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PROSECUTOR v. TAYLOR: IMPLICATIONS FOR BASHAR AL-ASSAD

STEVEN J. ROSE*

Abstract: Charles Taylor was the first sitting head of state to be indicted, tried, and convicted by an international criminal tribunal, the Special Court for Sierra Leone. This comment explores the procedural and structural similarities between the Special Court for Sierra Leone and the International Criminal Court. This comment then compares the evidence used to convict Charles Taylor and the evidence currently available about possible war crimes and crimes against humanity ongoing in Syria. Finally, this comment argues that Bashar al-Assad should be tried before the International Criminal Court, and that the *Taylor* case can be used as a template, due to the similarities between the courts and the evidence in each situation.

INTRODUCTION

On April 26, 2012, Charles Taylor, then President of Liberia, became the first Head of State indicted while in office, and later convicted by an international criminal tribunal.¹ The Special Court for Sierra Leone (Special Court) found Taylor individually responsible² for planning, aiding, and abetting crimes against humanity and war crimes.³ But Taylor was not found guilty under theories of participating in a joint criminal enterprise, instigating or ordering the crimes, or superior

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¹ Press Release, Special Court for Sierra Leone Office of the Prosecutor, Prosecutor Hails Conviction of Charles Taylor (Apr. 26, 2012) <http://www.sc-sl.org/LinkClick.aspx?fileticket=hCajjMya09g%3d&tabid=196>.

² See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), Sierra Leone–United Nations, Statute of the Special Court for Sierra Leone, art. 6(1), Jan. 16, 2002, 2178 U.N.T.S. 137. [hereinafter Special Court Statute] (defining individual responsibility as responsibility for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning preparation or execution of the crimes under the jurisdiction of the Special Court).

³ Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment ¶¶ 6953, 6971 (May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREEPCQ%3d&tabid=107>.

responsibility.⁴ Consequently, the Special Court sentenced Taylor to fifty years of incarceration.⁵ In the current unrest in Syria, some of these same crimes⁶ are being perpetrated by the Syrian military.⁷ Using *Prosecutor v. Taylor* as a guide, the International Criminal Court (ICC), which shares important functional and procedural similarities⁸ with the Special Court, should take action to impose accountability on those responsible for the crimes under its jurisdiction.⁹

Part I of this Comment discusses the background information relevant to the violence in Sierra Leone leading to the conviction of Taylor. Part II provides the procedures and basis for the referral of incidents to an international criminal court, along with the standards used to evaluate cases. Part III of this Comment argues that the case against

⁴ *Id.* ¶¶ 6900, 6972, 6973, 6986. Superior responsibility is imposed if a person knew or had reason to know a subordinate was going to or had committed such crimes, and failed to prevent or punish such commission. Special Court Statute, *supra* note 2, art. 6.3.

⁵ See *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Sentencing Judgment, Part IV, (May 30, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107>.

⁶ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 12.

⁷ Oral Update of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 20th Sess., June 18, 2012–July 6, 2012 ¶¶ 62–87, A/HR/20/CRP.1, June 26, 2012 [hereinafter Syria Update]. Specifically, the alleged crimes include unlawful killings, torture, sexual violence, arbitrary arrest and detention, and violations of children's rights. *Id.*

⁸ See Special Court Statute, *supra* note 2, arts. 1–5, 17(3), 17(4)(g); Rome Statute of the International Criminal Court, arts. 3, 5, 7(1)(a)–(k), 8, 17(3), 17(4)(g), 66, 67, 69, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; Special Court for Sierra Leone R. of Procedure and Evid. 85, 87(a), 89, 90(b) <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176> [hereinafter Court Rules]; International Criminal Court R. of Procedure and Evid., ICC-ASP/1/3, 63(5), 66 [hereinafter ICC Rules]; Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L., 857, 862–66 (2000) (explaining that numerous elements of the Special Court Statute derived from the Rome Statute). The Rome Statute is a treaty enacted by the United Nations which created the ICC. Rome Statute, *supra* note 8, preamble–arts. 1, 5.

⁹ See Navi Pillay, High Comm'r for Human Rights, Human Rights Comm'n, *The Deteriorating Human Rights Situation in the Syrian Arab Republic and the Killings in El-Houleh*, (June 1, 2012) (transcript available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12210&LangID=E>). Navi Pillay, the U.N. High Commissioner for Human Rights urges the U.N. Security Council to refer the situation to the Prosecutor of the ICC. *Id.* The ICC has jurisdiction over crimes such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, sexual violence, enforced disappearances, and other inhumane acts. Rome Statute, *supra* note 8, arts. 3, 5, 7(1)(a)–(k). The Special Court has jurisdiction over such crimes as murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution on political, racial, ethnic, or religious grounds, and other inhumane acts. Special Court Statute, *supra* note 2, arts. 1–4.

Taylor should be used as a blueprint for indicting, trying, and convicting Bashar al-Assad, the president of Syria.

