SCSL-2003-01-I
(1643-1668)

SPECIAL COURT FOR SIERRA LEONE
APPEAL CHAMBER

SUBMISSION OF THE AMICUS CURIAE ON HEAD OF STATE IMMUNITY

IN THE CASE OF
THE PROSECUTOR V. CHARLES GHANKAY TAYLOR
SCSL-2003-01-I

I. Introduction and Summary of Submission

Pursuant to Rule 74 of the Rules of Procedure and Evidence and Article 5 of the Practice Direction of 22 September 2003, the author of this submission, Professor Diane F. Orentlicher, has been appointed by the Special Court for Sierra Leone (SCSL) at its own invitation to submit an *amicus curiae* brief addressing the central issue raised by the motion before this Court: whether, under international law, the SCSL is barred from exercising jurisdiction over Charles Ghankay Taylor because he was President of the Republic of Liberia at the time of his indictment.

This question comprises two distinct issues, of which the first appears to be the most substantial issue before this Court: First, in view of Mr. Taylor's official status at the time he was indicted, was his indictment invalid on the ground that it violated the procedural immunities accorded incumbent heads of state or government under international law? Second, does Mr. Taylor enjoy immunity *ratione materiae* from prosecution for the specific crimes charged — an immunity that, if applicable, would continue to shield Mr. Taylor as a former head of state from prosecution for those alleged crimes? This submission concludes that Mr. Taylor is not entitled to either procedural immunity from the jurisdiction of this Court or substantive immunity from prosecution in relation to the specific charges in his indictment.

Procedural Immunity: The question whether Mr. Taylor was entitled to immunity from the jurisdiction of this Court at the time of his initial indictment turns above all on whether the SCSL, which has been fashioned out of both international and domestic elements, is properly characterized as an international tribunal. If the Court were essentially a domestic court of Sierra Leone, it is doubtful that it could lawfully exercise its jurisdiction over the incumbent head of state or government of another country absent a source of law, such as a decision of the United Nations Security Council, that would override the general rule of international law governing head-of-state immunity. Because the SCSL is essentially an international criminal tribunal for purposes of this issue, it may exercise jurisdiction over incumbent and former heads of state of government in accordance with its statute. (See Section III.)

Substantive Immunities: Operating alongside the broad procedural immunities generally enjoyed by incumbent heads of state and government from the jurisdiction of foreign national courts are substantive immunities, which shield the official conduct of heads of state and government from the judgment of foreign courts. These immunities continue after an individual

ceases to hold the position of head of state or government. As Mr. Taylor acknowledges, this type of immunity is not available in respect of the crimes for which he has been indicted by the SCSL. (See Section IV.)

II. Relevant Principles of International Law

The questions before this Court arise at a time when relevant state practice and, in consequence, applicable rules of customary international law are still evolving. Already, the law governing the immunities that must be accorded heads of state has undergone a profound transformation. In an earlier time, international law identified state sovereignty with the monarchs who ruled states, and "frequently made no clear distinction between" the two.[1] Both enjoyed virtually absolute immunity from the criminal, civil and administrative jurisdiction of national courts. But in the past half century in particular, the law relating to the immunity of foreign states and foreign heads of state has been transformed.

International law's earlier identification of sovereignty with a state's ruler gradually gave way to an approach more consonant with contemporary notions of popular sovereignty: The law of many countries developed distinct rules governing the immunity of foreign states on the one hand and of their leaders on the other hand.[2] In both streams of law, moreover, the previous rule of near-absolute immunity has given way to qualified immunities. In the words of a U.S. federal district court, inroads into the traditional immunities accorded foreign heads of state reflect a growing recognition "among the world's nations [of] new realities about the actions of state officials"[3] and of the global repercussions of human rights violations. "As a by-product of this greater awareness," the court observed, "a deeper wedge has been driven in the old sovereign equation, in recognition that it is not the 'state' as a collective abstraction, but rather live persons . . . who commit atrocities in violation of common norms, and that high-ranking government officials, even heads-of-state themselves, may be among the persons prone from time to time to indulge in lawlessness."[4]

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[1]Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 35 (1994). *See also* Jerrold L. Mallory, Note: *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170 (1986).

[2]SATOW'S GUIDE TO DIPLOMATIC PRACTICE 9 (Lord Gore-Booth, ed. 5th ed. 1979) [hereinafter "SATOW'S GUIDE"]. The domestic law of some countries continues to apply the same or largely similar rules to foreign heads of state and foreign states themselves.

[3]*Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 278 (S.D.N.Y. 2001).

[4]*Id.*

The most important developments in this regard, whose contemporary significance is addressed in Sections III and IV, derive from prosecutions of war criminals following World War II.[5] Article 7 of the Charter of the International Military Tribunal at Nuremberg provided:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[6]

A provision similar to Article 7 of the Nuremberg Charter was included in Allied Control Council Law No. 10,[7] pursuant to which the Allied Powers prosecuted German war criminals in the Allies' respective zones of occupation in Germany, and a somewhat modified version of the Nuremberg text — omitting explicit reference to heads of state — was included in the Charter of the International Military Tribunal for the Far East.[8]

Following the postwar prosecutions, the principle of non-immunity recognized in the Nuremberg Charter and Judgment was reaffirmed in several general international legal texts. In

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[5]Following World War I, the Powers that defeated Germany made plans to prosecute the former German kaiser, Wilhelm II. Article 227 of the Treaty of Versailles provided: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties." But the former German leader eluded prosecution by fleeing to the Netherlands, whose government refused to surrender him for trial. *See* Watts, *supra* note 1, at 82; GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE; THE POLITICS OF WAR CRIMES TRIBUNALS 59, 77-78 (2000).

[6]The Charter of the International Military Tribunal, concluded at London 8 August 1945, entered into force 8 August 1945, art. 7, 82 U.N.T.S. 279. Although Adolf Hitler committed suicide before he could be prosecuted, one of the defendants prosecuted before the IMT, Admiral Karl Doenitz, briefly served as head of state of Germany. Doenitz succeeded Hitler as head of state on 1 May 1945, serving in this position until Germany's surrender on 8 May 1945. Doenitz was no longer head of state at the time of his indictment.

[7]Adopted at Berlin 20 December 1945, 3 Official Gazette of the Control Council for Germany 50-55 (1946). Article 4(a) of this law provided: "The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."

[8]Proclaimed at Tokyo 19 January 1946, and amended 26 April 1946, 4 Bevans 20. Article 6 of the Tokyo Charter provided in pertinent part that "the official position, at any time, of an accused" would not by itself "free such accused from responsibility for any crime with which he is charged." This provision did not make explicit reference to heads of state because the United States, which promulgated the Tokyo Charter, had already determined not to prosecute Japanese Emperor Hirohito.

