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Nigeria

Amicus Curiae brief submitted to the Federal High Court reviewing refugee status granted to Charles Taylor

On 31 May 2004, the Nigerian Federal High Court granted leave to two Nigerian victims of torture in Sierra Leone to challenge asylum granted by the Nigerian government to former Liberian President Charles Taylor in August 2003. In March 2003, Charles Taylor was indicted by the Special Court for Sierra Leone on 17 charges of bearing the greatest responsibility for crimes against humanity and war crimes in the country's decade long conflict. The Nigerian government offered asylum to him with apparent guarantees that he would be protected from prosecution.

On 20 September 2004, Amnesty International applied to the Federal High Court for leave to submit the following *amicus curiae* brief. The brief examines the following issues relevant to the case:

- Firstly, whether a person who has been indicted by the Special Court for Sierra Leone for crimes against humanity or war crimes is entitled under international law to refugee status or, if such status has been granted, to retain that status. For the reasons explained in the brief, a person indicted for such crimes by the Special Court is not entitled to refugee status.
- Secondly, whether Nigeria is obliged under international law to surrender a person who has been indicted by the Special Court for Sierra Leone for crimes against humanity and war crimes to that Court, if it does not submit the case against that person to its prosecuting authorities for the purpose of investigation and, if there is sufficient admissible evidence, to prosecution of that person for those crimes. For the reasons explained in the brief, Nigeria is obliged to surrender a person indicted by the Special Court for such crimes, or to open a national investigation into the charges without delay.

This document contains the full text of the amicus curiae brief which Amnesty International has applied to submit.

Amicus curiae brief submitted by Amnesty International

Introduction

1. On 20 September 2004, Amnesty International, a non-governmental organization with 1.8 million members, supporters and subscribers in over 150 countries and territories in every region of the world, applied for leave to submit this *amicus curiae* brief to the Federal High Court. It addresses two legal issues before the Court in this case concerning Charles Ghankay Taylor, the former President of Liberia, who was indicted on 7 March 2003 by the Special Court for Sierra Leone on 17 counts of crimes against humanity and war crimes and was subsequently granted refugee status in Nigeria in August 2003.
2. The *amicus curiae* brief is also signed by Guy S. Goodwin-Gill, a Senior Research Fellow of All Souls College, Oxford, and was formerly Professor of International Refugee Law at Oxford, Professor of Asylum Law, University of Amsterdam, and Editor-in-Chief of the *International Journal of Refugee Law*. He is the author of *The Refugee in International Law*, Oxford: Clarendon Press, second edition, 1996, among many publications. Professor Goodwin-Gill is also a Member of the Bar of England and Wales and practices from Blackstone Chambers, London.
3. The first issue addressed in this brief is whether a person who has been indicted by the Special Court for Sierra Leone for crimes against humanity or war crimes is entitled under international law to refugee status or, if such status has been granted, to retain that status. For the reasons explained below, a person indicted for such crimes by the Special Court is not entitled to refugee status. Furthermore, a state which determines the refugee status of such a person should apply standards and principles of international refugee law, including guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) in pursuance of its mandate.[1]

[1] UNHCR issues guidelines pursuant to its mandate, as contained in the 1950 Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees:

> "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention;"

and Article II of its 1967 Protocol:

> "The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol."

4. The submissions on the first issue are based on the fact that Charles Ghankay Taylor has been granted refugee status by the Nigerian government. The fact is established in a counter affidavit submitted to the Federal High Court on 26 June 2004 by the Special Assistant to the Honourable Attorney-General of the Federation and the Minister of Justice (one of the Respondents in the case) which states:

> "That during the Presidency of the first Respondent [Charles Ghankay Taylor], a rebellion broke out in Liberia which developed into a civil war which eventually threatened both the office and life of the first Respondent as well as the life, property and security of Liberians and other residents therein, including Nigerians. That upon the intervention of the international community, Nigeria inclusive, in order to prevent a prolongation of the war and its attendant consequences on the peace, stability and sovereignty of Liberia, the first respondent vacated his office as President and was granted asylum by Nigeria sometime in August 2003 and he has remained as a refugee in Nigeria ever since."

   Even if it is subsequently claimed that Charles Ghankay Taylor was not granted "refugee status" but "political asylum" the statement shows that the government has clearly acted on the basis that Charles Ghankay Taylor is protected by refugee status. Nigeria as a state party to the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and the African Union's Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) cannot avoid the obligations set out in these treaties by providing the rights guaranteed in them but under a different name.

