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iLawyer

A Newsletter on International Justice

In This Issue...

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Guénaël Mettraux

Another busy couple of months for international criminal justice

Another busy couple of months for international criminal justice marked by significant advances (the first ICC judgment in *Lubanga* and the beginning of the *Mladic* trial before the ICTY), jurisprudential milestones (the *Special Tribunal for Lebanon* declaring itself jurisdictionally competent to try four absentees in relation to the killing of Lebanon's former PM, Rafik Hariri; the prosecution of Somali 'pirates' in France and elsewhere) as well as worrying retreats from the rule of law (Guantanamo, the "extradition" of El-Senussi to Libya and a difficult awakening from the Arab spring for the rule of law). David Tolbert (on the Arab Spring and the Rule of Law), Rachel Lindon (concerning the prosecution of Somali pirates in France), Miša Zgonec-Rozej (STL jurisdiction decision) and Julien Maton (on Guantanamo) contribute important and thoughtful pieces on these developments.

Also in the news is the ever contentious doctrine of 'joint criminal enterprise' – discreetly put aside by the *Taylor* Trial Chamber and making a cameo appearance in a very odd South African case. iLawyers Wayne Jordash and Guénaël Mettraux scrutinize it, once again...

Whilst international criminal tribunals are busy at it, the ICJ too is increasingly entangled in litigations pertaining to overlapping domestic criminal jurisdictions and competing demands for justice and political convenience. Guest blogger Philippa Webb discusses two recent ICJ cases (Equatorial Guinea's efforts to bring France before the Court in relation to alleged violations of immunities of an official in relation to a criminal investigation carried out by France and *Belgium v Senegal*'s "prosecute or extradite" case concerning Chad's former President Hissène Habré) which could once again re-draw the line between old and new international law.

Finally, Professor Nielsen of *Aarhus* University puts forth a most original (and welcome) idea: that of an Office of the Historian for the ICC, which could contribute to ensuring accountability and oversight of the Court and make the record of important developments in the life of the ICC.

iLawyers, Guest Bloggers and iCoordinators wish you an interesting read.

International Justice Review

2 July 2012

Libya: ICC staff released

The four staff members from the International Criminal Court (ICC) held by a militia in Libya, were released. The four, including Australian lawyer Melinda Taylor, had been held in Zintan since June 7, after travelling there to help prepare Saif al-Islam Gaddafi's defence. They were arrested and accused of spying and breaching national security.

10 July 2012

ICC Sentences Thomas Lubanga Dyilo to 14 Years Imprisonment

The ICC sentenced Thomas Lubanga Dyilo to 14 years imprisonment. Mr Lubanga was convicted on 14 March 2012 of "conscripting and enlisting children" when he was commander-in-chief of the Patriotic Forces for the Liberation of Congo (FPLC). On 7 August, the ICC issued a decision on the applicable principles for determining reparations for victims arising out of the case against Mr Lubanga.

18 July 2012

Mali Refers its Situation to the ICC Prosecutor

A delegation from the Government of Mali transmitted a letter to the Chief Prosecutor of the ICC, Fatou Bensouda, referring the "situation in Mali since January 2012" and requesting that the OTP open an investigation. The situation relates to violence that began in Mail last January, characterized by alleged killings, abductions, rapes and conscription of children, as well as the deliberate destruction of Muslim shrines.

30 July 2012

STL Trial Chamber Rules on Jurisdiction

The Trial Chamber of the Special Tribunal for Lebanon (STL) confirmed the Tribunal's jurisdiction to try those accused of committing the 14 February 2005 attack against former Lebanese Prime Minister Rafic Hariri and connected cases. Defence Counsels brought an appeal against this decision before the STL Appeal Chamber, where their challenges were heard on 1 October.

22 August 2012

Senegal and African Union set up special tribunal to try Habré

Senegal and the African Union concluded an agreement on the establishment of a special tribunal to try Hissène Habré. Mr Habré is accused of crimes against humanity, war crimes and torture, in relation to events occurred between 1982 and 1990, when he was President of Chad.

28 August 2012

First Witness takes the Stand in Ratko Mladic Trial

On 9 July, Elvedin Pasic became the first witness to testify in the ICTY case against Ratko Mladic. Mr Pasic, now 34, was a Bosniak teenager from Hvracani during the war. He recounted how he was captured by Bosnian Serb soldiers in November 1992, and that after being held in a makeshift detention centre he survived a massacre that left around 150 people dead in the Bosnian village of Grabovica, including his father.

28 August 2012

ECtHR Hears Tymoshenko Case

The ECtHR held a public hearing in the case concerning Ukrainian opposition leader Yuliya Tymoshenko. Ms Tymoshenko complained that her detention is politically motivated and unlawful and that her detention conditions are inadequate, in violation of various articles of the European Convention.

5 September 2012

Abdullah al-Senussi Extradited

Deposed Libyan leader Muammar Gaddafi's intelligence chief was extradited to Libya from Mauritania. Mr Senussi was sent back to Libya six months after being arrested at Nouakchott airport in Mauritania after flying in from Morocco. He had fled Libya after last year's uprising.

5 October 2012

Abu Hamza Extradited to the United States

The British High Court ruled on the final proceedings concerning five alleged terrorists who have been detained in the UK pending extradition to the US where they face various charges of terrorism. Each of the claimants had brought separate claims for judicial review and for stay of their extradition. The British High Court dismissed the five claimants' applications for permission to apply for judicial review or for a re-opening of the statutory appeals. A few hours later, the five men were on way to the US.

Q&A 10 Questions for Guénaël Mettraux, Defence Counsel before International Jurisdictions

1. Dr Mettraux, you have represented accused before a variety of international jurisdictions, including the ICTY, the ECCC, the STL and the ICC. What is the greatest challenge for a defence lawyer practicing before international criminal tribunals? And what is the greatest challenge facing the system of international accountability as a whole?

The use of plural would be in order here. In no particular order, the following would be among the greatest challenges defence counsel are likely to meet in international criminal cases: a culture of inadequate disclosure by the prosecution; the non-cooperation of potential information-providers (first among them, states) which hampers defence ability to get to relevant information and to prepare for trial; the bureaucratic burden that the administrative arm of international criminal tribunals typically inflicts on defence teams; and then there is the lurking risk of international criminal tribunals creating new law to fit the facts of the case.

As to the greatest challenge facing the system of international accountability as a whole, I believe it is selectivity. International criminal justice has to find the tools – legal, political and institutional – to make itself relevant to all, not just to some.

2. The various international tribunals before which you have worked have widely differing rules of procedure. Which of them better protect the accused's right to a fair trial and why?

The ones that work best are those which are clear, fair and which do not change all the time. Civil or common law is a non-issue. The real issue is whether the Rules provide for effective safeguards against unfairness or whether those have been peeled off from any effective protections in the name of expeditiousness or hybridation. These Rules too often give priority to practical concerns over the need to ensure fairness and *quality* of litigation.

3. What are your views on the role of the UN Security Council in referring (and potentially) deferring cases before the ICC? Is some justice better than none - or does the Council's role undermine the legitimacy of the court as a whole?

The Security Council does its – political – job. It can be selective if it wants to. The concern should be with the ICC, which has the responsibility to maintain its own independence,

impartiality and, most importantly, the appearance thereof. Some justice might be better than none, but the question is whether Justice suffers from hyper selectivity of prosecutions and whether the credibility of the ICC as an independent judicial organ is negatively affected by its apparent subjugation to the will of a political body. I have little doubt that the ICC is well aware of that risk. Part of the answer should come in the form of a genuinely independent exercise of prosecutorial policies in choosing and selecting cases and transparency in disclosing the factors that have led her to select this or that case rather than others.

4. More generally, how do you think the ICC can reformulate its approach especially in Africa to tackle the question of its acceptance by various African states?

I think that the ICC will resolve its African problem outside of Africa. If it can start credibly prosecuting cases in other parts of the world, it will not have to worry much about perception in Africa. That issue is alive now because it has no good answer to its almost exclusive focus on Africa.

5. Do you feel that in times to come the ICC should address newer and more nuanced areas of International Criminal Law such as Cyber Law, Cyber Warfare, drug-related crimes, corruption and terrorism?

