

## **The Legality of the Ex Post Facto Element in the Jurisdiction Of International Criminal Tribunals: A Case Study Of Special Court at Sierra Leone**

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**ABSTRACT:** *The trial of Charles Taylor by the Special Court at Sierra Leone was aimed at promoting international justice. However, the setting up of ad hoc judicial organs to try cases is done with the utmost caution of avoiding retrogressive legislations. The setting up of a court after the offences or substantial part of the of the offences have been committed to try the offenders who committed such offences or crimes amounts to introducing an ex-post facto element in contemporary international legal system and goes a long way to limit the credibility attached to such a trial. The non-inclusion of this judicial error in the jurisdiction of the International Criminal Court is a remarkable and commendable feature of the Court. It is submitted that the ex-post facto element or ad hominine legislation should be discouraged in both municipal and international judicial fora in other to speed up the promotion of international justice and fairness.*

### **I. INTRODUCTION**

Recently, Charles Taylor<sup>1</sup>, the former Liberian President, was sentenced to over fifty years of imprisonment by the Special Court at Sierra-Leone which, before the judgement in which the sentence was delivered, relocated its sittings to Hague on the basis that it might be safe conducting the trial in a place such as Sierra-Leone since his loyalists could do everything in their powers to abort the trial or constitute a threat to the courts officials. Taylor was the leader of one of the Rebel Groups, Peoples Patriotic Front, which waged a serious war against the government of Late Samuel Doe. As events unfolded in the entire unfortunate political saga, he, Taylor, later became the President of Liberia. The trial of Charles Taylor was not predicated on his roles during the days of the struggles to topple Late Samuel Doe, but was rather based on the roles which he played while he was in charge of one of the rebels groups and in office as President of Liberia.

The Special Court for Sierra Leone was established based on the joint agreement between the Government of Sierra Leone and the United Nations<sup>2</sup>. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone Law committed in the territory of Sierra Leone<sup>3</sup> since November 1996. The Special Court consists of three organs, including the Chambers (Appeals Chamber, Trial Chamber I and Trial Chamber II), the Registry (including the defence office), and the Office of the Prosecutor<sup>4</sup>. The jurisdiction of the Court is limited to the prosecution of “those who bear the greatest responsibility” for crimes against humanity, war crimes and violations of Sierra Leonean Law committed in Sierra Leone since November 30, 1996<sup>5</sup>.

### **THE HISTORICAL BACKGROUND OF THE SPECIAL COURT**

The establishment of the Special Court for Sierra Leone<sup>6</sup> was a fallout of the military coup in Sierra Leone that made the Armed Forces Revolutionary Council (AFRC) take over power in that state. This Council secured the

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<sup>1</sup> He was harboured in Nigeria for a short while under the regime of the former Nigerian President, Chief Olusegun Obasanjo and was later under the same regime handed over to the Sierra Leonean Government on the basis of a former request by the latter to the Nigerian Government and the basis also that Sierra Leone was competent to try Charles Taylor. See M. O. U. Gasiokwu, *International Law and Diplomacy (Selected Essays)*, Chenglo Limited, Enugu, 2004, p.154.

<sup>2</sup> Special Court for Sierra Leone @www.sc.sl.org/ last accessed on 12/07/12.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Special Court for Sierra Leone @www.state.gov/j/gcj/Sierra Leone/index.htm last accessed on 17/07/17. The “greatest responsibility” principle is apparently aimed at making those at the helm of affairs of a group that violates the general human rights principles, embodied in the statutes establishing international tribunals, to bear the responsibility for the inglorious, inhuman and degrading treatment of fellow human beings.

<sup>6</sup> The Court is a special one because first and foremost, it was a court outside the ambit of the international criminal tribunal. It is on the other hand, a hybrid court in the sense that its constitution and establishment were not purely a domestic affair because the United Nations got involved in constituting and establishing it.

support of the group known as the Revolutionary United Front (RUF), which was a rebel group from Liberia that invaded Sierra Leone. Charles Taylor, who was the leader of a rebel group known as the National Patriotic Front of Liberia, supported the invasion by the RUF<sup>7</sup>. Another factor of fighters who were pro-government in attitude, the Civil Defence Forces (CDF) fought against the combined forces of both the AFRC and the RUF. In the course of all this conflicts, war crimes and other serious violations of international humanitarian law and Sierra Leone law were committed.

