

# The trial of Charles Taylor

## Conflict prevention, international law and an impunity-free Africa

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### Introduction

This paper discusses the trial of the former head of state of Liberia, Charles Taylor, in the Special Court for Sierra Leone. It highlights the main legal issues surrounding his indictment in relation to the decade-long non-international armed conflict in Sierra Leone, his arrest, and the dilemma on his subsequent prosecution. It links the trial with the well known-conflicts in the African continent. It examines the trial with a possible vision of contribution to the development of international law, conflict prevention in Africa and creating an Africa-impunity-free continent. The significance of this paper is to contribute in the struggle against the culture of impunity in Africa.

The paper argues that regardless of where Charles Taylor is tried, justice remains to be done. The trial of Charles Taylor at The Hague is simply a change of venue, but the parties in the case will remain the same. In other words, it simply means that it will be the Special Court for Sierra Leone conducting trial in The Hague and not the International Criminal Court at all. The trial will be conducted by the Trial Chamber of the Special Court for Sierra Leone sitting in The Hague.

There are a number of significant things that would come out of the Charles Taylor trial. First, the trial promises to be an interesting test case for or against the culture of impunity by political leaders in Africa. It highlights the fact that rule of law and justice will always prevail. In this regard, the trial marks an important step in the administration of international criminal justice. It further reaffirms the commitment of the international community to hold accountable those who commit atrocities and violate international humanitarian law and human rights; no matter how rich, powerful or feared they might be. Second, the trial of Charles Taylor is an illustration of the principle that there will be no peace without justice. It serves

as a deterrent of future conflicts on the African continent. Third, the trial of Taylor stands to develop new principles of international law, in particular, on the 'persons who bear the greatest responsibility' for serious violations of international humanitarian law, while at same time also elaborating on the concept of participating in the 'joint criminal enterprise' in the commission of international crimes in the context of the armed conflicts. Lastly, but not least, it sets and emphasises the precedent that the defences of state sovereignty and head of state immunity can no longer exonerate the former or incumbent head of state from being prosecuted for grave breaches of human rights and international humanitarian law.

### The trial promises to be an interesting test case for or against the culture of impunity by African political leaders

While contending that the trial of Charles Taylor is an example of the current move towards seeing to it that the perpetrators of international crimes and serious violations of human rights are being brought to justice, the paper points out that trying a former head of state is not necessarily a new phenomenon in Africa. Some of the African leaders and high-ranking state officials who have been in one way or the other indicted or prosecuted either in the international

criminal tribunals, national or foreign national courts include: Jean Kambanda (former Prime Minister of Rwanda), Hissène Habré (former President of Chad), Robert Mugabe (President of Zimbabwe), Muammar Al-Qaddafi (Libyan leader), Mengistu Haile Mariam (former President of Ethiopia), and Abdulaye Yerodia Ndombasi (a former Minister for Foreign Affairs of the Democratic Republic of the Congo).

Key issues that this paper addresses are as follows:

- Isn't an arrest warrant issued by the Prosecutor of the Special Court and authorised by the Special Court for Sierra Leone contrary to the recognised international norms of head of state immunity and state sovereignty and non-interference in internal affairs of Liberia and Ghana?

- How can the Special Court, which sits in Sierra Leone, issue an arrest warrant against a sitting head of State of another country so that he can be tried in Sierra Leone?
- Should state sovereignty be respected under all conditions or are there instances in which it can be disregarded?
- Was Nigeria under obligation to grant asylum or hand over Charles Taylor for the purpose of prosecution, or apply universal jurisdiction?
- Where should Taylor be tried so that there shall be peace and justice to the victims of the armed conflict in Sierra Leone?
- Finally, what legal implications, reflections or impacts can the trial have on conflict prevention in Africa and creating an Africa-impunity-free continent?

### Establishment of the Special Court for Sierra Leone

The Special Court for Sierra Leone<sup>1</sup> was established by an agreement between the United Nations and the Government of Sierra Leone, after adoption of the United Nations Security Council Resolution 1315 of 2000. Its purpose is to prosecute those who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.<sup>2</sup> In Resolution 1315, the UN Security Council requested the Secretary-General, Kofi Annan, to negotiate an agreement with the Government of Sierra Leone with a view to establishing a Special Court. The agreement was later implemented into Sierra Leonean Law by the Special Court Agreement (Ratification) Act, 2002.<sup>3</sup> With the establishment of the Special Court, the amnesty granted to rebels under the Lomé Accord was technically rendered inoperative.

The President of Sierra Leone, Ahmad Tejan Kabbah, alarmed by the continued breach of the ceasefire agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF), the major warring faction, asked the United Nations to help Sierra Leone establish a 'Special Court' to try those suspected of atrocities.<sup>4</sup> The Special Court was established at the time when the Truth and Reconciliation Commission (TRC) was in operation in Sierra Leone. The TRC was established by an Act of Parliament, so implementing Article XXVI of the Lomé Accord, which states: "A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and the perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing

and reconciliation". Both the Special Court for Sierra Leone and the Truth and Reconciliation Commission are two facets of the process of reconstructing Sierra Leone intended to achieve these goals, by establishing accountability for the atrocities committed in Sierra Leone, assisting in reconciliation and preventing a recurrence of the conflict.<sup>5</sup>

### *The International Status and Mandate of the Special Court for Sierra Leone*

The Special Court for Sierra Leone is an international criminal tribunal and not a national court of Sierra Leone. Nor is it part of the judicial system of Sierra Leone exercising judicial powers. The Special Court, established by an agreement (treaty) has the characteristics associated with classical international organisations, including international legal personality; capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members. The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).<sup>6</sup>

The purpose of the Special Court is to prosecute persons who bear the greatest responsibility

The main competence of the Special Court in respect of individuals is its power to prosecute 'persons who bear the greatest responsibility' for serious violations of international humanitarian law and Sierra Leonean law in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, threatened the establishment of and implementation of peace process

in Sierra Leone.<sup>7</sup> However, the Special Court has no direct and primary jurisdiction over peacekeepers and related personnel who were involved in the peacekeeping operations in Sierra Leone at the time of the armed conflict.<sup>8</sup> The Special Court can only have jurisdiction over the peacekeepers and related personnel if the sending state is unwilling or unable to carry out an investigation or prosecution, and when authorised by the United Nations Security Council, which will be acting on the proposal of any State, to exercise jurisdiction over such peacekeepers or related personnel.<sup>9</sup>

With the mandate to try and punish '*persons who bear the greatest responsibility*', the Prosecutor of the Special Court has indicted individuals bearing greatest responsibility for crimes committed in the territory of Sierra Leone since 30 November 1996, and for participating in a '*joint criminal enterprise*' in the commission of crimes against humanity, violations

of Article 3 common to the Geneva Conventions and of Additional Protocol II to the Geneva Conventions (commonly known as war crimes), and other serious violations of international humanitarian law.<sup>10</sup>

### **Circumstances Leading To The Indictment Of Charles Taylor: 'Bearing The Greatest Responsibility' And Participating In A 'Joint Criminal Enterprise'**

The concepts of the 'persons who bear the greatest responsibility', and participation in the 'joint criminal enterprise', set the legal framework within which Charles Taylor was indicted.

#### **'Persons Who Bear The Greatest Responsibility'**

Although the 'persons who bear the greatest responsibility'<sup>11</sup> is partly stated in the competence of the Special Court in article 1 of the Statute of the Special Court for Sierra Leone, the concepts of 'those who bear the greatest responsibility' and 'joint criminal enterprise' are not defined anywhere under the Statute of the Special Court. Thus, the Special Court has no working definitions for the two concepts.<sup>12</sup> The Prosecutor of the Special Court maintains that "the people who caused and sustained the war are the persons bearing the greatest responsibility".<sup>13</sup> They include the "planners and instigators of the terrible violence or those who instigated or caused and sustained the serious violations of international humanitarian law in the territory of Sierra Leone".<sup>14</sup> The Prosecutor seems to have derived the concept from article 6(1) of the Statute of the Special Court for Sierra Leone: "A person who planned, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime... shall be individually responsible for the crime".

However, the definition adopted is narrow and raises the rhetorical question: Why is it not that 'those who bear the greatest responsibility' should be extended to include all those members of either rebel or government forces or peacekeepers who committed the same atrocities as those who have been indicted? However, Article 1(2) of the Statute of the Special Court excludes the Special Court from having primary jurisdiction over the peacekeepers and related personnel. Instead, the jurisdiction is solely with the sending states.

#### **'Participating in a Joint Criminal Enterprise'**

Joint criminal enterprise<sup>15</sup>, which is also a form of liability known as 'common plan', is not explicitly defined in the Statute of the Special Court for Sierra

Leone, although the prosecutor of the Special court seems to have found that it is implicitly included in the language of article 6(1) of the Statute of the Special Court. Joint criminal enterprise is also referred to by several categories of other terms such as 'common purpose' and 'common plan' liability.<sup>16</sup> Joint criminal enterprise is a theory of liability that has several variants. It essentially requires prosecutors to prove that a group of people had a common plan, design, or purpose to commit a crime; that the defendant participated in some fashion in the common plan; and that the defendant intended the object of the common plan.<sup>17</sup>

The following should also be proved in the joint criminal enterprise: the existence of a plurality of persons; that the accused voluntarily participated in one aspect of the common design, for instance, the formulation of a plan among the co-perpetrators to kill in effecting this common design; that the accused, even if not personally effecting the killing, intended this result; the existence of a common purpose and, or joint criminal enterprise; the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose; existence of a common criminal plan within the criminal enterprise; participation of the accused in the joint criminal enterprise; the specific role played by the accused in the enterprise; the intent of the accused person to participate in the criminal enterprise; the aim of the criminal enterprise; and the inclusion of the crimes committed in the plans of the criminal enterprise.<sup>18</sup>

The people who caused and sustained the war are the persons bearing the greatest responsibility

The joint criminal enterprise is to be regarded as a form of commission and not as a form of accomplice liability. A participant in a crime who shares the purpose of the joint criminal enterprise, as opposed to merely knowing about it, cannot be regarded as a mere aider and abettor to the crime contemplated.<sup>19</sup>

