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FROM IMMUNITY TO IMPUNITY: CHARLES TAYLOR AND THE SPECIAL COURT FOR SIERRA LEONE

JAMES L. MIGLIN[†]

The indictment and arrest of Charles Taylor for war crimes and crimes against humanity committed while Taylor was President of Liberia mark a significant development in the accountability of Heads of State. Yet the process by which the Special Court for Sierra Leone indicted Taylor and then attempted to have him arrested and delivered to the Court, as well as the Appeals Chamber's analysis of the legality of the indictment, revealed serious flaws and deficiencies. The Appeals Chamber misconstrued the legal foundation of the Special Court in deciding that Taylor, as a sitting Head of State, was not entitled to immunity from the process of the Special Court. Furthermore, the Appeals Chamber failed to distinguish between personal and functional immunities. The author argues that it would have been preferable, from a legal point of view, had the Appeals Chamber dismissed the indictment as a violation of Taylor's personal immunity as a sitting Head of State and allowed a future indictment to go forward when Taylor no longer enjoyed such immunity. Whatever the legal weaknesses of the Appeals Chamber's decision on the indictment, Taylor's arrest underscored the structural limits on hybrid courts such as the Special Court, which is not able to effectively project any legal authority or influence beyond the borders of its host State.

INTRODUCTION

On Monday, April 3, 2006, Charles Taylor became the first former African Head of State to come before an international criminal tribunal, jointly established by the UN and one of its members, for the alleged commission of international crimes on the territory of that State.¹ For nearly three years, Taylor had been living in exile in southern Nigeria after being forced to resign the Presidency of Liberia and flee the rebel insurrections in Monrovia and his indictment for war crimes by the Special Court for Sierra Leone. At that time, the international community had decided that putting Charles Taylor out of the reach of the Special Court was a price worth paying for peace and stability in Liberia. Charles Taylor appeared to be yet another brutal warlord allowed to decompose into the archives of history without ever answering for his alleged crimes.

In March 2006, Nigeria finally agreed to the request of the newly-elected President of Liberia, Ellen Johnson-Sirleaf, to hand over Taylor to the Special Court—or, more accurately, to repatriate Taylor to Liberia where he would be arrested by the United Nations and transferred to Freetown.² The Special Court, whose inability to pros-

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¹ See Charles Jalloh "The Law and Politics of the Charles Taylor Case," April 2006, Web exclusive comment from the Canadian Council On International Law, online: <http://www.ccil-ccdi.ca>.

² For the UN authorisation to arrest and transfer Taylor to the Special Court see UN SCOR, 5304th Mtg., UN Doc.S/RES/1638 (2005).

ecute any of the major rebel leaders had seriously jeopardised its domestic legitimacy, finally had its man—the man who could lift the Court out of its mediocrity and into the realm of the historic.

The process that finally delivered Charles Taylor to the Special Court highlights an underlying theme of this paper: the Special Court, as an institution, is unable to effectively project its influence or authority beyond Sierra Leone. This is not to suggest that the Special Court had been idle in attempting to secure Taylor; in fact, it had been quite active in bringing political pressure to bear on Nigeria and lobbying for a binding resolution of the Security Council, demanding that Taylor be turned over to the Court. In the end, however, it was a political process completely external to the Court that delivered Taylor to Sierra Leone. As a hybrid tribunal without a Chapter VII mandate or the financial and political resources to effectively secure international support and cooperation, the Special Court's influence was negligible. Charles Taylor's trial raises a myriad of difficult legal issues, including the extent of immunity for acts committed by a former Head of State while in office, the legality of Taylor's arrest and transfer by the United Nations to the Special Court, and his subsequent transfer for trial to the Netherlands. This paper, however, will look back to the summer of 2003—when Charles Taylor became the first incumbent Head of State in history to have his indictment and attempted arrest upheld by a judicial body—and evaluate the inability of the Special Court to arrest and prosecute him. It will argue that the judicial sanctioning of Taylor's indictment and arrest warrant while he was President of Liberia was wrongly decided and sets an unfortunate precedent for international criminal law. In relying on a poorly articulated exception to the law of sovereign immunity from the International Court of Justice's decision in *Congo v. Belgium*, the Appeals Chamber of the Special Court incorrectly seized upon the international nature of the Court and upheld the indictment.³ In doing so, it compounded the frailties of the court's decision and misconstrued the legal foundation and nature of the Special Court.

Parts I and II of this paper will provide the necessary context by looking at the events surrounding the indictment and attempted arrest of Charles Taylor and the current status of Heads of State in international law. Part III will critically assess the Appeals Chamber's decision upholding the legality of the indictment and arrest warrant. It will argue that the decision was wrongly decided and failed to demonstrate how the Special Court could disregard the immunity enjoyed at customary international law by Charles Taylor as the President of Liberia. Part IV will then evaluate the Special Court's effort to secure Taylor's arrest while travelling to Ghana for peace negotiations in June of 2003. This section concludes that the release of the indictment and arrest warrant while Taylor was in Ghana was not only unlawful, but also counterproductive with respect to both the peace process and the campaign to prosecute Taylor. The paper highlights the intersection of politics with international criminal law and the competing demands the two placed on Charles Taylor and the war in Liberia: while politics pursued peace, law sought justice and individual responsibility for grave violations of human rights. Finally, this paper concludes by looking at the current state of international law from a regime perspective. It argues that international criminal law is characterized by multiple legal regimes in which the law of Head of State immunity does not enjoy uniform

3 *Case concerning Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) [2002] I.C.J. Reports 3 [*Congo v. Belgium*].

application. The central weakness of the Appeals Chamber decision is its failure to demonstrate how the regime created by the Special Court includes Liberia and how its constitutive instrument removes the immunity enjoyed by Charles Taylor at customary international law.

I: CHARLES TAYLOR AND THE CIVIL WARS IN SIERRA LEONE AND LIBERIA

Charles Taylor returned to Liberia on Christmas Eve, 1989. Six years earlier Taylor had fled to the United States amidst allegations of embezzling government money. He was subsequently arrested and detained, but, while awaiting extradition, managed to escape from prison and go underground. It is widely believed that Taylor received military training under Colonel Qaddafi in Libya, where he met Foday Sankoh, future leader of the Sierra Leone rebel group the Revolutionary United Front (RUF).

Charles Taylor's return to Liberia plunged the country into a factional civil war that lasted the better part of seven years. In 1997, Charles Taylor was elected President, capturing 75 percent of the national vote and putting a temporary end to the conflict. Two years later, however, civil war resumed when a new insurrection calling itself "Liberians United for Reconciliation and Democracy" (LURD) began a campaign to oust Taylor from power. Over the next three years, LURD slowly consolidated its control over northern Liberia. In 2003, another rebel group, the Movement for Democracy in Liberia, emerged and made rapid gains through the south of Liberia. With war descending on the capital, Taylor agreed, at the behest of many African leaders, to attend high-level peace talks in Ghana in June of 2003.

Civil War in Sierra Leone

In March of 1991, Foday Sankoh, who had taken part in Charles Taylor's initial incursion into Liberia, led a group of dissidents and fighters loyal to Taylor into Sierra Leone. The RUF began attacking villages and forcibly recruiting soldiers (many of them children). They eventually gained control over the rich mineral resources of eastern Sierra Leone. By 1995, the RUF had descended on Freetown. A group of mercenaries hired by the military-controlled government of Sierra Leone managed to beat the RUF back to the border regions so elections could be held in April of 1996. Ahmed Tejan Kabbah, a former diplomat, was elected President, marking the return of civilian rule to Sierra Leone. President Kabbah negotiated his first of two peace agreements with the RUF in Abidjan on November 30, 1996.⁴ However, President Kabbah was overthrown within the year by a military coup, led by Johnny Paul Koroma, calling itself the Armed Forces Revolutionary Council (AFRC). The AFRC invited Foday Sankoh and the RUF to form a governing body called the Supreme Council.⁵ The junta lasted only ten months. West African peacekeeping forces drove the RUF/AFRC from the capital and reinstated the democratically elected

4 The date of the Abidjan Peace Agreement marks the temporal jurisdiction of the Special Court for Sierra Leone. See Article 1 of the *Statute of the Special Court for Sierra Leone*, online: The Special Court for Sierra Leone <http://www.sc-sl.org/scsl-statute.html>.

5 It is the view of the Prosecutor's Office that the RUF/AFRC alliance constituted a joint criminal enterprise. See *The Prosecutor against Charles Ghankay Taylor* (7 March 2003) SCSL-2003-01-I, Amended Indictment (Special Court for Sierra Leone, The Prosecutor), online: The Special Court for Sierra Leone (www.sc-sl.org).

President Kabbah in 1998. Fierce fighting continued, however, and on January 6, 1999, the RUF swarmed into Freetown. Over the next three weeks, for the first time, the world's attention focused on the embattled capital as thousands of innocent civilians were brutally raped, mutilated, and murdered.⁶

A second round of peace talks between President Kabbah and Foday Sankoh led to an agreement signed in Lomé on July 7, 1999. The Lomé Accord brought the RUF into the national government and installed Foday Sankoh as Vice President. It also called for the establishment of a United Nations peacekeeping operation, UNAMSIL, to assist the parties in carrying out the provisions of the agreement.⁷ However, the RUF violated the agreement by kidnapping UNAMSIL personnel, stealing ammunitions, and renewing attacks on civilians. On May 8, 2000, the RUF killed as many as twenty people who had gathered outside Sankoh's home to protest against the RUF's violations of the Lomé Accord. As a result, Sankoh and many of the senior members of the RUF were arrested, jailed, and stripped of their government positions.

