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The Special Court for Sierra Leone and the Immunity of Taylor: The *Arrest Warrant* Case Continued

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Abstract
In its *Taylor* decision the Special Court for Sierra Leone denied immunity *ratione personae* to the, at the time of the indictment, President of Liberia. This article first analyzes the legal reasoning of that decision. The Court's finding that it is an international court is approved; the consequence it attaches to that finding is criticized. The decision is then presented as an illustration of the negative consequences of relying upon controversial elements of the ICJ's *Arrest Warrant* case. It is suggested that instead of the distinction between national and international courts, the difference between criminal responsibility and procedural immunity could have been the basis for the reasoning of the ICJ and Special Court.

Key words
Arrest Warrant case; 'hybrid courts'; immunity *ratione materiae* and *personae*; 'international criminal courts'; Special Court for Sierra Leone; Taylor

1. Introduction

Impunity has lost one of the latest battles in the ongoing struggle between classical state sovereignty and more modern tendencies to encroach on sovereignty in cases of international crimes. The Special Court for Sierra Leone[1] decided that even though Charles Taylor was President of Liberia at the moment he was indicted, he was not entitled to immunity.[2] This article will place the Special Court's decision in the

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1. Hereinafter the Special Court, SCSL, or, when clear in the context, the Court.
2. SCSL, Decision on Immunity from Jurisdiction, *Charles Ghankay Taylor* (SCSL-2003-01-I), Appeals Chamber, 31 May 2004 (available at http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf, last accessed 6 March 2005). Hereinafter the Decision, the *Taylor* decision or *Taylor*. See for other notes on that case Z. Deen-Racsmány, '*Prosecutor v. Taylor*. The Status of the Special Court for Sierra Leone and its Implications for the Question of the Immunities of an Incumbent President Before it', (2005) 18 *LJIL* 299–322, 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* 1118–29; C. Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights*, October 2004 (available at www.asil.org/insights/insigh145.htm last accessed 3 February 2005); A. Mangu, 'Immunities of Heads of States and Government: A Comment on the Indictment of Liberia's President Charles Taylor by the Special Court for Sierra Leone and the Reaction of the Ghanaian Government', (2003) 28 *South African Yearbook of International Law* 238–45, C. Romano and A. Nollkaemper, 'The Arrest Warrant Against the Liberian President, Charles Taylor', *ASIL Insights*, June 2003 (available at www.asil.org/insights/insigh110.htm, last accessed 3 February 2005); S. Meisenberg, 'Die

larger context of developments on immunity in international law and will in particular show how the *Taylor* decision has been influenced by reasoning of the International Court of Justice (ICJ) in the *Arrest Warrant* case.[3] That judgment has been discussed extensively.[4] This article focuses upon the manner in which the decision in *Taylor*, as one of the first cases in which the reasoning of the ICJ in the *Arrest Warrant* case is applied, vividly illustrates the problematic consequences of some of the reasoning in that judgment for the coherence of international law.

Two central arguments of the decision in *Taylor* will be analyzed: the legal nature of the Special Court (section 3) and the consequences of that legal nature (section 4). The Court's conclusion on the legal nature will be supported; the conclusion on the consequences of that nature will be questioned. It will be demonstrated that the roots of the Special Court's problematic analysis of the consequences of it being an international criminal court are in the ICJ's reasoning in the *Arrest Warrant* case. The article will point to some weaknesses in the ICJ's and Special Court's reasoning. A modest alternative approach will be suggested that might be, although departing from the reasoning of the ICJ and the Special Court, more beneficial for the consistency of the applicability of international law (section 5). First the Special Court and its decision in *Taylor* will be introduced (section 2).

2. The Special Court for Sierra Leone and its decision to deny immunity to Taylor

When in 2000 the Revolutionary United Front, the rebel group that had entered Sierra Leone from Liberia in 1991 and kicked off a gruesome war that would last over a decade resulting in the death, maiming and rape of tens of thousands, once again violated a peace agreement, the government of Sierra Leone requested

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Anklage und der Haftbefehl gegen Charles Ghankay Taylor durch den Sondergerichtshof für Sierra Leone', (2004) 17 *Humanitäres Volkerrecht* 30–9. See also the briefs of the *amici curiae*, the revered D. Orentlicher (on file with author) and Ph. Sands (available at http://www.icc-cpi.int/library/organs/otp/Sands.pdf (last accessed 9 March 2005), who both support the distinction between national and international courts that will be criticized in this article.

3. Judgment, International Court of Justice, 14 February 2002, *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002) 41 *ILM* 536–58 (hereinafter *Arrest Warrant* case).

4. See, inter alia, A. Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', (2002) 13 *EJIL* 853–75; K. Gray, 'Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)', (2002) 13 *EJIL* 723; Sir R. Jennings, 'Jurisdiction and Immunity in the ICJ Decision in the Yerodia Case', (2002) 4 *International Law FORUM du droit international* 99–103, C. McLachlan, 'Pinochet Revisited', (2002) 51 *ICLQ* 959–66; A. Orakhelashvili, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)', (2002) 96 *AJIL* 677–84; M. du Plessis and S. Bosch, 'Immunities and universal jurisdiction – the World Court steps in (or on?)', (2003) 28 *SAYIL* 246–62; Ch. Schreuer and S. Wittich, 'Immunity v. Accountability: the ICJ's Judgment in the *Yerodia* case', (2002) 4 *FORUM* 117–20; B. Stern, 'Les dits et les non dits de la Cour internationale de Justice dans l'affaire RDC contre Belgique', (2002) 4 *FORUM* 104–16, C. Wickremasinghe 'Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium)*, Preliminary Objections and Merits, Judgment of 14 February 2002', (2003) 52 *ICLQ* 775–810; A. Winants, 'The *Yerodia* ruling of the International Court of Justice and the Belgian 1993/1999 Law on Universal Jurisdiction', (2003) 16 *LJIL* 491–509; S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', (2002) 13 *EJIL* 877–93; J. Wouters, 'The Judgment of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks, (2003) 16 *LJIL* 253–67.

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the United Nations (UN) to set up a criminal tribunal.[5] As a result of the continuing violations, the amnesties provided for in the 1996 and 1999 peace agreements had come into question. Moreover, with respect to the amnesty in the 1999 Lomé Agreement[6] the Special Representative of the UN Secretary-General had added at the time a disclaimer that the amnesty provision would not be applicable to international crimes of genocide, crimes against humanity and other serious violations of international humanitarian law.[7] Following the government's appeal, the Security Council unanimously adopted Resolution 1315 (2000), requesting the Secretary-General 'to negotiate an agreement with the government of Sierra Leone to create an independent special court' and recommending some features of such a 'special court'. When that agreement, of which the Special Court's Statute is an integral part,[8] had been concluded it was welcomed by the Council.[9]

Having started its work in August 2002, the Special Court indicted in March 2003 the then President of Liberia, Charles Taylor. As the second Head of State, and as the first African Head of State, he was indicted by an international court while in office. On 17 counts he is 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.[10] The Special Court also issued an international warrant of arrest and order for his transfer and detention. The indictment and warrant were revealed only in June 2003, when Taylor was participating in peace negotiations in Ghana. Under national and international pressure Taylor resigned in August 2003 as part of the deal in the negotiations for peace for his country. Although he had initially demanded withdrawal of the warrant in exchange for his resignation, in the end he settled for asylum that had been offered by Nigeria. After the issuance of the Interpol Red Notice in December 2003, Nigeria immediately declared that it would disregard it and not extradite Taylor. However, considering international leverage,[11] it is quite possible that Taylor will one day be

5. Letter dated 12 June 2000, see *Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone*. UN doc. S/2000/751, 31 July 2000, para. 9.
6. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé Accord, 7 July 1999, see www.sierra-leone.org/lomeaccord.html (last accessed 6 March 2005).
7. This reservation was added so close to the signing that it does not appear in the copies of the agreement, but it is repeated in the various reports on Sierra Leone of the Secretary-General and is endorsed by SC Res. 1315 (2000).
8. Art. 1 para. 2, 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.sierra-leone.org/specialcourtagreement.html (last accessed on 6 March 2005) (hereinafter, the Agreement).
9. SC Res. 1400 (2002).
10. SCSL-2003-01-I, The Prosecutor Against Charles Ghankay Taylor also known as Charles Ghankay MacArthur Dapkpana Taylor, Indictment, 7 March 2003, available at http://www.sc-sl.org/Documents/SCSC-03-01-I-001.pdf (last accessed 6 March 2005).
11. Some elements of this international leverage are that the Special Court has opened a temporary office in Nigeria; that hosting President Obasanjo is serving his last term; and that Nigerian victims of amputations in Sierra Leone, lawyers and journalists have started proceedings in Nigerian courts to oppose Taylor's asylum in Nigeria. The Security Council in SC Res. 1532 (2004) froze Taylor's assets while '... expressing concern that former President Taylor ... continues to exercise control over and to have access to ... misappropriated funds and property, with which he and his associates are able to engage in

extradited, and then Case No. SCSL-03-01, *Prosecutor of the Special Court v. Charles Taylor*, will commence.[12] The first decision in that case has already been made. In the 31 May 2004 decision under consideration, the Appeals Chamber of the Special Court rejected Taylor's preliminary motion in which he claimed immunity.[13] The Court did so by first emphasizing its 'truly international' legal status, despite the absence of Chapter VII powers, and by finding that it is an 'international criminal court'.[14] It then went on to hold that because of its nature as an international criminal court the paragraph in its statute that denies immunity to officials is 'not in conflict with any peremptory norm of general international law and its provisions must be given effect by this Court'. The judges concluded that 'the official position of the Applicant as an incumbent Head of State at the time when the criminal proceedings were initiated against him is not a bar to his prosecution by this Court'.[15]

The reasoning of the Court rests on two consecutive arguments. First, the Special Court is an international criminal court. Second, the consequence of that legal nature is that a provision in its statute denying immunity can be opposed to Taylor. The validity of these arguments will be discussed in turn.

