

# The Question of Charles Taylor's Immunity

Still in Search of a Balanced Application of Personal Immunities?

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## 1. The *Decision on Immunity from Jurisdiction*

The *Decision on Immunity from Jurisdiction* issued by the Appeals Chamber of the Special Court for Sierra Leone (Special Court or SCSL) relates to the application by Charles Ghankay Taylor, former President of the Republic of Liberia, to quash his indictment and annul the warrant for his arrest – both issued when he was head of state in office – on the grounds that he is immune from the jurisdiction of the Special Court.<sup>1</sup>

The indictment for war crimes and crimes against humanity and the arrest warrant concerning Taylor, issued on 7 March 2003,<sup>2</sup> were disclosed on 4 June 2003 in order to be transmitted to the authorities of Ghana, where Taylor was travelling to attend peace talks. However, the unsealing of the Special Court's acts proved ineffective to secure Taylor's apprehension.

On 23 July 2003, an application to quash the indictment was filed on behalf of President Taylor and the state of Liberia.<sup>3</sup> On 19 September 2003, following a Prosecution request,<sup>4</sup> the Trial Chamber excluded the state of Liberia from the proceedings and classified Taylor's application as a preliminary motion under Rule

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1 Decision on Immunity from Jurisdiction, *Taylor* (SCSL-03-01-I), Appeals Chamber, 31 May 2004. Most of the documents concerning the case and quoted hereinafter are available on the website of the Special Court, at [www.sc-sl.org](http://www.sc-sl.org) (visited July 2004).

2 Indictment, *Taylor* (SCSL-03-01-I), 7 March 2003.

3 Applicant's Motion made under Protest and without waiving of Immunity requesting that the Trial Chamber do quash the approved indictment against the person of President Charles Ghankay Taylor, *Taylor* (SCSL-03-01-I-015), 23 July 2003.

4 On 28 July 2003, the prosecution filed a response to the application (Prosecution Response to Defence Motion to quash the Indictment against Charles Ghankay Taylor, *Taylor* (SCSL-03-01-I-016)), and on 30 July 2003, the defence replied (Applicants Reply to Prosecution response to Applicants motion made under protest and without waiving of immunity requesting that Trial Chamber do quash the approved indictment against the person of President Charles Ghankay Taylor, *Taylor* (SCSL-03-01-I-017)).

72(E).<sup>5</sup> In the meantime, in August 2003, Taylor stepped down from the Presidency of the Republic of Liberia and obtained asylum in Nigeria.

Oral hearings were held by the Special Court between 30 October and 1 November 2003.<sup>6</sup> After the oral arguments, the Court allowed the parties to present additional post-hearings submissions before rendering its final decision on 31 May 2004.<sup>7</sup>

The key issue raised by the defence pertained to the scope of immunities enjoyed by Charles Taylor at the time of his indictment, namely when he was an incumbent head of state. The defence linked the core question of immunity to the nature of the Special Court and to its lacking the powers provided for in Chapter VII of the UN Charter (submission of the parties, §§ 6–16).

The Appeals judges dismissed the applicant's motion on the grounds that the SCSL is an international criminal court and therefore Taylor cannot avail himself of his position as head of state to claim immunity and avoid being subjected to its jurisdiction. In response to the defence's submissions, the judges held that the Special Court was established in the framework of Chapter VII of the UN Charter, like the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (§§ 34–42). According to the Appeals Chamber, Article 6(2) of the Special Court's Statute (which provides for the irrelevance of official capacity), being equivalent to similar articles inserted in the Statute of other international criminal tribunals, was not in conflict with any peremptory norm of international law. Hence, the official position of the applicant as incumbent head of state at the time at which the criminal proceedings were initiated against him was not a bar to his prosecution by the Special Court (§§ 43–53).

