Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition.
Brno : Masaryk University, 2009, ISBN 978-80-210-4990-1

LEGAL BASIS FOR THE ESTABLISHMENT OF INTERNATIONAL AND HYBRID CRIMINAL COURTS AND ITS IMPACT ON ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

KATEŘINA NOVOTNÁ

Masarykova univerzita, Právnická fakulta

Abstract in original language
Cílem příspěvku je poukázat na to, jak může způsob založení a právní základ soudu ovlivnit vynucování mezinárodního trestního práva, a to v kontextu nároku na imunitu hlavy státu v trestním stíhání. Příspěvek se zaměřuje na případ Charlese Taylora, nyní již bývalého prezidenta Libérie. Taylor je první africkou hlavou státu, která byla ve funkci obviněna ze spáchání zločinů podle mezinárodního práva na mezinárodní úrovni. Případ Taylor ilustruje střet dvou zájmů v soudobém mezinárodním právu: vzrůstající tendenci potrestat pachatele nejzávažnějších činů a (nedotknutelnou) oblast imunit vysokých státních představitelů.

Key words in original language
Mezinárodní trestní soudy a tribunály, smíšené (hybridní) trestní soudy, vynucování mezinárodního trestního práva, zločiny podle mezinárodního práva, imunita hlavy státu.

Abstract
The aim of this paper is to illustrate how the legal basis of the court may affect enforcement of international law in the context of immunities. This paper will focus on the case of Charles Taylor before the Special Court for Sierra Leone ('SCSL'). Taylor was only the second Head of State in history after Slobodan Milošević, and the first African head of state to be indicted for crimes under international law at the international level. The Taylor case well illustrates collision of the two interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from principle of sovereign equality of States. The main focus of this paper is the legal basis of the Special Court for Sierra Leone (SCSL), deeper analysis of personal and functional immunities available to Taylor will not form part of this paper.

Key words
International Criminal Courts and Tribunals; Hybrid Criminal Courts, Enforcement of International Criminal Law, Crimes under International Law, Immunity of a Head of State.

Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition.
Brno : Masaryk University, 2009, ISBN 978-80-210-4990-1

1. INTRODUCTION

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[1]

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

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

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

Traditionally, heads of states were not subject to the jurisdiction of national courts for whatever acts they may committed and there were no

---

[1] The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Proceedings, Vol. 22, p. 466, available at http://avalon.law.yale.edu/imt/judlawch.asp (last accessed 3 June 2009).

[2] The term crimes under international law will be used interchangeably with the terms international crimes and 'core' crimes. These crimes include: war crimes, crimes against humanity and genocide. The crime of aggression is left aside for the purposes of this paper.

[3] The submission that international law was not construed to punish individuals and is therefore concerned only with acts of States was rejected already by the Nuremberg Tribunal ('Tribunal'). In this respect the Tribunal also refused the opinion that individuals who carried out acts of State are not responsible due to the protection provided by the doctrine of the State sovereignty. *See* also R. Cryer, H. Frimain, D. Robinson, *An Introduction to International Criminal Law and Procedure*, Cambridge (2008).

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

international courts which would have jurisdiction over heads of state.[5] Until recently, the immunity of high ranking state officials who engaged in commission of such crimes was absolute, based on traditional rules safeguarding the sovereignty of states.[6]

Nevertheless, the interests of the international community in the maintenance of effective and smooth functioning of international relations between states are being increasingly confronted with the interests of bringing alleged perpetrators of international crimes to justice. These two interests are fulfilling different functions of international law.[7] Which interest should prevail if the accused is a Head of State?

It is apparent that judgments of the last years of both international and national courts in the context of immunity have turned on whichever of these two divergent interests prevails for judges.[8] Different approaches adopted by judges well characterize this tension of interests and the outcome of such prosecution depends to a large extent on the legal basis of the respective court (i.e. national versus international court) and on the status of the high ranking official (i.e. former or incumbent official).[9]

Various cases regarding the issue of the immunity of high ranking officials have recently reached both national and international courts. Following list of cases serves as an illustration of the increasing frequency in attempts to institute prosecutions for international crimes.[10] Main examples include (a)

---

[5] A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', *Recueil des Cours de l'Académie de droit international*, III (1994).

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

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

[8] Chatham House, 'Immunity for Dictators?' *A Summary of Discussion at the International Law Programme,* Discussion Group at Chatham House (9 September 2004).

[9] R. Cryer, 'A 'Special Court' for Sierra Leone?', 50 *International and Comparative Law Quarterly* 435 (2001).

[10] This list is not meant to be exhaustive.

former or incumbent presidents: Manuel Noriega11 (Panama), Augusto Pinochet12 (Chile), Slobodan Milošević[13] (the Federal Republic of Yugoslavia), Hissene Habre[14] (Chad), Muammar Qaddafi15 (Libya), Fidel Castro (Cuba), Mengistu Haile Mariam[16] (Ethiopia), Charles Taylor[17](Liberia), Saddam Hussein[18](Iraq) and very recently Omar Al Bashir[19](Sudan); (b) other high ranking officials: Abdulaye Yerodia Ndombasi[20] (Minister for Foreign Affairs of the Democratic Republic of the Congo) or Jean Kambanda[21] (Prime Minister of Rwanda).

---

11 United States v. Noriega, 746 F.Supp. 1506, 1511 (S.D.Fla.1990), and The United States v Manuel Antonio Noriega, United States Court of Appeals, Eleventh Circuit, Nos.92-4687; 96-4471, (7 July 1997).

12 *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 61 (H.L. 1998) (Pinochet I); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 119 (H.L. 1999) (Pinochet II); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 147 (H.L. 1999) (Pinochet III).

[13] *Prosecutor v Slobodan Milosevic* (IT-99-37-PT), Decision on Preliminary Motions, ICTY, 8 November 2001.

[14] Cour de Cassation du Senegal (Premiere chambre statuant en matiere penale), Aff. Habre, Arret n. 14, (20 March 2001).

15 Chambre Criminelle, Frech Supreme Court, Criminal Division, Paris, Arret n. 1414, Mar. 13, 2001, Gaz. Pal. (2001), 2, somm.

[16] Ethiopian Court held Mengistu Haile Mariam quilty of acts of genocide and Mariam was given a life sentence *in absentia* on December 2006, later changed to death penalty. The case number was not made available to the author. For more information *see* http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=14&Itemid=43 (last accessed 10 August 2009).

[17] *Prosecutor v. Charles Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, SCSL, 31 May 2004.

[18] No English translation of the judgment available to the author. For more information *see* 'Iraq Tribunal Issues Verdict in First Hussein Trial', International Center for Transitional Justice, 5 November 2006.

[19] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC, 4 March 2009.

[20] *Case Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 14 February 2002, I.C.J. 21, (hereinafter 'the *Yerodia* case'). See J. Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks', 16 *Leiden Journal of Intenational Law* 253 (2003); S. Wirth, 'Immunity for Core Crimes? The ICJ's judgement in the Congo v. Belgium Case', 13 European Journal of International Law 877 (2002).

[21] *Prosecutor v. Kambanda* (ICTR 97-23-S), Judgment and Sentence, ICTR, 4 September 1998.

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

The case is a fascinating one, and contains many points of major legal interest. This paper explores only some of the implications the case might have in international law. The central issue of this paper is whether Taylor as a president of Liberia at the time of issuance of the indictment was entitled to claim immunity before the SCSL in the light of the fact that the legal basis of the SCSL had been a bilateral treaty between the United Nations and Sierra Leone, to which Liberia was not a party.[22] This legal issue is important also from the practical perspective for similar cases which may arise before other courts. The topicality of this issue can be especially seen in the increased activities of the first permanent criminal court - the International Criminal Court ('ICC').

The same questions in the context of immunities of high ranking officers of third states not parties to the Rome Statute (the legal basis for the ICC) may appear particularly in the situation when there is no referral by the Security Council under Chapter VII of the UN Charter.[23] Even in the situation where there is actually a referral by the Security Council, as is the case with the current President of Sudan, Al-Bashir, some authors argue that there must be explicit removal of immunity in the respective Resolution adopted under Chapter VII powers in order to deny immunity ratione personae to a serving President of a state which is not a party to the Rome Statute.[24]

---

[22] Chatham House, *supra* note 8.