It is on record that all three Sierra Leonean armed factions – the AFRC, the RUF and the CDF – are accused of war crimes and other serious violations of international law and Sierra Leonean law. Charles Taylor, who became the President of Liberia in 1997, is accused of international humanitarian law and Sierra Leonean law committed by the AFRC and RUF, or failing to prevent AFRC and RUF forces under his command and control from committing such crimes<sup>8</sup>. The Special Court for Sierra Leone was established to try all those found to have taken part in committing these atrocities and it had its original place of sitting as Sierra Leone, but the sitting was moved to Hague on the basis of the Court's request and the approval of the Security Council to have the Court move there for security reasons.

#### **Ad homine Nature of the Court's Jurisdiction**

It is to be noted that the court was mandated to try specified offences committed in Sierra Leone since November 30 1996. Frankly speaking, this kind of arrangement encourages injustice on a retrospective basis. What this arrangement pro-supposes, if we must face the fact, is that there is no existing credible legal structure in Sierra Leone or in the international judicial form to handle the matters relating to those of which the Special Court for Sierra Leone has jurisdiction<sup>9</sup>. Though, there is nothing basically wrong with establishing such a court because such courts help to promote human rights principles and play indispensable roles in the administration of justice which on itself advances pacifism on a greater scale in both domestic and international relations. However, what is improper, it is respectfully submitted, is the aspect of making the Court's jurisdiction to have a retrospective effect<sup>10</sup>.

Ideals of justice maintained by civilized nations reflect the fact that laws, when made, should not be retrospect in effect. This is one of the differences between a civilian regime and a military regime, especially as it relates to Africa. Retrospective laws known technically as ad hominien legislations are bad laws and promoters of justice, civility, human rights have nothing to do with such laws<sup>11</sup>. Therefore, it is really difficult to understand why the United Nations (UN) allowed itself to be dragged into such an arrangement by its own consent and through the UN Secretary-General's involvement in the negotiation for such a Court to be established by the Government of Sierra Leone<sup>12</sup>.

Ordinarily, it is expected that the existing jurisdictional structures in international law are sufficient to tackle the problem created in Sierra Leone by the AFRC, the RUF and the CDF. Of the jurisdictions open to a sovereign state under international, the passive personality principle and the universal principle aspects of the jurisdiction apply to Sierra Leone as a state known to international law. The nationals of Sierra Leone and the government of Sierra Leone who suffered the effects of the activities of the above armed rebel or dissidents groups provide sufficient reason why all those who partook in causing the injury should be subjected to trial in Sierra Leone under the passive personality principle. If such people escape this kind of jurisdiction<sup>13</sup>, they can be arraigned in Sierra Leonean courts under the Universal principle aspect of international law recognised jurisdiction.

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<sup>7</sup> Invasion is an act that is contrary to the principle of non-interference in international law. It is immaterial whether the interference is by a sovereign state or a group as was the case with the RUF. The purported support giving to the activities of the RUF in Sierra Leone by Charles Taylor was part of what strengthened the case against hm. See Art. 2(7) of the United Nations Charter.

<sup>8</sup> Does the failure of a commander to prevent his troop or armed group from committing crimes of certain nature make him responsible to the action of the group? It is submitted that it does not make him responsible for the criminal acts of the group except in a situation where such criminal acts result directly from the instructions of the commander to his troop or group. It is to be noted that the commander's life may be in danger if he tries to stop what the troop or group is bent in doing or carrying out. Individual responsibility is, therefore, the best approach to bringing of the perpetrators of certain crimes to justice.