5. The second issue addressed in this brief is whether Nigeria is obliged under international law to surrender a person who has been indicted by the Special Court for Sierra Leone for crimes against humanity and war crimes to that Court, if it does not submit the case against that person to its prosecuting authorities for the purpose of investigation and, if there is sufficient admissible evidence, to prosecution of that person for those crimes. For the reasons explained below, Nigeria is obliged to surrender a person indicted by the Special Court for such crimes, or to open a national investigation into the charges without delay. The obligation is not affected by the status of the individual in Nigeria.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

I. The prohibition of asylum for persons where there are serious reasons to believe they have committed crimes against humanity or war crimes.

6. Customary and conventional international law, including treaties that Nigeria has ratified, as well as general principles of law, uniformly require that states must not grant refugee status to persons where there is serious reason to believe that they have committed crimes against humanity or war crimes.
7. The 1946 Constitution of the International Refugee Organization, adopted by the United Nations (UN) General Assembly, explicitly excluded "war criminals"[2] and "those who assisted the enemy in persecuting civil populations of countries, Members of the United Nations."[3]
8. Article 14 (2) of the 1948 Universal Declaration of Human Rights declares that the right to seek and to enjoy in other countries asylum from persecution "may not be invoked in the cases of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."
9. Paragraph 7(d) of the UNHCR Statute provides that the competence of the High Commissioner shall not extend to a person: "[i]n respect of whom there are serious reasons for considering that he [or she] has committed a crime covered by the provisions of treaties of extradition or 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."
10. Article 1F(a) of the1951 Refugee Convention expressly provides that it shall not apply 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."[4] Nigeria acceded to the 1951 Refugee Convention on 23 October 1967 and acceded to the 1967 Protocol relating to the Status of Refugees (1967 Refugee Protocol) on 2 May 1968.
11. Article I(5) of the OAU Refugee Convention contains an identical provision to Article 1F(a) of the 1951 Refugee Convention. Nigeria ratified the OAU Refugee Convention on 23 May 1986 and deposited its instruments of ratification on 24 June 1986.
12. In 1967, the General Assembly adopted the Declaration on Territorial Asylum. Article 1(2) of that Declaration provides: "The right to seek and to enjoy asylum

[2] U.N. G.A. Res. 62 (I) of 15 December 1946, Part II: Persons who will not be the Concern of the Organization, paragraph 1.
[3] *Ibid.*, paragraph 2(a).
[4] The *travaux préparatoires* of the 1951 Convention confirm the *obligation* not to accord asylum to people accused of war crimes and crimes against humanity. See Guy S. Goodwin, *The Refugee in International Law* (Oxford: Clarendon Press (1996), p. 95.

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."[5]

13. The Inter-American Commission on Human Rights (IACHR), in an important statement on this question on 20 October 2000, has declared that states are under a duty not to grant asylum to persons suspected of war crimes and other crimes under international law who flee to avoid criminal responsibility.[6]

[5] U.N. G.A. Res. 2312 (XXII) of 14 December 1967. The principle is reiterated in the General Assembly's Principles of international cooperation in the detection, arrest, extradition and punishment of war crimes and crimes against humanity, U.N. G.A Res. 3074 (XXVIII) of 3 December 1973:

"In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, 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 crime against humanity."

[6] Inter-American Commission on Human Rights, Organization of American States, *Asylum and International Crimes*, 20 October 2000. This statement, which deserves quoting in full, declares:

"Asylum is an institution that provides for the protection of individuals whose life or liberty is threatened or endangered by acts of persecution or violence stemming from the acts or omissions of a State. One form, political asylum, has been especially well-developed in Latin America. States have accepted that there are limits to asylum, based on several sources of international law, including that asylum cannot be granted to persons with respect to whom there are serious indicia that they may have committed international crimes, such as crimes against humanity (which include the forced disappearance of persons, torture, and summary executions), war crimes, and crimes against peace.

According to article 1(1) of the American Convention on Human Rights, the States have an obligation to prevent, investigate, and punish any violation of the rights recognized therein. The IACHR has stated previously that the evolution of the standards in public international law has consolidated the notion of universal jurisdiction, whereby any State has the authority to "prosecute and sanction individuals responsible for such international crimes, even those committed outside of a State's territorial jurisdiction, or which do not relate to the nationality of the accused or of the victims, inasmuch as such crimes affect all of humanity and are in conflict with public order in the world community." [IACHR, Recommendations on Universal Jurisdiction and the International Criminal Court, Annual Report 1998, Ch. VII.] The Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons expressly provide that a State party should take the measures necessary to establish its jurisdiction over the crimes provided for in those instruments when the alleged offender is within its jurisdiction and it does not extradite him/her.