I. BACKGROUND

The Special Court exists to prosecute those people most responsible for violations of international human rights law, crimes against humanity, the Geneva Conventions¹⁰, and the laws of Sierra Leone committed after November 30, 1996.¹¹ The Special Court specifically retained the ability to prosecute individuals who were previously granted amnesty through the Lomé Agreement.¹² Acting pursuant to a United Nations Security Council resolution,¹³ the U.N. entered into an agreement with the government of Sierra Leone¹⁴ to create the Special Court.¹⁵ The Special Court consists of judges chosen for their moral character, impartiality, and experience in international humanitarian law.¹⁶ The Prosecutor is responsible for investigating and prosecuting the individuals most culpable for the crimes under the Special Court's jurisdiction.¹⁷ Both the judges and the Prosecutor must remain inde-

¹⁰ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (specifying violations to include murder, mutilation, torture, terrorism, or humiliating treatment of civilians) [hereinafter Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. Performing or threatening violence, enforced prostitution, rape, sexual assault, torture, slavery, or pillage is prohibited. Additional Protocol II, *supra* note 10, arts. 4(1)–(2). There is also a prohibition on the recruitment of children under the age of 15 into armed conflict, or allowing such children to participate. *Id.* art. 4(3).

¹¹ See Special Court Statute, *supra* note 2, arts. 1–3, 5.

¹² See *id.* art. 10; Matrangai Sirleaf, *Regional Approach to Transnational Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia*, 21 FLA. J. INT'L L. 209, 224 (2009); Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 384–85 (2006); William Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 153–54 (2004–2005). The Lomé Agreement ended the civil conflict in Sierra Leone, and granted Amnesty to fighters from the RUF and AFRC. Schabas, *supra* note 12, at at 147–48.

¹³ S.C. Res. 1315, U.N. Doc. S/RES/1315, 2–3 (Aug. 14, 2000).

¹⁴ Agreement Between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court For Sierra Leone, Sierra Leone–United Nations, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter the U.N.–Sierra Leone Agreement]; Special Court Agreement, 2002 (Ratification) Act, (2002) Vol. 133, No. 22, Supplement to the Sierra Leone Gazette, (Act No. 9/2002).

¹⁵ U.N.–Sierra Leone Agreement, *supra* note 14, preamble–art.1.

¹⁶ Special Court Statute, *supra* note 2, art. 13

¹⁷ See *id.* art. 15.

pendent, and cannot seek or accept instructions from any government or other source.¹⁸

The Prosecutor brought an indictment against Taylor, alleging his individual responsibility for crimes against humanity, violations of the Geneva Conventions, and international humanitarian law.¹⁹ First, the indictment alleged that Taylor was responsible individually for the planning, instigating, committing, ordering, and aiding and abetting the commission of the crimes.²⁰ Second, the indictment alleged that Taylor was responsible for the actions of the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) through a theory of superior responsibility based on his authority over RUF and AFRC soldiers.²¹ Taylor was arraigned on April 3, 2006²² and the trial lasted 46 months before officially closing on March 11, 2011.²³ The Special Court found Taylor guilty of aiding and abetting and planning the crimes.²⁴

In finding Taylor responsible for aiding and abetting, the Special Court determined that Taylor provided arms and munitions,²⁵ military personnel,²⁶ operational support,²⁷ and encouragement to the leaders

¹⁸ *Id.* arts. 13(1), 15.

¹⁹ See Prosecutor v. Taylor, Case No. SCSL-03-01-T, Prosecution's Second Amended Indictment ¶ 33 (May 29, 2007) <http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107> [hereinafter Indictment] (alleging acts of terrorism, unlawful killings, sexual violence, physical violence, the use of child soldiers, abductions and forced labor, and pillage); Special Court Statute, *supra* note 2, arts. 2-4.

²⁰ *Taylor*, Case No. SCSL-03-01-T, Indictment ¶ 33.

²¹ *Id.* ¶ 34; Special Court Statute, *supra* note 2, art. 6.3.

²² Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment Summary ¶ 2 (Apr. 26, 2012) <http://www.sc-sl.org/LinkClick.aspx?fileticket=86r0nQUtK08%3d&tabid=53> [hereinafter Judgment Summary].

²³ *Id.* ¶ 8.

²⁴ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 6953, 6971.

²⁵ *Id.* ¶¶ 6910-6912, 6953. The Special Court found that Taylor directly and indirectly supplied the RUF and AFRC with small arms, and anti-tank and anti-aircraft weapons. *Id.* The RUF and AFRC used these arms and munitions in widespread and systematic attacks on civilians. *Id.*

²⁶ See *id.* ¶¶ 6918-6923, 6953. The Special Court found Taylor sent approximately 170 fighters to fight for the leaders of the RUF and AFRC, and that these troops participated in the attacks on civilians. *Id.* Taylor also reorganized and rearmed fighters retreating from Liberia, and returned them to the conflict. *Id.*

²⁷ See *id.* ¶¶ 6927-6936, 6953. The Special Court found Taylor provided communications technology, financial support, warnings of imminent attacks, guesthouses, assistance with transportation of arms and munitions, and security escorts to the leaders of the RUF and AFRC. *Id.*

of the RUF and the AFRC.²⁸ Moreover, the Special Court found these actions materially aided the soldiers in the commission of the crimes,²⁹ and that Taylor provided such aid knowing that the crimes were being committed.³⁰ Evidence including U.N. Reports and widespread media coverage proved that Taylor was aware of the crimes and the mindset of the soldiers perpetrating such crimes.³¹