More work for the ICC? I think that the Court has – at this ⏩

⏩ point at least – much more work than it can effectively chew. It needs to learn – fast – to work as an effective judicial body. Giving the Court more to do at this point (even if the giving is mostly abstract as with the case of "aggression") can only further slow down its learning process. Better, in my view, for the Court to focus on its core mandate and for it to work towards learning to fulfill that core mandate effectively, expeditiously and professionally.

6. What is your idea about the liability of multi national corporations for human rights abuses? Do you think international criminal law could become a credible deterrent for such violations, particularly in relation to the role of private contractors in conflict areas?

I am wary of too much criminal law. And even more wary of new criminal law that is put in the books but remains un-enforced. Criminal law could of course play a role in cases of grave human rights violations, but there are in my view other means of deterrence (including through financial sanctions) that might be more adequate for most other cases as a means of prevention. I reserve my right, of course, to change my opinion if and when truly effective enforcement mechanisms become available.

7. Do you think the interests of international justice would be better served by referring situations and conflicts arising in the most diverse parts of the planet to the ICC or is it more appropriate, at least in some cases, to create new ad hoc international tribunal with a geographically defined mandate and jurisdiction?

That would depend on how quickly the ICC can learn to work effectively and how big a caseload it is able to absorb. At the current path of things at the ICC, international justice would remain so symbolic in scope and ICC cases so few that its preventive effect is likely to remain anecdotal. If the situation does not improve on that front, new *ad hoc* Tribunals (*not my preference*) or muscled-up domestic jurisdictions (*a better idea, all things equal*) might have to carry some of the burden of prosecuting those cases that the ICC is unable to take on board. The creation of new *ad hoc* tribunals in those places where the ICC could otherwise exercise its jurisdiction would, furthermore, be a scathing acknowledgement of the ICC's limitations and ineffectiveness. Politically, it would be hard for states to justify creating such tribunals in those situations, even in cases where the demands for justice would be high. I wish states were a little more willing to be critical of the current performance of the ICC, if only to make it possible for the Court to absorb many more cases should there suddenly be an increased demand for international accountability. The need for other (*ad hoc*) tribunals might not then be completely blunted, but this question would be a much more remote concern if that were the case.

8. Moving on to your personal experience, what advice do you have for a young and upcoming international law student planning to work in the field of international criminal law? Do you feel experience in domestic criminal law is a necessary ingredient?

My advise: *do <u>not</u> do what I did*. So, I would advise them to learn their job in their home jurisdiction and come over to The Hague after a few years to learn new skills and contribute fresh ideas.

9. What has been your proudest professional moment?

Seeing justice done for Messrs Halilovic and Boskoski at the ICTY. Judges acquitted them, not me, so they deserve most of the credit for getting it right. But I remain very proud of the work that the *Halilovic* and *Boskoski* defence teams put into those cases to help Judges reach their decision.

10. Is there anyone you would not represent? Is there anyone you would like to prosecute?

No, unless the alleged crimes impacted friends or their relatives. Lawyers from the common law tradition have a sounder understanding of this issue than (many of) their civil-law counterparts. The responsibility to evaluate the merit of charges against an accused – and assess his responsibility – is with the court, not with counsel. Counsel's responsibility is to ensure that their clients effectively represented (guilty or not) and that they are treated fairly by the court. Furthermore, it is critical to counsel's effectiveness in this sort of case not to confuse his client's best interest (in the proceedings) with his client's political views or agenda.

And yes to the second question, there are a couple of people that I would have loved to prosecute. One of them comes to mind in particular, but the Prosecutor did well enough without my assistance…

Prof. Philippa Webb

New ICJ Case? Equatorial Guinea seeks to bring proceedings against France

On 25 September, Equatorial Guinea sought to institute proceedings against France at the International Court of Justice. It is the latest in a series of cases brought by African countries against France for purported violations of the immunity of State officials.

Equatorial Guinea claims that France has breached international law through proceedings and investigative measures taken against the President of Equatorial Guinea and the Vice-President, who is also the Minister of Agriculture and Forestry and the son of the President. Guinea makes references to an arrest warrant being issued against the Vice-President and the seizure of property and premises by French judges during an investigation. This is related to the French 'ill-gotten gains' investigation targeting three African leaders and their families for alleged embezzlement of State funds, including €160m worth of assets located in France invested in bank accounts, Riviera villas and luxury cars.

The first challenge that Equatorial Guinea faces is establishing the ICJ's jurisdiction since there is no basis in the Optional Clause nor in the compromissory clause of a treaty. Equatorial Guinea has therefore brought its claim on the basis of Article 38(5) of the Rules of Court, whereby the Applicant State asks the other State to consent to the Court's jurisdiction solely for the purpose of that case (forum prorogatum).

This provision of the Rules has been invoked three other times in cases against France. The first time was in Certain Criminal Proceedings in France, where the Republic of the Congo complained about French proceedings against its President, the Minister of the Interior and the Inspector-General. France consented to the Court' s jurisdiction under Article 38(5), but the case was withdrawn by the Republic of the Congo in November 2010 before a judgment could be rendered:

In Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Djibouti alleged that, inter alia, witness summons against the President, the Procureur de la République and the Head of National Security breached international law. France consented to the proceedings and the Court issued its Judgment in 2008, finding that the dignity of the President had not been harmed by the summons and that the required steps for invoking the immunity of the other two officials had not been taken.

Finally, in 2007, Rwanda tried to institute proceedings against France under Article 38(5) with respect to arrest warrants issued by French officials against Rwanda's Chief of General Staff of its Defence Forces, the Chief of Protocol attached to the Presidency and the Ambassador of Rwanda to India. It also challenged a request apparently from France to the UN Secretary-General that President Kagame should stand trial at the ICTR.

France did not consent to the ICJ's jurisdiction under Article 38(5) so the case was never entered onto the docket or 'General List' of the ICJ. France apparently lifted the arrest warrants in 2010.

It will be interesting to see how France will react to Equatorial Guinea's request. If France consents and the case proceeds to Judgment, it will raise fascinating issues of international law, including whether the ICJ's views on the scope of the immunity of State officials has changed since the Arrest Warrant Judgment of 2002 and the limits on the pre-judgment attachment of property. It will be a complementary case to Germany v Italy, which looked at these issues from the perspective of the immunity of the State itself.

Dr. P. Webb is a Lecturer in International Law at King's College London and a legal consultant in international law.

Miša Zgonec-Rozej

Comment on the STL Jurisdiction Decision

The Trial Chamber of the Special Tribunal for Lebanon (STL) held in its decision of 27 July 2012 that the STL had been lawfully established and that it has jurisdiction to try those accused of committing the 14th February 2005 attack against the former Lebanese Prime Minister Rafic Hariri and connected cases. The Trial Chamber rejected its competence to judicially review the Security Council's resolution 1757 (2007) establishing the STL and reiterated Lebanon's obligation, as a member state of the United Nations (UN), to comply with this Resolution.

The Defence challenges

Defence counsel for the four accused, who are being tried in their absence, submitted separate motions challenging the STL's jurisdiction and the legality of the STL's establishment, arguing that the Tribunal was set up illegally and that the Security Council exceeded its powers when it created it, that its establishment violates the sovereignty of Lebanon and is unconstitutional under Lebanese law, that it has selective jurisdiction and cannot guarantee the fair trial rights of the accused.

The Trial Chamber's decision

The Trial Chamber found that the Defence motions were not challenges to jurisdiction but rather challenges to the legality of the STL. It held that the STL was lawfully established, having been created by the UN Security Council – a body having the power to establish a criminal tribunal. The Trial Chamber held that its Statute and Rules of Procedure and Evidence provided the four accused with all the necessary fair trial rights as required by international human rights law. In rejecting the claim that the STL's existence violated Lebanon's sovereignty, the Trial Chamber held that this claim had never been advanced by Lebanon which, on the contrary, had been fulfilling its obligations under Resolution 1757. As Resolution 1757 was the sole basis for establishing the STL, the Trial Chamber did not consider it necessary to review the alleged violation of Lebanon's Constitution.