Based on the foregoing considerations, the Inter-American Commission should note that the institution of asylum is totally subverted by granting such protection to persons who leave their country to elude a determination of their liability as the material or intellectual author of international crimes. The institution of asylum presupposes that the person seeking protection is persecuted in his or her state of origin, and is not supported by it in applying for asylum.

14. The UNHCR Guidelines on International Protection: Application of Exclusion Clauses (2003 UNHCR Guidelines) explains the rationale for the exclusion clauses in the 1951 Refugee Convention:

> "Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997."[7]

15. A further aim of the drafters of the 1951 Refugee Convention was to ensure that those who had committed grave crimes in World War II did not escape prosecution.[8] As the Lisbon Experts Roundtable[9] notes:

> "[o]ther reasons for exclusion clauses include the need to ensure that fugitives from justice do not avoid prosecution by resorting to the protections provided by the 1951 Convention, and to protect the host community from serious criminals. The purpose of the exclusion clause is therefore to deny refugee protection to certain individuals while leaving law enforcement to other legal processes."[10]

16. In a number of cases, national courts have denied asylum to persons they have determined fall under Article 1F(a).[11] There are also a number of national cases

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In view of the foregoing considerations, the Inter-American Commission on Human Rights, in the exercise of the power conferred on it by article 41(b) of the American Convention, hereby recommends to the Member States of the OAS that they refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes."

[7] UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCR/GIP/03/05, 4 September 2003.
[8] Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, in Feller, Türk and Nicholson, Refugee Protection in International Law (Cambridge: Cambridge University Press 2003).
[9] The Second Track of the Global Consultations on International Protection process examined this subject at its expert meeting in Lisbon, Portugal, in May 2001, organized by UNHCR and Carnegie Endowment for International Peace.
[10] *Ibid.*, Summary Conclusions – Exclusion from Refugee Status, paragraph 1.
[11] See Sibyelle Kapferer, *Exclusion clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom*, International Journal of Refugee Law, Volume 12 Special Supplementary Issue, page 195, which identifies the following examples: *Szafman*, CRR, 8, 14 May 1954 (French *Commission de recours de réfugiés* excluded a Polish national, who was *Blockwart* at the camp of Birkenau and in this function committed crimes against humanity for which he was convicted

where courts have cancelled refugee status previously granted to a person because at the time of the application the person had failed to provide information which, had it been before the original determining panel, would have led to the application of an exclusion clause of Article 1F of the 1951 Refugee Convention.[12]

II. Important issues that a reviewing court should consider in reviewing a decision to grant asylum to a person who has been indicted by the Special Court for Sierra Leone.

(a) The Special Court for Sierra Leone is an international criminal court

17. The reviewing court should first consider the status of the Special Court for Sierra Leone in order to determine what weight to give to the indictment in reviewing an asylum process.
18. The Special Court for Sierra Leone is an international court. As a new model of international justice mechanism, the Special Court was established by an agreement between the UN and the government of Sierra Leone pursuant to a recommendation by the UN Security Council.[13] Oversight is provided by a Management Committee made up of representatives of the UN Secretary-General, the Government of Sierra Leone, Canada, Netherlands, Nigeria, Lesotho, United Kingdom and the United States of America.

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by a French Court); *Rendulic*, CRR, 4077, 6 June 1961and Ujevic, CRR, 3948, 21 December 1961 (*Commission de recours de réfugiés* excluded two former members of a Croatian army unit responsible for crimes considered to be "by their nature falling within the scope of Article 1F(a).") *Ntaguerura*, CRR, SR, 282.004, 19 June 1996 (*Commission de recours de réfugiés* excluded a former Minister in the interim government of Rwanda noting that the international community had classified the massacre of Tutsis in Rwanda during the period of his office as genocide)*; Bicamumpaka*, CRR, 294.336, 23 October 1997 (*Commission de recours de réfugiés* excluded a journalist who had worked from 1990 to 1994 for a state radio station in Rwanda used as an instrument for government propaganda); the article also notes at page 198:

> "[i]n Belgium, the [*Commissaire general aux réfugiés et aux apatrides*] CGRA took four decisions along similar lines in 1996 (three cases) and in 1997 (one) and excluded a former Minister under the Habyarimana Government, two leading members of the extremist political parties (all three were found to have actively supported the *interahamwe* militias), and a journalist who broadcast propaganda."

