fall back on the *traditional legal regulation contained in international customary rules*. Consequently, the Court may not make requests for cooperation entailing, for the requested State, a violation of international rules on personal immunities to the detriment of a State not party to the Statute"(emphasis added).[337]

Article 27 of the ICC Statute is only effective regarding heads of States that are parties to the Statute. "Non-parties remain entitled to the immunities that they would possess under customary international law. This is because the immunity is a right of the State and not that of the individual. Other States cannot remove that immunity or affect the right of that non-party by a treaty to which the State possessing the immunity is not a party."[338] This observation has important implications for the SCSL and its powers to affect rights of third parties as we shall see in the following chapter.

To conclude, the Nuremberg Principles, the relevant articles in the Statutes of the ICTY and ICTR, and Article 27, paragraph 1 of the Statute of the ICC do not explicitly address the issue of personal immunity. Yet, the ICTY and ICTR can benefit from the Chapter VII powers and the ICC has its Article 27 paragraph 2. When does the SCSL's Statute stand in relation to personal immunities?

7 Submissions of Parties and the SCSL Decision with Respect to Immunities

The first three possibilities mentioned by the ICJ in the *Yerodia* case with respect to the

[336] Most recently, the ICTY in the Karadzic case also referred to Art. 27 of the ICC Statute. See *Prosecutor v. Karadzic* (Case No. IT-95-5/18-PT), Decision on Accused's Second Motion fro Inspection and Disclosure: Immunity Issue, (17 December 2008).
[337] Gaeta *supra* note 327.

irrelevance of immunities evidently do not apply to Taylor's case.[339] However, in the fourth scenario, the ICJ indicated its views on the possibility of prosecuting crimes under international law before 'certain international criminal court'. As regards the phrase 'certain international criminal court', the ICJ explicitly referred to all the international courts and tribunals described above. Can the SCSL be also qualified as such an international criminal court for the purposes of denying immunity to Taylor?

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

The Defence argued that the principles enunciated by the ICJ in the *Yerodia* case establish that only an international court may indict a serving Head of State. According to the Defence the SCSL does not meet the criteria of an international court. It emphasized that 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'). The SCSL does not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court.

The Defence concluded that "the emphatic nature of the decision and the size of the majority endorsing it send a clear signal that the main judicial organ of the United Nations does not wish to subject the stability of international relations to disturbances originating from the decentralised

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[338] Akande *supra* note 332.

[339] See the *Yerodia* case, para 61: (1) 'First, such persons enjoy no criminal immunity under international law in their countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law'; (2) 'Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity'; (3) 'Thirdly, after a person ceases to hold the office … he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect

judicial investigations of crimes, no matter how object they be."[340]

According to the Prosecution the *Yerodia* case concerned "the immunities of an incumbent Head of State from the jurisdiction of the Courts of another state which is not the case here".[341] The prosecution maintained that the SCSL is such an example of international criminal tribunal for which customary international law permits to indict a serving Head of State.

The lack of Chapter VII powers was not viewed by the Prosecution as an obstacle: it argued that the ICC equally lacks Chapter VII powers yet denies immunity to Heads of States in respect of international crimes. The Prosecution concluded that in the *Yerodia* case the ICJ enumerated the number of circumstances in which a Minister of Foreign Affairs could be prosecuted for international crimes, including international criminal courts where they have the jurisdiction. The SCSL is in the Prosecution's view such an international criminal court and therefore has jurisdiction. Article 6(2) of the Statute clearly envisages that the SCSL has the power to try a Head of State.

The SCSL started by identifiying and citing the relevant provisions of the Charter of the International Military Tribunal in Nuremberg, the International Law Commission's 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' and pertinent provisions of the Statutes of the ICTY, the ICTR, the ICC. Based on these precedents, the SCSL concluded that '[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity'.[342] The SCSL then addressed the *Yerodia* case.

The SCSL first noted that the ICJ confirmed the personal immunities of incumbent Ministers for Foreign Affairs before national courts. At the same time the SCSL interpreted the ICJ's reasoning as meaning that the ICJ however confirmed the irrelevance of immunities in relation to 'certain international criminal courts'. The SCSL justified the different approach on the basis of

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of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period in a private capacity'.

[340] *Prosecutor v. Taylor*, para. 15.

[341] *Ibid.*, para. 9 (d).

distinction between international and national courts by stating that: "the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community."[343]

It further stated that it is in any case an established rule of international law which confirms the irrelevance of immunities before international criminal courts and that Article 6(2) of its Statute does not violate any *jus cogens* norms. On the basis of the above arguments, the SCSL held that there is no bar to the jurisdiction of the SCSL in relation to Taylor's personal immunity.

Finally, the SCSL concluded that since Taylor ceased to be a Head of State prior to this decision, '[t]he immunity ratione personae which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant'.[344]

The findings of the SCSL in line with the *Yerodia* case are hardly surprising. It was in the very interest of the SCSL to define itself as an international criminal court with all 'the belongings' necessary for denying the immunity. Were these findings actually correct?

7.1 Jurisdiction As a Precondition For Withdrawal of Immunity

Any immunity analysis is necessarily interconnected with establishing the jurisdiction of that particular judicial body in the first place. Logically, the question of jurisdiction must be decided first before considering the availability of any immunnity. In other words, jurisdiction precedes immunity.

The Statute of the SCSL provides the basis for jurisdiction in the Article 1 which states: "The Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the

[342] *Ibid.*, para. 49.
[343] *Ibid*., para 51.
[344] *Ibid*., para 59.

territory of Sierra Leone, since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".

