Prosecutor v. Taylor: The Implications for Bashar Al-Assad

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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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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).

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

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

\begin{itemize}
\item 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, \textit{supra} note 2, art. 6.3.
\item \textit{Taylor}, Case No. SCSL–03–01–T, Judgment ¶ 12.
\item See Navi Pillay, High Comm’r for Human Rights, Human Rights Comm’n, \textit{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. \textit{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. \textit{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, \textit{supra} note 2, arts. 1–4.
\end{itemize}
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 Conventions\(^\text{10}\), and the laws of Sierra Leone committed after November 30, 1996.\(^\text{11}\) The Special Court specifically retained the ability to prosecute individuals who were previously granted amnesty through the Lomé Agreement.\(^\text{12}\) Acting pursuant to a United Nations Security Council resolution,\(^\text{13}\) the U.N. entered into an agreement with the government of Sierra Leone\(^\text{14}\) to create the Special Court.\(^\text{15}\) The Special Court consists of judges chosen for their moral character, impartiality, and experience in international humanitarian law.\(^\text{16}\) The Prosecutor is responsible for investigating and prosecuting the individuals most culpable for the crimes under the Special Court’s jurisdiction.\(^\text{17}\) Both the judges and the Prosecutor must remain inde-

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\(^{10}\) 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).


\(^{14}\) U.N.–Sierra Leone Agreement, supra note 14, preamble–art.1.

\(^{15}\) Special Court Statute, supra note 2, preamble–art.1.

\(^{16}\) See id. art. 15.
dependent, and cannot seek or accept instructions from any government or other source.  

The Prosecutor brought an indictment against Taylor, alleging his individual responsibility for crimes against humanity, violations of the Geneva Conventions, and international humanitarian law. First, the indictment alleged that Taylor was responsible individually for the planning, instigating, committing, ordering, and aiding and abetting the commission of the crimes. 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. Taylor was arraigned on April 3, 2006 and the trial lasted 46 months before officially closing on March 11, 2011. The Special Court found Taylor guilty of aiding and abetting and planning the crimes.

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

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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=lrn0bAAM vYM%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.
23 Id. ¶ 8.
24 Taylor, Case No. SCSL–03–01–T, Judgment ¶¶ 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.
25 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 fightersretreating from Liberia, and returned them to the conflict. Id.
26 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. Moreover, the Special Court found these actions materially aided the soldiers in the commission of the crimes, and that Taylor provided such aid knowing that the crimes were being committed. 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.

The Special Court also found Taylor guilty for planning the crimes. 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. The Special Court noted that Taylor communicated frequently with the RUF and AFRC commanders, receiving updates on the progress of the operations. In undertaking the plan developed by Taylor, RUF and AFRC forces committed terrorism, murder, rape, cruel treatment, and other inhumane acts.

But the Special Court did not find Taylor individually responsible for ordering the RUF and AFRC to commit the underlying crimes. Having found Taylor responsible for aiding and abetting, the Special Court chose not to find him responsible for instigating such crimes. Additionally, the Special Court found Taylor did not participate in a joint criminal enterprise. 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. The Special Court found Taylor exerted substantial influence, but not

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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.\textsuperscript{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.\textsuperscript{41} As such, the requisite superior-subordinate relationship did not exist.\textsuperscript{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.\textsuperscript{43}

**II. Discussion**

The ICC is the world’s first permanent, treaty based international criminal tribunal.\textsuperscript{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.\textsuperscript{45} To create the ICC, The U.N. adopted the Rome Statute of the International Criminal Court (Rome Statute).\textsuperscript{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.\textsuperscript{47} Currently 122 States are party to the Rome Statute.\textsuperscript{48}

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

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\textsuperscript{40} Id. ¶ 6979.

\textsuperscript{41} Taylor, Case No. SCSL–03–01–T, Judgment ¶¶ 6980–6983.

\textsuperscript{42} Id. ¶ 6985.

\textsuperscript{43} Id. ¶ 6978.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{46} See Rome Statute, supra note 8, preamble–art 1.

\textsuperscript{47} See id. arts. 5, 12(1).


\textsuperscript{49} Rome Statute, supra note 8, arts. 12, 13.

\textsuperscript{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).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{56} or committed before the Rome Statute entered into force.\textsuperscript{57} One such court was the Special Court, because the timing of the crimes placed them outside the jurisdiction of the ICC.\textsuperscript{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.\textsuperscript{59} Each court has considerable leeway

\begin{thebibliography}{99}
\bibitem{art.27} The permanent members of the U.N. Security Council are China, France, Russia, Great Britain, and The United States. \textit{Id.} art. 23.
\bibitem{52} \textit{Id.} arts. 13, 15.
\bibitem{53} See \textit{id.} art. 11. The Rome Statute entered into force on July 1, 2002. \textit{Id.} art 3.
\bibitem{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).
\bibitem{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, \textit{The Globalization of Justice: The Rome Statute of the International Criminal Court}, \textit{Army Law}. 1, 9–10 (Sept. 2002).
\end{thebibliography}
to admit relevant evidence, including witness testimony, written statements, and expert testimony. All adult witnesses must be sworn to tell the truth before the court, and all witnesses must be available for full examination and cross examination. 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.