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

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

As this brief outline already indicates, legal basis of the court is crucial for its functioning in many areas. Legal basis of the court has impact in areas such as application of international legal standards both in terms of adequate human rights guarantees[25] and international criminal law, (compulsory) cooperation of other states and international organizations with the court including extradition proceedings[26] and interrelated issue of immunities. The aim of this paper is to illustrate how the legal basis of the court may affect enforcement of international law in the context of immunities. The main focus of this paper is the legal basis of the SCSL, deeper analysis of personal and functional immunities available to Taylor will not form part of this paper.[27]

First, various judicial mechanisms for prosecuting violations of international criminal law will be introduced and a definition of international, national and internationalized court will be offered. Second, an explanation as to why does the legal basis matter will be provided in the part titled 'International v. National Courts Practice with Respect to Immunity of Head of States'. Third, the SCSL's Decision on Immunity from Jurisdiction[28] in the Taylor case will be introduced. Fourth, critical analysis of the SCSL's decision will follow, including examination of binding effects of two main

---

[25] *See* e.g. *Report by Fédération Internationale des Ligues des Droits de l'Homme (FIDH)*, 'Iraq : Trial of Saddam Hussein : FIDH and HRDOI call for fair trial and victim's Rights to be guaranteed' (19 October 2005). Compare also with situation in Kosovo. Cassese observes that there were significant problems in Kosovo as regards relationship between local laws and international human rights standards. Cassese noted that there was "a lack of clarity among local judges as to whether international human rights standards were supreme law in Kosovo." Cassese, *supra* note 6, p. 8.

[26] For example the former President of Ethiopia, Mariam, is in exile in Zimbabwe, which still refuses to extradite him. The prevailing view as regards extradition proceedings is that in the absence of an extradition treaty, there is no international obligation to extradite such person. According to the UN report 'there is a growing trend, however, to recognize the duty to extradite or prosecute, in particular with certain crimes', 11th *UN Congress Committee on Crime Prevention and Criminal Justice*, I BKK/CP/15 (para 3), 21 April 2005, Bangkok, Thailand.

[27] For analysis of immunities available to Taylor, *see* S. M. H. Nouwen, 'Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued', *Leiden Journal of International Law 18* (2005); K. Novotna, 'Relationship between Crimes under International Law and Immunities: Coexistence or Exclusion? Charles Taylor Case', *Human Rights and International Humanitarian Law*, New Delhi, Satyam Law International (forthcoming in 2010). For analysis of immunities in general *see* e.g. I. Bantekas, 'Head of Sate Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 *Journal of Conflict & Security Law* 21 (2005), H. Fox, *The Law of State Immunity* (Preface to Paperback Edition), Oxford University Press (2004).

[28] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004, E. Denza, E, *Diplomatic Law* (Commentary on the Vienna Convention on Diplomatic Relations), 3d edition, Oxford (2008).

legal instruments: SC Resolution 1315 (2000) and the Agreement between the UN and Sierra Leone. This paper concludes by finding that the SCSL did not appreciate its special 'hybrid' legal basis and therefore failed to properly assess what are the implications of its legal basis for the rules of international law on incumbent head of state immunity.

2. JUDICIAL MECHANISMS FOR PROSECUTING VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

This all began with the establishment of the Nuremberg and Tokyo tribunals more than a half a century ago.[29] The beginning of the 1990s then witnessed a new evolution of various mechanisms for prosecuting violations of international criminal law, starting in 1993 with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994.[30] In 1998, the Rome Statute for the ICC was adopted.[31]

At the same time, other models referred to as 'hybrid', 'mixed' or 'internationalised' courts came into being.[32] Examples include: the Extraordinary Chambers in the courts of Cambodia[33], the Regulation 64 Panels in the courts of Kosovo[34], the District Court of Dili in East Timor[35]

---

[29] The International Military Tribunal for the Far East was established by the military order as opposed to the Nuremberg Tribunal, which was established by treaty.

[30] UN Security Council Resolutions 808, 827 (1993) and 955 (1994) respectively.

[31] Rome Statute of the ICC, U.N. Doc. A/CONF.183/9, available at http://untreaty.un.org/cod/icc/statute/romefra.htm (last accessed 5 September 2009).

[32] For an overview of some practical and legal problems internationalized courts might face, as well as the advantages and disadvantages of such courts, *see* Cassese, *supra* note 6.

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

[34] Prior to Kosovo's independence, the United Nations (UN) deployed UNMIK, which was established within the legal framework of the UN Security Council Resolution 1244 (UNSCR 1244). UNSCR 1244, which was adopted under the Chapter VII powers, decided on the deployment of international civil administration (UNMIK) and international security force (KFOR) presences under UN auspices. For an overview of the current situation in Kosovo, including the role of EULEX mission, *see* K. Novotna, Kosovo's Post-Independence - Test for the EU's Common Foreign and Security Policy. What Role Has the EULEX Mission to Play in Kosovo? COFOLA 2009: the Conference Proceedings, 1. Edition, Brno: Masaryk University (2009).

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

and to some extent also the Iraqi Special Tribunal[36], the Special Public Prosecutor's Office in Ethiopia[37] or the War Crimes Chamber in the State Court of Bosnia and Herzegovina.[38]

These various judicial mechanisms dealing with crimes under international law are characterised by different legal regimes and applicable law. On the one hand, national courts will apply primarily or only domestic criminal law into which crimes under international law might or might not be incorporated.[39] On the other hand, purely international judicial bodies will apply usually only international law. These can be either treaty-based such as the ICC and the SCSL or resolution-based (Resolution adopted under Chapter VII powers of the UN Security Council) such as the ICTY and the ICTR. These courts and tribunals are limited by their Statutes.[40] Last but not least, we have a newly emerging trend of so-called hybrid or mixed courts which further complicate the picture. The qualification of the exact legal basis of hybrid courts especially is not always clear cut.

Hence, it is useful to start the discussion by defining the terms 'international' court, 'national' court and 'hybrid/mixed/internationalized' court.[41] The term 'international criminal court' is frequently used in academic literature and jurisprudence, but without much attention given to the explanation of this term.[42] At the same time, it is necessary to emphasize that the definition of what constitutes an international court as opposed to national or hybrid court may vary significantly depending on factors taken

---

[36] Also named 'Iraqi High Court' or 'Supreme Iraqi Criminal Tribunal'.

[37] Officially named 'Office of the Special Prosecutor: The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia'. *See* also *Law, Rulings and Reports*, 'Ethiopia: Proclamation Establishing the Office of the Special Prosecutor, Proclamation 22/1992 (8 August 1992)', available at http://www.usip.org/files/resources/Ethiopia-Charter.pdf (last accessed 17 November 2009).

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

[39] E.g. Special Tribunal for Lebanon. As regards the Ethiopian Special Public Prosecutor's Office, there was a discussion "whether to use international law standing alone or as codified in the Ethiopian Penal Code and whether to use any non-international law-based sections of the Penal Code". In: International Human Rights Law Group, Ethiopia in Transition: A Report on the Judiciary and the Legal Profession 1 (1994).

[40] Bantekas *supra* note 27.

[41] Damgaard *supra* note 4.

[42] *Ibid*.

into account, on the purposes of this identification and on those who are in charge of identification.

There is no universally accepted definition of an international criminal court in international law and the recent jurisprudence considering this issue has not proved particularly insightful.[43] International Court of Justice (ICJ) in the Yerodia case for example simply stated that in 'certain international courts' (ICTY, ICTR, ICC) an incumbent or former Minister of Foreign Affairs could be subject to criminal prosecution'. The ICJ however did provide any further guidance as to what it means by phrase 'certain international courts'[44]. Does it exclude some other international courts?

Nevertheless, the ICJ in the Yerodia case held that an international court is a court that is established by two or more states or by a Security Council resolution under Chapter VII mandate of the United Nations Charter.45 Though the ICJ did not mention the following possibility, it is submitted that a state and an international organization can also establish an international tribunal (as in the case of the Special Court for Sierra Leone).

Damgaard points to the following factors as important for indication of international nature of the court (a) international court is not part of the judiciary of one single State (b) it applies international criminal law, the fact that it also applies domestic law does not disqualify it being international (c) its jurisdiction ratione materiae and ratione personae is international (d) its decisions are binding.[46] The first three factors are easy to approve. It is however not clear how does the binding nature of a decision contributes to the international character of the respective court.

A hybrid court, according to e.g. the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, is one that has mixed jurisdiction and composition.47 This means that the court may have the jurisdictional privileges of applying both municipal and international law and may also have both local and foreign prosecutors and judges participate in its judicial process.48 Nevertheless, it is submitted that the mixed

---

[43] *Ibid*.