The competence to review the Security Council Resolution

This decision raises a number of interesting as well as contentious issues. This comment will focus on the Trial Chamber's findings on the question of whether it has the power to review the legality of the relevant Security Council resolution. In the absence of any explicit authorisation in the Statute of the STL, the Trial Chamber held it had no such power. The Trial Chamber further held that, apart from the International Court of Justice (ICJ), which could potentially ⏩ judicially review the Security Council's decisions, no other judicial body possesses such a power.

This ruling runs directly counter to the historic Tadić jurisdiction decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY was likewise established by the Security Council acting under Chapter VII of the UN Charter. In 1995, in Tadić (the first case before the ICTY) the ICTY Appeals Chamber reviewed the legality of its own creation – applying the principle known as la compétence de la compétence – and thus reviewed, incidentally, the legality of the resolution establishing the ICTY. The Appeals Chamber (President Cassese presiding) held that although the establishment of an international criminal tribunal was not expressly mentioned among the enforcement measures provided for in Chapter VII, it fell within the powers of the Security Council under Article 41 of the UN Charter as a possible measure to be taken in response to a threat to the peace. The Appeals Chamber of the International Criminal Tribunal for Rwanda followed Tadić, taking the same approach in the Kanyabashi case.

The STL Trial Chamber provided no reasons for departing from the Tadić precedent. However, the establishment of the STL is, if anything, more controversial than that of the ICTY, and hence more in need of judicial review. While there was an on-going armed conflict in the former Yugoslavia, the determination that a single terrorist ⏩

⏩ act without any cross-border effects constitutes a threat to international peace and security is disputable. While the ICTY has jurisdiction over all international crimes committed during the war, the STL is competent only to try one criminal incident associated with the assassination of Hariri (and the so-called connected cases) but not any other terrorist acts in Lebanon. While the ICTY deals with genocide, war crimes and crimes against humanity under international law, the STL deals with terrorist crimes under domestic law. While all UN member states are obliged to cooperate with the ICTY, only Lebanon is required to cooperate with the STL.

While correctly noting that in its advisory opinion in the Namibia case, the ICJ explicitly rejected its powers of judicial review in respect of decisions taken by the UN organs, the STL Trial Chamber failed to consider that the ICJ has in effect reviewed the legality of Security Council resolutions in both advisory opinions and contentious cases, including in the Namibia case. Although the question of the power and scope of a review of the Security Council resolution by judicial bodies remains contentious, the Trial Chamber failed to consider, without any explanation, the Defence's arguments with regard to the evolving practice of various judicial bodies, including the European Court for Human Rights and the European Court of Justice, that have engaged in different forms of review of Chapter VII measures.

Conclusion

The Trial Chamber's decision, which the Defence have notified their intention to appeal, can be seen as a pragmatic one, given the political complexity surrounding the establishment of the STL. However, it is noticeably weak in its analysis and reasoning. The establishment of the STL is yet another innovative Chapter VII measure, the legality of which the STL should be able to review in accordance

with la compétence de la compétence principle. This is not to say that the STL can review all and any political decisions of the Security Council, but it was certainly open to the Trial Chamber to consider, on the basis of Tadić and other precedents, that it had the power to review the legality of the establishment of the STL under the UN Charter.

It remains to be seen whether the STL's Appeals Chamber, when it hands down its decision in the Antonio Cassese courtroom of the STL, will follow the road paved by its erstwhile president who masterminded the Tadić jurisdictional decision.

Background

In December 2005, the Lebanese Government requested the UN to establish a tribunal of an international character to try all those allegedly responsible for the Hariri attack and related killings. In 2007, the UN and the representative of the Lebanese Government signed a draft agreement but the agreement was not formally ratified by the Lebanese Parliament. Consequently, at the request of the Lebanese Prime Minister, the Security Council, acting under Chapter VII of the UN Charter, adopted resolution 1757 (2007) which enforced the provisions of the agreement and the STL's Statute. The STL, which has a majority of international judges, became operational on 1 March 2009. Four accused have so far been indicted, all of whom remain at large. On 1 February 2012, the STL decided to proceed to the trial of the four accused in absentia, a decision currently challenged by the Defence. A tentative date for the start of their trial is 25 March 2013.

The decision has received limited attention in Lebanon. The present government, which came to being after a long STL related crisis, finally agreed to approve the payment of its current financing contribution despite the opposition to the Tribunal by its members.

Miša Zgonec-Rozej is a teaching fellow at the Centre for International Studies and Diplomacy (CISD). She was formerly an associate legal officer at the ICTY, a law clerk at the ICJ, and a lecturer at the Faculty of Law, University of Ljubljana.

Rachel Lindon

Treatment by France of Somalis accused of piracy

For the French version of this post, click here.

Two trials have been held to date in France against Somali accused of piracy off the Somali coast.

At the first trial, which was held in November 2011 in the case known as the Carré d'As, between the six accused persons, one was acquitted, and the other five were sentenced to 4 to 8 years of imprisonment. The prosecution appealed and the decision is not final.

In the second trial, which was held in June 2012 in the case known as the Ponant, between the six accused, two were acquitted, and the other four were convicted and sentenced to 4 to 10 years of imprisonment. This decision has become final, without appeal of the parties.

Thus, to date, four Somali are free in France: three were acquitted and suffered for several years from undue and arbitrary detention, and the latter, after suffering an unreasonably long detention of four years, has covered his sentence (France, regularly condemned by the European Court of Human Rights for too long holding periods, set a fatal world record in provisional detentions of alleged Somali pirates ...).

After being arrested in Somali territory (land or maritime territory) transferred to France, what were the conditions of pre-trial detention of Somalis during the long years of investigations, and what has been provided their release?

Treatment by France of Somali in Detention

These twelve Somali, guilty or not, have been uprooted from their lands to be transferred to prisons in a country that was unknown to them.

Brutally uprooted, they were held in conditions which became almost inhuman: Somali speaking only, and having to be separated from each other during the investigation, they could not communicate with anyone for years, except during interrogation from the judge.

Lawyers have consistently sought the services of an interpreter for parlors. The judges also asked the interpreters for all investigative actions.

However, these twelve Somali have never benefited through an interpreter, in detention, both for medical procedures, sometimes heavy, than for disciplinary commissions in violation of the principle of respect for the human dignity of prisoners, recognized by the European Court of Human Rights (RAFFRAY TADDEI C. France, 21 December 2010, § 50) and the Standard Minimum Rules for the Treatment of Prisoners, as defined by the United Nations High Commissioner for Human Rights (Article 36 § 2).

Many of them were victims of violence by other inmates, especially since they were particularly isolated, and French Prison Administration seems to have too often failed in its duty to investigate, in violation of the jurisprudence of the ECHR (PREMININY C. RUSSIA, February 10, 2011).

To these were added the difficulties and violations due to isolated situation of Somali nationals: they did not receive funds from outside (while the need for a nest egg in French prisons is essential for a minimal survive , to rent a TV, and buy food), they received no visit and rarely hear from their families, a letter annually at most, while most were married and fathers of families.

These remands were so violent that many of them have suffered from serious psychological problems, were interned in psychiatric hospitals of the Penitentiary Administration, to the point that some even free, are still under psychiatric care.

Treatment by France of Somali out of Detention

The hope of the trial and the end of the hardness of ⏩

⏩ the detention was of short duration for those who have been released: released a few hours after the deliberations, at night, in Paris, the French penitentiary administration gave them , in addition to bundles of clothes accumulated during detention with the help of NGO, a kit for needy persons, including a tube ticket, five restaurant tickets and a phone card…

France did not consider it necessary to predict what would happen to these men, arrested more than 6,000 km away, found innocent for three of them, after detention.

They can not, whether innocent or guilty, return to their country because of retaliation incurred. Indeed, justice demanded full cooperation, summing them to provide the names of powerful pirate leaders who act in Somalia.

These real culprits, these warlords exploiting the misery of Somali people and possessing themselves properties from piracy, both in Nairobi and London, are still active on the spot, without ever having been disturbed, France contenting itself with underlings or innocents, who now could be sentenced to death if returned.

Somalis acquitted, and those guilty but having cooperated, free or still detainees, are therefore forced to seek asylum in France because they fear persecution in their home country and can not claim its protection.

But no more than return to their countries is not possible, a life in France is.

Left in the streets of Paris as suddenly as they were apprehended in Somalia, they had roofs to sleep and food thanks to the solidarity of civil society, Somalia community, lawyers, translators, and associations for housing…

Somali fishermen, who speak little or no French, they found themselves again in extreme poverty, but in an unknown environment, and permanently separated from their families.