1946, the United Nations General Assembly adopted a resolution "affirm[ing] the principles of international law recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" and directing the Committee on the codification of international law to formulate those principles.[9] Pursuant to the latter mandate, in 1950 the International Law Commission (ILC) adopted Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[10] Principle III ("Nuremberg Principle III") affirmed:

> The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

The Convention on the Prevention and Punishment of the Crime of Genocide,[11] the first postwar instrument aimed at transforming Nuremberg's lessons in individual responsibility into treaty law, provides that persons who have committed genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[12] Key drafts of the

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[9]GA Res. 95(I) (1946). A British judge captured the legal significance of the General Assembly's resolution this way:

> Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal [sic] adopted by the United Nations General Assembly on 11 December 1946. . . . At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law.

Regina v. Bartle et al. ex parte Pinochet, [1999] 2 W.L.R. 827, 24 March 1999 (hereinafter "Pinochet III") (opinion of Lord Browne-Wilkinson), *reprinted in* 38 I.L.M. 581 (1999). Subsequent references to *Pinochet III* follow the pagination in Volume 38 of INTERNATIONAL LEGAL MATERIALS.

[10]Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the United Nations International Law Commission 2 August 1940, Principle III, II Y.B.I.L.C. 374 (1940).

[11]Adopted by the UN General Assembly 9 December 1948, entered into force 12 January 1951, 78 U.N.T.S. 277.

[12]*Id.*, art. IV. This convention contemplates prosecution either before courts in the territory of the state in which genocide occurred, a situation that in most circumstances would not entail violation of a foreign state's sovereign rights, or before "such international penal

ILC's Draft Code of Crimes Against the Peace and Security of Mankind similarly provide that the official position of an individual who commits a crime included in the draft code does not relieve him of criminal responsibility or mitigate punishment, "even if he acted as head of State or Government."[13]

Building upon the postwar precedents, the statutes of two ad hoc international criminal tribunals established by the United Nations Security Council in 1993 and 1994, respectively, provide, in terms that are almost identical to Article 6(2) of the Statute of the SCSL,[14]: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[15] The first defendant convicted by the International Criminal Tribunal for Rwanda (ICTR), Jean Kambanda, held the post of Prime Minister of the Interim Government of Rwanda from 8 April to 17 July 1994 — a period encompassed in his indictment for genocide

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tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." *Id.*, art. VI.

[13]ILC Final Draft Articles and Commentary (1996), Draft Code of Crimes against the Peace and Security of Mankind, art. 7, *reprinted in* III THE INTERNATIONAL LAW COMMISSION 1949-1998, at 1686, 1705 (Sir Arthur Watts ed., 1999). *See also* Final Draft Articles and Commentary (1954), Draft Code of Offences against the Peace and Security of Mankind, art. 3, *reprinted in* III THE INTERNATIONAL LAW COMMISSION, 1949-1998, at 1676, 1684 (Sir Arthur Watts ed., 1999) ("The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code").

[14]The only difference is that Article 6(2) of the Statute of the SCSL uses the phrase "any persons" where the parallel provisions of the statutes of the ad hoc tribunals use the phrase "any person." *See* Statute of the Special Court for Sierra Leone, art. 6(2), Annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (hereinafter "SCSL Statute").

[15]Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7(2), adopted by the United Nations Security Council 25 May 1993, SC Res. 827, UN Doc. S/RES/827 (1993) (original text); amended by SC Res. 1166, UN Doc. S/RES/1166 (1998); SC Res. 1329, UN Doc. S/RES/1329 (2000); and SC Res. 1411, UN Doc. S/RES/1411 (2002) (hereinafter "ICTY Statute"); Statute of the International Criminal Tribunal for Rwanda, art. 6(2), adopted by the United Nations Security Council 8 November 1994, S.C. Res. 955, UN Doc. S/RES/955 (original text); amended by SC Res. 1165, UN Doc. S/RES/1165 (1998); SC Res. 1329, UN Doc. S/RES/1329 (2000); SC Res. 1411, UN Doc. S/RES/1411 (2002); SC Res. 1431, UN Doc. S/RES/1431 (2002) (hereinafter "ICTR Statute").

and crimes against humanity.[16] Slobodan Milošević, now on trial before the International Criminal Tribunal for the former Yugoslavia (ICTY), was indicted while he was the incumbent president of the Federal Republic of Yugoslavia.[17] Like Jean Kambanda, Mr. Milošević was charged in relation to conduct that occurred while he served as leader of his country.[18]

Rejecting a challenge to the ICTY's jurisdiction based upon the official status of Mr. Milošević, an ICTY Trial Chamber observed that the rule set forth in Article 7(2) of its statute "at this time reflects a rule of customary international law."[19] More generally, the ICTY Statute was intended to empower the Tribunal to enforce principles of international humanitarian law already clearly established under customary international law.[20]

Like the international criminal tribunals that preceded it, the International Criminal Court (ICC), whose statute entered into force on 1 July 2002, may exercise its jurisdiction over heads of state or government. Article 27 of the Rome Statute of the International Criminal Court,[21] adopted in 1998, provides:

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[16]*See The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-DP, Indictment (16 October 1997).

[17]Mr. Miloševi□, who served as President of the Federal Republic of Yugoslavia from July 1997 until October 2000, was first indicted by the ICTY on 22 May 1999; the initial indictment was subsequently amended. *See infra* note 18.

[18]*See The Prosecutor v. Slobodan Miloševi□ et al.*, Case No. IT-02-54, Indictment, para. 43 (24 May 1999); *The Prosecutor v. Slobodan Miloševi□ et al.*, Case No. IT-99-37-I, Amended Indictment (Kosovo), para. 4 (29 June 2001); *The Prosecutor v. Slobodan Miloševi□ et al.*, Case No. IT-99-37-PT, Second Amended Indictment (Kosovo), para. 4 (29 October 2001). Mr. Miloševi□ has also been indicted in connection with conduct that occurred before he became president of the FRY but while he was president of the Republic of Serbia. *See The Prosecutor v. Slobodan Miloševi□ et al.*, Case No. IT-01-50-I, Indictment (Croatia) (8 October 2001); *The Prosecutor v. Slobodan Miloševi□ et al.*, Case No. IT-02-54-T, First Amended Indictment (Croatia) (23 October 2002); *The Prosecutor v. Slobodan Miloševi□ et al.*, Case No. IT-01-51-I, 22, Indictment (Bosnia) (22 November 2001).

[19]*Prosecutor v. Slobodan Miloševi□*, Case No. IT-99-37-PT, Decision on Preliminary Motions, para. 23 (8 November 2001). *See also id.*, para. 31; and *Prosecutor v. Furund)ija*, Case No. IT–95-17/1, Judgment, para. 140 (10 December 1998) ("Article 7(2) of the [ICTY] Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda . . . are indisputably declaratory of customary international law").

[20]*See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, paras. 29, 34-35, UN Doc. S/25704 (3 May 1993).