[44] *Ibid* (emphasis added).

45 See *supra* note 20, para 61.

[46] Damgaard *supra* note 4 at p. 333.

47 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000, para. 9.

48 D. Orentlicher, 'International Justice Can Indeed Be Local', *Washington Post*, 21 December 2003.

composition and jurisdiction does not of itself identify/determine the legal basis of the court.[49] Such a description and judicial arrangement can be indeed described as a mixed judicial system. However, the legal basis of any court is rather determined by its constitutive instrument and authority of the body establishing the court.

There is no bar to have local judges, prosecutors and other personnel participating in proceedings of the court whose legal basis is e.g. an international treaty or resolution and which is therefore by its essence international. Equally, the fact that the legislative authorities of a particular state decide to include into the personnel composition of its national court non-nationals of that state does not, according to the ICTY, make that court any less a 'national court'.[50]

The War Crimes Chamber of the State Court of Bosnia and Herzegovina can serve as a useful example. The Defence in Stankovic 51 submitted that the War Crimes Chamber of the State Court is incapable of characterization as a 'national court.' It was assumed that to be a national court it must be composed of judges who are nationals of the State concerned. However, the ICTY held that no authority is offered for this proposition.[52]

The view of the Referral Bench[53] of the ICTY was that in the relevant context, which is Article 9(1)54 of the Statute of the Tribunal, there is no

---

[49] For a different view, *see* the Separate Opinion of Judge Robertson in the *Kondewa* case, where he stated that "[...] the Special Court [...] is not accurately described in the Secretary-General's report as a court of 'mixed jurisdiction and composition'[...] is in reality an international court onto which a few national elements have been grafted.", in: *Prosecutor v. Kondewa* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution Sierra Leone, (25 May 2004), para. 15.

[50] *Prosecutor v. Stankovic* (IT-96-23/2-PT), Decision on referral of case under rule 11*bis*, Partly Confidential and Ex Parte (17 may 2005), para 26.

51 *Ibid.*

[52] *Ibid.*

[53] The establishment of the War Crimes Chamber of the State Court of Bosnia and Herzegovina ('WCCh') enabled cases to be transferred from the ICTY to national judicial authorities. For a case to be referred to the WCCh pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence, the Referral Bench must be fully satisfied that the accused would be tried in accordance with international standards and that neither the level of responsibility of the accused nor the gravity of the crimes alleged in the indictment were factors that would make a referral to the national authorities inappropriate. According to Rule 11*bis* a referral may be made to a State: (a) in which the crimes were committed; (b) the accused was arrested; (c) or which has jurisdiction and is willing and adequately prepared to accept the case.

54 Article 9(1) of the ICTY Statute reads as follows: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations

apparent justification for giving to the phrase 'national court' any meaning other than the normal connotation, which is 'a court of or pertaining to a nation'.[55] The ICTY stated that the State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a 'national court.'[56]

Despite the conclusions made above, the qualification of the exact legal basis of hybrid courts is admittedly not straightforward; there exist considerable uncertainty and diverse views on this topic. For example, Nouwen considers Extraordinary Chambers in the courts of Cambodia, the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor as all being part of the domestic system and their legal status that of a domestic court. Ambach on the other hand suggests that the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor were set up by the UN Administration, and therefore are by nature international.[57]

In cases of Kosovo and East Timor, it was indeed the UN who promulgated regulations on the establishment of the panels. The authority to promulgate these regulations came from the SC Resolution adopted under Chapter VII powers. Accordingly, one could argue that the SC Resolution provided indirect legal basis. Nonetheless, it should be recognised that SC Resolution did not in fact established these courts, but rather "granted the UN administration the authority to promulgate domestic laws. The regulations establishing these courts should be considered as domestic instruments."[58]

Terminological and conceptual difficulties of hybrid courts lay exactly in their combined/hybrid nature. On the one hand, if hybrid courts are implemented into the domestic judicial structure of the forum state, they cannot be considered "as international institutions since they lack

---

of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."

[55] *Supra* note 50.

[56] *Ibid.*

[57] P. Ambach, 'The Overlapping Jurisdictions between the International Criminal Court and Hybrid International Tribunals', Bofaxe, No. 298E (2006),

available at http://www.ifhv.rub.de/imperia/md/content/publications/bofaxe/2006/x298e.pdf (last accessed 7 May 2007).

[58] S.M.H. Nouwen, ''Hybrid courts', The hybrid category of a new type of international crimes courts', 2 *Utrecht Law Review* 2, December, (2006).

international legal personality".[59] On the other hand, some of them cannot be qualified as national courts "since apart from having a considerable amount of international personnel and exercising jurisdiction over international crimes"[60], they are established by an international treaty with the UN.[61]

It needs to be borne in mind that these so-called hybrid courts have each a very different legal basis. Yet, they are ultimately established either under national law or international law.[62] Accordingly, Nouwen suggests that "the manner of establishment is what distinguishes these courts from one another, not what unites them."[63]

The presented views already indicate the uncertainty with regard to finding the origins of their legal basis. This uncertainty may negatively affect the functioning of these courts in many areas, including the area of immunities, as we shall see below.

3. WHY DOES THE LEGAL BASIS MATTER? INTERNATIONAL V. NATIONAL COURTS PRACTICE WITH RESPECT TO IMMUNITY OF HEAD OF STATES

The entitlement to immunity for core crimes does not have uniform application within different legal regimes and in front of various judicial bodies.[64] It is therefore necessary to clarify the respective terminology and categorization in order to subsequently determine the SCSL's legal basis for the purposes of lifting immunities to a serving head of state of a country other than Sierra Leone. The premise which will guide the following discussion is that the legal basis of the judicial bodies is crucial for effective functioning of courts.

As regards the practice of national courts, scholarly opinions vary significantly. The most important factor appears to be whether the senior official is serving or former one. Most of the legal scholars suggest that the

---

[59] *Ibid.*

[60] Ambach, *supra* note 57.

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

[62] Nouwen is opposing calling hybrid courts 'hybrid' because of their hybrid roots as it, according to her, 'only confuses the picture'. Nouwen, *supra* note 58.

[63] *Ibid.*

[64] I. Bantekas, 'Head of Sate Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 *Journal of Conflict & Security Law* 21 (2005).

operating principle in general international law is that a serving head of state is entitled to absolute immunity from the jurisdiction of national courts, unless it has been waived by the State concerned. This appears to be the dominant view, but it is not the only view.[65]

Some argue that the discussion about the legal nature of various courts and tribunals, national or international, would not have been necessary if the question of whether immunity applies to serving officials depended on factors other than the nature of the tribunals, for example, on the nature of the crime. In their opinion the focus should be made on the nature of the crime rather than the nature of the respective tribunal. 66

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

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

And why do not State practice and opinio iuris confirm the above argument about the nature of the crime under international law prevailing over the nature of the tribunals and courts? In order to be able to prosecute crimes under international law before national courts, the state concerned has to have jurisdiction to start with. Usually the courts pursuing the prosecution are courts other than courts of the state of the accused. Therefore, on which basis do they assert jurisdiction if crimes are not committed on their territory, and the accused is not a national of that state? Here comes into play universal jurisdiction, which is by no means indisputable.67 In the

---

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

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

67 As Schabas puts it: "The exercise of universal jurisdiction reminds us of Mark Twain's famous comment about the weather: Everyone talks about it, but nobody does anything

view of the shortage of a direct international authority, it is difficult to establish the current international law relating to immunities before national courts.

Many scholars and non-governmental organizations regard universal jurisdiction as uncontroversial and undisputable. It is often regarded as "one of the magic bullets in the campaign against impunity."68 Still, nobody has been imprisoned recently as a result of the exercise of universal jurisdiction. States rarely initiate prosecution regardless of the seriousness of international crimes unless there is either territorial or personal nexus, or a treaty obligation to prosecute or extradite.69

It is not the aim of this paper to deal with universal jurisdiction in detail.70 Moreover, the consideration of this problem is not strictly necessary to answering the question of Taylor's immunities before the SCSL if the international nature of the SCSL is accepted.

As regards the practice of international courts, amicus curiae invited by the SCSL stated that "in respect of the jurisdictional immunities of serving heads of state both international law and practice has generally distinguished between proceedings before national and international courts. As regards the international courts and tribunals which have been established, practice has been consistent, in that no serving head of state has been recognised as being entitled to rely on jurisdictional immunities."71

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

---

about it.". In: L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives,* New York, Oxford University Press (2004).