#### ***Factual Analysis in Respect of Charles Taylor's Role in the Armed Conflict in Sierra Leone***

The war in Sierra Leone, which started in early March 1991 and ended on 18 January 2002 with President Tejan Kabbah's announcement, is the source of Charles Taylor's indictment. The Prosecutor of the Special Court alleges that Taylor, while in military training in Libya, met Foday Saybana Sankoh, who later became the rebel leader of the RUF, where the two made a common cause to assist each other in taking power in their respective countries. Foday

Sankoh did assist Taylor and his National Patriotic Front of Liberia (NPFL) to attack Liberia in December 1989. In turn, between 30 November 1996 and 18 January 2002, Liberian fighters, including members and ex-members of the NPFL, under Taylor's control or with his approval and assistance, fought as part of or alongside the RUF, and later the AFRC, AFRC/RUF Junta or alliance. Members of the RUF, AFRC, Junta and, or the AFRC/RUF alliance, and Liberian fighters, assisted and encouraged by Taylor, committed a series of crimes and attacks against the people of the Republic of Sierra Leone, including civilian men, women and children.<sup>20</sup>

The acts allegedly committed by Taylor either individually or with others, include terrorising the civilian population of Sierra Leone; unlawful killings; sexual violence; physical violence; conscription or enlisting children under the age of 15 years into armed forces; abductions and forced labour by enslaving civilian population; and looting of civilian properties.<sup>21</sup> The Prosecutor of the Special Court contends that Taylor is criminally responsible, pursuant to article 6(1) of the Statute of the Special Court for Sierra Leone, for crimes mentioned above. Also, pursuant to article 6(3) of the Statute of the Special Court, Taylor, while holding positions of superior responsibility and command over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and, or Liberian fighters, is individually criminally responsible for the crimes referred to above. Taylor is also criminally responsible for the acts of his subordinates in that he knew or had reason to know that the subordinates were about to commit such acts or had done so.<sup>22</sup>

Therefore, Taylor is considered to be one of the persons bearing the greatest responsibility and those who participated in the joint criminal enterprise to commit crimes against humanity, war crimes (commonly known as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II to the Geneva Conventions), and other serious violations of humanitarian law and the Sierra Leonean law in the territory of Sierra Leone.

In view of the above acts or omissions the Prosecutor of the Special Court filed a motion before the Special Court for Sierra Leone for a decision by the Special Court approving the indictment issued on 7 March 2003 against Charles Taylor.<sup>23</sup> Following approval of the indictment, the Warrant of Arrest against Taylor was issued on 4 June 2003 while he was attending the Liberian peace talks in Ghana. Both the warrant and the indictment were e-mailed, faxed and personally served to the Government of Ghana for the purposes

of arresting Taylor at about 8 AM that day.<sup>24</sup> But, the authorities in Ghana turned down the Prosecutor's request, and Taylor returned to Monrovia.

Taylor, meanwhile, faced mounting pressure from rebel groups. Liberians United for Reconciliation and Democracy (LURD) operating in Northern Liberia, and the Movement for Democracy in Liberia (MODEL) from southern Liberia reduced Taylor's control to a third of Liberia – Monrovia and the central part of the country. Also under pressure from US President, George Bush, to 'leave the country,' Taylor appeared on Liberian television on 10 August 2003 to announce his resignation.<sup>25</sup> Having accepted an offer of asylum from Nigeria's President Olusegun Obasanjo on 6 July 2003, stepped down on 11 August 2003, handed over power to Vice President, Moses Blah, and left for Calabar in Nigeria.

Several requests were made by the Prosecutor of the Special Court and the International Police Organisation (Interpol) to the Government of Nigeria in order to surrender Charles Taylor to the Special Court for Sierra Leone for prosecution.<sup>26</sup> Nigeria initially stated that it would not submit him to Interpol's demands, unless Liberia wanted to try Taylor.<sup>27</sup> Offering him asylum from the war crimes charges would not necessarily violate international law but the issue of whether Taylor should escape prosecution "[was] really on the back burner."<sup>28</sup>

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### **The Arrest and Prosecution of Charles Taylor: Breaking the Myth, or a Sacrifice in Africa?**

Nigeria had long been under international pressure to surrender Taylor to the Special Court for Sierra Leone to face charges. On 24 February 2005, the European Parliament unanimously passed a resolution calling for Nigeria to transfer him to the Special Court for Sierra Leone.<sup>29</sup> On 4 May 2005, the United States House of Representatives passed a resolution, 421-1, calling for Nigeria to transfer Taylor to the Special Court for Sierra Leone. On 11 May 2005, the US Senate unanimously passed the 4 May House of Representative resolution, joining the call for Nigeria to transfer Taylor to the Special Court for Sierra Leone.<sup>30</sup> On 30 June 2005, a coalition of up to 300 African and international civil society organisations sent a petition to the African Union (AU) demanding that Nigeria surrender Taylor to the Special Court for Sierra Leone.<sup>31</sup> On 11 November 2005, the United Nations Security Council passed resolution 1638 (2005) which gave the United Nations Mission in Liberia (UNMIL) the powers to detain Taylor should he ever be returned to Liberia, and apprehend and transfer him to the Special Court.<sup>32</sup> This resolution echoes views of the United

Nations Security Council towards seeing to it that Taylor should be brought to justice.

On 17 March 2006, Ellen Johnson-Sirleaf, the new, democratically elected President of Liberia, officially requested Nigeria to extradite Taylor. After consulting the current Chairman of the AU, as well as the West African regional grouping, ECOWAS, President Olusegun Obasanjo informed the Liberian President that the "Government of Liberia [w]as free to take former President Charles Taylor into custody".<sup>33</sup> This request was granted on 25 March 2006 whereby Nigeria agreed to surrender Taylor to stand trial in the Special Court for Sierra Leone. Nigeria agreed to surrender Taylor and not to extradite him because no extradition treaty exists between Nigeria and Liberia.<sup>34</sup> On 26 March 2006, the Prosecutor of the Special Court for Sierra Leone, Desmond de Silva, requested Nigeria to execute a warrant of arrest on Taylor.<sup>35</sup>

Three days after the Nigerian Government stated it would end Taylor's political asylum, he fled Calabar where he had been living. On 29 March 2006, Nigerian security forces arrested Taylor as he tried to cross into Cameroon. When push came to shove, the Nigerian Government handed Taylor to the Irish United Nations soldiers. He was flown to Monrovia where he was transferred to a UN helicopter that took him to a detention centre in Freetown, where he was held in custody for almost three months. UN Peacekeepers in Liberia had already been mandated by the Security Council Resolution 1638(2005) to apprehend Taylor in the event of his return to Liberia, and to detain and transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court.

Nigeria's action was welcomed as a step towards ending the culture of impunity in the region, and was very much appreciated by the United Nations Security Council.<sup>36</sup> On the first day of Taylor's appearance before the Special Court for Sierra Leone when he pleaded not guilty to all charges, the Prosecutor of the Special Court made a public statement marking how important that day was to "the administration of international criminal justice", and to the effect that 'those who commit atrocities and violate international humanitarian law will be held accountable. No matter how rich, powerful or feared they may be – no one is above the law'.<sup>37</sup>

Taylor's indictment, subsequent arrest and transfer to the Special Court for Sierra Leone have raised a number of questions for scholars concerning the status of international law norms and principles: Isn't

an arrest warrant issued by the Prosecutor of the Special Court and authorised by the Special Court contrary to the recognised international norms of head of state immunity and state sovereignty and non-interference in internal affairs of Liberia? How can the Special Court for Sierra Leone, which sits in Sierra Leone, issue an arrest warrant against the then sitting head of state, not of Sierra Leone, but that of Liberia to be arrested and tried in Sierra Leone? Didn't the warrant violate the sovereignty of both Liberia and Ghana, where Taylor was attending peace talks? Why did Nigeria grant political asylum to Taylor, and then do an about turn when Nigerian President Obasanjo authorised his hand-over to Liberia to be tried in the Special Court for Sierra Leone?

### ***On State Sovereignty***

From Manuel Noriega,<sup>38</sup> the former president of Panama, to Augusto Pinochet,<sup>39</sup> the former president of Chile, to the late Slobodan Milosevic,<sup>40</sup> former president of the former Federal Republic of Yugoslavia, Saddam Hussein,<sup>41</sup> the former president of the Republic of Iraq, to Charles Taylor, the former president of Liberia, the world has witnessed dramatic changes in international law where both the head of state immunity and state sovereignty though important principles of international law, are eroded especially in the area of international criminal law in the interest of protecting humanity from the most egregious violations of human rights.

In respect of the trial of Taylor, the defence maintained that:

(a) [T]he principle of sovereign equality prohibits one state from exercising its authority on the territory of another. (b) Exceptionally, a state may prosecute acts committed on the territory of another state by a foreigner but only where the perpetrator is present on the territory of the prosecuting state. (c) The Special Court's attempt to serve the indictment and arrest warrant on Charles Taylor in Ghana was a violation of the principle of sovereign equality.<sup>42</sup>

The above arguments were countered by the prosecution side that:

Charles Taylor has been indicted in accordance with article 1(1) of the Special Court Statute, for crimes committed in the territory of Sierra Leone and not the territory of another state. The transmission of documents to Ghanaian authorities could not violate the sovereignty of Ghana.<sup>43</sup>

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Professor Philippe Sands, acting as *amicus curiae*,<sup>44</sup> submitted that “the Special Court did not violate the sovereignty of Ghana by transmitting the arrest warrant for Taylor but Ghana was not [also] obliged to give effect to such a warrant.”<sup>45</sup> On sovereignty, The Special Court decided that it was not the proper forum for raising the issue of Ghana’s sovereignty but acknowledged that the state asserts sovereignty by refusing to execute an arrest warrant. Further, it stated that requesting assistance, far from infringing sovereignty, the court actually recognised sovereignty. However, it stated clearly that Ghana’s sovereignty could not be in question as it was merely a receiving state. A successful claim of sovereign immunity could have led to a claim by Liberia of a violation of its sovereignty, as the immunity attaches to the state concerned, and not Ghana in that matter. But Liberia was not a party to the proceedings before the Special Court!<sup>46</sup>