- 5 Order Pursuant To Rule 72(E) – Defence Motion To Quash The Indictment And To Declare The Warrant Of Arrest And All Other Consequential Orders Null And Void, *Taylor* (SCSL-03-01-I-024), Trial Chamber, 19 September 2003.
- 6 In the meanwhile the Defence filed some additional submissions: Additional Submissions for and on Behalf of the Applicant herein Charles Ghankay Taylor Pursuant To Rule 72 G (I) of the Rules of Procedure and Evidence of the SCSL (SCSL-03-01-I-029), 1 October 2003. See also Prosecution Rule 72(G)(ii) Response Relating to the Defence Motion to Quash the Indictment (SCSL-03-01-I-036), 14 October 2003.
- 7 The positions of the parties are carefully summarized in the second part of the Decision, together with the *amicus curiae* briefs presented by Prof. Philippe Sands, Prof. Diane Orentlicher and the African Bar Association.

## 2. The Legal Reasoning of the Appeals Chamber

As mentioned above, the Trial Chamber classified Taylor's application as a preliminary motion under Rule 72(E).<sup>8</sup> The prosecution contended that the defence motion did not raise an 'issue relating to jurisdiction', but rather an 'issue relating to immunity' and should thus be decided by the Special Court only after the initial appearance of the accused, as provided for by Rule 73(A).<sup>9</sup> Therefore, as a first step, the Appeals Chamber addressed procedural questions.<sup>10</sup>

The judges maintained that, from a technical point of view, both Rules 72 and 73 require the initial appearance of the accused. In the case at issue, however, since the accused was an incumbent head of state at the time of his indictment, a narrow interpretation of these Rules seemed inappropriate because 'it may sound incongruous that a Head of State in strict compliance with the provision of the Rules submits himself to the Court before he can raise the question of his immunity'. For this reason, the Appeals Chamber exercised its discretion and construed the term 'preliminary' contained in Rule 72 as meaning 'before trial', thus allowing the accused to present his application although he had not yet appeared before the Court.<sup>11</sup>

After disposing of procedural questions, the Appeals judges endeavoured to establish the legal basis of the SCSL under Chapter VII of the UN Charter. This approach was engendered by the manner in which the defence formulated its arguments. The defence submitted that exceptions to immunity can only derive from other rules of international law such as Security Council resolutions adopted under Chapter VII. Given that the Special Court lacks Chapter VII powers, judicial orders issued by the Court qualify as orders by a national court and cannot overrule immunities enjoyed by Taylor.

In response to these contentions, the judges held that the Agreement between the UN and Sierra Leone establishing the SCSL has its legal foundation not only in the general purposes set forth in Article 1 of the UN Charter, but also, more specifically, in

8 Rule 72(E): 'Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to a bench of at least three Appeals Chamber Judges, where they will proceed to a determination as soon as practicable.'

9 Rule 73(A): 'Subject to Rule 72, either party may move before the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or the Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open Court.'

10 The procedural questions about the relationship between immunity and jurisdiction raised by the Prosecution are summarized by the judges as follows: (a) the application does not raise an issue related to jurisdiction, (b) the application is premature as the applicant has not made his initial appearance before the Court, and (c) the applicant does not have standing to bring the motion in any event as he is not before the Court (§ 20).

11 'The Appeals Chamber exercises its inherent power of discretion to permit the Applicant to make this application notwithstanding the fact that he has not made an initial appearance' (Decision, *supra* note 1, § 30).

Articles 39 and 41.<sup>12</sup> In short, the Security Council determined the existence of a threat to the peace under Article 39 and, as a following step, decided under Article 41 to conclude an agreement with the Government of Sierra Leone to establish the Special Court, even if it did not endow the Special Court with Chapter VII powers. To support their view, the Judges propounded a disjunctive reading of the first sentence of Article 41, whereby the Security Council concluded an agreement to establish the Special Court under the first part of the sentence ('The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions'), and could in future adopt other decisions to give effect to the Special Court's orders under the second part of the sentence ('... and it may call upon the Members of the United Nations to apply such measures').<sup>13</sup> In this respect, they concluded, the SCSL is expression of the will of the international community and truly international in character. Only at this stage did they take into account the specific elements that characterize the Special Court (which were also enumerated by Prof. Sands in his *amicus curiae* brief), concluding that the SCSL is an international criminal tribunal.