The Special Court also found Taylor guilty for planning the crimes.³² Taylor worked with leaders of the RUF and AFRC to develop military strategy for attacking particular targets, including the *modus operandi*, or the manner in which the operations were conducted.³³ The Special Court noted that Taylor communicated frequently with the RUF and AFRC commanders, receiving updates on the progress of the operations.³⁴ In undertaking the plan developed by Taylor, RUF and AFRC forces committed terrorism, murder, rape, cruel treatment, and other inhumane acts.³⁵

But the Special Court did not find Taylor individually responsible for ordering the RUF and AFRC to commit the underlying crimes.³⁶ Having found Taylor responsible for aiding and abetting, the Special Court chose not to find him responsible for instigating such crimes.³⁷ Additionally, the Special Court found Taylor did not participate in a joint criminal enterprise.³⁸ The final question for the Special Court was Taylor's responsibility by virtue of superior responsibility, or his superior command and control over subordinate RUF and AFRC soldiers.³⁹ The Special Court found Taylor exerted substantial influence, but not

²⁸ *Id.* ¶¶ 6940–6945, 6953. The Special Court found that Taylor gave military advice and strategy to the leaders of the RUF and AFRC with regard to military targets and the purposes for which such targets were to be used if captured. *Id.*

²⁹ *Id.* ¶¶ 6915, 6924, 6937, 6946; *see also* sources cited *supra* notes 24–28.

³⁰ *Taylor*, Case No. SCSL–03–01–T, Judgment ¶¶ 6947–6949.

³¹ *Id.* ¶ 6950 & n. 15580 (providing a substantial list of citations to media articles covering the situation in Sierra Leone and the crimes committed).

³² *Id.* ¶ 6971.

³³ *Id.* ¶¶ 6958–6959.

³⁴ *Id.* ¶ 6960.

³⁵ *Id.* ¶¶ 6958–6959, 6967.

³⁶ *Taylor*, Case No. SCSL–03–01–T, Judgment ¶ 6973 (noting Taylor advised leaders of the RUF and AFRC, but his advice and directions were not followed).

³⁷ *Id.* ¶ 6972.

³⁸ *Id.* ¶ 6900 (finding Taylor provided support for the 1991 invasion of Sierra Leone, but without evidence that such was done in furtherance of a common plan). The Special Court also noted the existence of common enemies as alternative motivation for providing such aid. *Id.* ¶¶ 6891–6900.

³⁹ *Id.* ¶¶ 6974–6986.

effective control over the RUF and AFRC.⁴⁰ Specifically noted was that Taylor gave advice to certain leaders, but such advice was not followed by the leaders of the RUF and AFRC.⁴¹ As such, the requisite superior-subordinate relationship did not exist.⁴² The Special Court held that to exercise effective control, a leader needed to have the ability to prevent or punish the commission of such crimes.⁴³

II. DISCUSSION

The ICC is the world's first permanent, treaty based international criminal tribunal.⁴⁴ It exists to prevent war crimes and crimes against humanity by establishing a court to end impunity and exercise jurisdiction over persons responsible for such crimes.⁴⁵ To create the ICC, The U.N. adopted the Rome Statute of the International Criminal Court (Rome Statute).⁴⁶ The ICC has jurisdiction over only the most serious crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression, exercised over any state party to the Rome Statute.⁴⁷ Currently 122 States are party to the Rome Statute.⁴⁸

There are three methods by which the ICC can exercise jurisdiction.⁴⁹ First, a State party to the Rome Statute can refer a situation under the jurisdiction of the ICC to the ICC Prosecutor.⁵⁰ Second, the U.N. Security Council can refer such a situation to the ICC Prosecutor.⁵¹ Third, the ICC Prosecutor can initiate investigations of his or her

⁴⁰ *Id.* ¶ 6979.

⁴¹ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 6980-6983.

⁴² *Id.* ¶ 6985.

⁴³ *Id.* ¶ 6978.

⁴⁴ *About the Court*, ICC-CPI.INT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Oct. 4, 2013).

⁴⁵ Rome Statute, *supra* note 8, preamble-arts. 1, 5 (“[It is d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”). Impunity refers to a person’s ability to escape the detrimental effects of his or her actions. BLACK’S LAW DICTIONARY 826 (9th ed. 2009).

⁴⁶ *See* Rome Statute, *supra* note 8, preamble-art 1.

⁴⁷ *See id.* arts. 5, 12(1).

⁴⁸ *The States Parties to the Rome Statute*, ICC-CPI.INT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 7, 2013).

⁴⁹ Rome Statute, *supra* note 8, arts. 12, 13.

⁵⁰ *See id.* arts. 13-14. “The Office of the Prosecutor shall act independently . . . [and] shall be responsible for receiving referrals and . . . examining them for and conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.” *Id.* art. 42(1).