3. The legal nature of the Special Court

Although the resolution in which the Security Council requested the Secretary-General to negotiate an agreement on the Special Court with the government of Sierra Leone referred in a preamble to the situation in Sierra Leone as a continuing threat to international peace and security,[16] and although the Council later welcomed the establishment of the Court,[17] the Council itself did not *establish* the Special Court.[18] Unlike the International Criminal Tribunals for the former

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activities that undermine peace and stability in Liberia and the region'. This was reiterated in SC Res. 1579 (2004). On 24 February 2005 the European Parliament passed a resolution calling on the European Union and its member states to take immediate action to bring about Taylor's appearance before the Special Court (available at http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+PRESS+DN-20050224-1+0+DOC+XML+V0//EN&LEVEL=2&NAV=S#SECTION8, last accessed 6 March 2005). US Congress has increased pressure on the US administration to urge Nigeria to hand over Taylor to the Special Court (see, inter alia, H.CON.RES.127, passed 4 May 2005 in the House and on 10 May 2005 in the Senate). Later in May 2005 the Coalition for International Justice published a report alleging that Taylor violated the terms of his political asylum – not interfering in Liberian and regional politics – among others by funding armed groups through some of his old commanders (available at http://www.cij.org/pdf/Following_Taylors_Money_A_Path_of_War_and_Destruction.pdf, last visited 20 May 2005).

12. Also on the issue of Taylor's immunity, Liberia has instituted proceedings against Sierra Leone at the ICJ on 4 August 2003, a few days before Taylor's resignation. However, the ICJ does not have jurisdiction as long as Sierra Leone does not accept it in this particular case. See ICJ Press Release 2003/26, 5 August 2003.
13. Rule 72 (E) of the Court's Rules of Procedure and Evidence makes it possible that preliminary motions are immediately dealt with by the Appeals Chamber. Although it is required that the applicant has made an initial appearance, this requirement was lifted because of the exceptional case that a still incumbent Head of State claimed immunity (see s. IV of the Decision, *supra* note 2).
14. Decision, *supra* note 2, paras. 37–42.
15. Ibid., para. 53.
16. SC Res. 1315 (2000).
17. SC Res. 1400 (2002).
18. See Deen-Racsmány, *supra* note 2, at 307–9, for a sweeping argument against the Court's reference to Articles 39 and 41 of the UN Charter as bases of SC Res. 1315 (2000). In her view, the basis of the resolution is better sought outside Chapter VII. However, it is submitted that even if SC Res. 1315 (2000) had been based on

Yugoslavia (ICTY)[19] and Rwanda (ICTR),[20] which were established by mandatory Security Council resolutions adopted under Chapter VII of the UN Charter,[21] the legal basis of the Special Court is an agreement between the United Nations (UN) and the government of Sierra Leone.[22] In that sense it shares its legal nature with the International Criminal Court (ICC) which was also established by a treaty, be it by a treaty with only, and many more, states as parties.[23]

As a consequence of its being a treaty-based and not a Chapter VII-based Court, third states not party to the treaty, are not bound to co-operate with it. The Security Council's involvement in its establishment does not change this. The Council did not 'forget' to give the Special Court the Chapter VII powers enjoyed by the ICTY and ICTR. Both the Secretary-General in the establishment phase and the previous President of the Special Court in the operational phase of the Court have requested the Council to grant the Court Chapter VII powers, but that never occurred.[24]

The Special Court is often referred to as a 'hybrid court'.[25] It is considered hybrid, because its Statute contains, unlike the two ad hoc tribunals, not only crimes under international law, but also certain different crimes under Sierra Leonean law.[26] Others refer to the Special Court's mixed composition of both Sierra Leoneans and internationals as another sign of the Court's hybrid character. However, although the Court can indeed be labelled a 'treaty-based sui generis court of mixed jurisdiction and composition',[27] the law applied by the Court and the nationality of the staff do

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Chapter VII, it still did not *establish* the SCSL, since the resolution does not say so and since the Court was established, as requested in the resolution, by an agreement between Sierra Leone and the UN (see *infra*). Nor did the resolution explicitly grant the SCSL specific Chapter VII powers, such as compulsory co-operation by third states.

19. SC Res. 808 (1993).
20. SC Res. 955 (1994).
21. There are several other differences between the ad hoc tribunals and the Special Court. First, despite the Secretary-General's insistence on assessed contributions, the Special Court is (under)funded by voluntary contributions. Second, the Special Court is located in the country where the alleged crimes were committed. Third, in many ways (legislation applied and composition of staff) the Special Court has both national and international elements. Finally, the Special Court was established on the request of the government concerned. Unlike the states of the former Yugoslavia, Rwanda had a say in the international tribunal that would be established for crimes committed in its country as it was a non-permanent member of the Security Council when the resolution was voted on. However, Rwanda did not vote in favour, among other reasons because the tribunal would not be able to impose capital punishment, because it would reside outside Rwanda and because Rwanda opposed the sharing of the Prosecutor and the Appeals Chamber with the ICTY (see S/PV.3453 8 November 1994).
22. See *supra* note 8.
23. Rome Statute of the International Criminal Court, 17 July 1998, UNTS 38544, hereinafter referred to as the Rome Statute. On 7 April 2005, 98 states had ratified the Statute.
24. See *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*. UN doc. S/2000/915, 4 October 2000, para. 10 and press release SCSL 11 June 2003, available at www.sc-sl.org under press releases.
25. See e.g. S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', (2001) 14 *Criminal Law Forum* 185–246, at 231, according to whom the Special Court belongs, like the tribunals in Cambodia and East Timor, to a 'new species of tribunal': 'internationalised domestic tribunals'. However, although the types of trial in these three tribunals indeed are all 'a half-way house, a hybrid containing elements of domestic prosecutions and an international process', they may not be categorized as one new single species. Their legal nature (see *infra* note 28) is fundamentally different.
26. Article 5 Statute SCSL. So far, however, none of the indictments contained counts based on the national crimes.
27. *SG Report Special Court, supra* note 24, at para. 9.

not determine the *legal nature*[28] of the Court.[29] The Secretary-General rightly held that the legal nature of the Special Court, as with any other legal entity, is determined by its constitutive instrument.[30] Since the constitutive instrument is an agreement between a state – Sierra Leone – and an international organization – the UN – the legal nature of the Special Court is international.

This is not changed by the fact that the agreement has been incorporated into domestic, Sierra Leonean, legislation.[31] The Ratification Act bears out that the Court is an international body that operates outside of and not subject to the Sierra Leonean Constitution.[32]

Even before the decision in *Taylor*, the Special Court had shed light on its legal nature, deciding on preliminary motions attacking the lawfulness and validity of its creation.[33] It rejected the arguments that its establishment was contrary to the Constitution of Sierra Leone[34] and held that it was an international tribunal 'established by law'.[35] Moreover, in a decision on the validity of the provision in its Statute denying amnesty accorded in the Lomé Agreement, the Court explained:

> Upon its establishment the Special Court assumed an independent existence and is not an agency of either of the parties which executed the Agreement establishing the Court. It is described as 'hybrid' or 'mixed jurisdiction' because of the nature of the laws it is empowered to apply. Its description as hybrid should not be understood as denoting that it is part of two or more legal systems.[36]

Therefore, scholarly descriptions of the Court as 'a national court with a large involvement',[37] and a 'Sierra Leonean international court'[38] or as part of the category of 'internationalized domestic courts (semi-internationalized courts), *which are part*