Having determined the nature of the SCSL, the Appeals judges addressed the crucial issue of Taylor's immunity. The starting point is the analysis of Article 6(2) of the SCSL Statute (SCSLSt.) in order to ascertain its consistency with international law.<sup>14</sup> The judges argued that similar articles were always inserted in the statutes of international criminal tribunals established in the past, from the Nuremberg Military Tribunal to the most recent International Criminal Court (§§ 45–48). They observed that the nature of the offences for which jurisdiction was vested in these various tribunals clearly gives some indication as to the circumstances under which

12 'Although the Special Court was established by treaty, unlike the ICTY and the ICTR which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the Court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41.' (Decision, *supra* note 1, § 37).

13 'It is manifest from the first sentence of Article 41, read disjunctively, that (i) the Security Council is empowered to "decide what measures not involving the use of armed force are to be employed to give effect to its decision"; and (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures. The decisions referred to are decisions pursuant to Article 39. Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41 or Article 48, should subsequent events make the course prudent may be made subsequently to the establishment of the court. It is to be observed that in carrying out its duties under its responsibility for the maintenance of international peace and security the Security Council acts on behalf of the members of the United Nations. The agreement of the United Nations is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.' (Decision, *supra* note 1, § 38).

14 Article 6(2): 'The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

immunity is withdrawn. They also underlined that the international nature of the tribunals was always relevant to determine the existence of exceptions to immunity (§ 49).

In this respect, they placed their reasoning against the background of the judgment of the International Court of Justice (ICJ) in the *Arrest Warrant* case,<sup>15</sup> to which they expressly made reference. It is common knowledge that the ICJ addressed the issue of immunity with regard to the position of current foreign ministers. The ICJ concluded that customary international law provides for a general rule entitling a serving foreign minister to enjoy full immunity from criminal jurisdiction before a foreign national court, while admittedly he or she may be tried 'before certain international criminal courts'.<sup>16</sup>

The Appeals Chamber fully shared the ICJ's opinion on the need to distinguish between proceedings before foreign national courts and international criminal courts. Incumbent high-ranking state officials may be subject to criminal proceedings before international criminal courts, but still enjoy full immunity before foreign national courts. The main reason for this distinction is the principle of state immunity: one sovereign state may not adjudicate on the conduct of another state. This principle does not apply before international criminal tribunals, which derive their mandate from the international community.<sup>17</sup> In conclusion, since the sovereign equality of states does not prevent a head of state from being prosecuted before an international criminal court, and given that the Special Court belongs to this category, there is no bar to Taylor's criminal proceeding before the SCSL (§§ 50–53).

Finally, the judges noted that the applicant has ceased to be a head of state. Therefore, had he succeeded in his application, the Prosecutor would have been compelled to issue a fresh arrest warrant.

### 3. Some Critical Remarks on the Appeals Chamber's Legal Construction

The Appeals Chamber connected the unavailability of immunity for Charles Taylor to the international nature of the tribunal; it was thus essential for the judges to determine that the SCSL is an international criminal court.

15 ICJ, *Arrest Warrant of 11 April 2000 (Belgium v Democratic Republic of Congo)*, 14 February 2002. The judgment is available on the website of the International Court of Justice, at [www.icj-cij.org](http://www.icj-cij.org) (docket). On the judgment, see A. Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case', 13 *European Journal of International Law* (2002) 853–875; S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v Belgium Case?', *ibid.*, 877–894; M. Spinedi, 'State Responsibility v Individual Responsibility for International Crimes: *Tertium Non Datur?*', *ibid.*, 895–901.