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

While the developments reflected in these texts and precedents have significantly eroded principles of immunity formerly accorded foreign heads of state, their implications have not yet been fully established. Sir Arthur Watts' observation of nearly a decade ago is equally pertinent today: Changing attitudes toward the immunity of heads of state have led "to the emergence of a body of rules which is in many respects still unsettled, and on which limited State practice sheds an uneven light."[22] Even so, recent decisions by domestic and international courts have clarified key aspects of relevant law and point the way toward resolution of other issues that remain to be clarified.

In considering the implications of these developments for the issues raised by Mr. Taylor and the Government of Liberia, several key distinctions must be borne in mind. First is the distinction between immunity *ratione personae*, which attaches to the status of certain incumbent officials and operates as a procedural bar to the exercise of jurisdiction over them by the courts of another state, and immunity *ratione materiae*, which operates to shield from the scrutiny of domestic courts the official conduct of foreign state officials.[23] While immunity *ratione personae*, which is often characterized as a procedural immunity, "is enjoyed in recognition of [a foreign head of state's] very special status as holder of his State's highest office," it serves a functional aim as well: "It also secures to him, if he is at the time engaged upon an official visit, the freedom from harassment which is necessary if he is to be able to perform properly the functions of his visit."[24] A commonly stated rationale for immunity *ratione materiae* is "the

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[21]UN Doc. A/CONF.183/9 (1998), as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999; entered into force 1 July 2002 (hereinafter "Rome Statute").

[22]Watts, *supra* note 1, at 52.

[23]*See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 330 (4th ed. 1990).

[24]Watts, *supra* note 1, at 53.

principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state."[25]

Although immunity *ratione materiae* operates alongside immunity *ratione personae*, the former generally becomes relevant — or at any rate its relevance becomes apparent — when a foreign defendant's official status comes to an end and he or she is therefore no longer entitled to claim the broader protections associated with immunity *ratione personae*.[26] Implicit in what has just been said is that a second distinction relevant to the issues before this Court concerns the immunities available to incumbent and former officials, respectively.[27]

Finally and crucially for this Court, recent jurisprudence has highlighted and to some extent clarified the significance of a third consideration — whether official immunities are asserted before a domestic court or an international tribunal. Thus the immunities available to Mr. Taylor turn in significant measure on whether, for purposes of the law relating to head of state immunity, the SCSL is governed by the rules applicable to proceedings before international tribunals rather than the more restrictive principles governing state-to-state relations.[28]

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[25]*Pinochet III*, *supra* note 9, at 658 (opinion of Lord Phillips).

[26]*See* Colin Warbrick and Dominic McGoldrick, *Current Developments: Public International Law; The Future of Former Head of State Immunity After* Ex Parte Pinochet, 48 INT'L & COMP. L.Q. 937, 940 (1999) ("The existence of immunity *ratione materiae* is not immediately apparent given that the personal immunity of [the] head of state has the effect of rendering any discussion of the official or non-official nature of [his] acts redundant").

[27]This distinction proved crucial in a civil action lodged against Ferdinand Marcos in a United States court. Plaintiffs had sued Marcos, along with his wife and other defendants, when Marcos was president of the Philippines. The plaintiffs alleged that "defendants planned, executed and covered up the murder of two Filipino union leaders . . . who openly and actively opposed the Marcos regime." *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 783 (W.D. Wash., 26 Aug. 1988). On 23 December 1982, the district court dismissed the Marcoses from the suit on the ground that they enjoyed head of state immunity. On 6 November 1987, following the collapse of the Marcos regime, "the court reinstated the Marcoses as defendants, holding that once they left office, the Marcoses could not claim immunity as heads of state." *See id.* (summarizing history of the case). In a subsequent decision, the court rejected the Marcoses' motion for reconsideration and reaffirmed its earlier ruling that the couple were no longer entitled to head of state immunity. In doing so the court concluded that the suggestion of immunity filed by the U.S. Department of State on behalf of the Marcoses while Mr. Marcos was president of the Philippines "had significance when filed in 1982, but has none given the change of circumstance." *Id.* at 786. The court noted that the State Department had "not filed a new suggestion of immunity since Marcos left office." *Id.*

[28]Some courts have intimated that the scope of official immunities may also vary depending upon whether the defendant is sued in a civil action or prosecuted criminally. *See*,

III. Immunity *Ratione Personae*

A. Scope of the Immunity: Overview

Summary: *Under the approach taken by the International Court of Justice in* Case Concerning International Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), *2002 ICJ Rep. ___ (14 Feb.) (Merits), a serving head of state or government enjoys virtually absolute procedural immunity from the jurisdiction of foreign national courts. He or she does not, however, enjoy this immunity in respect of international crimes before a properly constituted international criminal court in accordance with its statute.*

It has been widely recognized that the immunity *ratione personae* enjoyed by heads of state from both the civil and criminal jurisdiction of foreign states is very broad[29] — in the view of some writers, virtually absolute.[30] At least until recently, however, it may have been open to question whether the legal principle recognized in the Nuremberg Charter and its progeny created an exception to the immunity *ratione personae* previously conferred by international law on foreign heads of state as well as to their immunity *ratione materiae*.[31] Some legal scholars

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e.g., *Al-Adsani v. United Kingdom*, Judgment, para. 61 (Eur. Ct. H.R. 21 November 2001) (Grand Chamber) (distinguishing civil action against a foreign state for torture, in which immunity may appropriately be recognized, from criminal proceedings involving torture); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 281 (S.D.N.Y. 2001) (after noting that significant inroads have been made into the immunity of heads of state, court asserts "that developments in the criminal context, whether concerning former or sitting government leaders, have advanced more definitively than the parameters defining permissible jurisdiction over sitting heads-of-state extending to personal conduct in civil matters").

[29]*See* Watts, *supra* note 1, at 53 ("It is well established that, put broadly, a Head of State enjoys a wide immunity from the criminal, civil and administrative jurisdiction of other States").

[30]*See* SATOW'S GUIDE, *supra* note 2, at 10 (the incumbent head of a foreign state "is entitled to immunity — probably without exception — from criminal and civil jurisdiction").

[31]The ILC's commentary to Article 7 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind seems to suggest that the principle of non-immunity for international crimes applies to both the immunity *ratione personae* and the immunity *ratione materiae* that international law confers upon foreign heads of state: "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility." ILC Final Draft Articles and Commentary (1996), Draft

believed that the rule of non-immunity derived from Nuremberg denied defendants charged with international crimes the right to drape themselves in the mantle of immunity *ratione personae*.[32] The Belgian Parliament apparently believed that Nuremberg Principle III largely stripped foreign leaders of immunity *ratione personae* in respect of war crimes, crimes against humanity and genocide[33] until, in a decision rendered in February 2002, the International Court of Justice judged Belgium's issuance and international circulation of an arrest warrant against an incumbent foreign minister of the Democratic Republic of the Congo on charges of crimes against humanity and war crimes to be a violation of international law.[34] Other states, including the United Kingdom,[35] the United States of America,[36] and Spain,[37] have continued to recognize broad immunity *ratione personae* when it comes to foreign heads of state or government.

