Sierra Leone civil war—individual criminal responsibility—crimes against humanity—war crimes—head of state immunity

PROSECUTOR v. TAYLOR. Case No. SCSL-03-01-T. Judgment. *At* http://www.sc-sl.org. Special Court for Sierra Leone, April 26, 2012.

PROSECUTOR v. TAYLOR. Case No. SCSL-03-01-T. Sentencing Judgment. *At* http://www.sc-sl.org. Special Court for Sierra Leone, May 30, 2012.

On April 26, 2012, Trial Chamber II (Chamber) of the Special Court for Sierra Leone (Special Court or Court) in The Hague convicted former Liberian president Charles Ghankay Taylor of crimes against humanity and war crimes committed from November 30, 1996, to January 18, 2002, in the territory of Sierra Leone during its civil war.[1] Specifically, Taylor was found guilty of the crimes against humanity of murder, rape, sexual slavery, enslavement and other inhumane acts, and the war crimes of committing acts of terror, murder, outrages upon personal dignity, cruel treatment, pillage, and conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. In a separate judgment rendered on May 30, 2012, the Chamber sentenced Taylor to a single term of fifty years for all the counts on which the accused had been convicted.[2]

By way of providing the necessary factual background for judging Taylor's personal guilt, the judgment recites at some length the events that occurred in Sierra Leone from the end of November 1996 until the end of the civil war on January 18, 2002. During this period, many attacks against the civilian population took place, including the burning of homes, murder, sexual violence, physical violence, the illegal recruitment of child soldiers, abduction and forced labor, and looting. These acts were perpetrated within the broader context of the armed conflict in Sierra Leone, which had started on March 23, 1991, when the Revolutionary United Front (RUF) launched a war from the east of the country near the border with Liberia (paras. 30–70).

The Special Court was established by the United Nations and the government of Sierra Leone pursuant to an agreement signed on January 16, 2002, to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.[3] Despite the conclusion of the Abidjan Peace Agreement, signed on November 20, 1996, by President Ahmad Tejan Kabbah of Sierra Leone and Foday Sankoh (the leader of RUF), the conflict resumed in January 1997. On May 25, 1997, members of the Sierra Leone army overthrew the democratically elected government of Kabbah, formed the African Forces Revolutionary Council (AFRC), and invited RUF to join it in a junta. The joint AFRC/RUF alliance could control major towns and diamond-producing areas in Sierra Leone, relying on diamond proceeds to fund its fighting. In this regard, Taylor was alleged to be regularly involved with RUF

[1] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment (Spec. Ct. Sierra Leone Apr. 26, 2012) [hereinafter Judgment]. Decisions and documents of the Court cited herein are available online at its website, http://www.sc-sl.org, unless otherwise noted.

[2] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (Spec. Ct. Sierra Leone May 30, 2012) [hereinafter Sentencing Judgment].

[3] Statute of the Special Court for Sierra Leone, Art. 1 (Jan. 16, 2002) [hereinafter Statute].

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leaders by supplying arms and ammunition in exchange for diamonds mined in Sierra Leone (paras. 42–46).

Taylor served as president of Liberia from August 2, 1997, to August 11, 2003, when he stepped down in the face of challenges from rebel groups and political pressure. Afterward, he went into exile in Nigeria. Before resigning, Taylor had already been indicted by the Special Court, but his indictment and warrant of arrest were made public only during his first trip outside Liberia in June 2003. The indictment was unsealed when he was participating in peace talks with rebel leaders in Ghana. But Nigeria refused to follow Interpol's instruction to arrest Taylor. Nearly three years later, on March 29, 2006, following a request by the president of Liberia, Ellen Johnson-Sirleaf, he was arrested by the Nigerian authorities and surrendered to the Special Court. The accused was transferred into the Court's custody in Freetown and then, because of security concerns about holding the trial in West Africa, to The Hague in June 2006 (paras. 8–10).[4]