[12] See *Thambipillai v. Canada (Minister of Citizenship and Immigration)* IMM-5279-98, 22 July 1999 (participation in torture while working for the Indian Peace Keeping Forces in Sri Lanka); *Aleman v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 710, 25 June 2002 (new evidence related to participation in crimes against humanity as member of the El Salvadorean army).

[13] See UN Security Council Resolution 1315 (2000), 14 August 2000.

19. Article 8 of the Statute of the Special Court for Sierra Leone sets out the relationship with the national courts of Sierra Leone demonstrating that it is not part of the national court system:

> "1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.
>
> 2. The Special Court shall have primacy over the national courts of Sierra Leone."

20. In a ruling rejecting a preliminary motion by Charles Ghankay Taylor that as former head of state of Liberia he had immunity for the crimes for which he is indicted, the Special Court for Sierra Leone itself considered the question of its status, deciding:

> "(a) the Special Court is not part of the judiciary of Sierra Leone and is not a national court;
>
> (b) the Special Court is established by treaty and has the characteristics associated with classical international organizations (including: legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct of that of its members.)
>
> (c) the competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the International Criminal Court, including in relation to the provisions confirming the absence of entitlement of any person to claim immunity.
>
> (d) accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court."[14]

21. Therefore, for the purposes of the Federal High Court's review, the indictment of the Special Court for Sierra Leone should be treated as the indictment of an international criminal court or tribunal.

[14] *Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction*, 31 May 2004, paragraph 41.

(b) The charges against Charles Taylor amount to war crimes and crimes against humanity within the meaning of exclusion clause in Article 1F (a) of the Refugee Convention and Article I (5) of the OAU Refugee Convention.

22. Charles Taylor was indicted on 7 March 2003 on a 17-count indictment for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes), and other serious violations of international humanitarian law, set out in the Statute of the Special Court for Sierra Leone. These charges fall within the scope of Article 1F (a) of the 1951 Refugee Convention and Article I (5) of the OAU Refugee Convention.
23. The language of Article 1F (a) of the 1951 Refugee Convention and Article I (5) of the OAU Refugee Convention does not limit the scope of the crimes to the status of the war crimes and crimes against humanity at the date of the Conventions were adopted, but allows for the evolution of the crimes into their current definitions. As the Lisbon Experts Roundtable noted:

> "The Rome Statute establishing the International Criminal Court and the Statutes of the two ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), constitute the latest comprehensive instruments informing the interpretation of article 1F (a) crimes. These, together with provisions in other international humanitarian law instruments, clarify the interpretation of crimes covered by article 1F (a)."[15]

24. The definitions of war crimes and crimes against humanity in the Statute of the Special Court for Sierra Leone are drawn from the definitions in the Rome Statute, the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and other international law.
25. The definitions of crimes against humanity in Article 2 of the Statute of the Special Court conform to the definition in the Rome Statute which was adopted by 120 states at the Rome Diplomatic Conference on 17 July 1998 and to date has been ratified by 94 states, including Nigeria.
26. The definitions of violations of Article 3 common to the Geneva Conventions of 12 August 1949 and of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 set out in Article 3 of the Statute of the

[15] Lisbon Experts Roundtable *Supra* note 10, paragraph 6.

Special Court are directly taken from those treaties. The Geneva Conventions of 12 August 1949 have been ratified by 193 states, including Nigeria on 20 June 1961. Protocol II has been ratified by 158 states, including Nigeria on 10 October 1988, and it has been signed by four other states.

27. Other serious violations of international humanitarian law set out in Article 4 of the Special Court's Statute are consistent with war crimes set out in Article 8 of the Rome Statute and other international humanitarian law.
28. Given the serious nature of the crimes concerned, Article 1F(a) is applicable at any time, whether the act in question took place in the country of refuge, country of origin or in a third country.[16]

(c) Principles of international refugee law and practice that should be applied by a state in determining whether to apply an exclusion clause to a person indicted by the Special Court for Sierra Leone.

(i) The decision-maker must consider the applicability of an exclusion clause when he or she is aware that an indictment by an international criminal court exists.