16 See § 61 of the ICJ *Arrest Warrant* judgment.

17 Another reason, which the judges drew from Prof. Orentlicher's *amicus curiae* brief, is that international tribunals provide a 'vital safeguard to the potential destabilizing effect of unilateral judgment in this area'.

However, the attempt to prove that the Special Court had its legal basis in Chapter VII of the UN Charter is open to criticism. In particular, it is surprising that the judges, once they established that the SCSL is an international criminal court, created within the framework of Chapter VII, did not rely upon this element to reject the immunity claim. Instead, as briefly outlined in the previous paragraph, they dismissed the claim simply by referring to the distinction between national and international criminal courts propounded by the ICJ in the *Arrest Warrant* judgment, which, however, had made no reference to the need for a Chapter VII backing.

With respect, it seems that the Appeals judges confused different questions and thus missed an important opportunity to clarify some of the ambiguities and controversial aspects left open by the ICJ in *Arrest Warrant*.

First of all, the Appeals Chamber confused the analysis of the international nature of the Special Court and the analysis of its legal foundation. The nature of the Special Court as an international criminal tribunal could have been proved by relying on the characteristics of the SCSL.<sup>18</sup> The features of the SCSL are in fact those of an international organization: it was established by way of an international agreement, is vested with the specific competence to prosecute persons who bear the greatest responsibility for the most serious international crimes committed in the territory of Sierra Leone since 30 November 1996<sup>19</sup> and is endowed with the necessary autonomy to pursue this objective. As a consequence, the Special Court may enter into agreements with states and other international legal subjects,<sup>20</sup> as it has already done,<sup>21</sup> and enjoys privileges and immunity. In addition, its composition is mixed but international judges appointed by the UN Secretary-General represent the majority both in Trial and Appeals Chambers (Article 12 SCSLSt.). The SCSL is financed by voluntary contributions by the members of the international community. Finally, it is worth mentioning that the Sierra Leonean Special Court Agreement 2002 Ratification Act 2002 expressly provides that the SCSL is not part of the judiciary of Sierra Leone and that offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone.<sup>22</sup>

A different question is the legal foundation of the Special Court, which can be found in the international agreement concluded between the United Nations and Sierra Leone. The attempt to place the agreement establishing the Special Court under Article 41 of the UN Charter seems far-fetched. In particular, it is inaccurate to assert

18 See also the *amicus curiae* brief of Prof. P. Sands, which touches on some of these characteristics.

19 Article 1 SCSLSt.

20 Article 11 of the Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

21 See the Headquarters agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone, and the Cooperation Agreement between the Criminal Police Organization-INTERPOL and the Special Court for Sierra Leone; both agreements are available on the website of the Special Court, *supra* note 1.

22 Articles 11 and 13 of the Special Court Agreement, 2002, Ratification Act, 2002, available on the website of the SCSL, *supra* note 1.

that the Security Council concluded the agreement with Sierra Leone:<sup>23</sup> the treaty was made by the United Nations as a whole and the Government of Sierra Leone, notwithstanding the fact that the Security Council launched the negotiation process. The juridical capacity of the United Nations to enter into agreements is well established and is not based on Chapter VII, independently of the circumstances which originated a treaty. Therefore, the Agreement establishing the Special Court (with the annexed SCSL Statute), like every other agreement concluded by the United Nations, is binding on the Organization as such and not on individual Member States, which remain third parties in this respect (*pacta tertiis nec nocent nec prosunt*). On the contrary, had the SCSL been established through a decision of the Security Council on the basis of Article 41, its Statute would be binding on individual UN Member States, as is the case for the ICTY and the ICTR.<sup>24</sup> In this respect, the Special Court comes closer to the ICC than to the ad hoc International Criminal Tribunals.<sup>25</sup>

By following the conceptual framework indicated by the defence and adopting the above-described line of reasoning, the judges totally ignored the treaty nature of the SCSL and failed to deal with the consequences that it entails. More specifically, the Appeals Chamber avoided explicitly addressing *the question of whether a treaty-based court may remove immunities accruing to incumbent high-ranking third states' officials*.

