REVIEWING THE TRANSFER CHARLES TAYLOR TO THE HAGUE

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Abstrak

Sierra Leone mengalami perang saudara yang mengerikan pada tahun 1991 yang menyebabkan sebanyak 100.000 kematian dan hampir 450.000 orang pengungsi. Selama perang, Charles Taylor, Presiden Liberia membantu kelompok pemberontak di Sierra Leone yaitu the Revolutionary United Front (RUF) baik logistik, keuangan dan materi. Setelah perang saudara selama satu dekade, Sierra Leone bersama dengan Perserikatan Bangsa-Bangsa (PBB) setuju untuk membentuk pengadilan kriminal internasional yang mrupakan suatu pengadilan khusus untuk Sierra Leone (selanjutnya disingkat SCSL) untuk menghukum pelaku serius selama perang. Meskipun Sierra Leone membentuk pengadilan sendiri dan mempunyai kemampuan untuk mengadili penjahat lainnya di wilayahnya, Charles Taylor sendiri yang dipindahkan ke Den Haag, wilayah lain di luar Sierra Leone. Studi ini bertujuan untuk memberkan argumen bahwa pengadilan kriminal internasional seharusnya secara cermat mempertimbangkan pemindahan tertuduh untuk menjamin proses hukum yang sah. Studi ini tidak menentang pemindahan tersebut dengan pertimbangan keadaan Sierra Leone pada saat itu. Meskipun demikian, proses untuk memutuskan pergantian tempat haruslah lebih transparan dan adil bagi tertuduh. Studi ini mencoba mengusulkan rekomendasi bagi pengadilankriminal internasional di masa datang ynag bermaksud melakukan penggantian tempat beracara melalui pembelajaran dari kasus Charles Taylor.

Kata kunci: Charles Taylor, the Hague, Sierra Leone

Abstract

Sierra Leone fell in a devastating civil war in 1991, which caused 100,000 deaths and almost 450,000 refugees and internally displaced people. During the war, Charles Taylor, the President of Liberia assisted a rebel group in Sierra Leone, the Revolutionary United Front (RUF) logistically, financially, and materially. After a decade-lasting civil war, Sierra Leone agreed to establish an international criminal tribunal, the Special Court for Sierra Leone (thereafter, SCSL or Special Court), with the United Nations to punish the most serious perpetrators during the war. Although Sierra Leone established its own tribunal and had capacity to try other criminals within its territory, Charles Taylor was the only person transferred to the Hague, another territory outside of Sierra Leone. This study is intended to argue that the international criminal tribunals should carefully consider the transfer of the accused in transparent manner to ensure due process and legitimacy among ordinary population by looking at the case of the transfer of Taylor to The Hague by

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the SCSL. This study does not oppose the transfer itself. Rather, it was probably necessary under the fragile security situation in Sierra Leone at a given time. Even so, the process to decide the change of venue should be more transparent and fair for the accused. This study tries to propose a recommendation for future international criminal tribunals for the change of venue of the accused through the learning from the case of Charles Taylor.
Keywords: Charles Taylor, the Hague, Sierra Leone

A. Background

The indictment and arrest of Charles Taylor for war crimes and crimes against humanity marked a significant development for international criminal justice. Although most Head of States have enjoyed immunity from their atrocities, Taylor's case will be future precedence that Head of States are as responsible for their conducts as any other citizen. After a decade-lasting civil war, Sierra Leone agreed to establish an international criminal tribunal, the Special Court for Sierra Leone (thereafter, SCSL or Special Court), with the United Nations to punish the most serious perpetrators during the war. The SCSL had difficulty to arrest the sitting Head of State because he was in peace negotiation of a Liberian civil conflict when the Court issued the arrest warrant. After his arrest, the tribunal procedure was not without any problem in the trial of the former president of Liberia. One of the most controversial decisions was the transfer of Taylor to The Hague for his trial. In principle, defendants who commit crimes should be tried in the crime-conducted territory. Only when domestic courts are unwilling or unable to do so, international criminal courts can try as its alternative. Although Sierra Leone established its own tribunal and had capacity to try other criminals within its territory, why only Charles Taylor was transferred to another territory outside of Sierra Leone? What were the international community and the government of Sierra Leone's rationale to do so? What was the proceeding to decide the change of venue? Few scholars discussed about this issue so far.[1] This study will research this issue by looking at legal framework as well as the proceedings.

Justice Raja N. Fernando, then President of the SCSL requested to the government of the Netherlands and to the International Criminal Court (ICC) to conduct Charles Taylor's trial in The Hague on 29 March 2006, where the trial is held by the Trial Chamber of the SCSL sitting in The Hague under Rule 4 of the Rules of Procedure and Evidence (thereafter, Rules) today.[2] Fernando's primary reason to transfer Taylor to The Hague was concerns

[1] Giulia Bigi, "The Decision of the Special Court for Sierra Leone to Conduct the *Charles Taylor* Trial in The Hague," *The Law and Practice of International Courts and Tribunals* 6. 2007: 303-316.; Pádraig McAuliffe, "Transitional Justice in Transit: Why Transferring a Special Court for Sierra Leone Trial to The Hague Defeats the Purposes of Hybrid Tribunals," *Netherlands International Law Review*. 2008: 365-393.