Originally, the previous version of the SC resolution drafted by the United States contained a phrase restricting jurisdiction only to 'senior Sierra Leone nationals'; this was later changed to encompass 'those who bear the greatest responsibility'. Moreover, Taylor was accused of crimes committed within Sierra Leone rather than elsewhere.[345] The SCSL of course primarily exercises jurisdiction over relevant crimes committed on the territory of Sierra Leone regardless of whether these crimes were committed by nationals or non-nationals. Accordingly, Charles Taylor can fit both in the category of 'those who bear the greatest responsibility' for crimes as well as crimes 'committed in the territory of Sierra Leone'.

Accordingly, the jurisdiction of the SCSL was clearly established, unlike in the *Yerodia* case where the jurisdiction of the Belgian court over Yerodia was not actually properly examined by the ICJ, but rather simply assumed. There was no controversy in this respect in the Taylor case. To conclude, despite the fact that the SCSL did not examine whether it has a jurisdiction in order to proceed with addressing any exemption from such jurisdiction, its jurisdiction was not objectionable and was not actually disputed by the Defence counsel.

As Akande has noted:

> Although Liberia has instituted proceedings before the International Court of Justice (ICJ), arguing that the indictment and arrest warrant issued against its Head of State do not respect the immunity that international law confers on heads of states, neither Liberia nor any other state appears to have argued that Sierra Leone is not able to delegate its criminal jurisdiction to an international court or that the Court is not entitled to exercise Sierra Leone's territorial jurisdiction over foreign nationals.[346]

Whether it can exercise jurisdiction over the serving head of State of country other than Sierra

[345] The *Yerodia* case, Dissenting Opinion of Judge Guillame, para. 4: "The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental" (*Lotus* Case) .

Leone is however another issue.

7.2 The Analysis of the SCSL's Reasoning – Immunities Part

It is well known that the decisions of the ICJ are binding only for the concrete case and only between the parties. Still, the ICJ's decision in the *Yerodia* is relevant to other cases relating to immunities. Indeed, as Piotrowicz put it "the reality is that whatever it says, whether in the operative part of the judgment or not, is going to be scrutinized and used to support claims about the state of law."[347] That is exactly what happened in the *Taylor* case.[348]

As seen above, the ICJ's fourth scenario in the *Yerodia* case was used by both parties as well as the SCSL for its reasoning. The defence used it in order to demonstrate that the SCSL is not an international court and therefore not entitled to deny immunity to a serving head of state. The Prosecution used it to prove that the SCSL is indeed a 'certain international criminal court' entitled to withdraw immunity from a serving head of state. The SCSL approved the Prosecution's arguments in this respect. Was that a correct conclusion?

It is submitted that the immunity from jurisdiction may be claimed not only before national courts, but also before international courts depending on the nature and extent of powers and attributes each court possesses. This possibility was entirely excluded by the SCSL, which understandably rather adopted the argumentation of one of the *amici curiae* that "in respect of the jurisdictional immunities of serving heads of state both international law and practice has generally distinguished between proceedings before national and international courts. As regards the international courts and tribunals which have been established, practice has been consistent, in that no serving head of state has been recognized as being entitled to rely on jurisdictional immunities."[349]

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[346] Akande *supra* note 56.
[347] R. Piotrowicz, 'Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction, The Australian Law Journal 76 (2002), p. 291.
[348] It is of course important to note that the facts of the *Yerodia* case differ in many respects significantly in comparison with the *Taylor* case. The *Yerodia* case dealt with immunity of incumbent Minister for Foreign Affairs before national courts as opposed to immunity of incumbent Head of State before international court. The ICJ's primarily focus was on the practice before national courts.
[349] Sands supra note 88.

This is all well, but to which consistent practice was the *amicus curiae* referring to? As indicated in the introductory chapter, Taylor is only the second in history behind Slobodan Milosevic, and the first African head of state to be indicted for crimes under international law at the international level. This 'consistent' practice is thus supported by only one example of an *international* court which actually never pronounced on the immunity of a *serving* head of state, i.e. the ICTY with respect to indicting the then president of the Federal Republic of Yugoslavia Slobodan Milosevic.[350]

7.2.1 Significance of the Phrase 'Involvement of the International Community'

The central part of the SCSL's decision for the purposes of denying the immunity to Taylor was the distinction between international and national courts. In his respect, the SCSL relied on 'the involvement of a whole international community' in the establishment of the SCSL in order to justify its categorisation as 'certain international criminal tribunal'. The SCSL emphasized that it derives its mandate from the international community and therefore the principle of immunity based on the sovereign equality of states has no relevance before international criminal courts (and it considers itself an international criminal court).

After establishing its international legal basis, the SCSL proceeded to emphasize the role of international community also in the context of the agreement and its binding effects for all UN member states. The SCSL's argued that the Agreement is actually an expression of the will of the international community, because in maintaining the international peace and security, the UN acts on behalf of all member states.[351]

The issue of the agreement and its binding effects for third parties was dealt with extensively in the previous chapter. Hence, it suffices to briefly summarize that it was emphasized that the UN possesses a separate legal personality.[352] It is then rather disputable to assert, as the SCSL did, that simply by virtue of the fact that states are members of the UN, they are therefore parties to

[350] At least to the knowledge of this author, there is no other example of what is referred to as a consistent practice.
[351] See Orentlicher *supra* note 88, p. 12. Orentlicher stated that the Security Council by authorizing the Secretary General to negotiate an agreement with Sierra Leone was not only carrying out its responsibility to maintain peace and security, but 'in doing so, it was acting on behalf of all Members of the United Nations',

the Agreement and accordingly are bound by its provisions. As a general matter, member states are not bound by treaties concluded by the UN by the virtue of membership *alone.*

To conclude, it is submitted that the undeniable involvement of the whole international community (i.e. the UN) is not a sufficient criterion in order to determine whether the SCSL can ignore the immunities of the Head of State of a country non party to the agreement. Either a consent of the states (including the affected state) to be bound by the agreement or some form of the Chapter VII powers involvement of the Security Council would be needed. None of these grounds were clearly present in Taylor case, yet the SCSL "tried to find a ground for lifting the immunity by combining the two grounds for as far as they were present."[353]

7.2.2 Significance of the Phrase 'Certain International Courts'

The ICJ in the Yerodia case confirmed the authority of a suitably constituted international tribunal to issue an arrest warrant in respect of a serving or former head of state. As regards the phrase before 'certain international criminal courts', the ICJ referred to examples of the ICTY, ICTR and the ICC.[354] The central issue is thus whether the SCSL can qualify as such a 'certain international criminal court' which is capable of derogating from the principle of immunity.

