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Focus

Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004.

ICJ, Case Concerning the Arrest Warrant of 11. April 2000, ***Democratic Republic of Congo v. Belgium***, 14 February 2001, General List n°. 121.

Art. 6 (2) SCSL Statute

The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

The Taylor Immunity Decision

The immunity of Head of States is one of the most controversial topics in international law. The reaction to the prosecution of such persons before the ICTR and the ICTY was rather calm and not much discussed. The function of *Jean Kambanda* as former Prime Minister of Rwanda and questions relating to any immunity thereto were not even examined by the ICTR. In a decision relating to *Slobodan Milosevic* the ICTY Trial Chamber stated that Art. 7 of the ICTY Statute, which similar to Art. 6 SCSL Statute rejects immunity to high State officials, reflects customary international law. It appeared that there was a common opinion – shared by domestic courts as in the *Pinochet* case – that abandoned immunities of Head of States for international crimes. This conclusion was not entirely shared by the ICJ in its *Arrest Warrant* case that stepped in and halted these developments. In its controversial judgment the ICJ concluded that customary international law provided for a general rule entitling a serving foreign minister to enjoy full immunity from criminal jurisdiction before a foreign national court.

It is this ICJ judgment and the specific nature of the Special Court for Sierra Leone (SCSL) as a treaty based court between the Government of Sierra Leone and the UN that make the indictment and the attempt to apprehend *Charles Taylor* in June 2004 for war crimes and crimes against humanity committed in Sierra Leone controversial. Still at large *Taylor* filed a preliminary motion to squash the indictment and the warrant of arrest. This motion was directly decided by the Appeals Chamber pursuant to Rule 72 (E) of the Rules of Procedure and Evidence. Even though preliminary motions pursuant to the SCSL Rules may usually only be raised after an initial appearance the Appeals judges nevertheless decided on the substantive issue of the motion.

On the question of immunity the Appeals Chamber dismissed the motion on the grounds that the SCSL is an international criminal court and therefore Art. 6 (2) of the SCSL Statute is not in conflict with any peremptory norm of international law. As a result *Taylor* was rightly subject to criminal proceedings before the SCSL when he was incumbent head of State of Liberia and still is after stepping down from this position. This conclusion is generally correct as the SCSL - despite its *hybrid* nature – is not a national but an international court, based outside of the legal system of Sierra Leone. However, the Appeals Chamber does not touch the core issues raised by the *Arrest Warrant* case, where the ICJ, in an *obiter dictum,* provided four different exceptions to the principle of immunity. The fourth and last stated exception is that an incumbent or former high State official may be subject to criminal proceedings "*before certain international criminal courts, where they have jurisdiction*." Examples named by the ICJ are the ICTY, ICTR, and the ICC. As the jurisdiction of the SCSL was transferred by the State of Sierra Leone to the SCSL on the basis of an agreement it would have been necessary to assess if such cession was limited by immunities provided under customary international law to third State nationals. Naturally no State may transfer more sovereign power than it possesses itself in international law. Given the *Arrest Warrant* case Sierra Leone courts would have not been able to prosecute *Taylor*. A clear distinction between the examples given by the ICJ and the legal nature of the SCSL would have been more helpful than a bland statement on its international nature.

As the SCSL has no Security Council Chapter VII backing it is more comparable with the ICC than with the ICTR and ICTY. The core question here is whether these treaty-based courts and their immunity provisions can also deprive Head of States of non-contracting parties of such immunities. In the *Arrest Warrant* judgement, the ICJ only referred to Art. 27 of the ICC Statute without any distinction between the prosecution of a member State or a non-member State official. There are three key reasons why the ICJ most likely covered third State official and why the same conclusions are applicable in the case of *Taylor* even though Liberia is not a State party to the SCSL.

First, the ICJ stated in its second exception to immunity that high State officials cease to enjoy immunity from foreign jurisdiction in cases of waiver of the State which they represent. Art. 27 ICC Statute amounts to such a waiver of State parties to the ICC. Consequently it would have been unnecessary to mention the ICC again in the fourth exception – i.e. no immunity before certain international criminal courts – if the ICJ only wanted to cover such persons of member States. Looking at the SCSL it is apparent that Art. 6 SCSL Statute at least constitutes a waiver of Sierra Leone for its own high State officials.

Second, the ICJ explicitly states that certain international criminal courts may prosecute high State officials "*where they have jurisdiction*". As the ICC also has jurisdiction over persons of third States this indicates that the ICJ did not want to make a distinction between contracting and non-contracting parties. Applying this conclusion on the SCSL it is evident that the alleged acts of *Taylor* fall under the jurisdiction of the SCSL as he supposedly is a person that bears the greatest responsibility for crimes committed on the territory of Sierra Leone.

Third, the reason for a distinction between national and international courts is placed in the *rationale* behind immunities that derives from sovereign equality of States, trying to shield the effective performance and functions of a high State official from any undue third State interference. Before international courts, which are independent from any national jurisdiction, lawfully established and ensuring recognised human rights standards, such a fear of an undue interference is unfounded. The application of this core reason for the denial of immunities before international criminal courts on the SCSL explains why Art. 6 SCSL Statute also applies to high State officials of non-State members. As the SCSL organs are independent and not part of the judiciary of Sierra Leone and due to the fact that the prosecutor and judges enjoy diplomatic immunity in Sierra Leone any undue influence by its host State on judicial decisions cannot be perceived. The fact that Sierra Leone has appointed three judges is negligible as they can always be overruled by a majority opinion of international judges, or in cases of clear prejudice may be disqualified. The SCSL has further been established by law and ensures international human rights standards. *Taylor* therefore enjoys no immunity before the SCSL even though Liberia is not a State party to it.

Notwithstanding the lack of clarification of these controversial questions of jurisdiction over Head of Sates of third State parties the *Taylor* decision remains an important precedent for the development of international law.

Responsibility

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