Code of Crimes against the Peace and Security of Mankind, art. 7, *reprinted in* III THE INTERNATIONAL LAW COMMISSION 1949-1998, at 1706 (Sir Arthur Watts ed., 1999). But the phrase "appropriate judicial proceedings" should be read to qualify the apparently broad sweep of the ILC's approach. In a footnote to the quoted text, the ILC commentary observes: "Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment." *Id.* at 1706, n.56.

[32]In a somewhat cryptic passage, Sir Arthur Watts might seem to have supported this view: "So far as concerns criminal proceedings, a Head of State's immunity is generally accepted as being absolute . . . . However, this immunity, while absolute at least as regards the ordinary domestic criminal law of other States, has to be qualified in respect of certain international crimes, such as war crimes." Watts, *supra* note 1, at 54 (footnotes omitted). When, however, he elaborated upon this qualification in a separate section of his Hague Lectures, Sir Arthur largely confined his observations to a context involving proceedings before an international criminal tribunal. *See id.* at 82-83. *See also Pinochet III*, *supra* note 9, at 599 (opinion of Lord Goff).

[33]*See Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits), Judgment, para. 56, 2002 ICJ Rep. ___ (14 Feb.) (Merits) (hereinafter "Yerodia" case). Belgian authorities acknowledged, however, that "immunity from enforcement" must be accorded "to all State representatives welcomed as such onto the territory of Belgium (on 'official visits')." *Id.*, para. 68; *see also id.*, para. 65.

[34]*See infra* (discussing the *Yerodia* case).

[35]In their crucial decision of March 1999 concerning the immunity of former Chilean President Augusto Pinochet from criminal process in the United Kingdom, all seven members of the judicial panel expressed the view or implicitly assumed that, were Pinochet still president of Chile, he would be immune from British legal process. *See Pinochet III, supra* note 9, at 592 (opinion of Lord Browne-Wilkinson); *id.* at 598 (opinion of Lord Goff); *id.* at 627-28 (opinion of

In the view of a majority of Justices of the International Court of Justice (ICJ), however, the legal developments summarized in the previous section did not fundamentally alter the immunity *ratione personae* that international law accords certain foreign officials, including heads of state or government, in respect of the criminal jurisdiction of national courts.[38] In its 2002 judgment in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* ("the Yerodia case"),[39] the ICJ concluded that Belgium had violated international law by issuing an international arrest warrant *in absentia* in respect of the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), Mr.

Lord Hutton); *id.* at 641 (opinion of Lord Saville); *id.* at 651 (opinion of Lord Millett); *id.* at 653 (opinion of Lord Phillips). This view was implicit in the opinion of Lord Hope. *See id.* at 621.

[36]In determining who may claim head of state immunity, United States courts defer to the recognition policy of the Executive Branch. *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994), *appeal dismissed*, No.94-6026 (2d Cir. 1994); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part, rev'd in part*, 886 F.2d 438 (DC. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990).

[37]*See* Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on* The Congo v. Belgium *Case* (2002), 13 EUR. J. INT'L L. 853 (2002), available at http://www.ejil.org/journal/curdevs/sr31-01.html (discussing Order (*auto*) of 4 March 1999 (No. 1999/2723), which found that Fidel Castro, as serving head of state of Cuba, was not amenable to Spanish jurisdiction). France apparently also falls into this category. *See* Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The* Ghaddafi *Case Before the French* Cour de Cassation, 12 EUR. J. INT'L L. 595, 597-98 (2001) (discussing ambiguities surrounding the legal basis of a March 2001 ruling that French courts could not assert criminal jurisdiction over Libyan leader Mouammar Ghaddafi on charges of complicity in acts of terrorism).

[38]A judgment rendered by the ICJ in a contentious case "has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, concluded 26 June 1945, entered into force 24 October 1945, art. 59, 59 Stat. 1055, 3 Bevans 1179. In *Prosecutor v. Duško Tadi*, the Appeals Chamber of the ICTY declined to follow an interpretation of customary international law adopted by the ICJ in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986 ICJ Rep. 14 (27 June) (Merits). *See Prosecutor v. Duško Tadi*, Case No. IT-94-1-A, Judgment, paras. 115-137 (15 July 1999). While the Appeals Chamber of the SCSL is thus not bound to follow the ICJ's approach, the following analysis is based upon the assumption that, as a leading contemporary decision on the scope of official immunities in respect of international crimes, the ICJ's opinion in *Yerodia* is persuasive authority.

[39]2002 ICJ Rep. ____ (14 Feb.) (Merits).

Abdulaye Yerodia Ndombasi, on charges relating to war crimes and crimes against humanity.[40] At the same time, the ICJ's judgment reaffirmed the relevance of the principle of non-immunity in respect of international crimes once foreign officials cease to hold the office in question. Crucial for present purposes, the judgment also affirmed that the immunity *ratione personae* enjoyed by incumbent foreign ministers and heads of state does not apply in respect of proceedings before international criminal tribunals whose statutes include provisions along the lines of those quoted in Section II of this submission.

The Belgian law pursuant to which Mr. Yerodia had been charged provided that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law."[41] Following its issuance on 11 April 2000, the arrest warrant was transmitted to the Congo as well as to the International Criminal Police Organization (Interpol), through which it was circulated internationally.[42] On 17 October 2000, the DRC instituted proceedings against Belgium before the ICJ claiming, inter alia, that Belgium had violated "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State."[43]

The ICJ concluded that Belgium's issuance of an international arrest warrant against the incumbent foreign minister of the DRC "constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed

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[40] *See id.*, para. 13.

[41] *See id.*, para. 15. The Belgian law was subsequently amended.

[42] *Id.*, para. 14.

[43] *See id.*, paras. 1, 17. By the time the ICJ reached final judgment, Mr. Yerodia no longer held the office of Minister for Foreign Affairs. *Id.*, paras. 18-19. The ICJ rejected Belgium's claim that the case should therefore be dismissed. *See id.*, paras. 23-40.

In addition to its assertion that Belgium had violated Mr. Yerodia's official immunities, the DRC's initial application claimed that Belgium's assertion of universal jurisdiction violated "the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations." *See id.*, paras. 1, 17. The DRC did not pursue this claim in subsequent proceedings, and so the ICJ's judgment did not include a ruling on this issue. *See id.*, para. 43. (Several judges did, however, express views on this issue in separate opinions.) This issue, along with claims relating to the immunity of an incumbent head of state and other senior officials, have been raised in a case now pending before the ICJ, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*. By an application filed on 4 August 2003, Liberia has sought to bring proceedings against Sierra Leone before the ICJ in relation to the SCSL's indictment of Mr. Taylor. *See* ICJ Press Release 2003/26 (5 Aug. 2003).

by him under international law."[44] The Court also found that the international circulation of the warrant by Belgian authorities "constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."[45]

In reaching these conclusions, the ICJ explicitly rejected[46] Belgium's claim that the immunity *ratione personae* of incumbent foreign ministers "can in no way protect them where they are suspected of having committed war crimes or crimes against humanity."[47] Reasoning that the warrant, which was still extant, remained unlawful even though Mr. Yerodia was no longer foreign minister, the Court "consider[ed] that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated."[48] Although the decision concerned the immunities of an incumbent foreign minister, the ICJ observed that incumbent heads of state and government also "enjoy immunities from jurisdiction in other States, both civil and criminal."[49]

Of central importance to the issues before the Appeal Chamber of the Special Court for Sierra Leone, however, the ICJ distinguished the law applicable to the situation before it — an attempt by a national court to prosecute the foreign minister of another state — from the rule embodied in the statutes of international criminal tribunals. In the view of the ICJ, decisions of international criminal tribunals denying immunity to senior government officials "are in no way at variance" with its conclusion concerning the immunity of incumbent foreign ministers in proceedings before *national* courts.[50] Leaving no doubt that, in its view, the two situations may call for different approaches, the Court observed that "the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar

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[44]*See Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Judgment, para. 70, 2002 ICJ Rep. ___ (14 Feb.) (Merits).