⁵¹ *Id.* art. 13(b). Such referral requires nine affirmative votes, including affirmative votes from all of the permanent members of the U.N. Security Council. *See* U.N. Charter

own accord, based on an assessment of information regarding crimes within the jurisdiction of the ICC.⁵² Regardless of the manner in which jurisdiction is conferred upon the ICC, jurisdiction may only be exercised over actions taken after July 1, 2002.⁵³ The ICC has jurisdiction over a citizen of a state not party to the Rome Statute only if the defendant's state or the state in which the crimes occurred agree to the jurisdiction of the ICC, or upon referral by the U.N. Security Council.⁵⁴

Prior to the ICC, the U.N. established International Criminal Tribunals to preside over specific instances of particularly heinous state-sponsored crimes, such as crimes against humanity.⁵⁵ Similarly, in cooperation with state governments, the U.N. created special courts to adjudicate situations involving actors in states not party to the Rome Statute,⁵⁶ or committed before the Rome Statute entered into force.⁵⁷ One such court was the Special Court, because the timing of the crimes placed them outside the jurisdiction of the ICC.⁵⁸

The ICC and the Special Court are not bound by national rules of evidence, but rather by a particular set of Rules of Procedure and Evidence established for each Court.⁵⁹ Each court has considerable leeway

art. 27. The permanent members of the U.N. Security Council are China, France, Russia, Great Britain, and The United States. *Id.* art. 23.

⁵² *Id.* arts. 13, 15.

⁵³ See *id.* art. 11. The Rome Statute entered into force on July 1, 2002. *Id.* art. 3.

⁵⁴ See Brendan Leanos, Comment, *Cooperative Justice: Understanding the Future of the International Criminal Court Through its Involvement in Libya*, 80 FORDHAM L. REV. 2267, 2282 & nn.119–20 (2012).

⁵⁵ See S.C. Res. 995, U.N. Doc. S/RES/995 ¶ 1 (Nov. 8, 1994) (establishing at the request of the government of Rwanda, an International Criminal Tribunal); S.C. Res. 827, U.N. Doc. S/RES/827 ¶ 2 (May 25, 1993) (adopting the report of the U.N. Secretary General and establishing the International Criminal Tribunal for the former Yugoslavia).

⁵⁶ S.C. Res. 1757, U.N. Doc. S/RES/1757 ¶¶ 1–2 (May 30, 2007) (establishing, at the request of the government of Lebanon, an international tribunal to adjudicate the terrorist bombing of the former Lebanese Prime Minister Rafiq Hariri). Lebanon is not a party to the Rome Statute. Rome Statute, *supra* note 8, at 5.

⁵⁷ See G.A. Res. 57/228B, U.N. Doc. A/RES/57/228B, Annex arts. 1–2 (May 22, 2003) (establishing the Extraordinary Chambers in the Courts of Cambodia for crimes committed between Apr. 1975 and Jan. 1979). Cambodia is now a party to the Rome Statute. Rome Statute, *supra* note 8, at 4.

⁵⁸ See U.N.–Sierra Leone Agreement, *supra* note 14, preamble, art. 1; Rome Statute, *supra* note 8, art. 11. Sierra Leone is a party to the Rome Statute. Rome Statute, *supra* note 8, at 6. The crimes however, took place before July 1, 2002. See Indictment, *supra* note 19 ¶¶ 6–31 (listing crimes occurring between Nov. 30, 1996 and Jan. 18, 2002).

⁵⁹ See Rome Statute, *supra* note 8, art. 21(1)(a); Court Rules, *supra* note 8, 89; ICC Rules, *supra* note 8, 63(5); Bruce Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, ARMY LAW. 1, 9–10 (Sept. 2002).

to admit relevant evidence,⁶⁰ including witness testimony, written statements, and expert testimony.⁶¹ All adult witnesses must be sworn to tell the truth before the court,⁶² and all witnesses must be available for full examination and cross examination.⁶³ A number of features of the Special Court were directly influenced by the Rome Statute, such as the inclusion of procedural error as a basis for appeal.⁶⁴

These rules enabled the Special Court to rely on circumstantial evidence if the only reasonable inference which could be drawn from the evidence tended toward proof of guilt.⁶⁵ The Prosecutor admitted documentary evidence against Taylor through testimony of witnesses, in lieu of oral testimony,⁶⁶ and in the form of documents of the U.N. and U.N. bodies, non-governmental and Associated Press news releases, and BBC radio broadcasts.⁶⁷ Exercising its ability to allow “any relevant evidence,”⁶⁸ the Special Court allowed witnesses to offer both personal knowledge and hearsay evidence.⁶⁹

The Special Court used the evidence to determine the guilt or innocence of Taylor under two different theories: 1) responsibility for planning, instigating, ordering, committing, or otherwise aiding and abetting the planning preparation or execution of the crimes;⁷⁰ and 2) superior responsibility arising from his failure to prevent or punish unlawful acts by his subordinates.⁷¹

⁶⁰ Court Rules, *supra* note 8, 89(C) (“A Chamber may admit any relevant evidence.”); Rome Statute, *supra* note 8, 69(3); Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute ¶ 107 (March 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>; Nancy A. Coumbs, *Evidence*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 324, 327 (William Schabas & Nadia Bernaz eds., 2011); ROBERT CREYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 383 (2007).

⁶¹ Rome Statute, *supra* note 8, art. 69; *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 162.

⁶² Court Rules, *supra* note 8, 90(b); ICC Rules, *supra* note 8, 66.

⁶³ See Rome Statute, *supra* note 8, art. 67(1)(e); Court Rules, *supra* note 8, 85.

⁶⁴ Frulli, *supra* note 8, at 862–86.

⁶⁵ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 170–171. The ICC has used similar procedures. See *Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute ¶ 111.