In addition to contesting his personal responsibility for the atrocities committed in Sierra Leone, Taylor challenged the Special Court's jurisdiction on several grounds. Because he had been head of state of Liberia at the time the indictment and arrest warrant were issued, he initially claimed immunity from any exercise of the Court's jurisdiction and sought to have the proceedings terminated. Both the Trial and Appeals Chambers rejected that request on the ground that the customary international law doctrine of head-of-state immunity does not apply to prevent an individual from being prosecuted before an international criminal tribunal.[5] Moreover, according to the Appeals Chamber, Article 6(2) of the Special Court's Statute, which provides that those in an official capacity shall not be exempt from responsibility, does not conflict with any peremptory norm of international law.[6]

The Chamber also rejected Taylor's claims that the prosecution was selective and vindictive (paras. 73–84). In this regard, the Chamber referred to the *Čelebići* test of the International Criminal Tribunal for the Former Yugoslavia (ICTY) providing that, to demonstrate whether a prosecution is selective, the defense must establish: "(i) an unlawful or improper (including discriminatory) motive for the prosecution and (ii) that other similarly situated persons were not prosecuted" (para. 79).[7] The Chamber rejected the argument that statements by Prosecutor David M. Crane to the U.S. Congress and leaked U.S. Embassy cables constituted clear evidence of the existence of political and improper motives behind the prosecution (para. 81).

Similarly, the Chamber rejected the defense's submissions that Taylor's trial was based on discriminatory or improper motives because the prosecution had alleged that he, Col.

[4] Security Council Resolution 1688 (June 16, 2006) was issued pursuant to Chapter VII of the United Nations Charter. Importantly, the Security Council noted the intention of the president of the Special Court to establish a chamber in the Netherlands for Taylor's trial and requested that all states cooperate in assisting the Court in making arrangements for the proceedings.

[5] Prosecutor v. Taylor, Case No. SCSL-03-01-I, [Appeals] Decision on Immunity from Jurisdiction, paras. 52–53 (May 31, 2004), *at* http://www.sc-sl.org/LinkClick.aspx?fileticket=7OeBn4RulEg=&tabid=191.

[6] *Id.*, paras. 43–53. Article 6(2) of the Statute provides, "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."

[7] Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgment, para. 611 (Feb. 20, 2001).

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Muammar el-Qaddafi, and Blaise Compaoré were members of the same joint criminal enterprise, but the latter two were not prosecuted by the Special Court. The defense cited the prosecutor's assertion that the destruction of Sierra Leone was "[s]ustained by a joint criminal enterprise backed by three heads of state . . . [those of] Libya, Liberia, and Burkina Faso."[8] The Chamber nonetheless found that these allegations did not establish that other persons who had not been charged bore the same level of responsibility as the accused (para. 82).

On the merits, the defense denied that the former Liberian president himself bore any criminal responsibility for the atrocities that had been committed by armed groups during the conflict in Sierra Leone (paras. 16–17). The facts of those atrocities had already been established by the Special Court in other proceedings.[9] The question was whether (or how) they could be attributed to Taylor. The prosecutor charged him with crimes against humanity and war crimes under different modes of liability pursuant to both paragraphs 1 and 3 of Article 6 of the Court's Statute.

Indeed, according to the indictment, as Liberian president, Taylor had planned, instigated, ordered, committed, or aided and abetted in the planning, preparation, or execution of the crimes in question. The accused, as a leader of the National Patriotic Front of Liberia (NPFL) and later as president of Liberia, had acted in concert with members of RUF, the AFRC, the AFRC/RUF junta or alliance, and/or Liberian fighters, including members or ex-members of the NPFL. Thus, the prosecutor argued that Taylor, as a member of a joint criminal enterprise (JCE), was a principal perpetrator of the crimes committed; Taylor had participated in a common plan, common criminal purpose, or design "to forcibly control the population and territory of Sierra Leone and to pillage its resources, in particular diamonds, by the use of criminal means, specifically a campaign of terror encompassing the Indictment crimes with [members of the different warring factions] and officials in his government during his Presidency" (para. 6888).[10]

The Chamber rejected the prosecutor's submissions in relation to both superior responsibility and participation in a joint criminal enterprise, by holding that the accused did not have effective control over the AFRC/RUF and that he was not acting pursuant to a common plan to terrorize the population of Sierra Leone (paras. 6986, 6900). Taylor was found guilty, however, on the basis of two modes of liability pursuant to Article 6(1) of the Statute: "aiding and abetting" and "planning."