29. As the 2003 UNHCR Guidelines state:

> "States parties to the 1951 Convention/1967 Protocol and/or OAU Convention and UNHCR need to consider whether the exclusion clauses apply in the context of the determination of refugee status."[17]

30. The Standing Committee of UNHCR's Executive Committee[18] has explained:

> "If the protection provided by refugee law were permitted to afford protection to perpetrators of grave offences, the practice of international protection would be in direct conflict with national and international law, and would contradict the humanitarian and peaceful nature of the concept of asylum."[19]

[16] UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,* 4 September 2003, paragraph 11 (UNHCR Background Note).
[17] 2003 UNHCR Guidelines, *supra,* note 7, paragraph 7.
[18] Nigeria is a member of the Executive Committee of the High Commissioner's Programme (UNHCR's EXCOM), an intergovernmental body of 66 states (May 2004). EXCOM's conclusions on international protection, which are adopted by consensus, are regarded as authoritative in the field of refugee rights.
[19] Standing Committee Note on the Exclusion Clauses, 8th Meeting 30 May 1997, paragraph 3.

31. If a decision-maker, when it is considering an application for asylum, is aware that the person has been indicted for crimes against humanity and war crimes, it is obliged under the 1951 Refugee Convention and the OAU Refugee Convention to investigate the reports and to determine whether the person was subject to exclusion.[20]

(ii) A decision-maker should conclude that an indictment by an international criminal court meets the standard of proof set out Article 1F (a) of the 1951 Refugee Convention and Article I(5) of the OAU Refugee Convention that "serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity" exist.

32. This principle was adopted by UNHCR following the Rwandan genocide when it decided to exclude all those indicted by the ICTR[21] and is expressly incorporated into UNHCR's current policy:

> "Given the rigorous manner in which indictments are put together by international criminal tribunals…indictments by such bodies, in UNHCR's view, satisfies the standard of proof required by Article 1F."[22]

33. Originally, during the aftermath of the Rwandan genocide, UNHCR applied the same standard for issuing an ICTR indictment as the standard of proof for considering all such exclusion cases.[23] However, this was subsequently revised to impose an even lower standard of "more likely than not".[24]

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[20] The fact that Charles Taylor had been indicted by the Special Court for Sierra Leone was known to the government, since the indictment became public on 4 June 2003. The issue was also public knowledge at that time having been widely reported in the international, regional and national news. See, for example, Sierra Leone: Special Court indicts Liberia's Taylor for war crimes, BBC, 4 June 2003; Liberia's Taylor demands scrapping of UN court's war crimes indictment, AFP, 12 June 2003; U.S. Keeps door open to Liberia intervention, Reuters, 1 July 2003; Liberia High on leader's agenda, BBC, 10 July 2003; Nigerians unhappy with country's asylum offer to Liberia's Taylor, Lagos Vanguard, 12 July 2003; Nigerian union chief condemns asylum offer to Liberia's Taylor, The Guardian (Lagos), 14 July 2004; Liberia asks world court to quash Taylor's war crimes rap, AFP, 6 August 2003.

[21] Opening statement by the UN High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme at its forty-seventh session (Monday, 7 October 1996): "On our part, we have now officially excluded from our mandate all those Rwandans who have been indicted by the International Criminal Tribunal for Rwanda."

[22] UNHCR Background Note, supra, note 16, paragraph 107.

[23] UNHCR *Internal Memorandum, Guidelines on Application of Exclusion Clauses to Rwandan Asylum Seekers*, issued in September 1997, decided that the standard for meeting "serious reasons" was

34. As one leading commentator notes in relation to ICTY and ICTR indictments (footnotes omitted):

> "The standards for issuing and confirming an indictment in the Statute of the International Criminal Court and the Statutes for the Tribunals for the Former Yugoslavia and Rwanda appear to be somewhat lower than the 'serious reasons for considering' test…However, the practice of the Tribunals for the former Yugoslavia and Rwanda reveals that the prosecutors require significant evidence of involvement in international crimes before an indictment is issued. A decision maker may rely on the indictment of an individual by an international criminal tribunal for war crimes, crimes against humanity, or crimes against peace as constituting 'serious reasons for considering' that he or she has committed such crimes".[25]

35. This argument has even greater force in respect of an indictment by the Special Court for Sierra Leone where the standard is higher. Rule 47 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone requires that, before submitting an indictment for approval by the Designated Judge, the Prosecutor 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."

(iii) The burden of proof shifts to the indicted person.