68 *Ibid.*

69 *Ibid.*

70 For deep survey and analysis of universal jurisdiction *see* Reydams, *supra* note 67.

71 See Sands *supra* note 65. Moreover, it can be argued that this 'consistent' practice is supported only by one example of *international* court, i.e. the ICTY with respect to indicting then president of the Federal Republic of Yugoslavia Slobodan Milosevic. Yet, at the time of the decision, Milosevic was already a former Head of State. At least to the author's knowledge, there is no other example of what is referred to as a consistent practice.

Immunities should serve to prevent foreign states from interference into the affairs of other states and from exercising jurisdiction over another state.[72] As long as the state concerned has not consented to the exercise of the jurisdiction, there is, according to Akande, no difference whether the exercise of this jurisdiction is done unilaterally by a foreign state or through some collective judicial body.[73] He adds that to claim nonexistence of immunities before international tribunals without the consent by the relevant state will allow a subversion of the policy underpinning international law immunities.[74]

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

In my view, [...] there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts [...].International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.[75]

The proposition that immunities do not apply before international tribunals depends on the following factors which have to be considered: (i) The manner of the court's establishment and identification of the exact legal basis for denying immunity. In other words, does the Statute of that international court deny immunity to a Head of State? (ii) The establishing instrument of the court must bind the concerned state.[76]

---

[72] D. Akande, 'International law Immunities and the International Criminal Court', *American Journal of International Law* 7, (2004).

[73] *Ibid*.

[74] *Ibid*.

[75] *Prosecutor v Krstic* (IT-98-33-T), Judgment, Dissenting Opinion of Judge Shahabuddeen, (17 September 2003), paras. 11-12 (emphasis added).

[76] Chatham House *supra* note 8.

4. INTRODUCTION OF THE SPECIAL COURT FOR SIERRA LEONE

The SCSL is one of the latest versions of the judicial mechanisms to address crimes under international law. The SCSL was established in 2002 with the mandate to try those bearing 'the greatest responsibility'[77] for the crimes committed during the conflict in that country. The seat of the SCSL was deliberately chosen in Freetown, so that justice be not only done, but be seen to done, by and for the people of Sierra Leone. Proceedings are therefore taking place directly in the country where the crimes occurred in contrast with the proceedings before the ICTR and the ICTY taking place in Tanzania (Arusha) and The Netherlands (The Hague) respectively.

One of those accused of bearing 'the greatest responsibility' is Charles Taylor. Taylor was elected President of Liberia in 1997. The Indictment against Taylor was approved by the SCSL in March 2003. Taylor remained Head of State until August 2003. His tenure of office covered most of the period the SCSL has temporal jurisdiction pursuant to its mandate to try those primarily responsible for the war crimes and crimes against humanity committed in Sierra Leone since 30 November 1996.[78]

Taylor was only the second head of State[79] to be indicted while in office. The Indictment initially included 17 counts in which Taylor was accused of planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of crimes such as terrorizing the civilian population and collective punishments, unlawful killings, physical and in particular sexual violence, use of child soldiers, abductions and forced labour, looting and burning and attacks on peacekeepers.80 The Indictment claims, inter alia, that Taylor was acting with intent to gain access to the mineral wealth of Sierra Leone, in particular the diamond wealth and to destabilize the state.[81]

---

[77] *See* Article 1(1) of the SCSL Statute: "1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear *the greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."(emphasis added).

[78] K. Novotna, 'No Impunity for Charles Taylor' (David Davies Prize Winning Article), *Aberystwyth Journal of World Affairs* 2 (2004), p. 90.

[79]First Head of State indicted while still in office was Slobodan Milosevic, President of the former Federal Republic of Yugoslavia.

80 *Prosecutor v. Taylor* (SCSL-2003-01-I), Indictment, 7 March 2003. The Indictment was amended on 16 March 2006, reducing the number of counts to 11.

[81] *Ibid.*

The SCSL is a novel and unique mechanism which represents a development of a new legal basis. It is the first time in a history when the court has been established by the agreement between UN and a state. Accordingly, the issues brought by the Defence counsel for Taylor in the motion[82] challenging the jurisdiction of the SCSL turned to a large extent on the process of the establishment of the SCSL, its legal basis and implications of this legal basis for its international jurisdictional reach, i.e. issues which will be examined next.

4.1 THE SCSL'S DECISION ON IMMUNITY FROM JURISDICTION

Head of State who commits murder and other grave crimes is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example.[83]

In determining its legal basis, the SCSL in its Decision on Immunity from Jurisdiction[84] focused on reviewing two main instruments. Firstly, the SCSL identified Resolution 1315 (2000) of the UN Security Council authorizing the Secretary General to negotiate an agreement on the Statute with the Government of Sierra Leone. Secondly, the SCSL pointed towards the report of the Secretary-General submitted to the Security Council pursuant to this resolution.

Referring to Resolution 1315, the Appeals Chamber of the SCSL (Appeals Chamber) noted that the SCSL is given an international mandate and is part of the international justice machinery. It further stated that the SCSL is not part of the domestic judicial system of Sierra Leone. The SCSL proceeded to address the availability of immunities for an incumbent Head of State. The SCSL first cited the relevant provision of its Statute, Article 6 (2), which lays down the rule that "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible

---

[82] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004.

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

[84] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004.

Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment".

The SCSL identified and cited the relevant provisions of the Charter of the International Military Tribunal in Nuremberg and the International Law Commission's 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' and articles in the Statutes of the ICTY, the ICTR and the ICC. Based on these precedents, the Appeals Chamber concluded that "[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity".85

The SCSL then focused on the decision of the ICJ in Yerodia, in which the ICJ upheld the personal immunity of the incumbent Minister for Foreign Affair of the Republic of Congo, Yerodia Ndombasi. The SCSL approved this decision while stating that the ICJ had on the other hand confirmed the withdrawal of such immunities in relation to 'certain international criminal courts'. The SCSL provided the following rationale for the distinction to be made between international and domestic courts: "the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community." 86

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

The Appeals Chamber ended its analysis by noting that as Taylor stepped down as Head of State prior to this decision, "[t]he immunity ratione personae which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant".87

In the context of its powers to The Appeals Chamber came to the conclusion that:

Although the SCSL was established by treaty, unlike the ICTY and ICTR, which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear

---

85 *Ibid*., para. 49.

86 *Ibid*., para. 51.

87 *Ibid*., para. 59.

that the power of the Security Council to enter into an agreement for the establishment of the SCSL was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315 (2000), the establishment of the SCSL by Agreement with Sierra Leone.[88]

The Appeals Chamber stated that Article 39 empowers the Security Council to determine the existence of any threat to the peace and emphasized that the Security Council in its Resolution 1315 (200) indeed reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.[89] The Appeals Chamber continued that much issue had been made of the absence of Chapter VII powers in the SCSL. In the Appeals Chamber view, a proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the SCSL.[90] The Appeals Chamber stated that:

it is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to 'decide what measures not involving the use of armed force are to be employed to give effect to its decision;' and (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures.91

The conclusion was that the decisions referred to are decisions pursuant to Article 39. On the basis of its reasoning, the Appeals Chamber underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security, it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.92 The SCSL pointed out that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. In this regard the Appeals Chamber held:

the Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone.

---

[88] Ibid., para. 37.

[89] *Ibid.*

[90] *Ibid*., para. 38.

91 *Ibid.*

92 *Ibid.*

This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.93

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

4.2 ANALYSIS: BINDING EFFECTS OF RESOLUTION 1315 AND AGREEMENT

4.2.1 LEGAL SIGNIFICANCE OF THE LACK OF SO-CALLED CHAPTER VII POWERS

The considerable attention given below to binding effects of Resolution 1315 is justified by the fact that the SCSL attempted to establish its legal basis under Chapter VII powers. If it had been indeed the case, it would have had important implications for immunity afforded by contemporary international law to, at the time of the issuance of indictment, an incumbent Head of State.[94] This part will however reveal some shortcomings and inconsistencies in the SCSL's reasoning and prove that the SCSL's findings were not correct in this respect.

Arguments of the SCSL relating to the bindings effects of Resolution 1315 were not very convincing. Some of them were rather confusing and even contradictory. The following conclusions of the SCSL can serve as an illustration of this contradiction. Firstly, the SCSL underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security, it may or may not, at the same time, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.[95]

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

---

93 *Ibid.*

[94] In short, it is suggested that a right to claim immunity (as a part of customary international law) preexists also before international courts and can be thus lost only under certain circumstances.