<sup>9</sup> Jurisdiction is a legal right over persons and properties which is attributable to a state. See, G. N. Okeke, *Aspects of International Law* Joen Printing and Publishing Company, Enugu, 2007, p.51.

<sup>10</sup> Retrospective jurisdiction means the same with ex post facto jurisdiction. Ex post facto is a Latin word which means "from after the action" or "after the fact". See Ex Post Facto Law, Wikipedia, the free encyclopaedia, available @ <http://en.wikipedia.org/wiki/Ex-Post-Facto-Law> last accessed on 24/08/12.

<sup>11</sup> What makes it a bad law is inherent in the practice of changing the position of law in order to nail an accused who committed an act that was not illegal or does not carry a weighty sentence in order to make the act illegal or the sentence in order to make the act illegal or the sentence weighty as to even warrant a death sentence to be pronounced upon the person accused of committing such an act.

<sup>12</sup> Even though the UN was invited by the Sierra Leonean government to help it resolve the matter concerning the trial of Charles Taylor, the proprietary of the Court's jurisdiction ought to have been fully considered by the UN before entering into an agreement with the Sierra Leonean government to establish the Court.

<sup>13</sup> The consideration of jurisdiction in any trial that is handled by a domestic or international tribunal is a crucial one. This position is based on the fact that any trial conducted outside the jurisdiction of a municipal or international tribunal amounts to an exercise in futility and the pronouncement of sentence, thus, becomes an empty pronouncement, ineffectual and a nullity.

The only limit to this jurisdiction<sup>14</sup> is the demand that follows the application of the principles and that es that before applying the principle, the offender must be in the custody of the state that wishes to try him. This was exactly what happened in *R. v. Eichmann*<sup>15</sup> where the Israeli courts tried Eichmann for the offence he committed the Jews by playing the role of a transport officer who facilitated the inglorious conveyance of the Jews to their deaths in the gas chamber in Germany. Millions of Jewish people lost their lives in the unfortunate incident. After the Second World War, Eichmann was found in Argentina and he was kidnapped there and taken to Israel. Being in Israel's custody, the Israeli authorities commenced his trial under the Universal principle aspect of jurisdiction, convicted him and sentenced him to death. It is worthy of note that if Israel had wanted to claim the right to try him under the passive personality principle, it would have successfully maintain that position because the facts of the case show that Israelis suffered the activities of Eichmann as the then transport officer.

Instead of going the way expressed in the above paragraph, the Sierra Leonean government decided to go the other way round with the tacit support of the United Nations. Arguably, one would say that since the United Nations Security Council was invited by the Government to come and help in the trial of the offenders who have been tried by the Special Court for Sierra Leone, it would be stated, on the face value, to be a legitimate arrangement. Legitimacy may be conceded to the Court because the parties that established it posses the cloak of international personality who are entitled to enter into treaties and pursue an objective<sup>16</sup>. It is submitted that the pursued objective should be one which does not offend any known principle of law especially that accepted and practiced by civilized nations. Ad homeniem legislation offends against the principle of modern law making.

### **A Review of Charles Taylor's Conviction**

Charles Taylor, the former Liberian President, who had been standing trial before the Special Court for Sierra Leone was convicted last month of June 2012 by the Court for offences which are within the Court's jurisdiction and was sentenced to fifty years imprisonment<sup>17</sup>. The crimes for which he was convicted were mainly those which were committed before the establishment of the court.

In order to circumvent this legal bottleneck, the trial was based on acts of Taylor that offended international conventions that had existed long before the establishment of the Court. This is a marked departure from the manner in which most tribunals and courts are set up in the judicial fora. The International Criminal Court, for instance, was established by the Rome Statute of 2002. It has its jurisdiction set out in article 5 and operates on the basis of trying crimes within its jurisdiction which was committed from July 2, 2002 onwards, the date being the date when the court was established. This is not only in accord with the established principles of law by civilized nations, it is also a commendable act of promoting international justice.