28. Frulli, *supra* note 2 at 1123 distinguishes between legal nature and legal foundation and uses the term legal nature for the characteristics of a court. In this article legal nature is used for legal foundation and is distinguished from characteristics.
29. Different: R. Cryer, 'A "Special Court" for Sierra Leone', (2001) 50 ICLQ 435–446, at 437, who argues that the applicable law also determines the legal nature of a court.
30. *SG Report Special Court*, *supra* note 24, at para. 9.
31. Sierra Leone has a dualist system when it comes to the relation between domestic and international law and the Special Court Agreement, 2002, (Ratification) Act 2002, available at http://www.sc-sl.org/Documents/scsl-ratificationact.pdf (last accessed 6 March 2005) is the Parliament's ratification and implementation bill of the non-self-executing Agreement between the Government and the UN. See also N. Udombana, 'Globalization of Justice and the Special Court for Sierra Leone's War Crimes', (2003) 17 *Emory International Law Review* 55–132, at 85.
32. See in particular Arts. 11(2), 13 and 21.
33. SCSL, Decision on the Constitutionality and Lack of Jurisdiction, *Kallon, Norman and Kamara* (SCSL-2004-15/14/16-AR72(E)), Appeals Chamber, 13 March 2004.
34. Ibid., paras. 44–53.
35. Ibid., paras. 54–8.
36. SCSL, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, *Kallon and Kamara* (SCSL-2004-15/16-AR72(E)), Appeals Chamber, 13 March 2004. See also Judge Robertson's Separate Opinion in SCSL, Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution Sierra Leone, *Kondewa* (SCSL-2004-14-AR72(E)), Appeals Chamber, 25 May 2004, para. 15: '. . . the Special Court . . . is not accurately described in the Secretary-General's report as a court of "mixed jurisdiction and composition:" . . . it is in reality an international court onto which a few national elements have been grafted.'
37. S. Beresford and A. Muller, 'The Special Court for Sierra Leone: An Initial Comment', (2001) 14 *LJIL* 635–51, at 636.
38. A diplomat quoted by M. Sieff, 'War Criminals: Watch Out', *The World Today*, February 2001, 18–20, at 19.

of the domestic justice system of their host countries, but include a mix of local and international judges who apply both international and domestic law',[39] aptly describe the hybrid characteristics of the Court, but do not acknowledge the fundamentally international legal nature of the Special Court.

However, in *Taylor* the Special Court deemed it necessary to advance more arguments than the fact that it derives its existence from an international treaty to establish that it is 'truly international'.[40] It pointed to the 'high level involvement of the Security Council'[41] and made the disputable statement that the 'Agreement between the United Nations and Sierra Leone is an agreement between *all* members of the United Nations and Sierra Leone'. Not only is this highly questionable considering the law on international organizations;[42] for the reasoning on the legal nature of the Special Court, the remark was also unnecessary. As the constitutive instrument is decisive for the legal nature of a court, the Special Court, established by an international treaty, is an international criminal court, notwithstanding the fact that its constitutive instrument is different from that of other international criminal courts like the ICTY and ICTR (Security Council resolutions).

The Court thus came to the correct conclusion that its legal nature is international, although some of the arguments it advanced are disputable. However, the Court's emphasis on the Security Council's involvement may well have more to do with the second step the Court made to deny Taylor immunity: the consequences of its international legal nature.

4. The consequences of the distinction between international and national courts; following the *Arrest Warrant* case

The entire analysis of the Court's legal nature, national or international, would not have been necessary if the question of whether immunity applies to an incumbent official depended on factors other than the nature of the Special Court, for example, on the nature of the crime. Having mentioned various provisions in the statutes of other international criminal courts (Nuremberg, ICTY, ICTR, ICC) that deny immunity to officials, the Special Court seemed to hint at this by stating: 'The *nature of the offences* for which jurisdiction was vested in those various tribunals is instructive as to the circumstances in which immunity is withheld.'[43] However, the Court immediately went on to say that '*the nature of the Tribunals* has always been a relevant consideration in the question whether there is an exception to the principle

39. W. Burke-White, 'A community of courts: toward a system of international criminal law enforcement', (2002) 24 *Michigan Journal of International Law* 1–101, at 23 (emphasis added).
40. Decision, *supra* note 2, para. 38. Also in SCSL, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, *Brima, Kamara and Kanu* (SCSL-04-16-PT), Trial Chamber, 31 March 2004, para. 37. The Special Court did not only refer to the Agreement as its constitutive basis, but also to SC Res. 1315 (2000). As has been argued that, although this resolution indeed invited the Secretary-General to establish such a court, it did not in itself establish it.
41. Decision, *supra* note 2, para. 36.
42. See more extensively Deen-Racsmány, *supra* note 2.
43. Ibid., para. 49. Emphasis added.

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of immunity'.[44] Although a consideration obviously inspired by the *Arrest Warrant* case, it referred to that case only subsequently, referring to the paragraph in which the ICJ held that 'an incumbent or former Minister for Foreign Affairs' may be subject to criminal proceedings before '*certain international criminal courts*, where they have jurisdiction.'[45] The Special Court admits that the reason for the distinction between national and international courts is 'not immediately evident' but it 'would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community'.[46] The Court quoted Professor Orentlicher's *amicus* brief that provided another reason for the distinction: 'states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area'. The Court also referred to the judgment of Lord Slynn of Hadley in *Pinochet*, who argued that 'there is ... no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before *international tribunals*'.[47] The Court reached the conclusion that Taylor's official position at the moment he made the application was not a bar to prosecution by the Court.

Although the Court only referred to the ICJ's *Arrest Warrant* case in one paragraph, it is obvious from the arguments put forward in Taylor's Application that the importance of the distinction between national and international courts for the immunity issue was derived predominantly from that case. It is therefore instructive, before criticizing the consequences attached to the distinction, to recap the ICJ's relevant considerations.[48]

When comparing the situation of Taylor with that of the key person in the *Arrest Warrant* case, Yerodia Ndombasi, Minister for Foreign Affairs of the Democratic Republic of Congo at the moment he was indicted by a Belgian court, the following points are noticeable.

First, both were incumbent officials at the time of the indictment and issue of the arrest warrant: Yerodia Minister for Foreign Affairs, Taylor Head of State. In the *Arrest Warrant* case the ICJ found that immunity for a Minister for Foreign Affairs from jurisdiction in other states is 'firmly established' in international law. It avoided the question as to where in international law that immunity has been so firmly established and immediately turned to the *extent* of the immunities enjoyed by such a Minister.[49] In Taylor's case of a Head of State, the principle of immunity is even

44. Ibid., para. 49. Emphasis added.
45. Ibid., para. 50. Emphasis added.
46. Ibid., para. 51.
47. Ibid., para. 52. Emphasis added.
48. See for more extensive comments on the *Arrest Warrant* case specifically, inter alia, the articles referred to *supra* note 4.
49. Judgment, *Arrest Warrant* case, *supra* note 3, para. 51. It is doubted whether it is so 'firmly established' that the immunity of a Minister for Foreign Affairs includes not only immunity on official visits, but also, as held by the Court, on private visits. See for criticism on the ICJ's poor motivation, among others, Wouters,

more firmly established in customary international law and is not questioned.[50] The immunities enjoyed by a Minister for Foreign Affairs attach *a fortiori* to the Head of State, as the state's representative par excellence.

Second, both Yerodia and Taylor were indicted for war crimes and crimes against humanity. In the *Arrest Warrant* case Belgium had contended that while in general Ministers for Foreign Affairs enjoy immunity, they do not when suspected of having committed crimes of that nature. However, from state practice (case law and national legislation) the Court could not deduce such a rule, nor from the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international tribunals. The latter rules would apply only to the specific *international* tribunals and could not lead to the conclusion that similar rules applied in regard to prosecutions in national courts. The decisions of these courts would not lead to a different conclusion either, because they do not 'deal with the question of the immunities of *incumbent* Ministers for Foreign Affairs before *national* courts where they are accused of having committed war crimes or crimes against humanity'.[51] So at this point the ICJ made the critical distinction that is the key difference between the situations of Yerodia and Taylor. Yerodia was prosecuted by a *national* court (Belgian); Taylor by an *international* court (the Special Court).

Having discarded Belgium's argument, the ICJ, probably aware of the consequences of this finding (immunity for incumbent officials even though they are accused of international crimes), continued with a soothing remark: '*immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity.'[52] The Court enumerated four situations in which immunity and impunity do not go together. Whilst these considerations were for Yerodia's situation *obiter dicta*, in Taylor's case one of them became crucial as it provided the Special Court with the key to distinguish the two cases. According to the ICJ: '[A]n *incumbent* or former Minister for Foreign Affairs may be subject to criminal proceedings *before certain international criminal courts, where they have jurisdiction*.'[53] Apparently, in the view of the Special Court, this circumstance was the decisive distinction between Yerodia's and Taylor's situations and hence it could come to an opposite result as the ICJ. Whereas Yerodia had been entitled to immunity at the moment he was indicted, Taylor was not. Yerodia was prosecuted by a Belgian national court, obviously not belonging to the category of 'certain international criminal courts'. The Special Court, however, had, correctly, established that it itself is an international court.

But it is questionable whether it belongs to the category of 'certain international criminal courts' as mentioned by the ICJ. Before examining this issue, first the

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supra note 4, at 256–8, Schreuer and Wittich, *supra* note 4, at 117–18, Du Plessis and Bosch, *supra* note 4, at 257–8. Cassese, *supra* note 4 at 855, is more positive about this part of the judgment.