Article 27(2) of the Statute of the International Criminal Court (ICCSt.) raises the same problem. In *Arrest Warrant*, the ICJ mentioned Article 27 ICCSt. as an example of a treaty rule removing immunities accruing to serving state officials, but did not make any distinction between the position of a State Party's official and that of a third state's official. At the same time, the ICJ expressly held that high-ranking state officials may be prosecuted before certain international criminal courts 'where they have

23 In the same sense, see also the Special Court's Decision on Preliminary Motion on Lack of Jurisdiction *Materiae: Illegal Delegation of Powers by the United Nations, Fofana* (SCSL-2004-14.AR72 (E)), Appeals Chamber, 25 May 2004, *passim*.

24 Article 41 of the UN Charter was indicated by the ICTY as the legal foundation of the ICTY itself in the famous Tadić Decision on Jurisdiction, which seems to have inspired the SCSL in its Decision. See ICTY, Decision on the defence motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-1-AR72), Appeals Chamber, 2 October 1995, §§ 9–40.

25 In any case, the contractual nature does not deprive the SCSL of its character of international criminal tribunal, nor does it deprive the Security Council of the possibility to act under Chapter VII to foster cooperation with the Special Court. The Security Council, acting under Chapter VII, may invite Member States to cooperate with the Special Court, as it has already done in the past. See, e.g. § 6 of Res. 1508, adopted on 19 September 2003, where the Security Council 'Notes with serious concern the precarious financial situation of the Special Court for Sierra Leone, reiterates its appeal to States to contribute generously to the Court, as requested in the Secretary-General's letter of 18 March 2003, and urges all States to cooperate fully with the Court'. The invitation to cooperate with the Special Court was reiterated also in § 9 of Res. 1537 of 30 March 2004. The implications deriving from the treaty nature of the Special Court were clear from the early stages of the process that led to its establishment; see M. Frulli, 'The Special Court for Sierra Leone. Some Preliminary Observations', 11 *European Journal of International Law* (2000) 857–869.

jurisdiction'.<sup>26</sup> One could infer from the ICJ ruling that once jurisdiction is established in a specific case, Article 27(2) may be interpreted as applying both to States Parties and third states' officials.

It is precisely this question, left open by the ICJ, that the Special Court evaded by relying on an ambiguous reference to Chapter VII of the UN Charter.

#### 4. Does the Application of Immunities Truly Depend on the Nature of the Tribunal?

Before dwelling on the interplay between treaty rules removing personal immunities and third states' obligations, it may be useful to set out some general reflections on the current status of international law with regard to the relationship between the law of immunities and charges of the most serious international crimes.

In order to clarify the general framework, it is appropriate, as a first step, to distinguish between different classes of immunity accruing to incumbent heads of state and other high-ranking state officials. It is widely acknowledged that acting heads of state enjoy two different classes of immunity: functional and personal immunities.<sup>27</sup> Functional immunity (also referred to as *ratione materiae* immunity or simply as state immunity) attaches to the official or public nature of the acts accomplished by state officials in the exercise of their functions. Its rationale lies in the assumption that acts performed by state officials are to be ascribed only to the state that they represent. Hence, functional immunity is substantial in nature and survives the cessation of office. Conversely, personal or *ratione personae* immunities – enjoyed only by limited categories of high-ranking state officials – are absolute because they attach to a specific *status* or position and to the important functions associated with it.

26 In the final part of § 61 of the *Arrest Warrant* judgment, the ICJ stated that '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'.