Was Ghana or Liberia obliged to execute the warrant of arrest against Charles Taylor? The question can be answered in two dimensions: Relying on state sovereignty and the obligation under customary international law. Wonderful enough is the fact that the Statute of the Special Court has no express provision appealing for states co-operation in respect of execution of warrants of arrest save for the co-operation in respect of enforcement of sentences. By “enforcement,” it is meant an individual serving imprisonment after being convicted by the Special Court.<sup>47</sup> It is probably implied that that obligation could be effected under customary international. Contrary to the Special Court, the International Criminal Tribunal for Rwanda enjoys international co-operation from states. This is derived from its own Statute, which states that:

States shall co-operate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to (a) The identification and location of persons; (b) The taking of testimony and the production of evidence; (c) The service of documents; (d) The arrest or detention of persons; (e) The surrender or the transfer of the accused to the International Criminal Tribunal for Rwanda.<sup>48</sup>

Arguably, the Statute of the Special Court should have incorporated the same provision on state co-operation in international crimes as those contained in the

Statutes of the ICTR and ICTY. Under the customary international law, co-operation for international crimes is generally an obligation to the international community as a whole. This is obligation *erga omnes* – that is, obligations that a state owes to the international community as a whole and in the enforcement of which all states have an interest.<sup>49</sup> Therefore, Ghana and Liberia were obliged to execute a warrant of arrest against Taylor for the crimes he committed in Sierra Leone. It should be noted that prohibition of crimes against humanity and war crimes has attained the *jus cogens*<sup>50</sup> in international law. Having desisted from executing the warrant, the two states were in material breach of the very peremptory norm resulting into the obligation *erga omnes* in international law. The International Court of Justice provided an *obiter dictum* on the obligation *erga omnes* that:

[A]n essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.<sup>51</sup>

On this line of argument, articles 40 and 41 of the Draft Articles on State Responsibility<sup>52</sup> provide that states shall co-operate to bring to an end through lawful means to any serious breach of an obligation arising under a peremptory norm of general international law and shall not recognise as lawful a situation created by such a serious breach. A breach of an obligation is serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation.<sup>53</sup> Besides, under customary international law, Ghana and Liberia also have a duty to extradite or surrender Taylor to the Special Court or punish him for the crimes allegedly committed in Sierra Leone.

Notwithstanding the above line of arguments, under state sovereignty principle, it can be stated that certainly Ghana and Liberia had no express obligation. It should be noted that states enjoy the rights inherent in full sovereignty. However, had there been any resolution from the Security Council acting under Chapter VII of the Charter of the United Nations requiring Ghana or Liberia to execute the warrant, then such would

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be regarded as an obligation in international law which would mean that such states would assist in their contribution to maintain international peace and security pursuant to a special arrangement.<sup>54</sup> What then does sovereignty mean or entail here?

State sovereignty traditionally denotes the supreme authority of the organs of state over all persons and objects within its territory. In relations between states, sovereignty signifies independence, or the right to exercise within a portion of the globe and to the exclusion of any other state the functions of a state, and to represent these functions externally.<sup>55</sup> The Charter of the United Nations ensures “the principle of the sovereign equality of all its members”<sup>56</sup> and that there is no authority to “intervene in matters which are essentially within the domestic jurisdiction of any State.”<sup>57</sup> On the principle of sovereign equality of states, the 1970 Declaration on Principles of International Law concerning Friendly relations and Co-operation among States in accordance with the Charter of the United Nations provides that:

All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: (a) states are juridically equal; (b) each state enjoys the rights inherent in full sovereignty; (c) each state has the duty to respect the personality of other states.<sup>58</sup>

Sovereignty is the kind of right that creates a space within which the bearer of the right is sometimes free to do what is morally wrong. This seems correct and important, yet misleading if over-emphasised.<sup>59</sup> If a state has a right to sovereignty, this implies that other states have a duty to respect that right by among other things, refraining from intervening in its domestic affairs. The function of the principle of non-interference in international law may be said to protect the principle of state sovereignty.

However, should state sovereignty be respected under all conditions or are there instances in which it can be disregarded? In some cases, state sovereignty is not and should not be a bar to interference in the domestic affairs of a state especially when there are serious human rights concerns. If such interference is an unacceptable assault on state sovereignty, then, how should the international community respond to situations of human rights violations? Alain Pellet<sup>60</sup> contends that sovereignty, properly defined, is not a defence for breaches or gross violations of fundamental human rights. Sovereignty can only be defined as the very criterion of States, by virtue of which such an entity possesses the totality of international rights and duties *recognised by international law* as long as it

has not limited them in particular terms by concluding a treaty.<sup>61</sup> It is in this respect that state sovereignty, in international law, can be broken particularly in grave circumstances, such as genocide, crimes against humanity and war crimes.

### ***‘Head of State Immunity’ in Matters Related to Crimes Against Humanity and War Crimes***

On the question of a Head of state immunity from prosecution, the defence in the Taylor’s trial argued that:

“[A]s an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute immunity from criminal prosecution... [And] that the indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution.”<sup>62</sup>

The Special Court for Sierra Leone held that “since the Applicant [Charles Taylor] is subject of criminal proceedings before this court, processes issued in the course of, or for the purpose of, such proceedings against the Applicant cannot be vitiated by a claim of personal immunity”.<sup>63</sup> It added that as Taylor had ceased to be a head of state the immunity *rationae personae* had also ceased to attach to him.<sup>64</sup>

The Special Court reasoned in line with its Statute which states that:

The official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.<sup>65</sup>

The question whether a head of state can be brought before an international criminal court for prosecution and punishment has been the most controversial in international criminal law. The theory that heads of states are not accountable and therefore have no international criminal responsibility under the system of international criminal law has no juridical validity. One of the consolidated principles of international criminal law is that heads of states bear international criminal responsibility for international crimes.<sup>66</sup> However, the International Court of Justice (ICJ) upheld the immunities in national courts even in cases of war crimes and crimes against humanity on the basis of the customary international law. It held that:

[A]lthough various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law,

including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.<sup>67</sup>

Such immunities include first, the personal immunity or *ratione personae*, which attaches to senior state officials, such as heads of state or government or Ministers of Foreign Affairs, while they are still in office. This immunity applies even to international crimes, as held by national courts in cases involving Qaddafi,<sup>68</sup> and Mugabe<sup>69</sup>. According to Dapo Akande:

Judicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime.<sup>70</sup>

The second immunity, that attaching to official acts (functional immunity) or *ratione materiae* may be invoked not only by the serving state officials but also by former officials in respect of official acts performed while they were in office. However, such immunity can not exist when a person is charged with international crimes either because such acts can never be 'official' or because they violate norms of *jus cogens* and such peremptory norms must prevail over immunity.

In respect of the proceedings before international criminal courts, the ICJ was of the view that an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings where they have jurisdiction.<sup>71</sup> Contemporary international law no longer accepts that a head of state commit crimes and go unpunished. Moreover, some human rights norms enjoy such a high status that their violations, even by state officials, constitute an international crime. The doctrine of immunity cannot stand aloof from these developments.<sup>72</sup> Dapo Akande puts it that:

While international crimes, when committed by state officials, will often constitute official acts, a separate rule removes immunity *ratione materiae* in proceedings relating to international crimes. This immunity is not available in such proceedings because the reasons for which such immunity is conferred do not apply to prosecutions for international crimes. Firstly, the general principle that only the state and not the officials may be held responsible for acts done by officials in their official capacity does not apply to acts that amount

to international crimes. On the contrary, it is well established that the official position of individuals does not exempt them from individual responsibility for acts that are crimes under international law, and thus does not constitute a substantive defence.<sup>73</sup>

It is contended that the above should always remain the position in respect of international crimes such as crimes against humanity, war crimes and genocide.

### ***Was Nigeria Under Obligation to Grant Asylum or Hand over Charles Taylor for the Purpose of Prosecution, or Apply Universal Jurisdiction?***

Granting political asylum to a person accused of having committed international crimes falls within the sovereignty of a granting state and is at the discretion of that receiving sovereign state. No general law requires a state to extradite or surrender such a person without a specific extradition treaty.<sup>74</sup> The return of criminals is secured by extradition agreements between states. Therefore, Nigeria would still exercise its sovereignty by continuing to grant asylum to Taylor unless a resolution from the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, required Nigeria to hand him over to face charges. Even if Nigeria had refused to hand over Taylor back to Liberia, it would do so under the principle of state sovereignty, and that act, to some extent, should have been respected as a rightful exercise of sovereignty in its own territory though it would be subjected to international criticism. It would have been otherwise if there was an extradition treaty between Nigeria and Liberia, upon which Liberia could claim material breach of

the obligations under that particular treaty, or even customary international law.

Contrary to the above position, although international law does not require such treaties to follow a particular form, certain general principles of extradition law have emerged.<sup>75</sup> These include the maxim of *aut dedere aut judicare ou punire*, which refers to the obligation to extradite or prosecute. Its aim is to secure international co-operation in the suppression of certain kinds of criminal conduct. The obligation requires a state that has hold of someone who has committed a crime of international concern either to extradite the offender to another state that is prepared to try him, or else to take steps to have him prosecuted before its own courts. Had Nigeria decided to prosecute Taylor under the Nigerian Court of Law, it would depend on whether Nigeria has a law requiring such prosecution, and also whether the offences allegedly committed by Taylor are also punishable under the Nigerian law.

The official position of individuals does not exempt them from individual responsibility for acts that are crimes under international law

A state which refuses to extradite its own nationals is expected to prosecute them in its own jurisdiction, but in cases of non-nationals, a state which refuses to extradite, is expected to prosecute that person or persons, only if its own law requires and recognises as a general rule the principle of prosecution of offences committed abroad.<sup>76</sup>

It should be noted with great concern that Taylor was charged with crimes against humanity and war crimes at the Special Court for Sierra Leone, offences that attract universal jurisdiction under international criminal justice system. Therefore, by its continued delay to extradite or timely hand over Taylor to Liberia or surrender him to the Special Court, Nigeria was expected to exercise universal jurisdiction over Taylor. Crimes subject to universal jurisdiction may be punished by any state having custody of the offender, as would have been the case of Nigeria and Taylor, irrespective of the place where the offences were committed.