50. A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', (1994, III) 247 *Recueil des cours* 9–130, at 36.
51. Judgment, *Arrest Warrant* case, *supra* note 3, para. 58. Emphasis added.
52. Ibid., para. 60. Emphasis added.
53. Ibid., para. 61. Emphasis added.

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other requirement 'where they have jurisdiction' will be assessed, since, immunity being an exception to jurisdiction, jurisdiction precedes immunity. In the decision the Special Court only addressed the internationality requirement and apparently assumed that it had jurisdiction.

The first Article of the Statute of the Special Court is the basis for the exercise of its jurisdiction:

> The Special Court shall ... have the power to prosecute persons *who bear the greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law *committed in the territory of Sierra Leone*, since 30 November 1996, including those *leaders* who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.[54]

The original version of the Security Council resolution demanding the establishment of the Special Court, drafted by the United States, was limited to 'senior Sierra Leone nationals';[55] however, as this has been expanded to the more general 'those who bear the greatest responsibility', Taylor can match the personal jurisdiction requirements.[56]

The underlying principle for jurisdiction claimed in the Statute, the territoriality principle, is perfectly compatible with international law. It is the most widely acknowledged base for jurisdiction in international law, since it is an inherent part of sovereignty of a state. A state has the right to adjudicate crimes that have been committed on its territory, whether by nationals or by foreigners. Taylor could argue that he never actively committed the crimes he is accused of in *Sierra Leone*, since he was present in Liberia. However, the territoriality principle does not only grant jurisdiction to the state where the act has commenced (subjective element), but also to the state where the act is completed (objective element). In case it is difficult to construe a link between acts of Taylor in Liberia and the factual crimes committed in Sierra Leone, Sierra Leone could also invoke the protective principle or passive personality principle as a basis for jurisdiction. Whether universal jurisdiction *in absentia* is allowed is still controversial.[57]

Sierra Leonean national courts would be allowed to exercise jurisdiction over Taylor on the basis of the widely accepted grounds for jurisdiction such as the territoriality, passive personality, and protective principles and therefore it can be sustained that Sierra Leone could share this jurisdiction with the Special

54. Statute, Art. 1(1) (emphases added). Although the Security Council had used the specification 'those who bear the greatest responsibility' in SC Res. 1315 (2000), the Secretary-General regarded this as a recommendation and not as a binding instruction and proposed the more general term 'persons most responsible'. Pointing to 'bearing the greatest responsibility' emphasizes leadership control over the character and scale of the crimes. However, the Security Council, especially the United States, insisted on a limitation to 'those who played a leadership role' and therefore the terminology of 'those who bear the greatest responsibility'. See *SG Report Special Court*, *supra* note 24, para. 29 and *Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General*, UN doc. S/2000/1234, view 1.

55. M. Sieff, *supra* note 38, at 19.

56. At the time of the establishment particularly (Sierra Leonean) RUF-leader Foday Sankoh was caught sight of, not Taylor.

57. See the various separate opinions of the judges in the *Arrest Warrant* case, *supra* note 3. Perhaps the Court will give more guidance on the issue in the *Case Concerning Certain Criminal Proceedings in France* (*Republic of the Congo v. France*), General List No. 129, which it has currently under consideration.

Court, although in the Statute only the territoriality principle is explicitly mentioned. Had Sierra Leone not consented to the Special Court, the Court would violate the sovereignty of Sierra Leone and would need an alternative authorization for the exercise of jurisdiction, which could have been a Security Council resolution like the two ad hoc tribunals. Since Sierra Leone consented and the jurisdiction claimed in the Statute is compatible with international law, the jurisdiction requirement is indeed, as the Court apparently assumed, fulfilled.

However, the question whether the Special Court belongs to the ICJ's category of 'certain international criminal courts' as a consequence of which immunity can be denied to incumbent officials is more difficult. The ICJ did not set out guidelines for this category and only referred explicitly to the ICTY, ICTR and ICC.[58]

In the *Taylor* decision the Special Court compared the relevant article in its Statute denying immunity with similar provisions in the Nuremberg Charter and Principles and the Statutes of the ICTY, ICTR and ICC. Article 6(2) in the Statute of the Special Court reads: 'The 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.'

This paragraph is indeed nearly identical to Article 7 of the Nuremberg Charter,[59] Principle III of the Nuremberg Principles,[60] Article 7(2) of the ICTY,[61] Article 6(2) of the ICTR Statute[62] and Article 27(1) of the Statute of the International Criminal Court.[63] The crucial question, though, is why these 'certain international criminal courts' would be allowed to disrespect the immunity of incumbent officials. If one argues that there can be no immunity for certain international crimes and that these provisions merely reflect international customary law, the Special Court would be allowed to deny immunity to every Head of State. However, the distinction between prosecutions by national and international courts is then hard to maintain: should they not apply the *same* international law? This approach will be further elaborated

58. Judgment, *Arrest Warrant* case, *supra* note 3, para. 61, see also *infra* note 106 for the text of the paragraph.
59. Article 7 of the Charter of the International Military Tribunal of Nuremberg, *UNTS*, Vol. 82, 279: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.' Article 6 of the Charter of the International Military Tribunal of Tokyo contained a similar provision.
60. Nuremberg Principles, *Yearbook of the International Law Commission* (1950), Vol. II, acknowledged in GA Res. 95 (I), 11 December 1946 and GA Res. 488, (V) 12 December 1950: 'The fact that a person who committed an act which constitutes a crime under international law acted as a head of State or responsible Government official does not relieve him from responsibility under international law.'
61. Article 7, para. 2 of the Statute of the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary-General; UN Doc. S/25704 of 3 May 1993; approved by SC Res. 827 (1993): '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.'
62. Identical. See the Statute attached to SC Res. 955 (1994).
63. The Rome Statute provides in Article 27: '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.' The second paragraph is an innovation in comparison with the other statutes, the importance of which will be elaborated in the next section.

in the next paragraph, but is not the one taken by the ICJ and Special Court. Their approach holds that whilst normally officials are entitled to immunity, even for international crimes, statutes of international courts can provide for exceptions. The question arises as to what legal foundation exists for such an exception.

With respect to treaty-based tribunals like the ICC it can be argued that the states parties have consented to lift the immunity of their officials in case they are prosecuted before the ICC. However, in accordance with the fundamental principle of every law system *pacta tertiis nec nocent nec prosunt* (a treaty binds the parties and only the parties)[64] the provision of Article 98 of the Rome Statute provides that the absolute immunity of officials of third states has to be respected.[65] The only way legitimately to lift the immunity of officials of non-party states would be if such a provision is supported by a Security Council resolution adopted under Chapter VII of the UN Charter. Either the tribunal itself is rooted in such a Security Council resolution (ICTY and ICTR) or the resolution determines it for another court (which has not yet happened, but would be possible).

Consequently, if two states (or a state and an international organization) decide to establish a tribunal by a treaty between them, the fact that it is thus an *international* tribunal is not enough for it not to respect the immunity enjoyed by officials from third states. If this were not the case, it would be a very easy and unjustifiable escape from international obligations.[66] Since Liberia is not a party to the agreement that established the Special Court and since the Court does not have Chapter VII powers, the conclusion according to this line of reasoning should be that there is no ground on which the provision denying immunity in the Special Court's Statute is opposable to a third state, Liberia.

Nevertheless, the Special Court reached the opposite conclusion. Unlike the ICJ the Special Court explicitly addressed the question of what founds the distinction between national and international courts. First, international criminal tribunals would derive their mandate from the international community and hence do not, unlike national courts would, violate the principle that sovereign states do not adjudicate on the conduct of another state.[67] Second, derived from Professor Orentlicher's

64. Reflected in Art. 34 of the 1969 Vienna Convention on the Law of Treaties UNTS 1155, 331.

65. Art. 98, titled 'Cooperation with respect to waiver of immunity and consent to surrender' provides:
'1. 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 immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'
Whilst for the question of immunity para. 1 is relevant, para. 2 has gained in importance since the US has tried and succeeded to conclude bilateral agreements with states to protect US nationals from extradition to the ICC. See for an elucidating interpretation of this Article in relation to Art. 27 of the Rome Statute D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 *AJIL* 407–33.

66. See also Akande, *supra* note 65, at 417: 'It makes little difference whether the foreign states seek to exercise this judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to.'

67. In the *Arrest Warrant* case this argument was not put forward explicitly, but it was recognized in literature as an underlying principle of the distinction between national and international courts. See e.g. Stern, *supra*

amicus brief, the collective judgment of the international community provides a vital safeguard against the potential destabilizing effect of unilateral judgment. Therefore, the Court implicitly interprets the ICJ's 'certain international criminal tribunals' as 'international criminal tribunals in the establishment of which the international community was involved'. Referring to Article 24 of the UN Charter, determining that, in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the UN, the Special Court concluded: '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.'[68] Adoption of that approach essentially consists of an implicit waiver of immunity: since all UN member states, including Liberia, have entrusted the Security Council to act in cases of threats to international peace and security, they have also consented to the possible lifting of immunity.