Regarding the first of these modes, the Chamber held Taylor guilty as a *secondary perpetrator* under Article 6(1), for *aiding and abetting* the planning, preparation, and execution of war crimes and crimes against humanity (para. 6953). Consistently with the ICTY jurisprudence, the Chamber held that such a mode of liability requires that the accused provided "practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (*actus reus*)" (para. 6904). Moreover, the subjective element (*mens rea*) of

[8] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Defence Final Trial Brief, para. 11 (May 23, 2011) (quoting Court's first prosecutor, David M. Crane, *in Taylor*, Case No. SCSL-03-01-T-1029, Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and Its Investigators, Annex O, at 30,439–40 (Sept. 24, 2010)).

[9] Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-A, Appeal Judgment (Oct. 26, 2009); Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A, Appeal Judgment (May 28, 2008); Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-04-16-A, Appeal Judgment (Feb. 22, 2008).

[10] Citing *Taylor*, Case No. SCSL-03-01-T, Public Prosecution Final Trial Brief, paras. 574–87 (Apr. 8, 2011).

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aiding and abetting requires that the "accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist the commission of the crime" (*id.*).

The Chamber established that as president of Liberia, Taylor had provided arms and ammunition, military personnel, operational support, moral support, and operational guidance to RUF, the AFRC, the AFRC/RUF junta, and Liberian fighters for military operations during the relevant time. For instance, the Chamber found that there was a continuous supply to Taylor of diamonds mined from areas in Sierra Leone, often in exchange for arms and ammunition. In the Chamber's view, Taylor's practical assistance, encouragement, and moral support "substantially contributed to" the commission of the crimes by the AFRC/RUF during the course of the military operations in Sierra Leone (para. 6946).

Regarding the second mode of liability, the Chamber found Taylor criminally responsible for *planning* the crimes committed by members of the AFRC/RUF and Liberian fighters during the attacks on Kono and Makeni in December 1998, and in the invasion of, and retreat from Freetown between December 1998 and February 1999 (para. 6971). In particular, it said, in November 1998, Taylor and RUF leader Sam Bockarie conceived a plan to carry out an attack that would have culminated in the invasion of Freetown (para. 6958). That plan, the Court noted, had defined the various military targets and the modus operandi of the attack. Moreover, the military campaign to recapture Freetown by the AFRC/RUF fighters had been characterized by extreme violence and involved the commission of war crimes and crimes against humanity. Indeed, during the invasion, over seven thousand people were killed on January 6, 1999, while countless others were raped, mutilated, and displaced from their homes. According to the Chamber, the plan "substantially contributed to" the AFRC/RUF's military operations leading to and involving the Freetown invasion, during which these groups committed the war crimes and crimes against humanity (para. 6968).

In sum, the Chamber found sufficient evidence to establish Charles Taylor's liability for aiding and abetting the planning, preparation, and execution of war crimes and crimes against humanity in Sierra Leone between November 30, 1996, and January 18, 2002, and of planning the crimes committed by AFRC/RUF and Liberian fighters during the above-mentioned attacks on Kono and Makeni, and the invasion of Freetown. As a consequence, the Chamber imposed a combined sentence of fifty years on Taylor for multiple convictions pursuant to Article 19 of the Court's Statute and Rule 101 of the Rules of Procedure and Evidence.

* * * *

The *Taylor* judgment is notable for the extensive detail with which it describes the events during the civil war in Sierra Leone, for its application of the concepts of planning and aiding and abetting to the role played by Taylor in those events, and for the severity of its sentence.

At nearly twenty-five hundred pages, the length of the judgment would create a sense of bewilderment even in the most enthusiastic reader. The Chamber dedicated innumerable pages to a discussion of the pre-civil-war context and, in particular, the pre-indictment period, focusing, for example, on Taylor's role between 1990 and 1996. Moreover, because some of this discussion concerned actions that were not included in the indictment submitted by the prosecutor, it was not *directly* relevant to the establishment of Taylor's individual criminal responsibility in this proceeding. But this approach could be justified on the basis that, unlike domestic criminal courts, international criminal tribunals serve in part to document and draw

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attention not only to the specific culpable conduct of the individual defendant but also to its larger context. According to the Chamber, the evidence prior to the indictment period was considered "only for the purposes of clarifying the context, or establishing by inference the elements of criminal conduct" (para. 2193).