Establishment of the Special Court for Sierra Leone

In the face of this rapidly deteriorating security situation, President Kabbah wrote to the United Nations, requesting its help in creating an appropriate judicial forum in which to try the perpetrators of the gravest atrocities.⁸ The Security Council requested that the Secretary-General negotiate with the government of Sierra Leone to create an independent special court with jurisdiction over persons "who bear the greatest responsibility" for war crimes, crimes against humanity, and other serious violations of international law.⁹ After several meetings with the government of Sierra Leone the Secretary-General recommended a court be established by agreement between the UN and Sierra Leone, thus creating a "treaty-based sui generis court of mixed jurisdiction and composition."¹⁰ Composed of both national and international staff, judges, and lawyers, this court would have jurisdiction over both international crimes and crimes under domestic law and primacy over Sierra Leonean courts.

In early 2002, the United Nations and Sierra Leone signed a final agreement, which was incorporated into national law by the *Special Court Agreement 2002 (Ratification) Act*.¹¹ The Special Court for Sierra Leone became a treaty-based court of mixed or

6 The date January 6, 1999 is the Sierra Leonean equivalent of September 11, 2001, and it is used in much the same way North Americans use the term 9/11. For an account of the atrocities see Human Rights Watch, "Getting Away With Murder, Mutilation and Rape: New Testimony from Sierra Leone," July 1999, Vol.11 No 3(A), online: Human Rights Watch <http://www.hrw.org/reports/1999/sierra/>.

7 UNAMSIL was established with 6,000 peacekeepers in October 1999. By 2001, the force had tripled to 17,500 and its mandate had expanded, see online: United Nations Mission in Sierra Leone <http://www.un.org/Depts/dpko/missions/unamsil/index.html>.

8 C. Melron Nicol-Wilson, "International Criminal Tribunals: A Comparative Study of the Tribunals in the Former Yugoslavia, Rwanda and Sierra Leone" (2002) Australian International Law Journal 126 at 134.

9 UN SCOR, 4186th Mtg., UN Doc.S/RES/1315 (2000) at 2, online: United Nations Security Council <http://www.un.org/documents/scres.htm>.

10 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN SCOR, UN Doc. S/2000/915 at para. 9, online: United Nations Security Council <http://www.un.org/Docs/sc/reports/2000/sgrep00.htm>.

11 See *Agreement Between the United Nations and The Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone and Special Court Agreement 2002 (Ratification) Act*, 2002, online: The Special Court for Sierra Leone <http://www.sc-sl.org/documents.html>.

hybrid composition, more similar to the International Criminal Court (ICC) than to the ad hoc tribunals for Yugoslavia and Rwanda (ICTY and ICTR).¹²

The process establishing the Special Court was a calculated departure from the approach taken in establishing the ICTY and ICTR. Neither the former Yugoslavia nor Rwanda was consulted when the ad hoc tribunals were created. Additionally, those tribunals' statutes were drafted by the UN Secretariat and adopted by Security Council Chapter VII resolutions, essentially making the tribunals subsidiary organs of the UN.¹³ In creating the Special Court for Sierra Leone, there was a sense that a treaty-based court enjoying the consent and support of the host State would enjoy greater legitimacy, raise fewer legal concerns, and function more effectively.¹⁴ Perhaps most importantly, the international community did not have the wherewithal for the creation of another expensive international criminal tribunal.¹⁵ Against the advice of the Secretary-General, the Special Court was to be funded entirely by voluntary contributions, a source of constant uncertainty that to this day "infects all of the Special Court's activities."¹⁶ These concerns led one commentator, in an oft-cited phrase, to dub the Special Court a "shoestring" court.¹⁷

The decision to establish a treaty-based court with the consent of the territorial State was, in many respects, returning full-circle to the International Military Tribunal created after World War II. In the wake of the Cold War, a renaissance of sorts occurred in international criminal justice; the ad hoc tribunals for the former Yugoslavia and Rwanda were legal responses to the failure of the international community to effectively react to the conflict in Yugoslavia or prevent genocide in Rwanda. However, by the turn of the century, the Security Council had reached a point of "tribunal fatigue."¹⁸ To some, the ad hoc tribunals were simply more work than they were worth. This weighed heavily on the UN when considering responses to conflicts in Sierra Leone, Kosovo, East Timor, and Cambodia. These countries were caught between the international community's dissatisfaction with the ICTY and ICTR and the as-yet inoperative ICC. While it is beyond the scope of this paper to argue what sort of judicial forum should or could have been established for Sierra Leone, the point is not merely academic. The decision of the Security Council to establish a hybrid, treaty-based court has had direct repercussions on the ability of the Special Court to secure Charles Taylor and the perceived success of international criminal justice in Sierra Leone.

Since the constitutive instrument of the Special Court is a treaty and not, like the ad hoc tribunals, a Security Council resolution made pursuant to Chapter VII of the UN Charter, the Special Court has primacy over the national courts of Sierra Leone but not over the courts of other States. The Special Court is empowered to issue binding orders on the government of Sierra Leone but lacks the authority to request

12 See generally Antonio Cassese, *International Criminal Law* (New York: Oxford University Press Inc., 2003) at 11.

13 Avril McDonald, "Sierra Leone's Shoestring Special Court" (2002) 84 *Int'l Rev. Red Cross* 121 at 124. See also *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 10 at para. 9.

14 See Nicol-Wilson, *supra* note 8 at 126-127.

15 McDonald, *supra* note 13 at 124.

16 James Cockayne, "The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals," 28 *Fordham Int'l L.J.* 616 at 630. See also *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, Article 6, *supra* note 11.

17 McDonald, *supra* note 13.

18 A term coined by David Scheffer and cited in Cassese, *supra* note 12 at 340.

the surrender of a person from another State or the authority to induce compliance with any such request.¹⁹ This means that evidence, witnesses, or indictees that are outside the territorial boundaries of Sierra Leone are, without cooperation from other States, simply beyond the reach of the Special Court.²⁰ Such a problem was, in fact, foreseen by the Secretary-General when he wrote in his report: “the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.”²¹ The Secretary-General likely had Charles Taylor in mind when he made this suggestion. The Security Council has never taken this advice, despite a political campaign by the Prosecution in May of 2005 to get a Chapter VII resolution for the surrender of Taylor.²²

The Indictment and Exile of Charles Taylor

In May of 2002, free and fair elections were held in Sierra Leone and Ahmed Tejan Kabbah was re-elected president. UNAMSIL was firmly in place and a modest disarmament, demobilization, and reintegration campaign had finished its work; peace, it seemed, had finally returned to Sierra Leone. With the Special Court established, the prosecution began the work of sorting through a tortuous civil war notorious for its sheer brutality. In March of 2003, the bulk of the indictments were issued against high-ranking members of both the rebel and government forces in Sierra Leone. On March 7, Judge Bankole Thompson signed Charles Taylor’s indictment, but it was kept sealed because, as the prosecution later explained, Taylor was a sitting Head of State and under a UN Security Council travel ban.²³ Two months later, when Taylor agreed to attend peace talks in Accra, the prosecution decided to seek Ghana’s cooperation in arresting and transferring Taylor to the Special Court.

On June 4, the Office of the Prosecutor reportedly hand-delivered the relevant documents to the Ghanaian High Commission in Freetown and transmitted copies electronically to the Ghanaian Minister for Foreign Affairs in Accra. There is confusion as to whether Ghana in fact received the documents and what, if any, official response they had to them.²⁴ Nonetheless, hours after the indictment had been made

19 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 10 at para. 10; McDonald, *supra* note 13 at 125–126. See also Michael P. Scharf, “The Special Court for Sierra Leone” (October 2000) *ASIL Insights*, online: <http://www.asil.org/insights/insigh53.htm>.

20 Charles Taylor was the second-last person indicted by the SCSL not in custody. Both Johnny Paul Koroma and Sam Bockarie were indicted by the Special Court in March of 2003 while reportedly living outside of Sierra Leone. In fact, Prosecutor David Crane publicly accused Taylor of harbouring them. Within months, both were reported killed in Liberia, but only the indictment against Bockarie was withdrawn when his body was handed over to the Special Court by Liberia on June 2, 2003. See Special Court for Sierra Leone Press and Public Affairs Office, Press Release, “Special Court Obtains Bockarie’s Alleged Body” (2 June 2003), online: The Special Court for Sierra Leone <http://www.sc-sl.org/Press/pressrelease-060203.html>. The indictment against Koroma remains. His whereabouts are a frequent topic of discussion in Sierra Leone as many people believe he will return once the UN and the Special Court leave.

21 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 10 at para. 10.

22 See Leslie Lang, “The Special Court for Sierra Leone: Media Coverage of Charles Taylor,” Report prepared for the War Crimes Studies Center at the University of California at Berkeley, online: War Crimes Studies Center, U.C. Berkeley <http://socrates.berkeley.edu/~warcrime/>.

23 See *The Prosecutor against Charles Ghankay Taylor*, *supra* note 5; Kathy Ward “Might v. Right: Charles Taylor and the Sierra Leone Special Court” (2003) 11 No. 1 Hum. Rts. Brief 8.