Apparently, in order to circumvent the criticism of encouraging ad homeniem legislation, the authorities that established the Special Court for Sierra Leone<sup>18</sup> predicted the trial of the Court, especially as it relates to the trial of Charles Taylor on international conventions long in existence before the establishment of the Court, the main Conviction being the Geneva Convention and the additional protocols. He was tried based on the commission of crimes against humanity punishable under article 2 of the Statute in particular murder, rape, physical slavery, other inhumane acts. Further additional counts charged against Charles Taylor was based on the violation of article 3 of

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<sup>14</sup> The jurisdiction of a tribunal is only limited by the enabling statute.

<sup>15</sup> 36 ILR. Israel's claim of jurisdiction to try Eichmann was based on Universal Principle of jurisdiction. The sentence of death placed upon Eichmann by the trial court was challenged up to the Supreme Court of Israel which affirmed the death sentence.

The crime for which Eichmann was accused took place in Germany. In order to bring Eichmann to book based on his trial in Israel, under the universal principle, he was abducted from Argentina and taken to Israel in order to place him under custody in Israel.

<sup>16</sup> The legitimacy of the arrangement in itself is not in doubt. What is in serious doubt is whether the Ex Post Facto nature of the trial is ideal in the light of the current focus on international and national justice in judicial matters. Justice should not only be done but also be manifestly seen to have been done in judicial settlement of issues o disputes.

<sup>17</sup> The offence relating to violence against women violated the articles on the Elimination of all Forms of Discrimination against Women and neither Liberia nor Sierra Leone made any reservation relating to the Convention. See United Nations, Human Rights Status of International Instruments Centre for Human Rights, New York, 1987, pp.139-155.

<sup>18</sup> It is doubtful whether the Court, unlike the ICT, has a revision power to review its judgement based on a fresh fact which was not produced before the court and the failure to produce did not rest on negligence. In *Tunia v. Libyan Arab Jamahiriya*, Judgement, ICF Rep. 1985, p.193, the ICJ was called upon to deal authoritatively with the system of revision or interpretation of its judgement since the beginning of the judicial system under international law. See T. O. Elias, United Nations Charter and the World Court, Nigerian Institute of Advanced Legal Studies, Lagos, 1989, p.156.

the Geneva Convention and additional protocol II punishable under article 3 of the Convention in particular acts of terrorism<sup>19</sup> and others.

The Court stated that there was a nexus between Taylor and the crimes and reflected the position of the defence in the prosecution of Taylor maintained that the accused in his diplomacy played a substantial role in fostering peace and security in Sierra Leone and that his contributions to the peace process was significant and that his prosecution from the onset being craft, selective and vindicated in nature on the basis of political matters and injustice. Nevertheless, the court, after a detailed analysis of the case, found Taylor guilty on the basis of some of the charges brought against him and consequently convicting him. The court, however, deferred sentence to a future date and on that date sentenced Charles Taylor to fifty years imprisonment.

The fact remains that trial of those accused of committing crimes against humanity<sup>20</sup> and other serious crimes of international dimension helps significantly in discouraging the further commission of the crimes by lawless people or those who pay little regard to the law<sup>21</sup>. Furthermore, a trial of such people is in accord with civility in so far as the accused is given a fair trial, based on fair hearing and impartiality. The only grouse of this article has in relation to the Special Court for Sierra Leone is the retrospective approach to matters that are such serious in nature as the ones involving Charles Taylor. The court no doubt was neither a purely international tribunal nor a domestic court. It qualifies as a hybrid court: sharing the qualities of international tribunals and domestic courts<sup>22</sup>.

The position of the defence in Charles Taylor's trial as noted by the court was that the trial has a political undertone and was based on injustice. The manner of the court establishment and jurisdiction gave rise to the advertised position of the defence. Though the court went ahead to convict and sentence Taylor, the fact still remains that if the trial had been conducted following the normal principle of jurisdiction in international law, the same results, perhaps, would have been without giving any room for the accusation of injustice levelled against those whose hands were in the trial of Charles Taylor.