[2] The Rules of Procedure and Evidence. Available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=yNjqn5TIYKs%3d&tabid=176>. Cited on Dec. 25, 2010.

about stability and security in the West Africa sub-region if the trial were held in Sierra Leone's capital, Freetown.[3] The Appeals Chamber mentioned that the change of venue is purely administrative and diplomatic function of the President and avoided even to discuss this issue with its judicial function.[4] This decision raises concerns on the fundamental legal aspects of transparency and due process for the accused.

B. Discussions

1. Brief History of the Sierra Leonean Civil Conflict

Sierra Leone was one of the British colonies in West Africa until it achieved independence in 1961. After the independence and the first election in 1962, Sierra Leone seemed to establish and maintain democratic regime. In 1967, its second election provided an opposition party, the All People's Party (APC) led by Siaka Stevens, to rule the country. However, the country became unstable with a series of coups and counter-coups. After consecutive three coups within one year, the APC finally could form a government in 1968. This formation of civil government did not lead to democratization and democratic consolidation. Instead, Sierra Leone transformed itself into a one-party state under the APC. During this one-party regime, the government prevented opposition parties, civil society, and independent press from strengthening. The army also weakened under the Stevens's leadership, and all senior officers were replaced by APC loyalists.[5]

Under the one-party rule, political and socioeconomic conditions deteriorated. The governance failures, particularly political corruption, were exacerbated by an economic crisis.[6] Internal and external pressure to liberalize the political system gradually became intensified.[7] The pressure made the APC give up maintaining the one-party constitution, and this was believed to pave the way for multi-party elections. The APC government created a new Constitution in 1991, approved by popular referendum. The Constitution provided the establishment of government institutions, guaranteed civil and political rights, and gave the composition, powers, and functions of an autonomous electoral commission.[8] Then, President Momoh announced to hold a multi-party

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[3] Bigi. 304.

[4] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-SR72-104, Appeals Chamber, Decision on Urgent Motion Against Change of Venue, 29 May 2006. Available at <http://www.sc-sl.org/scsl/Public/SCSL-03-01-Taylor/SCSL-03-01-AR72-104.pdf>. Cited on Dec. 27, 2010.

[5] Adekeye Adebajo, "Sierra Leone: A Feast for the Sobels," in *Building Peace in West Africa: Liberia, Sierra Leone, and Guinea-Bissau* (79-109), (Boulder, Colo.: Lynne Rienner Publishers, 2002), p.81.

[6] Adebajo, p.81.

[7] See Jimmy D. Kandeh, "Transition Without Rupture: Sierra Leone's Transfer Election of 1996," *African Studies Review*, Vol. 41, No. 2, 91-111.

[8] M. Jide Balogun, "Election Monitoring An Early Warning Perspective and Governance Capacity Building Strategy," *Paper Presented at Regional Workshop on Capacity Building in Electoral*

election in 1992. However, democratic transition was not followed smoothly by the establishment of democratic legal framework. The 1992 elections were never held. Instead, armed rebellion against the repressive government took place. This civil war was the result of political repression, political corruption, and alienated people from the political process.[9]

Sierra Leone fell in a civil war in 1991 after its one-party government failed to perform well politically and economically. In the civil war, then Liberian President Taylor played an important role by supporting a rebel group, the Revolutionary United Front (RUF) led by Foday Sankoh. Taylor himself became the president of Liberia from the leader of a rebel group, the National Patriotic Front of Liberia (NPFL). Taylor supported Sankoh logistically, financially, and materially. Taylor provided personnel forces and weapons for the RUF in exchange for diamond resources as intending to put his RUF ally in power in his neighbor country. Sankoh tried to seize power in the same way to Taylor's for his presidency. The RUF attracted a lot of dissatisfied youths and took control over southeastern diamond mining areas. The Sierra Leone Army could not defeat the RUF due to its capacity weakened during one-party regime. Military officers worried of the RUF's dominance overthrew Momoh government and formed a military junta. However, the junta could not achieve a peace agreement with the RUF to end the conflict, and then, the junta decided to hand over power to a newly elected government. In 1996, Sierra Leone had an election still at war, and the electorate chose Ahmad Tejan Kabbah as their president. The election did not also lead to peace and stability in the small West African state.