⁶⁶ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 162.

⁶⁷ *Id.* ¶¶ 200–201 & n. 470.

⁶⁸ *Id.* ¶ 168; Court Rules, *supra* note 8, 89(c).

⁶⁹ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 170–173.

⁷⁰ Special Court Statute, *supra* note 2, art. 6(1); *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 454–487.

⁷¹ Special Court Statute, *supra* note 2, art. 6(3); *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 488–502.

First, aiding and abetting requires the Prosecutor prove Taylor provided practical assistance, encouragement, or moral support, which had a substantial effect on the commission of a crime.⁷² Second, the Prosecutor must prove Taylor knew that his acts aided the perpetrator in the commission of the crimes, and he must have been aware of the essential elements, including the requisite mental state of the underlying offenses.⁷³ The Prosecutor did not need to prove that Taylor shared the mental state of the perpetrator.⁷⁴

Proving Taylor planned the crimes required the Prosecutor prove Taylor intentionally designed an act, intending or knowing it was substantially likely that a crime would be committed in the execution of the designed act.⁷⁵ The Prosecutor did not need to prove Taylor's plan was necessary for the commission of the underlying crime; however he needed to prove that the plan significantly contributed to such commission.⁷⁶ The Special Court found that Taylor contributed to the selection of military targets, and the strategies used against such targets.⁷⁷ Taylor's awareness of the commission of the crimes was established through his receipt of military and news reports.⁷⁸

First, proving responsibility for ordering the crimes required the Prosecutor to show Taylor intentionally instructed another person to perform a particular act.⁷⁹ Second, the Prosecutor had to show that Taylor was in a position of authority over the perpetrator, such that he could compel the perpetrator to obey the order.⁸⁰ The Special Court held that the evidence that Taylor issued orders was evidence that he held a position of authority.⁸¹ The Special Court, however, found Taylor not guilty of ordering the crimes because his instructions were advisory in nature and at times not followed by the RUF and AFRC leadership.⁸²

To find Taylor guilty under a theory of superior responsibility, the Special Court needed to find that Taylor had effective control over the perpetrators.⁸³ The Prosecutor also needed to show that Taylor had or

⁷² *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 482.

⁷³ *Id.* ¶¶ 486-487.

⁷⁴ *Id.* ¶ 487.

⁷⁵ *Id.* ¶ 469.

⁷⁶ *Id.* ¶ 470.

⁷⁷ *Id.* ¶¶ 6958-6965.

⁷⁸ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 6969-6970.

⁷⁹ *Id.* ¶ 474.

⁸⁰ *See id.* ¶ 475.

⁸¹ *See id.* ¶ 481.

⁸² *Id.* ¶ 6973.

⁸³ *Id.* ¶¶ 490, 493-494.

should have had knowledge that the crimes had been or were about to be committed.⁸⁴ The Prosecutor was allowed to use circumstantial evidence to prove actual knowledge, and imputed knowledge required only that Taylor have general notice of a risk that crimes might be carried out by his subordinates.⁸⁵ Finally the Prosecutor needed to prove Taylor failed to take reasonable and necessary measures to prevent or punish the commission of the crimes.⁸⁶ The actions considered reasonable and necessary depend on the circumstances, and the degree of authority Taylor held over the perpetrators.⁸⁷ The Special Court found that the leaders of the RUF and AFRC received guidance and instruction from Taylor, but were not his subordinates.⁸⁸ The Special Court further found that any soldiers Taylor sent to fight in Sierra Leone did not remain under his effective control.⁸⁹ Thus, the Special Court found Taylor not guilty under a theory of superior responsibility.⁹⁰

Both the ICC and the Special Court have jurisdiction over only those crimes listed in the establishing statutes, and such statutes cover nearly identical crimes.⁹¹ In both courts, the accused is considered innocent until proven guilty,⁹² and is under no obligation to testify.⁹³ The accused will only be found guilty after the Prosecutor proves the charged crimes beyond a reasonable doubt.⁹⁴ The judges of the Special Court are responsible for evaluating witness testimony, and resolving any inconsistencies.⁹⁵ The Special Court took into consideration in resolving such inconsistencies the circumstances and events endured by

⁸⁴ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 490, 496.

⁸⁵ *Id.* ¶¶ 497-498.

⁸⁶ *Id.* ¶ 500.

⁸⁷ *Id.* ¶ 501.

⁸⁸ *Id.* ¶ 6983.

⁸⁹ *Id.* ¶ 6984.

⁹⁰ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 6985-6986.

⁹¹ See Special Court Statute, *supra* note 2, arts. 1-4; Rome Statute, *supra* note 8, arts. 5-8. Such crimes include crimes against humanity, consisting of murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, and other inhumane acts. See Special Court Statute, *supra* note 2, art. 2; Rome Statute, *supra* note 8, art. 7. Also covered are violations of Common Article Three of the Geneva Conventions and serious violations of international humanitarian law. See Special Court Statute, *supra* note 2, arts. 3-5; Rome Statute, *supra* note 8, art. 8.

⁹² Special Court Statute, *supra* note 2, art. 17(3); Rome Statute, *supra* note 8, art. 66.

⁹³ Special Court Statute, *supra* note 2, art. 17(4)(g); Rome Statute, *supra* note 8, art. 67(g).

