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 immunity 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.

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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 immunity. As such, the Appeals Chamber dismisses the immunity of Head of States for crimes committed on the territory of Sierra Leone. This conclusion was not entirely shared by the ICJ 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. In the case Sierra Leone courts would have not been able to prosecute Taylor. 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. In the case Sierra Leone courts would have not been able to prosecute Taylor. In the case of Taylor even though Liberia is not a State party to the SCSL.

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 sovereign equality of States, trying to shield the effective performance and functions of a high State official. 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.

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