While neither the consent ground nor the Security Council resolution ground were clearly present in *Taylor*, the Court tried to find a ground for lifting the immunity by combining the two grounds for as far as they were present. That reasoning is, with respect, unconvincing. It is very unlikely that every treaty concluded by the Secretary-General on behalf of the UN, authorized by the Council, can be considered a treaty to which *all* member states are parties. It would be hard to reconcile with the independent international personality of the UN. The UN is more than the sum of its members and the organization 'occupies a position in certain respects in detachment from its Members'.[69] More generally, 'international community involvement' is an imprecise criterion for whether third states can be affected by statutes of 'international courts', in particular whether the immunities of their officials can be ignored or not. How much 'international involvement' is required? Can it also be involvement of UN organs other than the Security Council, like in the case of the Extraordinary Chambers in the Courts of Cambodia?[70] Or what if a regional organization establishes an international criminal court?

The conclusion must be that, if, as the ICJ held, international law provides for immunity to incumbent officials also in case of alleged international crimes, the internationality of the tribunal as such is not a sufficient ground for lifting the immunity. The immunity is only lifted from officials of those states that consented to the agreement or if a Security Council resolution binds 'third states' to that extent.

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note 4, 108 note 14: '*Strictu sensu*, le problème de l'immunité ne se pose pas devant une juridiction internationale, l'immunité étant par définition prévue pour protéger la souveraineté d'un Etat par rapport à celle d'un autre Etat. C'est plutôt une question de délimitation de la compétence de l'instance internationale.' However, this view ignores the various legal bases 'international' tribunals can have and the fact that for a tribunal to be 'international' it is sufficient that it has been established in a treaty by two states. This remains a situation in which some states exercise jurisdiction over another state. It is not merely a matter of the limitation of the jurisdiction of the international tribunal, because the tribunal is likely to be entitled to the same grounds of jurisdiction as the states that established it, universal jurisdiction, when available, included.

68. The Decision, *supra* note 2, para. 38.

69. *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Rep. 174.

70. Particularly the Commission on Human Rights, the General Assembly and the Secretariat were involved in the establishment of what now are national chambers with international influences. See, for a good overview, http://www.yale.edu/cgp/chron_v3.html (last accessed 6 March 2005).

The next paragraph will explore whether the alternative route the Special Court hinted at but did not follow – the nature of the crime instead of the nature of the tribunal determining the immunity question – provides a better answer to immunity questions. Instead of the national–international court distinction, another distinction will prove to be essential: that between criminal responsibility and procedural immunity.

5. An alternative approach: the nature of the offence

In the *Arrest Warrant* case the ICJ rejected Belgium's argument that there was an exception to immunity for incumbent officials in case of alleged international crimes. The ICJ could not deduce such a rule from state practice (case law and national legislation) nor from the relevant rules contained in the legal instruments creating international tribunals. According to the ICJ, the latter *rules* only applied to the specific *international* tribunals and could not lead to the conclusion that similar rules applied in regard to prosecutions in national courts. The *decisions* of these courts would not lead to a different conclusion either, because they do not 'deal with the question of the immunities of *incumbent* Ministers for Foreign Affairs before *national* courts where they are accused of having committed war crimes or crimes against humanity'.[71]

That aspect of the reasoning of the ICJ may be criticized. First, it will be submitted that the statutes and practice of international courts on immunity *are* relevant to prosecutions in national courts, because they reflect customary international law. That law is related to the internationality of the crime and not of the tribunal and has to be applied by *all* tribunals applying international criminal law. Second, the ICJ's distinction between the different immunities for former and incumbent officials will be approved, but it will be argued that nevertheless practice with respect to one can influence the other.

The ICJ's observation that the statutes of the international courts have been especially designed for those courts and not for trials by municipal courts is obviously true. However, that is not to say that the competence to deny immunity is *created* in these instruments nor that it is an exclusive competence of *international* courts. The rules on immunity in the statutes could also codify customary international law on international crimes to be respected by *all* courts that apply international criminal law, irrespective of their nature (national or international). True, because of their international nature, the international tribunals may have been catalysts in finding or even developing these rules, however, not with the intention to keep the rules within the artificial boundaries of international courts. On the contrary, the courts pronounced on these rules as *principles* of international law and there are no indications that they would be the sole courts allowed to use those rules. For example, the Nuremberg Tribunal authoritatively confirmed the status of the non-immunity rule as a principle of international law: 'The principle of international law, which under certain circumstances protects the representative of a State, cannot apply to

71. Judgment, *Arrest Warrant* case *supra* note 3, para. 58. Emphasis added.

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acts condemned as crimes by international law.'[72] So, according to the Tribunal, the immunity question is related to the nature of the offence (an international crime) and not to the nature of a prosecuting institution. The fact that the scope of this finding is not limited to international tribunals is supported not only by the argument that the Nuremberg tribunal simply exercised a jurisdiction that national states would have had as well,[73] but also by the confirmation of the Nuremberg Principles as general international law by the UN General Assembly.[74] Also the International Law Commission's 1996 Draft Code of Crimes Against the Peace and Security of Mankind confirms the no-immunity rule as a principle of international law. This Code is explicitly also meant for *national* trials and thus again confirms that the no-immunity rule does not depend on the nature of the institution that exercises jurisdiction over international crimes.[75] By rejecting Belgium's argument that international instruments and decisions attest to exclusion of immunity in case of international crimes, on the basis of its false finding that these instruments and decisions are not relevant to prosecutions of international crimes by national courts, the ICJ has unnecessarily and harmfully narrowed down the reach of the principles established by international tribunals. However, that is not to say that the ICJ could not have come to the conclusion that Yerodia enjoyed immunity. Without doing harm to the important contributions of international courts to the body of general international criminal law,[76] the ICJ could have validly granted Yerodia

72. Counter-memorial Belgium in the *Arrest Warrant* case, para. 3.5.61, referring to 'Judgments of 30 Sept. and 1 Oct. 1946, Off. Doc., v. I, p. 235'.

73. See Lord Millett in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte, (No. 3)* [1999] 2 All ER 97 (hereinafter *Pinochet (No. 3)*), 'it is important to appreciate that the International Military Tribunal (the Nuremberg Tribunal) which was established by the four allied powers at the conclusion of the Second World War to try the major war criminals was not, strictly speaking, an international court or tribunal. As Sir Hersch Lauterpacht explained in Oppenheim's International Law, vol. II, 7th ed. (1952), pp. 580–581 (ed. Sir Hersch Lauterpacht), 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 its judgment the tribunal described the making of the charter as an exercise of sovereign legislative power by the countries to which the German Reich had unconditionally surrendered, and of the undoubted right of those countries to legislate for the occupied territories which had been recognised by the whole civilised world.' Counsel for the plaintiff in *Pinochet (No. 3)*, quoted the same authority and concluded with regard to the Nuremberg trials: 'If ever there was a clear immunity for heads of state or former heads of state it has been eroded during the course of this century.' Whilst the Nuremberg Charter was indeed agreed upon by the four allied powers, it was annexed to the London Agreement, which was signed by 19 parties in addition to the four allies.

74. GA Res. 95 (I), 11 December 1946 and International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, submitted to the General Assembly as part of the Commission's report, appearing in *Yearbook of the International Law Commission* (1950) Vol. II. With regard to the 1946 resolution Lord Browne-Wilkinson remarks in *Pinochet (No. 3), supra* note 73: 'At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law.' Part of international law must mean that it is not only applicable in international, but also in national trials when international law is applied.

75. The Draft Code, available at http://www.un.org/law/ilc/texts/dccomfra.htm (last accessed 9 March 2005), provides in Art. 7: '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.'

76. Wouters, *supra* note 4, at 259–61, also criticizes the ICJ's rejection of the importance of the immunity provisions in international instruments for customary international law and hence also for national prosecutions. However, in convincingly putting forward provisions in international instruments denying immunity, he ignores the fact that most of these instruments, the Rome Statute excluded, only relate (at least explicitly) to criminal responsibility and not to procedural immunity, as will be elaborated below.

immunity on the basis of another distinction: the distinction between procedural immunity and criminal responsibility, which coincides with the difference between immunity *ratione personae* and *ratione materiae* respectively.[77]

In Taylor's and Yerodia's cases the immunity in question was *ratione personae*. That immunity, attached to the *person* of the incumbent official, is inspired by *functional necessity*. For that reason it is absolute, unrelated to the nature of acts, because every violation of the immunity would impede the fulfilment of the function. When out of office the former official only enjoys a more limited immunity *ratione materiae*. That immunity does not attach to the person but to the *acts* performed by the person in her or his *function* while in office.[78] The rationale behind this immunity is that the acts should be ascribed to the state and that as the state would enjoy immunity for those acts, the former official should as well.

In the *Arrest Warrant* case the ICJ did recognize the difference between criminal responsibility and procedural immunity.[79] However, unfortunately, it did not use it as the basis of its decision, but mentioned it only after it had come to the conclusion that Yerodia enjoyed immunity, as *obiter* reasoning to reassure that immunity does not necessarily lead to impunity.

