Open Society Justice Initiative *Amicus Curiae* Brief in the Matter of

David Anyaele and Emmanuel Egbuna

v.

Charles Ghankay Taylor and Others

A Submission from the Open Society Justice Initiative to the Federal High Court of Nigeria, Abuja Division

November 2004

OPEN SOCIETY JUSTICE INITIATIVE

IN THE FEDERAL HIGH COURT OF NIGERIA, ABUJA DIVISION
HOLDEN AT THE FEDERAL CAPITAL TERRITORY, ABUJA

In the Matter of an Application by David Anyaele and Emmanuel Egbuna for Judicial Review and/or Acts Done Pursuant to the National Commission for Refugees etc. Act (Cap.244, LFN 1990)

Between

David Anyaele and Emmanuel Egbuna, *Applicants*

AND

Charles Ghankay Taylor et al., *Respondents*

Amicus curiae brief submitted by the Open Society Justice Initiative

Summary

1. This brief, filed by the Open Society Justice Initiative as *amicus curiae* in the case of *David Anyaele and Emmanuel Egbuna vs. Charles Ghankay Taylor et al.*, before the Federal High Court of Nigeria, summarizes the most relevant aspects of international criminal law pertinent to the present proceedings regarding the former President of Liberia, Charles Ghankay Taylor. The brief gives an overview of the key legal issues and obligations resting upon States under international law, including the extent of immunity due former Heads of State, the scope of the obligation to surrender or prosecute persons accused of serious international crimes, and the requirement to deny refugee status to such persons. It asserts that a) international law requires that persons accused of crimes against humanity and war crimes be brought to justice and that b) there is a duty on States to deny refuge to persons accused of the most serious international crimes. Exclusion is required when there is "clear and credible evidence" that an individual has committed serious crimes. Charles Taylor, accused of serious international crimes by the Special Court for Sierra Leone, should thus be denied refuge in Nigeria and extradited to the Special Court to stand trial.

Submitting Organization

2. The Open Society Justice Initiative pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. It has offices in Budapest (Hungary), New York (United States) and Abuja (Nigeria). A major objective of the Justice Initiative's work is to promote accountability for international crimes in international and hybrid courts, including through preparation of legal submissions on questions of law, assistance in carrying out investigations and reports, collaboration with NGOs to improve the selection

process for international judiciaries, and support for publication and dissemination of international tribunal decisions.*

A. International Law Requires That Persons Accused of Crimes Against Humanity and War Crimes Be Brought to Justice

3. It is well settled that all States are subject to a set of fundamental obligations under international law to hold to account those who credible evidence suggests have committed the most egregious crimes of concern to the international community as a whole.[1] These obligations flow primarily from international criminal law, a body of law with core principles established at customary and conventional law.

4. Since the early 1990s, the field of international criminal law has witnessed significant advances. Legal regulation of international crimes, particularly war crimes, crimes against humanity, and genocide, has been refined and solidified. New institutions have been established and seminal judgments have been handed down both nationally and internationally. Institutions such as the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), created by the United Nations Security Council in 1993 and 1994 respectively, acting under Chapter VII of the UN Charter, have added substance and clarity to the proscriptions of international criminal law and international humanitarian law. Additionally, following long and rigorous negotiation by States, the Rome Statute of the International Criminal Court (ICC) was signed on July 17, 1998.[2] The ICC Statute currently has 97 States Parties; it entered into force on July 1, 2002. Nigeria ratified the Statute on September 27, 2001. The Special Court for Sierra Leone (SCSL) was established by an Agreement between the United Nations and the Government of Sierra Leone on October 4, 2000, pursuant to Security Council Resolution 1315 (2000).

5. Within the past 11 years, some seven international/ized courts have been established, namely the Yugoslav and Rwanda Tribunals, the International Criminal Court, the Special Court for Sierra Leone, and internationalized courts in East Timor, Kosovo, and Cambodia (in final stages of establishment).[3] These efforts, the most concerted since the post World War II trials held in the mid to late 1940s in Nuremberg and Tokyo, demonstrate convincingly the increasing resolve of the international community to enforce international law, and end impunity for war crimes, crimes against humanity, and genocide.

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* The Justice Initiative is indebted to Deirdre Clancy, Co-Director of the International Refugee Rights Initiative, for her collaboration with the Justice Initiative on this brief.

[1] See generally M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd ed. (The Hague: Kluwer, 1999); Yoram Dinstein & M. Tabory, ed., *War Crimes in International Law* (The Hague: Martinus Nijhoff, 1996); N. Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000); Theodor Meron, *War Crimes Law Comes of Age: Essays* (Oxford: Clarendon, 1998); Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 *Yale L.J.* 2537; Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); William A. Schabas, *Criminal Responsibility for Violations of Human* Rights (2003).

[2] Rome Statute of the International Criminal Court, U.N. Doc.A/CONF.183/9; 2187 U.N.T.S. 90, *entered into force* 1 July 2002 [hereafter Rome Statute or ICC Statute].

[3] See generally G.A. Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2003).

Even when it is virtually impossible for all perpetrators to be held accountable, such as in cases where they number in the tens of thousands, the new international legal order insists that those bearing the greatest responsibility for the most serious crimes be tried for their crimes, lest international law be undermined and peace and security threatened.

6. Although international law generally establishes rights and duties between and among States, international criminal law imposes obligations not only on States, but also makes individuals liable to criminal sanction. International criminal law imposes individual and superior responsibility upon persons found guilty of the most serious international crimes, including war crimes, crimes against humanity, genocide, torture, and slavery. As the Statutes for the ICTY, ICTR, ICC, and SCSL make clear, certain crimes of exceptional gravity—including war crimes and crimes against humanity—both shock the conscience of humankind and threaten the public order.

7. Atrocities and mass crimes were prevalent throughout the twentieth century, prompting repeated endeavors of the community of States to prohibit and prosecute the most egregious international crimes, including war crimes, crimes against humanity, and genocide. Protections against these crimes are amongst those which have risen to the level of peremptory norms of international law, *jus cogens* norms, which are "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[4] The fundamental nature of these norms in turn gives rise to obligations *erga omnes*, "obligations of a State towards the international community as a whole."[5] Violations of *jus cogens* norms create an obligation on all States to redress the violations.

8. When there is credible evidence to suggest that individuals have committed war crimes, crimes against humanity and genocide, they may be subject to prosecution by the courts at national level, by the State of residence or citizenship, or by other States acting on the basis of an internationally recognized form of jurisdiction, such as, for example passive personality jurisdiction or universal jurisdiction.[6] Individuals may be also subject to prosecution by an international, regional, or hybrid court or tribunal that has jurisdiction over the crimes.