[95] *Prosecutor v. Taylor*, para. 38.

Secondly, the SCSL at the same time admitted that it was lacking Chapter VII powers by stating that the lack of Chapter VII powers "does not by itself define the legal status of the Special Court."[96] Similarly, in his amicus curiae submission Sands stated that despite the fact that Resolution 1315 was not adopted under Chapter VII, it however reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region.[97]

Regarding the SCSL's status as an international criminal tribunal, the SCSL in its decision focused on the UN's involvement with the establishment of the SCSL. The main attention of the SCSL was given to the authority of the Security Council to enter into an agreement with the Government of Sierra Leone in order to establish the SCSL. According to the SCSL, this authority could emanate from: (1) the general purposes of the UN as expressed in Article 1 of the Charter,[98] as well as (2) the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security.[99]

When examining the Resolution 1315, the SCSL concentrated on the second scenario, i.e. on the Security Council's specific powers under Article 39 and 41. The Resolution 1315 authorized the UN Secretary-General to negotiate the establishment of the SCSL, while reaffirming in the preamble that the situation in Sierra Leone continued to constitute a threat to international peace and security.100 Does the mere reaffirmation in the preamble that the situation in Sierra Leone continued to constitute a threat to peace suffice to imply the binding effect of this Resolution?

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

---

[96] *Ibid.*

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

[98] Article 1 states that one of the main purposes of the UN is to maintain international peace and security.

[99] *Prosecutor v. Taylor*, para. 37.

100 C. Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights* (2004), available at http://www.asil.org/insigh145.cfm (last accessed 4 May 2008).

has become standard practice for the SC to state that it is 'acting under Chapter VII of the Charter'.[101]

At the same time it is however true that the SC often determined the existence of a threat to peace without a reference to Chapter VII and thus left the legal basis in doubt.102 Accordingly, it may be argued that the Resolution 1315 could serve as another example of leaving its legal basis unclear. The SC reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security. But it did so only in a preamble, not in the operative part.

Simma suggests that "unless other factors indicate that action under Chapter VII is envisaged, such resolutions should, according to the general rule, be interpreted narrowly."103 Simma concludes that resolutions that cannot be considered as adopted under Chapter VII do not create binding effects for member States.[104] It is submitted that there were no other factors indicating any intention to adopt Resolution 1315 under Chapter VII (except the terminology similar with Article 39). Racsmany suggests that "instead of using classical Chapter VII verbs such as 'demands', or the imperative 'shall', the language falls even short of 'calling upon' states to undertake certain measures."105

In order to further support the above conclusions, one can further point to the request of the President of the SCSL to the Security Council to grant the SCSL Chapter VII powers, which has never occurred.106 There would certainly be no need for this request should the Resolution 1315 be already adopted under Chapter VII powers. There would also be little need to arrange any subsequent cooperation agreements as envisaged in paragraph 8 of the Resolution 1315.[107] In subsequent resolutions regarding the situation

---

[101] B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), at p. 727.

102 See e.g., SC Res 502 (1982) ('breach of the peace', Falkland conflict), SC Res 393 (1976) (Zambia, 'armed conflict' by South Africa), SC Res.1227 (1999) (Eritrea and Ethiopia).

103 Simma, *supra* note 101, p. 727.

[104] *Ibid.*, p. 455.

105 Z. Deen-Racsmany, 'Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity', Leiden Journal of International Law, 18 (2005), quoting from P. C. Szasz, 'The Security Council Starts Legislating', 96 *American Journal of International Law* 901, p. 902.

106 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000, para. 10. *See* also Press Release of the SCSL (11 June 2003), available at www.sc-sl.org (last accessed 18 October 2009).

[107] "Requests the Secretary-General to include recommendations on the following: (a) any additional agreements that may be required for the provision of the international assistance

in Sierra Leone, the Security Council has called upon all states to 'cooperate fully' with the SCSL but has not resorted to Chapter VII mandatory procedure.108

The SCSL's conclusions that Chapter VII powers are not determinative of its legal basis (i.e. whether it is an international or a national court) were certainly correct. Still, the SCSL was nevertheless trying to imply the binding nature of Resolution 1315(2000). Why, if the international legal basis of the SCSL can be clearly shown by the fact that the SCSL was established by international agreement?

It is suggested that proving the binding effects of Resolution 1315 either under Chapter VII or under other provisions of UN Charter (e.g. Article 25 in connection with Chapter VI) would have crucial implications with respect to issues such as (obligatory) cooperation of states other than Sierra Leone with the SCSL or, more importantly for our purposes, withdrawal of immunities of serving head of state should the agreement be found unsatisfactory in regulating these issues.[109] It seems that the SCSL was trying to 'cure' shortcomings of a merely bilateral agreement by trying to imply binding effects of Resolution 1315 in order to justify the denial of immunity of a Head of State of another country.

4.2.2 NO NEED FOR CHAPTER VII POWERS?

The above conclusion that Resolution 1315 was not adopted under Chapter VII powers is further supported by the argument that, at least initially, there was no need for Chapter VII powers. The Security Council can define its involvement in any matter either under Chapter VI or Chapter VII. Involvement under Chapter VII powers allows the Security Council to 'intervene' in the respective state without the consent of that state. It is submitted that, in the case of Sierra Leone, there was actually no need to impose measures under Chapter VII.

The SCSL's establishment was initiated by the President of Sierra Leone. Hence, the Security Council's involvement was based on the invitation and request for international assistance and help from the UN by Sierra Leone itself. The government of Sierra Leone was willing to cede jurisdiction to the SCSL, although its original request was limited to assistance in

---

which will be necessary for the establishment and functioning of the special court", para. 8 of Resolution 1315.

108 Security Council Resolutions 1478 (2003), 1508 (2003).

[109] The agreement and its binding effects will be dealt with in the Chapter 4.3.

conducting trials of the RUF.[110] The establishment of the SCSL was thus clearly consensual.[111]

It is the first time that a court has been established on the basis of an agreement between the UN and a member state. Accordingly, there was no need for Chapter VII powers in a sense of imposing the establishment of the SCSL on Sierra Leone, as the situation differed significantly from the situations in the former Yugoslavia or Rwanda, where the two ad hoc tribunals were established without the consent, or even against the will, of the respective countries.

During the proceedings before the SCSL's Appeals Chamber, the Prosecutor stated that "Chapter VII powers were needed in the case of Yugoslavia and Rwanda because there was no agreement with the States concerned. Here, in Sierra Leone, that is not the case."[112] Thus, the SCSL is a similar creation, but one which is in the Prosecutor's view is actually more democratic, because Sierra Leone has explicitly agreed to its establishment. It was nevertheless acknowledged by both the Prosecutor and the Defence in the Fofana case113 that the SCSL may not enjoy all of the consequences which could flow if it had been established by the Security Council acting under Chapter VII.[114]

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

---

[110] However, the SCSL itself did not approve the delegation of jurisdiction because it would arguably diminish its claim to its international nature. According to the SCSL "the establishment of the Special Court did not involve a transfer of jurisdiction of sovereignty by Sierra Leone…the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community", in: *Prosecutor v. Gbao* (SCSL-04-15-AR72(E)), Decision on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court (25 May 2004), para. 6.

[111] It can be however argued that the fact that Sierra Leone requested the help with establishment of the SCSL and therefore was certainly willing to cooperate in all respects does not mean that other state will be willing to voluntarily cooperate as well. Especially when it comes to requests for arrest and extradition of incumbent Head of State of another country.

[112] *Report on proceedings before the Appeals Chamber of the Special Court for Sierra Leone* (1 November 2003), available online at http://www.specialcourt.org/documents/WhatHappening/ReportAppealHearings01NOV03.html (last accessed 8 April 2008).

113 *Prosecutor v. Fofana* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (25 May 2004).

[114] Chapter VII powers are relevant e.g. to the enforceability against third States of acts of the SCSL.

UN as expressed in Article 1 of the Charter of the SC applied to its establishment.