The ICJ could have demonstrated that in cases of international crimes the statutes and state practice deny immunity *ratione materiae*, but still respect immunity *ratione personae*. It could validly have argued that in international law there can be no immunity *ratione materiae* for international crimes, because the crux of international crimes is that international law establishes individual criminal responsibility for those acts. Therefore, it is impossible that the same international law would determine that those acts are solely acts of state, to be protected by immunity, for which individuals may not be held personally responsible because they were performed as a 'function of the state'.

However, whereas immunity *ratione materiae* is inherently about the nature of the acts, the characteristic of immunity *ratione personae* is that it applies to a person, irrespective of the nature of the act. On the basis of statutes and practice the ICJ could probably have argued convincingly that there is always criminal responsibility, so never immunity *ratione materiae*, for international crimes, but that the procedural immunity covered by immunity *ratione personae* is not affected by international crimes, because its characteristic is that it applies irrespective of the nature of the acts.

Instead of downplaying the importance of the international tribunals for the formation of general rules on immunity, the ICJ could have pointed out that Principle 3

77. See for an articulate criticism on the ICJ's failure to make the distinction between immunity *ratione materiae* and *personae* see Cassese, *supra* note 4, at 862.

78. Some authors, e.g. Frulli, *supra* note 2, at 1125 and Cassese, *supra* note 4, at 853, use the classification of 'functional' and 'personal' immunities, the former being immunity *ratione materiae*. However, because the function is also relevant for personal immunities, since personal immunity is inspired by 'functional' necessity, this author prefers to avoid the confusing term 'functional' immunity.

79. Judgment, *Arrest Warrant* case, *supra* note 3, para. 60: '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.'

of the Nuremberg Principles,[80] the relevant articles in the Statutes of the Tribunals for the former Yugoslavia and Rwanda,[81] and Article 27, paragraph 1 of the Statute of the International Criminal Court[82] literally do not relate to the question whether the accused has a right to *procedural immunity*, but to *substantive immunity*. Their contents are that the fact that a person who committed the crimes was at the time an official does not relieve the person from *criminal responsibility*; there is no immunity *ratione materiae* for such crimes. As such, the provisions in these statutes are evidence of a rule of customary law that provides that international crimes can never be official acts. The provisions referred to, however, do not state anything explicitly on *procedural immunity* enjoyed by incumbent officials, so on immunity *ratione personae*. To that extent the Rome Statute is revolutionary as it explicitly added to the criminal responsibility in paragraph 1 of Article 27, a second paragraph denying procedural immunity.[83] However, as has been argued, the situation is complicated because whilst pursuant to Article 27(2) the official capacity cannot *bar the Court from exercising its jurisdiction*, according to Article 98(1)[84] the Court may not request for surrender if that would require the requested state to violate immunities of third states.[85]

Not mentioned by the ICJ, Regulation 2000/15 of the UN Transitional Administration in East Timor which established special panels with universal jurisdiction over genocide, war crimes and crimes against humanity also contains a provision on immunity.[86] The provision in this regulation, based on a Chapter VII Security Council resolution,[87] addresses, unlike the Statutes of the ICTY, ICTR and SCSL,

80. Nuremberg Principles, *Yearbook of the International Law Commission* (1950), Vol. II, acknowledged in GA Res. 95 (I), 11 December 1946 and GA Res. 488, (V) 12 December 1950: 'The fact that a person who committed an act which constitutes a crime under international law acted as a head of State or responsible Government official does not relieve him from *responsibility* under international law' (emphasis added).

81. Article 7(2) and Art. 6(2) respectively: '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' (emphasis added).

82. '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' (emphasis added).

83. See *supra* note 63. See, however, Akande, *supra* note 65, at 419–20, who seems to consider substantive responsibility in principle a different issue than immunity, immunity *ratione materiae* included. 'Article 27(1) primarily addresses the substantive responsibility of state officials for international crimes rather than questions of immunity.' However, he continues: '. . . deeper analysis shows that Article 27(1) does have the effect of removing at least some of the immunities to which state officials would otherwise be entitled.' He then seems to conclude that Article 27(1) *implicitly* excludes not only immunity *ratione materiae* but also *ratione personae*. Article 27(2) would *explicitly* exclude immunities.

84. See *supra* note 65.

85. Akande, *supra* note 65, at 421–26, convincingly argues that this provision has to be interpreted as to benefit only non-ICC parties and not 'third states' that are party to the ICC. See further on the relation between Article 27 and 98, O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999) at 1132; R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) at 202; R. Wedgwood, 'International Conference: Augusto Pinochet and International Law', (2000) 46 *McGill Law Journal* 241–53, at endnote 35. Also in R. Wedgwood, '40th Anniversary Perspective: International Criminal Law and Augusto Pinochet', (2000) 40 *Virginia Journal of International Law* 829–47, at 844.

86. Regulation No. 2000/15 of 6 June 2000 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (available at http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf, last accessed 6 March 2005).

87. SC Res. 1272 (1999).

not only criminal responsibility but also procedural immunity. Article 15(2) of the Regulation is nearly identical to Article 27(2) of the Rome Statute.

Each of these provisions supports the proposition that whilst immunity *ratione materiae* and international crimes are inherently incompatible, immunity *ratione personae* as a procedural bar to prosecutions of international crimes prevails, unless it has been lifted by the state concerned, like the states parties to the Rome Statute did for jurisdiction exercised by the ICC, or it has (explicitly) been lifted in a statute or regulation based on a Security Council Chapter VII resolution.

In its consideration of case law, instead of rejecting it as irrelevant because of stemming from *international* tribunals, the ICJ could also have seen confirmed the importance of the distinction between immunity *ratione materiae* and *personae*, and between criminal responsibility and procedural immunity. None of the tribunals ever tried an *incumbent* official; Milošević was indicted when he was head of state, but at the moment of the trials he was no longer. Moreover, instead of rejecting the importance of the *Pinochet* case because it dealt with a *former* official, it could have used the case to point to the importance of the distinction, as was also done by many of the Law Lords. Some denied Pinochet immunity as a *former* head of state, however, emphasizing that had he been a serving head of state he would have undoubtedly enjoyed immunity.[88] Although this may have been inspired by UK law, in particular the State Immunities Act 1978 which explicitly provides for immunity for *serving* heads of state equal to the immunity accorded to states, the considerations nevertheless confirm the fundamental differences between immunity *ratione materiae* and *personae*.

Unfortunately, the ICJ blurred the distinction between criminal responsibility and procedural immunity. Rather than confirming some important findings of the *Pinochet* decisions, it made an *obiter* remark that could be interpreted as undermining them. The distinction between procedural immunity and criminal responsibility would have benefited from the ICJ emphasizing the rationale for denying immunity to Pinochet provided by the first panel of the House of Lords over that of the third panel. The third panel narrowed the reach of the decision of the first House of Lords panel by relying more strictly on conventional than on international customary law to parry official acts immunity. They relied on the consent to the Torture Convention for lifting immunity instead of arguing that international crimes can never be covered by immunity *ratione materiae*. While consent or at least consensus may be necessary for the development of an international crime, once certain behaviour

88. See, e.g., judgment of Lord Nicholls of Birkenhead in *R v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 1)* [1998] 4 All ER 897 (hereinafter '*Pinochet (No. 1)*'): 'there can be no doubt that if Senator Pinochet had still been head of the Chilean state, he would have been entitled to immunity' and 'I have no doubt that a current head of state is immune from criminal process under customary international law'; and judgment of Lord Steyn: 'If General Pinochet had still been head of state of Chile, he would be immune from the present extradition proceedings.' Lord Saville denied removal of immunity for an incumbent Head of State in case of torture, because his immunity is 'entirely unrelated to whether or not he was acting in an official capacity'. Lord Millett's view was that 'a serving head of state or diplomat could still claim immunity ratione personae if charged with an offence under s 134. He does not have to rely on the character of the conduct of which he is accused. The nature of the charge is irrelevant; his immunity is personal and absolute'. In his view, to arrest or detain Pinochet while he was still in office would be 'an intolerable affront to the Republic of Chile'.

has reached that status it automatically cannot be an official function, hence it cannot enjoy immunity *ratione materiae*. Consent to lift immunity is therefore not necessary.