9. International crimes are increasingly being prosecuted under the principle of universal jurisdiction. Developed in the nineteenth century to deal with crimes such as piracy and slavery, universal jurisdiction applies today to additional crimes of concern to the international community as a whole, including genocide, war crimes and crimes

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[4] See e.g., *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 53; Bassiouni (1999), at 210-217.

[5] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain, Second Phase, Judgment (5 February 1970)*, 1970 I.C.J. 3, para. 33. See also Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon, 1998) at 568; and Giorgio Gaya, "Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts" in Joseph H.H. Weiler, Antonio Cassese & Marina Spinedi, eds., *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (New York: Walter de Gruyter, 1989) at 151.

[6] See e.g., S. R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (1997), at 133-161.

against humanity.[7] Universal crimes, particularly *jus cogens* violations, are considered so heinous that States have obligations to ensure they are punished: the principle *aut dedere aut judicare*—either surrender or prosecute—applies. This principle provides that a State must either extradite a suspect for trial before a national, regional, or international/ized court, or bring the suspect to justice before its own courts.[8]

10. The obligation to prosecute or surrender persons accused of serious violations of international criminal law is rooted both in treaty obligations and customary international law. The Preamble to the Rome Statute, for example, to which Nigeria is a party, emphasizes that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

11. Treaties which also incorporate this principle include the 1949 Geneva Conventions and the UN Convention against Torture.[9] When there is credible evidence that crimes encompassed by these instruments have been committed, State Parties to these treaties, such as Nigeria, are specifically obligated to search for, prosecute, and punish persons suspected of torture, or of committing grave breaches of the Geneva Conventions. This obligation has also been interpreted to mean that under no circumstances can States grant immunity or amnesty from prosecution.[10]

12. A decade and more ago, legal scholars argued that in addition to specific treaty obligations, a norm had developed at customary international law which both requires prosecution of the perpetrators of the most serious international law crimes and prohibits the granting of amnesty to such persons.[11] Those obligations are increasingly solidified in practice, as demonstrated by the proliferation of international and hybrid tribunals which are holding leaders responsible for such atrocities as war crimes, crimes against humanity, genocide, torture, and enslavement. Further, there is increasing willingness among States to apply the principle of universal jurisdiction in their own national courts to prosecute violations of international criminal law.

13. The United Nations General Assembly has repeatedly affirmed the obligation to prosecute war crimes and crimes against humanity—or to extradite alleged

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[7] See the Draft Code of Crimes Against the Peace and Security of Mankind, arts. 8 and 9, ILA, Report of the 48th Session, UN Doc. A/51/10, at para. 50.

[8] See generally M. C. Bassiouni & E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

[9] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Resolution. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, [hereafter Convention against Torture] art. 5 (2). Nigeria ratified the Convention against Torture in June 2001. The duty to extradite or prosecute persons alleged to have committed offences prohibited under the Convention against Torture is stated in absolute terms under Article 7.: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution".

[10] See Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989).

[11] See, for example, Roht-Arriaza (1995), *supra*.

offenders.[12] More recently, the UN Secretary-General, in his August 2004 report on the rule of law and transitional justice, emphasized that experience demonstrates that lasting peace and stability cannot be achieved without recourse to redress and justice.[13] He also recognized that international standards require that amnesty cannot be promised for genocide, war crimes, crimes against humanity, or gross violations of human rights, even to secure a peace agreement and end a conflict.[14] Noting the international shift from impunity and amnesty "towards the creation of an international rule of law", he emphasized that "[d]espite their limitations and imperfections, international and hybrid criminal tribunals have changed the character of international justice and enhanced the global character of the rule of law."[15]

14. Within the African legal context, scholars have been adamant in emphasizing the existence of a customary international law duty to prosecute those suspected of having committed serious international crimes. The *Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective*, developed by a group of African jurists, make this explicit:

> The absence of specific enabling domestic legislation does not relieve any State of its international legal obligation to prosecute, extradite, surrender or transfer suspects to any State or international tribunal willing and able to prosecute such suspects. (2) The principle of non-interference in the internal affairs of States, as enshrined in Article 4(g) but qualified by Article 4(h) of the Constitutive Act of the African Union, shall be interpreted in light of the well established and generally accepted principle that gross human rights offences are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction.[16]

15. Nigeria has not only ratified the Geneva Conventions, it has also enacted domestic legislation specifically incorporating them into its domestic law and recognizing universal jurisdiction over grave breaches.[17]

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[12] See also Declaration on Territorial Asylum, GA res 2312 (XXII) (1967); Resolution on the Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, GA res. 2712 (XXV) (1970); Principles of International Co-operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, GA res 3074 (XXVIII) (1973); Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, recommended by the Economic and Social Council Resolution 1989/65 of 24 May 1989; Declaration on the Protection of All Persons From Enforced Disappearances, GA res 47/133, U.N, Doc no. A/RES/47/133 (1992).

[13] Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 3 Aug. 2004, para. 2.

[14] Report of the Secretary-General, at paras. 10 and 32.

[15] Report of the Secretary-General, at para. 40.

[16] Africa Legal Aid, "African Perspectives on Universal Jurisdiction for International Crimes, Report of the Experts Meeting," Cairo, Egypt, 30-31 July 2001. The Principles were cited in the Dissenting Opinion of Judge Van de Wyngaert in the *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* Judgement of 14 February 2002.

[17] See the Geneva Conventions Act, Laws of the Federation of Nigeria 1990, ch. 162, sect. 3 (1)-(2) (formerly the Geneva Conventions Ordinance, 1960). Prior to this law, the United Kingdom's Geneva Conventions Act 1957 applied to Nigeria under the UK's Geneva Conventions Act (Colonial Territories)

16. There is every indication that Charles Taylor has not only committed serious crimes in Sierra Leone, he is also responsible for crimes in Liberia, and his freedom in Nigeria threatens peace, security, economic viability, and the rule of law in the entire West African region.[18]

17. Charles Taylor has been indicted by the Prosecutor of the Special Court for Sierra Leone and charged with crimes against humanity and war crimes under Articles 2, 3 and 4 of the Statute of the Special Court.[19] These crimes invoke international criminal responsibility, are *jus cogens* violations and are considered amongst the most serious crimes of concern to the international community as a whole. There is credible evidence to suggest that he is responsible for these crimes. To allow him to escape justice would undermine legal norms, be in violation of Nigeria's obligations, and set a precedent that Nigeria willingly provides a safe haven to persons accused of atrocities. Nigeria has a duty to either prosecute Charles Taylor or extradite him to a relevant authority, notably to the Special Court for Sierra Leone, which has indicted him for war crimes and crimes against humanity.