Although Economic Community of West African States (ECOWAS) sent peacekeeping force, Economic Community of West African States Monitoring Group (ECOMOG), to Sierra Leone to make peace, the security situation was not improved. Eventually, United Nations took over the control of peacekeeping mission from ECOMOG and sent its own peacekeeping force as United Nations Mission in Sierra Leone (UNAMSIL). The government and the RUF agreed Lomé Accord to end the war, but the RUF did not follow the peace process, and they even attacked and abducted the UN peacekeepers. With Britain's military intervention in Sierra Leone, Sierra Leone could finally succeed in establishing peace and stability.[10] In addition to the deployment of more trained and effective peacekeeping forces, the international community imposed economic sanctions against weapons, diamonds, and travel on Liberia. These sanctions were intended to prevent Taylor from supporting

Administration in Africa, Tangier, Morocco, 24-28 September, 2001, p.16.

[9] Jimmy D. Kandeh, "Sierra Leone's Post-Conflict Elections of 2002," *The Journal of Modern African Studies*, 41(2), 189-216, p.192.

[10] See Funmi Olonisakin, *Peacekeeping in Sierra Leone: the Story of UNAMSIL*. (Boulder, Colo.: Lynne Rienner Publishers, 2008).

the rebels in Sierra Leone as well as weakening the control of Taylor within Liberia. In January 2002, President Kabbah declared that disarmament completed and civil war was over. The war in Sierra Leone resulted in as many as 100,000 deaths and almost 450,000 refugees and internally displaced people, approximately 10 percent of the 5.2 million population.[11]

2. The Establishment of the Special Court for Sierra Leone (SCSL)

President Kabbah sent a letter for the UN Secretary-General to ask the UN to help creating an independent and credible court to bring justice for atrocities by the members of the RUF and maintain peace and security in Sierra Leone.[12] The UN Security Council Resolution 1315 (2000) responded the letter with request for the UN Secretary-General and the government to negotiate and create an independent special court.[13] The UN Secretary-General and the government of Sierra Leone agreed to establish the SCSL to prosecute persons who bear the greatest responsibility for the commission of serious violation of international humanitarian law and crimes committed under the Sierra Leonean law against the people of Sierra Leone and the United Nations and associated personnel in January 2002.[14] Following the Agreement, the UN and the government of Sierra Leone issued the Statute of the Special Court for Sierra Leone (thereafter, Statute) in October 2003.[15] The Statute provided jurisdiction and organizational framework of the Special Court.

The SCSL is a hybrid international-national tribunal. The SCSL is based on international and domestic laws and judges. The serious violations include crimes against humanity, war crimes, other serious violations of international humanitarian law, and crimes under Sierra Leonean law.[16] In other words, the Special Court has jurisdiction over

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[11] Carter Center, *Observing the 2002 Sierra Leone Elections: Final Report*, May 2003. Available at http://aceproject.org/regions-en/countries-and-territories/SL/reports/Final%20Report%20on%20Sierra%20Leone%20Elections-2002.pdf. Cited on Nov. 28, 2010.

[12] UN Doc S/2000/786. Available at <http://www.undemocracy.com/S-2000-786.pdf>. Cited on Dec. 25, 2010.

[13] UN Doc S/RES/1315. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement>. Cited on Dec. 27, 2010.

[14] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (thereafter, Agreement), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>. Cited on Dec. 25 2010.

[15] The Statute of the Special Court for Sierra Leone, Article 1(1): The Special Court for Sierra Leone shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone. Available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>. Cited on Dec. 25 2010.

[16] The Statute, Article 2 to 5.

both international and national laws. The judge is also composed of hybrid personals in both Chambers. In a Trial Chamber, one is appointed by the Government of Sierra Leonean, and the other two by the UN; a Appeals Chamber is composed of two judges appointed by Sierra Leone and the other three by the UN.[17] The Statute also contemplates that the Special Court will be guided by both decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and decisions of the Supreme Court of Sierra Leone.[18]

The Special Court is located in Freetown, Sierra Leone, where the crimes took places, unlike past ad hoc international criminal tribunals, such as the ICTY in The Hague, the Netherlands, and the ICTR in Arusha, Tanzania. Thus, the SCSO is the international tribunal in the *locus criminis*. Jalloh argued that the SCSL presents the most advanced 'nationalized' international tribunal model accountable for the perpetrators of the serious crimes.[19] These hybrid nature and location of the SCSL is intended to outreach the ordinary population in Sierra Leone. To ensure this function, the Rules of the SCSL provided legal basis of establishing an Outreach Office.[20] The Special Court ensures the accessibility of the proceedings to the affected population by the crimes as well as the territorial linkage.[21] The establishment of the SCSL was also the first attempt to create an international tribunal by a bilateral treaty between the UN and its member states.[22] This foundation of the Special Court enjoyed the consent and support from the host state, and this is expected to raise fewer legal concerns and function effectively.[23] Through all these means, the SCSL attempted to maximize the local legitimacy and ownership as well as ensure international standards to prosecute the perpetrators of the most serious crimes.