24 Kathy Ward, *supra* note 23, cites a press release by the Special Court on June 4, 2003, stating that the Special Court received acknowledgment from a “senior official” (no such press release is presently on the Web site). However, when a BBC reporter on the ground in Accra questioned the Ghanaian Foreign Minister, Monie Captain, on the arrest warrant, he reportedly replied, “It’s not a problem—we don’t recognize that court.” He

public and the arrest warrant reportedly sent to Ghana, a surreal spectacle unfolded in Accra: Taylor, now an indicted war criminal, sat on stage in a conference room packed by Ghanaian police and army personnel, with the special representative of the United Nations and the Presidents of South Africa, Ghana, and Sierra Leone at his side. The indictment was never mentioned and Taylor received a police escort back to the airport, where he boarded a government plane for the return flight to Monrovia.²⁵

The seventeen-count indictment against Charles Taylor accused him of encouraging, supporting, and financing the RUF and the joint criminal enterprise between the RUF and the AFRC. The indictment alleged that Taylor trained, armed, and financed the armed insurrection and acted in concert with Foday Sankoh and other members of the RUF and AFRC in order to obtain access to the mineral wealth of Sierra Leone and to destabilize the State.²⁶ The indictment held Charles Taylor individually responsible pursuant to Article 6(1) of the *Statute of the Special Court for Sierra Leone* for planning, instigating, ordering, and aiding and abetting in the planning, preparation, or execution of the crimes. In addition, or in the alternative, the indictment alleged that Taylor was individually responsible under the doctrine of command responsibility pursuant to Article 6(3).²⁷ The counts included terrorizing the civilian population, imposing collective punishment on the civilian population, unlawful killings, sexual and physical violence, abductions, forced labour, attacks on UNAMSIL personnel, and the use of child soldiers.

The civil war in Liberia continued after Taylor returned from Ghana. The international community—particularly the United States, which debated sending peacekeepers into Monrovia—renewed diplomatic and political negotiations with the embattled President. It was clear to the international community that peace could not be had while Taylor remained in power. At the peace conference in Accra, Taylor had stated that he was prepared to resign only if certain conditions, such as the installation of a peacekeeping force, were met. On August 11, 2003, Charles Taylor resigned the Presidency and boarded a Nigerian government plane bound for Lagos.²⁸ A West African peacekeeping force entered Liberia followed by a limited deployment of U.S. Marines and a UN peacekeeping force in October. The details of the exile agreement were not made public, but it is generally taken to have included a ban on interfering in Liberian politics and, as some Nigerian officials have asserted, an agreement that the international community would not pressure Nigeria to turn Taylor over to the Special Court.²⁹

further explained that he had not been in his office all day and “as much as I respect the BBC, I can’t arrest people on their reports.” See Paul Welsh, “Liberian Leader’s Strange Day in Ghana” *BBC News* (5 June 2003), online: BBC News <http://news.bbc.co.uk/2/hi/africa/2965110.stm>.

²⁵ Welsh, *ibid.*

²⁶ For an excellent study of the link between Charles Taylor and Sierra Leone’s diamonds see “Following Taylor’s Money: A Path of War and Destruction,” Coalition for International Justice (May 2005), online: Coalition for International Justice (www.cij.org). (The Coalition for International Justice closed on March 31, 2006.)

²⁷ *The Prosecutor against Charles Ghankay Taylor*, *supra* note 5 at paras. 26 and 27. The indictment was amended to eleven counts (from the original seventeen) on March 16, 2006, perhaps in anticipation of Nigeria’s consent to repatriate Taylor to Liberia, and in consideration of the need for a more streamlined and focused trial.

²⁸ For an summary of the events leading up to Taylor’s resignation and the situation in Liberia in the summer of 2003, see online: CNN International <http://www.cnn.com/SPECIALS/2003/liberia/>; see also *Report of the Secretary-General to the Security Council on Liberia*, UN SCOR, UN Doc.S/2003/875, online: <http://www.un.org/Docs/sc/sgrep03.html>.

²⁹ Ward, *supra* note 23.

Nigeria's decision to allow Taylor to go into exile was a political deal made with the broad support of the international community. While many human rights groups and legal scholars have criticized the decision for perpetuating the environment of impunity surrounding high-ranking State officials and for undermining the work of the Special Court, it is clear that most actors involved felt it was simply the price to be paid for bringing peace to Liberia. Even the Prosecutor for the Special Court, David Crane, supported the decision, saying "it was the right thing at the time."³⁰ The international community has been reluctant to criticize Nigeria for accepting Taylor, despite pressure from many non-governmental organizations. In fact, the Security Council recently thanked Nigeria for providing for the "temporary stay of former President Charles Taylor." The Security Council's use of the word "temporary" implies that Taylor's stay in Nigeria was never seen as permanent.

II: CHARLES TAYLOR AND HEAD OF STATE IMMUNITY

Even while Charles Taylor was negotiating the terms of his resignation in the summer of 2003 he took legal action against the indictment and arrest warrant issued against him. On July 23, 2003, Taylor filed a motion with the Special Court for an order quashing the indictment and declaring the arrest warrant and order of transfer null and void.³¹ Two weeks later, on August 4, 2003, the Republic of Liberia brought an application before the ICJ to bring proceedings against Sierra Leone in respect of the indictment and arrest warrant.³² In both motions, the applicant asserted that as the incumbent President of Liberia, Charles Taylor enjoyed absolute immunity from criminal prosecution and that the Special Court's attempt to impose legal obligations outside of Sierra Leone violated the principle of the sovereign equality of States.³³

Head of State Immunity

The doctrine of Head of State immunity is vague and unsettled.³⁴ There appears to be a clear divergence between treaty and customary international law with respect to the concept and rationale for Head of State immunity. Recent case law increasingly recognizes it as a defence, while the statutes of many courts—from the International Military Tribunal, to the ad hoc tribunals for the former Yugoslavia and Rwanda, to the ICC—explicitly remove such immunity defences.³⁵ Even within

³⁰ Lang, *supra* note 22 at 10.

³¹ *Prosecutor v. Charles Ghankay Taylor* (2004) Decision on Immunity From Jurisdiction, Case No. SCSL-2003-01-I, (Special Court for Sierra Leone, Appeals Chamber) online: The Special Court for Sierra Leone <http://www.sc-sl.org>.

³² International Court of Justice, Press Release, 2003/26, "Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President" (5 August 2003), online: International Court of Justice http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipress2003/ipresscom2003-26_xx_20030805.htm; Stephane Bourgon and Muriel Cauvin "Judgments and Decisions Issued by International Courts and other International Bodies on Human Rights in 2003" (2005) 3 J.I.C.J. 296 at 297. To the author's knowledge, the suit was never recognized by Sierra Leone.

³³ See *Prosecutor v. Charles Ghankay Taylor*, *supra* note 31 at para. 7.

³⁴ Kerry Creque O'Neill, "A New Customary Law of Head of State Immunity?: Hirohito and Pinochet" (2002) 38 Stan. J. Int'l L. 289.

³⁵ Paul J. Toner, "Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense" (2004) 108 Penn State L.R. 899 at 926.

these statutory instruments there is a further divergence as to the extent of the immunity. While the statutes of the ICTY and ICTR retain a limited procedural immunity, the ICC's enabling statute removes procedural immunity completely.

The international community's interests in securing peace on the one hand and promoting responsibility for international crimes and respect for human rights have often conflicted in practice. The doctrine of Head of State immunity is no exception in this regard: the international community has extended impunity to perpetrators of some of the most serious international crimes in order to secure peace and stability.

Historically, Head of State immunity derives from the doctrine of sovereign immunity. The Head of State in her person is equated with the State itself and is therefore granted the same privileges and immunities accorded to the State.³⁶ In many respects, Head of State immunity is analogous to the diplomatic immunity enjoyed by members of diplomatic missions in foreign countries.³⁷ Prior to the decision of the ICJ in *Congo v. Belgium*, it was thought to apply to no more than five hundred individuals; with the extension of the doctrine by the ICJ to Ministers for Foreign Affairs and, arguably, other high-ranking government ministers, the number may be much larger.³⁸

Head of State immunity has grown from its roots and can no longer be considered an absolute immunity. Contemporary international law draws a distinction between immunity *ratione materiae* (functional immunity) and immunity *ratione personae* (personal immunity).³⁹ In the former, the act is imputed to the State and not to the individual so that this species of immunity constitutes a substantive defence to a charge. Functional immunity covers the official *acts* of most State agents or other persons who act on behalf of the State and outlives the discharge of official functions. Functional immunity can be invoked in any legal proceeding and may protect State officials not entitled to personal immunity.⁴⁰

Personal immunity, by contrast, is a procedural defence that renders the State official absolutely immune from civil or criminal jurisdiction. It attaches to the *person* by virtue of the position they hold (primarily diplomatic agents, Heads of State, Heads of Government, and Ministers for Foreign Affairs) and therefore covers all acts—private or official—committed during office or prior to assuming office. However, personal immunity only attaches to the individual for as long as the person remains in office; once she ceases to hold the position, personal immunity no longer applies.⁴¹ Personal and functional immunity will often coexist and overlap. For example, while an individual is in office, she is subject to personal immunity by virtue of the office she holds, and, in addition, any official acts she commits—subject to

36 Hazel Fox, *The Law of State Immunity* (New York: Oxford University Press, 2002) at 437; see also O'Neill, *supra* note 34 at 291.

37 O'Neill, *supra* note 34 at 292. The analogy, O'Neil demonstrates, is a useful starting point but breaks down when one considers the nature and scope of the duties, the private-official act dichotomy, and the officials' respective vulnerabilities.

38 Fox, *supra* note 36 at 421–423.

39 See generally Cassese, *supra* note 12 at 266; see also Fox, *supra* note 36 at 429–431.

40 Dapo Akande, "International Law Immunities and the International Criminal Court" (2004) 98 A.J.I.L. 407 at 412.

41 *Ibid.* at 410.

one exception—are protected by functional immunity, even after she leaves office.⁴² Once she has left office, by contrast, only functional immunity will apply.