B. There is a Duty Upon States to Deny Refuge to Alleged Perpetrators of the Most Serious International Crimes

18. The underlying objective of international criminal law—to provide legal obligations and remedies that thwart impunity for the most serious crimes—also includes the obligation to deny refuge to those who have committed serious breaches of international criminal law.[20] This requirement is given most explicit expression in the concept of exclusion in international refugee law: individuals in respect of whom there are serious reasons for considering that they have committed grave crimes cannot be recognized as refugees and cannot benefit from the protection of the international refugee protection regime. Article 1F of the 1951 Refugee Convention relating to the Status of Refugees specifically provides:

Order in Council, 1959, providing national courts with universal jurisdiction over grave breaches of the Geneva Conventions.

[18] See e.g., SC Res. 1478 (6 May 2003); SC Res. 1532 (12 March 2004); *Taylor's fate critical to lasting peace*, The Nation, 24 July 2003; *Taylor's shadow looms over Liberia as Nigeria issues warning*, AFP, 13 Oct. 2003; Edith Lederer, *UN says Taylor should be brought to justice*, United Nations, 16 Sept. 2004.

[19] *Prosecutor* v. *Charles Ghankay Taylor*, Indictment, Special Court for Sierra Leone, Case No. SCSL-2003-01-I (7 March 2003), paras. 32-59. Statute of the Special Court for Sierra Leone, January 16, 2002, available online at http://www.sierra-leone.org/specialcourtstatute.html. Articles 3 and 4 of the Special Court's Statute confer subject-matter jurisdiction upon the Special Court with respect to a limited set of war crimes: violations of Article 3 common to the Geneva Conventions and of Protocol II (Article 3) as well as other serious violations of international humanitarian law (Article 4). The remaining serious violations of international humanitarian law listed in Article 4 of the Statute of the Special Court for Sierra Leone are recognized as violations of customary international law. They also violate conventional law applicable in Sierra Leone and Nigeria.

[20] See generally, Chaloka Beyani, Joan Fitzpatrick, Walter Kälin and Monette Zard, guest editors, "Exclusion from Protection: Article 1F of the 1951 United Nations Refugee Convention and Article I(5) of the 1969 OAU Convention in the Context of Armed Conflict, Genocide and Restrictionism," *International Journal of Refugee Law* 12, Special Supplementary Issue (Winter 2000) [hereafter *IJRL Special Issue*].

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

c) He has been guilty of acts contrary to the purposes and principles of the United Nations. [21]

19. In Africa, the exclusion clauses have been given particular regional expression in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[22] Article I (5) of that Convention tracks the provisions of Article 1F exactly, with two exceptions. First, the 1969 OAU Convention exclusion clause directs that it is "the country of asylum" which has the responsibility to determine the existence of "serious reasons for considering" a finding of excludability. Second, an additional provision, Article I 5 (c), stipulates a fourth category of excludable individual—one who "has been guilty of acts contrary to the purposes and principles of the Organization of African Unity."[23] In Nigeria, the Refugees Commission Decree of 1989 incorporates the core content of the exclusion clauses of both the 1969 OAU and 1951 UN Conventions.[24]

20. The mechanism of exclusion can be viewed as a permanent valve which mediates between two critical goals of the international community: the obligation to protect those threatened with serious human rights violations and the requirement to combat the impunity of the authors of such violations. Serving as a reminder that criminals may not be unjustly sheltered, the institution of exclusion triggers a State's obligation

[21] The 1951 United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* 22 April 1954. [hereafter "the 1951 UN Convention"]. As of 1 August 2004, 142 States were parties to the Convention, including Nigeria, which deposited its instrument of accession on 23 October 1967. The UNHCR Statute also contains parallel restrictions on the scope of the application of UNHCR's mandate. Paragraph 7 (d) provides that the competence of the High Commissioner shall not extend to a person in "respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition of a crime mentioned in article VI of the 1945 London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the 1948 Universal Declaration of Human Rights," Statute of the Office of the United Nations High Commissioner for Refugees, GA Resolution. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc A/1775 (1950) of 14 December 1950.

[22] The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, *entered into force* 20 June 1974 [hereafter the "1969 OAU Convention"].

[23] References hereafter to the scope of art. 1 F of the 1951 Geneva Convention are to be understood also to apply to art. I 5 of the 1969 OAU Convention.

[24] National Commission for Refugees, etc. Decree 1989, Official Gazette, No. 75, vol 76, 29 December 1989, Section 20.

to search out those who have committed the most serious crimes and ensure that they are held accountable for their actions.

21. In considering the formulation of the concept of exclusion during the drafting of the 1951 UN Convention,[25] States took the view that "fugitives from justice—including both those whose serious unpunished criminal conduct would bring refugee law into disrepute and [those] who would use refugee status to avoid lawful extradition—were inherently unworthy of refugee status."[26] The requirement to exclude from refugee status is thus set out in peremptory terms in the both the 1951 UN and 1969 OAU Conventions: "the provisions of this Convention shall not apply" to persons who come within the ambit of exclusion. The Nigerian Refugees Commission Decree is similarly categorical: "a person shall not be considered a refugee under this Decree if exclusion applies."[27] As Hathaway clarifies, "[a]lthough a government may invoke its sovereignty to admit a person described in Article 1F to its territory, it is absolutely barred from granting Convention refugee status to that person."[28] In fact, a proposal from the United States to leave the question of exclusion as a matter of State discretion was explicitly rejected during the drafting process. Delegates objected, *inter alia*, to the "disturbing moral consequences" of such an approach.[29]

22. Exclusion under Article 1F of the 1951 Convention therefore "requires governments to deny refugee status to any person reasonably regarded as either an international criminal or a fugitive from domestic criminal justice."[30] The drafters of the 1951 Convention thus intended to ensure that those who committed serious crimes would not escape prosecution—that refugee status should not function as a refuge for criminals. Due to the infant state of the institutions and mechanisms of international criminal justice at the time of the drafting, however, many States were not equipped to prosecute all of the crimes covered by the exclusion clauses. Facilitation of extradition was one of the ways by which States could strive to ensure that accountability was pursued.[31] Leading commentators Hathaway and Harvey suggest that, as a result, exclusion can be said to be "predicated on the satisfaction of an external and clearly defined standard of international or extraditable criminality."[32]

23. Today, the content and institutions of international criminal responsibility have evolved to include expanded provision for both permissive and mandatory jurisdiction and more responsive mechanisms facilitating and governing extradition. This provides a new context within which the exclusion clauses may operate fully

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[25] The *travaux préparatoires* of the 1951 Convention can be found at http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=PROTECT&id=3c0762ea4.
[26] J.C. Hathaway and C.J. Harvey, "Framing Refugee Protection in the New World Disorder," *Cornell International Law Journal* 34 (2001) [hereafter "Framing Refugee Protection"] at 273.
[27] National Commission for Refugees, etc. Decree 1989, Official Gazette, No. 75, vol 76, 29 December 1989, Section 20 (2).
[28] "Framing Refugee Protection", *supra*, at 263.
[29] UN *ad hoc* Committee on Statelessness and Related Problems, 18th mtg, UN Doc. E/AC/.32/SR.17 at 3.
[30] "Framing Refugee Protection" *supra*, at 259.
[31] "Framing Refugee Protection" *supra*, at 277.
[32] "Framing Refugee Protection" *supra*, at 259.

effectively—to identify and differentiate those persons needing protection from those needing to be held accountable for their crimes.