3. The Indictment and Arrest of Charles Taylor

The Statute clearly mentioned that the positions of Head of States or Governments would not relieve the responsibility nor mitigate punishment if they are accused.[24] On 7 March 2003, the Prosecution issued indictment against Charles Taylor, but it was kept sealed. In June 2003 when Charles Taylor was in Ghana for peace talks to end a Liberian 14-year lasting civil war as a Head of State, the Prosecutor of the SCSL,

[17] The Statute, Article 12
[18] The Statute, Article 20(3).
[19] Charles C. Jalloh, "The Contribution of the Special Court for Sierra Leone to the Development of International Law", *African Journal of International and Comparative Law*, Vol. 15, No. 2 (September 2007) 165-207.
[20] The Rules, Article 33(A).
[21] Bigi, p.311.
[22] Jalloh. The ICTY and the ICTR were established by the UN Security Council Resolution respectively the Resolution 808/827 and the Resolution 995.
[23] James L. Miglin, "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone," *Dalhousie Journal of Legal Studies*, Vol. 16, 21-46, p.25.
[24] The Statute, Article 6(2).

David Crane, unsealed his indictment and issued an international arrest warrant and order to transfer against the former Liberian President. Taylor was charged with 17 counts indictment for crimes against humanity, war crimes, and other serious violations of international humanitarian law.[25] Later, his indictment was amended to an 11-count criminal charge.[26] The SCSL, however, does not have its own force to enforce its arrest warrants; thus, the SCSL largely relies upon the good will of governments to take actions and execute its arrest warrants.[27] Ghanaian authorities did not execute the order when the arrest warrant was issued. Even if Ghana wanted, Miglin argued, it was difficult that it could have lawfully arrest him because Taylor was absolutely immune from the criminal jurisdiction from Ghana as a sitting Head of State.[28]

At the time of arrest warrant, Taylor's grip on power weakened due to the international sanctions and other warring factions' attacks. In August 2003, Taylor handed over power to his vice president when he noticed that he could not reverse the situation. In exchange for step-down, he achieved an asylum deal in Nigeria to eschew his arrest.[29] Nigeria's decision to allow Taylor into exile was political decision to bring peace and stability in West Africa sub-region. While Charles Taylor was in Nigeria as an asylum status, however, Taylor tried to influence politics in Liberia. The newly elected President of Liberia, Ellen Johnson-Sirleaf, requested Nigerian government to hand over Taylor to the Special Court.[30] On March 29 2006, Taylor was arrested close to Nigerian border with Cameroon after he had disappeared from his residence in Nigeria. He was deported to Liberia under the authority of the UN Security Council Resolution 1638[31] and then, transferred to the Detention Centre of the SCSL in Freetown. On April 3 2006, he was officially charged for 11 counts crimes at his initial appearance before the SCSL in Freetown.

4. The Decision to Conduct the Charles Taylor Trial in The Hague

[25] *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I-001, Indictment, 7 March 2003, <http://www.sc-sl.org/LinkClick.aspx?fileticket=5glkIHnmPYM=&tabid=159> cited on Dec. 25 2010.

[26] *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I-75, Amended Indictment, 17 March 2006. <http://www.sc-sl.org/LinkClick.aspx?fileticket=VIfMuLYvYs4=&tabid=159>. Cited on Dec. 25, 2010.

[27] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915. <http://www.afrol.com/Countries/Sierra_Leone/documents/un_sil_court_041000.htm>. Cited on Jan. 13, 2011.

[28] Miglin, p.42.

[29] See Desirée Nilsson and Mimmi Söderberg Kovacs, "Breaking the Cycle of Violence? Promises and Pitfalls of the Liberian Peace Process," *Civil Wars* 7(4). 2005: 396–414.

[30] Miglin, p.21.

[31] UN Doc S/RES/1638. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/600/30/PDF/N0560030.pdf?OpenElement>. Cited on Jan. 13, 2011.

When Charles Taylor was arrested, Justice Raja N. Fernando, then President of the SCSL, requested to the government of the Netherlands and to the President of the International Criminal Court (ICC) to conduct Charles Taylor's trial in The Hague on 29 March 2006. Judge Fernando referred to concerns about security in West Africa sub-region in his letter.[32] On 6 April 2006, the Counsel of Taylor filed an urgent emotion before Trial Chamber II and requested 1) to order no change of venue from Freetown to another location without giving Taylor an opportunity to be heard on the important issue, 2) to request the President to withdraw the request to use the ICC Detention Centre, and 3) to clarify that the requests and the decision have not yet been made to transfer Taylor to the Netherlands for trial.[33] In the meantime, even before Chambers II made any decisions, the ICC agreed to provide the SCSL the services, facilities, and support on 13 April 2006.[34] The Prosecution filed its Response to the Urgent Defense Motion by mentioning that the change of venue is the President of the SCSL's administrative capacity.[35] Trial Chamber II found that the Motion raised objections based on lack of jurisdiction pursuant to Rule 72(B)(i) by challenging the President's authority to decide whether to change the venue of the trial and alleged an abuse of process pursuant to Rule 72(B)(v) by arguing that the President discriminated against the accused.[36] The Trial Chamber referred to the Appeals Chamber for determination pursuant to Rule 72(B)(E) and (F) on 3 May 2006.