However, instead of confirming and elucidating the *Pinochet* decisions, the ICJ did the opposite. When enumerating the third exception in which immunity and impunity do not coincide, the Court undermined the lesson of the *Pinochet* case that for immunity *ratione materiae* the official–private act dichotomy is not sufficient. It stated that a former Minister for Foreign Affairs can be tried by a court in another state, provided it has jurisdiction, '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 of office in a *private capacity*'.[89] In the *Pinochet* case it was apparent that international crimes are usually not committed in a 'private capacity' and nevertheless cannot be protected by immunity *ratione materiae*.[90] The ICJ could have better protected the fundamental principle in international law of individual responsibility for international crimes by stating that a former official can be tried for acts committed during the period of office that cannot be considered as *official functions*. International crimes could never be official functions.[91]

The importance of these positions will become apparent if the *Taylor* proceedings continue and if Taylor were to invoke immunity *ratione materiae*. It is hard to maintain that he committed the alleged war crimes and crimes against humanity in a 'private capacity'. On the contrary, 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. An *a contrario* reasoning of the statement of the ICJ would mean that Taylor could enjoy immunity, also after leaving office, for these acts since he did not commit them in a 'private' capacity. A better view is that international crimes can never be an official function, hence never covered by immunity *ratione materiae*.[92]

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89. Judgment, *Arrest Warrant* case, *supra* note 3, para. 61 (emphasis added).
90. Some, like Wirth, *supra* note 4, at 891, conclude by reasoning *a contrario* that the Court has ruled that 'Ministers for Foreign Affairs are immune for official acts even when they are no longer in office', and consider therefore the judgment as a step back from the *Pinochet* decision (Wirth, at 881 and see also 890). Wouters, *supra* note 4, at 262 calls it 'the most controversial statement of the whole judgment'. See also Stern, *supra* note 4, at 112: 'D'un trait de plume, la cour efface l'avancée spectaculaire qui s'était produite dans l'affaire Pinochet, ne mentionnant même pas dans le dispositif de son arrêt . . . ' Also at 116. See more extensively on the problematic consequences of the *Arrest Warrant* case for the Pinochet precedent McLachlan, *supra* note 4.
91. Although it is unfortunate that the ICJ not only did not enforce the *Pinochet* decision, but even seems to have weakened it, too much importance should not be given to this particular phrasing in its judgment. It must be considered in the context of that case and it is doubtful whether the *a contrario* reasoning will be supported by the Court. It was a reasoning *obiter* and, moreover, the primary focus of the ICJ in the *Arrest Warrant* case was not on the legality of the prosecution a former Minister, but an incumbent. See also C. Wickremansinghe, *supra* note 4, at 781: 'it is advisable to focus on the *ratio decidendi* in what was said, rather than seeking to draw more far-reaching conclusions on what was not said.' The Joint Separate Opinion of Higgins, Kooijmans and Buergenthal gives more hope as they hold more precisely, (2002) 41 *ILM* 75–592, para. 85: '. . . immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for "official" acts. It is now increasingly claimed in the literature . . . that 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 . . . This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as is evidenced in judicial decisions and opinions.'
92. This is also supported by ICTY, *Prosecutor v. Blaškić (Subpoena)*, 29 October 1997, 110 *International Law Reports* 687, at 710: 'Under these norms [of international criminal law prohibiting war crimes, crimes against humanity and genocide], those responsible for such crimes cannot invoke immunity from national or

While the evidence of the firm establishment of the distinction between procedural immunity and criminal responsibility in international law leads to the conclusion that the ICJ could have upheld Yerodia's immunity on that basis, this might also indicate that the Special Court should have granted Taylor immunity. In that sense this alternative approach might be legally more valid, but it would nevertheless lead to the same conclusion as the application of the (unwarranted) distinction between national and international courts, had the Special Court applied it properly: Taylor as an incumbent official enjoyed immunity.[93]

However, the Special Court could have pointed to developments within the alternative approach (the distinction between procedural immunity and criminal responsibility) that might reveal that in case of international crimes not only is immunity *ratione materiae* of no avail, but that also the immunity *ratione personae* does not apply. Although it is questionable whether this is already fully fledged customary international law,[94] the Special Court could have indicated these tendencies and had it based its decision on these tendencies it would have contributed to the development of this emerging customary international law.

The tendencies the Special Court could have indicated are those that extend the reasoning behind no immunity *ratione materiae* for international crimes to immunity *ratione personae*. Several examples spring to mind. First, whilst it is true that most of the Law Lords unequivocally stated that had Pinochet been an incumbent head of state he had enjoyed immunity *ratione personae* regardless of the crimes he was charged with, some of the various reasoning for denying immunity *ratione materiae* is also relevant for *ratione personae*. For example, denying immunity on the basis that if international law condemns certain acts as criminal it cannot at the same time provide immunity for those acts,[95] could also hold true for the immunity of serving heads of state if no sharp distinction is made between criminal responsibility and procedural immunity. Moreover, in the summary of one of the rulings[96] the official functions test usually associated with immunity *ratione materiae* was extended to incumbent heads of state.[97] Likewise, whilst Article 7 of the Nuremberg Charter seems to focus on the attribution of criminal responsibility only, some language in the case law of the Tribunal might indicate that it also excludes procedural immunity,[98] even though no serving head of state or minister was ever prosecuted by

international jurisdiction *even if they perpetrated such crimes while acting in their official capacity*.' Emphasis added.

93. See also conclusion, Deen-Racsmány, *supra* note 2, at 320–21.
94. See also Frulli, *supra* note 2, at 1128, with respect to international criminal tribunals and Wirth *supra* note 4, at 888, more in general, who acknowledge potential precedents, but doubt whether this is already international law. Wirth warns of the consequences for the maintenance of peace.
95. *Pinochet (No. 1)*, *supra* note 88, Judgment of Lord Nicholls of Birkenhead.
96. *Pinochet (No. 1)*, *supra* note 88: 'A claim to immunity by a *head of state* or a former head of state applied only to acts performed by him in the exercise of his functions as head of state.'
97. See also *Pinochet (No. 3)*, *supra* note 73, Brownlie QC on behalf of Amnesty International: 'Neither a former head of state *nor a current head of state* can have immunity from criminal proceedings in respect of acts which constitute crimes under international law. *There is no distinction between a head of state and a former head of state*' (emphasis added).
98. As is stated by the ILC in the Commentaries on the Draft Code, *supra* note 75, on Article 7: 'As further recognized by the Nürnberg Tribunal in its judgement, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural

the Nuremberg Tribunal.[99] Similarly, irrespective of the fact that the relevant article in the ICTY Statute only refers to criminal responsibility and does not address the question of procedural immunity, the Prosecutor of the ICTY did not feel prevented from indicting Milošević as the first President to be indicted while in office.[100] When the Trial Chamber addressed Milošević's preliminary motions and the arguments put forward by the *amici curiae* Milošević was no longer president. The Chamber circumvented the thorny question of whether Milošević's indictment was compatible with the Statute and international law in general considering the facts that at the time of the indictment he still was an incumbent official probably entitled to procedural immunity and that Article 7(2) in the ICTY Statute only addresses criminal responsibility. In the *Arrest Warrant* case the ICJ has decided that the fact that the person entitled to absolute immunity stands trial after loosing that immunity does not legalize the issue and circulation of an arrest warrant while the person was still in office. In order to justify Milošević's indictment while he was still a serving president, the Tribunal would have to interpret Article 7(2) of its Statute as not only attributing criminal responsibility, but also as excluding procedural immunity. Moreover, it would either have to find that that interpretation would be compatible with customary international law, like the rules on criminal responsibility, or acknowledge that it is a deviation from customary international law, but authorized because of its Chapter VII legal nature. However, instead of deciding upon the exact scope of Article 7(2), the Tribunal only confirmed the general validity of the article. Since the Tribunal interpreted Milošević's argument as denying the validity of the article and not as contending that the article was not applicable, and as it focused on the 'lack of competence by reason of his status as *former* President' argument, it is not very clear whether the Tribunal has read in the article not only the attribution of criminal responsibility but also an exclusion of procedural immunity. It rejected Milošević's argument, in the way it had interpreted it, by stating that '[t]here is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law'.[101] A hint for arguing that the Tribunal only read attribution of criminal responsibility in the article and not exclusion of procedural immunity is that it continued by saying: 'The history of this rule can be traced to the development of the doctrine of *individual criminal responsibility* . . .'[102] As support for the customary character of the rule it adduced

immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.'

99. Karl Dönitz, Germany's Reich President from 1 May 1945 (after Hitler's suicide) until his arrest on 23 May 1949 (after the capitulation), was at the time he was indicted by the Nuremberg Tribunal no longer incumbent but former head of state.

100. Prosecutor Arbour was well aware of this. In her application to Judge Hunt she wrote: 'this indictment is the first in the history of this Tribunal to charge a Head of State during an on-going armed conflict with the commission of serious violations of international humanitarian law.' Press release, The Hague, 27 May 1999, JL/PIU/403-E, through www.un.org/icty/latest/index.htm (visited 29 April 2004). She did not refer to Art. 7(2) of the Statute.

101. Decision on Preliminary Motions, *Milošević* (IT-99-37-PT), Trial Chamber, 8 November 2001, para. 28.

102. Ibid., para. 29.

various international instruments and case law. Next to mentioning the Nuremberg and Tokyo Charters, the Nuremberg Principles and the Statutes for the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone it attached particular significance to Article 27 of the Statute of the International Criminal Court and the 1996 International Law Commission's Draft Code on Crimes against the Peace and Security of Mankind. It cited specifically the two latter instruments 'as evidence of the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in crimes over which the International Tribunal has jurisdiction'.[103] While the Chamber wished to emphasize in this way the customary character of the rules and still only talked about 'criminal liability' which probably can be equated with 'criminal responsibility', it is remarkable that the Chamber referred to those two documents that also explicitly or implicitly (in the comments) exclude procedural immunity. Also, the paragraphs from the case law cited by the Tribunal can be interpreted as excluding immunity *ratione personae*.[104] It could be a concealed way of saying also that the indictment against Milošević while he was still a serving president was in conformity with international law.