The crimes encompassed by the exclusion clauses

24. The exclusion clauses do not enumerate precisely the acts that may render a person "undeserving" of refugee status. Guidance on the definition of crimes referred to in the exclusion clauses and the assignation of criminal responsibility for those crimes must be found outside refugee law—in the evolving body of international criminal law.[33] Charles Taylor has been indicted by the Special Court for crimes including grave breaches of the Geneva Conventions and crimes against humanity, crimes which are unequivocally within the ambit of Article 1F (a). Other crimes may be considered as "non-political" ordinary crimes, including, for example, isolated acts of torture not found to be part of a systematic attack (Article 1F (b)). Finally, there are allegations that Charles Taylor may be responsible for crimes referred to as "contrary to the purposes and principles" of the United Nations and the Organisation of African Unity, envisaged in Article 1F (c) and Article I 5 (c) and (d) of the UN and OAU Refugee Conventions respectively.[34]

25. An additional factor must be noted. Since the terrorist attacks of September 11, 2001, in the United States, the international community has imposed ever more stringent measures aimed at combating "terrorist" acts. The suggestion that terrorists might avail themselves of protection through the international refugee regime is viewed with particular opprobrium.[35] The result has been a series of authoritative declarations by the Security Council under Chapter VII of the Charter of the United Nations emphasizing the mandatory nature of exclusion in certain circumstances. On September 28, 2001, for example, the UN Security Council, acting under Chapter VII, called upon all States to "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts".[36] Follow up resolutions and related legislative initiatives have reiterated this obligation.[37]

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[33] See Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice* (2002) at 129-146.

[34] See Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 Oct. 1945, chap. 1, art. 1-2 and Charter of the Organization of African Unity, 479 U.N.T.S. 39, *entered into force* 13 Sept. 1963, arts. II-III). Both the nature of the indictment charging Taylor with war crimes and crimes against humanity and other information readily available in the public domain suggest this possibility.

[35] UNHCR shares "the legitimate concern of States" that there be "no avenue for those supporting or committing terrorist acts to secure access to territory, whether to find a safe haven, avoid prosecution or to carry out further attacks." UNHCR, "Addressing Security Concerns Without Undermining Refugee Protection," November 2001. See also General Assembly Resolution 210, UN GAOR 51st Session Agenda Item 151, UN Doc. A/Res/51/210 (1997) inviting States to "take appropriate measures […] before granting asylum, for the purposes of ensuring that the asylum seeker has not participated in terrorist acts".

[36] Security Council Resolution No. 1373, UN Doc. S/Res/1373 (2001), 28 Sept. 2001 at para. 3 (f).

[37] See, for example, Security Council Resolution 1456 of 20 January 2003 and the Draft Comprehensive Convention on International Terrorism, U.N. Doc. A/C.6/55/1.

26. Although an accusation that an applicant has committed acts of "terrorism" cannot as such lend itself to being used as a separate ground for exclusion (given the lack of consensus within the international community as to its exact definition and constituent elements)[38] acts considered "terrorist" can be encompassed within the exclusion clauses. The OAU Convention on the Combating and Preventing of Terrorism, for example, to which Nigeria is a party, defines terrorism *inter alia* as, "any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or cause or may cause damage to public or private property […] and is calculated or intended to: […] (iii) create general insurrection in a State." The definition also includes "any promotion, sponsoring, contribution to, command, aid incitement, encouragement, attempt, threat, conspiracy, organising or procurement of any person, with the intent to commit any act referred to."[39] A number of the counts referred to in the indictment of Charles Taylor are amenable to consideration within this rubric. In addition, there have been allegations that Taylor harbored and supported al Qaeda operations prior to, and post, the September 11 bombings in the United States.[40] It is important to bear in mind, however, that the highest standards and procedures must be adhered to in assessing crimes designated as "terrorist" for purposes of the application of the exclusion clause Article 1 F (b). Instruments which purport to automatically depoliticize certain acts, for example, should be approached with caution.

Determining individual criminal responsibility

27. There are clear principles and criteria of procedural fairness which apply when a legal determination concerning the rights or interests of an individual is under contemplation.[41] The risk of exposure to serious harm that may result from a decision to exclude demands that it be taken in accordance with the strictest procedural safeguards.[42] Key elements of this requirement include the right to be heard in person and the right to an appeal of a decision to exclude.

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[38] Although there is no internationally accepted legal definition of terrorism as yet, as of the end of 2001 there were no fewer than 19 global and regional treaties which dealt with various acts of terrorism. For a full list of international legal instruments related to the prevention and suppression of terrorism see General Assembly, Sixth Committee Information UN Doc. A/56/160 at sec. III.

[39] OAU Terrorism Convention, *supra* at art.1 3. (a) and (b).

[40] See for example, Bryan Bender, "Liberia's Taylor Gave Aid to Qaeda, UN Probe Finds," *Boston Globe* 4 August 2004. See also Edward Harris, "Al-Qaeda Bomb Suspects Hid in Liberia," Associated Press, 1 June 2004.

[41] For an extensive discussion of procedural rights in the application of the exclusion clause see Michael Bliss, "'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses," in *IJRL Special Issue*, *supra*. See also UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses – Article 1F of the 1951 Convention relating to the status of refugees*, UNHCR Doc. No. HCR/GIP/03/05 (4 September 2003).