Their ludicrous situation having raised concerns of some people: the three Somali of the Ponant, out of custody on 15 June 2012, at 3:00 am, finally found an association for temporary accommodation, in expectation of places in a Center for Asylum Seekers (their particular circumstances has led their demand for housing to be considered a priority).

They will also receive financial aid granted by the French government for all asylum seekers of the order of 400 Euros monthly.

Finally, for those finally ⏩

Julien Maton

Guantanamo's Perversion of Justice

In a recent article in The Guardian, Richard Dicker discusses the stark contrast between the Nuremberg trial and Guantánamo's Camp Justice, in light of the politics of the US Government in terms of fair trial rights.

The US government's willingness to offer a fair trial, as it was the case at Nuremberg, is not reiterated at Guantánamo. On the contrary, the US government restricts the exercise of basic fair trial rights guaranteed by international and US domestic law.

The author states that the Nuremberg trial marked a stunning turning-point in using law to punish the most egregious crimes and laid the foundation for the still-evolving system of international justice. On the other hand, Guantánamo is unlikely to create such a powerful positive precedent.

For instance, anything detainees or their lawyers say in the courtroom is presumed classified, so that none of what they say will ever appear in the public record, explains the author.

Moreover, the prosecutor can unilaterally veto a defense attorney's decision to call a witness. If this is the case, the lawyer must debate with the prosecutor in front of the judge. For Richard Dicker, this constitutes an unfair allocation of power between prosecution and defense which directly violates the "equality of arms", and locks in a prosecutorial advantage that undercuts a vigorous and effective defense.

Based on the growing awareness worldwide of the efforts that have succeeded in bringing some of those accused of the world's worst crimes to justice, Richard Dicker urges policymakers in Washington to raise due process guarantees at Guantánamo if they don't want to undercut US credibility in pressing for justice elsewhere but also to devalue Nuremberg's achievements.

Julien Maton works in a Defence Team at the Special Tribunal for Lebanon.
He has previously worked as an intern in the Defence of Jean-Pierre Bemba before the ICC

⏩ acquitted, an emergency interim proceedings for compensation of arbitrary and undue detention has been presented to judges. Justice will have to quantify 50 months of arbitrary detention and lives permanently broken…

Meanwhile, the fate of those still held is far from being solved. Convicted and sentenced to 4 to 10 years imprisonment (sentence that may seem minor, but the French people, through its jury took into account the specificity of the crimes and the situation on the ground), they soon come out of detention.

Within a month, the minor of the case so called Carré d'As, 17 years old at the time of the facts and therefore his detention, sentenced to 4 years in prison, has completed his entire sentence. He should therefore be released.

Again, there are no plans for his release: he can not leave French territory, because he must wait for the appeal of his case (which will probably take place in spring 2013). But so far, he will not be legally on the territory, and can not expect any housing assistance...

He will be outside the walls of FLEURY MEROGIS (the biggest jail in Europe) with no money, no family and no papers, but not deportable and forced to stay.

The French government, which so wanted to protect its nationals as crew in the Gulf of Aden, will therefore leave a young adult, totally isolated, speaking only a few words of French taught in contact with other inmates and knowing of our territory only our jails, roam in our streets, while waiting for the appeal lodged by the prosecution...

France does not have him learned its language nor a job, only to survive in a prison, and then survive in a city so far away from his past life...

Somalis will face then released to the French administrative rigor:

Services of insertion and probation apply their rules: no paper, no help to the output.

Services for asylum seekers theirs: following an asylum application (performed within strict rules), and without dwelling on their criminal status, housing is granted in certain conditions.

Services of the Ministry of Justice asking that we apply their own: it only remains to seek compensation for those innocent, and if not, it is not their concern anymore…

France behaves like the international community with Somalia, applying abstract rules, to the country, or its nationals transferred to France, without evoking the particularism of their situations.

Do the fight against piracy and declarations for electioneering purposes allow the "homeland of human rights" to violate these rights and to throw men in our jails and then in our streets?

Treatment that these men accused of piracy, innocent or guilty, have faced in France, make them actually regret Somalia, a country without government, in civil war for 20 years, but which they can not, like their family, ever find again.

Rachel LINDON, lawyer at Paris' and Madrid's bars, former secrétaire de la conférence, specialized in criminal law, has been a defence lawyer in both piracy cases judged in France. Partner at PRLK (lindon@prlk.fr).

David Tolbert

The UN must act decisively to uphold the rule of law

When 26-year old Tunisian street vendor Mohamed Bouazizi set himself on fire on December 17, 2010, his act resonated across an entire region and sparked what is known as the Arab Spring. His cry echoed across the world because it was a universal call for justice, basic fairness, and equal treatment. Indeed, it was a call for the rule of law.

Nearly two years later, the United Nations has a unique opportunity to answer that call when the UN General Assembly holds a high level meeting on the rule of law this September. The UN member states are in a position to hold a serious discussion on how to advance the rule of law through the creation of tools and fora where real engagement can occur. Convened against a backdrop of the paralysis of the UN Security Council over the bloodbath in Syria and political transitions in the Middle East and elsewhere, few topics are of more pressing concern to the international community.

Though popular cynicism would tell us that there is nothing of less use than a UN discussion, these debates can have an impact far beyond the General Assembly's Chamber. Some resolutions resulting from such debates have paved the way for groundbreaking developments on global issues such as the environment, child labour, racial discrimination, and matters of justice. Furthermore, the outcomes of these meetings can have irreversible impacts for years to come: the Universal Declaration of the Human Rights, adopted by the General Assembly in 1948, continues to change the face of 21st century law and practice throughout the world.

Yet the UN record on the rule of law is hardly outstanding, and decisive action is needed urgently in many countries. On virtually every continent we see repressive governments or violent conflicts with scores of victims and untold suffering. As the world watches Syria burn, calls for UN action have done little to motivate a polarised Security Council. Given the Council's deadlock which resulted in the resignation of Kofi Annan and faltering of his mediating efforts in Syria, the General Assembly has a unique opportunity to be particularly relevant. If the UN's commitment to human rights and justice are going to be more than rhetoric, the rule of law must be at the very heart of the UN's work.

Recent decades have shown that the rule of law can be established by confronting a repressive or violent past through establishing the truth about abuses, holding those most responsible for mass crimes accountable, providing reparations for victims and reforming key institutions such as the police and security forces. Working in concert, these measures are often referred to as transitional justice, and provide a basis for reckoning with a past of abuse and a path to a more peaceful future.

The UN has recognised the importance of transitional justice measures rhetorically, and to a more limited extent, practically. It has expressed this recognition through the creation of international and hybrid tribunals (such as those for the former Yugoslavia, Rwanda and Sierra Leone), support for truth commissions and memorials, backing for reparations programmes, and vetting of police and military structures. It has taken steps to recognise those most vulnerable to violence and abuse – children, women, indigenous people and other minorities – and to pay particular attention to their needs. Through the application of these measures, countries in every part of the world have started to emerge towards a more peaceful and hopeful future.

To address the universal desire for justice and the rule of law, the upcoming General Assembly debate should ask how the UN can deliver on its promises in more concrete ways, and how it can break down internal silos that prevent it from effectively addressing these critically important issues. It should also ask ⏩ ⏩ how key UN institutions, including the International Court of Justice, the Security Council and the General Assembly, can improve their response when the rule of law breaks down. These issues deserve serious debate, reflection, and action.

While there is much to be concerned about in the Middle East, some real progress has been made over the past ⏩

18 months: credible elections were held in Libya, an authentic transition is underway in Tunisia (with a true human rights hero serving as president), and a robust civil society advocating for justice and reform is growing across the region.

Much remains to be done, but the Arab Spring shows us that the call for the justice and the rule of law cannot be swept aside. It is time for the UN General Assembly to prove its commitment to the rule of law through concrete and comprehensive steps. The Mohamed Bouazizis of this world deserve no less.