Crimes against humanity and war crimes are crimes so universally condemned that they would certainly attract universality principle. The 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation that has custody of the perpetrators may punish them according to its laws applicable to such offences.<sup>77</sup> In the case against Adolf Eichmann, it was stated that:

[T]he interest in preventing and punishing acts belonging to the category in question [crimes against humanity] – especially when they are perpetrated on a very large scale – must necessarily extend beyond the borders of the State to which the perpetrators belong and which evinced tolerance and encouragement of their outrages; for such acts can undermine the foundations of the international community as a whole and impair its very stability.<sup>78</sup>

The universal jurisdiction was also emphasised by the Trial Chamber of the ICTY, which observed that:

...the crimes which the International Tribunal has been called upon to try [crimes against humanity and grave breaches of the Geneva Conventions] are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States

cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objections to an international tribunal properly constituted trying these crimes on behalf of the international community.<sup>79</sup>

Despite the delay, Nigeria finally decided to hand over Taylor to Liberia, which was willing to cause him to be tried by the Special Court for Sierra Leone. To that extent, Nigeria fulfilled its legal obligation under international co-operation in international crimes in particular, those under international humanitarian law.<sup>80</sup> It remains questionable whether such an act was a sacrifice in the African continent in exchange for peace in West African states of Sierra Leone and Liberia. It is contended that, in some instances, especially where there is an emerging volatile peace, such as that of Liberia and Sierra Leone, states in hold of offenders, should trade with peace, reconciliation and justice by handing over such offenders to face justice in order to help end the culture of impunity.

However, on the other side, it amounts to a hypocritical kind of politics in Africa, especially when a state had earlier on voluntarily, and acting on sovereignty, granted asylum, and later on refused several requests to surrender an offender, as was the situation with Nigeria and Taylor. Nigeria could still have maintained its stance for not handing over Taylor, as it would be in accordance with the agreed terms during the negotiations leading to his resignation as the President of Liberia.<sup>81</sup> It should be noted that on 11 August

2003, Taylor relinquished power and went into exile in Nigeria, after an immunity-from-prosecution deal had been arranged and secured by the African Union, ECOWAS, the UN, UK and the US governments.<sup>82</sup> The understanding was that Taylor will continue to be protected by the Nigerian government, and would not be handed over to the Special Court. To give him double assurance, Presidents John Kufuor, Thabo Mbeki, Joachim Chissano and Olusegun Obasanjo accompanied him to the Nigerian capital, Abuja, on the first leg of the journey into exile.<sup>83</sup>

Taylor's "arrest and trial is a breach of the spirit and intent of the Comprehensive Peace Agreement (CPA) and other national and international protocols which ended the Liberia civil war and facilitated the exile of former President Taylor to Nigeria."<sup>84</sup> The present situation of Taylor is representative of international deception at the highest level, which sends a signal that could make it difficult for national leaders in the

### Taylor's arrest and trial is a breach of the spirit and intent of the Comprehensive Peace Agreement of Liberia



future who will find themselves in the position as former President Taylor was, to accord international peace brokers the kind of co-operation needed to end conflicts.<sup>85</sup> If Taylor knew of this trade, that the Nigerian President, Olusegun Obasanjo would turn against him and dishonour his promise, he would not have resigned and accepted Obasanjo's offer of asylum.

### **The Dilemma on 'Where' the Trial of Charles Taylor Should Take Place**

The debate on Head of State immunity and state sovereignty in respect of Taylor was brought to an end after Taylor was transferred to The Hague to stand trial conducted by the Trial Chamber of the Special Court for Sierra Leone. After Taylor's first appearance before the Special Court, the President of the Special Court for Sierra Leone, Justice Raja Fernando, requested the Government of The Netherlands and the President of the International Criminal Court (ICC) to facilitate the conduct of the trial by the Special Court in The Hague. This was largely to avoid the security concerns in the West African sub-region that would have resulted from a trial in Freetown.<sup>86</sup> Alpha Sesay wrote:

Taylor's transfer to The Hague negatively impacts all the objects set... It would deprive war victims of the justice that they deserve... Victims are able to get a first hand view of how alleged perpetrators are made to answer for their acts. These are all things that Sierra Leoneans stand to lose if Taylor is transferred to The Hague. It might be too demanding for the court to facilitate the presence of such victims, local media and civil society coverage at The Hague and this means Sierra Leoneans would be deprived of what they truly deserve... If given second hand information, how would they find the process credible? Security has always been a concern since the Court's inception. When RUF commanders were indicted, many people feared that their supporters would cause an uprising. When Chief Hinga Norman, a hero for many people, was indicted, because of security concerns, the Special Court requested both the ICTY and ICTR to provide temporary detention for him and host his initial appearance. These institutions refused and Norman's trial has been in Sierra Leone ever since. Nothing has happened amidst such early fears.<sup>87</sup>

Taylor's defence counsel recently sought "an order from the Trial Chamber to the effect that no change of venue for the proposed trial of Charles Ghankay Taylor be made without first giving the Defence an opportunity to be heard on this important issue"

and that "such a request for change of venue by the President of the Court is "premature and raise a real risk of appearance of unfairness in that the Accused [Charles Taylor] in this case has not been afforded a right to be heard on the important issue of venue". Believing a venue change to be unnecessary, the Defence counsel asked the Trial Chamber II to direct the President of the Special Court "to withdraw the Requests reportedly made to the Government of the Kingdom of the Netherlands and to the President of the ICC (and to any other entities or organisations that may have been contacted) without the Trial Chamber or the President finding, after full arguments from the parties, that such a change of venue is necessary and merited".<sup>88</sup>

After the Trial Chamber II referred the matter to the Appeals Chamber of the Special Court for Sierra Leone, on 29 May 2006, the Appeals Chamber delivered its decision on the urgent motion for change of venue from Freetown to The Hague stating:

The motion is inadmissible because it seeks to interject the Trial Chamber, and now the Appeals Chamber, into administrative and diplomatic functions of the President ... Neither the Statute nor the Rules authorizes a Chamber to intervene in the administrative and diplomatic functions entrusted to the President ... At this stage of the proceedings, matters relating to the venue of the Taylor trial are exclusively within the administrative and diplomatic mandate of the President. Prior to a decision being made, any questions relating to the President's activities concerning the venue of the Taylor trial should be directed to the Office of the President and not to the Trial or Appeals Chambers. Accordingly, the Appeals Chamber finds that the motion is inadmissible, and thus, dismisses the motion in its entirety.<sup>89</sup>

Taylor's transfer to The Hague negatively impacts all the objects set

This paper concurs with the decision of the Appeals Chamber. However, it is also prudent to refresh the minds of the learned Judges who decided on the Defence motion for change of venue that by stating that "*any questions relating to the President's activities concerning the venue of the Taylor trial should be directed to the Office of the President and not to the Trial or Appeals Chambers*", that they overlooked the central tenet of the principles of natural justice – *Nemo iudex in sua causa* – which means that no person can judge a case in which he or she is a party.<sup>90</sup> It is reasonable to ask: how could the Appeals Chamber prefer that the matter should have been directed to the President who had already asserted the security reasons leading to the requests for venue

in the Taylor's trial? This tests the whole issue of the Special Court's independence and impartiality.

In the UN Security Council, there was not an expedient adoption of the resolution on the transfer of Charles Taylor's trial from Freetown to The Hague though, probably because the Security Council was waiting for the decision on motion filed by the Defence Counsel for Taylor at the Special Court in order to see how the matter on the transfer of Taylor to The Hague could be decided by the Special Court in order to avoid contradictions and to ensure the independence and impartiality of the Appeals Chamber of the Special Court on the matter.

Following the above decision of the Appeals Chamber of the Special Court for Sierra Leone on 29 May 2006, two weeks later, on 16 June 2006, the UN Security Council adopted resolution 1688(2006) to the effect that the trial of Taylor should take place in The Hague at the building and facilities of the ICC<sup>91</sup> thereby endorsing the decision of the Appeals Chamber of the Special Court for Sierra Leone.<sup>92</sup> Thus, the adoption of the United Nations Security Council Resolution 1688(2006) created a Chapter VII (of the Charter of the United Nations) legal basis for the Special Court for Sierra Leone to detain Taylor and conduct his trial in the Netherlands. The Secretary-General of the UN was definitely under obligation to conclude a special headquarters agreement with the Government of Sierra Leone and the Government of the Kingdom of the Netherlands to such effect.<sup>93</sup>

The adoption of the resolution demanding the transfer of Taylor to The Hague regarding the effects of conducting the trial in The Hague is for the interests of justice, victims and for functioning of the ICC and the Special Court. Security Council Resolution 1688(2006) noted that the trial of former President Taylor could not be conducted within the sub-region, in Freetown at the Special Court, due to the security implications.<sup>94</sup> Exclusive jurisdiction over Taylor is vested solely with the Special Court during his presence in the Netherlands in respect of matters within the statute of the Special Court. The Netherlands shall exercise no jurisdiction over Taylor except by express agreement with the Special Court.<sup>95</sup>

Resolution 1688(2006) also expresses that the costs to be incurred as a result of the trial of former Liberian President Taylor in The Netherlands are expenses of the Special Court and that no additional costs can be incurred by any other party without their prior consent.<sup>96</sup> It also points out the Security Council's belief that the trial of Taylor will contribute to achieving truth and reconciliation in Liberia and the

wider sub-region; and that it remains committed to assisting the Governments of Liberia and Sierra Leone in their efforts to building stable, prosperous and just societies.<sup>97</sup> The Security Council is determined that the presence of former President Taylor in the sub-region is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region.<sup>98</sup> Above all, the Security Council is determined to end impunity, establish rule of law and promote respect for human rights and to restore and maintain international peace and security, in accordance with international law and the purposes and principles of the Charter of the United Nations.<sup>99</sup>

Following the adoption of the United Nations Security Council Resolution 1688(2006) on the transfer of Taylor to The Hague, on 19 June 2006, the President of the Special Court for Sierra Leone ordered that Taylor be transferred and detained in The Hague and that the pre-trial proceedings, trial, and any appeal be conducted there.<sup>100</sup> Also, pursuant to Rule 64 of the Rules of Procedure and Evidence of the Special

Court for Sierra Leone, the Registrar of the Special Court made certain orders<sup>101</sup> relating to the detention of Taylor in the ICC's Detention Centre, including an order that the rules of detention and standards of the ICC shall be applicable to the detention of Taylor *mutatis mutandis* (with necessary or suitable changes; upon changing that which is to be changed) and that the complaints procedure set out in Rule 59 of the Rules of Detention of the Special Court shall be applicable. Acting in accordance with Rule 64 of the Rules of Procedure and Evidence of the Special Court, the President of the Special Court endorsed the Registrar's Order on 19 June 2006.