[45]*Id.*, para. 71.

[46]*Id.*, para. 58 (the Court has been unable to discern in state practice "any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity").

[47]*Id.*, para. 56.

[48]*Id.*, para. 76.

[49]*Id.*, para. 51.

[50]*Id.*, Judgment, para. 58.

to criminal prosecution . . . before certain international criminal courts, where they have jurisdiction."[51]

This observation naturally raises the question, does the SCSL fall within the ambit of the rule allowing prosecution of incumbent heads of state before "certain international criminal courts"? If so, the original indictment of Mr. Taylor breached no rule of international law concerning the immunity *ratione personae* of incumbent heads of state. This question is one of first impression, as the SCSL is the first hybrid court to indict a head of state.[52] But the novelty of this question should not obscure the clarity of its answer: For reasons elaborated in the following section, there is little reason to doubt that the rule applicable to purely international criminal courts applies to the SCSL.

B. Application of the Rule of Non-Immunity Before the SCSL

> **Summary**: *For purposes of the distinction between prosecutions before national and international criminal courts recognized by the ICJ and other authorities, the SCSL is an international criminal court. Accordingly, Mr. Taylor is not entitled to claim procedural immunity from the jurisdiction of the SCSL.*

To see why the SCSL is properly considered an international criminal court for purposes of the immunities that may be claimed by incumbent heads of state or government, it is helpful to recall why international law accords such officials procedural immunities before *national* courts. While these immunities have been justified on various grounds,[53] one of the rationales most relevant here is captured in the maxim *par in parem non habet imperium*, "by virtue of which one State shall not be subject to the jurisdiction of another State."[54] As the preeminent representative of his state's sovereignty, a head of state can not be prosecuted before the courts

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[51] *Id.*, para. 61. *See also Pinochet III, supra* note 9, at 660 (opinion of Lord Phillips) ("The principle of state immunity provides no bar to the exercise of criminal jurisdiction by an international tribunal, but the instruments creating such tribunals have tended, nonetheless, to make it plain that no exception from responsibility or immunity from process is to be enjoyed by a head of state or other state official").

[52] Hybrid courts have also been established in Kosovo and East Timor. In both instances, the hybrid courts were established by the relevant UN administering authority and thus derive their legal authority from a different source than the SCSL.

[53] *See* 1 OPPENHEIM'S INTERNATIONAL LAW 1034 n.2 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed., 1992) (hereinafter "OPPENHEIM").

[54] *Al-Adsani v. United Kingdom*, Judgment, para. 54 (Eur. Ct. H.R. 21 November 2001) (Grand Chamber). *See also Pinochet III, supra* note 9, at 598 (opinion of Lord Goff).

of another state without violating bedrock principles of international comity.[55] This concern is inapposite, however, when a head of state is prosecuted before an international tribunal.

A separate basis for the immunity *ratione personae* generally accorded foreign heads of state or government before national courts reflects "the practical need to ensure the free exercise by [the head of state] of his functions as the highest organ of the state."[56] Although relevant international jurisprudence for the most part has not provided a reasoned explanation for the distinction drawn between national and international courts for purposes of this rationale, it is reasonable to suppose that states have considered the collective judgment of the international community to provide a vital safeguard against the potentially destabilizing effect of unilateral judgment in this area.

No institution is better suited to provide that safeguard than the United Nations Security Council,[57] whose authority was the basis of the agreement establishing the SCSL.[58] Nor is there

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[55]*See Pinochet III*, *supra* note 9, at 644 (opinion of Lord Millett) ("It would be an affront to the dignity and sovereignty of the state which [a serving head of state] personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state . . . ."); *id.* at 657 (opinion of Lord Phillips) ("It would have been contrary to the dignity of a head of state that he should be subjected to judicial process"). *See also* Watts, *supra* note 1, at 52 (tracing immunity of heads of state from suit to "conceptions of the nature of the State and of its ruler which prevailed in former times"; "originally the predominant consideration was probably that one sovereign monarch could not be subject to the jurisdiction of another sovereign monarch, since they were of equal standing with each other").

[56]OPPENHEIM, *supra* note 53, at 1034 n.2. *Cf. Yerodia*, *supra* note 33, para. 53 (the immunities afforded foreign ministers under customary international law are granted "to ensure the effective performance of their functions on behalf of their respective States").

[57]*Cf. Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 280 n.78 (suggesting that, as creatures of the UN Security Council, the ICTY and ICTR "bear the imprimatur of . . . international consensus").

[58]*See* SC Res. 1315, para. 1; UN Doc. S/RES/1315 (2000) (requesting the UN Secretary-General "to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution"). The Security Council not only set into motion the negotiations that led to the Special Court's creation, but also called upon the Government of Liberia "to cooperate fully with the Special Court for Sierra Leone once it is established." SC Res. 1408, preamble; UN Doc. S/RES/1408 (2002). More recently the Security Council has called upon "all States, in particular the Government of Liberia, to cooperate fully with the Special Court for Sierra Leone." SC Res. 1478, preamble; UN Doc. S/RES/1478 (2003).

any reason to suppose that the Security Council can perform this role only when exercising its authority under Chapter VII of the United Nations Charter.[59]

Yet the rule that denies even incumbent heads of state immunity from prosecution before international criminal tribunals is hardly confined to courts established by or with the imprimatur of the UN Security Council. For purposes of the distinction drawn by the ICJ between national and international courts, relevant jurisprudence has implicitly defined "international criminal courts" broadly.[60] Of the five frequently-cited examples of an international criminal court, only two — the ICTY and ICTR — share a common legal foundation and essentially similar

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[59]This is not to deny the potential value of a Chapter VII resolution in clarifying the obligations of states that are not parties to the UN-Sierra Leone Agreement to cooperate with and comply with requests of the SCSL, as well as of their right to do so without infringing otherwise applicable rules of international law. The issue of the Court's own authority to indict incumbent heads of state — the principal issue raised in the motion before the Court — is, however, legally distinct from the right or obligation of third states to comply with the Court's requests and orders. An analogous distinction is reflected in the statute of the ICC. *Compare* Rome Statute, *supra* note 21, art. 27 (2) ("Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person"), *with id.*, art. 98(1) ("The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity"). While the precise meaning of the latter provision remains to be clarified, an interpretation circulated informally by Canada and the United Kingdom during negotiation of the ICC's Rules of Procedure and Evidence provides that "the Court should not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party." *Quoted in* BRUCE BROOMHALL, INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 144 n.58 (2003). In any event, Article 27(2) makes clear the ICC's authority to exercise its jurisdiction over incumbent heads of state, while Article 98(1) "instead pertains to the obligations under international law *of the requested State*, as well as to the exercise of jurisdiction by such States, rather than by the Court." *Id.* at 141 (emphasis in original).