David Tolbert is president of the International Center for Transitional Justice. This article appeared on www.aljazeera.com

Anna Bonini

"The Most Serious Suspension of Democratic Rights in a Western Country since World War II"

On 6 July 2012, Italy's highest court, the Corte di Cassazione, issued its final ruling on what has been described by Amnesty International as "the most serious suspension of democratic rights in a Western Country since the Second World War". This landmark judgment concerned events surrounding the G8 summit hosted by Italy over ten years ago, and the ensuing cover-up by high-ranking members of the Italian police.

In late July 2001, leaders of the world's largest economies met in the Ligurian town of Genoa, heavily locked down due to fear of terrorist attacks. Over 200,000 people took part in anti-globalization demonstrations on the streets of Genoa in the days immediately preceding and during the summit. Even though the large majority protested peacefully, some demonstrations degenerated. The Italian police forces reacted with unheard-of violence. On 20 July, a young protester, Carlo Giuliani, was fatally shot by a 21-year-old carabinieri officer and, by the end of the summit, several hundred people, including demonstrators, journalists and police officers, had been seriously injured in street clashes.

The recent Cassation Court Judgment focuses, however, only on events that occurred in the Armando Diaz school in the early hours of 22 July 2001. Over 300 police officers raided the school, which was primarily used as a dormitory for demonstrators and a media centre during the summit. Protesters and journalists were subjected to deliberate and unjustified beatings, resulting in severe injuries. Many were arrested and transferred to the nearby Bolzaneto temporary detention facility, where they were subject to further ill-treatment. British activist Mark Covell was left in a coma with eight broken ribs and a shredded lung.

Police officials initially stated that the raid had come in response to attacks on security forces by protestors, and that weapons were found at the Armando Diaz school. The Cassation judgment rejected this version of events. Rather, demonstrators, many of whom were sleeping when the raid began, had not reacted violently, but the police had tried to incriminate them by planting firebombs and staging a knife attack.

The recent judgment is particularly significant in that it concludes definitively that the highest levels of the Italian police force were directly involved in the attempted cover-up that followed the events at the Diaz school. Fifteen senior officers, including figures such as the current head of the anti-crime department and the chief of the Central Operative Service, were convicted for falsifying evidence. Due to an earlier law designed to reduce inmate numbers, none of the officers are likely to spend any time in prison. However, the conviction means they automatically will be suspended from duty for five years, effectively beheading the Italian police force.

Even though counsel for the victims and the public prosecutor expressed satisfaction, many were critical of the Cassation Court's ruling. It was too little, for suspension from duty is likely to remain the only punishment for the convicted officers. It was also too late, as it came over 11 years after the Genoa events, allowing other officers charged with inflicting GBH and libel to escape liability for the statute of limitations timed out all convictions. Impunity could have been avoided had Italy implemented in its domestic system a provision for the criminalization of torture as required by Article 4 of the Convention Against Torture, which it ratified in 1989, and complied with current international law and practice excluding the applicability of a limitation period to cases of torture. It is hoped that the Cassation Court judgment will at least revive the debate within Italian civil society and political circles as to the importance of incorporating into domestic law the crime of torture as defined in Article 1 of the Convention.

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Guénaël Mettraux

An Unwelcome Memory of the Apartheid Era: The 'Common Purpose' Doctrine Makes a Come-Back

The doctrine of "Joint Criminal Enterprise" also known as "common purpose" doctrine has sometimes been lauded as the tool that would end impunity. The flip side of the doctrine is a darker thing however.

Because it is so broad, so extraordinarily flexible and so all-encompassing in its reach, it is capable of spreading criminal liability far and wide, almost indistinguishably to anyone associated *de près ou de loin* with a criminal endeavor. When applied to individuals charged with war crimes and other mass atrocities, this fact is generally regarded as a valuable prosecutorial tool capable of reaching into the far corners of organized criminality. Trigger something violent and unlawful and you might be held criminally responsible for all of its natural and foreseeable consequences, regardless of the identity of the perpetrator of those criminal consequences, regardless of the fact that you did not intend these consequences and regardless of the fact that you made no demonstrable contribution to these consequences. Now to an illustration of how such a flexible doctrine may apply in practice…

In one of the strangest ever cases of JCE or common purpose doctrine, South African prosecutors have now dusted off this Apartheid-era instrument and used it to charge 270 miners who were present during a violent demonstration in the course of which 34 fellow miners were shot and killed by South African police officers. The charges? Murder, 34 counts of it.

Weird and unfair? Yes and yes. But also strangely valuable as a lesson in legal (in)sanity. Nothing makes the point better about the dangers of a particular rule of law than a good case of abuse of prosecutorial discretion. What shocks, of course, is that these miners did not kill their fellow demonstrators and that they did not intend such a result. These facts are not, however, relevant to that doctrine. Nor is the fact that they did not contribute to the death of any of them other. Their willful participation in an unlawful demonstration in the knowledge that death or injury could result would have been enough. So maybe what should shock our conscience is not the fact that prosecuting authorities acted as they did but that the law itself allowed them to do so and allowed them to drag into the net of the criminal law individuals so remotely connected to the criminal consequences for which they are now charged?

Our willingness to be appalled by prosecutorial or judicial unfairness is of course often first triggered by the sympathy that we may feel towards the accused (Pussy Riot over Mikhail Khodorkovsky; South African miners over Bosnian Serb wartime leaders). But there is another sort of unfairness that we should perhaps also concern ourselves with: the unfairness of letting some being prosecuted and convicted under certain legal standards when we are not ready to see us all being held to the same exacting and expansive standards. Next time a "great advance" is made in international criminal law, we should, I dare suggest, pause and wonder whether that law is really one that we are content to see apply to all, in particular to ourselves.

And then, a day later, things got (legally) a lot better….

The BBC is now reporting that charges against the miners have been "provisionally dropped".

It might be that a Prosecutor has woken up today to his better judgment and that he remembered the wise words of Glanville Williams that "the lawyer is interested in the causal parentage of events, not in their causal ancestry". Or it may be that yet another jurisdiction has started rejecting a legal instrument (the "common purpose" doctrine or "joint criminal enterprise" theory) that is so hard to reconcile with principles of individualized justice and almost impossible to fit into the idea of personal culpability. Either way, it is a good step in the right direction…

Wayne Jordash

Charles Taylor, JCE and Letting Sleeping Dogs Lie

Charles Taylor was convicted on all 11 counts of an indictment that charged the Accused with five counts of crimes against humanity; in particular: murder, rape, sexual slavery, other inhumane acts, and enslavement. In addition to the crimes against humanity, he was also convicted on five counts of violating Article 3 Common to the Geneva Conventions and Additional Protocol II, punishable under Article 3 of the Statute, for acts of terrorism, violence to life, health and physical or mental well-being of persons, in particular murder, outrages upon personal dignity, violence to life, health and physical or mental well-being of persons, in particular cruel treatment, and pillage. The remaining count, on which Taylor was also found guilty, was that of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, a serious violation of international humanitarian law punishable under Article 4 of the Statute.

Although the Prosecution had alleged liability on the basis of 'joint criminal enterprise' (JCE) for all of the crimes in the indictment, the Trial Chamber found no such liability. Most of Mr. Taylor's convictions were rendered on the basis of aiding and abetting crimes, under Article 6(1) of the Statute. He was found guilty under this mode of liability for the majority of conduct that fell within Counts 1 – 11. He was also found guilty for the remaining conduct, under the same counts, on the basis of planning the commission of specified crimes following attacks in three districts of Sierra Leone between December 1998 and February 1999.

The Trial Chamber passed a sentence of 50 years. As reported in this blog on 30 May 2012 this sentence was worryingly incongruous with finding Taylor responsible for the majority of the crimes as a secondary participant. It involved explicitly removing the distinction between the more direct modes of participation (such as perpetrating a crime, committing crimes as a member of a joint criminal enterprise ("JCE") or ordering a crime) and Mr. Taylor's convictions for aiding and abetting. This being so, why didn't the Trial Chamber convict Taylor on one of these more direct bases?

Some non-starters: superior responsibility, planning, & ordering

An analysis of the Judgment and the facts of the case show that, for the vast majority of the crimes, the evidence could not begin to sustain other more direct modes, such as ordering (e.g., 6979 of the Judgment) or planning (e.g., 6977). Whilst it is true that Mr. Taylor was convicted for planning certain crimes following attacks in three Districts of Sierra Leone between December 1998 and February 1999 (e.g., 6977), the analysis, to put it mildly, is less than convincing and is one of the weakest parts of the Judgment (e.g., 3099 – 3130).