Article 1 states that one of the main purposes of the UN is to maintain international peace and security. Decisions taken under other Articles may be regarded, according to Simma, as "implementing such purposes and principles."[115] In his view, international peace and security can be promoted and achieved through various policies or measures. This can include (1) measures of collective security taken under Chapter VII and (2) adjustment or settlement of international disputes or situations under Chapter VI. Thus, Article 1 identifies another path to maintain international peace and security.[116]

Since international peace and security can be achieved through various policies or measures, there is no need for the UN Charter to anticipate all possibilities to be used. The UN Charter for example also originally did not anticipate peacekeeping missions.[117] Despite the fact the UN Charter does not explicitly mention peacekeeping, it was suggested that it can be implied from the UN's primary purpose as stated in Article 1, i.e. the primary purpose of the UN being to maintain international peace and security.[118] The UN therefore must possess powers and means in order to be able to fulfil its primary purpose.[119] Construing the powers of the UN in the Charter too strictly could prevent the UN from acting. The Charter as a flexible legal and political document allows for many possible approaches and interpretations, depending upon the given international situation.[120]

---

[115] Simma *supra* note 101.

[116] *Ibid.*

[117] The UN Charter neither explicitly mentions nor authorizes peacekeeping. As the former UN Under Secretary-General for Political Affairs stated, "[t]he technique of peace-keeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947." In: B. Urquhart, 'The United Nations, Collective Security, and International Peacekeeping', quoting from A. K. Henrikson (ed.), *Negotiating World Order: The Artisanship and Architecture of Global Diplomacy* 59, p. 62 (1986).

[118] J. P. Bialke, 'United Nations peace operations: applicable norms and the application of the law of armed conflict', *Air Force Law Review* (2001).

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

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

There was consensus among many policymakers that peace could be jeopardized if certain individuals and factions were not neutralized. The peacekeeping mission in Sierra Leone was at that time the largest in history and the international community was already investing huge financial resources. The international community and the government of Sierra Leone both sought to stabilize the country. In this context, the study conducted by No Peace Without Justice Initiative noted that "the government wanted the RUF leadership tried without the instability that would result from national trials. The international community wanted to prosecute those responsible for attacks on UN peacekeepers. While the evaluation criteria have since changed to encompass notions of legacy and promoting the rule of law, the Special Court was originally conceptualized as central to redressing security concerns."[121]

Maintaining peace and security was therefore one of the main motivations for establishing the SCSL.[122] The Security Council's role in establishing the SCSL could be thus also justified under the general powers of the Security Council under Article 1 and their subsequent implementation through Chapter VI.123

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

What can be subject to criticism is nevertheless the attempt of the SCSL to imply the binding effect of Resolution 1315 based allegedly on specific powers of the Security Council under Articles 39 and 41. Resolution 1315 contains just recommendations with respect to the subject matter jurisdiction

---

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

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

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

and personal jurisdiction of the SCSL and requests for the Secretary-General to negotiate an agreement with the Government of Sierra Leone, to submit a report to the Security Council on the implementation of this resolution or to address in his report the questions of the temporal jurisdiction of the special court and other issues pertaining to the establishment of the SCSL. Resolution 1315 should be rather viewed as another path to promote and maintain international peace and security via adjustment or settlement of international disputes or situations under Chapter VI (emphasis added).[124]

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

Article 25 of the UN Charter provides that members of the United Nations "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." It is submitted that Article 25 of the UN Charter does not necessarily apply only to decisions taken under Chapter VII (i.e. decisions on enforcement measures). According to Simma "if one followed such a narrow interpretation of Art. 25, the whole system set up for the maintenance of peace would be weakened, and it would clearly run counter to the overall concept of the Charter. Furthermore, Art. 25 would be unnecessary as the binding effect of decisions taken under Chapter VII could already be achieved on the basis of Art. 48 and Art 49."[125]

To further support this view, one can refer to the ICJ's Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia.[126] In this Advisory Opinion, the ICJ held that "the decisions made

---

[124] Chapter VI actions usually rest in providing assistance to a state in order to help the state to maintain peace and order, however do not include the possibility of enforcement as opposed to actions under Chapter VII powers. Racsmany for example suggests that the establishment of the SCSL "is better compared to classical, consensual peacekeeping operations. These are generally considered as falling under Chapter VI or between Chapters VI and VII of the UN Charter. Their legal basis is in any case commonly located outside of Chapter VII." See Z. Racsmany, Z. Deen-Racsmany, 'Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity', *Leiden Journal of International Law*, 18 (2005), p.308.

[125] Simma, *supra* note 101, p. 458.

[126] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (for a full citation see *supra* note 123). Compare with statement of Sir Hartley Shawcross in

by the Security Council […] were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24[127] and 25. The decisions are consequently binding on all States Members of the United Nations which are thus under obligation to accept and carry them out."[128] By adopting this contextual approach, the ICJ further stated:

It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council…The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[129]

Nonetheless, even if this contextual approach would be adopted and applied to Resolution 1315, it can be still concluded that in the light of interpretation of all circumstances (i.e. language and terms of the resolution, content, purpose, the discussions leading to its adoption, the Charter provision

---

the ICJ *Corfu Channel* case, where he asserted that recommendations "under Chapter VI of the Charter, relating to methods of settling disputes which endanger peace, are binding." He contested the applicability of Article 25 only to Chapter VII, by stating "that position, in my submission, is completely untenable. [Even] if one were to disregard […] the preparatory work and the commentaries, one could not find in the Charter itself a shred of support for the view that Article 25 is limited in its application to Chapter VII of the Charter", See *Corfu Channel Case*, Prelim. Objections, Pleadings Vol. III, (1949) I.C.J.Rep, 72, pp. 76-77.

[127] In the *Fofana* case, the SCSL held that Article 24(1) may be invoked as the direct basis for action of the United Nations, i.e. for the establishment of the Agreement pursuant to the Resolution 1315 (2000). The SCSL further stated that Article 24(2), which refers to the specific powers granted to the Security Council is not exhaustive and must be read as fulfilling the function of closing the gaps. It was argued by the Prosecutor that if the Security Council can establish an international tribunal under Article 41, there is no reason why it could not take the same action under Article 24 of the Charter when the state affected has consented. *Prosecutor v. Fofana* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (25 May 2004).

[128] See *supra* note 123, p. 53, para. 115.

[129] *Ibid.*

invoked etc.), Resolution 1315 was not intended to have binding effects. Resolution 1315 contains mere recommendations regarding the subject matter jurisdiction and personal jurisdiction of the SCSL and requests for the Secretary-General to negotiate an agreement with the Government of Sierra Leone.

Relevant findings can be summarized as follows:

1. Proving that Resolution 1315 was indeed adopted under Chaper VII would have crucial implications for withdrawal of immunities of serving head of state should the agreement be found unsatisfactory in regulating these issues.

2. It is however suggested that Resolution 1315, which recommended the establishment of the SCSL, was not adopted under Chapter VII powers despite the attempt of the SCSL to prove otherwise.

3. There are some doctrinal opinions[130] and advisory opinions of the ICJ[131] suggesting that the resolution can be still binding under certain circumstances even if not adopted under Chapter VII powers, it is however not a case in the context of Resolution 1315. There was no intention of the SC to adopt this resolution as binding for reasons provided above.

Moreover, the SCSL was not even established by the SC Resolution (as oppose to the ICTY and ICTR ad hoc tribunals). The SCSL was established by a bilateral agreement pursuant to Resolution 1315. For the reasons given, it is not possible to imply binding effects of the Resolution 1315 for the purposes of denying immunity to high ranking state officials as was in the case of the establishment of the ICTY and ICTR. The SCSL should instead direct its attention to the binding effects of agreement establishing the court. This issue will be addressed next.

4.2.3 AGREEMENT BETWEEN THE UN AND THE REPUBLIC OF SIERRA LEONE AND ITS BINDING EFFECTS

Apart from Resolution 1315, attention needs to be given to the Agreement which actually establishes the SCSL.[132] Analysis of the agreement is the

---

[130] *See* e.g. Simma *supra* note 101, p. 458.

[131] See *supra* note 123.

[132] The SCSL justified the fact the SCSL is treaty-based by referring to Article 2(1)(a) in connection with Article 31(1) of the Vienna Convention on the Law of the Treaties between States and International Organizations (The 1986 Vienna Convention) and provided a modified version of Article 2(1) by defining international treaty as "an international agreement governed by international law and concluded in written form…between one or more states (in this instance Sierra Leone) and one or more international organizations (the United Nations).

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

The SCSL adopted arguments and conclusions of both of the invited amici curiae.[133] According to one amicus curiae, Orentlicher, the Security Council by authorizing the Secretary-General to negotiate an agreement with Sierra Leone was not only carrying out its responsibility to maintain peace and security, but "in doing so, it was acting on behalf of all Members of the United Nations".134

Subsequently, the SCSL developed this argument further by stating that since the Security Council was acting "on behalf of all Members of the United Nations", the agreement is to be regarded as "between all members of the United Nations and Sierra Leone".[135] According to the SCSL "this fact makes the Agreement an expression of the will of the international community".136 However, it is rather disputable to assert, as the SCSL did, that only by virtue of the fact that states are members of the UN, they are therefore parties to the Agreement and accordingly are bound by its provisions.