[60]*See, e.g., Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, [1998] 3 W.L.R. 1456, *reprinted in* 37 I.L.M. 1302, 1311-1312 (1998) (opinion of Lord Slynn) (including Nuremberg and Tokyo tribunals, along with ICTY, ICTR, and ICC, in discussion of "international tribunals"). This decision was later set aside because of the failure of one of the participating judges to disclose his connection to an organization that had been granted leave to participate in the proceedings.

structure.[61] The Nuremberg Tribunal was established by a four-party agreement[62] to which nineteen other countries adhered; its judges and prosecutors were drawn from the four countries that established the tribunal. Its counterpart in Tokyo, the International Military Tribunal for the Far East ("Tokyo Tribunal"), was established through proclamation by U.S. General Douglas MacArthur.[63] Both the ICTY and ICTR were established by the United Nations Security Council acting under Chapter VII of the UN Charter. Finally, the ICC was established by a multilateral treaty, to which 92 countries have already become parties.[64]

To appreciate the breadth of the concept of international criminal courts established through past and contemporary practice, it is useful to recall that one of the principal legal justifications for the Nuremberg Tribunal was the authority of the convening states as occupying powers of Germany. As the Nuremberg Tribunal asserted, its jurisdictional authority derived at least in part from the combined authority of the four states that signed its Charter, which were then operating as occupation powers following Germany's unconditional surrender:

> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. . . .

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[61]Thus it does not follow from the observation of the UN Secretary-General that "the Special Court differs from the two [ad hoc] Tribunals in its nature and legal status," Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 69 (2000) (hereinafter "Report of the Secretary-General"), that the SCSL is a national court.

[62]Charter of the International Military Tribunal, concluded at London 8 August 1945; entered into force 8 August 1945, 82 U.N.T.S. 279.

[63]Charter of the International Military Tribunal for the Far East, proclaimed at Tokyo 19 January 1946, amended 26 April 1946, T.I.A.S. No. 1589, 4 Bevans 20. Although the Tokyo tribunal was established by proclamation of a U.S. commander, its judges were drawn from eleven countries. Also, the American Chief Prosecutor was assisted by ten associate prosecutors, each possessing the nationality of a different country.

[64]The Rome Statute exemplifies a third potential basis for allowing some international tribunals to exercise their jurisdiction over incumbent heads of state or government — the consent of their own states as expressed in their adherence to a treaty establishing the court. Since the SCSL is established pursuant to a mandate of the Security Council, its authority derives not only from the bilateral treaty between the United Nations and the Government of Sierra Leone, but also from the Security Council in the exercise of its powers under the UN Charter.

> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[65]

In effect, then, the Nuremberg Tribunal's international nature derived in part from the pooling of national jurisdiction (here, the peculiar brand of national jurisdiction exercised by occupying powers following an interstate war) properly exercised by each of the four states that signed the Nuremberg Charter.[66]

Like the statutes of each of the international criminal tribunals mentioned previously, the Statute of the SCSL specifically provides that "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[67] Thus if the SCSL is subject to the rule of non-immunity that has applied in respect of the Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR, and the ICC, Mr. Taylor's status as head of state at the time of his indictment would not afford him immunity from the exercise of this Court's jurisdiction even if he were still president of Liberia.

There should be little doubt that the SCSL falls within the ambit of this rule. Especially significant for present purposes, the SCSL was established pursuant to a mandate of the United

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[65]Nazi Conspiracy and Aggression: Opinion and Judgment, at 46 (1 October 1946), reprinted by United States Government Printing Office (1947) (hereinafter "Nuremberg Judgment").

[66]In his judgment in *Pinochet III*, Lord Millett asserted that "the International Military Tribunal (the Nuremberg Tribunal) which was established by the four Allied Powers at the conclusion of the Second World War to try the major war criminals was not, strictly speaking, an international court or tribunal." *Pinochet III*, *supra* note 9, at 646 (opinion of Lord Millett). Rather, quoting the 1952 edition of OPPENHEIM'S INTERNATIONAL LAW, Lord Millett continued, "the Tribunal was: '. . . the joint exercise by the four states which established the Tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with international law.'" *Id.* Despite these reasons for wondering whether the Nuremberg Tribunal was truly international, it has routinely been included in the roster of international tribunals before which heads of state may not plead immunity.

[67]Statute of the SCSL, art. 6(2). This text would not be dispositive if the SCSL were in essence a national court. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits), Judgment, para. 15, 2002 ICJ Rep. ___ (citing similar provision in Belgian law, which was basis of issuance of international arrest warrant found to violate international law).

Nations Security Council.[68] When, in its resolution 1315 (2000), the Security Council requested the UN Secretary-General to "negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution,"[69] the Council was exercising its "responsibility for the maintenance of international peace and security."[70] In doing so, the Security Council was acting on behalf of all Members of the United Nations.[71] There is no reason to suppose that the Security Council's authority to act on behalf of UN Member States in the performance of its responsibilities is confined to actions taken under Chapter VII of the UN Charter.[72]

Moreover, although a court of mixed composition applying an amalgam of international and national law, the Special Court has the hallmarks of an international tribunal. Tellingly, the report of the UN Secretary-General to the Security Council proposing the basic structure of the SCSL distinguishes the Court from "national courts of Sierra Leone."[73] More to the point, the

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[68]SC Res. 1315, UN Doc. S/RES/1315 (2000). *See also* SCSL Statute, preamble (noting the establishment of the SCSL by an agreement between the UN and Sierra Leone "pursuant to Security Council resolution 1315 (2002)").

[69]*Id.*, para. 1.

[70]United Nations Charter, done 26 June 1945, entered into force 24 October 1945, art. 24(1), 59 Stat. 1031, 3 Bevans 1153. Security Council resolution 1315 reiterates "that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region." SC Res. 1315, preamble; UN Doc. S/RES/1315 (2000).

[71]*See* United Nations Charter, *supra* note 70, art. 24(1) (UN Members "agree that in carrying out its duties under [its primary responsibility for the maintenance of international peace and security] the Security Council acts on their behalf").

[72]*See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, para. 110, 1971 ICJ Rep. 16 (21 June). The Council may even adopt legally binding decisions outside the framework of Chapter VII. *See id.*, para. 113.