With regard to the absence of the SCSL in the list of certain international courts mentioned by the ICJ, two observations can be advanced. Firstly, it is important to note – as a matter of chronology - that the SCSL was not established at the time of the ICJ's decision in the *Yerodia* case. The court delivered its decision on 14 February 2002. It is therefore understandable that it does not mention the SCSL as another example of 'certain international courts'. The agreement establishing the SCSL was concluded only a few weeks before and had not been implemented at that stage.[355] Secondly, it can also be argued that paragraph 61 of the ICJ's decision was simply obiter dicta, providing a series of examples rather than a closed list.

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[352] E.g. H. G. Schermers and N. M. Blokker, *International Institutional Law* (2003), 1002, para. 1579.
[353] Nouwen supra note ..p. 657.
[354] The *Yerodia* case, para. 61.
[355] Robertson supra note 205.

However, there are crucial differences between the SCSL, on the one hand, and the ICTY, ICTR and the ICC on the other. All international courts cited by the ICJ (i.e. ICTY, ICTR and ICC) bind more than one state. All members of the United Nations are obliged to cooperate with both the ICTY and ICTR by virtue of their establishment under Chapter VII powers, including, inter alia, arrests and surrendering of any alleged perpetrators including Heads of States who are within their jurisdiction.[356] As was clearly established in the first part of this thesis, the SCSL, unlike both ad hoc tribunals, does not possess Chapter VII powers.

The third court mentioned by the ICJ was the permanent court – the ICC. Since the ICC is a treaty-based court similar to the SCSL, it can actually serve as a very useful example for illustrating why the SCSL in the Taylor decision 'got it wrong'. The SCSL was established by bilateral treaty between the United Nations and the Government of Sierra Leone. The ICC was also established by international treaty, a multilateral one. States parties to this multilateral treaty agreed to deny any potential immunity to their high ranking officials including the Head of State in case they commit certain crimes under international law.

Even though the Rome Statute establishing the ICC binds more than one state, it can not bind those states not parties to the treaty. It is a well known principle that a treaty cannot create neither obligations nor rights for third parties without their consent (*pacta tertiis nec nocent nec prosunt*).[357] This is reflected in Article 98, which states: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

In the light of the above, it is clear that the ICC can also come under the pressure of how to proceed in the case of immunity invoked by the Head of State of a non-party to the treaty. As summarized by Romano and Nollkaemper: "While the Statute of the ICC denies immunity to Heads of State, in principle, it cannot affect the immunity of Heads of States of non parties.

[356] *Ibid.*
[357] See also Art. 34 of the Vienna Convention on the Law of Treaties, "A treaty binds the parties and only the parties; it does not create obligations for a third State without its consent".

States that are parties to the Statute would violate international law if they hand over a Head of State of a non-party to the ICC."[358] In applying the above findings regarding the ICC to the similar context of the SCSL, it can be argued that states not parties to the Agreement establishing the SCSL can not arrest and/or extradite an incumbent president to the SCSL without some further authority.[359]

If an international organization, in this case the UN and a state, in this case Sierra Leone decide to establish an international criminal court by bilateral agreement, its classification as an international criminal court does not automatically mean that a state official of another country has no immunity from prosecution before that body. Were that the case, it would arguably be an easy way to get around international obligations.[360] It might be argued that what Sierra Leone could not have done unilaterally, it cannot do by participating in the creation of an international court.

In sum, while the jurisdiction (which precedes immunity) of the SCSL was established, the possibility to disrespect personal immunity of serving head of state of another country merely on the international legal basis of the SCSL is disputed.

Article 6(2) of the SCSL Statute, which is a crucial provision for the purposes of immunities, is taken verbatim from Article 7 (2) of the ICTY Statute (which is the same as Article 6(2) of the ICTR Statute). These provisions were interpreted as relating to merely immunity *ratione materiae*. Even if a more extensive interpretation of the ICTY ad ICTR Statutes is accepted, the important difference is that the *ad hoc* tribunals were established by Resolution under Chapter VII as opposed to the SCSL, which was established by a bilateral agreement.

It is therefore submitted that (1) the SCSL cannot oppose the provision denying personal immunity in its Statute towards a third state, i.e. Liberia. (2) Even if it could deny immunity to a head of state of another country, such a broad interpretation of Article 6(2) would only be valid if

[358] C. P.R Romano, A. Nollkaemper,'The Arrest Warrant Against The Liberian resident, Charles Taylor', ASIL Insights (2004), available at <http://www.asil.org/insights/insigh> 10.htm) (last accessed 27 March 2008), p.2.
[359] *Ibid.*
[360] Nouwen supra note 49.

the rule denying personal immunity reflects customary international law, as has already been established for the rule on criminal responsibility. (3) If the SCSL would not be able to establish such a rule, a provision similar to that contained in Article 27(2) of the ICC Statute is then argued to be necessary.[361] Next chapter will suggest a more cautious way forward with respect to two kinds of immunities available to a Head of State.