The doctrine of Head of State immunity exists for the same reason that the doctrine of sovereign immunity exists: one sovereign State does not adjudicate on the conduct of a foreign State.⁴³ The prosecution of a Head of State or other State agent for official conduct while in office is tantamount to trying and prosecuting the state itself and thus disregarding its sovereignty.⁴⁴ Similarly, personal immunities prevent States from interfering in the internal organization of other States for reasons unrelated to the objectives of international criminal justice. More importantly, personal immunities ensure that a State official can effectively perform her duties while present in a foreign State, without fear of harassment.⁴⁵ In turn, this helps ensure the meaningful participation of States in the international system, promotes stability, and maintains peace. In fact, the personal inviolability of a Head of State, diplomat or Minister for Foreign Affairs is so essential to the maintenance of peace that it has led one commentator to argue persuasively that it must prevail over other values such as individual responsibility for “core crimes” and grave violations of human rights.⁴⁶

By contrast, it is now well established that there is a customary rule of international law lifting functional immunities for war crimes and crimes against peace and humanity as well as torture and other core crimes such as genocide.⁴⁷ The rule applies to *most incumbent* State officials—except high-ranking State officials protected by personal immunity—and *all former* State officials, including Heads of State.⁴⁸ The rationale for such a rule is simple: the reasons for which immunity is granted do not apply to international crimes, which can never be considered official acts, because no State can officially commit crimes of this nature.⁴⁹ The source of this exception is Article 7 of the Charter of the International Military Tribunal, which states that an accused’s official position cannot free her from responsibility nor mitigate her punishment.⁵⁰ Similar provisions have been included in the statutes of the ICTY,

42 Cassese, *supra* note 12 at 267.

43 This is a fundamental principle of international law recently restated in *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97 at para. 38 [*Pinochet*].

44 Steffen Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute” (2001) 12 *Crim. L.F.* 429 at 431.

45 See Cassese, *supra* note 12 at 293; Akande, *supra* note 40 at 410; *Congo v. Belgium*, *supra* note 3 at para. 53–54. The Institut de Droit International, “Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law” Adopted Vancouver Session 2001, online: Institut de Droit International http://www.idi-iiil.org/idiE/navig_chon1993.html, wrote in their preamble:

Affirming that special treatment is to be given to a Head of State or a Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole.

46 See Wirth, *supra* note 44 at 444–445.

47 See generally Cassese *supra* note 12 at 267–271; See also Steffen Wirth, “Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v. Belgium* Case” (2002) 12 *E.J.I.L.* 877 at 888.

48 See Wirth, *ibid.* where the author convincingly argues that this rule still applies despite the *obiter dictum* in the ICJ’s decision in *Congo v. Belgium* that former Ministers for Foreign Affairs enjoy immunity even for serious international crime unless they acted in a private capacity.

49 Akande, *supra* note 40 at 414.

50 Article 7 of The Nuremberg Charter, 1945, Charter of the International Military Tribunal states: “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.”

the ICTR, the ICC, and the Special Court for Sierra Leone. Moreover, the UN General Assembly unanimously affirmed both the principles and the judgments of the Nuremberg Tribunals in 1946.⁵¹ The Supreme Court of Israel noted this principle as part of the law of nations in the *Eichmann* decision, which held that State agents acting in their official capacity are not immune from criminal liability if they commit international crimes.⁵² More recently the House of Lords in *Pinochet* held that torture, as a *ius cogens* international crime, could never be considered an official act to which functional immunity attached.⁵³ Together these statutory provisions, resolutions, and national cases indicate the crystallisation of a customary rule.⁵⁴

A similar customary rule lifting personal immunities for international crimes, however, does not yet exist in international law. In fact, before national courts, high-ranking State agents entitled to person immunity remain inviolable and immune from prosecution on the strength of the customary rule on personal immunities.⁵⁵ While the House of Lords held that Pinochet could not be protected by functional immunities as a former Head of State, it confirmed that had he still been president, he would have enjoyed personal immunity for all public and private acts, even if they constituted international crimes.⁵⁶ Around the same time, a Spanish court held that Fidel Castro, as the sitting Head of State of Cuba, could not be prosecuted for international crimes under Spanish law.⁵⁷ Two years later, France's Court of Cassation of Paris accepted a plea of immunity and declined jurisdiction on a charge of murder brought against Muammar al-Qaddafi for complicity in the bombing of a passenger airplane on the basis of Head of State immunity.⁵⁸ In 2001, a United States court dismissed a civil law suit against President Mugabe of Zimbabwe and his Minister for Foreign Affairs and held that they were immune from lawsuit as well as service of the process, again based on sovereign immunity.⁵⁹ Finally, in 2003, the Belgian Court of Cassation dismissed a prosecution brought against Ariel Sharon because, as Prime Minister of a foreign State, he enjoyed immunity from prosecution.⁶⁰ Thus, the ICJ was correct in concluding in *Congo v. Belgium* that there is no

51 UN GAOR, 1st Sess., UN Doc. Res. 95 (1946), online: United Nations General Assembly <http://www0.un.org/documents/ga/res/1/ares1.htm>; see generally Cassese, *supra* note 12 at 269.

52 *Eichmann Case* (1961) 36 I.L.R. 277 (Israel Sup. Ct.); Cassese, *supra* note 12 at 268–269.

53 *Pinochet*, *supra* note 43 at paras. 46–47; O'Neill, *supra* note 34 at 309. The holding of the Lords in *Pinochet* that international crimes cannot be considered official acts may be a means of reconciling the troubling *obiter dictum* of the ICJ in *Congo v. Belgium* at para. 61. See below.

54 Cassese, *supra* note 12 at 270. See also Article 13(2) of the Institut de Droit International, "Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law," *supra* note 43, where the Institut states that former Heads of State "may be prosecuted and tried when the acts alleged constitute a crime under international law..." and Principle 5 of the Princeton Principles on Universal Jurisdiction (New Jersey: Program in Law and Public Affairs and Woodrow Wilson School of Public and International Affairs, Princeton University, 2001), online: Program in Law and Public Affairs, Princeton University <http://www.princeton.edu/~lapa/univ Jur.pdf>, which reads: "With respect to serious crimes under international law as specified in Principle 2(1), 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."

55 Cassese, *supra* note 12 at 271.

56 *Pinochet*, note 43 at para. 39; Wirth, *supra* note 47 at 884; Antonio Cassese "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case" (2002) 13 E.J.I.L. 853 at 866.

57 Order (auto) of 4 March 1999 (no.1999/2723) cited in Cassese, *supra* note 12 at 292.

58 Salvatore Zappala, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation" (2001) 12 E.J.I.L. 595.

59 *Tachiona v. Mugabe*, (2001) 169 F. Supp. 2d 259; 2001 U.S. Dist. LEXIS 18712 (QL). See also Daryl A. Mundis, "Tachiona v. Mugabe: A US Court Bows to Personal Immunities of a Foreign Head of State" (2003) 1 J.I.C.J. 462.

60 Antonio Cassese, "The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and Others* case" (2003) 1 J.I.C.J. 437.

exception under customary international law to the rules according immunity and inviolability to incumbent Ministers for Foreign Affairs, and by extension Heads of State, where they are suspected of having committed war crimes or crimes against humanity.⁶¹

All of these cases dealt with Heads of State indicted or sued before the national courts of foreign States based on various applications of universal jurisdiction. If the Special Court for Sierra Leone were a domestic court, there would be no sound basis upon which one could argue that Charles Taylor was not immune from its jurisdiction based on his status as President of Liberia. The gravity of the crimes alleged is irrelevant to his *personal* immunity; as long as Taylor remained President, the Special Court had no jurisdiction over him whatsoever. However, the characterization of the Special Court as a national court of Sierra Leone is inaccurate. While it is not an international court in the sense of the ICTY or the ICTR, the Special Court is more like an international court than a domestic court of Sierra Leone. It was this very point that the Appeals Chamber of the Special Court seized on when they held that Charles Taylor did not enjoy personal immunity from its jurisdiction. In doing so, it followed a questionable *obiter dictum* of the ICJ in the *Congo v. Belgium* decision, wherein the Court stated that incumbent or former officials who enjoy personal immunity may be prosecuted before certain international courts.⁶² It is necessary, therefore, to consider the reasoning of the ICJ in this regard before analysing the Special Court's conclusion that Taylor did not enjoy personal immunity.

The *Congo v. Belgium* Decision

In *Congo v. Belgium*, the ICJ was asked to resolve a dispute arising from an arrest warrant issued by a Belgian judge against the Minister for Foreign Affairs for the Democratic Republic of the Congo, Mr. Abdulaye Yerodia, for the alleged commission of international crimes. The ICJ held that due to the nature of her duties, a Minister for Foreign Affairs is one of the categories of State officials protected by personal immunity. Ministers for Foreign Affairs are inviolable and immune from foreign jurisdiction, as any interference with them would prevent them from exercising the functions of their office.⁶³ The ICJ held that the mere issuance of a warrant for Mr. Yerodia's arrest violated his personal immunity. The conclusion of the ICJ has been largely celebrated, but the analytical road that the court traveled and two of the exceptions to personal immunity that it articulated have been widely criticized.

Notably absent in the reasoning of the ICJ in *Congo v. Belgium* is any distinction between personal and functional immunities.⁶⁴ The ICJ correctly concludes that immunity from jurisdiction is procedural in nature and does not provide the State official with a substantive defence that would exonerate her from criminal responsibility.⁶⁵ This statement does highlight the implications of the two different immunities

61 *Congo v. Belgium*, *supra* note 3 at para. 58. See also Article 2 of the Institut de Droit International, "Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law," *supra* note 45: "In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity."

62 *Congo v. Belgium*, *supra* note 3 at para. 61.