27 See Y. Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*', 15 *International and Comparative Law Quarterly* (1966) 76–89, who affirms, referring to diplomatic agents: '(...) immunity *ratione materiae* exists all along, side by side with immunity *ratione personae*. If it is not noticed prior to the conclusion of the diplomatic assignment, this is due to the fact it is eclipsed by the shadow of the personal immunity', at 77. On this distinction, see also, more recently, A. Cassese, *International Law* (Oxford: Oxford University Press, 2001), at 96–97; Cassese, 'When May Senior State Officials . . .', *supra* note 15; P. Gaeta, 'The Irrelevance of Official Capacities and Immunities', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court. A Commentary* (Oxford: Oxford University Press, 2002), 975–1002; S. Zappalà, 'Do Heads of State Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*', 12 *European Journal of International Law* (2001), 595–612, and the legal literature quoted in these articles.



Personal immunity is essentially based on the notion of functional necessity:<sup>28</sup> certain categories of state officials (heads of state, heads of governments, foreign ministers and diplomatic agents) need to exercise their functions without any threat, impediment or interference in order to ensure the smooth and peaceful conduct of international relations. Though absolute, personal immunities come to an end when state officials relinquish their official position; they are therefore procedural bars to the exercise of jurisdiction. In addition, they embrace not only immunity from the exercise of jurisdiction of foreign courts – as is the case for functional immunity – but also inviolability and immunity from arrest and detention.<sup>29</sup>

From an overview of national and international case law, state practice and *opinio juris*, as well as scholarly opinions,<sup>30</sup> it may be inferred that high-ranking state officials charged with war crimes and crimes against humanity cannot rely on functional immunity in order to attribute their acts to the state that they represent and to escape their criminal responsibility. This notion is based on the premise that international law provides that individual criminal liability always attaches to certain grave acts. These acts, even if accomplished by state officials, cannot be attributed solely to states.<sup>31</sup> In short, there is a *fundamental inconsistency* between the rule providing for individual criminal responsibility and the rule on functional immunity of state officials, which aims at absolving state officials from personal liability by attributing their acts to their respective states. This assumption was nonetheless challenged by the ICJ in *Arrest Warrant*. The Court asserted that the irrelevance of official capacity is provided for only in conventional texts or in the statutes of international criminal tribunals, thus implying that national courts should respect the functional immunity

28 See, e.g. J.L. Kunz, 'Privileges and Immunities of International Organizations', 41 *American Journal of International Law* (1947), at 837. See also G. McClanahan, *Diplomatic Immunity. Principles, Practices, Problems* (New York: St. Martin's, 1989) 27–28. See also B. Sen, *A Diplomat's Handbook of International Law and Practice, Third Revised Edition* (Dordrecht/Boston/London: Nijhoff, 1988), which clearly asserts, referring to diplomatic agents: 'It is obvious that were they liable to ordinary legal and political interference from the State or even individuals, and thus more or less be dependent on the goodwill of the Government of the State to which they are accredited, they might be influenced by considerations of safety and comfort in a degree which would materially hamper them in the exercise of their functions', at 97.

29 While it is undisputed that incumbent heads of state enjoy both functional and personal immunity, former heads of state enjoy only functional immunity.

30 See A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 267–271, which examines national and international case law and documents showing the customary nature of the rule establishing the irrelevance of official capacity in case of charges of the most serious international crimes. In this sense, see also Gaeta and Zappalà, *supra* note 25.

31 In fact, the rationale of functional immunity, as recalled above, is predicated upon the fact that acts performed by state agents are acts of state and, as such, they should not be adjudicated in the courts of another state: ultimately, the rationale lies in the sovereign equality of states.

accruing to state officials accused of the most serious international crimes.<sup>32</sup> The ICJ's position was severely criticized in this respect; in fact, it seems that the elements confirming the irrelevance of official capacity both before *national* and *international* courts are compelling.<sup>33</sup> In conclusion, the *national or international nature of the tribunal trying state officials accused of serious international crimes does not have any bearing whatsoever on the application of the rule on functional immunity*. This rule cannot shield state officials before either national or international courts.