Both state practise and scholarly opinions[137] show that the conclusion of the SCSL was not correct. For example Article 17 of the SCSL Statute states "the Government shall cooperate with all organs of the Special Court at all stages of the proceedings". Article 17 therefore addresses obligation to cooperate only for the government of Sierra Leone. Are third states also obliged to cooperate with the SCSL? If so, on what legal basis?

It is suggested that the Agreement cannot be interpreted so broadly. For example Damgaard claims that such consequences of UN membership were not envisaged when the UN Charter was adopted and further suggests that if the agreement was between all the UN member states and Sierra Leone, then such member states would assume obligations under such

---

[133] See *supra* note 97.

134 *Ibid*., para. 12.

[135] *Prosecutor v. Taylor*, para. 38.

136 *Ibid.*

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

agreement.[138] However, no state expressed that it feels bound by this agreement. In fact, many states acted otherwise.[139]

The SCSL itself approved the limitation of the SCSL when it stated that: "[w]hile acknowledging that the ICTY and ICTR have Chapter VII powers of the UN Charter ensuring that there is an obligation on all UN members to cooperate, in the case of the Special Court, as the Agreement is between the UN and Sierra Leone, its primacy is limited to Sierra Leone alone, as also the obligation to co-operate with the Special Court."[140]

Under these circumstances it is hard to maintain the position that the agreement is to be regarded as 'between all members of the United Nations and Sierra Leone'. Becoming a party to a treaty 'by interpretation' does not respect principles of State sovereignty.[141] Furthermore, the UN possesses separate legal personality and such as "is more than a sum of its members and the organization occupies a position in certain respects in detachment from its members."[142] As a general matter, member states are not bound by treaties concluded by the UN by the virtue of membership alone.

At this point it is useful to reiterate what led the SCSL's to emphasize the role and involvement of the Security Council in the establishment of the SCSL. As already indicated in the previous chapter, the SCSL did so arguably in order to imply binding effects of the Resolution and therefore by

---

[138] Damgaard, *supra* note 4.

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

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

[141] *See* also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (Convention). Article 34 of the Convention provides that a treaty does not create either obligations or rights for a third state without the consent of that State.

[142] *Reparation of Injuries Suffered in The Service of the United Nations*, I.C.J. Reports, 1949, p. 174.

implication also binding effects of the Agreement for all member states of the UN. It is nevertheless suggested that individual member states remain third parties and are thus not bound by bilateral agreement (pacta tertiis nec nocent nec prosunt).

An alternative approach, which was suggested by the Secretary-General in his Report, would be the conclusion of a multilateral treaty by all UN member states. On the one hand, this approach would allow the treaty to be opened for signature and ratification by all member states.[143] The advantage of this approach would be the possibility of a detailed examination and elaboration of all issues relevant to the establishment of the international tribunal. States participating in the negotiation and conclusion of the treaty could then fully exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.[144]

On the other hand, this approach will admittedly require considerable time to establish the treaty and subsequently to achieve the required number of ratifications for entry into force.[145] Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.[146] Therefore, what sounds as legally more elegant approach, might prove unfeasible from the practical point of view.

The following statements well illustrate the divergence of views on the way of establishment of the SCSL. In the Fofana case, applicant argued that the UN illegally delegated its powers in this respect and suggested that "the situation may have been different if the court had been set up by the agreement involving a wide group of concerned states."[147] In contrast, Judge Robertson expressed his views on the establishment of the SCSL through bilateral treaty by stating "it cannot in my judgement make any meaningful difference that the Security Council has chosen to authorise the Secretary-General to establish the Court with a similar purpose148 by agreement with a single state (a state where peace need to be restored) rather than by unilateral action or by action in agreement with many states... multilateral agreement would presumably make it more difficult for the Security

---

[143] Report *supra* note 112.

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid.*

[147] *Prosecutor v. Fofana*, (SCSL-04-14-PT), Defence Reply to The Prosecution Response to the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (30 November 2003), para. 7.

148 By 'a Court with the similar purpose' is meant the ICTY.

Council to e.g. terminate a court, since it would need the agreement of a number of states rather than one."149

It is respectfully submitted that there is a 'meaningful difference' in establishing the court by bilateral or multilateral treaty. The SCSL's legal basis is certainly international regardless of the number of parties to the treaty, i.e. whether it is established by bilateral or multilateral treaty.[150] The difference lies in the fact that the bilateral agreement is arguably binding only on Sierra Leone, it does not bind any other state. This conclusion has important consequences for the purposes of denying immunity of an incumbent head of state of a third country not party to the treaty.

4.2.4 HYBRID NATURE OF THE SCSL NOT RECOGNISED

The SCSL was often referred to as a 'hybrid court'.151 Some refer to its hybrid nature due to the fact that under the SCSL Statute, not only crimes under international law, but also certain crimes under Sierra Leonean law can be prosecuted and punished. The mixed composition of both internationals and Sierra Leoneans within the SCSL was often emphasized as another sign of the SCSL's hybrid nature. However, as already noted above[152], the law applied by the Court and the nationality of the staff do not determine the legal nature of the Court.153

The hybrid nature of the SCSL was also emphasized by Richard Holbrooke who has been an active supporter of the establishment of the SCSL in the SC. After Resolution 1315 (2000) was passed, Holbrook described the proposed character of the SCSL in the following way "This court is going to be of a hybrid nature […]. We have not asked the United Nations to set up another international war crimes tribunal such as the ones that exist for Rwanda and Yugoslavia, but rather we have asked the Secretary-General to

---

149 *Prosecutor v. Kallon, Norman and Kamara* (SCSL 2004-14-AR72(E)), Decision on Constitutionality and Lack of Jurisdiction, (13 March 2004), Separate Opinion of Judge Robertson, para. 5.

150 The Secretary-General rightly held that the legal nature of the SCSL, as with any other legal entity, is determined by its constitutive instrument. Since the constitutive instrument is an agreement between a state - Sierra Leone - and an international organization - the UN - the legal nature of the SCSL is international.

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

152 *See* Chapter 2.

153 *See* differently Cryer, who argues that the applicable law also determines the legal nature of a court. R. Cryer, 'A "Special Court" for Sierra Leone', (2001) 50 *International and Comparative Law Quarterly*, p. 437.

work with the Sierra Leone Government for what I would call a mixed court, although the actual phrase of this resolution is "Special Court.""[154]

At the beginning, Resolution 1315 anticipated the possibility for the SCSL to share the Appeals Chamber of the ICTY and the ICTR. However, according to UN Assistant Secretary-General Office of Legal affairs Zachlin "the judges in those two courts were very apprehensive of the legal efficacy of such an arrangement given the different nature of the two court systems." He explained that the judges "felt that it would be very difficult for an appeals chamber of the Yugoslavia and Rwanda Tribunals to be sitting as an appeals chamber for a Sierra Leone Court which has its own statute and which is operating on the basis of its own jurisdictional provisions. And they felt very uncomfortable with that. And it seems to us that this was a very legitimate point."[155]

5. CONCLUSION

The approach of the SCSL in Taylor case consisted of two main findings: the SCSL first held that it is an international court. Subsequently, the SCSL decided that as the consequence of its international legal basis, Article 6 of the Statute of the SCSL denying immunity can be invoked against Taylor. Therefore, the SCSL denied immunity ratione personae to the president of Liberia while still in the office. While such a decision may be welcomed, the legal reasoning on the basis of which the SCSL arrived at the conclusion was subjected to criticism. The validity of the SCSL approach in its decision was critically examined in order to find out whether its approach complies with the current state of international law with respect to immunities for crimes under international law.

While this paper approved the international legal basis of the SCSL, the legal reasoning on the basis of which the SCSL arrived at the conclusion to deny immunity to Taylor was found disputable. More elaborate reasoning and judicial clarification of contentious issues were needed, bearing in mind that until the establishment of the SCSL, it had never been considered that the legal basis of an international criminal court could be an agreement between the UN and one or more states.

The SCSL's legal nature, even if international due to its constitutive instrument, is to a large extent different from the two ad hoc tribunals

---

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

[155] Press Briefing by the UN Assistant Secretary-General Office of Legal Affairs, Ralph Zacklin, (September 2000), New York, available at www.sierra-leone.org/specialcourt0900.html > (last accessed 16 March 2008).