[73]*See, e.g.*, Report of the Secretary-General, *supra* note 61, paras. 8, 10. Article 20 of the Special Court Agreement 2002, Ratification Act 2002, which provides that, for purposes of execution, an order of the SCSL "shall have the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court," does not detract from this conclusion. This provision is directed at authorities of Sierra Leone, in execution of obligations assumed by the Government of Sierra Leone in its bilateral treaty with the United Nations. That Sierra Leone has assumed treaty obligations in respect of the Court and enacted relevant implementing legislation does not exclude the possibility of the Court seeking cooperation from other states. As previously noted, the Security Council has explicitly called upon one third state — the Republic of Liberia — to cooperate with the SCSL. *See supra* note 58; *but see* Report of

Secretary-General's report emphasizes that, "[l]ike the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system" and, along with the two ad hoc tribunals, operates "independently of the relevant national system."[74]

Significantly, in its resolution requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create the Special Court, the United Nations Security Council directed the Secretary-General to consider the possibility of expanding the writ of the Appeals Chamber for the Yugoslavia and Rwanda tribunals to include appeals from the Trial Chamber of the SCSL — a prospect that would seem inconsistent with an intention to establish a special brand of national court.[75] Although the Secretary-General ultimately decided against this option, his explanation emphasized the "high administrative and financial costs"[76] of adding another court to the case load of an "already heavily burdened Appeals Chamber."[77]

The report of the Secretary-General also noted but did not recommend an option "based on the concept of a 'national jurisdiction' with international assistance, which would rely on the

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the Secretary-General, para. 10 (expressing view that the SCSL, lacking the right to assert primacy over courts of third states, "also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request").

[74]Report of the Secretary-General, *supra* note 61, para. 39. *See also* Special Court Agreement 2002, Ratification Act 2002, art. 11(2) ("The Special Court shall not form part of the Judiciary of Sierra Leone").

[75]SC Res. 1315, para. 7, UN Doc. S/RES/1315 (2000). This is not to suggest that it is legally impossible for an international court to receive appeals from national courts. Rather, the context of the establishment of the SCSL suggests that the Secretary-General understood the Court to be sufficiently analogous in its legal nature and structure to the ICTY and ICTR that it could plausibly share a common appeals chamber with those two courts.

Also suggestive of the SCSL's character as an international court is Article 14(1) of its statute, which provides: "The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court."

[76]Report of the Secretary-General, *supra* note 61, para. 40.

[77]*Id.*, para. 42. The Secretary-General also suggested that linking the SCSL to the Appeals Chamber of the two ad hoc tribunals would be "legally unsound." *Id.*, para. 40. In explaining his conclusion, he did not elaborate upon this point — except perhaps in his suggestion that this option might "delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals." *Id.*, para. 42. *See also id.*, para. 45 (noting that the President of the ICTY had expressed concern about linking the three tribunals through a common appeals chamber, in part because of potential "problems arising from the mixing of sources of law").

existing . . . Sierra Leonean court system, both in terms of premises . . . and administrative support."[78] The Secretary-General did not develop this alternative, however, apparently because he did not consider it to be "consistent with resolution 1315 (2000)."[79]

As with other UN institutions, including the United Nations itself and the two ad hoc tribunals established by the UN Security Council, the immunities of the personnel and property of the SCSL as well as the Court's own legal capacity are governed by a bilateral agreement between the United Nations and the host state, in this case Sierra Leone.[80] Various provisions in

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[78] *Id.*, para. 72.

[79] *Id.* The Secretary-General's decision not to pursue this option is at odds with the claim that the SCSL "has the character of a bi-lateral cooperation agreement between the Government of Sierra Leone and the United Nations in which the United Nations promised technical and other *assistance* to the *domestic* legal process of Sierra Leone." The Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, Defence Preliminary Motion to Quash the Indictment and Arrest Warrant against Charles Ghankay Taylor, p. 5 (23 July 2003) (emphasis in original). *But see* Applicants['] Reply to Prosecution Response to Applicants['] Motion, p. 7 (30 July 2003) ("nowhere in the [applicants' previous] submissions . . . was it expressly stated that the Special Court is a national Court and that it forms part of the judiciary of the Republic of Sierra Leone").

[80] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (hereinafter "UN-Sierra Leone Agreement"). This agreement contains a number of provisions that are analogous to provisions in the Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/1994/848 (hereinafter "ICTY Headquarters Agreement") and the Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda, UN Doc. A/51/399-S/1996/778, Appendix (hereinafter "ICTR Headquarters Agreement"). *Compare, e.g.*, UN-Sierra Leone Agreement, art. 8 (1) and (2), *with* ICTY Headquarters Agreement, art. V(1), and ICTR Headquarters Agreement, art. V(1); *compare also* UN-Sierra Leone Agreement, art. 8(3), with ICTY Headquarters Agreement, art. IX, and ICTR Headquarters Agreement, art. IX.

In addition, Article 11(d) of the UN-Sierra Leone Agreement provides that the SCSL will have the juridical capacity necessary to enter into agreements with States necessary for the exercise of its functions, a power that connotes the Court's status as a subject of international law. *See Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174, 178-79 (citing the United Nations' capacity to become a party to treaties as an important factor in the Court's conclusion that the Organization possesses

the agreement between the United Nations and the Government of Sierra Leone reflect the Court's nature as an international institution. For example, the Court's judges, Prosecutor and Registrar are afforded "the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations."[81] Lastly, the constituent instruments of the SCSL provide for the appointment of its Prosecutor, Registrar, and a majority of judges by the United Nations Secretary-General.[82]

For the foregoing reasons, it is submitted that the principle that heads of state or government may not assert immunity *ratione personae* to avoid prosecution before international criminal tribunals in accordance with their statutes is applicable to proceedings before the SCSL.[83] It follows that the indictment of Mr. Taylor while he was serving President of the Republic of Liberia did not infringe relevant rules of international law concerning the immunity of heads of state or government

IV. Immunity *Ratione Materiae*

Summary: *As the applicant's motion concedes, the substantive immunities accorded heads of state or government by international law do not extend to conduct constituting an international crime.*

As previously noted, both incumbent and former heads of state or government enjoy certain immunities *ratione materiae*. These substantive immunities operate alongside the immunity *ratione personae* that incumbent heads of state enjoy *vis-à-vis* foreign national courts and shield former leaders from prosecution for acts "performed while head of state, provided that the acts were performed in [their] official capacity."[84]

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international legal personality).

[81]UN-Sierra Leone Agreement, *supra* note 80, art. 12(1).

[82]*See* SCSL Statute, *supra* note 14, art. 15(3) (providing for appointment by the UN Secretary-General of the Prosecutor); *id.*, art. 16(3) (providing for appointment by the UN Secretary-General of the Registrar of the SCSL, who must be a UN staff member); *id.*, art. 12 (providing for appointment of a majority of the SCSL's judges by the UN Secretary-General and remaining judges by the Government of Sierra Leone).