Although the Trial Chamber II pointed out Rule 72 of the Rules, the legal issues to transfer Taylor's trial to another location are the Agreement and the Rules for its procedures of the change of venue as the Urgent Defence Motion cited, which respectively provide that;

'The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocate outside Sierra Leone, if

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[32] The Special Court for Sierra Leon, Press and Public Affairs Office, Press Release of 30 March 2006. Available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=gR%2bYCtzTfKg%3d&tabid=111>. Cited on Dec. 25, 2010.

[33] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-PT-91, 6 April 2006. Available at <http://www.sc-sl.org/scsl/Public/SCSL-03-01-Taylor/SCSL-03-01-PT-91.pdf>. Cited on Dec. 28, 2010.

[34] Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone, (Thereafter, Memorandum). Available at <http://www.icc-cpi.int/NR/rdonlyres/66184EF8-E181-403A-85B8-3D07487D1FF1/140161/ICCPRES030106_en.pdf >. Cited on Jan. 12, 2011.

[35] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-PT-92, 25 April 2006. Available at <http://www.sc-sl.org/scsl/Public/SCSL-03-01-Taylor/SCSL-03-01-PT-94.pdf>. Cited on Dec. 27, 2010.

[36] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-PT-98, 3 May 2006. Available at <http://www.sc-sl.org/scsl/Public/SCSL-03-01-Taylor/SCSL-03-01-PT-98.pdf>. Cited on Dec. 27, 2010.

circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leon, on the one hand, and the Government of the alternative seat, on the other.'[37]

And that;

'A Chamber or a Judge may exercise their functions away from the Seat of the Special Court, if so authorized by the President. In so doing, audio or video-link technology, email or other available electronic instruments may be used if authorized by the President or Presiding Judge.'[38]

The legal basis to relocate trials exists in these provisions, but what circumstances meet 'if it considers it necessary for the efficient exercise of its functions' are not mentioned clearly. However, the Appeals Chamber did not address this ambiguity of the law and mentioned that the Trial Chamber's referral was inappropriate, because the Urgent Defence Motion requested relief that the Trial Chamber did not have the power.[39] The Appeals Chamber cited that matters relating to the change of venue of the Taylor trial were 'exclusively' within the administrative and diplomatic mandate of the President. The Appeals Chamber continued to mention that the Urgent Defence Motion was inadmissible because it sought to interject the Chambers into the administrative and diplomatic functions of the President. Neither the Statue nor the Rules authorizes Chambers to intervene the administrative and diplomatic functions entrusted to the President; thus, neither the Trial Chamber nor the Appeals Chamber was not authorized to take the actions sought by the Defence. Finally, the Chamber concluded;

'Accordingly, the Appeals Chamber finds that the Motion is inadmissible and, thus, dismisses the Motion in its entirety.'[40]

Following this decision, UN Security Council Resolution 1688 (2006) provides the legal basis for the relocation of the trial on 16 June 2006.[41] On 20 June 2006, Taylor was sent to the Detention Centre of the International Criminal Court (ICC) in The Hague, where the Trial Chamber of the SCSL would conduct the trial.

The decision to transfer Taylor to The Hague raises three problems: due process guarantees for the accused, the ICC's role as a complementary court to a national one, and the revival of rule of law in post-conflict states. First, the change of venue of Taylor trial raised an important question on the due process guarantees for the accused. As mentioned above, under the Agreement and the Rules,[42] the SCSL has

[37] Agreement, Article 10.
[38] Rules, Rule 4.
[39] *Prosecutor v. Charles Ghankay Taylor*, 29 May 2006.
[40] *Prosecutor v. Charles Ghankay Taylor*, para 9, 29 May 2006
[41] UN Doc S/RES/1688. Available at <http://www.undemocracy.com/S-RES-1688(2006).pdf>. Cited on Dec. 27, 2010.
[42] Agreement, Article 10.; Rules, Rule 4.

flexibility of the change of venue, but the problem is that these provisions do not mention which circumstance are necessary conditions. Rule 100 of the ICC Rules of Procedure and Evidence provides that the ICC would decide to sit in another location if it considers it would be "in the interests of justice",[43] and Rule 4 of the ICTR Rules of Procedure and Evidence allows the President to authorize the conduct of the jurisdictional functions away from the original seat if this would be "the interests of justice" as well.[44] The SCSL Rule does not contain any reference, and the Agreement also provides just 'if it considers it necessary for the efficient exercise of its functions'. Thus, there is space of interpretation on these provisions for the matter.