[42] As UNHCR has declared "given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner", Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, Protection Policy and Legal Advice Section, Department of International Protection, Geneva, 04

28. For the exclusion clauses to apply all elements required to constitute the particular alleged crime must be present. This includes not only the objective elements of such crimes but also the subjective elements: the personal circumstances pertaining to the perpetrator which determine whether he or she incurred criminal responsibility.[43] In assessing responsibility it is important to recall that the exclusion clauses encompass both international crimes and non-international crimes.[44]

29. International criminal law gives rise to individual and superior responsibility for, among other crimes, grave breaches of the Geneva Conventions and other violations of the laws or customs of war, crimes against humanity, genocide and crimes against peace.[45] It is not solely direct, personal commission of the acts alleged which incur international criminal responsibility, as superiors and others facilitating or orchestrating crimes may also be held accountable. The indictment against Charles Taylor charges *inter alia* that prohibited acts were carried out in furtherance of "a joint criminal enterprise in which the accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which the accused participated."[46] Article 6(1) of the Statute of the Special Court for Sierra Leone specifically provides that: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime […] shall be individually responsible for the crime."[47] It has long been recognized that international criminal responsibility includes participation in a joint criminal enterprise.[48]

30. In its provisions on criminal responsibility, the Rome Statute of the ICC also recognizes the concepts of conspiracy, facilitation, aiding and abetting, encouraging, inciting, furthering, contributing to, participating in a common purpose and attempting to commit a justiciable crime.[49] Recent jurisprudence established in the ICTR and ICTY provides guidance on interpreting the scope of these forms of individual and superior

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September 2003, at *International Journal of Refugee Law*, Vol. 15, No. 3, [hereafter "Background Note"] at para. 2.

[43] See ICC Statute, *supra*, arts. 25 and 30.

[44] While the scope of criminal responsibility set out in Article 25(3) of the Rome Statute is usually appropriate in the application of Articles 1F(a) and 1F(c) in the absence of clear international standards describing criminal responsibility for serious non-political crimes, it has been suggested that this might also be the appropriate standard in the application of Article 1F(b). See recommendations of Lawyers Committee for Human Rights (2002), *supra*, at 141.

[45] Nuremberg Charter, *supra*, art. 6 (a), (b) and (c) respectively. "Crimes against peace" are now more commonly referred to as "the crime of aggression." Genocide, originally encompassed by "crimes against humanity," was given recognition as an independent crime by the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

[46] Indictment, *The Prosecutor v. Charles Ghankay Taylor*, Special Court for Sierra Leone , Case No. SCSL-03-I, 7 March 2003, at para. 26.

[47] Statute of the Special Court for Sierra Leone, *supra*.

[48] See especially ICTY *Tadic* Appeals Chamber Judgment of 15 July 1999, IT-94-1, and ICTY *Kvoèka et al*. Trial Chamber Judgment of 2 Nov. 2001, IT-98-30/1, which cite Nuremberg precedent.

[49] See ICC Statute, art. 25(3), *supra*. See also Statute of the ICTY, *supra*, art.6 (1); Statute of the ICTR, *supra*, art. 7(1). Both the ICTY and the ICTR have the power to prosecute those who planned, instigated, ordered, or otherwise aided and abetted the planning, preparation, or execution of crimes under their respective jurisdictions. See also the recent ICTY *Stakic* Trial Chamber Judgement, IT-97-24, 31 July 2003.

responsibility. The categories of instigation, commission, aiding and abetting and participation in a joint criminal enterprise were elaborated on extensively in the ICTY case of *Kvoèka et al. (Omarska and Keraterm camps).*[50]

31. Command (or superior) responsibility is one of the forms of criminal responsibility frequently applicable to military or political leaders and is included in the current SCSL indictment against Charles Taylor.[51] Its scope is described authoritatively in Article 28 of the Rome Statute.[52] It should be emphasized that persons may be determined responsible in this respect on account of their inaction, i.e., if they fail in their duty to ensure the lawful conduct of their subordinates. As in a criminal trial, in determining whether or not the asylum seeker is excludable, the decision-making authority must permit Charles Taylor to present evidence demonstrating his innocence.

Standards and burden of proof

32. Despite its critical international criminal law content, applying the exclusion clauses does not require a criminal trial: its application is not predicated on a definitive finding that the asylum seeker has been found guilty of the crimes in question. The standard stipulated both in the 1951 UN and 1969 OAU Conventions and indeed in the Nigerian Commission for Refugees Decree 1989 is that there are "serious reasons for considering" the individual responsible.[53] Although "serious reasons for considering" is not a familiar standard in most legal systems and does not in itself provide a clear and precise test,[54] recent authoritative surveys of comparative jurisprudence have identified the standard as lower than the common law criminal standard of "proof beyond a reasonable doubt," but higher than the civil law "balance of probabilities" standard.[55] UNHCR describes the test thus: "clear and credible

[50] *Kvoèka* Trial Chamber Judgement, *supra*.

[51] Indictment, *The Prosecutor v. Charles Ghankay Taylor,* Special Court for Sierra Leone , Case No. SCSL-03-I, 7 March 2003, at para. 27.

[52] See also the Statute of the ICTY, *supra*, art. 7; Statute of the ICTR, *supra*, art. 6(3); ICTY *Blaškiæ* Trial Chamber Judgement, IT-95-14-T, 3 March 2000; ICTY *Èelebiæi* Appeals Chamber Judgement, IT- 96-21, 21 Feb. 2001.

[53] This is the standard stipulated in Section 20 (2) (a) of the 1989 Decree.

[54] An examination of State practice shows that a variety of standards have been employed in different jurisdictions. The Federal Court of Appeal in Canada, for example, has held that "serious reasons for considering" indicates "a lower standard of proof than the balance of probabilities." (*Ramirez v. Canada* [1992] 2.F.C. 306, 311-313). A number of subsequent decisions have followed this approach. "[C]lear and convincing evidence" was the formulation used, however, in a more recent case. (*Cardenas v. Canada*, 23 *Immigration Law Review* 92d, 244 (1994), at 252). The UK Court of Appeal has concluded that it is sufficient that "the evidence point[s] strongly to […] guilt." *T. v. Secretary of State for Home Department*, Court of Appeal, [1995] *Immigration Appeals Reports* 142. In the U.S., a much lower standard has been employed when examining analogous asylum bars. The "probable cause" test has been interpreted as requiring "good reason to believe." *Jiminez v. Aristeguieta*, 311 F.2d. 547, 562 (5th Cir 1962) (quoting *U.S. v. Burr*, 25 F. Cas. 2, 12 (C.C.D. Va. 1807) (No. 1469a)).