Whether this is correct or not, it is clear from the voluminous 2500 page judgment, setting out, it seems, every last piece of evidence, that Mr. Taylor's role, geographically and organizationally, was simply too remote to amount to proof of intentionally designing the acts that constituted the crimes, a prerequisite for a finding of planning for the remainder of the crimes.

Similarly, this remoteness, as well as the nature of Mr. Taylor's relationship with the rebels, removed any real prospect of a conviction pursuant to superior responsibility or ordering. As noted by the Trial Chamber, the "substantial influence" that Mr. Taylor had over the RUF, and to a lesser extent the AFRC, was not the same as effective control (e.g., 6985 – 6992). In reality, since the case commenced, no one but the Prosecution considered superior responsibility or ordering to be a fair summation or an accurate reflection or manifestation of Mr. Taylor's relationship with the ground commanders or the direct perpetrators of the crimes.

Why aiding & abetting, rather than JCE?

And so, buried in an overloaded indictment reflecting international criminal law's fixation with notions of evil ⏩

⏩ masterminds or monsters, rather than contributions to crimes by ordinary men, was the real case against Taylor: aiding and abetting or participation through a JCE. JCE is prevalent in other cases before the SCSL, which are closely related to the Taylor case. Given that Mr. Taylor was found in those cases to have been part of the joint criminal enterprise, with the same alleged aim of gaining power and control in Sierra Leone, the Trial Chamber's rejection of JCE in Taylor begs obvious questions.

In a judgment of 7000 paragraphs, the Chamber ruled out applying JCE in a paltry fourteen paragraphs (6893 – 6906). In a further, similarly scant analysis, it sought to explain why aiding and abetting was the more appropriate mode of liability (6907 – 6958).

The Chamber noted that "[w]hile the relationship [between the Accused and the rebels] was a mutually beneficial one, the Trial Chamber… [was]… of the view that it was the expression of "converging and synergistic interests", rather than a common plan to terrorize the civilian population of Sierra Leone (6901). According to the Trial Chamber the support provided by Mr. Taylor, rather than being provided pursuant "to a common plan to terrorize the civilian population of Sierra Leone […] indicates that there was a quid pro quo in the relations between the RUF and the Accused. The trading of diamonds for arms is the clearest example, and a number of statements attributed to the Accused indicate the interest he had in providing weapons or facilitating the provision of weapons to the RUF in exchange for diamonds". The Trial Chamber found that "the Accused and the RUF were military allies and trading partners, but it is an insufficient basis to find beyond a reasonable doubt that the Accused was part of any JCE" (6905).

But still no answers…

The Trial Chamber's justification provides no meaningful answers to the critical issues. Of the fourteen paragraphs of analysis, only four addressed the substance of the issue: whether Mr. Taylor's contributions evinced a shared intention to pursue the common purpose within the indictment period (6900, 6901, 6904 and 6905) (or, as per the SCSL's novel interpretation of JCE, demonstrated that Taylor foresaw the crimes having intended to pursue the objective of seizing power). Even putting that aside, the analysis is weak at best, for two key reasons.

First, the reasoning misses the point entirely. The purpose of a JCE must either itself be a crime or necessarily entail a crime, and most criminal enterprises, prosecuted at the international criminal tribunals under the rubric of JCE, are of the latter type. That is to say, they have as their final objective a non-criminal objective. For example, at the ICTY, the JCEs are commonly pled as a variant of a political campaign designed to achieve a Serbian State – in particular, a joint enterprise to commit a specified crime in order to achieve that end.

The Trial Chamber found that the operational strategy of the RUF/AFRC was to "deliberately use terror against the Sierra Leonean population as a primary modus operandi" (6796), or put another way, "the crimes committed by the AFRC/RUF were inextricably linked to how the RUF and AFRC achieved their political and military objectives" (6799). That Mr. Taylor pursued a course of conduct designed ultimately to enable him to obtain diamonds would appear to be of little consequence when, in order to achieve that aim, the rebels, according to the Trial Chamber, had to use terror to take and hold power in Sierra Leone and Taylor's acts were so intended.

In light of the "inextricably linked" acts of terror, Taylor and the other JCE members' had "converging and synergistic interests" that included terror as an objective – even if only because terror was the way in which other objectives would be achieved. ⏩

⏩ If Taylor knowingly supported acts of terror, whatever his ultimate aim, this – if combined with his substantial contribution – was sufficient to underpin convictions pursuant to JCE.

This leads us to the second reason for the shortcomings in the Trial Chamber's analysis – that, on the basis of the factual findings that the Trial Chamber made (provided, of course, that they are legitimate), it did find that Taylor knowingly supported the JCE, and substantially contributed thereto. The composite findings that were used to underpin the convictions for aiding and abetting the majority of the crimes, and planning the remainder, are indistinguishable from those that would have justified a conviction for JCE.

In particular, Taylor was not found to have merely assisted in the commission of the crimes through the provision of weapons and arms, as might be commonly presumed by his aiding and abetting convictions. On the contrary, according to the Trial Chamber's findings, Taylor's involvement, whilst falling short of defining him as a superior with effective control or management of the organization, was as involved and sustained as any traditional JCE member and sufficient to enable an inference of a shared criminal intent. As well as Taylor's convictions for planning the January 6th 1999 attack on the capital Freetown, the most heinous mass criminal event in the history of the Sierra Leone conflict (e.g., 3099 – 3618), Taylor was found to have substantially and materially intervened in, and sustained, the operations of the RUF and AFRC in a multitude of ways.

He was found to have been, if not a decisive participant, an extremely instrumental one, providing all manner of support, facilitation, direction, advice, protection and expertise, from the beginning to the end of the 61 month indictment. This included: supplying personnel to assist with combat activities, including fighters (e.g., 4093, 4495, 4583, 4616 – 4622), providing expertise and equipment (e.g., radio technology 3665, 3804, 3834, 3885,), satellite phones (e.g., 3731, 3806), operational training, e.g., 3665, 4108), other such assistance, such as a safe house (e.g., 3916-7, 4246), military and political instructions/advice, which was often followed by the RUF leadership (e.g., 3606 – 3610, 4108, 4151, 6781, 6783), as well as a dizzying array of frequent and substantial supplies (or facilitation) of arms and ammunition throughout the indictment period that "was critical in enabling the operational strategy of the RUF and AFRC during the Indictment period" (e.g., 5838 – 5845).

Moreover, the Trial Chamber found that Taylor would have known of these crimes in the six most populous districts of Sierra Leone from early on in the indictment period (30 November 1996 to 18 January 2002), at least by August 1997 (e.g., 6885 – 6892), yet continued to provide this substantial support until the end of the war in 2002.

In light of the Prosecution's stated JCE case – that the "Accused's participation in the JCE through the provision of vital instruction, direction, guidance, material, manpower, communications capability, strategic command and other support, contributed significantly to the commission of the Indictment crimes, the survival of the other JCE participants and prolonged the conflict" (6895) – the Trial Chamber's justification is difficult, if not impossible, to reconcile or understand from any straightforward legal and factual standpoint. The obvious question is: how is it possible to have been so critical or instrumental in the continued operations of the RUF/AFRC, over the whole of the indictment period, with full knowledge of the inextricable link of those operations with heinous crimes, not to be judged to have shared the criminal intent?