Still, it is legitimate to ask whether the assessment of evidence not *strictly* relevant to the establishment of liability can jeopardize the right to a fair trial, especially with regard to the expeditiousness of the proceedings. In the present case, for instance, the criminal proceedings lasted well over nine years, during seven of which the accused was held under detention. That question also triggers another concerning the main purpose of international criminal tribunals. Is the historiographical reconstruction of the events in a country fraught with civil or international conflicts a function more appropriate to a truth and reconciliation commission than a criminal tribunal? As one author has suggested, the role of the latter is properly limited to assessing legally relevant matters, while "[a]n increasing number of facts that are important to historical research remain unexamined, because they appear 'neutral'—and thus uninteresting—in the beam of partisan lights."[11]

In any event, the salience of the *Taylor* judgment rests on a number of facts. Charles Taylor is only the second head of state to have been indicted, tried, and convicted by an international criminal tribunal (the first was Admiral Karl Dönitz, who succeeded Hitler as head of state of the Third Reich in April 1945 and was thereafter convicted by the International Military Tribunal in Nuremberg). The verdict clarifies Taylor's role in the civil war in Sierra Leone. Yet the judgment—consistently with the findings of the Truth and Reconciliation Commission—describes his involvement in the Sierra Leone conflict as very modest. In fact, the Special Court substantially rejected the prosecutor's thesis that the accused was a principal perpetrator pursuant to Article 6(1) and that the crimes suffered by the people of Sierra Leone would therefore not have occurred but for Taylor's supervision and support for RUF and the AFRC (paras. 6890–900).

Unlike the Rome Statute of the International Criminal Court, the Special Court's Statute in Article 6(1) adopts a "unitarian" concept of perpetration, which does not provide for different forms of participation in the commission of a crime. In this regard, to distinguish between principal and accessorial liability, the *Taylor* judgment discussed the concept of the JCE (paras. 457–68). According to this theory, an individual who did not perform the *actus reus* of the crime may still be held responsible for its commission on the basis of his participation in a joint criminal enterprise. The prosecution must prove the existence of a common plan, design, or purpose (which amounts to or involves the commission of a crime provided for in the Statute) and the *significant* contribution to the crime by the accused. With respect to the subjective element, the Chamber concluded that a principal may be liable as a co-perpetrator even when the crimes committed by other members of the criminal enterprise exceed the scope of the common plan, if they constitute a natural and foreseeable consequence of the common plan.[12]

[11] Mirjan R. Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 337 (2008).

[12] An exception to such a type of JCE applies in the case of special intent crimes like terrorism where, as noted by the Chamber, it would be an anomaly to convict an individual as a co-perpetrator "for a *dolus specialis* crime without possessing the requisite *dolus specialis*." Judgment, para. 468 n.1101 (quoting Prosecutor v. Ayyash, Case

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The Chamber found insufficient evidence to establish Taylor's responsibility as a principal for the commission of war crimes and crimes against humanity. It held that the prosecution had failed to prove Taylor's participation in any common plan involving the commission of crimes falling within the Special Court's jurisdiction during either the pre-indictment period (between 1991 and 1996) or the indictment period (between 1996 and 2002).

During the former, Taylor had provided RUF with a training camp in Liberia, instructors, recruits, and material support, including food and other supplies, but the Chamber did not view the evidence as establishing that he had participated in any common plan involving the commission of crimes with RUF leader Sankoh or the Gambian revolutionary known as Dr. Manneh. The cooperation between the NPFL, under Taylor's command, and RUF did not present any critical element of criminality but, instead, was a military action and limited in purpose (para. 6897). While Taylor supported the invasion of Sierra Leone in March 1991, the prosecutor had not proved that the invasion was commenced pursuant to a common purpose to terrorize the civilian population (para. 6896). After his election as president of Liberia in 1997, Taylor supplied RUF leaders with arms and ammunition in exchange for diamonds throughout the indictment period, but the prosecution had also not proved that the armed groups in question were actually supported pursuant to a *common plan* to terrorize the civilian population of Sierra Leone (para. 6898).