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. The Prosecutor admitted documentary evidence against Taylor through testimony of witnesses, in lieu of oral testimony, 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. Exercising its ability to allow “any relevant evidence,” the Special Court allowed witnesses to offer both personal knowledge and hearsay evidence.

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; and 2) superior responsibility arising from his failure to prevent or punish unlawful acts by his subordinates.

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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. 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. Finally the Prosecutor needed to prove Taylor failed to take reasonable and necessary measures to prevent or punish the commission of the crimes. The actions considered reasonable and necessary depend on the circumstances, and the degree of authority Taylor held over the perpetrators. The Special Court found that the leaders of the RUF and AFRC received guidance and instruction from Taylor, but were not his subordinates. The Special Court further found that any soldiers Taylor sent to fight in Sierra Leone did not remain under his effective control. Thus, the Special Court found Taylor not guilty under a theory of superior responsibility.

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. In both courts, the accused is considered innocent until proven guilty, and is under no obligation to testify. The accused will only be found guilty after the Prosecutor proves the charged crimes beyond a reasonable doubt. The judges of the Special Court are responsible for evaluating witness testimony, and resolving any inconsistencies. The Special Court took into consideration in resolving such inconsistencies the circumstances and events endured by

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

In the ongoing situation in Syria, evidence exists of potential war crimes, along with the knowledge of such crimes by Assad. 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. The Prime Minister of Turkey recently expressed frustration with the U.N. for not doing more to stop Assad and the spread of violence. The Obama administration has been criticized for not intervening in Syria, with or without U.N. support. U.N. and media reports have extensively documented the crimes committed in Syria. These reports rely upon both witness testimony and documentary evidence. The U.N. continues to collect evidence regarding the crimes taking places in Syria, by voting to extend the evidence gathering mission of the Independent International Commission of Inquiry on Syria (Syria Commission). Furthermore, as President of

96 See id. ¶ 173.
97 Dyilo, Case No. ICC–01/04–01/06, Judgment ¶¶ 102–104.
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.
Syria, Assad is the Syrian commander in chief. Assad has also taken direct command of the Syrian military, and the forces accused of committing the crimes are members of the Syrian military.

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.” Not only do many states have obligations arising from international treaties, 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.” These prosecutions also act as a source of retribution, rehabilitation, accountability, justice, deterrence, and the rule of law.

The ICC can serve as a functional equivalent of the Special Court. The purpose of each Court is to prosecute the individuals most responsible for the crimes of greatest gravity in international law.
who would otherwise act with impunity. Both Courts exercise limited jurisdiction, restricted to a specific and nearly identical set of crimes. The Courts provide similar rights and protections to the accused, including the presumption of innocence, right to remain silent, and the right to cross examine any witness brought by the Prosecutor. Moreover, both Courts allow for consideration of relevant evidence which may not be admissible in state courts, such as hearsay, and circumstantial evidence. In fact, in several decisions the ICC has cited cases heard before the Special Court in determining the reliability of evidence, the interpretation of the scope of crimes, and in defining the mental state needed for responsibility for the actions of subordinates.

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. In fact, had the crimes in Taylor occurred after July 1, 2002, the case could have been heard before the ICC. Just as the Special Court used U.N. and media reports as proof
of Taylor’s knowledge of the crimes being committed in Sierra Leone, extensive U.N. and media reports have documented the crimes committed during the ongoing violence in Syria. The U.N. is continuing to collect evidence regarding the ongoing crimes by extending the mandate of the Syria Commission. Moreover, the U.N. reports on the ongoing violence in Syria rely on the same types of evidence used in Taylor, notably witness testimony, and documentary evidence. 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. 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. 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. 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. Furthermore, Assad has taken direct day-to-day command of the Syrian military, rather than operating through aides. In contrast to the orders given by Taylor, which were advisory in nature and not obeyed, the orders given by Assad have been carried out. As such, the element needed for conviction for ordering the crimes is no longer missing.

126 See sources cited supra note 98.
130 See infra notes 131–145 and accompanying text.
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.
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.\textsuperscript{138} Taylor was not directly in command of the RUF and AFRC forces,\textsuperscript{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.\textsuperscript{140} In contrast, Assad has direct control of the Syrian military.\textsuperscript{141} Assad, as President of Syria, is the commander in chief, exercising effective control over the soldiers personally carrying out the crimes.\textsuperscript{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,\textsuperscript{143} the ICC Prosecutor has access to the evidence of the crimes, including witness testimony, photographs, and satellite imagery.\textsuperscript{144} Moreover, Assad has the requisite relationship for superior responsibility.\textsuperscript{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.\textsuperscript{146}

Conclusion

In \textit{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 \textit{Taylor} and that which has been gathered so far in Syria, allow \textit{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-

\textsuperscript{138} See infra notes 139–145 and accompanying text.

\textsuperscript{139} \textit{Taylor}, Case No. SCSL–03–01–T, Judgment ¶ 6973.

\textsuperscript{140} \textit{Id.} ¶ 6985.

\textsuperscript{141} Nakhoul, supra note 106; Kelley, supra note 106.


\textsuperscript{143} Syria Report 1, supra note 98 ¶ 4.

\textsuperscript{144} See generally Syria Report 2, supra note 98; Syria Update, supra note 7; Syria Report 1, supra note 98.


\textsuperscript{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.