### The trial of former President Taylor could not be conducted in Freetown due to the security implications

On 20 June 2006, the Special Court for Sierra Leone transferred Taylor to the detention centre of the ICC in The Hague for the purpose of using the facilities of the ICC during his trial, in accordance with the Memorandum of Understanding (MoU) concluded by the ICC and the Special Court for Sierra Leone on 13 April 2006. That MoU was signed by Judge Kirsch on behalf of the ICC and by Livermore Munlo, the Registrar of the Special Court.<sup>102</sup>

Immediately after Charles Taylor was transferred to The Hague, there was a lack of communication between Charles Taylor, his family members and Karim A.A.Khan, his Defence Counsel. As a result, an oral application was made on 21 June 2006 to The Trial Chamber II of the Special Court for orders pertaining to the transfer of Charles Taylor to The Hague. His Defence Counsel, during the Status Conference at the Special Court, sought the following orders:

1. An order directing the Registrar to take all necessary steps to ensure that visas for the Netherlands for the family members of the Accused are facilitated without any further delay;
2. An order directing the Registrar to allow the Accused to receive and make telephone calls in precisely the same way that he was allowed to do in Freetown; and
3. An order scheduling a status conference in The Hague.<sup>103</sup>

The Trial Chamber II granted orders 2 and 3 above and denied order 1 above by stating that the order sought is not within the jurisdiction of the Trial Chamber. Although satisfied that in the present case, the fact that Taylor and his Counsel could not communicate with one another contravenes the right of the accused under article 17(4)(b) of the Statute of the Special Court for Sierra Leone, an issue related to the right of the accused to a fair trial, the Trial Chamber held that “any failure by the Registrar to facilitate visas for the family members of the accused does not affect or concern any fair trial rights of the accused and that therefore the Trial Chamber does not have jurisdiction to entertain that particular application”.<sup>104</sup>

What is the legal position on the seat of the Special Court? In law, it is not a new thing to find the trial of an individual being moved from a normal seat to another place. Domestic courts may seat anywhere appropriate for the interest of justice. Regarding the legal mandate for the seat of the Special Court, the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone provides that:

The Special Court ... may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.<sup>105</sup>

Arguments in favour of the trial taking place in Freetown are strong and credible. In the public view, the Special Court is expected to leave a legacy by contributing to peace, truth, reconciliation and justice; consequently ending a culture of impunity in the West African sub-region. Nevertheless, despite the disappointment of the local population in Sierra Leone or Liberia, the transfer of Taylor to The Hague, will offer the same kind of justice, as it would, were he to be tried in Freetown.

Provided the Special Court undertakes, as obliged, to incur all expenses for the trial to take place in The Hague, the trial will run as normal. The trial of Taylor at The Hague is simply a change of venue, but the parties in the case will remain the same. In other words, it simply means that it will be the Special Court for Sierra Leone conducting trial in The Hague and not the ICC at all. The trial will be conducted by the Trial Chamber of the Special Court for Sierra Leone sitting in The Hague. The Special Court for Sierra Leone, with the assistance of the Secretary-General of the UN and relevant States, shall make the trial proceedings to the people of the sub-region, including through video link.<sup>106</sup>

Although the Government of the Netherlands has indicated that it accepts the trial of Taylor to be conducted in the Netherlands, it has also placed a condition that arrangement be made to ensure that he is transferred to a place outside of the Netherlands immediately after the final judgment of the Special Court. In this regard, the Government of the United Kingdom has expressed its desire to allow former President Taylor, if convicted of the offences he is being charged with, to enter and serve imprisonment term in the UK. The Secretary of State for Foreign and Commonwealth Affairs, Mrs. Margaret Beckett, stated that:

### The transfer of Taylor to The Hague, will offer the same kind of justice

At the request of the United Nations Secretary-General, I have therefore agreed that, subject to Parliamentary legislative approval, the United Kingdom would allow former President Taylor, if convicted and should circumstance require, to enter the United Kingdom to serve any sentence imposed by the Court. This is entirely without prejudice to the eventual location or outcome of the trial. Former President Taylor’s right to a fair trial must be respected. Were the Court to acquit former President Taylor, we would not be required to allow him to come to the United Kingdom. Were he to be convicted, and subsequently released after serving sentence, the expectation at this stage is that former President Taylor would leave or face removal from the United Kingdom.<sup>107</sup>

However, it will depend on the will of the parliamentarians in the UK whether to allow Taylor, once convicted of the offences of crimes against humanity or war crimes, to enter and serve sentence in the UK.

### Lessons and Legal Implications for Conflict Prevention in Africa

Armed conflicts have severely undermined Africa’s development. According to Wafula Okumu, “in all of



the African conflicts, civilians have paid the heaviest prices – as pawns, hostages and objects of conflict, if not the deliberate targets of violence.”<sup>108</sup> The consequences of these conflicts have ranged from massive destruction of infrastructure, loss of millions of lives, destruction of social, economic and political systems to displacement of millions from their homes. Non-international armed conflicts continue in Chad, Democratic Republic of the Congo, Ivory Coast, Somalia, Sudan, and Uganda, while a number of other Africa countries emerging from violent conflicts are struggling to rebuild themselves. A common denominator in these conflicts is the prominent role played by the leaders, both in government and rebel movements. What legal implications, reflections or impacts can the trial have in conflict prevention in the African continent? What can the masterminds of conflicts in Africa learn from the trial of Taylor?

Taylor’s trial will send a loud and clear message to African leaders and warlords that no matter how rich, powerful or feared they may be, they will be held accountable for committing heinous crimes. The persons bearing the greatest responsibility for the non-international armed conflicts in Northern Uganda, Darfur region of western Sudan, the Democratic Republic of the Congo, Ivory Coast, Somalia, Chad, and other parts of Africa, must take note that their turns to face justice are not far. They must be made aware that none is above the law. Some of them have been investigated or are being investigated by the Chief Prosecutor of the International Criminal Court for war crimes and crimes against humanity and are likely to face charges similar to Taylor’s.

The trial also sets the precedent that the defences of state sovereignty and head of state immunity can no longer exonerate the former or an incumbent head of state from being prosecuted for human rights violations and grave breaches of the laws and customs of armed conflicts. Trying a former head of state is not necessarily a new phenomenon in Africa. Some of the African heads of state or governments who have been in one way or the other indicted or prosecuted either in the international criminal tribunals, national or foreign national courts include: Jean Kambanda (former Prime Minister of Rwanda) who was tried by the International Criminal Tribunal for Rwanda; Hissène Habré (former President of Chad) who was indicted by the national courts of Senegal on allegations of torture; Robert Mugabe (President of Zimbabwe) who was indicted by the United States Court in New York; Muammar Al-Qaddafi (Libyan leader) indicted by the French *Cour de Cassation*; Abdulaye Yerodia Ndombasi (former Minister for Foreign Affairs of the Democratic Republic of the Congo) indicted by the Belgian National Court

while still in office; and Mengistu Haile Mariam (former Ethiopian leader) who is currently being tried in absentia in Ethiopia.

Africa stands to see the demise of a culture of impunity especially by the heads of state and governments. Taylor’s trial is a wake up call for those heads of state and governments who are committing serious violations of human rights against their own citizens to stop such atrocities. It is also a warning that those who misuse sovereign powers entrusted to them will one day be called upon to account for their actions.

Taylor’s trial clearly illustrates the principle that there will be no peace without justice. Much as Truth and Reconciliation Commissions will be established for the purposes of telling the truth, forgiving and forgetting, there remains one important aspect in the whole spectrum of peace, justice and reconciliation—this is, the perpetrators of international crimes and gross violations of human rights and humanitarian law in armed conflicts will be punished and there will be justice for the victims of the armed conflicts. Fear of punishment typically deters criminal behavior and in any case it stops the criminal from harming society while she or he is in prison.<sup>109</sup> Deterrence is a justification for punishment when it produces more good than evil. Indeed, as Jeremy Bentham’s “utility theory of punishment” states: punishment should be severe enough that the trade-off is not worth it. More serious crimes should carry more severe penalties. Utilitarianism argues that the right act or policy is that which would cause “the greatest happiness for the greatest number;”<sup>110</sup> meaning that punishment is aimed at satisfying the majority—as in this case, the victims of armed conflict.

## Taylor’s trial sends a clear message to African leaders

## Conclusion and Recommendations

This paper has followed the trial of Charles Taylor’s indictment, arrest and prosecution. In particular, it has dealt with legal issues related to the immunity attached to the serving or former head of state and assertion of state sovereignty in circumstances where there are grave concerns of human rights violations and that of material breaches of international humanitarian law, for example crimes against humanity and war crimes. It has also partly dealt with the surrender of perpetrators of crimes attracting universal jurisdiction, in particular those surrounding Charles Taylor, the debate on where he should be tried, and with the role that his trial will play in developing international law and conflict prevention in Africa.

Taylor’s trial is preceded by the trial of the Rwanda’s former Prime Minister, Jean Kambanda who was

sentenced to life imprisonment after pleading guilty to genocide and crimes against humanity<sup>111</sup> committed during the non-international armed conflict in Rwanda in 1994. Hissène Habré, former president of Chad, is also facing the possibility of a second trial on charges of crimes against humanity in a Belgian court under the principle of universal jurisdiction.<sup>112</sup>

Now that it has been decided that Taylor will be tried in The Hague,<sup>113</sup> justice remains to be done. One thing though is certain: Taylor's trial promises to be an interesting test case for or against the culture of impunity by political leaders in Africa.<sup>114</sup>

As it stands, the trial has emphasised and sets a remarkable precedent on the head of state immunity and state sovereignty in international law, thus contributing to the development of international law in Africa. Further, upon its successful completion, the trial of Taylor stands to develop new principles of international law, in particular, on the 'persons who bear the greatest responsibility' for serious violations of international humanitarian law and will definitely elaborate on the concept of the 'joint criminal enterprise' in the commission of international crimes in the context of the armed conflict in Sierra Leone.

Regardless of what may have been opined in this work in the discussions on several issues above, it is concluded that head of state immunity and state sovereignty cannot, and should not bar the prosecution of heads of states in Africa wherever there is clear evidence for commission of international crimes such as crimes against humanity, war crimes and genocide. States in hold of perpetrators of international crimes are under obligation to surrender, extradite or prosecute them as support in international co-operation for international crimes. Further, the trial of Taylor serves as a deterrent against conflicts in Africa. The trial emphasises the principle that there can be no peace without justice, meaning that perpetrators of crimes should be punished in order to satisfy the victims of such crimes.