[83]None of this is to suggest that all hybrid courts must be deemed international criminal courts for purposes of determining the application of immunities *ratione personae*. Conceptually, it is possible to establish a hybrid court which is in essence a domestic court onto which some international elements have been grafted. For reasons elaborated above, however, the SCSL appears to fall within the category of international criminal courts for purposes of immunity *ratione personae*.

[84]SATOW'S GUIDE, *supra* note 2, at 10.

The question of how to define "acts performed in an official capacity" for these purposes is hardly free from ambiguity.[85] But whatever ambiguity may surround the scope of a former

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[85]This question bedeviled British law lords who had to determine the scope of Pinochet's immunity *ratione materiae*. Although the former Chilean president was found liable to extradition to Spain to face charges relating to torture occurring at the very least after 8 December 1988, the law lords who constituted the judicial committee in *Pinochet III* took rather diverse jurisprudential paths to reach this result. *See* Eileen Denza, Ex Parte *Pinochet: Lacuna or Leap?* 49 INT'L & COMP. L.Q. 949, 952-53 (1999); BROOMHALL, *supra* note 59, at 133-36.

The ICJ's opinion in the *Yerodia* case recognized the distinction between acts performed in an official and "private" capacity, but provided scant clarification of their respective spheres. The majority opinion noted that, "after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity." *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits), Judgment, para. 61, 2002 ICJ Rep. ___ (14 Feb.) (Merits). The opinion arguably implied that conduct constituting a grave crime would not fall within the scope of a foreign official's immunity *ratione materiae*:

> The Court emphasizes . . . that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

Id., para. 60 (emphasis in original). A separate opinion of three judges provides somewhat more guidance:

> The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.

head of state's immunity *ratione materiae*, there should be no doubt that this immunity excludes conduct that international law condemns as criminal.[86] This is the unambiguous meaning of Nuremberg Principle III, which explicitly frames the rule of non-immunity of former heads of state in terms of their criminal responsibility.

The link between Nuremberg's central idea of individual criminal responsibility and the absence of substantive immunity based upon an individual's official position is even more explicit in the statutes of the ICTY and ICTR. In identical terms — which are also nearly identical to the text of Article 6(2) of the Statute of the SCSL[87] — both statutes provide that the "official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[88] It is no accident that this text immediately follows a provision explicitly recognizing the individual criminal responsibility of those alleged to have committed crimes subject to the ad hoc tribunals' subject matter jurisdiction[89]; the rule embodied in Nuremberg Principle III is integral to the concept of individual criminal responsibility that lies at the heart of the law derived from Nuremberg.

Nowhere is this point more clearly expressed than the judgment of Nuremberg itself. Interpreting Article 7 of its Charter, the Nuremberg Tribunal rejected the defendants' argument "that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State."[90] The tribunal explained:

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 74, 2002 ICJ Rep. ___ (14 Feb.) (Merits). For criticism of the majority opinion's treatment of this distinction, see Cassese, *supra* note 37.

[86]*See* Watts, *supra* note 1, at 84 ("It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated . . . serious international crimes").

[87]*See supra* note 14.

[88]ICTY Statute, art. 7(2); ICTR Statute, art. 6(2) (emphasis added). Similarly, Article 27 (1) of the Rome Statute frames its version of Nuremberg Principle III in terms of non-exemption "from criminal responsibility."

[89]ICTY Statute, art. 7(1); ICTR Statute, art. 6(1).

[90]Nuremberg Judgment, *supra* note 65, at 52.

> The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[91]

Indeed, Mr. Taylor himself acknowledges that the immunity *ratione materiae* attaching to a head of state does not shield him from prosecution "for any international crime he may have perpetrated while in office (or before taking office)."[92] Similarly, in challenging before the ICJ Belgium's issuance and international circulation of an arrest warrant against its incumbent foreign minister, the Democratic Republic of the Congo conceded that "it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court whether domestic or international, constitute a 'ground of exemption from his criminal responsibility or a ground for mitigation of sentence.'"[93]

The criminal responsibility of senior officials may, in fact, be greater than that of other participants in international crimes by virtue of their authority as leaders. In *Prosecutor v. Jean Kambanda*,[94] a trial chamber of the ICTR found that the defendant's status as Prime Minister of the Interim Government of Rwanda at the time of the offenses to which he pleaded guilty increased his criminal responsibility:

> The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace

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[91] *Id.* at 53. *See also Attorney Gen. of Isr. v. Eichmann*, 36 I.L.R. 277, 308-11 (Isr. Sup. Ct. 1962).

[92] The Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, Defence Preliminary Motion to Quash the Indictment and Arrest Warrant against Charles Ghankay Taylor, p. 7 (23 July 2003). *See also* Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-PT, Applicants['] Reply to Prosecution Response to Applicants['] Motion, p. 4 (30 July 2003) (asserting Mr. Taylor's right to enjoy "functional immunity subject to one exception namely in the case of perpetration of international crimes").

[93] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Merits), Judgment, para. 48, 2002 ICJ Rep. ___ (14 Feb.) (Merits).

[94] Case No. ICTR 97-23-S, Judgment and Sentence, Trial Chamber I, 4 September 1998.

> and security. Jean Kambanda abused his authority and the trust of the civilian population. . . . He failed to take necessary and reasonable measures to prevent his subordinates from committed crimes against the population. Abuse of positions of authority or trust is generally considered an aggravating factor.[95]

Far from providing a basis for claiming immunity *ratione materiae*, then, an individual's culpability for crimes against the basic code of humanity is, in general, enlarged by virtue of the power and responsibility attached to his or her office.

V. Conclusion

Whether the Special Court for Sierra Leone has legal authority to indict an incumbent head of state or government in accordance with its statute turns principally upon whether the Court is properly classified as an international criminal court for purposes of the law governing the immunity *ratione personae* of heads of state or government. For reasons set forth in this brief, it is submitted that the Special Court for Sierra Leone is properly characterized as such a court. Accordingly, the Court possessed legal authority to indict Mr. Taylor while he was President of the Republic of Liberia. Conversely, Mr. Taylor was not entitled to procedural immunity from the jurisdiction of this Court while he served as president. Further, and as Mr. Taylor himself acknowledges, neither an incumbent nor former head of state or government enjoys substantive immunity from prosecution in respect of the international crimes with which Mr. Taylor has been charged.

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23 October 2003

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[95] *Id.*, para. 41. *See also id.*, para. 61(B)(vii) (including in the trial chamber's enumeration of aggravating factors the following: "Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust"). *See also Prosecutor v. Biljana Plavši*, Case No. IT-00-39 & 40/1, Sentencing Judgment, para. 127 (26 February 2003) (finding that "the seriousness of the offence is aggravated . . . by the senior leadership position of the accused").

Pursuant to the principle of superior responsibility, the authority possessed by a head of state may also be relevant in establishing his or her criminal responsibility for acts carried out by subordinates, provided of course all relevant elements are established.

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