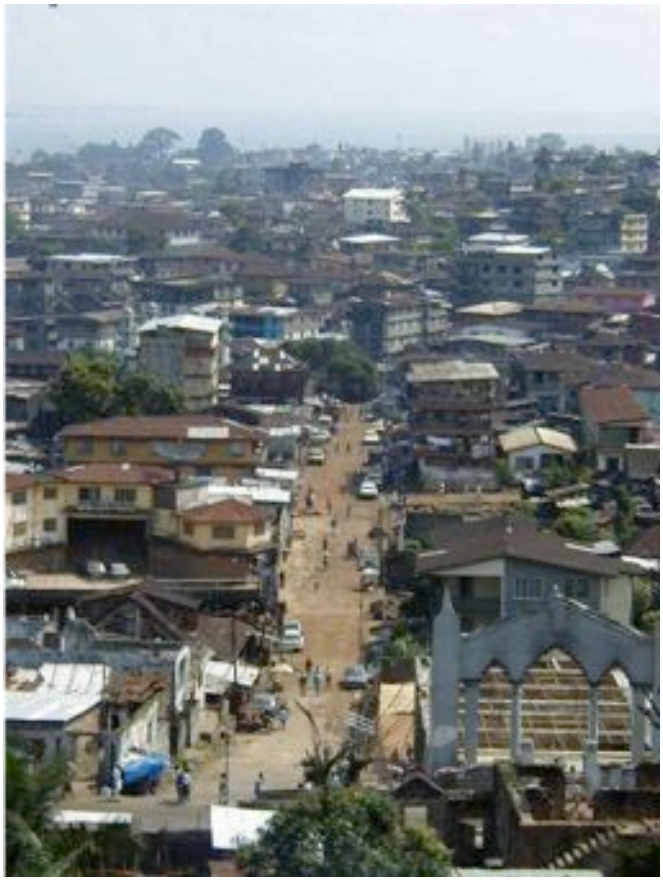
In sum, the reasons given for applying aiding and abetting, rather than JCE, are weak, at best. However, it is suggested that other motivations were in play during the deliberations, which reveal the mere expedience on which this central aspect of the Taylor judgment was based. ⏩

The real reason for the rejection of JCE

It is an open secret that the JCE mode of liability, if generously interpreted by a Trial Chamber, is flexible enough to find guilt in the most testing of circumstances. For the reasons noted below, this critique is especially apposite in relation to the conception of JCE that the SCSL's jurisprudence has propounded, albeit anomalously. The problems posed by this jurisprudential anomaly are the real reasons for the application, in Taylor, of aiding and abetting rather than JCE.

The problem for the Trial Chamber was that, if it was going to apply the SCSL's interpretation of JCE – the view of the majority in the Appeal Chamber in Sesay et al. – it would have been duty bound to apply a theory of JCE that, whilst reflecting elements of a crime of aggression, has been widely and rightly discredited as not part of customary law and a violation of the principle of legality and culpability. As Justice Fisher, who is now President of the SCSL and was also a member of the Appeals Chamber in the RUF case, noted at the time that the Majority upheld Gbao's convictions:

"by holding that Gbao can be liable for crimes within the Common Criminal Purpose that he did not intend and that were only reasonably foreseeable to him… [the Majority] blatantly violates the principle nullum crimen sine lege because it imposes criminal responsibility without legal support in customary international law applicable at the time of the commission of the offence".



The majority decision, she went on to observe, had "abandoned the safeguards laid down by other tribunals as reflective of customary international law." The Gbao convictions illustrate the consequences of abandoning these safeguards: without any basis in customary international law, a man "stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend." (45 of the dissent in the RUF Appeal Judgment).

Justice Fisher was right. The majority in the Appeals Chamber upheld the majority view in the Trial Chamber that an Accused may be found responsible pursuant to a JCE for possessing an intent to pursue a non-criminal objective with the foreseeability that crimes might be committed during the implementation of that endeavor. And such responsibility, it was held, exists even in the absence of any proof that it was actually foreseen by the Accused that such crimes might be committed (e.g. RUF Trial Judgment, Para. 1979; see also, Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone – Journal of International Criminal Justice, (May 2010) and Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone – Leiden Journal of International Law, 23 (2010) for further commentary by Wayne Jordash, Scott Martin and Penelope Van Tuyl).

Had the Taylor Trial Chamber assessed Taylor's criminal responsibility through the majority's novel interpretation of JCE, it would have been bound to attribute crimes to Taylor that he, or other JCE members, had intended, but also make explicit findings attributing crimes that were only foreseeable – to the notional 'reasonable person' – from an intention to pursue the taking of power and control over Sierra Leone. In other words, the Trial Chamber would have been duty bound to also violate the principle of nullum crimen sine lege with deleterious consequences for the perceived robustness and ultimately the legacy of the Taylor Judgment.

Rather than grapple with the discredited majority theory, it is plain, as argued above, from a reading of the judgment that the SCSL Trial Chamber decided to duck the JCE question. This was a wise decision but not one based on the findings made. Accordingly, it is very difficult to see any justification for the choice not to convict Taylor pursuant to the SCSL's mode of JCE liability, other that the Trial Chamber's prudent decision to avoid international critique of the SCSL's interpretation of JCE and avoid tainting the Taylor convictions in a way similar to those of 'lesser' convicted persons such as Gbao.

The Chamber's approach – prudent but fair?

This approach, whilst prudent, does raise serious

questions. The problem arises upon consideration of the long sentence received by Mr. Taylor – equivalent to that of a primary participant. Having realized that the SCSL's version of JCE, used to convict the RUF Accused, was so fundamentally flawed and recognized to be so, the Trial Chamber faced a dilemma: convict using the discredited version of JCE or accept that Taylor's role must be described and sentenced as significantly less than the Accused in the SCSL's earlier cases.

The Trial Chamber's solution was enticingly simple: to convict for aiding and abetting, and sentence as if for JCE. Simple it may have been, but unjust in equal measure. The Trial Chamber justified this special treatment for Mr. Taylor by holding that while "aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation…" Mr. Taylor's leadership role "puts him in a class of his own." As noted by Professor Mark Drumbl, in a compelling guest post on Opinio Juris on 11 June 2012, the Trial Chamber fetishized Taylor's head of state status. This enabled the sentence to be increased.

Conclusion

The fact that the Trial Chamber sought to avoid JCE is more than understandable, given the SCSL's mishandling of this form of liability in previous cases, and the desire to insulate the Taylor judgment from the adoption of a flawed version of JCE and the inevitable critique. However, understandable is not the same as legally sound. To refuse to convict explicitly on a discredited version of JCE, but then to sentence as if those findings had been made, is neither good law nor a reason to celebrate, however infamous the Accused in question.

The question now remains, what happens next? The parties must file their notice of appeal on the 19 July 2012. Will the SCSL Prosecution resist the temptation to put this issue before the majority in the Appeal Chamber for them to once-again resurrect and apply their version of JCE? Had the Prosecution taken steps to avoid this in the Gbao case, perhaps, he would not now be imprisoned for the remainder of his natural life for crimes, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. Despite the obvious problems with the Taylor Trial Chamber's approach in rejecting JCE, one can only hope that the Prosecution takes the more prudent approach and let's sleeping dogs lie. This, in the circumstances, must be the wiser course, rather than providing the majority in the Appeal's Chamber with another opportunity to perpetuate its misguided and dangerous view of JCE in a case as significant as Mr. Taylor's.

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Prof. Philippa Webb

ICJ Belgium v Senegal: Temporal Issues and the Prosecution of Torture

On Friday 21 July 2012, the ICJ issued its Judgment in the case brought by Belgium against Senegal on 'Questions relating to the Obligation to Prosecute or Extradite'.

Belgium had instituted proceedings against Senegal to compel compliance with Senegal's obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad, or to extradite him to Belgium for the purposes of criminal proceedings. Jurisdiction was based on the UN Convention against Torture (CAT).

There are several fascinating aspects of this Judgment, including the ICJ's finding that Belgium, as a State party to the CAT, has standing to invoke the responsibility of Senegal for alleged breaches of its obligations under the Convention; the relevance (or not) of pronouncements regarding Hissène Habré by the UN CAT Committee, the African Union, and the ECOWAS Court of Justice; the ICJ's recognition of the prohibition on torture as a jus cogens norm, and so on.

However, this post will focus on the ICJ's findings on the temporal dimensions of obligations under CAT, an area that has not been previously explored in detail and is of relevance to all States Parties to CAT. The clear message is: delays will not be tolerated.

As regards the obligation in Article 5(2) of CAT to establish universal jurisdiction over the crime of torture, the Court observed that Senegal had not adopted the necessary legislation until 2007. It had become party to CAT in 1987. There is no express temporal requirement

⏩ in Article 5(2) of CAT, but the ICJ observed that Senegal's delay necessarily affected its compliance with other obligations (para 77). This should be taken as a warning to the numerous States parties that have not adopted national implementing legislation under CAT. It also sends an indirect message to the 121 ICC States Parties, less than half of which have implemented the Rome Statute in their domestic jurisdictions.