⁹⁴ Rome Statute, *supra* note 8, art. 66(3); *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 159; see also Court Rules, *supra* note 8, 87(a) ("A finding of guilty may be reached only when a majority of the Trial chamber is satisfied that guilt has been proved beyond reasonable doubt.").

⁹⁵ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 172.

the witnesses.⁹⁶ Similarly judges in the ICC evaluate the credibility of witnesses, taking into consideration the circumstances and events witnesses experienced.⁹⁷

In the ongoing situation in Syria, evidence exists of potential war crimes, along with the knowledge of such crimes by Assad.⁹⁸ Official condemnation of the Assad government has been sharp and continuous, with the U.N. Human Rights Council, other international humanitarian organizations, and the U.S. Senate condemning the actions taken by Assad's government in Syria.⁹⁹ The Prime Minister of Turkey recently expressed frustration with the U.N. for not doing more to stop Assad and the spread of violence.¹⁰⁰ The Obama administration has been critiqued for not intervening in Syria, with or without U.N. support.¹⁰¹ U.N. and media reports have extensively documented the crimes committed in Syria.¹⁰² These reports rely upon both witness testimony and documentary evidence.¹⁰³ The U.N. continues to collect evidence regarding the crimes taking place in Syria, by voting to extend the evidence gathering mission of the Independent International Commission of Inquiry on Syria (Syria Commission).¹⁰⁴ Furthermore, as President of

⁹⁶ See *id.* ¶ 173.

⁹⁷ *Dyilo*, Case No. ICC-01/04-01/06, Judgment ¶¶ 102-104.

⁹⁸ See, e.g. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012) [hereinafter Syria Report 2]; Syria Update, *supra* note 7; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) [hereinafter Syria Report 1]; Sebnem Arsu and Hwaida Saad, *Turkey Faults U.N. Inaction over Syria*, N.Y. TIMES, Oct. 14, 2012, at A12, available at <http://www.nytimes.com/2012/10/14/world/middle-east/syria.html>; Alan Cowell & Steven Myers, *U.N. Panel Accuses Syrian Government of Crimes Against Humanity*, N.Y. TIMES, Feb. 24, 2012, at A10.

⁹⁹ See, e.g. U.N. Human Rights Council, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/21/L.32 (Sept. 24, 2012); U.N. Human Rights Council, The Deteriorating Situation of Human Rights in the Syrian Arab Republic and the Recent Killings in El-Houleh, U.N. Doc. A/HRC/RES/S-19/1 (June 1, 2012); Condemning the Government of Syria for Crimes Against Humanity, and for Other Purposes, S. Res. 428, 112th Cong. (2012).

¹⁰⁰ Arsu & Saad, *supra* note 98.

¹⁰¹ See Amos N. Guiora, *Intervention in Libya Yes; Intervention in Syria No: Deciphering the Obama Administration*, 44 CASE W. RES. J. INT'L L. 251, 263-74 (2011). Critics have stated that, "[w]ith respect to Syria, The Obama Administration has limited its response to largely meaningless rhetoric, some of it embarrassingly 'distant' and 'distracted.'" *Id.* at 267.

¹⁰² See, e.g. Syria Report 2, *supra* note 98; Syria Update, *supra* note 7; Syria Report 1, *supra* note 98; Arsu & Saad, *supra* note 98; Cowell & Myers, *supra* note 98.

¹⁰³ See Syria Report 2, *supra* note 98 ¶¶ 9-10; Syria Update, *supra* note 7 ¶¶ 32, 39, 46; Syria Report 1, *supra* note 98 ¶¶ 8-11.

¹⁰⁴ Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/21/L.32 ¶ 17 (Sept. 24, 2012).

Syria, Assad is the Syrian commander in chief.¹⁰⁵ Assad has also taken direct command of the Syrian military,¹⁰⁶ and the forces accused of committing the crimes are members of the Syrian military.¹⁰⁷

III. ANALYSIS

Taylor not only *can* be used as a blueprint for a case against Assad, but it *should* be used as such. Some international law scholars argue that states have an affirmative “duty to prosecute grave international crimes.”¹⁰⁸ Not only do many states have obligations arising from international treaties,¹⁰⁹ but prosecuting war crimes and crimes against humanity on an international level raises the stigma associated with such crimes, and “demonstrates that impunity is unacceptable.”¹¹⁰ These prosecutions also act as a source of retribution, rehabilitation, accountability, justice, deterrence, and the rule of law.¹¹¹

The ICC can serve as a functional equivalent of the Special Court.¹¹² The purpose of each Court is to prosecute the individuals most responsible for the crimes of greatest gravity in international law

¹⁰⁵ Constitution of the Syrian Arab Republic Feb. 27, 2012, art. 105, *available at* <http://sana.sy/eng/370/2012/02/28/401178.htm>. The current constitution of the Syrian Arab Republic was passed by referendum in February 2012. Neil MacFarquhar & Alan Cowell, *Syria Says 90 Percent Approved Constitution*, N.Y. TIMES, Feb. 28, 2012, at A4; Martin Chulov, *Syria Claims 90% of Votes Backed Reforms in Referendum*, THE GUARDIAN (Feb. 27, 2012, 2:11 PM), <http://www.guardian.co.uk/world/2012/feb/27/syria-bashar-al-assad>. Bashar Al-Assad is the President of the Syrian Arab Republic. Syria Report 2, *supra* note 98 ¶ 16.