8 Charles Taylor- Head of State Immunity

8.1 Claimed immunity *ratione personae*

The fundamental question for our purposes is whether all immunities are irrelevant before any court that may be characterized as 'international'. As shown by State practise, statutes of international criminal courts, case-law of both national and international courts and scholarly opinions, not all immunities before all courts can be overcome even for prosecution of crimes under international law.[362]

This proposition was also confirmed by the ICJ in Yerodia case, which proved to be central for analysis of the *Taylor* case. Both Yerodia and Taylor were incumbent state officials at the time of the issuance of arrest warrants, therefore they invoked immunity *ratione personae*. Immunity ratione personae applies irrespective of the nature of the acts committed, it is so called absolute immunity. The underlying justification for immunity *ratione personae* is the functional necessity argument, i.e. in order to carry out its functions smoothly, the state official (representing a state itself) needs to be protected from *any* external interventions. Denial of this kind of immunity could be said to negatively affect the fulfilment of the functions of the state official.[363]

This immunity is recognized by courts and scholars as 'not merely a relic of the personal

[361] *Ibid.*
[362] Racsmany *supra* note 126.
[363] Nouwen supra note 49.

sovereignty of the ruler.'[364] Indeed, immunity *ratione personae* constitutes a general rule of customary international law.[365] It has therefore relevance not only before domestic courts, but also before international tribunals "unless the status and nature of the international court justifies a different conclusion".[366] Any exception to this general rule, which remains so far fully applicable before domestic courts[367], must be legally justified in the case of international courts.[368]

As was shown in the previous chapter, both *ad hoc* criminal tribunals and the ICC provides for this exception. The legal basis for this exception is either a Security Council Chapter VII resolution or an international treaty. Moreover, even if there is an explicit exception in the form of waiver of immunity by states parties to the treaty, that immunity arguably applies only to contracting parties. A summary by a leading commentator defines well the position of the SCSL in relation to denial of immunities to a serving Head of State of another country:

> [T]he possibility of relying on international law immunities to avoid prosecutions by international tribunals depends on the nature of the tribunal: *how it was established and whether the State of the official sought to be tried is bound by the instrument establishing the tribunal.* In this regard, there is a distinction between those tribunals established by Security Council Resolution (i.e. the ICTY and ICTR) and those established by treaty. Because of the universal membership of the UN and because decisions of the Council are binding on all UN members, the provisions of the Statutes of the ICTY and ICTR are capable of removing immunity with respect to practically all states. On the other hand, since treaties are only binding on the parties, a treaty establishing an international tribunal is not capable of removing an immunity which international law grants to officials of States that are not party to the treaty. These immunities are rights belonging to the non-party States and those States may not be deprived of their rights by a treaty to which they are not party.[369]

Lasting entitlement to immunities *ratione personae* granted by customary international law to incumbent Head of States of non-state parties to the ICC Statute seems to be the best reflection of the current state of law on immunities. Hence, it is submitted that the agreement between Sierra Leone and the UN establishing the SCSL can not take away from the incumbent President of

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[364] R. Y. Jennings and A.Watts (eds.), *Oppenheim's International Law* (1996), 1034; A. Cassese, *International Criminal Law*, Oxford University Press (2008), p. 265; the *Yerodia* case, para. 53.
[365] Cassese *supra* note 48.
[366] Racsmany *supra* note 126, p. 314.
[367] See confirmation of immunity *ratione personae* by all national courts so far (e.g. in cases of Castro, Qaddafi).
[368] See *supra* note 364.
[369] Akande supra note 56, p. 417 (emphasis added).

another country the immunity *ratione persone* granted under customary international law without more (e.g. the consent of Liberia).

It is submitted that the SCSL's interpretation of the *Yerodia* case led to an incorrect conclusion about immunity *ratione personae* of an incumbent Head of State. The SCSL's decision neither adequately interpreted nor usefully applied the criterion of 'certain international courts'. This decision was more of a declaration than the result of a well considered judicial deliberation.

Admittedly, the SCSL was not in an easy position as its legal basis and any obligations under international law are complicated by the hybrid nature of that body. Still, as restrictive as it may be, it is proposed that the SCSL should have confirmed the immunity *ratione personae* enjoyed by Taylor while in office.[370]

8.2 Another Route to Proceed - Immunity *Ratione Materiae*

Nevertheless, there was another route for the SCSL to take in order to be legally consistent with the current state of law on immunities and at the same time to address the alleged responsibility of Taylor for international crimes. The SCSL already anticipated this holding at the end of its decision in the *Taylor* case '…it is apt to observe that the Applicant had at the time the Preliminary Motion was heard ceased to be a Head of State. The immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant.'[371]

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[370] 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." In: Wirth, S.Wirth,'Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium Case', 13 *European Journal of Interntional Law* 877, p. 888. In contrast, Kleffner argues that: "is it not as obvious as suggested that granting immunity to those who are likely to be most responsible . . . is unsettling orderly international relations any less than hampering the conduct of a State on the international plane. After all, these crimes are recognized by the international community to 'threaten the peace, security and well-being of the world'." In: J. K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* 86, p. 105.

[371] *Prosecutor v. Taylor*, para. 59.

Due to the different rationales for the two kinds of immunity international law recognizes that once a state official is out of office there is no longer a need for absolute immunity since he or she is no longer representing a state as such. It follows that the only immunity which Taylor would be left with after he stepped down from the presidency is immunity *ratione materiae*. This brings us back to the distinction between private and official acts.

The Indictment[372] stated that Taylor's support of the rebels in Sierra Leone was motivated by the desire to obtain access to the mineral wealth (in particular the diamond wealth) of Sierra Leone. The SCSL inquired during the proceedings whether acts so motivated are, acts in an official capacity. Interestingly, the OTP replied that Taylor is charged in his private capacity, in which 'he embarked on a common aim with others to steal diamonds and begin a war to that end.'[373] The OTP further stated that functional immunity could not apply and that Taylor was not acting as head of state but privately through agents in Sierra Leone.

Even though one may accept that one of the Taylor's motives or wishes was to increase his private wealth through obtaining control over Sierra Leone's diamond resources, it is hard to maintain that Taylor committed the alleged war crimes and crimes against humanity in a 'private capacity'. Indeed, he has been accused of using his powerful position in Liberia and the region for aiding and abetting in (and profiting from) the war in Sierra Leone.