The Urgent Defence Motion could have been a chance to clarify which circumstances could meet these provisions. The Appeals Chamber, however, did not mention any reasoning to send Taylor to The Hague by saying the decision was purely administrative functions of the President. In other words, the judges of the SCSL avoided to even consider the procedure of the change of venue as the President's decision is final. The President could achieve huge discretion without judicial control to decide whether transfer of Taylor's trial is necessary or not. This full autonomy of the President may make due process, which is necessary for fair trials, uncertain and make the accused in a weak position.[45] Since the change of venue is exclusively administrative, the President could transfer any accused to another location without intervention. Even if the transfer negatively affects, anyone cannot challenge the decision.[46]

Moreover, the international criminal tribunals are expected to have demonstration effect for the domestic courts to understand the respect of laws and due process cultures by showing the international standard of judicial process. Ratner and Abrams argued that the elements of the culture of respect for fairness and impartiality of process and the rights of the accused are the most important elements for countries in transition.[47] Thus, the lack of proper proceedings may have opposite impact on domestic courts. This also may lead a perception among the public that the Special Court is seen as international, imposed, and alienated among them. In other words, this may eventually undermine the legitimacy of the SCSL among ordinary Sierra Leoneans.

Second, although the Statute of Rome mentions that the ICC is complementary function to domestic courts,[48] the ICC accepted Taylor

[43] Rule 100 of the ICC Rules of Procedure and Evidence. Available at <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf>. Cited on Jan. 13, 2011.

[44] Rule 4 of the ICTR Rules of Procedure and Evidence. Available at <http://www.unictr.org/Portals/0/English/Legal/ROP/100209.pdf>. Cited on Jan. 13, 2011.

[45] See Cristian DeFrancia, "Due Process in International Criminal Courts: Why Procedure Matters," *Virginia Law Preview*, Vol. 87, 1381-1349.

[46] Bigi, p.308.

[47] Cited in McAuliffe, p.375.

[48] Article 1 and 17 of the Rome Statute of the International Criminal Court (ICC).

to detain in its Detention Centre even before the Appeals Chamber of the SCSL rendered the judgment. Although the ICC provides only its Detention Centre and the Taylor's trial itself is conducted under the jurisdiction of the SCSL, the process to decide the transfer did not meet enough the criteria of the ICC as the complementary function of domestic courts. This was because there was not careful judicial discussion held in the Special Court on whether the trial of Taylor is incapable for the Special Court. Without the careful and clear consideration on the matter, the SCSL's decision to transfer Charles Taylor to The Hague may harm the principle of complementarity.

The decision to conduct Taylor Case in The Hague was in-between 'unwilling' and 'unable'. Obviously, the President of the SCSL did not wish to try Taylor in Freetown because he was afraid of that his trial in Freetown may cause insecurity and derail peace process in Sierra Leone.[49] This decision can also be explained with 'unable'. What are situations that the ICC determines that a state is unable to prosecute an individual? The State of Rome referred that a state is unable when it is "a total or substantial collapse or unavailability of its national judicial system".[50] Ellis clarified four categories to fit the words 'collapse' and 'unavailability';

1. States entangled in conflict,
2. States in political unrest or economic crisis,
3. States in transition, and
4. States entirely lacking the type of judicial system to meet international standard.[51]

Probably the case of Taylor's transfer fills into this second category. Indeed, the reasoning of the President of the SCSL was concern about security in the sub-region.[52] The reason itself was understandable at the given time. It was believed that there were still many supporters of Charles Taylor in West Africa. UN Security Council Resolution 1688 referred that if Taylor Case was held in Freetown, insecurity would have spread in the wider sub-region, and the presence of Taylor is impediment to stability and threat to peace.[53] Then, the Resolution established the necessary legal framework of the transfer.

There was a case that the accused was sent to a special Scottish Court sitting in the Netherlands, *Lockerbie Case*.[54] In this case, Libyan

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<http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf>. Cited on Jan. 13, 2011.

[49] Laura A. Dickinson, "The Promise of Hybrid Courts," The American Journal of International Law, Vol. 97, No. 2, Apr. 2003, 295-310, p.309. The SCSL, Press Release of 30 March 2006.

[50] The Statute of Rome, Article 17(3).

[51] Mark S. Ellis, "The International Criminal Court and its Implication for Domestic Law and National Capacity Building," *Florida Journal of International Law*, Vol. 15, 2002-2003, 215-242, p.238.

[52] The SCSL, Press Release of 30 March 2006.

[53] UN Doc. S/RES/1688.