What the Sierra Leonean government would have done in order to achieve the result stated above would have been to apply to the government of Liberia to extradite Charles Taylor in order for him to undergo trial in Sierra Leone<sup>23</sup>. This it would succeed in doing if there exists a belated treaty between the two states on extradition. On that premise, Charles Taylor would be extradited to Sierra Leone to stand trial in their domestic courts up to their Supreme Court in case of essential needs to appeal against the decisions of lower courts. The alternative to this would have been to refer the matter to the Security Council with a plea or application that the Council refers the matter to the International Criminal Court (ICC). Fortunately enough, the ICC's jurisdiction covers most of, if not all, the crimes that Charles Taylor was accused of committing or aiding and abating.

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<sup>19</sup> Steps are being taken on an international plane to fight terrorism. The spread of terror in a greater dimension to many parts of the world reveal the innate inclination towards callousness – in relation to man's dealing with fellow man. Man, in this sense, is a generic term that encompasses all species of mankind. The move to stop terrorism is a universal character as the United Nations Security Council has firmly stood behind such a move and encourages sovereign states to take proactive measures in order to curtail or curb the menace of terrorism in the world.

<sup>20</sup> See G. N. Okeke, *The Use of Force Outside the Aegis of the Security Council*, Joen Printing and Publishing Company, 2008, Enugu, pp.136-139.

<sup>21</sup> Lawless people are generally referred to as anarchists. Anarchism is a principle that questions the existence of state's institutions and laws. They do not believe in keeping to the law, although among themselves, they have rules guiding their operations and regulating their conduct.

<sup>22</sup> Hybrid courts are the product of current dispensation. They are demonstrative of a weak municipal judicial system that requires the catalyst of an international power to galvanize them into action as it relates to the dispensation of justice. In this sense, it is submitted, with respect, that the Special Court of Sierra Leone needed the powerful support of the United Nations Security Council to operate and this was secured through the enabling agreement between the Government of Sierra Leone and the United Nations. The Special Court in Iraq that tried the late Saddam Hussein was of a similar character.

<sup>23</sup> In fairness to Sierra Leone, it has the jurisdiction to try Charles Taylor under the Passive Personality Territory and Protective Principles in international law. Moreover, Liberia also has the authority to try Charles Taylor under the Nationality Principle. The point being made by this observation is that the African Union (AU) could have been used as a forum of resolving which states between Liberia and Sierra Leone would try Taylor. Where, the letter which suffered the injury of the acts for which Taylor was tried secured the green light of the AU to go ahead with the trial on the basis of the AU's assurances of providing adequate security to ensure that the trial suffered no hitch, the trial would then have a type of a legitimacy as would stand the test of critical legal analysis.

It is the strong view of the author of this article that the way and manner the prosecution of Taylor before a court established after a significant portion of the crimes were committed were offensive to international justice. The defence could predicate his appeal on the basis of the views expressed in the article and judicial officers who are unbiased umpires would be swayed to set the conviction aside on the basis of the loopholes emphasized in the area of the court's establishment and jurisdiction.

However, this alternative is partly defective as the ICC's jurisdiction does not cover any crime or act committed before the establishment of the Court. The only way that Charles Taylor could be tried by the ICC is by means of referral of the case to the ICC by the Government of Sierra Leone or by the Security Council and this would become legitimate only when the crimes committed after the establishment of the ICC would be made the only basis of his trial or indictment.

## **V. CONCLUSION**

International law is bracing up to face contemporary legal challenges with vigour and in line with this overwhelming effort, it has branched forth to cover almost all the areas covered by municipal law including prescribing punishments for the commission of crimes. The position of international law in relation to the promotion of criminal justice is, like domestic law, based on punishing the guilty and letting the innocent to go free in an atmosphere of fairness. It is fair to an accused that the crimes for which he is standing trials have been written down prior to the commission of crimes. Moreover, the setting up of the Special Court at Sierra Leone which eventually tried Charles Taylor instead of resorting to the use of domestic courts under the universal or territorial principle jurisdiction amounts, with respect, to an unnecessary duplication of judicial bodies.