Things are different with regard to the relationship between personal or procedural immunities and charges of international crimes. A careful analysis of case law shows that *national* courts bow to personal immunities accruing to incumbent high-ranking state officials, even when they are accused of war crimes and crimes against humanity.<sup>34</sup>

In contrast, recent practice shows that personal immunities have not been upheld by *international* criminal courts. In particular, the ICTY implicitly interpreted Article 7(2) ICTYSt. as also referring to personal immunities of incumbent high-ranking state officials, as borne out by the fact that Milošević was indicted when he was acting President of the Federal Republic of Yugoslavia. Milošević, however, was arrested and surrendered to the ICTY by its national authorities when he had already relinquished office and the ICTY Chambers never pronounced expressly on the possible application of Article 7(2) to an incumbent head of state. In the *Decision on Preliminary Motions* (8 November 2001), the ICTY Trial Chamber touched on the comprehensive validity of Article 7(2) without making any distinction as to its relevance to functional or personal immunities, but clearly referring to Milošević as a former head of state. In sum, ICTY practice does not furnish compelling evidence as to the emergence of a general exception to the rules on personal immunities before international criminal tribunals. In addition, the *ad hoc* Tribunals do have, without any doubt, a Chapter VII backing and cannot be fully compared with treaty-based courts.

As to treaty-based tribunals, it must be noted that Article 27(2) ICCSt. contains a

32 In the well known *obiter* of the judgment the ICJ affirmed: '... Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.' The *Arrest Warrant* judgment has been widely commented on and criticized on this point and need not be reconsidered in detail.

33 It suffices here to recall that, following the ICJ judgment, national case law has reaffirmed that functional immunity cannot be a defence for foreign state officials charged with serious international crimes. See the Belgian Court of Cassation judgment in the *Sharon* case (12 February 2003), available online at [www.cass.be/cgi-juris/juris-cass-a1.pl](http://www.cass.be/cgi-juris/juris-cass-a1.pl) (visited June 2004). For a comment, see A. Cassese, 'The Belgian Court of Cassation v the International Court of Justice: the *Sharon and others* Case', 1 *Journal of International Criminal Justice* (2003), 437–452.

34 See, e.g. the case against the Israeli Prime Minister Sharon, *supra* note 32. Immunity was also upheld by the French judges in a case against Khadafi and by the Spanish judges in a case against Fidel Castro; see Cassese, *International Criminal Law*, *supra* note 30, *passim*.

very clearly formulated exception to personal immunities.<sup>35</sup> Some scholars contended that Article 27(2) restates an obvious principle, since individuals are only entitled to enjoy personal immunities *vis-à-vis* the authorities of the state where they are authorized to discharge their official functions.<sup>36</sup> However, one may question the self-evident nature of this exception. While this rule clearly removes personal immunities of senior state officials of States Parties to the ICC Statute, it does not seem obvious that it may remove personal immunities accruing to third states' officials under international law. Bearing in mind the rationale underlying personal immunities – i.e. functional necessity – one should probably conclude that proceedings before both national and international criminal courts may hamper the discharge of official functions and endanger the smooth conduct of international relations.<sup>37</sup>

It may be argued, however, that the need to bring to justice those responsible for the most serious international crimes is strongly felt by the international community and is gradually leading towards the formation of a rule removing personal immunities before international criminal tribunals. A balance must be struck between two conflicting exigencies: repression of the so-called 'core crimes' and a stable and orderly functioning of international relations, which is what rendering senior state officials immune *ratione personae* from prosecution aims at protecting.<sup>38</sup> In trying to reconcile these conflicting requirements, one can look at the safeguards offered by international criminal tribunals. It is undisputed that these can offer a high degree of competence, impartiality and certain guarantees for the accused (in terms of due process and human-rights standards), whereas proceedings before national courts may be politically biased or instrumental, i.e. initiated only to discredit a foreign senior state official. Hence, it can be argued that states are gradually accepting the notion of forfeiting their officials' personal immunities in order to allow proceedings against them before competent international criminal courts. The adoption of Article 27(2) ICCSt. points in this direction. However, this trend is far from being consolidated and no easy solution is offered for treaty-based courts.