Similarly, the Chamber refused to hold the accused criminally responsible under Article 6(3), which defines superior responsibility, since Taylor did not have effective control over RUF or the AFRC/RUF junta (paras. 6977–86). Despite his substantial influence over rebel leaders, the Chamber concluded that he was not in a position to take necessary and reasonable measures to prevent or punish members of the armed groups who were responsible for the perpetration of the acts in question. As for the Liberian fighters who had participated in the commission of crimes in Sierra Leone, the Chamber found insufficient evidence to establish that they remained under his authority or effective control once in Sierra Leone.

Apparently, the imposition of a lengthy sentence of imprisonment was significantly influenced by the official position of Taylor as head of state, rather than his involvement in the commission of the crimes. He was convicted only as an accomplice under Article 6(1), and was not shown to be a primary perpetrator of, hence responsible for, the crimes committed during the relevant time in Sierra Leone. In the sentencing judgment, the Chamber stated that, "[a]lthough Mr. Taylor has been convicted of planning as well as aiding and abetting, his conviction for planning is limited in scope."[13] In line with the Special Court's jurisprudence, as well as that of the ICTY and the International Criminal Tribunal for Rwanda, the Chamber admitted in principle that secondary liability, like aiding and abetting, warrants a lesser sentence than those imposed on principal perpetrators.[14]

Nevertheless, it recognized an exception to this principle when the aider and abettor is a head of state, since such a special status places the accused in a different category of offenders for the purpose of sentencing.[15] According to the Chamber, the betrayal of public trust, which characterizes crimes committed by individuals who are charged with the duty to protect or defend

No. STL-11-01/I, Interlocutory Decision on the Applicable Law, para. 248 (Spec. Trib. Leb. Feb. 16, 2011) (Cassese, J.)).

[13] Sentencing Judgment, para. 101.

[14] *Id.*, para. 36.

[15] *Id.*, para. 100.

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the victims, "outweighs the distinctions that might otherwise pertain to the modes of liability discussed above."[16] Indeed, the Chamber explicitly stated that holding a leadership position by an accused found criminally responsible for a crime under Article 6(1) of the Statute could be considered an aggravating circumstance.[17]

To underscore the significance of the leadership role in the sentencing context, it is worth noting that the direct perpetrators of the crimes in question, RUF leaders Issa Sesay, Morris Kallon, and Augustine Gbao were convicted and sentenced to fifty-two, forty, and twenty-five years, respectively.[18] Trial Chamber I found that they had participated in a joint criminal enterprise that consisted of a common plan, shared by leaders of the AFRC and RUF, to "take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."[19]

In assessing the gravity of the crime—the core element in the determination of the sentence—the principle of culpability should play a central role, especially in the case of international crimes, which are generally perpetrated by a multiplicity of actors. That is, sentencing decisions should reflect the specific responsibility of individual defendants for their own contribution to the crime in question. Such a decision should take into account, for instance, that an aider and abettor need not share the exact criminal intent of the perpetrator; it suffices for him to have knowledge that the perpetrators intend to commit the crime. Judges should refrain from excessive reliance on those elements that do not fall within the culpability principle.

In this regard, it seems problematic that an international tribunal should give more weight to the official status of the accused as head of state than to his actual contribution to the commission of the crime. The risk, of course, is that an accused individual may end up being sentenced on the basis of his official position rather than his actual conduct. The notable arbitrariness of judges in determining sentences sheds light, more generally, on the importance of the principle of legality (*nulla poena sine lege*), whose role has not yet been secured as a cornerstone of a fair and stable international criminal justice system.

TRIESTINO MARINIELLO
Edge Hill University, United Kingdom

[16] *Id.*, para. 102.
[17] *Id.*, para. 29.
[18] Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-T, Sentencing Judgment, pt. VI (Apr. 8, 2009).
[19] *Id.*, Judgment, para. 1985 (Mar. 2, 2009).

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