(ICTY and ICTR) or the ICC. It can not be simply concluded that the SCSL is an international court through an attempt to compare it with the ICTY, ICTR and ICC. The SCSL is indeed international as for its legal basis. Nevertheless, it is proposed that the question is not simply whether the court is international as for its legal basis, but rather whether the court's international legal basis allows for abrogation of immunities.[156]

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

Not all immunities are irrelevant before any court that may be characterized as 'international'. As for the immunity ratione personae, this immunity constitutes a general rule of customary international law and is therefore relevant not only before domestic courts, but also before international courts "unless the status and nature of the international court justifies a different conclusion. Any exception to this general rule, which remains so far fully applicable before domestic courts, must be legally justified in the case of international courts."[157]

The proposition that immunities ratione personae do not apply before international tribunals depends on the manner of the court's establishment as well as identification of the exact legal basis for denying immunity. In addition, the establishing instrument of the court must bind the concerned state.[158] The legal basis for exception to immunity can be either a Security Council Chapter VII resolution or an international treaty binding the concerned state.

Accordingly, explicit exception to immunity in the Rome Statute of the ICC applies only to contracting parties. On the other hand, lasting entitlement to immunities ratione personae granted by customary international law to incumbent Heads of State of non-state parties before the ICC reflects the current state of law on immunities.[159] By analogy, the agreement between Sierra Leone and the UN establishing the SCSL cannot, without more or of

---

[156] See e.g. the discussion in Chatham House, one of the questions raised was "Could state A get around the obligation to provide immunity to the head of state B, by entering into a treaty with state C to set up an "international" court?", *supra* note 5. See also, Damgaard, *supra* note 4.

[157] Cassese *supra* note 65.

[158] Akande *supra* note 72.

[159] *Ibid.*

itself, take away from the incumbent President of another country the immunity ratione personae granted under customary international law.

The SCSL was labelled a 'treaty-based sui generis court of mixed jurisdiction and composition'.160 The SCSL is indeed Sierra Leone specific including the consequences attached to such a nature. Many of the legal choices made were intended to address the specificities of the Sierra Leonean conflict. As such, the SCSL has a unique place in international criminal justice system.161 Nevertheless, the analysis of the SCSL's legal basis also revealed new legal issues and challenges, including the question of denying immunity to the incumbent Head of State of the country not party to a treaty which established the court.

Some argue that the manner in which the SCSL was established was completely unrelated to the issue of immunity: instead, the initial desire was to separate the proceedings from domestic criminal law and the legal system of Sierra Leone.[162] This may well be so. It can even explain some of the difficulties with which the SCSL was confronted. Unfortunately, it does not justify in some respects unfounded reasoning of the SCSL in the Taylor case.

Do these findings suggest that Taylor should be completely immune from the exercise of jurisdiction by the SCSL? No, they rather propose that there is a serious legal issue to be discussed in the context of immunities available to a serving Head of State by the SCSL.[163] The central conclusion of this paper is therefore a finding that a classification of a judicial body as an international criminal court does not automatically mean that a state official has no immunity from prosecution before that body.[164]

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

---

160 Report, *supra* note 112 , para. 9.

161 *Ibid*.

[162] Chatham *supra* note 8.

[163] Examination of immunities *ratione materiae* and *ratione personae* goes beyond the scope of this paper. For a detailed analysis of immunities available to Taylor, *see* e.g. Nouwen, Novotna, *supra* note 27.

[164] *See* Damgaard, *supra* note 4.

Literature:
Books

- Cryer, R.; Frimain, H.; Robinson, D., An Introduction to International Criminal Law and Procedure, Cambridge (2008).
- Damgaard, C., Individual Criminal Responsibility for Core International Crimes (Selected Pertinent Issues), Springer (2008).
- Denza, E., Diplomatic Law (Commentary on the Vienna Convention on Diplomatic Relations), 3d edition, Oxford (2008).
- Fox, H. The Law of State Immunity (Preface to Paperback Edition), Oxford University Press (2004).
- Reydams, L., Universal Jurisdiction, International and Municipal Legal Perspectives, New York: Oxford University Press (2004).
- Romano, C., Nollkaemper, A., and Kleffner, J. (eds.), Internationalized Criminal Courts: Sierra Leone, East Timor, Cambodia and Kosovo, Oxford University Press (2004).
- Simma, B., (ed.), The Charter of the United Nations: A Commentary, Oxford University Press, (2002).

Articles

- Akande, D., 'International Law Immunities and the International Criminal Court', American Journal of International Law 7, (2004).
- Akande, D., 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?', Oxford Transitional Justice Research Working Paper Series (2008).
- Ambach, P., 'The Overlapping Jurisdictions between the International. Criminal Court and Hybrid International Tribunals', Bofaxe, No. 298E (2006).
- Bantekas, I., 'Head of Sate Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis

of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 Journal of Conflict & Security Law 21 (2005).

- Berdal, M., R., 'The Security Council, Peacekeeping and Internal Conflict after the Cold War', 7 Duke Journal of Comparative and International Law 71, 73 (1996).
- Bialke, J., P., 'United Nations peace operations: applicable norms and the application of the law of armed conflict', Air Force Law Review (2001).
- Cassesse, A., Why May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, European Journal of International Law 13 (2002).
- Cryer, R., 'A 'Special Court' for Sierra Leone?', 50 International and Comparative Law Quaterly 435 (2001).
- Chatham House, 'Immunity for Dictators?', A summary of discussion at the International Law Programme Discussion Group at Chatham House, (9 September 2004).
- Frulli, M., 'The Special Court for Sierra Leone: Testing the Water. The Question of Charles Taylor's Immunity. Still in Search of a Balanced Application of Personal Immunities?', 2 Journal of International Criminal Justice (2004).
- Gowlland-Debbas, V., 'The Relationship between the Security Council and the International Criminal Court', Graduate Institute of International Studies, Weltpolitik (2001)
- Jalloh, C., 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone', ASIL Insights (2004).
- Koller, S., 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia judgement as it pertains to the Security Council and the International Criminal Court', 20 Am. U. Int'l L. Rev. 7 (2004).
- Linton, S., 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', 14 Criminal Law Forum (2001).

- Nouwen, S., M., H., ‘‘Hybrid courts’, The hybrid category of a new type of international crimes courts’, 2 Utrecht Law Review 2, December, (2006).
- Nouwen, S., M., H., ‘Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued’, Leiden Journal of International Law 18 (2005).
- Novotna,K., ‘No Impunity for Charles Taylor’, Aberystwyth Journal of World Affairs 2, (2004).
- Novotna, K., ‘Relationship between Crimes under International Law and Immunities: Coexistence or Exclusion? Charles Taylor Case’, Human Rights and International Humanitarian Law, Satyam Law International, New Delhi (forthcoming in 2010).
- Novotna, K., ‘Kosovo’s Post-Independence - Test for the EU’s Common Foreign and Security Policy. What Role Has the EULEX Mission to Play in Kosovo?’ COFOLA 2009: the Conference Proceedings, 1. Edition, Brno: Masaryk University (2009).
- Orentlicher, D., ‘International Justice Can Indeed Be Local’, Washington Post, (21 December 2003).
- Orentlicher, D., F., ‘Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles’, Georgetown Law Journal (2004).
- Perriello, T., Wierda, M., ‘The Special Court for Sierra Leone under Scrutiny’, Prosecution Case Studies Series, the International Center for Transitional Justice (2006).
- Romano, C., P., R.; Nollkaemper, A., ‘The Arrest Warrant Against The Liberian President, Charles Taylor’, ASIL Insights (2004).
- Sands, P., ‘Immunities before international courts’, Guest Lecture Serious of the Office of the Prosecutor, (18 November 2003).
- Sands, P., ‘International Law Transformed? From Pinochet to Congo...?’, Leiden Journal of International Law, 16(2003).

- Summers, M., A., 'Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to The Statute of The International Criminal Court, Brookland Journal of International Law 31 (2), (2006).
- Watts, A., 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', in: Recueil des Cours de l'Académie de droit international, III (1994).
- Wirth, S. 'Immunity for Core Crimes? The ICJ's judgement in the Congo v. Belgium Case', 13 European Journal of International Law 877 (2002).
- Wouters, J., 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks', 16 Leiden Journal of Intenational Law 253 (2003).

Contact – email
katerina.novotna@law.muni.cz