In order to create an impunity-free Africa, the international community should continue respecting, fulfilling and promoting its obligations in international law and human rights by restricting head of state immunity and state sovereignty for incumbent or former heads of states in grave circumstances of gross human rights violations, and grave breaches of international humanitarian law. It should do so in instances covering genocide, crimes against humanity and war crimes. By doing so, it will be possible to create an Africa-impunity-free continent while at the same time maintaining functional relations between African states. If African States can adopt a culture of bringing individual perpetrators of serious international crimes to justice regardless of their status as former or incumbent heads of states it will greatly

contribute to conflict prevention in Africa. On their part, African states should be willing to surrender the perpetrators of heinous crimes as their contributions to rebuilding societies emerging from armed conflicts through justice and reconciliation.

To achieve an Africa-impunity free continent, and to deter further conflicts in the continent, African states must take the necessary steps in the right direction. Thus, it is recommended that due to the tribunal fatigue and the fact that international criminal tribunals, including the Special Courts that have become too costly and cumbersome for the international system to operate, African States that have not yet ratified or acceded to the Rome Statute of the ICC should do so.<sup>115</sup> Upon such ratification or accession, those states following the dualist system should also proceed to enact laws for the purposes of implementing the Rome Statute of the ICC and incorporate them into their national legal systems.<sup>116</sup> Under the contemporary international law the ICC is seen not only as the best avenue for dealing with war crimes and crimes against humanity but also as the best alternative to the specialised tribunals.

## Endnotes

- 1 In this paper the words 'the Special Court' may be used interchangeably with 'the Special Court for Sierra Leone'.
- 2 UNSC Res 1315(2000) of 14 August 2000, UN Doc. S/RES/1315. See also *Prosecutor v Charles Taylor, Decision on Immunity from Jurisdiction*, Case No. SCSL-2003-01-I, 31 May 2004, para 35; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002), UNSC Res 246, UN Doc S/2002/246.
- 3 Act No.9 (2002). Act Supplement to the Sierra Leone Gazette, CXXXIII (22). 25 April 2002. Available at <[www.sc-sl.org/Documents/SCSL-ratificationamendmentact.pdf](http://www.sc-sl.org/Documents/SCSL-ratificationamendmentact.pdf)> (accessed on 21 April 2006).
- 4 Other warring factions included: The Civil Defence Force (CDF) which fought against the RUF, and later, the Armed Forces Revolutionary Council (AFRC) created via a coup by members of the Sierra Leone Liberation Army (SLA) on 25 May 1997. John Paul Koroma became the leader of the AFRC; and AFRC/RUF. For more on the causes of the conflict in Sierra Leone, see The Truth and Reconciliation Commission Report, 2004, in chapters titled '*Causes of Conflict*', para 10; '*Primary Findings*', paras 12-19.
- 5 C Bhoke, The Special Court for Sierra Leone: Towards peace, justice and reconciliation Field Trip Report submitted to the Centre for Human Rights, University of Pretoria, (unpublished paper, 2005, and on file with the author), p 7. On the relationship between the Truth and Reconciliation Commission and the Special Court, see also, A Tejan-Cole The Special Court for Sierra Leone: Conceptual concerns and alternatives, *African*

- Human Rights Law Journal* 1 (1), 2001, p 119; A Tejan-Cole The complementary and conflicting relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, in H Fischer and A McDonald (eds.), *Yearbook of International Humanitarian Law*, 2002, vol.5, TMC Asser Press, The Hague, pp 316-322; W A Schabas, The relationship between Truth Commissions and International Courts: The case of Sierra Leone *Human Rights Quarterly* 25 (4) 2003, pp 1035-1066.
- 6 *Prosecutor v Charles Taylor, Decision on Immunity from jurisdiction, op.cit*, paras 40-42. The background to the establishment and the legal basis of the Special Court is narrated in the decisions of the Appeals Chamber of the Special Court for Sierra Leone: See, *Prosecutor v Norman, Kallon and Kamara*, Case Nos. SCSL-2004-14-AR 72(E), SCSL-2004-15-AR 72 (E), SCSL-2004-16-AR 72 (E), *Decision on Constitutionality and Lack of Jurisdiction*, 13 March 2004 ('*Constitutionality Decision*'); *Prosecutor v Kallon and Kamara*, Case Nos. SCSL-2004-15-AR 72(E), SCSL-2004-16-AR 72(E), *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, 13 March 2004 ('*Lomé Amnesty Decision*').
  - 7 Art 1(1) of the Statute of the Special Court for Sierra Leone. The Statute is annexed to the Report of the Secretary General of the United Nations on the establishment of the Special Court for Sierra Leone, UN Doc S/2000/915.
  - 8 Art 1(2) of the Statute, *ibid*.
  - 9 Art 1(3) of the Statute, *ibid*.
  - 10 See generally, the consolidated indictments in the cases of *Prosecutor v Issa Hassan Sessay and 2 Others*, Case No.SCSL-2004-15-PT, 13 May 2004 (Indictment); *Prosecutor v Samuel Hinga Norman and 2 Others*, Case No. SCSL-03-141-I, 5 February 2004 (Indictment); *Prosecutor v Alex Tamba Brima and 2 Others*, Case No. SCSL-2004-16-PT, 18 February 2005 (indictment); and *Prosecutor v Charles Taylor*, Case No.SCSL-2003-01-I, (Indictment) 3 March 2003; see also amended indictment of the same case, of 16 March 2006.
  - 11 For a comprehensive coverage on 'those who bear the greatest responsibility' and 'joint criminal enterprise', see generally, C Bhole and B Dawit, The Concepts of Joint Criminal Enterprise and those who bear the Greatest Responsibility, legal Memorandum submitted to the Defence Team, The RUF Trial, Special Court for Sierra Leone, as part of the Academic consortium of the Special Court for Sierra Leone, unpublished, 2005, pp 5-19, (on file with the author); M Goldmann, Sierra Leone: An African solution to African problems?, in A von Bogdandy and R Wolfrum (2005) *Max Planck Yearbook of United Nations Law*, vol.9, Martinus Nijhoff, Leiden, pp 504-508.
  - 12 Views expressed by Kevin Metzger, Defence Counsel in the AFRC Trial, in the briefing with the author, held on Tuesday, 26 April 2005, in the Conference Room, Defence Office, during a field trip to the Special Court for Sierra Leone, Freetown.
  - 13 Interview with Desmond de Silva, Prosecutor of the Special Court for Sierra Leone (then Deputy Prosecutor) in an interview with the author held on Monday, 25 April 2005, Conference Room-Office of the Prosecutor (OTP).
  - 14 Interview with David Crane, (then Prosecutor of the Special Court for Sierra Leone), during a briefing held on Monday, 25 April 2005 at Conference Room OTP.
  - 15 On Joint criminal enterprise see generally, A M Danner, Joint criminal enterprise and contemporary international law, *American Society of International Law Proceedings*, vol 98, 2004, pp 186 et seq.; N Piacente, Importance of the joint criminal enterprise doctrine for the ICTY Prosecutory policy, *Journal of International Criminal Justice*, vol 2, 2004, pp 446 et seq; A M Danner and J S Martinez, Guilty associations: Joint criminal enterprise, command responsibility, and the development of International Criminal law, *California Law Review* 93 (1) 2005, pp 75-169.
  - 16 In *Prosecutor v Dusko Tadic, Judgment*, Appeals Chamber of the ICTY, Case No. IT-94-1-A, (15 July 1999), paras 175, 177, 186, 193, 196, 219-222, 224 and 227.
  - 17 Danner, *op cit*, p 187.
  - 18 See *Prosecutor v Tadic*, *op cit*, paras 196, 220 and 227; Piacente, *op cit*, p 449.
  - 19 Piacente, *op cit*.
  - 20 See *Prosecutor v Charles Taylor*, *ibid*, *Case summary accompanying the amended indictment*, paras 1, 2, 6 and 22.
  - 21 *Prosecutor v Charles Taylor*, *ibid*, paras 4-31 and 59.
  - 22 See the amended indictment of the *Prosecutor v Charles Taylor*, *op cit*, paras 33-34.
  - 23 See *The Prosecutor v Charles Taylor*, Case No. SCSL-2003-01-I, *Decision Approving Indictment and order for Non-disclosure*, 7 March 2003.
  - 24 See the information provided by David Crane, (then Prosecutor of the Special Court) in an interview with Charles Cobb Jr, Nigeria will hand over Charles Taylor, predicts War crimes Prosecutor, *The Global Policy Forum*, 25 September 2003, available at <<http://www.global.org/intljustice/sierra/2003/0925ctinterv.htm>> (accessed on 4 April 2006).
  - 25 <[http://en.wikipedia.org/wiki/Charles\\_Taylor](http://en.wikipedia.org/wiki/Charles_Taylor)> (accessed on 29 April 2006).
  - 26 Brief Chronology on efforts to bring Charles Taylor to justice, available at <<http://www.sc-sl.org/Press/prosecutor-032606.pdf>> (accessed on 2 May 2006).
  - 27 Interpol issues Red Notice for former Liberian President Interpol Media Release, 4 December 2003, available at <<http://www.interpol.int/Public/ICPO/PressRelease/PR2003/PR200334.asp>> (accessed on 2 May 2006). At the request of the Special Court for Sierra Leone, on 4 December 2004 Interpol issued a Red Notice for the former Liberian President Charles Taylor. This was in accordance with a co-operation agreement between Interpol and the Special Court, finalised in November 2003.
  - 28 Charles Taylor: A wanted man Thursday, 4 December 2003, available at <<http://www.cnn.com/2003/WORLD/africa/06/10/liberia.taylor/index.html>> (accessed on 28 April 2006).