[54] The *Lockerbie Case* was the bombing of Pan Am Flight from London to New York over

domestic court tried to prosecute the two Libyan accused. However, the domestic prosecution did not meet international credibility, and Libyan President, Colonel Qaddafi, agreed to extradite them to a neutral country after pressured by the international community.[55] In other words, the Libyan domestic court tried, but it was determined as unable to conduct the trial of international crimes in international standard. Thus, the Scottish Court conducted the trial against the two Libyan accused as its complementary court to the incapable domestic court. In contrast, the SCSL has capacity to conduct other trials of those who responsible for serious crimes in international standard. As mentioned above, the case of Taylor was seen as dangerous to be held there among the international community. Even so, the decision to transfer Taylor to The Hague did not consider if the trial can really be held in Freetown or not; thus, it is questionable that the ICC's acceptance of Taylor was a complementary function.

Third, the relocation of Taylor's trial may have negative impact on the rule of law in the host country. International criminal tribunals have two-fold aims. First, as clearly mentioned in UN Security Council Resolution 1638[56] and the Agreement,[57] it is necessary to prosecute persons who are responsible for serious crimes against humanity. Second, post-conflict states need reconstruction of a rule of law.[58] The rule of law is meant that the majority of people has knowledge of laws, understands of the meanings, and trusts the courts to apply them equally to everyone.[59] To achieve both purposes, the UN and the government of Sierra Leone established a hybrid international-national court. This is because post-conflict states frequently lack the capacity of conducting fair trials without international assistance. There are a couple of reasons. First, those states do not have infrastructures for fair trials due to the decade-lasing devastating conflict. The lack of capacity is not only physical infrastructure, such as courtroom, but also personnel including trained judges, lawyers, and administrators.[60] Through working with the international judges, lawyers, and administrators, domestic counterparts can benefit a lot on their skills and knowledge. Second, the public do not have trust toward the existing judicial branch since the justice was manipulated under the dictatorship of one-party state system where courts are instrument of governments to abuse their rights.[61] International criminal tribunals can bring the legitimacy as fair trials

Lockerbie, Scotland, which resulted in the death of 270 persons.

[55] Jonathan I. Charney, "International Law and the Role of Domestic Courts," *The American Journal of International Law*, Vol. 95, No. 1, Jan. 2001, 120-124, p.123.; Bigi, p.315.

[56] UN Doc S/RES/1315.

[57] The Agreement, Article 1.

[58] Thomas Carothers, "The Rule-of Law Revival," Foreign Affairs, Vol. 77, No. 2, 95-106.

[59] McAuliffe, p.371.; Carothers, p.96.

[60] Roland Paris, *At War's End: Building Peace after Civil Conflict*. Cambridge: Cambridge University Press, 2004.

[61] Kandeh, 1998.; Kandeh, 2003.

among the public.

The SCSL is not exceptional of the purposes. The SCSL is a hybrid international-national tribunal, composed of international judges and Sierra Leonean judges. The Special Court also has jurisdiction over international and national laws, as mentioned above. The SCSL even established the Outreach Office to communicate the most affected by crimes. Thus, the Special Court has more emphasis on local legitimacy and ownership than the previous ad hoc international criminal tribunals. Through them, it intends that the court could reconstruct the rule of law: the hybrid court body penetrates the norm of rule of law into both the local jurisprudence of the country and the popular consciousness of local population.[62]

However, the change of venue of Taylor, who is one of the most responsible for atrocities during the civil war, may not be compatible with this purpose. To revive the rule of law, the location has a significant impact. McAuliffe argued that the closer the affected by wars experience of the trial, the more legitimate its practices become in their eyes.[63] One of the key lessons from the past international criminal tribunals of the ICTY and the ICTR was that people are less likely to have a positive attitude to institutions that operate abroad, regardless of their success in prosecuting the most serious criminals in the conflicts in the region.[64] As learning the failures, the UN and the Sierra Leone chose to create a hybrid criminal court located in Freetown. Bigi argued that it cannot be ignored that the transfer of Taylor's trial limits the accessibility of the community most affected by the war to the proceeding of trial.[65]

BBC surveyed Sierra Leoneans on the issue of the SCSL during June and July 2007.[66] This survey showed complex attitudes among the people to the decision to hold the trial of Charles Taylor in The Hague. The vast majority of Sierra Leoneans are aware of Charles Taylor's trial, and 47 percent of respondents think that the trial should be held in The Hague where it is now on the one hand. In this regard, the decision of the SCSL was understood among the local population, and a half of the population supports the decision of transfer to another location. On the other hand, there is almost the same percent of the respondents, 41%, thinking that Taylor should be tried in Freetown or somewhere in Sierra Leone. This result may be caused by the lack of explanation from the SCSL. Particularly, the Special Court avoided to review the transfer and possibility to try in Freetown. Even if it was necessary to relocate the venue, transparent procedure of the change of venue is required to

[62] Dickinson, p.305.
[63] McAuliffe, p.372.
[64] McAuliffe, p.372.
[65] Bigi, p.312.
[66] BBC World Service Trust, 2008. Survey. Available at <http://www.communicatingjustice.org/files/content/file/Surveys/Sierra%20Leone%20primo%20PDF%20version.pdf>. Cited on Jan. 11, 2011.

overcome the crisis of legitimacy and for the most affected by wars to understand why the transfer is necessary. Through this process, the purpose of the international criminal tribunals could be guaranteed.