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[372] Specific charges contained in the indictment against Charles Taylor are (1) Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II including acts of terrorism; collective punishments; violence to life, health and physical or mental well-being of persons, in particular murder; outrages upon personal dignity; violence to life, health and physical or mental well-being of persons. (2) Crimes against humanity including extermination; murder; rape; sexual slavery and any other form of sexual violence; other inhumane acts. (3) Other serious violations of international humanitarian law including conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission. See *Prosecutor v. Taylor* (SCSL-2003-01-I), Indictment (7 March 2003). The Indictment was amended on 16 March 2006.

[373] See Response by Desmond de Silva, QC for the Prosecution, *Report on Proceedings before the Appeals Chamber of the Special Court for Sierra Leone* (1 November 2003).
available at http://www.specialcourt.org/documents/WhatHappening/ReportAppealHearings01NOV03.html (last accessed 12 June 2006). The author of this thesis conducted questioning of several scholars and practitioners, with answers to the examined question going both ways. For example the response to the question whether Taylor is prosecuted for crimes committed in private or official capacity by Prof. David Crane (who acted as the Chief Prosecutor in the Taylor case) was "for both" (i.e. for abuse of the state power and for his private criminal

The better explanation, which was already presented in the chapter dealing with distinction between official and private acts, would be that international crimes can indeed be committed in an official capacity. This is however not to say that they qualify as official acts to be accordingly covered by functional immunity. The state sovereignty inspiring the immunity *ratione materiae* cannot prevail in cases of prosecution of international crimes, because international law at the same time establishes individual criminal responsibility for those crimes.[374]

Relevant international instruments, starting with the end of the First World War and its Versailles Treaty, the Nuremberg Charter and Nuremberg Principles adopted after the Second World War, the Statutes of the ICTY, ICTR, ICC and various hybrid tribunals (East Timor, Kosovo), the Genocide Convention, the Convention Against Torture and other sources illustrate state practice and *opinio juris* indicating that there exists a rule of customary international law which removes immunity *ratione materiae* in case of grave breaches of international law. The *Pinochet* case proves that immunity *ratione materiae* was not granted even before national courts (albeit on the basis of the Torture Convention).

Importantly, the Defence in the *Taylor* case explicitly recognized and accepted the above proposition by stating that Taylor's entitlement to enjoy "functional immunity [is] subject to one exception, namely in the case of perpetration of international crimes."[375]

By correctly applying the law as it currently stands, both sets of requirements may be protected in a more balanced way. With these arguments, we can move to conclude that the SCSL should confirm Taylor's immunity *ratione personae* at the time of his initial indictment while recognizing that he would not enjoy exemption on the basis of immunity *ratione materiae* from the SCSL's jurisdiction should a new indictment be issued.

9 Conclusion

enterprise). The indictment nevertheless alleged that Taylor committed the crimes alleged "rather in a private capacity". This well illustrates the difficulty in providing clear answers.

[374] Nouwen *supra* note 49.

[375] See *Prosecutor v. Taylor*, Applicants Reply to Prosecution Response to Applicants Motion, p. 4 (30 July 2003).

9.1 Concluding Remarks for the *Taylor* case

Laws are like the spider's webs: they stand firm when any light and yielding object falls upon them, while a larger thing breaks through them and makes off.[376]

There is little doubt that *Taylor* case before the SCSL could have presented an opportunity to elaborate on the current state of law on immunities and to clarify or justify different approaches taken by national and international courts on which the SCSL relied. Has it done so, or has it perhaps wasted an opportunity?

The central issue of this thesis was whether Taylor, as president of Liberia at the time of issuance of the indictment, was entitled to claim immunity before the SCSL in light of the fact that the SCSL had been established by a bilateral treaty between the United Nations and Sierra Leone, to which Liberia was not a party. This legal issue is important also from the practical perspective for similar cases which may arise before other courts. The topicality of this issue can be especially seen in the increased activities of the first permanent criminal court - the ICC.

The same questions in the context of immunities of third states not parties to the Rome Statute may appear before the ICC, particularly in the situation when there is no referral by the Security Council under Chapter VII of the UN Charter.[377] Even in the situation where there is actually a referral by the Security Council, as is the case with the current President of Sudan, Al-Bashir, some authors argue that there must be *explicit* removal of immunity in the respective Resolution adopted under Chapter VII powers in order to deny immunity *ratione personae* to a serving

[376] Solon c.630- 560 B.C., quoted from 'Philosophy and Catholic Christian', *Diocesan Circular* (September 2007), p. 2, available at http://www.anglicancatholic.ca/diocirc/200709circ.pdf (last accessed 26 June 2008). See also R. Fredona, R. 'Carnival of Law: Bartolomeo Scala's Dialogue *De Legibus Et Judiciis*', *Viator*, Brepols Publishers, Volume 39, (2008), pp. 193-213.

[377] Under Article 13(b) of the Rome Statute, the Security Council acting under Chapter VII, can refer a specific situation "in which one or more of such crimes appears to have been committed" to the Prosecutor. This mechanism can trigger the jurisdiction of the ICC without consent of the concerned State (which is not a party to the Rome Statute). For deeper discussion see, V. Gowlland-Debbas, 'The Relationship between the Security Council and the International Criminal Court', Graduate Institute of International Studies, *Weltpolitik* (2001), available at http://www.globalpolicy.org/intljustice/icc/crisis/2001relationship.htm (last accessed 17 February 2008).

President of a state which is not a party to the Rome Statute.[378] The aim of this thesis was also to contribute to the discussion on the emergence of various aspects of procedure in this area.