[55] See Background Note, *supra*. The recently agreed EU minimum standards on qualification for refugee status also employ the standard "serious reasons for considering." See Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refuges or as person who otherwise need protection, 31 March 2004, 2001/0207 (CNS) available at http://www.ecre.org/eu_developments/status/Asile%2021_30%20March_31%20March%202004.pdf

evidence of involvement in excludable acts is required to satisfy the 'serious reasons' test."[56]

33. The establishment of the factual basis for an exclusion decision, or the evidence required to meet the "serious reasons" standard can be constituted by a wide variety of information, including the existence of an indictment by an international tribunal, a final decision by a national court reached after a fair trial, credible admissions by the applicant and clear and convincing information.[57]

34. Information that a person is the subject of an indictment, charge or proceeding or conviction before an international tribunal for an excludable crime—as is at issue in the instant case—should be considered to constitute "clear and convincing reasons" for exclusion when that evidence is credible. As UNHCR has noted "given the rigorous manner in which indictments are put together by international criminal tribunals […] indictments by such bodies […] satisfies the standard of proof required by Article 1F."[58] During the screenings of Rwandans in the aftermath of the Rwandan genocide, for example, an indictment issued by the Rwanda Tribunal was considered to constitute sufficient grounds for exclusion from refugee status under UNHCR Guidelines.

35. Charles Taylor has been indicted by the Special Court for Sierra Leone. The standard of indictment before the Special Court is in fact *higher* than that of the ICTR and ICTY: before the Prosecutor can present a case for indictment before the Special Court he must be "satisfied in the course of an investigation that a suspect has committed a crime, or crimes within the jurisdiction of the Special Court."[59] In view of the strict standard of this indictment by the SCSL, it is submitted that in the case of Charles Taylor, the threshold for a finding of "serious reasons" with respect to the crimes stipulated has been reached and that he is presumptively subject to exclusion.

36. As noted above, however, the existence of an indictment is not the only basis upon which the application of the exclusion clauses can be founded. In the case of Charles Taylor, a vast repertoire of documentation alleging his involvement in a variety of serious crimes exists with inter-governmental, governmental and non-governmental sources.[60] The activities of the Liberian government, while Charles Taylor headed it,

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[56] See Background Note, *supra*, at para 108.

[57] "Ensuring a Fair Procedure: The Findings of the Legal Advisory Group" in Lawyers Committee for Human Rights (2002), *supra*, at 147-186.

[58] Background Note, *supra*, at para 107.

[59] Rule 47 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. Under the Rules of Procedure and Evidence of both the ICTY and ICTR, the "Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal" may present a case for indictment. (Rule 47B of the Rules of Procedure and Evidence, rev. 32, of the ICTY 12 August 2004, available at http://www.un.org/icty/legaldoc/ and Rule 47B of the Rules of Procedure and Evidence of the ICTR, available at http://www.ictr.org/ENGLISH/rules/260600/.

[60] See e.g., Report of the Panel of Experts Appointed Pursuant to UN Security Council Resolution 1306 (2000), Paragraph 19 in Relation to Sierra Leone, available at http://www.sierra-leone.org/panelreport.html .

attracted the condemnation of the UN Security Council in 2001, which declared that Liberian support for the Revolutionary United Front (RUF) in Sierra Leone constituted a "threat to peace and security."[61] Even in the absence of the outstanding indictments of the Special Court, there is ample evidence that Charles Taylor has incurred responsibility for serious crimes, which raises the question of the application of the exclusion clause.

37. Although in asylum procedures the burden of proof is generally shared between the asylum determining body and the applicant, where the application of the exclusion clauses is at issue, the burden of proof shifts to the State. There are certain cases, however, where a rebuttable presumption of excludability may arise, and the situation of Charles Taylor is a case in point. Although automatic exclusion of persons purely on the basis of their senior position in a government is not permitted, "a presumption of individual responsibility reversing the burden of proof may arise as a result of a senior person's continued membership of a government (or part of it) clearly engaged in activities that fall within the scope of Article 1F."[62] As UNHCR advises, "[t]his would be the case for example, where the government concerned has faced international condemnation (in particular from the UN Commission on Human Rights or the Office of the UN High Commissioner for Human Rights) for gross or systematic human rights abuses."[63] UNHCR guidelines further suggest that the standard of proof required for a challenge to a rebuttable presumption is "a plausible explanation regarding non-involvement or disassociation from any excludable acts, coupled with an absence of serious evidence to the contrary."[64]

38. Where an indictment has been issued by an international or hybrid tribunal, it may be preferable in some cases for the determination process to be suspended and the individual turned over to the relevant prosecuting authority. If the asylum seeker is acquitted, she or he may then pursue a claim for protection as a refugee. In Tanzania, for example, during the screenings of the Rwandan caseload carried out in 1997, the position was that any asylum seeker or refugee who was indicted by the Tribunal would be handed over to the authorities in Arusha.[65] Although indictment by the Tribunal was not considered in itself determinative of status, if an indicted person was eventually cleared by the Tribunal, his or her refugee status would be respected by the government of Tanzania (barring any other obstacles to recognition). The option of transferring Charles Taylor for trial to the Special Court for Sierra Leone, prior to final determination of his status, is available to the Government of Nigeria. If found not guilty, he may return to Nigeria and seek legitimate asylum.

39. Even following a positive determination of status, cancellation of refugee status is required if it is subsequently found that the exclusion clauses applied at the time that

[61] U.N. Security Council Resolution 1343 (2001).
[62] Background Note, *supra*, at para 58.
[63] Background Note, *supra*, at para 58.
[64] Background Note, *supra*, at para 110.
[65] Lawyers Committee for Human Rights (2002), *supra*, at 28-33.

the decision was made.[66] As the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* makes clear, "facts justifying exclusion [may] become known only after a person has been recognized as a refugee. In such cases the exclusion clause will call for a cancellation of the decision previously taken."[67] In particular, as UNHCR has noted "[i]nformation which comes to light during the extradition process may also set in motion proceedings leading to the revocation of the status of a recognized refugee."[68]

40. In December 2003, Interpol issued a "red notice" regarding Charles Taylor. Although not itself an arrest warrant, the "red notice" was based on the Special Court indictment against Charles Taylor and forms the basis for a decision by the Nigerian authorities on whether or not to authorize provisional arrest. At a minimum, the notice indicates the necessity for review of the status granted him in Nigeria.[69]

Immunities

41. The increasing attention being paid to the application of international criminal law to individuals acting—or purporting to act—in an official capacity has raised the question whether such individuals should ever, and under what circumstances, be shielded from arrest and prosecution by doctrines of immunity. The doctrine of Head of State immunity is largely a matter of custom.[70] In 1945, the immunity rules were revised for purposes of determining the individual criminal responsibility of officials in proceedings before international tribunals. Article 7 of the Nuremberg Charter declared that "[t]he official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[71] Likewise, the Statute of the

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[66] See more generally, Sibylle Kapferer, "Cancellation of Refugee Status," UNHCR Department of International Protection, March 2003.