- 29 See the resolution on the EU Parliament website <<http://www.eu.parliament.eu.int>> (accessed on 2 May 2006).
- 30 See generally, L Lang, *The Special Court for Sierra Leone: Media coverage of Charles Taylor*, War Crimes Studies Centre, Paper no 2, available at <<http://www.warcrimescenter.berkeley.edu>> (accessed on 2 May 2006).
- 31 Brief Chronology on efforts to bring Charles Taylor to justice, *op cit*.
- 32 UNSC Res. 1638 (2005), S/RES/1638(2005), Adopted by the Security Council at its 5304th meeting, on 11 November 2005, para 1.
- 33 Obasanjo agrees to surrender Charles Taylor, available at <<http://www.theallineed.com/news/0603/25151215.htm>> (accessed on 2 May 2006).
- 34 See note 25 above.
- 35 <<http://www.sc-sl.org/Press/prosecutor-032606.pdf>> (accessed on 2 May 2006).
- 36 See, for example, UNSC Res. 1667 (2006). S/RES/1667 (2006).
- 37 Press Release, Freetown, 3 April 2006 Chief Prosecutor welcomes the successful initial appearance of Charles Taylor in Freetown, Sierra Leone, available on the website of the Special Court at <[www.sc-sl.org](http://www.sc-sl.org)> (accessed on 4 April 2006).
- 38 *United States v. Noriega*, 746 F.Supp. 1506, 1511 (S.D.Fla.1990), available at <<http://laws.lp.findlaw.com/11th/924687man.html>> (accessed on 3 May 2006) and *The United States v Manuel Antonio Noriega*, United States Court of Appeals, Eleventh Circuit, Nos.92-4687; 96-4471, (7 July 1997) para I, second sub-paragraph. Noriega asserted that the district court should have dismissed the indictment against him due to his status as a head of state and the manner in which the US brought him to justice. He challenged his convictions on the grounds related to the district court's decision to exercise jurisdiction over the case.
- 39 See generally, *R v Bartle and the Commissioner of Police for the Metropolis and Others (appellants), Ex parte Pinochet (Respondent), House of Lords, Opinions of the Lords of Appeal for Judgment in the cause*, 24 March 1999. Available at <<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>> (accessed on 3 May 2006); *R v Bow Street Magistrate: ex parte Pinochet Ugarte*, [1998] 4 All ER 897 (HL). In that case, the House of Lords decided (Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) that Pinochet could not claim immunity *ratione materiae* for criminal acts committed while he was in office.
- 40 See generally, a plethora of cases against Milosevic in respect of three different states of Bosnia, Croatia, and Kosovo respectively, all of which charged Milosevic on the basis of individual criminal responsibility and participation in the joint criminal enterprise pursuant to articles 7(1) and 7(3) of the Statute of the ICTY: *The Prosecutor v Slobodan Milosevic*, Case No. IT-02-54-T, (Amended indictment), 21 April 2004, paras 1-79; *The Prosecutor v Slobodan Milosevic*, Case No.IT-02-54-T, (Second amended indictment), 28 July 2004, paras 7-9, 24-110; and *The Prosecutor v Slobodan Milosevic and 4 Others*, Case No.IT-99-37-PT, (Second amended indictment), paras 16-28. In this last case, the Trial Chamber of ICTY addressed the question of immunity in its decision on preliminary motions in November 2001. In rejecting the assertion of immunity raised in the submission by the *amic curiae*, the Court considered art 7(2) of the Statute of ICTY as being customary international law. See *Prosecutor v Slobodan Milosevic, Decision on Preliminary Motions*, IT-99-37-PT, Trial Chamber, 8 November 2001.
- 41 See the statement issued on 19 October 2005 stating the charges and the defendants in the case at <<http://www.iraq-ist.org/ar/press/releases/0027a.htm>> (in Arabic), but summarised in English at <[http://www.loc.gov/law/public/saddam/saddam\\_pres.html](http://www.loc.gov/law/public/saddam/saddam_pres.html)> (accessed on 4 May 2006). See Jamie Tarabay, *Saddam admits approving death sentences*, 5 April 2006, available at <<http://www.npr.org/templates/story/story.php?storyId=5324452>> (accessed on 4 May 2006). On the legality of the trial see generally, Issam Saliba, *The nullum crimen principle and the Trial of Saddam Hussein*, available at <[http://www.loc.gov/law/public/saddam/saddam\\_prin.html](http://www.loc.gov/law/public/saddam/saddam_prin.html)> (accessed on 4 May 2006).
- 42 *Prosecutor v Charles Taylor, Decision on Immunity from Jurisdiction, op.cit*, paras 7 and 8, citing the *Lotus Case*, PCIJ; Series A, No.10 (1970).
- 43 *Prosecutor v Charles Taylor*, *ibid*, para 10.
- 44 *Amicus curiae* means 'a friend of the court'; one who is invited by the court to submit on specific legal matters in order to help clarify concepts and position in law.
- 45 *Prosecutor v Charles Taylor*, *op cit*, para 17(e), emphasis supplied.
- 46 *Prosecutor v Charles Taylor*, *ibid*, para 57.
- 47 Art 22 of the Statute of the Special Court states that "imprisonment shall be served in Sierra Leone but may also be served in any of the States which have concluded with the ICTR or ICTY an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States".
- 48 Art 28 of the Statute of ICTR. Art 29 of the Statute of the ICTY contains similar obligations.
- 49 J Dugard, *International Law: A South African perspective*, (3rd edn.), Juta and Company: Lansdowne, 2005, p 43.
- 50 'Jus cogens' means a 'compelling law'. *Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Art 53 of the Vienna Convention on the Law of treaties of 1969 recognises *jus cogens* by providing that: "A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."
- 51 *The Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Second Phase, Judgment of 5 February 1970, 1970 ICJ Reports 3, p 32.

- 52 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, (2001) UN General Assembly Ordinary Resolution, at the 56th Session, Supplement No. 10(A/56/10).
- 53 Art 40(2) of the Draft Articles on State Responsibility, *ibid*.
- 54 Such an obligation would have been undertaken by virtue of being a member of the United Nations, and of course, a party to the Charter of the United Nations, and under article 43(1) of the Charter.
- 55 M Griffins, I Levine and M Weller, Sovereignty and suffering, in J Harris *The Politics of humanitarian intervention*, Pinter Publishers, London & New York, 1995, p 35.
- 56 Art 2 (1) of the Charter of the United Nations, the Charter was signed at San Francisco on 26 June, and entered into force on 24 October 1945.
- 57 Art 2(7) of the Charter, *ibid*.
- 58 UN GA Res. 2625, UN GAOR, 25th Session, Supp. No. 28, at 121, UN Doc. A/8028 (1970), (24 October 1970). See also R J Vincent, *Non-intervention and international order*, Princeton Press, Princeton, 1974, p 14. On sovereignty, see also, B Wicker *International law: Idea or reality?* *The Christian Law Review*, no 154, 2005, pp 35-56; R Jackson *Quasi-States, dual regimes, and neo classical theory: International jurisprudence and the Third World*, *International Organisation* no 41, 1987, p 519.
- 59 H Shue, *Limiting sovereignty* in J L Welsh (ed), *Humanitarian intervention and international relations*, Oxford University Press, Oxford, 2004, p 12.
- 60 Alain Pellet, *State sovereignty and the protection of fundamental human rights: An international law perspective*, *Pugwash Occasional Papers*, vol 1, February 2000, available at <<http://www.pugwash.org/reports/rc/pellet.htm>> (accessed on 24 June 2005).
- 61 A Pellet, *ibid*. (citations and quotations omitted but emphasis maintained).
- 62 *Prosecutor v Charles Taylor*, op cit, paras 6(a) and (d).
- 63 *Ibid*, para 58. By 'the processes issued in the course of', the court meant the warrant of arrest issued against Charles Taylor.
- 64 *Ibid*, para 59.
- 65 Art 6(2) of the Statute of the Special Court for Sierra Leone. The same position is stated in art 7(2) of the Statute of the ICTY, established pursuant to UN Security Council Res. 808 of 22 February 1993 and UN Security Council Res. 827 of 25 May 1993; art 6(2) of the Statute of ICTR, established pursuant to UN Security Council Res. 955 of 8 November 1994; art 27(2) of the Rome Statute of the International Criminal Court; art 7 of the Charter of the International Military Tribunal (the Nuremberg Charter) London, 8 August 1945, UNTS vol 82 p 279. However, a stronger treaty authority on the immunity of head of state or government under the contemporary international law is the provisions of arts 25 and 27(2) of the Rome Statute of the International Criminal Court.
- 66 F Malekian, *International criminal responsibility of individuals*, in M C Bassiouni (ed), *International Criminal Law*, (2nd edn.) 1999, vol 1, Transnational Publishers, New York, p 174.
- 67 *The Case Concerning the Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v Belgium)*, (Yerodia Case), 2002 ICJ Reports, 14 February 2002, para 58.
- 68 *Cour de Cassation (France)*, 13 March 2001, Judgment No.1414, reprinted in *Revue Generale de Droit International Public*, no 105, 2001, p 473; See also Salvatore Zappala, *Do Heads of State in Office enjoy immunity from jurisdiction for international crimes? The Ghaddafi case before the French Cour de Cassation*, *European Journal of International Law*, vol 12, 2001, p 596 (wherein the discussion on the Qaddafi case is made).
- 69 See *Tachiona v Mugabe*, 169 F.Supp.2d 259,309 (SDNY 2001).
- 70 D Akande, *International law immunities and the International Criminal Court*, (2004) 98 *American Journal of International Law*, vol 98, 2004, p 407; Dugard, op cit, p 252.
- 71 *Yerodia case*, op cit, para 61.
- 72 Dugard, op cit, pp 249-250.
- 73 Akande, op cit, p 415.
- 74 For a discussion on such a position, see N J Botha, *The basis of extradition: The South African perspective*, *South African Yearbook of International Law*, vol 17 (1991-1992), pp 131-133.
- 75 Dugard, op cit, p 210.
- 76 See E M Wise, *Aut dedere aut judicare: The duty to prosecute or extradite* in M C Bassiouni, *International criminal law: Procedural and enforcement mechanisms*, Transnational Publishers, New York, (2nd edn), 1999, pp 17-18.
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- 78 *Attorney-General of Israel v Eichmann*, Supreme Court of Israel, *International Law Reports*, vol 36, 1962, p 296.
- 79 *Prosecutor v Tadic, Decision on the Defence Motion on Jurisdiction*, Trial Chamber, (10 August 1995), para 2.
- 80 Such obligations are found in the Geneva Conventions, 1949. See, for example, *Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949*, 74 UNTS 135, art 129; and *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 74 UNTS 85, art 50.
- 81 See art XX of the Comprehensive Peace Agreement between the Government of Liberia (GOL), the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, Accra, Ghana, 18th august 2003, available at <[http://www.iansa.org/documents/Liberia\\_Comprehensive\\_Peace\\_Agreement.doc](http://www.iansa.org/documents/Liberia_Comprehensive_Peace_Agreement.doc)> (accessed on 22 May 2006).
- 82 Lansana Gberie, Jarlawah Tonpoh, Efam Dovi and