The first part of this thesis focused on identifying the legal basis and manner of the establishment of the SCSL, which had important implications for the nature and extent of immunity. The second part of the thesis revealed the close interconnection between the legal basis with the issue of withdrawal of immunity for incumbent Heads of State. The SCSL did not fully take account of its special legal basis. By ignoring its bilateral treaty nature, the SCSL failed to properly assess what are the implications of its legal basis for the rules of international law on incumbent head of state immunity.

Since the SCSL, inspired by the ICJ reasoning in the *Yerodia* case, connected the issue of denying the immunity to Taylor with the international legal basis of the SCSL, it came as no surprise that the Appeals Chamber of the SCSL determined that the SCSL is indeed an international criminal court. As the consequence of its international legal basis, the SCSL held that it can invoke Article 6 (2) of its Statute in order to deny immunity to the then-serving president of Liberia. The SCSL thus denied immunity *ratione personae* to Taylor.

While this thesis approved the international legal basis of the SCSL, the legal reasoning on the basis of which the SCSL arrived at the conclusion was found to be open to dispute. Moreover, the consequences it attached to its legal basis from the immunity perspective were subject to criticism and found to be incorrect. More elaborate reasoning and judicial clarification of contentious issues were needed, bearing in mind that until the establishment of the SCSL, it had never been considered that the legal basis of an international criminal court could be an agreement between the UN and one or more states.

The considerable attention given to the binding effects of Resolution 1315 (2000) was justified by the fact that the SCSL attempted to establish its international legal basis under Chapter VII powers. It seems that the SCSL was trying to 'cure' the shortcomings of a merely bilateral

[378] Nouwen *supra* note 49. In the view of the author of this thesis, as long as there is a Resolution under Chapter VII powers, it should suffice for denial of immunity even if not explicitly mentioned.

agreement by trying to imply binding effects of Resolution 1315 (2000) in order to justify the denial of immunity of a Head of State of another country. If the SCSL could indeed prove its legal basis under Chapter VII powers, it would have had important implications for immunity afforded by contemporary international law to serving Heads of State.

This argument is supported by the approach adopted by the ICTY with respect to Article 7 (2) of its Statute. This provision arguably relates only to the fact that the accused cannot claim its official position as a substantial defence, which would in turn mean that there is criminal responsibility for such acts (in that sense Article 7 (2) removes immunity *ratione materiae*); however for so long as the Head of State is in power, there is a procedural bar to the exercise of jurisdiction over these acts (in that sense Article 7(2) preserves immunity *ratione personae*).

Nevertheless, the ICTY implicitly interpreted Article 7(2) as not only the attribution of criminal responsibility but also referring to immunity *ratione personae*. Even if such a broad interpretation is accepted, the crucial difference is that the ICTY was established by Resolution under Chapter VII as opposed to the SCSL, which was established by a bilateral agreement.

The ICTY could thus arguably be more relaxed and adopt a rather flexible interpretation of its Statute with Chapter VII backing, which allows to affect the rights of all member states, even against their will or without their consent. So while it is true that Article 6(2) of the SCSL Statute is taken verbatim from Article 7 (2) of the ICTY Statute (which is the same as Article 6(2) of the ICTR Statute), the SCSL should not interpret this provision as affecting rights of thirds parties, as opposed to the ICTY.

Resolution 1315 (2000), which recommended the establishment of the SCSL, was not adopted under Chapter VII powers despite the attempt of the SCSL to prove otherwise. Moreover, the SCSL was not even established *by* any SC Resolution (in contrast to the ICTY and ICTR). The SCSL was established by a bilateral agreement *pursuant to* Resolution 1315 (2000). For these reasons, it is not possible to imply binding effects of Resolution 1315 (2000) for the purposes of denying immunity to high ranking state officials as was in the case of the establishment of the

ICTY and ICTR. The SCSL should instead direct its attention to the agreement establishing the court, whose binding effects for third parties were arguably harder to prove.

Moreover, it is surprising that despite the attempt to establish its international legal basis under Chapter VII powers, the SCSL has not subsequently relied on this argument for purposes of denying immunity *ratione persoane* to Taylor. The SCSL rather focused its attention to the distinction between national and international criminal courts made by the ICJ in the *Yerodia* case.[379]

By attempting to fit itself into a category of 'certain international criminal courts', a phrase used by the ICJ in the *Yerodia* case, the SCSL limited its legal argumentation to the finding that it is indeed an international court with powers to deny immunity to serving Heads of State. Yet, the mere fact that the legal basis of a certain judicial body is characterized as international does not automatically mean that *any* Head of State should be denied immunity before such a court.

Not all immunities are irrelevant before any court that may be characterized as 'international'. As shown by State practise, statutes of international criminal courts, case-law of both national and international courts and scholarly opinions, not all immunities before all courts can be eliminated even for prosecution of crimes under international law. A claim to immunity is indeed to be treated differently, not only before national courts as opposed to international courts, but importantly for our purposes, also before *some* international courts as opposed to *other* international courts. The approach surely depends also on the kind of immunity the state official may invoke.

As for the immunity *ratione personae*, this immunity constitutes a general rule of customary international law and is therefore relevant not only before domestic courts, but also before international courts "unless the status and nature of the international court justifies a different conclusion".[380] Any exception to this general rule, which remains so far fully applicable before domestic courts, must be legally justified in the case of international courts.[381]

[379] Frulli *supra* note 17.
[380] Cassese *supra* note 48.
[381] *Ibid.*

The proposition that immunities *ratione personae* do not apply before international tribunals depends on the manner of the court's establishment as well as identification of the exact legal basis for denying immunity. In addition, the establishing instrument of the court must bind the concerned state.[382]

As was shown in the chapter dealing with international criminal tribunals, both *ad hoc* criminal tribunals and the ICC provide for the exception to the general rule. The legal basis for this exception is either a Security Council Chapter VII resolution or an international treaty. Moreover, even if there is an explicit exception to immunity to which states agreed by becoming a party to the ICC Rome Statute, it applies only to contracting parties.