[67] Office of the High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (Geneva: January 1992) at para 141.

[68] Sibylle Kapferer, "The Interface between Extradition and Asylum," UNHCR, Legal and Protection Policy Research Series, November 2003, para 213.

[69] See, for example, the ECOWAS Convention on Extradition (1994) at art. 22 (3) which specifically provides that a request for provisional arrest may be made by a requesting State through Interpol.

[70] While the immunity of diplomats has always been regulated by its own regime, the immunity of Heads of State appears to have been subsumed within State immunities until relatively recently, owing to the identification of the State with its ruler. See generally Dapo Akande, *International Law Immunities and the International Criminal Court* (2004) 98 A.J.I.L. 407; Jürgen Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Martinus Nijhoff, 1997); Sir Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers," 3 *Recueil des Cours* 9, 35-81. *See also* Jerrold L. Mallory, "Resolving the Confusion Over Head of State Immunity: The Defined Right of Kings," 86 *Columbia L. Rev*. 169, 177 (1986).

[71] The Nuremberg Tribunal declared that "[t]he principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law." Nuremberg Judgment, *supra*, at 223. Similar formulations followed in other instruments, for example the Genocide Convention states that "Persons committing genocide or any of the other acts enumerated in art. III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

International Criminal Tribunal for the former Yugoslavia, art. 7(2), stipulates: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[72] In keeping with these developments, Article 27 of the Rome Statute similarly holds that norms of responsibility apply without any distinction based on official capacity.[73]

42. Further State practice and doctrinal development are needed before a straightforward consensus can emerge with respect to all aspects of procedure in this area.[74] Where international tribunals are *not* involved, the immunities *rationae personae* of Heads of State and Heads of Government who are still in office continue to enjoy support from States as a necessary component of inter-State relations.[75] This stands in distinction to the situation of former Heads of State facing domestic courts, where the development concerning immunities is less consistent.[76]

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[72] The Statute of the Rwanda Tribunal, art. 6(2), is identical. The ICTY indicted Slobodan Milosevic while in office as President of the Federal Republic of Yugoslavia. *Prosecutor* v. *Milosevic et al*., Indictment, ICTY Case No. IT-99-37, (24 May 1999). The ICTR convicted Jean Kambanda, Interim Prime Minister of Rwanda during the 1994 conflict, for crimes committed during his time in office, citing the abuse of his official position as an aggravating factor in sentencing. ICTR *Kambanda* Judgment and Sentence, ICTR-97-23-S, para. 61(B)(vii) (4 Sept. 1998). The ICTY has declared art. 7(2) of the ICTY Statute and art. 6(2) of the ICTR Statute to be "indisputably declaratory of customary international law": ICTY *Furundž ija* Trial Chamber Judgment, IT-95-17/1, para. 140, 10 December 1998.

[73] Rome Statute, *supra*, art. 27. Article 6(2) of the Statute of the Special Court for Sierra Leone similarly provides: "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

[74] *See* Otto Triffterer, commentary on Art. 27, in O.Triffterer and C. Rosbaud, eds. *The Rome Statute of the International Criminal Court*, (2000), at 501.

[75] The absolute immunity that attaches to the person of a diplomat as a representative of their sending State is known as immunity *rationae personae*, and applies to all acts performed during tenure of the posting, regardless of whether performed within the scope or purported scope of the person's official functions; the immunity enjoyed by a Head of State at customary international law during their tenure in office is generally recognised to be of the same sort: Hazel Fox, *The Pinochet Case No.3* 48 I.C.L.Q. 687, 693-69 4 (1999);. On 13 March 2001, the French Cour de Cassation ruled that Libyan Head of State Mouammar Ghadaffi was entitled to immunity from alleged involvement in the terrorist bombing of a civilian aircraft. See Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity From Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation* 12 *E.J.I.L.* 595 (2001). On 30 October 2001, a United States court dismissed a suit, alleging torture and other crimes, against the current President and Foreign Minister of Zimbabwe, accepting a Suggestion of Immunity from the U.S. Department of State. *Tachiona et al*. v. *Mugabe et al., Decision and Order*, 31 October 2001 (00 Civ. 6666 [VM], unreported) (U.S. Dist. Ct., S.D.N.Y.). In the definitive proceedings against former Chilean President *Pinochet*, none of the seven judges doubted that the immunity enjoyed by a standing Head of State is absolute and applies to acts done in both a private and a public capacity, such that Pinochet would have been protected from any legal process before domestic courts (absent a waiver) had he still been Head of State at the time the warrant was issued: *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), [1999] 2 All E.R. 97, 111 (H.L.). See also the decision of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment*, 14 February 2002.

[76] The immunity enjoyed by a diplomat after completion of his or her posting is an immunity attaching only to acts performed in an official capacity (i.e. immunity *rationae materiae*). The same limited immunity is increasingly said to apply to a former Head of State at customary international law; thus, jurisdiction has been exercised over former Heads of State for acts done in a personal capacity (as, e.g., for personal enrichment): See Jennings & Watts (1996), X, at 1037-1044.

43. Most importantly for purposes of the present proceedings, it is by now well-recognized that where the jurisdiction of an internationalized tribunal is engaged there is no persuasive ground for upholding immunities of either standing or former Heads of State or Government.[77] In its decision on the immunity asserted for Charles Taylor, the Appeals Chamber of the Special Court for Sierra Leone stated that: "the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[78] The Special Court for Sierra Leone has also affirmed that for all relevant purposes it constitutes an international criminal tribunal, having been created by agreement of the United Nations with the government of Sierra Leone[79] at the request of the United Nations Security Council, and having the legal personality and other attributes common to such bodies.[80] It has international and domestic judges and is adjudicating international crimes of war and crimes against humanity.

44. In light of the above and in the circumstances of the present proceedings, no question of immunity arises as a result of Charles Taylor's status as a former Head of State.

Due process for those not recognized as refugees and denied asylum

45. Although persons who come within the ambit of the exclusion clauses continue to be entitled to protection of their fundamental human rights, they are considered to be "undeserving" of the special status of refugee because of the egregious nature of their past actions.[81] Once a person has been excluded from refugee status, therefore, States may be viewed as having a twofold duty. They must ensure, as far as possible, that persons accused of serious crimes are brought to justice and, at the same time, no matter how atrocious the crimes alleged, that they continue to benefit from international human rights protection. This would include, for example, an opportunity for Charles Taylor to challenge in Nigerian Courts the arrest warrant and transfer request of the Special Court. However, in balancing competing interests, when States take into account the due process rights of the accused, they must also balance these against the due process rights of victims, in order that justice is achieved.