63 *Ibid.*

64 See Cassese, *supra* note 56.

65 *Congo v. Belgium*, *supra* note 3 at para. 60.

and, given that the case involves a warrant issued against an incumbent Minister for Foreign Affairs, it is reasonably clear that the holdings of the Court in the *Congo* decision apply to the personal immunity of State officials. However, the Court's failure to explicitly distinguish between personal and functional immunities weakens the analytical clout of the decision; while the outcome is sound, the opportunity to clarify and sharpen the law of personal immunities was not fully seized.

The bulk of academic criticism of the *Congo* decision has focused on the four exceptions to personal immunity enumerated by the Court.⁶⁶ The first two exceptions—that personal immunities do not prevent the prosecution of officials in their own country, and that a State may waive the personal immunity of its own officials—are sound. However, the Court went on to state that former officials may be prosecuted by foreign States for acts committed in a “private capacity” during the official's tenure.⁶⁷ Finally, the Court says incumbent or former officials “may be subject to criminal proceedings before certain international courts, where they have jurisdiction.”⁶⁸ This is not only inconsistent with the customary rule of international law lifting functional immunities for international crimes, but the Court also declined to refer to, let alone analyze, the existence of any such rule. The Court then goes on to cite as examples the ICTY, the ICTR, and the ICC (specifically, Article 27(2) of the Rome Statute).

The principles enunciated in these last two statements are neither well reasoned nor easily reconciled with the existing law of immunity.⁶⁹ The distinction between official and private acts, if accepted as correct, could stall the development of international criminal law, which has been moving in an opposite direction since World War II, and dilute the practical importance of the *Pinochet* decision.⁷⁰ To adopt the ICJ's reasoning in the *Congo* case would make high-ranking State officials who usually plan and order international crimes immune to prosecution by virtue of their status (provided they acted “officially”) while making low-ranking officials who actually carry out the order subject to prosecution.⁷¹ It would seem reasonable to argue that international crimes are rarely, if ever, committed in a private capacity.⁷² Thus, one way to reconcile the decision in *Congo* with the existing law of State immunity would be to adopt the reasoning in *Pinochet* that international crimes can never be official acts. As a consequence, State officials would be immune for official acts provided that those acts do not constitute core crimes. While this may achieve

66 *Ibid.* at para. 61.

67 *Ibid.* at para. 61

68 *Congo v. Belgium*, *supra* note 3 at para. 61:

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

69 Wirth, *supra* note 45 at 891.

70 Paola Gaeta, “Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hisense Habre Case” (2002) 1 J.I.C. J. 186 at 192.

71 *Ibid.* at 190.

72 Cassese, *supra* note 56 at 868. Charles Taylor may, in fact, be one of the rare cases in which one could argue that his crimes were committed in his private capacity to generate personal wealth from Sierra Leonean diamonds. However, in the author's opinion, this is an overly simple characterization of both the war and Taylor's motivations.

the same result as a rule lifting functional immunity for international crimes, it is not explicit in the Court's judgment and there is no compelling reason to prefer a "private acts" rule over the more elegant and simple rule lifting functional immunity for international crimes.

As discussed below, the ICJ's statement that personal immunities would not prevent the prosecution of an incumbent Minister for Foreign Affairs before certain international courts, provided the courts have jurisdiction, was the basis upon which the Appeals Chamber of the Special Court for Sierra Leone held that Charles Taylor did not enjoy personal immunity. As such, it is the first application of *Congo v. Belgium* and, given the fact that it denied immunity to a sitting Head of State, will be considered a significant contribution to international criminal law. Those who fight to end impunity and promote individual responsibility might eagerly celebrate the decision, solely because they desire the result. But celebrating the end of impunity—or perhaps more accurately, the end of personal immunity for sitting Heads of State—is premature and should be resisted. In relying on the suspect elements of the ICJ's decision in *Congo v. Belgium*, the Appeals Chamber replicated all of its frailties and ambiguities.⁷³ The decision displays confusion over certain areas of international law and perpetuates the uncertainty surrounding the present state of the law on international immunities—all of which is even more regrettable when one considers that the same result could have been achieved through less controversial and more legally coherent reasoning.⁷⁴

III: THE DECISION ON THE IMMUNITY OF CHARLES TAYLOR

The Appeals Chamber's decision turned primarily on the legal status of the Special Court.⁷⁵ The Chamber highlighted the involvement of the Security Council in the foundation of the Special Court and the agreement between the UN and Sierra Leone. The absence of a Security Council resolution under Chapter VII was not, on its own, determinative of the Special Court's status. As Sarah Nouwen has argued, the finding that the Special Court is an international criminal court is sound, but the consequences the Appeals Chamber attached to that finding are contentious.⁷⁶ It may be an international court, but that does not mean its rulings are binding on all the members of the UN or that, solely by virtue of it being international, the Court can disregard the President of Liberia's immunity. To achieve that result it must be established in law that Liberia has been bound by, or otherwise consented to, the jurisdiction of the Special Court and that its constitutive instrument removes the customary rule of personal immunity for Heads of State.

The Appeals Chamber connected the unavailability of personal immunity for Taylor with the international nature of the tribunal.⁷⁷ The attractiveness of this line of

73 Sarah M. H. Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued" (2005) 18 *Leiden J. Int'l L.* 645.

74 Zsuzsanna Deen-Racsmany, "Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity" (2005) 18 *Leiden J. Int'l L.* 299.

75 *Prosecutor v. Charles Ghankay Taylor*, *supra* note 31 at paras. 34–42.

76 Nouwen, *supra* note 73.

77 Micaela Frulli, "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?" (2004) 2 *J.I.C.J.* 1118 at 1122.

reasoning is obvious: an international court would not, like a domestic court, violate the principle of sovereign immunity that one State does not adjudicate on the conduct of another State. Since international courts are created by the international community and not by the actions of any one State, the principle is not violated. Immediately after citing the ICJ's *obiter dictum* in the *Congo v. Belgium* decision, the Appeals Chamber endorsed this exact line of reasoning when it wrote:

A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, 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.⁷⁸

According to this view the indictment against President Taylor could be readily distinguished from *Congo v. Belgium*, which involved the issuance of an arrest warrant from a domestic court.

This analysis, while initially persuasive, is problematic and illustrative of the perils of relying on the law as stated by the ICJ in the *Congo v. Belgium* decision. Should it matter that the prosecuting State is attempting to exercise its jurisdiction unilaterally or through some collective body to which the state has not consented?⁷⁹ If two countries—or a State and an international organization—established a treaty court between them, would its characterization as “international” be enough to allow it to disregard the rights and privileges enjoyed at customary law by a third State?⁸⁰ Surely the sovereign equality of a State not party to such a court would be violated if the court attempted to exercise jurisdiction over that State's highest officials or Head of State.

The difficulty stems from the Appeals Chamber confusion between the international nature of the Special Court and its legal foundation. While there is no doubt that the Special Court has many of the features and characteristics of an international court, its legal foundation is that of an agreement between two parties—Sierra Leone and the UN.⁸¹ A fundamental principle of international law is that a treaty only binds the parties to the treaty.⁸² Since the UN is an international organization with independent legal personality greater than the sum of its members, the agreement between the UN and Sierra Leone is binding on the organization itself and not its members, who remain third parties to the agreement.⁸³

However, the Appeals Chamber conceived of the agreement between the United

78 *Prosecutor v. Charles Ghankay Taylor*, *supra* note 31 at para. 53.

79 Akande, *supra* note 40 at 417.

80 Nouwen, *supra* note 73 at 656

81 Frulli, *supra* note 77 at 1123.

82 *Pacta tertiis nec nocent nec prosunt*. See the Article 26 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331.

83 Frulli, *supra* note 77 at 1124; Deen-Racsmay, *supra* note 74 at 311; Nouwen, *supra* note 73 at 657 wrote: “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 nature of the UN.” See also *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. Reports 174.

Nations and Sierra Leone as an agreement between all members of the United Nations and Sierra Leone.⁸⁴ The Appeals Chamber reasoned that the UN Security Council identified the situation in Sierra Leone as a threat to international peace under Article 39 of the UN Charter, created the Special Court pursuant to Article 41 of the UN Charter, and was thus empowered to call upon member States to aid in the implementation of the Special Court. Therefore, the Appeals Chamber concluded, when “carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations.”⁸⁵ Essentially, the Appeals Chamber attempted to establish the legal basis of the Special Court within Chapter VII, implying it was a measure binding upon all member States.

With respect, the Security Council did not create the Special Court by way of a resolution as it did the ICTY and the ICTR; the Security Council merely authorized the Secretary-General to negotiate and enter into an agreement with Sierra Leone for the creation of the Special Court. In doing so the Security Council never explicitly invoked Chapter VII. The language employed in Resolution 1315 did not use classic Chapter VII verbs such as “demand” or “shall” and fell short of “calling upon” States to take any measures.⁸⁶ In fact, the resolution simply “requests” and “recommends.”⁸⁷ There was no apparent intention in any pertinent Security Council resolution to create any binding effect. The establishment of the Special Court is more appropriately compared to classical, consensual peacekeeping operations, which are generally constituted under Chapter VI or somewhere between Chapters VI and VII.⁸⁸ Finally, if the Special Court was truly created through a Chapter VII resolution, or at least something akin to one, the Appeals Chamber elected not to resolve the issue of Taylor’s immunity on that basis. If the Appeals Chamber had established the Special Court as an international criminal court created within the framework of Chapter VII, it could have simply relied upon this as the basis for rejecting Taylor’s claim.⁸⁹ But the Appeals Chamber dismissed the claim based on the distinction between international and national criminal courts made by the ICJ in *Congo v. Belgium*.