The Special Court could have used the Milošević precedent. Its Statute contains the same phrasing as the ICTY Statute on the issue of immunity; it only refers to *criminal responsibility*.[105] On the basis of the Milošević case this provision could be extensively interpreted as to include a bar to procedural immunity. Nevertheless, an important difference between the ICTY and Special Court remains that the legal foundation of the former is a Chapter VII Security Council resolution. Therefore, the Special Court's extensive interpretation of the provision would only be valid if the rule denying procedural immunity reflects customary international law, as has already been established for the rule on criminal responsibility. One could argue that the wide accession to the Rome Statute, which explicitly denies procedural immunity, is evidence of this emerging customary rule. However, the Rome Statute explicitly protects the immunity of incumbent officials of third states. Moreover, when the Special Court Statute was drafted the more elaborate article of the Rome Statute had already been approved, but the Special Court Statute nevertheless incorporates the Article of the ICTY Statute, only referring to criminal responsibility, and not the more extensive version of the Rome Statute, also denying procedural immunity.

Finally, it may be instructive to analyze once again the ICJ's determination that 'certain international criminal courts' can prosecute incumbent officials. Although this paragraph has been criticized for the unjustified distinction between national

103. Ibid., para. 31.

104. Ibid., para. 32, referring to the Nuremberg Judgment, stating: 'The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.' From the very extensive *Pinochet* case, the Tribunal precisely quoted three lines of Lord Millett, that can be interpreted as excluding a procedural immunity defence: '[i]n future those who commit atrocities against civilian populations must expect to be called to account if fundamental rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence.' (para. 33).

105. Art. 6 para. 2. The Article comes under the heading 'Individual criminal responsibility'.

and international courts, the Court's phrasing can reflect a view on the question of the extent to which the Court believes that these 'international criminal courts' can disrespect not only immunity *ratione materiae* but also *personae*.[106]

As the ICJ mentions these 'certain international criminal courts' as examples of exceptions to the immunity of both former *and incumbent* officials, it seems of course that in the view of the ICJ these tribunals can not only deny immunity *ratione materiae* but also *personae*. However, as has been shown, the Statutes of these tribunals are less unequivocal. The Court seems to have realized this, considering the way in which the Court mentioned examples of those 'certain' international criminal courts. First, it did not mention the two World War tribunals. True, that could be because they are not active any more, but the Court might have recognized that the charters explicitly referred to criminal responsibility only and not to procedural immunity, without there being case law proving differently. Secondly, the Court only named the ICTY and ICTR, without quoting the provisions that make trials of *incumbent* officials possible.

It could be that the Court believed that these tribunals attested that only *former* officials can be prosecuted, but that would mean that the Court provided examples that only partly substantiate its own statement. Another interpretation is that the Court was of the opinion that the ICTY and ICTR can prosecute incumbent officials, bearing in mind Milošević's indictment, but that it did not cite explicit provisions because there are no explicit provisions lifting procedural immunity. In contrast, the Court did unequivocally cite Article 27(2) of the ICC Statute, apparently of the opinion that at least this provision unambiguously excludes procedural immunity for incumbent officials.

In conclusion, whilst there is convincing evidence that international crimes cannot be covered by immunity *ratione materiae*, practice so far seems to uphold immunity *ratione personae* for such crimes. This can be justified by the different rationales of the two types of immunity. The state sovereignty inspiring the substantial immunity *ratione materiae* cannot prevail in cases of international crimes, because international law establishes individual criminal responsibility for those crimes. However, the necessity of maintaining peaceful international relations still inspires the more temporary immunity *ratione personae*. Nevertheless, some tendencies point to congruence of the rationales of denying both types of immunity. Although the answer on the question of procedural immunity is therefore still not unequivocal,[107]

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106. To recall the provision in the judgment in the *Arrest Warrant* case, *supra* note 3, para. 61: '[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, para. 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".'

107. See also the commentary of the authoritative members of the Committee that drafted the Princeton Principles on Universal Jurisdiction, available at http://www.princeton.edu/~lapa/unive_jur.pdf (last accessed 10 March 2005). They too emphasized the distinction between criminal responsibility and procedural immunity. Principle 5 on criminal responsibility tracks the language of the ICTY and ICTR Statutes and according to

the advantage of the criminal responsibility–procedural immunity approach over the national–international tribunal approach is that international criminal law remains a unified body of law that is not torn asunder as a consequence of unjustified attention to the nature of the tribunal applying it. The only case in which such a difference might be valid is if a tribunal has Security Council Chapter VII powers, because this provides a basis to deviate from otherwise applying international norms. Since, unlike international crimes, the rules on immunity have no *jus cogens* status[108] the Security Council has the power to do so.

6. Conclusion and prospects

The Special Court decided that Taylor's official position as an incumbent head of state at the time when he was indicted was not a bar to his prosecution by the Special Court. He 'was and is subject to criminal proceedings before the Special Court . . .'[109] Notwithstanding this positive decision for the battle against impunity, the reasoning of the Special Court, inspired by the ICJ's, seems arbitrary and formalistic. Too much importance is given to the nature of the prosecuting institution, too little to the distinction between criminal responsibility and procedural immunity and, in that context, the nature of the crime. The Special Court correctly found that it is an international court but attached, precipitated by the ICJ, incorrect consequences to that finding. Without Security Council Chapter VII powers there are no grounds on which it would be allowed to disrespect the procedural immunity of incumbents of third states not party to the agreement that established the Special Court.

The alternative approach suggested emphasizes that international law should be the same international law, irrespective of the kind of tribunal in which it is applied. It has been shown that immunity *ratione materiae* is incompatible with the concept of individual responsibility for international crimes and therefore is of no avail to former officials charged with crimes against humanity and war crimes. It has been harder to prove the emergence of such a rule in customary international law with respect to procedural immunity of serving officials, because the immunity *ratione personae* is founded on a different principle. Nevertheless, several developments have been pointed out which the Special Court could have used as a foundation for finding such a rule and hence denying Taylor procedural immunity. By doing so, the Special Court would have advanced the emergence of this customary rule. However, if the Court had also admitted that even in cases of alleged international

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the Committee none of the statutes of the international tribunals, apart from the ICC, addresses the issue of procedural immunity. Then they state: 'The Principles do not purport to revoke the protections afforded by procedural immunity, but neither do they affirm procedural immunities as a matter of principle. In the future, procedural immunities for sitting heads of state, diplomats, and other officials may be called increasingly into question, a possibility prefigured by the ICTY's indictment of Slobodan Miloševic while still a sitting head of state. Whether this unprecedented action will become the source of a new regime in international law remains to be seen. Participants in the Princeton Project opted not to try and settle on principles governing procedural immunity in order to leave space for future developments.'

108. Different: Lord Hope in *Pinochet (No. 3)*, *supra* note 73, according to whom the rule of immunity for serving heads of state has *jus cogens* status. This is unconvincing, if only because states can waive immunity, whereas rules of *jus cogens* cannot be waived.

109. Decision, *supra* note 2, para. 53.

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crimes procedural immunity prevails if no binding Chapter VII resolution supports an exception, the Court could have achieved the pursued result of being competent to try Taylor. The key would be in the last paragraph of the Decision: '. . . 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.'[110] Admittedly, it would be less elegant, but at least legally consistent.[111]

We all know that it does not stop with Taylor. The generation of presidents and other officials accused of committing war crimes and crimes against humanity is not yet extinct.

Clarity is needed, and soon. Immunity *ratione materiae* must be freed from the false distinction between official and private acts, and be based on *functions* of the official, which can never include international crimes. For the millions of victims it is inexplicable that their leaders cannot be prosecuted because they did not act in a 'private capacity'. To accept that explanation is to signal the ultimate undermining of the rule of law: officials are not bound by the law but above it. Immunity *ratione personae* must be freed from the false distinction between national and international courts. As a reaction to the continued horror incited and continued by certain officials, several kinds of criminal tribunal have proliferated worldwide: national, international, 'internationalized domestic', 'hybrid', etc. A consequence of the ICJ's linking immunity to the nature of the prosecuting court is that for many of these tribunals the question of procedural immunity could arise. The Special Court for Sierra Leone has now answered the question for Taylor. This article hopes to serve the debate about the basis of future answers.

110. Ibid., para. 59.

111. One could even follow the dissenters in the *Arrest Warrant* case, *supra* note 3, who held that once the official ceases to be an official, the illegal consequences of the arrest warrant cease to exist as well. See the dissenting opinions of Judges Oda, Al-Khasawneh and Van den Wyngaert and the Joint Separate Opinion of Judges Buergenthal, Higgins and Kooijmans.