Lasting entitlement to immunities *ratione personae* granted by customary international law to incumbent Heads of State of non-state parties before the ICC seems to be the best reflection of the current state of law on immunities.[383] By analogy, the agreement between Sierra Leone and the UN establishing the SCSL cannot, without more or of itself, take away from the incumbent President of another country the immunity *ratione personae* granted under customary international law.

In sum, neither the agreement, nor the Statute of the SCSL should be made opposable towards Liberia for the purposes of denying immunity *ratione personae*. Even if they were, an additional argument can be raised, i.e. that Article 6 (2) fails to explicitly address immunity *ratione personae*. Furthermore, as already mentioned above, the SCSL is not in the same position as the ICTY with respect to Chapter VII powers, which could arguably justify the broad interpretation of the ICTY Statute.

Despite the fact that the following conclusion may appear too restrictive, it is proposed that, under given circumstances, the SCSL should have confirmed the immunities *ratione personae* enjoyed by Taylor while in office as this approach best reflects the current state practise.

[382] Akande *supra* note 56.
[383] *Ibid.*

Nevertheless, there was another route for the SCSL to take in order to be legally consistent with the current state of law on immunities and at the same time address the alleged responsibility of Taylor for international crimes. International law recognizes that once a state official is out of office there is no longer a need for absolute immunity since he or she is no longer representing a state as such. The only protection which remains is for acts committed in an official capacity. It follows that the only immunity which Taylor could invoke while out of office is immunity *ratione materiae*, which is based on different rationale than immunity *ratione personae*.

Immunity *ratione personae* is granted to state officials irrespective of the nature of the acts. It can therefore be invoked, one may add unfortunately, even in the case of international crimes. On the other hand, immunity *ratione materiae* is precisely concerned with the nature of the acts. It applies only to acts which can be qualified as official acts. At the same time, international criminal law establishes individual criminal responsibility for international crimes. Therefore, there cannot simultaneously coexist both individual criminal responsibility for international crimes and immunity *ratione materiae* for international crimes, even if these crimes were committed in an official capacity, or to be more precise, in the abuse of official capacity.

Relevant international instruments, starting with the end of the First World War and its Versailles Treaty, the Nuremberg Charter and Nuremberg Principles adopted after the Second World War, the Statutes of the ICTY, ICTR, ICC and various hybrid tribunals (East Timor, Kosovo), the Genocide Convention, the Convention Against Torture and other sources illustrate state practice and *opinio juris* indicating that there exists a rule of customary international law which removes immunity *ratione materiae* in case of grave breaches of international law. The *Pinochet* case proves that immunity *ratione materiae* was not recognized even before national courts (albeit on the basis of the Torture Convention).The Defence in the *Taylor* case explicitly recognized and accepted the above proposition by stating that Taylor's entitlement to enjoy "functional immunity [is] subject to one exception namely in the case of perpetration of international crimes."[384]

By correctly applying the norms forming the relevant current international law, both sets of

[384] See *Prosecutor v. Taylor*, Applicants Reply to Prosecution Response to Applicants Motion, p. 4 (30 July 2003).

requirements may be protected in a more balanced way. With these arguments, we can move to conclude that the SCSL should confirm Taylor's immunity *ratione personae* at the time of his initial indictment while recognizing that he would not enjoy exemption on the basis of immunity *ratione materiae* from the SCSL's jurisdiction should a new indictment be issued.

Some argue that the manner in which the SCSL was established was completely unrelated to the issue of immunity: instead, the initial desire was to separate the proceedings from domestic criminal law and the legal system of Sierra Leone.[385] This may well be so. It can even explain some of the difficulties with which the SCSL was confronted. Unfortunately, it does not justify in some respects unfounded reasoning of the SCSL in the *Taylor* case.

Any constitutive instruments of international criminal tribunals should preferably anticipate problems and try to address principal issues such as jurisdiction and immunities beforehand in order to avoid the uncertainty, which often makes the court adopt too creative reasoning, which is hard to justify even by employing a teleological interpretation of certain provisions. This is surely a lesson to be learned for establishing a similar forum for the prosecution of international crimes elsewhere.

The *Taylor* case well illustrated the collision of two competing interests in contemporary international law: the growing acceptance of individual international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from the principle of the sovereign equality of States. Which interest should prevail? And does it matter? It will be always difficult to reach a proper balance between the two.

However, one may argue that there is no need for 'respect' or 'dignity' of the Head of State who suppresses its own people and abuses its official position in order to engage in commission of worse crimes such as genocide, war crimes or crimes against humanity.[386] In this respect, international criminal law expresses something universal, which is deeply rooted in moral philosophy - condemnation of acts of (in Arendt's phrasing) extreme evil.[387]

[385] Chatham *supra* note 6.
[386] Sands supra note 190.
[387] A. M. Drumbl,, *Atrocity, Punishment and International Law*, Cambridge University Press (2007), p. 182.

It should be at the same time recognized that "criminal law in general, and international criminal law in particular, will never be a panacea for the ills of the world."[388] But, if international criminal law is designed to punish 'extraordinary' as opposed to 'ordinary' crimes, it should aspire to show that as "those who bear the greatest responsibility"[389] attempt to place themselves beyond the reach of law, "the law adapts to bring them back within its grasp."[390]

9.2 The way forward: Thoughts *de lege ferenda*

By way of a more general conclusion, the following remarks are admittedly departing from the current law into the realm of what might be termed "wishful legal thinking"[391], to trends in international law pointing towards recognition of the rights of victims of international crimes, even if punishing the highest representative of the state can threaten the norm of sovereignty.[392] In fact, the notion and scope of sovereignty is increasingly being challenged in many inter-related areas.[393]

State sovereignty, in Kofi Annan's view, is being redefined and "States are now widely understood to be instruments at the service of their peoples, and not vice versa... When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."[394] For Kofi Annan and many others, "sovereignty

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[388] *Ibid*., p. 38. For example Koskenniemi suggests that "international law fundamentally is a European tradition derived from a desire to rationalize society through law." He however concludes that "the fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal." In: M. Koskenniemi, 'International Law in Europe: Beetween Tradition and Renewal', 16 *European Journal of International Law* 113,114 (2005); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

[389] The term is used in the SCSL Statute as guidance for the court regarding its personal jurisdiction.