The Court then turned to Article 6(2), which provides that the State in whose territory a person alleged to have committed torture is present 'shall immediately make a preliminary inquiry into the facts'. The temporal requirement is clear, and the Court interpreted it literally. The ICJ recognized that a State has a 'choice of means' for conducting the inquiry, but 'steps must be taken as soon as the suspect is identified in the territory of the State' (para 86). For Senegal, the establishment of the facts in Habré's case became imperative since at least 2000, when a complaint was filed against him.

The most complicated temporal issues arose with respect to Article 7(1) of CAT, which provides for the obligation to prosecute (if the State does not extradite the person alleged to have committed torture). The Convention is silent as to a temporal requirement. CAT had entered into force for Senegal on 26 June 1987 and for Belgium on 25 June 1999. The ICJ held that the prohibition on torture is part of customary international law and has the status of jus cogens, but there is nothing in the CAT that reveals an intention to require a State party to prosecute acts that occurred before entry into force of the Convention for that State (para 100). The Court therefore held that Senegal's obligation to prosecute under Article 7(1) did not apply to acts before 26 June 1987 (though there was nothing to prevent Senegal instituting proceedings for acts committed before that date) (para 102). As for Belgium, the Court considered that it had been entitled from 25 July 1999 to request the Court to rule on Senegal's compliance with its obligation to prosecute (para 104). There is thus a 12-year gap between the existence of Senegal's obligation to prosecute and Belgium's right to engage Senegal's responsibility for the failure to fulfill that obligation. In the event, Belgium had only invoked Senegal's responsibility for conduct starting in 2000.

Importantly, the ICJ dismissed Senegal's excuses for its delay in submitting Habré's case for prosecution based on financial difficulties (para 112), the decision of the ECOWAS Court of Justice (para 111), the absence of relevant legislation, and its courts' findings of lack of jurisdiction (para 113). Although Article 7(1) does not specify a time frame, the ICJ held the obligation to prosecute must be 'undertaken without delay' (para 115).

The Judgment in Belgium v Senegal provides important guidance on the implementation of CAT obligations. Procrastination and diversion will not be accepted. The ICJ ordered Senegal to take the necessary measures to submit the case to its competent authorities for prosecution 'without further delay' (para 121).

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Christian Axboe Nielsen

An Office of the Historian for International Criminal Courts

Although the extent to which history and historians should be present in the international courtroom is a topic of considerable scholarly debate, there can be no doubt that history figures prominently in international criminal justice. Much has been written in recent years on the role of history at international courts and tribunals – most recently Richard Wilson's Writing History in International Criminal Trials.

Yet amidst all the discussion of the intersection between international criminal justice and the writing of history, relatively little attention has been devoted to the internal histories of these institutions. This is, I believe, an unfortunate omission, and one which deserves to be remedied. Why not, therefore, establish an "office of the historian" at the International Criminal Court – and perhaps also at ad hoc international criminal courts and tribunals?

The idea of having an official historian embedded within an institution is not a novel one. Plenty of organizations and institutions have such offices, particularly in the United States. The US Department of State has one of the better known official historians – replete with its own website. This office produces the Foreign Relations of the United States series, a well-regarded resource used by historians all over the world. The US Army produced official histories of campaigns in the Second World War, the Korean War and the Vietnam War. (And already in 1949, Telford Taylor, one of the godfathers of international criminal justice, produced a lengthy "Final Report to the Secretary of the Army" on the Nuremberg war crimes trials.) Even the CIA has produced classified internal histories that are sometimes made available in declassified form – and the CIA also has its own in-house journal Studies in ⏩

Intelligence. In the UK, the Foreign and Commonwealth Office has in-house historians, and the super-secretive MI5 granted access to Cambridge history professor Christopher Andrew to write an authorized history of the domestic intelligence agency.

What do embedded historians do? In the case of the US Department of State, "Historians in the Office of the Historian collect, arrange, and annotate the principal documents comprising the record of American foreign policy." Separated from the daily grind of the institution by a special role, but also given mandated access to confidential documents that will remain inaccessible to the general public for years, if not decades, official historians work to preserve the history of the institution. This includes the structural history of the institution as well as its operational history. This preserves institutional knowledge, creates a repository of seminal documents and also creates the possibility of studies that can determine important lessons from both successful and failed operations, programs and trials.

An outstanding example of an internal history produced at a judicial institution is the official history of the Office of Special Investigations. The OSI was established within the US Department of Justice in 1979 to centralize litigation against alleged Nazi war criminals who had come to the United States after the Second World War. Judy Feigin, the author of the history, "The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust," wrote that "this report was not written simply to recount a series of unrelated but interesting undertakings. It is designed to serve as a teaching and research tool for historians, the media, academics, policy makers and the general public." As such, the official history did much more than merely recount the history of the litigation of the office. It also dealt with the political, moral and ethical questions that prompted the establishment of the OSI and which recurred throughout its work. Feigin correctly observed that the crimes handled by the OSI were not limited to the Second World War, and that future lawyers, politicians and academics could therefore draw important lessons from the history of the OSI.

Why have an office of the historian at the ICC? First, for internal purposes. An internal office of the historian would be able collate confidential documentation, and analyze and reflect upon the establishment and operations of the ICC in a way that could not be permitted for outsiders. (Privileged access was in some instances granted by the ICTY to outsiders in the past, resulting in John Hagan's very valuable book, Justice in the Balkans.) In the first instance, this might have to be restricted to being an exercise of the Office of the Prosecutor (OTP), or separate Registry, Chambers and OTP exercises, given the requisite internal walls that exist at the Court. In addition to the institutional history, the most useful output of an office of the historian would be case studies of completed investigations or cases. It is striking, for example, that in the considerable literature that exists in legal journals on the work of the ICC, there are virtually no studies available of the investigations of the Court. This vastly important area risks remaining an eternal black box unless some steps are taken to produce internal histories.

The second reason for having an office of the historian at the ICC is external. As Feigin noted, there is much to be discussed and learned from both the successful and unsuccessful operations of a judicial body. Yet unlike the OSI or its equivalent in Germany, the Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen (Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes), the ICC is not subject to any jurisdiction that can compel access to outside researchers in the long-term. It is therefore crucial that the Court

itself have an internal office that can foster and advocate the writing and preservation of its own history. The same office, together in consultation with the senior management of the ICC, could subsequently publish the full or redacted versions of these reports, thus providing a valuable contribution to the public understanding of the Court.

It goes without saying that employees of an office of the historian at the ICC would have to operate with discretion, integrity and confidentiality. The employees of the office, who would be of high academic caliber, should be able to participate with management approval at relevant international conferences on the work of the Court. This would help to ensure that they remain active members of the academy and militate against the Hague version of Stockholm syndrome.

However, the internal histories these historians produce would for the immediate future be just that – internal products for the consumption and use of others at the Court. Confidentiality about sensitive operational and legal information, as well as the risk of litigation, absolutely necessitates this. Yet this does not mean that the office of the historian should be muzzled or otherwise follow the line. Internal histories would be useless if the office of the historian did not have a robust mandate guaranteeing it a strong measure of independence in its queries as well as broad access to internal documentation upon request. There would hence have to exist a solemn covenant between the office of the historian and the ICC. The embedded historians would submit to defer the pleasure of publication – and perhaps eventually publish redacted versions of certain publications. On the other hand, the Court would have to guarantee on a suitable timeframe for the publication of most, if not all, publications – again some perhaps in a redacted form. This last point deserves careful attention given the tug-of-war that occurred with respect to the aforementioned OSI report.

No one is claiming that institutions that have produce official histories necessarily learn from their mistakes. And embedded historians labour under the risk of subjectivity. Yet the same could be said for unofficial, "external" histories. An office of the historian at the ICC would be an important step towards preserving the work of the Court for future generations.

With the departure of Luis Moreno Ocampo and the completion of its first trial, the ICC has closed the first, turbulent chapter of its history. The Court is in many ways still in its formative years, but also has enough accumulated experiences to give historians plenty to examine. This would be an ideal time to consider seriously the creation of an office of the historian at the ICC. This office would, in the long run, contribute to making the institution, and hence international criminal justice, more transparent and accountable – the subject of this author's next blog contribution.

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