A great deal of the difficulty with the reasoning of the Appeals Chamber can be attributed to the fact that the *obiter dictum* of the ICJ was either an incomplete or imprecise statement of the law. It is unclear exactly what the ICJ had in mind; was its intention to pronounce that immunities are irrelevant before all international courts? If one emphasizes the use of phrases such as “certain international courts,” “established pursuant to Security Council resolutions under Chapter VII,” and “statute expressly provides” then such a far-reaching conclusion is not easily reached.⁹⁰ As argued above, a court cannot remove rights and privileges enjoyed by third parties solely by virtue of the fact that it is “international.” Two additional

84 *Prosecutor v. Charles Ghankay Taylor*, *supra* note 31 at para. 38.

85 *Ibid.* at para. 38.

86 Deen-Racsmany, *supra* note 74 at 307.

87 See UN Doc.S/RES/1315 (2000), *supra* note 6.

88 Deen-Racsmany, *supra* note 74 at 308. Deen-Racsmany also makes an excellent point at 311 that a contractual waiver of immunities pertaining to officials of its member States other than Sierra Leone may be in violation of Article 2(7) of the UN Charter and thus *ultra vires* the Security Council, unless it is acting under Chapter VII.

89 Frulli, *supra* note 77 at 1123.

90 Deen-Racsmany, *supra* note 74 at 316.

elements are required:

The statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) that the state of the official concerned is bound by the instrument removing the immunity. Therefore, a senior serving state official entitled to immunity *ratione personae* (for example, a head of state) is entitled to such immunity before an international tribunal that the state concerned has not consented to.⁹¹

Therefore, if an international court is going to remove a right or privilege enjoyed by a state or an individual at customary international law, two requirements must be met: first, the State must be brought into the regime of that court, and secondly, that regime must explicitly provide for the removal of that right or privilege.

It has already been argued that the first branch of that test cannot be satisfied in this case—Liberia has not consented to the Special Court and is not, absent a resolution under Chapter VII, bound by the agreement between the UN and Sierra Leone. That aside, assuming Liberia has, one way or another, been brought into the international regime created by the Special Court, does that regime provide for the removal of the personal immunity enjoyed by the President of Liberia at customary international law? The question is a live one that has sparked divergent opinions.

Article 11 of the agreement between the UN and Sierra Leone endows the Special Court with an international legal personality. Since its statute compels it to apply international law (except as expressly derogated from), the Special Court must apply the customary international legal rule affording personal immunity for incumbent Heads of State. Therefore, if the immunities available at customary law are not going to apply before the Special Court, the Statute of the Court must remove them. Article 6(2) of the Statute of The Special Court for Sierra Leone states: “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.”⁹² This provision is nearly identical to Article 7 of the Nuremberg Charter, Article 7(2) of the ICTY statute, Article 6(2) of the ICTR statute, and Article 27(1) of the Rome Statute.⁹³

Article 6(2) of the Special Court’s statute is a replication of the “classic provision” limiting the immunity conferred upon Heads of State and other high-ranking officials it is unclear whether the provision removes both functional and personal immunity, or just the former. By contrast, the Rome Statute contains two separate immunity provisions: one emphasizing criminal responsibility and a new provision regarding procedural immunity. Article 27 of the Rome Statute states:

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

91 Akande, *supra* note 40 at 418.

92 Statute of the Special Court for Sierra Leone, *supra* note 1.

93 See Nouwen, *supra* note 73 at 655.

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.⁹⁴

The immunity provisions in the Rome Statute are significantly more robust than the “classic provision.” They explicitly refer to two different types of immunities - immunity from criminal responsibility (*ratione materiae*) and special procedural rules (*ratione personae*). The inclusion of a “revolutionary” two-part immunity provision in the Rome Statute has led some scholars to conclude that provisions like Article 6(2) of the Special Court’s statute cover only functional immunity.⁹⁵ Thus, it is possible that even if Liberia had been bound by the agreement establishing the Court, Charles Taylor would have retained personal immunity as a sitting Head of State under customary law.

Sierra Leone’s domestic legislation ratifying the agreement with the UN, the *Special Court Ratification (2002) Act*, has a significantly different provision. Article 29 states: “The existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court.”⁹⁶ Arguably, this provision goes further than the Statute of the Special Court by removing procedural immunity for State officials and dealing explicitly with arrest and detention. Of course, as domestic law, it is only applicable in Sierra Leone. While beyond the scope of this paper, it is interesting to note that this provision may remove the personal immunity enjoyed by President Kabbah, who has been President of Sierra Leone since his election in 1996. President Kabbah has not been indicted by the Special Court, but three high-ranking officials of Sierra Leone’s Civil Defence Force are currently on trial.⁹⁷ It is difficult to believe that Kabbah was not involved in the planning and implementation of the government resistance to the RUF and AFRC. While there can be little doubt that arresting President Kabbah for war crimes would be a politically catastrophic decision, it may well be within the legal capacity of the Special Court.

If all that the “classic provision” in Article 6(2) does is remove functional immunities for former State officials, it is redundant—or more accurately, it merely codifies customary international law. A former State official facing prosecution for acts committed in a private capacity or acts constituting core crimes has no functional immunity with regard to those crimes, and thus an interpretation that limits the effect of the “classic provision” to functional immunity would not alter customary law. Some scholars argue that the strictness of the provision provides for a broader interpretation, which could prevent defendants from invoking personal immuni-

94 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 at 106.

95 See Nouwen, *supra* note 73 at 661; Deen-Racsmany, *supra* note 74 at 315.

96 *Special Court Agreement 2002 (Ratification) Act*, *supra* note 13.

97 Sam Hinga Norman, former Deputy Defence Minister and later Minister of Internal Affairs; Moinina Fofana is alleged to have been National Director of War for the Civil Defence Forces. Allieu Kondewa is alleged to have been High Priest of the Civil Defence Forces. Each individual faces eight counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law. See online: The Special Court for Sierra Leone <http://www.sc-sl.org/CDF.html>.

ties.⁹⁸ Such a literal interpretation of the provision is possible and one could cite it as a general rule to the effect that the official position of a defendant may not be relied on as a bar to prosecution.⁹⁹

However, that position is problematic and is based on circular reasoning. The “classic provision” in the Nuremberg Principles adopted by the UN General Assembly gave rise to the State practice, subsequent codification, and adherence to the customary rule lifting functional immunity. So, while it is true that the contemporary use of this provision in the statutes of the ICTY, the ICTR, and the Special Court merely reflects customary law, it is because of their use and adherence to the provision that such a rule crystallized. To argue that the provision is now redundant, and therefore needs to be expanded, ignores the logic that if the provision was sufficiently broad to remove personal immunity for international crimes in its initial conception, then that too should have developed into a customary rule. A survey of State practice shows that it has not. Therefore, a State could argue that when it consented to a regime with this provision, it did not believe that the personal immunity of its officials had been discarded. The use of a more robust, two-part immunity provision in the Rome Statute could be construed as an explicit recognition by those States party to the ICC of the limited scope of the “classic provision” and of the effect that being a party to the ICC will now have on incumbent State officials.

The indictment of Slobodan Milošević while a Head of State has been cited by some as support for the emergence of a trend in international law to remove the personal immunities of Heads of State.¹⁰⁰ The indictment of Milošević was the first of its kind in the history of international criminal law. This was well known to both the prosecution and the judge who confirmed the indictment.¹⁰¹ Milošević’s indictment also supports an expansive reading of the “classic provision” (found in Article 7(2) of the ICTY Statute).¹⁰² While there is little doubt that Milošević’s indictment was unprecedented, the strict legality of the indictment has never been sanctioned by any judicial body, nor has Article 7(2) been held to remove the personal immunity for incumbent Heads of State. It is important to note that Milošević was no longer President when he was arrested and surrendered to the Hague. The Trial Chamber, while addressing Milošević’s preliminary objections, circumvented the difficult question of whether his indictment complied with international law or the ICTY Statute.¹⁰³ It qualified Milošević’s objection by characterizing the indictment as dealing with his status as *former* President and never ruled on the personal immunity

98 See Cassese, *supra* note 11 at 272. Prof. William Fenrick made a similar argument during a presentation of this paper at Dalhousie Law School on March 27, 2006, when he said that, in his opinion, the ICTY Courts would have no trouble interpreting such a provision to cover the personal immunities of incumbent Heads of State.

99 Akande, *supra* note 40 at 417.

100 Scott Grosscup, “The Trial of Slobodan Milošević: The Demise of Head of State Immunity And The Specter of Victor’s Justice” (2004) 32 Denv. J. Int’l L. & Pol’y 355.

101 International Criminal Tribunal for the Former Yugoslavia, Press Release, JL/PIU/403-E, (27 May 1999), online: United Nations International Criminal Tribunal for the Former Yugoslavia (www.un.org/icty/pressreal/p403-e.htm). The press release says: “As pointed out by Justice Arbour in her application to Judge Hunt, ‘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.’”

102 “The official position of any accused person, whether as Head of State of Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” *Statute of the International Tribunal*, ICTY, online: United Nations International Criminal Tribunal for the Former Yugoslavia <http://www.un.org/icty/legaldoc-e/index.html>.

103 Nouwen, *supra* note 73 at 665.

he enjoyed at the time of his indictment.¹⁰⁴ Nor did the Trial Chamber analyze Article 7(2) of the ICTY Statute beyond confirming its consistency with customary international law, which may be taken as dealing only with Milošević's criminal responsibility for acts committed while President. Therefore, the Milošević indictment is not a valid precedent for the indictment of incumbent Heads of State and is an unresolved anomaly in international criminal law.

