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iLawyer

A Newsletter on International Justice

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Wayne Jordash

The Onward March of International Justice

At the time of writing, the international criminal justice world ruminates upon the surprise surrender of Bosco Ntaganda to a US embassy in Kigali. Apparently, Ntaganda, the former Democratic Republic of Congo general, requested an immediate transfer to the Court. His transfer to the ICC took place almost immediately. Rumors abound, but it appears that subjecting himself to international justice was a more reassuring long-term prospect than continued involvement with the M23 rebels that took control of parts of eastern Congo last year. Now may come the question concerning where he should be tried. As reported in the international press, Congolese government spokesmen Lambert Mende stated, "We'd prefer to have him judged here, but if he is sent to The Hague, that's no problem either. The most important thing is that justice is served".

Whatever the outcome of this debate, the non-negotiated surrender and transfer, the first of its kind to the ICC, is another milestone in the world of international and transitional justice that keeps growing and extending its reach in real and tangible ways by the month. As David Tolbert, President of the International Centre for Transitional Justice correctly pointed out in his article, "[a]fter war, Syrians will need justice and forgiveness. It will not be easy", published on ilawyerblog on the 21st January 2013, "the concepts of transitional justice have ceased to be seen simply as idealistic and philosophical notions, but are credibly making their way into the politics of peacemaking". Of course, progress of this kind comes in many different (often, controversial) shapes and sizes, as the last few months of international justice activity have amply demonstrated.

On 22 November 2012, the ICC issued an arrest warrant for Côte d'Ivoire's former first lady Simone Gbagbo, the first woman to be indicted by the Court. In January 2013, it was ⏩

arising from Operation Storm in 1995, an operation that saw tens of thousands of ethnic Serbs leaving their homes and more than a 1,000 killed during the operation. On 29 November 2012, Haradinaj, the former Prime Minister of Kosovo and former commander of the Kosovo Liberation Army (KLA) and two of its ex-commanders of the KLA, Balaj and Brahimaj, were acquitted after their re-trial. These decisions were followed on 4 February 2013 by the acquittal of two former Rwandan ministers by the ICTR Appeals Chamber, overturning convictions for conspiracy to commit genocide and incitement to commit genocide against Justin Mugenzi, who was trade minister during the 1994 genocide, and Prosper Mugiraneza, former minister in charge of civil servants. The Appeals Chamber capped this remarkable series of decisions with an equally dramatic acquittal of Momčilo Perišić, former Chief of the General Staff of the Yugoslav Army, on 28 February 2013, refocusing attention on the role of Serbia in the Bosnian Serb crimes during the Yugoslavian war. This period has also seen the death of Ieng Sary, a co-founder of Cambodia's Khmer Rouge movement in the 1970s, who died while on trial before the Extraordinary Chambers in the Courts of Cambodia (ECCC). His wife Ieng Thirith faced the same charges but was declared unfit for trial by the ECCC last year after being diagnosed with Alzheimer's disease, leaving this troubled court with only two remaining accused and the (very) remote prospect of Case 3 and 4 providing the victims with any form of redress.

⏩ announced that the former strongman of Guatemala, José Efraín Ríos Montt, who presided over the bloodiest period of Guatemala's civil war, would stand trial in Guatemala on charges of crimes against humanity and genocide with regard to his alleged role in the killing of 1771 indigenous Ixil Mayans between the years of 1982 – 1983. The commencement of his trial on the 19 March 2013 marks the first time any national court has prosecuted its own former head of state for genocide.

On 8 February 2013, Senegal officially inaugurated the Extraordinary African Chambers set up to try the former President of Chad, Hissène Habré for international crimes. Two weeks after the first conviction, on 5 February 2013, the Bangladesh International Crimes Tribunal, found Abdul Kader Mullah, the assistant secretary general of the Jamaat-e-Islami, guilty of crimes against humanity committed during the 1971 Liberation War. Abdul Kader Mullah, who denied all the charges, was convicted on five out of six charges, including murder, and sentenced to life in prison. In November 2012, Palestine took one more step towards the possibility of being able to instigate ICC action over the building of settlements in the West Bank, as the UN General Assembly recognized it, by a huge majority, as a non-member state with observer status.