International criminal tribunals cannot function without state cooperation. Arrest warrants and orders issued by international criminal tribunals must be enforced by states. It is thus crucial to determine whether the exceptions contained in treaty-based

35 Article 27(2) ICCSt.: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.' It is interesting to note that the Sierra Leonean Special Court Agreement, 2002 Ratification Act 2002, unlike the Special Court's Statute, reproduces this wording in its Art. 29: '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.'

36 Gaeta, 'Official capacity', *supra* note 25, at 991.

37 See J. Klefner, 'The Impact of Complementarity on National Implementation of Substantive Criminal Law', 1 *Journal of International Criminal Justice* (2003), at 105.

38 For a similar argument, although one that draws different conclusions, see Gaeta, 'Official Capacity', *supra* note 25, *passim* and Klefner 'The Impact ...', *supra* note 37, at 105–106.

statutes allow states, in their reciprocal relations, to refrain from respecting personal immunities in order to enforce an international criminal tribunal's order.

With regard to the ICC, it was suggested that by accepting Article 27(2), States Parties waived personal immunities not only vis-à-vis the ICC, but also vis-à-vis the States Parties to the ICC, as far as cooperation with the Court is concerned. In this respect, it was submitted that Article 98(1) ICCSt. (on cooperation with respect to waiver of immunity and consent to surrender), which must be read in conjunction with Article 27(2), should be interpreted as requiring a waiver only when a State Party must enforce a Court's order concerning a third state's official.<sup>39</sup> In short, customary rules on personal immunities remain unaltered and States Parties must respect personal immunities accruing to third states' officials.

With regard to the SCSL, *mutatis mutandis*, one can conclude that Article 6(2) cannot be considered to be an implied waiver of personal immunities of *third states' officials*. Accordingly, neither Sierra Leone nor a third state could have enforced the arrest warrant concerning Taylor without a waiver from Liberia.

Hence, Ghana—where Taylor was travelling at the time of the disclosure of the Special Court's arrest warrant—was not obliged to enforce the warrant.<sup>40</sup> Had it enforced it, it would have incurred international responsibility for violating Taylor's personal immunity. However, since Taylor has relinquished his position as head of state, he may no longer invoke any kind of immunity to protect himself from the charges of war crimes and crimes against humanity.<sup>41</sup>

39 Gaeta argues in addition that the derogation only operates at the vertical level among States Parties, i.e. they can remove personal immunities of an incumbent state official of another State Party only to surrender him to the ICC, but not to try it before its own courts. See Gaeta, 'Official Capacity', *supra* note 25, *passim*. Of course, the situation is different for the ICTY and the ICTR. As to the ICTY Statute, the Appeals Chamber of the ICTY itself clearly asserted, in the Blaskić (subpoena) case, that UN Member States have a duty to cooperate with the ad hoc Tribunals and must enforce their decisions and orders, according to a 'vertical' model of cooperation. On the different models of cooperation with international criminal courts, see Cassese, *International Criminal Law*, *supra* note 30, at 355–362.

40 Ghana was free not to comply with the Special Court's warrant. In this respect, the Appeals Chamber rightly rejected the applicants' contention that the issue of the arrest warrant and its transmission to Ghana were an infringement of the sovereignty of Ghana; see Decision, *supra* note 1, § 57.

41 According to the *International Justice Tribune*, Monday, 19 July 2004, two Nigerian nationals, victims of amputations in Sierra Leone in 1999, have won their first victory in the battle to force Nigeria to extradite the former president of Liberia, Charles Taylor, to Sierra Leone to face prosecution by the Special Court. The Nigerian High Federal Court ruled on 12 July that they can challenge the legality of Charles Taylor's asylum in their country, granted in August 2003.