By relying on the distinction between national and international courts laid down in *Congo v. Belgium*¹⁰⁵, the Appeals Chamber relied excessively on the international nature of the tribunal and failed to address the Special Court's legal foundation and the implications of that legal foundation. Liberia has never been brought into the regime of the Special Court and is thus not bound by its Statute. Moreover, even if Liberia had been, Article 6(2) of the Special Court's Statute does not remove the personal immunity of the President of Liberia; it only removes the functional immunity of former officials, eliminating a substantive defence for any acts committed during his or her tenure. However, the Appeals Chamber never drew the distinction between immunities *ratione material* and *ratione personae*, nor did it analyze customary international law and the possible effect of Article 6(2), concluding only that Article 6(2) was "not in conflict with any peremptory norm of general international law."¹⁰⁶ As in the Milošević decision, concluding that the provision did not conflict with customary law could only be correct if the Appeals Chamber was referring to functional immunity for former State officials, since no rule has developed lifting the personal immunity of Heads of State for international crimes.

The Special Court did not have Charles Taylor in its custody when it ruled on his immunity. He was no longer President of Liberia and was living in exile. Cancelling the indictment and the arrest warrant would not have prevented the prosecution from simply issuing a new one, as the personal immunity Taylor once enjoyed by virtue of his office was gone. The Appeals Chamber acknowledged as much in the last paragraph of its decision. It would have been preferable if the Appeals Chamber had examined the law on immunity, concluded that Taylor was personally immune as a Head of State, and ordered the indictment withdrawn. The Chamber could have gone on to cite the absence in customary international law of functional immunity for crimes of this nature and paved the way for a new indictment. Such an approach would have made a pre-emptive strike on any future claim for immunity, although such a claim would likely be unsuccessful.¹⁰⁷

IV: ARRESTING CHARLES TAYLOR

If Charles Taylor was personally immune from the Special Court's jurisdiction, then it follows that the indictment, arrest warrant, and request for his transfer from Ghana were all unlawful. In his application Taylor argued that the arrest warrant

104 *Prosecutor v. Slobodan Milošević* (2001) Decision on Preliminary Motions (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations International Criminal Tribunal for the Former Yugoslavia <http://www.un.org/icty/Milosevic/trialc/decision-e/1110873516829.htm> at paras. 26–34; See also Deen-Racsmany, *supra* note 74 at 316.

105 *Supra* note 3

106 *Prosecutor v. Charles Ghankay Taylor*, *supra* note 31 at para. 53.

107 It has been reported that after the charges against Taylor were read and prior to entering a plea, Taylor had an exchange with Judge Lussick in which he questioned the jurisdiction of the Court over him as the 21st President of Liberia. See Jalloh, *supra* note 1.

infringed on Ghana's sovereignty. The Appeals Chamber dismissed this part of Taylor's application, holding that this was Ghana's objection to make, and one that could not be heard before the Special Court.¹⁰⁸ The Appeals Chamber observed that since arrest warrants do not execute themselves, Ghana asserted its sovereignty by declining to execute the warrant. Finally, the Chamber concluded that even if Taylor was personally immune at the time of the indictment, and if he had succeeded in his application, the consequence would have been to compel the Prosecutor to issue a fresh warrant, since at the time of the decision Taylor had stepped down as President.¹⁰⁹

As of August 11, 2003, when Taylor resigned and went into exile, he no longer enjoyed personal immunity as President of Liberia. However, when the indictment was signed and the arrest warrant issued and transferred to Ghana, Taylor was still President. It is worth recalling that a similar situation arose in *Congo v. Belgium*, when Mr. Yerodia ceased to be Minister for Foreign Affairs during the proceedings but before the ICJ rendered its judgment. The ICJ, however, reached the opposite conclusion. It reasoned that given the nature and purpose of arrest warrants, its mere issuance violated the immunity Mr. Yerodia enjoyed by virtue of his position and "infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."¹¹⁰ If one recalls that the purpose of granting personal immunity to Heads of State and other officials is to ensure the effective performance of their duties—especially when travelling outside their countries—then the conclusion that an arrest warrant or indictment violates an official's immunity is a sensible one.

Charles Taylor is a perfect example. At the time of his indictment, he was in Ghana, albeit reluctantly, to attend high-level peace talks with other African Heads of State and government officials. If the indictment against Taylor had been made public, there is little chance he would have agreed to leave Liberia. Releasing the indictment the morning of the peace conference surprised and confused the Ghanaian authorities and prompted a stream of criticism from the African leaders in attendance.¹¹¹ The President of Ghana, John Kufuor, who was also the chairman of the Economic Community of West African States, was particularly upset. He publicly called for the withdrawal of the indictment and cancelled negotiations to have Foday Sankoh, who was sick, travel to Ghana for medical treatment.¹¹² Sankoh died a month later, leading one commentator to observe that Taylor's indictment became Sankoh's death warrant.¹¹³ Moreover, the agreement reached after the peace conference fell apart within weeks, once Taylor began back-peddalling on his promise to resign. This, in turn, led to renewed rebel attacks and frustrated the installment of peacekeepers.¹¹⁴ While the interests of justice and the rule of law were crucial, peace and an end to the humanitarian crisis in Liberia were felt to be higher priorities. The issuing of the indictment and arrest warrant made Taylor hesitant to leave Liberia, prejudiced the efforts of the international community to bring peace to Liberia, and

108 *Ibid.* at para. 57.

109 *Ibid.* at para. 59. Recall that personal immunity ceases to protect individuals after they leave office.

110 *Congo v. Belgium*, *supra* note 3 at para. 70.

111 Lang, *supra* note 22 at 3.

112 "ECOWAS Chairman Urges UN to Lift Taylor Indictment," online: The United Nations Integrated Regional Information Networks <http://www.irinnews.org>; See Lang, *supra* note 22 at 3.

113 Lang, *supra* note 22 at 3.

114 "ECOWAS Chairman Urges UN to Lift Taylor Indictment," *supra* note 111.

may have deprived the Special Court of an opportunity to try the notorious RUF leader, Foday Sankoh.

There was a further complication. Even if Ghana had wanted to, it is highly unlikely that it could have lawfully arrested Charles Taylor. As a sitting Head of State, Taylor was inviolable and absolutely immune from the criminal jurisdiction of Ghana; the country had no legal authority to disregard Taylor's personal immunity. The Special Court's Prosecutor at the time, David Crane, said that making the indictment public during the peace conference in Ghana was intended to bring attention to the case against Taylor and pressure him to resign: "with a stroke of the pen, Charles Taylor was stripped of his political power before the world."¹¹⁵ One might suspect that Crane was simply trying to save face. The indictment against Taylor was kept secret for three months; then, at the exact moment that Taylor's plane took off for Ghana, it was made public. Taylor was under a UN travel ban and rarely left Liberia. One might speculate that Crane saw his only chance to get Taylor and took it, hoping Ghana would feel obligated to assist.¹¹⁶

On the other hand, even if the prosecution believed that Taylor's position as Head of State did not preclude his indictment, they must have known, or at least suspected, that his position would prevent Ghana from arresting, detaining, and transferring Taylor to the Court. If they did not believe either Ghana legally could hand over Taylor or would politically choose to do so, then the timing of the indictment's release looks more like a political move. At the time, Crane told the BBC: "The timing of this announcement was carefully considered in the light of the important peace process begun this week. It is imperative that the attendees know they are dealing with an indicted war criminal."¹¹⁷ If politically motivated, the move may have been a questionable one. It was considered by some to be diplomatically naïve and unhelpful.¹¹⁸ Taylor had announced at the start of the conference that he was willing to resign if his resignation would bring peace. Taylor's war machine was suffering under a UN arms embargo and asset freeze, and the rebels were infiltrating Monrovia. This led some analysts to conclude that he was ready to leave and the indictment only prolonged the war.¹¹⁹ Upon his return from Ghana, Taylor demanded that the indictment against him be dropped as a condition of his resignation. Others point to Taylor's sordid past and his history of saying one thing and doing another in order to conclude that it is unlikely he would have abided by the peace agreement.¹²⁰

It is clear that there were competing international demands on (and for) Charles Taylor at the time of his indictment. The political process, supported by both African and Western leaders, wanted Taylor free and protected so he could participate in the peace talks and bring an end to the Liberian conflict. The legal process, however, had a rare opportunity to apprehend Taylor.¹²¹ From either perspective, the indictment's release was ineffective and possibly even counter-productive. Politically, it caused Taylor to renege on his agreement to step down and led to renewed fight-

115 Lang, *supra* note 22 at 3 and 10.

116 Ward, *supra* note 23.

117 "Arrest Warrant for Liberian Leader," June 4, 2003, online: BBC News <http://news.bbc.co.uk/1/hi/world/Africa/2961390.stm>.

118 Cockayne, *supra* note 16 at 636-637, footnote 101; See also Ward, *supra* note 23.

119 Ward, *supra* note 23.

120 *Ibid.*

121 *Ibid.*

ing in the capital during the summer of 2003.¹²² It is difficult to believe that Taylor was driven into exile because of the indictment. Why would Taylor be anxious to leave the safe haven of the Presidency? Taylor commenced legal action before both the ICJ and the Special Court in the summer of 2003 in an attempt to have the indictment dropped. In the end, Taylor only agreed to accept Nigeria's offer of asylum on the basis that he would not be turned over to the Special Court. It is likely that the indictment prolonged the war and made Taylor suspicious of leaving his position of relative safety in Monrovia.