36. As demonstrated above, an indictment by an international criminal court meets the standard of proof required by Article 1F(a) of the 1951 Refugee Convention and Article I(5) of the OAU Refugee Convention. In such circumstances, the burden of proof shifts to the indicted person to rebut the evidence. UNHCR in its 1996 Exclusion Clauses: Guidelines on the Application (1996 UNHCR Guidelines) provides:

"lower than the criminal law standard on which a conviction can be based but would equate with the standard required to bring a criminal indictment under the International War Crimes Tribunal for Rwanda".

[24] UNHCR *Revised Internal Guidelines on Screening Rwandans*, December 1997, at paragraph 8 "Following the experience of the screening teams and recommendations of various missions to assess the process, a threshold of 'more likely than not' is now being proposed"

[25] Michael Bliss, '*Serious reasons for Considering': Minimum Standards of Procedural Fairness in the Application of Article 1F Exclusion Clauses*, International Journal of Refugee Law, Volume 12, Special Supplementary Issue 2000, page 119.

> "In the extreme case of an asylum-seeker who is indicted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, or by a future International Criminal Court, a rebuttable presumption of exclusion is warranted".[26]

(iv) In order to grant asylum, a decision-maker must be satisfied that the presumption of excludability has been rebutted according to the correct standard of proof.

37. UNHCR provides:

> "When a rebuttable presumption does arise, the standard of proof to be met by the applicant to rebut the presumption is that of a plausible explanation regarding non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary."[27]

(v) A decision-maker should not apply the proportionality test in relation to crimes against humanity and war crimes contained in the indictment.

38. In most exclusion cases, decision-makers, in accordance with international human rights law, weigh the consequences of exclusion for the individual against the seriousness of the crimes. UNHCR's 2003 Guidelines conclude that "such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity and acts falling under Article 1F(c), as the acts covered are so heinous."[28]
39. At the same time as considering whether to apply an exclusion clause in a case involving crimes against humanity and war crimes, a court must, however, also consider whether an individual who is excluded from refugee protection is still protected from being subjected to *refoulement* under customary international

[26] UNHCR 1996 Guidelines, footnote 5. See also 2003 Guidelines, *supra* note 7, paragraph 34**:**
> "Where, however, the individual has been indicted by an international criminal tribunal…the burden of proof is reversed, creating a rebuttable presumption of excludability."

[27] UNHCR Background Note, *supra*, note 16, paragraph 110.

[28] 2003 UNHCR Guidelines, *supra*, note 7, paragraph 24. See also: Guy S. Goodwin, *The Refugee in International Law*, *supra* note 4, at page 97:
> "Arguably also the crimes mentioned in Article 1F(a) are necessarily extremely serious, to the extent that there is no room for any weighing of the severity of potential persecution against the gravity of the conduct, which amounts to a war crime, a crime against peace or a crime against humanity."

In *Gonzalez v. Minister of Employment and Immigration* [1994] F.C.J. No. 765 (FCA), the Federal Court of Canada held that there was no room for balancing in the application of Article 1F(a).

law,[29] and under instruments such as International Covenant on Civil and Political Rights[30] and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[31] in cases where s/he would be at risk of serious human rights violations such as torture. The prohibition of *refoulement* is absolute.

40. In a case where a person has been indicted by the Special Court for Sierra Leone, which is an international criminal court, that guarantees extensive rights of an accused person,[32] the person would not be at risk of human rights violations and

[29] Opinion by Sir Elihu Lauterpacht CBE, QC and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* para 252**:**

> "No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception." is an authorative view that set out the relevant content of the principle of non-refoulement under customary international law.

Available at: http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3b33574d1

[30] UN Human Rights Committee: General comment 20 to Article 7 (Forty-fourth session, 1992):

> "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."

[31] Article 3 states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[32] Article 17 of the Statute of the Special Court for Sierra Leone states:

"1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any

the prohibition of *refoulement* would clearly not apply. Although the person should not be precluded from making this claim, but the person should have the burden to prove that some difficult–to-imagine exceptional circumstances existed that made the person subject to the risk of an unfair trial or other grave human rights guarantees in an international criminal court, despite the guarantees in its statute and rules.

III. Consideration that the reviewing court should give to international condemnation of the government of Liberia's involvement in the Sierra Leonean conflict.