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- 83 Ibid.
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- 86 Press Release 'Special Court President requests Charles Taylor to be tried in The Hague', Special Court for Sierra Leone, Press and Public Affairs Office, 30 March 2006, available at <<http://www.sc-sl.org/Press/pressrelease-033006.pdf>> (accessed on 9 May 2006). See also the Briefing on Charles Taylor, UN Spokesman's Noon Briefing. Daily Press Briefing by the Office of the Spokesman for the Secretary-General, Department of Public Information, News and Media Division, New York, 30 March 2006, available at <<http://www.un.org/News/briefings/docs/2006/db060330.doc.htm>> (accessed on 9 May 2006).
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- 88 *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-PT-91, *Urgent Motion for an Order that no change of venue from the seat of the Court in Freetown be ordered without the Defence being heard on the Issue and Motion that the Trial Chamber request the President of the Special Court to withdraw the requests reportedly made to (1) The Government of the Kingdom of the Netherlands to Permit that the Trial of Charles Ghankay Taylor be Conducted on its Territory and (2) to the President of the ICC for use of the ICC Building and Facilities in the Netherlands during the Proposed Trial of Charles Ghankay Taylor*, paras. 2-3. For the most recent commentary on this issue, see, C Jalloh, The law and politics of the Charles Taylor case, *Canadian Council on International Law*, April 2006, available online at <[http://www.ccil-ccdi.ca/index.php?option=com\\_content&task=view&id=165&Itemid=76](http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=165&Itemid=76)> (accessed on 9 May 2006).
- 89 See paras 5, 7 and 8 of the Decision on urgent defence motion for change of venue, The Appeals Chamber of the Special Court for Sierra Leone, Case No. SCSL-03-01-AR 72, (29 May 2006).
- 90 The Latin maxim '*nemo iudex in sua causa*' may also be referred to as '*nemo iudex in parte sua*' or '*nemo debet esse iudex in propria causa*' and '*in propria causa nemo iudex*'. The other two principles of natural justice are '*audi alteram partem*' -- hear the other party -- to allow impartiality and fairness. The third one is the 'right to know the reasons for the decision reached'.
- 91 See UNSC Res. 1688(2006), UN Doc. S/RES/1688(2006), Adopted by the Security Council at its 5467th meeting, on 16 June 2006. The Security Council adopted a draft resolution submitted by the United Kingdom of Great Britain and Northern Ireland, *ibid*, which received 15 votes in favour; none against and no abstention, and was adopted unanimously as resolution 1688(2006).
- 92 The Appeals Chamber dismissed the motion filed by the Defence Counsel for Charles Taylor, Mr. Karim. A.A.Khan. See Urgent Defence Motion for an Order that no Change of Venue from the Seat of the Court in Freetown Be Ordered Without the Defence Being Heard on the Issue and Motion that the Trial Chamber Request the President of the Special Court to Withdraw the Requests Purportedly Made to (1) the Government of the Kingdom of the Netherlands to Permit that the Trial of Charles Ghankay Taylor Be Conducted on its Territory &(2) to the President of the ICC for the Use of the ICC Building and Facilities in the Netherlands During the Proposed Trial of Charles Ghankay Taylor, 7 April 2006 (the "Motion"). See also Defence Reply to Prosecution Response to Motion for an Order that no Change of Venue from the Seat of the Court in Freetown Be Ordered Without the Defence Being Heard on the Issue and Motion that the Trial Chamber Request the President of the Special Court to Withdraw the Requests Purportedly Made to (1) the Government of the Kingdom of the Netherlands to permit that the Trial of Charles Ghankay Taylor Be Conducted on its Territory & (2) to the President of the ICC for the Use of the ICC Building and Facilities in the Netherlands During the Proposed Trial of Charles Ghankay Taylor, 28 April 2006.
- 93 Pursuant to para 5 of the UNSC Res. 1688(2006) *op cit*, note 109: "The Security Council requests the Secretary-General to assist, as a matter of priority, in the conclusion of all necessary legal and practical arrangements, including for the transfer of former President Taylor to the Special Court in the Netherlands and for the provision of the necessary facilities for the conduct of the trial, in consultation with the Special Court, as well as the Government of the Netherlands." It is also in consonance with art 10 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002), UNSC Res 246, UN Doc.S/2002/246. See also Rule 4 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
- 94 See preamble to UNSC Res. 1688(2006), *ibid*.
- 95 See para 7, *ibid*.
- 96 Pursuant to para 10 of UNSC Res. 1688(2006), *ibid*, and in accordance with art 6 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *op cit*.
- 97 See preamble to the UNSC Res. 1688 (2006), *ibid*.
- 98 *Ibid*.
- 99 *Ibid*.
- 100 Order Changing Venue of Proceedings dated 19 June 2006 ('President's Order'). Note that in this order,

- Charles Taylor was referred to as “the accused”.
- 101 Order by the Registrar Pursuant to Rule 64 dated 19 June 2006 (‘Registrar’s Order’).
- 102 See Press Release “The Special Court for Sierra Leone to use ICC Facilities for Trial of Charles Taylor”, The Hague, 21 June 2006, ICC-20060621-140-En. Available at <<http://www.icc-cpi.int/press/pressreleases/153.html>> (accessed on 27 June 2006).
- 103 See, *Prosecutor v Charles Ghankay Taylor*, (Case No. SCSL-03-1-PT), *Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague*, 23 June 2006, at 2.
- 104 *Ibid*, pp. 3-4.
- 105 Art 10, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, *op cit*.
- 106 See para 6 of UNSC Res. 1688 (2006), *op cit*.
- 107 See the “Written Ministerial statement on Sierra Leone by the Secretary of State for Foreign and Commonwealth Affairs”, annexed to a Letter dated 15 June 2006 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, (UN Doc. S/2006/406). On all documents related to the issue of the transfer of Charles Taylor to The Hague, see, *The Journal of the United Nations: Programme of Meetings and agenda, Summary of official meetings, Security Council*, No.2006/116, Saturday, 17 June 2006. Available online at <<http://www.un.org/Docs/journal/En/lateste.pdf>> (accessed on 19 June 2006).
- 108 See Wafula Okumu, Humanitarian International NGOs and African Conflicts, in Henry F. Carey and Oliver P .Richmond (eds), *Mitigating Conflicts – The Role of NGOs*, Frank Cass, London, 2003, p. 122.
- 109 See Richard Brandt, ‘A utilitarian theory of punishment’, available at <<http://stairs.umd.edu/140/brandt.html>> (accessed on 7 June 2006).
- 110 See Wikipedia, The Free Encyclopedia: Jeremy Bentham, *Utilitarianism*, available at <[http://en.wikipedia.org/wiki/Jeremy\\_Bentham](http://en.wikipedia.org/wiki/Jeremy_Bentham)> (accessed on 7 June 2006); Hugo Bedau, Bentham’s theory of punishment: Origin and content, The Bentham Project, available at <<http://www.ucl.ac.uk/Bentham-Project/journal/Bedau.htm>> (accessed on 7 June 2006).
- 111 *The Prosecutor v Jean Kambanda*, Case No. ICTR 97-23-S, Trial Chamber I, Judgment and Sentence, Decision of 4 September 1998, paras 3, 43-44, 52-53, and 61-62.
- 112 The former Chadian President was arrested in Senegal in 2001. Senegalese Courts dismissed charges against him in 2005 when ruled that they did not have jurisdiction to try him for acts committed in Chad. Hissène Habré is accused by Belgium of committing acts constituting crimes against humanity, war crimes, torture and other human rights violations during his regime from 1982 to 1990. On 15 November 2005, Habré was detained by the Senegalese authorities pursuant to an extradition request from Belgium. For commentaries on Hissène Habré case, see McNabb Associates, *International Crimes: Crimes against humanity – Chad’s Hissène Habré*, available at <<http://www.internationalcrimesblog.com/2006/05/crimes-against-humanitychads-hissne.html>> (accessed on 7 June 2006); Human Rights Watch, *The case against Hissène Habré ‘an African Pinochet’*, May 2006, available at <<http://hrw.org/english/docs/2005/09/30/chad11786.htm>> (accessed on 6 June 2006).
- 113 See para 8 of the UNSC Res. 1688(2006), *op cit*: “The Security Council decides further that the Government of the Netherlands shall facilitate the implementation of the decision of the Special Court to conduct the trial of former President Taylor in the Netherlands, in particular by: (a) Allowing the detention and the trial in the Netherlands of former President Taylor by the Special Court; (b) Facilitating the transport upon the request for the Special Court of former President Taylor within the Netherlands outside the areas under the authority of the Special Court; (c) Enabling the appearance of witnesses, experts and other persons required to be at the Special Court under the same conditions and according to the same procedures as applicable to the International Criminal Tribunal for the Former Yugoslavia.”
- 114 King, *op cit*, p. 16.
- 115 Art 125 of the Rome Statute of the International Criminal Court sets such obligations for states to ratify or accede to the Rome Statute of the ICC thereby recognising the jurisdiction of the ICC for international crimes. As of 28 October 2005, there were 100 ratifications. Out of the said number, 27 come from African states. Available at <<http://www.iccnw.org/documents/RATIFICATIONSbyUNGroups.pdf>> (accessed on 7 June 2006).
- 116 South Africa for example, enacted a legislation to implement the Rome Statute of the International Criminal Court. See, *Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002*.

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## About this paper

This paper discusses the trial of the former head of state of Liberia, Charles Taylor, from Freetown to The Hague, by the Special Court for Sierra Leone. It highlights the principal legal issues surrounding Taylor's indictment in connection with the decade-long civil conflict in Sierra Leone, his arrest, and the dilemma about his subsequent prosecution. It discusses the possible implications for those involved in other African conflicts and also examines the trial in terms of its potential contribution to the struggle against impunity, the development of international law and conflict prevention in Africa.

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