¹⁰⁶ Samia Nakhoul, *In Shifting Syria Conflict, Assad Assumes Command of Forces*, REUTERS, Oct. 10, 2012, *available at* <http://www.reuters.com/article/2012/10/10/us-syria-crisis-assad-asma-idUSBRE8990U220121010>; Michael Kelley, *President Bashar Al-Assad Has Assumed Personal Command Of Syria's Military*, BUS. INSIDER (Oct. 10, 2012), *available at* <http://www.businessinsider.com/assad-is-now-commanding-syrian-forces-2012-10>.

¹⁰⁷ See generally Syria Report 2, *supra* note 98 ¶¶ 51–7, 71–3, 83–6, 94–5, 101–102, 112–113, 121–124, 128–129, 132; Syria Update, *supra* note 7 ¶¶ 62–88; Syria Report 1, *supra* note 98 ¶¶ 83, 87.

¹⁰⁸ Sirleaf, *supra* note 12, at 235 & n. 132 (citing M. CHERIF BASSIONI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW*, 20–25 (1995); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2537 (1993); Naomi Rhot-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 451 (1990)).

¹⁰⁹ Sirleaf, *supra* note 12, at 235 (specifying the Convention on the Prevention and the Punishment of the Crime of Genocide and the 1949 Geneva Conventions).

¹¹⁰ Carey Shenkman, Note, *Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Outside Armed Conflict*, 87 N.Y.U. L. REV. 1210, 1240 (2012); Sirleaf, *supra* note 12, at 244.

¹¹¹ Sirleaf, *supra* note 12, at 211–12.

¹¹² See *infra* notes 113–122 and accompanying text.

who would otherwise act with impunity.¹¹³ Both Courts exercise limited jurisdiction, restricted to a specific and nearly identical set of crimes.¹¹⁴ The Courts provide similar rights and protections to the accused, including the presumption of innocence,¹¹⁵ right to remain silent,¹¹⁶ and the right to cross examine any witness brought by the Prosecutor.¹¹⁷ Moreover, both Courts allow for consideration of relevant evidence which may not be admissible in state courts, such as hearsay,¹¹⁸ and circumstantial evidence.¹¹⁹ In fact, in several decisions the ICC has cited cases heard before the Special Court in determining the reliability of evidence,¹²⁰ the interpretation of the scope of crimes,¹²¹ and in defining the mental state needed for responsibility for the actions of subordinates.¹²²

The current situation in Syria shares important similarities with the situation that the Special Court adjudicated in Sierra Leone, with many of the same crimes being committed.¹²³ In fact, had the crimes in *Taylor* occurred after July 1, 2002, the case could have been heard before the ICC.¹²⁴ Just as the Special Court used U.N. and media reports as proof

¹¹³ See Special Court Statute, *supra* note 2, arts. 1, 11; Rome Statute, *supra* note 8, preamble-art. 1; *see also* note 9, *supra*.

¹¹⁴ See Special Court Statute, *supra* note 2, arts. 1-4; Rome Statute, *supra* note 8, preamble-arts. 5-8.

¹¹⁵ Special Court Statute, *supra* note 2, art. 17(3); Rome Statute, *supra* note 8, art. 66(1).

¹¹⁶ Special Court Statute, *supra* note 2, art. 17(4)(g); Rome Statute, *supra* note 8, art. 67(1)(g).

¹¹⁷ Rome Statute, *supra* note 8, art. 67(1)(e); Court Rules, *supra* note 8, 85(b).

¹¹⁸ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 168; *see* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges ¶ 118 (Sept. 30, 2008) <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

¹¹⁹ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 170-171; *Dyilo*, Case No. ICC-01/04-01/06, Judgment ¶ 111.

¹²⁰ *Katanga*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges ¶ 116 & nn. 152-53 (citing cases heard by the Special Court).

¹²¹ *Dyilo*, Case No. ICC-01/04-01/06, Judgment ¶ 603.

¹²² Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 67(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ¶ 428 & n. 560 (June 15, 2009) <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (citing cases from the Special Court).

¹²³ *See Taylor*, Case No. SCSL-03-01-T, Judgment Summary ¶¶ 14-59. *See generally* Syria Report 2, *supra* note 98 (listing crimes such as unlawful killing, arbitrary detention, torture, sexual violence, violations of children's rights, and pillaging.).

¹²⁴ *See* Rome Statute, *supra* note 8, arts. 5-8, 11(1). *See generally Taylor*, Case No. SCSL-03-01-T; Indictment, *supra* note 19 (listing crimes occurring between Nov. 30, 1996 and Jan. 18, 2002). Since Sierra Leone is a party to the Rome Statute, the ICC has jurisdiction over Sierra Leone, limited to crimes occurring after July 1, 2002. Rome Statute, *supra* note 8, arts. 1, 5-8, 11.

of Taylor's knowledge of the crimes being committed in Sierra Leone,¹²⁵ extensive U.N. and media reports have documented the crimes committed during the ongoing violence in Syria.¹²⁶ The U.N. is continuing to collect evidence regarding the ongoing crimes by extending the mandate of the Syria Commission.¹²⁷ Moreover, the U.N. reports on the ongoing violence in Syria rely on the same types of evidence used in *Taylor*, notably witness testimony,¹²⁸ and documentary evidence.¹²⁹ As such, *Taylor* can be used as a template for a case against Assad for the crimes occurring in Syria.