41. In addition to the weight of the indictment of an international criminal court, in cases involving a high ranking government official, a reviewing court should also consider evidence of international condemnation of the government for gross and systematic human rights abuses. UNHCR, in accordance with principles of individual criminal responsibility under international criminal law, concludes:

> "Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or to have condoned or acquiesced in the carrying out of criminal acts by subordinates, should be excluded from refugee status…
>
> [a] presumption of individual responsibility reversing the burden of proof may arise as a result of such 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. This 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 High Commissioner for Human Rights) for gross or systematic human rights abuses."[33]

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case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt."

[33] UNHCR Background Note, *supra*, note 16, paragraphs 57-58.

42. The standard of proof to rebut the presumption would be the same as set out in paragraph 34.
43. These principles are equally applicable to international condemnation of a government's practice of supporting groups charged with committing crimes against humanity and war crimes in other states. In this case, the reviewing court should consider the UN Security Council's strong condemnation of the government of Liberia in Resolution 1343 (2001) for its support of the Revolutionary United Front, which is consistent with the indictment of the Special Court for Sierra Leone:

> "Taking note of the findings of the Panel of Experts that diamonds represent a major and primary source of income for the Revolutionary United Front (RUF), that the bulk of RUF diamonds leave Sierra Leone through Liberia, and that such illicit trade cannot be conducted without the permission and involvement of Liberian government officials at the highest levels, and expressing its deep concern at the unequivocal and overwhelming evidence presented by the report of the Panel of Experts that the Government of Liberia is actively supporting the RUF at all levels, …
>
> Determining that the active support provided by the Government of Liberia for armed rebel groups in neighbouring countries, and in particular its support for the RUF in Sierra Leone, constitutes a threat to international peace and security in the region …
>
> *Demands* that the Government of Liberia immediately cease its support for the RUF in Sierra Leone and for other armed rebel groups in the region, and in particular take the following concrete steps:
>
> > cease all financial and, in accordance with resolution 1171 (1998), military support to the RUF, including all transfers of arms and ammunition, all military training and the provision of logistical and communications support, and take steps to ensure that no such support is provided from the territory of Liberia or by its nationals."

IV. The obligation to surrender a person indicted by an international criminal court or open an investigation with a view to determining whether to pursue criminal or extradition proceedings.

44. As demonstrated in Part I, the reason for including exclusion clauses in the 1951 Refugee Convention and the OAU Refugee Convention was to ensure that such persons could not use the asylum protections to evade justice. As the 2003 UNHCR Guidelines note, a decision to cancel refugee status on the basis of the exclusion clause in Article 1F(a) and grant the individual a stay on other grounds does not affect the obligations under international law that the person be criminally prosecuted or extradited.[34] The process for reviewing the refugee status of a person indicted by the Special Court should, therefore, also examine Nigeria's obligations with respect to a person charged with crimes under international law.
45. Nigeria has recognized in the context of international armed conflicts that it has an obligation to bring to justice in its own courts those who have committed or ordered grave breaches of the Conventions, to extradite them to another country willing and able to do so or to transfer them to an international criminal court. In contrast to violations of common Article 3 of the Geneva Conventions and violations of Protocol II, where there is no express obligation in these treaties to exercise universal jurisdiction, the treaty obligation with respect to grave breaches is absolute, and no state can excuse itself or another state from fulfilling it. [35] Nigerian courts have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.[36] Some of the conduct

[34] 2003 UNHCR Guidelines, *supra*, note 7, paragraph 8.

[35] However, the Geneva Conventions impose an obligation on all states to repress other violations of these treaties. Independently of these treaty obligations, all states are obliged to repress war crimes regardless whether they are committed during an international or a non-international armed conflict. See Amnesty International, *Universal Jurisdiction: the duty of states to enact and implement legislation* (AI Index: IOR 53/004/2001), (available at http:www.amnesty.org), September 2001, Chapter III, page 1 "The prohibition of war crimes is part of *jus cogens* (fundamental norms) and an obligation *erga omnes* (owed by all states to the international community as a whole) on all states to enforce."

[36] Section 3 (1) - (2) of the Geneva Conventions Act, Laws of the Federation of Nigeria 1990, ch. 162 § 3 (1) - (2) (formerly the Geneva Conventions Ordinance, 1960). Previously, the United Kingdom's Geneva Conventions Act 1957 applied to Nigeria under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 provides national courts with universal jurisdiction over grave breaches of the Geneva Conventions. That section provides in part:

> "(1) If, whether in or outside the Federal Republic of Nigeria, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the First Schedule to this Act, that is to say -

amounting to violations of common Article 3 of the Geneva Conventions and Protocol II over which the Special Court has jurisdiction under article 3 of its Statute, also amounts to grave breaches of the Geneva Conventions when committed in an international armed conflict. In part, as a result of the Liberian government intervention in the period that Charles Taylor was President, the conflict in Sierra Leone in the past decade has involved both international and non-international armed conflict.