C. Conclusion

This study looked at the decision of the SCSL to conduct the trial of Charles Taylor, the former Liberian President, in The Hague. Sierra Leone had a decade devastating civil war, which caused 100,000 deaths and almost 450,000 refugees and internally displaced people, approximately 10 percent of the 5.2 million population. During the war, Taylor assisted a rebel group, the RUF, logistically, financially, and materially. With the international intervention, Sierra Leone achieved peace and stability in 2002. Even before the official declaration of war over, the UN and the government of Sierra Leone agreed to establish the SCSL to prosecute persons who are the greatest responsible for serious violations of international humanitarian law and Sierra Leonean law.[67] The Special Court is formulated in hybrid manner between international and national. Besides of its hybrid jurisdiction, The SCSL includes both international and national judges in both Chambers, and it is located in Freetown where victims most affected by the war are.

Charles Taylor was indicted by the SCSL while he was still a Head of State.[68] As the international pressure and a Liberian civil war worsened for him, Taylor stepped down from presidency and fled to Nigeria as an asylum status. Nigeria handed over Taylor to the Special Court with a formal request from the newly elected Liberian President under the pressure of the international community. Right after he was sent to Freetown, the President of the SCSL expressed concern about peace and security n West Africa sub-region and requested the ICC to conduct Taylor's trial in The Hague.[69] The Counsel of Taylor filed an urgent motion not to order the change of venue before the accused would hear the reasons on the important issue.[70] However, the Appeals Chamber concluded that the Motion was inadmissible since the transfer was exclusively administrative and diplomatic functions of the President.[71] The ICC accepted the request that Taylor would be transferred to its Detention Centre and his trial would be held there under the SCSL's authority and jurisdiction, even before the decision was made.[72] After the UN Security Council provided the legal basis of the transfer,[73] the Special Court transferred him to The Hague.

The transfer of Taylor to The Hague has some problems since the Appeals Chamber avoided even considering the proceedings of the change of venue. First, the lack of judicial review may undermine the importance of due process. This huge discretion of the President makes due process guarantees

[67] The Agreement, Article 1.
[68] *The Prosecutor v. Charles Ghankay Taylor*, 7 March 2003,
[69] The SCSL, Press Release of 30 March 2006.
[70] *Prosecutor v. Charles Ghankay Taylor*, 6 April 2006.
[71] *Prosecutor v. Charles Ghankay Taylor*, 29 May 2006.
[72] Memorandum.
[73] UN Doc S/RES/1688.

uncertain since he could transfer anyone to another location without any judicial control, which disrupts fair trials for the accused. Second, the ICC's acceptance of Taylor may not meet its complementary function because it is not clear that the SCSL is really incapable to conduct the trial without careful consideration. The ICC conducts its jurisdiction only when domestic courts are unwilling and unable to do so.[74] Due to the Appeals Chamber's avoidance to even check the proceeding, the capability of the SCSL was left out from the discussion. Third, the relocation of the greatest responsible person for atrocities in the civil war may hinder the legitimacy of the Special Court and undermine the rule of law in the local community. The reconstruction of rule of law is one of the main purposes of international criminal justice. The SCSL also tried to achieve the goal through the means of hybrid characteristics of the body. Although the relocation limits accessibility of the community to the trial proceedings, ordinary Sierra Leoneans may perceive the decision unacceptable without well explanation of the decision. It was shown in BBC survey that almost same percent of population see the change of venue of Taylor acceptable or unacceptable.[75]

The Agreement and the Rules[76] provides flexibility of the change of venue, and the reasons of the SCSL were understandable in the given circumstance of post-conflict security. However, this does not mean that the President could decide the issue without any judicial reviewing on the proceedings. Even if it is necessary to relocate the venue, this research argues that transparent procedure is required to ensure due process guarantees for the accused and understand why the transfer is necessary for the most affected by wars. With such careful discussion on why transfer is necessary, the ICC can also enjoy its role as the complementarity. This paper does not intend to argue that all the population has to accept the decision of transfer, but at least the attempt is necessary. This recommendation will be applicable for future conducts of international criminal courts and the ICC. This learning from Taylor's case would develop the norms and functions of international criminal tribunals to be more transparent and credible.

[74] The Rome Statute, Article 1 and 17.
[75] BBC World Service Trust.
[76] Agreement, Article 10.; Rules, Rule 4.

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