Not only are the cases comparable, but the case against Assad is *stronger* than the case against Taylor.¹³⁰ The Special Court relied on the fact that Taylor was in frequent contact with the RUF and AFRC troops, after having aided in the planning of the targets and operational strategies in its determination of his guilt for planning the crimes in Sierra Leone.¹³¹ Since the specific orders he gave were not actually carried out by the RUF and AFRC troops, the Special Court found Taylor not guilty of ordering the crimes.¹³² In Syria, reports by the U.N. Human Rights Council indicate that the operations carried out by the Syrian military which resulted in human rights violations were conducted in such a manner as to require state directives.¹³³ Furthermore, Assad has taken direct day-to-day command of the Syrian military, rather than operating through aides.¹³⁴ In contrast to the orders given by Taylor, which were advisory in nature and not obeyed,¹³⁵ the orders given by Assad have been carried out.¹³⁶ As such, the element needed for conviction for ordering the crimes is no longer missing.¹³⁷

¹²⁵ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 6969–6970.

¹²⁶ See sources cited *supra* note 98.

¹²⁷ See U.N. Human Rights Council, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/21/L.32 ¶ 17 (Sept. 24, 2012).

¹²⁸ See *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 163–167; Syria Report 2, *supra* note 98 ¶ 9.

¹²⁹ See *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 199–203; Syria Report 2, *supra* note 98 ¶ 10.

¹³⁰ See *infra* notes 131–145 and accompanying text.

¹³¹ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶¶ 6958–6960.

¹³² *Id.* ¶ 6973 (noting Taylor's advisory role, and numerous times when his advice or directions were not followed).

¹³³ Syria Report 1, *supra* note 98 ¶¶ 92, 95.

¹³⁴ Nakhoul, *supra* note 106; Kelley, *supra* note 106.

¹³⁵ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 6973.

¹³⁶ Syria Report 1, *supra* note 98, ¶¶ 92, 95.

¹³⁷ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 6973.

In addition, the case against Assad for superior responsibility is stronger than that against Taylor.¹³⁸ Taylor was not directly in command of the RUF and AFRC forces,¹³⁹ leading the Special Court to find that Taylor did not have the superior-subordinate relationship with the RUF and AFRC troops required to find him guilty.¹⁴⁰ In contrast, Assad has direct control of the Syrian military.¹⁴¹ Assad, as President of Syria, is the commander in chief, exercising effective control over the soldiers personally carrying out the crimes.¹⁴² As such, despite the Assad government's refusal to grant the Syria Commission access to the country or to otherwise cooperate with fact-finding efforts,¹⁴³ the ICC Prosecutor has access to the evidence of the crimes, including witness testimony, photographs, and satellite imagery.¹⁴⁴ Moreover, Assad has the requisite relationship for superior responsibility.¹⁴⁵ The U.N. Security Council should follow the urging of the U.N. High Commissioner for Human Rights and refer the situation in Syria to the ICC.¹⁴⁶

CONCLUSION

In *Prosecutor v. Taylor*, the Special Court proved that no one, not even a head of state, could commit crimes against humanity with impunity. The Special Court laid out a blueprint for future cases, by balancing the rights of the accused, the need for accountability, and the evidentiary procedures necessary to account for the difficulties in evidence collection in conflict areas. The equivalent procedures of the ICC and the Special Court, and the comparable evidence used in *Taylor* and that which has been gathered so far in Syria, allow *Taylor* to be a template for a case against Assad. The similarities in the functioning of the Courts are paralleled by the similarities in the evidence against Tay-

¹³⁸ See *infra* notes 139–145 and accompanying text.

¹³⁹ *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 6973.

¹⁴⁰ *Id.* ¶ 6985.

¹⁴¹ Nakhoul, *supra* note 106; Kelley, *supra* note 106.

¹⁴² See Constitution of the Syrian Arab Republic Approved in Popular Referendum on Feb. 27, 2012, art. 105, available at <http://sana.sy/eng/370/2012/02/28/401178.htm> [hereinafter Syria Constitution Approved]; Nakhoul, *supra* note 106; Kelley, *supra* note 106. Effective control refers to the ability to prevent or punish the commission of the crimes. *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 6978.

¹⁴³ Syria Report 1, *supra* note 98 ¶ 4.

¹⁴⁴ See generally Syria Report 2, *supra* note 98; Syria Update, *supra* note 7; Syria Report 1, *supra* note 98.

¹⁴⁵ See Syrian Constitution Approved, *supra* note 142, art. 105; Nakhoul, *supra* note 106; Kelley, *supra* note 106. Superior responsibility requires the existence of a superior/subordinate relationship. *Taylor*, Case No. SCSL-03-01-T, Judgment ¶ 6978.

¹⁴⁶ Pillay, *supra* note 9.

lor and Assad. The gravity of the crimes occurring in Syria and the fact that the ICC exists specifically to punish the perpetrators of such crimes, argue that the ICC has a duty to take action. The ICC can, and *should* use *Taylor* as a blueprint to hold Assad accountable.