46. Although the grant of refugee status is not strictly a bar to prosecution, extradition or rendition, as long as the refugee's rights continue to be protected, a number of States

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[77] In *Pinochet*, the only exception to the immunity of a Head of State in office is where an international tribunal has been established by an instrument expressly providing for the responsibility of Heads of State. See Lords Browne-Wilkinson, *Pinochet*, at 114, Goff, at 120-121, Hope, at 147, and Phillips, at 189.
[78] *Prosecutor* v. *Charles Ghankay Taylor, Decision on Immunity from Jurisdiction*, Special Court for Sierra Leone Case No. SCSL-2003-01-I (31 May 2003), paras. 50-52.
[79] U.N. Security Council Resolution 1315 (2000), 14 August 2000.
[80] *Prosecutor* v. *Charles Ghankay Taylor, Decision on Immunity from Jurisdiction*, Special Court for Sierra Leone, Case No. SCSL-2003-01-I (31 May 2003), paras. 37-42.
[81] Background Note, *supra*, at para 21.

have made provisions for a prohibition on the extradition of refugees.[82] Nigeria is among those countries.[83] At the same time, because of the scope and egregiousness of the charges currently outstanding against Charles Taylor, and the internationalized character and status of the body requesting transfer, the very question of rendition in these circumstances fulfils the standard for the application of exclusion and the revocation of his status.

Asylum and exclusion

47. The right of individuals to "seek and enjoy asylum" is one of the foundations of the modern international refugee protection regime.[84] Although an individual right to "seek and *be granted* asylum" has not yet been developed clearly in international law,[85] over the last fifty years the institution of asylum, both as a right *of* States and as a concept with emerging individual human rights elements, has taken on new facets. Africa has perhaps developed the most progressive regional approach to asylum, recognizing a right for individuals "when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."[86] The evolution of modern human rights law and international criminal law, both in treaty and in its customary law content, has unequivocally placed certain constraints on State freedom to regulate entry and exit of persons to territory, and thus by extension on the institution of asylum—e.g., *inter alia*, the extra-territorial effect of the prohibition on torture;[87] the *jus cogens* norm of non-refoulement;[88] and the obligation to prosecute or extradite those accused of the most serious international crimes.

48. The circumscribing effect of exclusion is therefore not limited to the determination of refugee status under the auspices of the 1951 U.N. and 1969 OAU Refugee Conventions. Exclusion as a concept finds analogous expression in a number of the instruments which are facilitating the emerging contours of a right *to* asylum. Article

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[82] A number of States have, however, made express provision in national law for the non-extradition of refugees. See Sibylle Kapferer, *The Interface Between Extradition and Asylum*, UNHCR, Legal and Protection Policy Research Series, November 2003, at para. 226.

[83] Article 1 (1) of the National Commission for Refugees Decree 1989 provides that, "no person who is a refugee within the meaning of this Decree shall be refused entry into Nigeria, expelled, extradited or returned in any manner whatsoever to the frontiers of any territory" where his life or liberty would be threatened.

[84] Article 14 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A, 10 December 1948.

[85] During the Charter drafting discussions, for example, a proposal to substitute "to be granted" for "enjoy" was opposed strongly by States. See Guy Goodwin Gill, *The Refugee in International Law*, 2nd ed. (Oxford, Oxford University Press, 1996) at 175, fn 15.

[86] African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, art. 7(1) [hereafter African Charter] art. 12 (3).

[87] See, *inter alia*, Convention against Torture, art. 3, *supra*.

[88] 1951 UN Refugee Convention, art. 33. See E Lauterpacht and D Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in E. Feller, V. Turk and F. Nicholson eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*). Under the 1969 OAU Convention, this obligation also extends to protecting those who are compelled to flee as a result of "external aggression, occupation, foreign domination or events seriously disturbing public order." 1969 *supra*, art. I(2).

14(2) of the Universal Declaration of Human Rights, for example, expressly denies the right to seek asylum to any person attempting to avoid "prosecutions genuinely arising from non-political crimes."[89] The 1967 U.N. Declaration on Territorial Asylum echoes closely the language of the exclusion clauses of refugee legislation providing that "the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity in the international instruments drawn up to make provisions in respect of such crimes."[90] Article 28 of the European Union Directive on minimum standards for giving temporary protection in the event of a mass influx clearly provides that displaced persons who are not refugees may be excluded from protection on grounds almost precisely equivalent to those set out in Article 1 F of the 1951 Refugee Convention.[91]

49. Although these exclusion-related restrictions are expressed as curbs on the exercise of an individual right, they are clearly reflective of the existence of corresponding duties on States not to shelter those seeking to avoid justice. In Resolution 3074 on the Principles of International Co-operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, the U.N General Assembly laid the foundations for an integrated approach to international justice and protection of human rights, linking exclusion in the context of asylum to the requirement for international cooperation in the punishment of serious international crimes.[92] The Resolution also explicitly expresses the prohibition on granting asylum to serious criminals in terms of a restriction on the right *of* asylum of the State: "States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity."[93] Further, in Africa, through the operation of the OAU Convention on Terrorism, State parties have undertaken "ascertain, when granting asylum, that the asylum seeker is not involved in any terrorist act."[94]

Conclusion

50. The armed conflicts raging in places such as the former Yugoslavia, Rwanda, and Sierra Leone in the 1990s have forced a new recognition of the intimate relationship between impunity, international human rights and international criminal law, amnesty, and refugee status. The five decades of impunity between World War II and the Yugoslav conflict have been strongly countered by the need to establish accountability, enforce international law, and promote enduring peace and security. Charles Taylor has been charged with war crimes and crimes against humanity by the

[89] Universal Declaration of Human Rights, *supra*, art. 14(2).
[90] UN General Assembly Resolution 2312 (XXII) of 14 December 1967.
[91] European Union Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Council Directive 2001/55/EC of 20 July 2001.
[92] Principles of International Co-operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, GA res 3074 (XXVIII) (1973).
[93] U.N. General Assembly. Resolution 3074 (XXVIII) of 3 December 1973, at para. 7.
[94] O.A.U. Terrorism Convention, *supra*, art. 4 (2) (g).

Special Court for Sierra Leone, an internationalized court brokered by the United Nations. Nigeria cannot permit him to purport to enjoy refugee status or political asylum in Nigeria. If Nigeria is not willing to prosecute Charles Taylor, it must extradite him to the Special Court for Sierra Leone to stand trial on the charges against him.

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