Assuming there was doubt within the Prosecutor's Office as to the legality of the indictment and Ghana's ability to arrest the President of Liberia, it would have been more strategic to keep the indictment sealed until Taylor had resigned. Then his personal immunity would have disappeared, and a foreign State (such as Ghana or Nigeria) could have lawfully arrested him. While it is debatable whether a foreign State would have exercised such power, there would have been no legal hurdle of *ratione personae* to overcome. Furthermore, such a course would have avoided the complication involved in an exile agreement stipulating that Nigeria would not turn Taylor over to the Special Court. Nigeria has remained good on its word that it would only consider surrendering Taylor at the request of a democratically elected Liberian President.

The primary duty and responsibility of the Prosecutor is legal, not political. It would be naïve to suggest that politics are not considered in the prosecution of war crimes. However, the Special Court is not adequately equipped to pursue politics and diplomacy. In a comprehensive evaluation of the Special Court, James Cockayne concludes that as an institution, hybrid courts are unable to secure funding, cooperation, or support from other States in an effective manner.¹²³ In fact, Cockayne concludes, the problem with the Special Court is structural.¹²⁴ The primary source of this structural failure stems from the absence of a Chapter VII mandate.¹²⁵ From such a mandate flow financial support, judicial cooperation, and State assistance; Chapter VII powers send a "signal that the international community is serious about accountability in a particular situation, and give[s] a tribunal diplomatic clout."¹²⁶ Moreover, tribunals like the Special Court do not have diplomatic staff and, once their umbilical cord with the UN is severed, have little recourse to the Security Council for assistance.¹²⁷ Finally, such tribunals involve the UN in both peace and justice enterprises in the same country at the same time.¹²⁸

A modest staff dedicated to working the diplomatic channels and scouring the political landscape might have contributed a great deal to the Special Court's attempts to secure Charles Taylor's attendance. The manner in which the indictment was released was clumsy: it was dropped off at the doorstep of Ghana's embassy and

122 For a summary of the events in the summer of 2003, including the involvement of U.S. Marines, see online: CNN International <http://www.cnn.com/SPECIALS/2003/liberia/>.

123 Cockayne, *supra* note 16 at 634–639.

124 *Ibid.* at 636.

125 *Ibid.* at 636.

126 *Ibid.* at 636.

127 In the winter of 2005, the Special Court conducted a relatively sophisticated political campaign to secure a Chapter VII resolution to force Nigeria to hand over Taylor. Ultimately they were unsuccessful, largely because Nigeria had done the international community a favour and could not now be humiliated by a Chapter VII resolution. For more on this campaign, see Lang, *supra* at note 21.

128 Cockayne, *supra* note 16 at 637.

emailed to the embassy in the morning with, one is led to believe, little or no advance discussion, requests, or warnings. This was hardly a diplomatic means of securing cooperation and could not have been well received. Advance discussion could have led to a satisfactory compromise: the indictment's release could have been suspended until the political process had played itself out, peace was secured, and Taylor was outside of Liberia. Perhaps such covert discussions took place, although with the confusion that followed the release of the indictment, this seems unlikely. There is no guarantee such efforts would bear fruit, but without a Chapter VII backing, they were not given a meaningful chance of success.

After Charles Taylor went into exile, it appeared that he was beyond the reach of the Special Court. While many human rights groups and activists cried foul, the political consensus was that Nigeria had done the international community a favour by taking Taylor. In February of 2005, the Office of the Prosecutor began a behind-the-scenes campaign to exert political pressure on Nigeria to hand over Taylor.¹²⁹ Its goal was an enforceable Chapter VII resolution from the Security Council. While that was never achieved, the Office of the Prosecutor was able to secure consensus among Security Council members that Taylor should be handed over—yet the members could not agree on an approach for doing so. The modest success of this campaign underscores the need for diplomatic influence and expertise in hybrid tribunals.

CONCLUSION

International criminal law is characterized by the existence of multiple legal regimes, including domestic law, customary international law, and the law of international criminal tribunals.¹³⁰ The concept of personal immunity for Heads of State does not have uniform application across these discrete regimes. As this paper has endeavoured to show, customary international law, as applied primarily in domestic courts, recognizes the personal immunity enjoyed by Heads of State. Any divergence from this general rule is more accurately characterized as a discrete legal regime than as an exception.¹³¹ A given international tribunal may, depending on its regime, apply a different international law from domestic courts and even from other tribunals. For example, the immunity provisions in the ad hoc tribunals and the Rome Statute are significantly different from each other, and, this author would argue, the former remove only functional immunity while the latter remove both functional and personal immunities.

The regime of international law created by the Special Court is a discrete regime that includes Sierra Leone and the UN as an organization. It is a relatively small regime compared to the ICTY and ICTR, which, by virtue of their Chapter VII mandate, capture all of the member States of the UN. As an international organization, the Special Court is bound by customary international law, but the regime created by its constitutive instrument may depart from, codify, or supplement customary law. Thus, it is not unlike the relationship between the common law and statu-

129 Lang, *supra* note 21 at 4–5.

130 Much of the theoretical underpinning for this section comes from Ilias Bantekas, "Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War" (2005) 10 J. Confl. & Sec. L. 21.

131 *Ibid.* at 22.

tory law; the latter may overrule, codify, expand, or restrict the former. Therefore, when considering the application of personal immunity to an individual, the first consideration is whether the individual is captured by the particular regime—by virtue of a Chapter VII resolution, consent or some third-party provision.¹³² The central weakness of the Appeals Chamber's decision was its failure to establish how Liberia was brought into the regime created by the Special Court and the degree to which that legal regime lifted the immunity enjoyed by incumbent Heads of State and other high-ranking government officials at customary law.

The attempts by the Special Court to obtain Charles Taylor demonstrate the role politics plays in international criminal law. Political and legal processes in this area often intersect and often have conflicting goals. One could argue that international criminal law can only do what is politically palatable, as political considerations are often paramount to legal ones. Even the ICC, whose very genesis may represent the minimization of politics in international criminal law, is plagued by illegitimacy if it is unable to secure the consent of major internal actors. Securing Charles Taylor's appearance before the Special Court was primarily a political issue with legal hurdles. International courts—and particularly hybrid tribunals—require diplomatic staff and political savvy if they are to fulfill the purposes for which they are created. It is important to remember that Charles Taylor is before the Special Court today because of a political process that resulted in Liberia's request to Nigeria for Taylor's transfer.¹³³ Nigeria, ever suspicious of the jurisdiction of the Special Court, was only willing to fly Taylor back to Liberia where UNMIL arrested and transported him to the Special Court. Although it was an enthusiastic recipient, the Court was unable to trigger the political process itself. This must not be taken as its own failure. If the international community wants to do better, it must have the courage to endow its institutions with the power and capacity to do what it asks them to do.

Another conclusion drawn from this analysis is that hybrid courts should not be established where the conflict is not well contained within the host State. If suspects, witnesses, evidence, and victims extend beyond State borders, hybrid courts established between the UN and the host State are simply not an effective institutional mechanism to achieve justice. This point is not merely academic. The UN and Lebanon may be making such a mistake with the proposed establishment of a hybrid tribunal to try those responsible for the assassination of Rafik Hariri.¹³⁴ It is likely that perpetrators, conspirators, witnesses, and evidence in the Hariri case are located outside of Lebanon and beyond the reach of the proposed tribunal's jurisdiction, which, like the Special Court, will be limited to the host State. If the tribunal's prosecutions are frustrated by third-party States, its only recourse will be to the UN Security Council or other international political processes. The proposed tribunal, like the Special Court, will be largely at the mercy of other international actors and their respective interests.

132 The debate as to whether non-party nationals could be subject to the immunity provision of the Rome Statute is a live one. See Articles 12, 27, and 98 of the Rome Statute.

133 Nigeria had always maintained that they did not recognize the jurisdiction of the Special Court outside of Sierra Leone. But they had always maintained that they would consider a request from a democratically-elected President of Liberia to hand over Taylor. In the end, it is worth noting, that Nigeria was only willing to "repatriate" Taylor and fly him back to Monrovia.

134 See *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, UN SCOR, UN Doc. S/2006/893, online: United Nations Security Council <http://www.un.org/Docs/journal/asp/ws.asp?m=s/2006/893>.

With the proliferation of international criminal tribunals in the last part of the twentieth century and the indictment of Slobodan Milošević and Charles Taylor, there is some evidence of the emergence of a trend lifting the personal immunity of Heads of State for international crimes. It is clear that this modest trend has not developed into a customary rule, as the domestic courts of several countries have been consistent in upholding the immunity of Heads of State and other officials. There is little doubt that the ICC has the legal authority to indict and prosecute a sitting Head of State provided that country is a party to the Rome Statute. Whether it has the political wherewithal to do so is a separate question. The bulk of academic commentary opines that the ICC is unable to prosecute a Head of State or high-ranking official from a non-member State. The Special Court of Sierra Leone, while apparently willing to indict an incumbent head of a third-party state, lacked the legal authority to do so—demonstrating that sometimes, ambition can exceed capacity.

Charles Taylor will be tried by the Special Court for Sierra Leone in the Netherlands. The immunity he once enjoyed as President of Liberia is gone and his status as a former Head of State should not bar his prosecution, although he will likely argue that it should. The Special Court finally has the person who may be the most responsible for the decade of horror that engulfed much of West Africa and continues to shape and define the politics of peace and war in the region. As desirable as the outcome may be, the legal path by which Taylor traveled to justice is fraught with dubious decisions and unconvincing analysis. What the final assessment of the Special Court for Sierra Leone and its prosecution of Charles Taylor will be is impossible to predict. However, the attempts to indict, arrest, and transfer Charles Taylor in the spring and summer of 2003 are symptoms of “shoestring justice” and the lessons learned from the experience should not be overlooked, despite the final success of Taylor’s likely imminent prosecution.