46. As a party to the Rome Statute of the International Criminal Court, Nigeria has expressly recognized in the Preamble to that treaty that it is subject to a much broader obligation under international law to ensure the effective prosecution of crimes against humanity and war crimes "by taking measures at the national level and by enhancing international cooperation" and that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Granting asylum to a person indicted by an international criminal court for crimes against humanity and war crimes and obstructing justice by refusing to surrender that person to the international criminal court that has issued the indictment or to open a criminal investigation in its own courts is a breach of a state's obligations under international law.
47. In 1971, the UN General Assembly in its Resolution on the Question of the punishment of war criminals and of persons who have committed crimes against humanity constitutes further evidence in support of a rule of customary international law. It declared:

> "*its deep concern* at the fact that many war criminals and persons who have committed crimes against humanity are continuing to take refuge in the territories of certain states and are enjoying their protection,"[37]

(a) article 50 of the First Geneva Convention, 1949;
(b) article 51 of the Second Geneva Convention, 1949;
(c) article 130 of the Third Geneva Convention, 1949;
(d) article 147 of the Fourth Geneva Convention, 1949;
he shall, on conviction thereof -

(i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the Convention in question, be sentenced to death, and (ii) in the case of any other such grave breach, be liable to imprisonment for a term not exceeding fourteen years.

(2) A person may be proceeded against, tried and sentenced in the Federal Capital for an offence under this section committed outside Nigeria as if the offence had been committed in the Federal Capital, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital."

[37] G.A. Res. 2840 (XXVI) of 31 October 1971.

and urged all states:

> "to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes."

48. In 1973, the UN General Assembly adopted the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, which went even further in stating this obligation of all states, declaring:

> "war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and if found guilty, to punishment"

and

> "States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes." [38]

A fortiori, these obligations apply to state cooperation with an international criminal court.

49. Moreover, to the extent that charges relate to conduct amounting to torture and other cruel, inhuman and degrading treatment or punishment, Nigeria is also bound by its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture).[39] Nigeria ratified the Convention against Torture on 28 June 2001. Article 6 (1) of the Convention against Torture expressly provides:

> **"**Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person

[38] *Supra* note 5.

[39] Although the Special Court's indictment does not specifically indict Charles Taylor for torture as a crime against humanity, the charges include acts that can amount to torture and other cruel, inhuman and degrading treatment or punishment, including, rape and other forms of sexual violence (counts 5 to 7); outrages upon personal dignity including: mutilations (count 8); violence to life, health and physical or mental well-being of persons in particular cruel treatment (counts 9 and 16); other inhumane acts (count 10).

alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted".

If a person has been indicted by an international criminal court for conduct amounting to torture and other cruel, inhuman and degrading treatment or punishment, a state party to the Convention against Torture would be obliged under Article 6 (1) to take the person into custody or take other legal measures to ensure the person's presence and then determine whether criminal or extradition proceedings should be instituted.

In Article 5(2) of the Convention against Torture , every state party must establish jurisdiction over persons suspected of torture present in the country where it does not extradite the suspect and pursuant to Article 7(1), if the suspect is not extradited must "submit the case to its competent authorities for the purpose of prosecution."

50. Although the UN Security Council has to date not adopted a resolution under Chapter VII of the UN Charter requiring states to cooperate with the Special Court for Sierra Leone, there is nothing to prevent the government of Nigeria from entering into a cooperation agreement with the Special Court or from otherwise surrendering a person indicted by the Court to face the charges against them.

Conclusions

51. There is a clear prohibition under international law of granting asylum to a person where there are serious reasons to believe they have committed crimes against humanity or war crimes. The fact that a person has been indicted by an international criminal court is a significant factor which must be taken into account by the determining authority, including placing the burden of proof on the indicted person to demonstrate that they are not subject to the exclusion clause.
52. The reviewing court, at the same time as considering the applicability of the exclusion clause, should also consider how the state can meet its obligations under international law in relation to serious charges of crimes under international law contained in the indictment by the international criminal court. This includes whether the state should surrender the person to the international criminal court or open a national investigation in relation to the charges. Failure to take any

measures would amount to a clear violation of Nigeria's obligations under international law.