[390] Sands *supra* note 190.

[391] R. Piotrowicz, supra note 345, quoted from K. Hailbronner, '*Non-Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking', (1986) 26 *Virginia Journal of International Law* 857, p. 872.

[392] Cassese: "One still has to strive to replace the Westphalian model of international society, geared to reciprocity and largely based on mutual respect among sovereign states, with the Kantian model, which hinges on a set of universal values transcending the immediate interests of each state, and which therefore moves pride of place to community interests." *supra* note 5, p. 1.

[393] See e.g. the emergence of the concept of *The Responsibility to Protect*, Report of The International Commission on Intervention and State Sovereignty, available at http://www.iciss.ca/pdf/Commission-Report.pdf (last accessed 23 February 2008)

[394] K. Annan, *The Economist*, 1999.

is not becoming less relevant; it remains the ordering principle of international affairs. However, it is "the peoples' sovereignty rather than the sovereign's sovereignty.'"[395]

This is an expression of a "struggle between international law as primarily state and sovereignty based regime and international law reaching beyond the state and defining justice by taking into account not only the interests of the sovereign state, but also the individual human being."[396] The status of sitting Heads of State is certainly one of the remaining parts of this struggle. The scope of immunity is being increasingly contested, as the jurisprudence shows, but is far from settled. Further evolution of State practice is needed before a straightforward consensus may emerge.[397]

Yet there is already an existing consensus between most civilized States acknowledging "a seriousness of the duty incumbent upon state authorities to respect the core human rights of those within their power"[398], which is transformed into accountability of states for human rights violations. Most states already accept the notion of accountability for human rights violations, which indeed can be seen as a restriction on state sovereignty.[399]

In this context, it is difficult to see how holding one person individually criminally responsible for crimes under international law can impact on state sovereignty more than finding a whole state responsible for human rights violations (including paying compensations which is actually not the case so far in international criminal proceedings, although the ICC Rome Statute already anticipates this possibility for victims).

It is suggested that the rationale for preserving immunities should be re-evaluated, especially with respect to practise before national courts. 'Seriousness of the duty incumbent upon state authorities' should be transformed into individual criminal responsibility of those individuals who are the highest representatives of this very state authority via abrogation of *both* immunity in

[395] E. Larking, 'Human rights and the principle of sovereignty: a dangerous conflict at the heart of the nation state?', Australian Journal of Human Rights 15 (2004).
[396] J. Bröhmer, 'Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three', *Leiden Journal of International Law* 13 (2000), p. 234.
[397] Racsmany *supra* note 126.
[398] R. Piotrowicz, 'The governments, the Lords, the ex-president and his victims: limitations to the immunity of former heads of state', *The Australian Law Journal* 73 (1999), p. 484.

cases of commission of international crimes (providing there is a court which has a jurisdiction to start with). Immunity can be preserved for all instances of illegal activity except one - international crimes. This restriction would be narrow enough to ensure prosecution and punishment of international crimes without substantial impact on sovereignty and damaging the conduct and smooth functioning of the state's (foreign) relations.

For now, more moral than legal arguments can be found in support of the reduction of personal immunity. Indeed, old doctrines die hard.[400] States fear that by rejecting immunity, domestic courts could be overloaded with cases brought against Heads of State by former victims, human rights organizations, or anyone with a 'cause'.[401] Another fear is that prosecutions can be abused for political purposes or that they can lead to instability or even armed conflict between states.[402] Admittedly, these fears are real. Nonetheless "the moral and legal weight behind individual accountability for international crimes regardless of official capacity is of such substance that it mandates an evaluation of the trade-offs involved in accepting the risks of impunity in order to preserve comity."[403]

As three of the judges of the ICJ in their joint Separate Opinion in the *Yerodia* case observed "the law reflects a balancing of different community interests, and therefore is in constant evolution."[404] These strong dissenting opinions, taken with the *Pinochet* ruling, support hopes that not only NGOs and academics, but perhaps even states, will start to realize that there is no more need to protect those who are given the opportunity to represent and rule a nation of people, but, in that position, do serious harm to (often its own) people.[405] The highest state representatives should accordingly be held to the very highest standards of international law, not the lowest.[406]

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[399] Especially in the situations where the ultimate decision about the particular breach of human rights lies with international judicial body, e.g. European Court of Human Rights.
[400] Robertson *supra* note 205.
[401] Philippine Statute on Crimes Against International Humanitarian Law and Other Serious International Crimes, Comment on House Bill No. 4998 (22 June 2006), available at http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/position%20papers/abthr_pos066-067.htm. (last accessed 23 August 2007).
[402] *Ibid.*
[403] *Ibid.*
[404] The *Yerodia* case, para. 75.
[405] See *supra* note 399.
[406] *Ibid.*

A day may thus come when states agree to abolish personal immunity not only before international, but also national courts. Because the law, as Justice Jackson believed, must not only be dynamic, adaptable and capable of changing to different circumstances. The law should indeed be obliged to do so because as he stressed "unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law."[407] This newer, stronger international law might then help the law to stand firm not only when 'light and yielding objects fall upon it', but also to ensure that 'a larger thing' would not break through and make off. Hope, as they say, springs eternal.

[407] Report of Robert H. Jackson To the President, Released by the White House on June 1945, Excerpted from Department of State Bulletin, June 10, 1945, p. 1071. See also R. Jackson, 'Report to President Truman on the Legal Basis for Trial of War Criminals' (1946), Temple Law Quarterly 19.

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