In January 2013, 57 States unsuccessfully sought to refer Syria to the ICC, in an effort to "ensure accountability for the crimes that seem to have been and continue to be committed in the Syrian Arab Republic and send a clear signal to the Syrian authorities". This effort led to naught, at least in the short term, due to the well-known and ongoing impasse in the Security Council.

On 16 November 2012, the ICTY Appeals Chamber overturned the convictions of two Croatian generals, Ante Gotovina and Mladen Markač, acquitting them of all crimes

And so, international and transitional justice remains, as ever, a work in progress. The central questions continue to revolve around building national capacity, positive complementarity, joined up approaches to international justice, rule of law and development activities, and making accountability a reality, despite seemingly intractable, resource-starved environments. The challenges are many; but as Bosco Ntaganda's surprise visit to the US embassy suggests, justice continues to extend its reach, in often-unforeseen ways and with unpredictable consequences, to play its part in stopping violence and restoring peace.

International Justice Review

1 November 2012

STL Appeals Chamber Dismisses Challenges Against In Absentia Trial

The Appeals Chamber of the Special Tribunal for Lebanon (STL) unanimously dismissed challenges by the Defence asking for a review of the decision to try in absentia the four men accused in the 14 February 2005 attack against former Lebanese Prime Minister, Rafic Hariri. The STL is the first international court since the Nuremberg tribunal to allow for trials in absentia.

16 November 2012

ICTY Appeals Chamber Acquits Ante Gotovina and Mladen Markac

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) overturned the convictions of two Croatian generals, Ante Gotovina and Mladen Markac, acquitting them of all and any crimes against the Serb civilian population in the Krajina region of Croatia.

In the following weeks, the Appeals Chamber also acquitted of all charges Ramush Haradinaj, the former Prime Minister of Kosovo and affirmed the sentence of life imprisonment for Milan Lukić, for crimes against humanity and war crimes committed in the eastern Bosnian town of Višegrad in 1992 and 1993.

The Trial Chamber of the Tribunal sentenced Zdravko Tolimir to life imprisonment after the former high ranking official of the Bosnian Serb Army was found guilty of genocide, crimes against humanity and war crimes.

29 November 2012

Palestine becomes non-member UN state with observer status

In a historic session, the UN General Assembly voted by a huge majority to recognize Palestine as a non-member state with observer status in the organization. There were 138 votes in favor, nine against and 41 abstentions, including Israel and the United States.

18 December 2012

ICC Acquits Mathieu Ngudjolo

The International Criminal Court (ICC) acquitted alleged former militia leader Mathieu Ngudjolo of all charges of war crimes and crimes against humanity committed in eastern Democratic Republic of Congo in 2003. The verdict is only the second in the 10-year history of the ICC, and the first acquittal.

16 January 2013

ICC Prosecutor opens war crimes investigation in Mali

The Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, launched an investigation into alleged crimes committed on the territory of Mali since the armed uprising of January 2012. This decision is the result of a seven-month preliminary examination of the Situation in Mali opened in July 2012 following a request by Mali's Government.

29 January 2013

Former Guatemalan Dictator to Face Genocide Trial

José Efraín Ríos Montt will stand trial on charges of crimes against humanity and genocide in connection with the killing of 1771 indigenous Ixil Mayans during his rule in 1982-1983. He is the first former president to be charged with genocide by a Latin American court.

4 February 2013

ICTR: Former Ministers Mugenzi and Mugiraneza Acquitted

The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) acquitted two former Rwandan ministers whom the Trial Chamber had sentenced to 30 years in jail. The Appeals Chamber overturned convictions for conspiracy to commit genocide and incitement to commit genocide against Justin Mugenzi, who was trade minister during the 1994 genocide, and Prosper Mugiraneza, former minister in charge of civil servants.

8 February 2013

Opening of the Extraordinary African Chambers to try Hissène Habré

Senegal officially inaugurated the Extraordinary African Chambers that has been set up within the Senegalese judicial system to try the former president of Chad, Hissène Habré. Habré's case, provided that he will stand trial, will mark the first time that the domestic courts of one country have tried the Head of State of another country for alleged international crimes.

18 February 2013

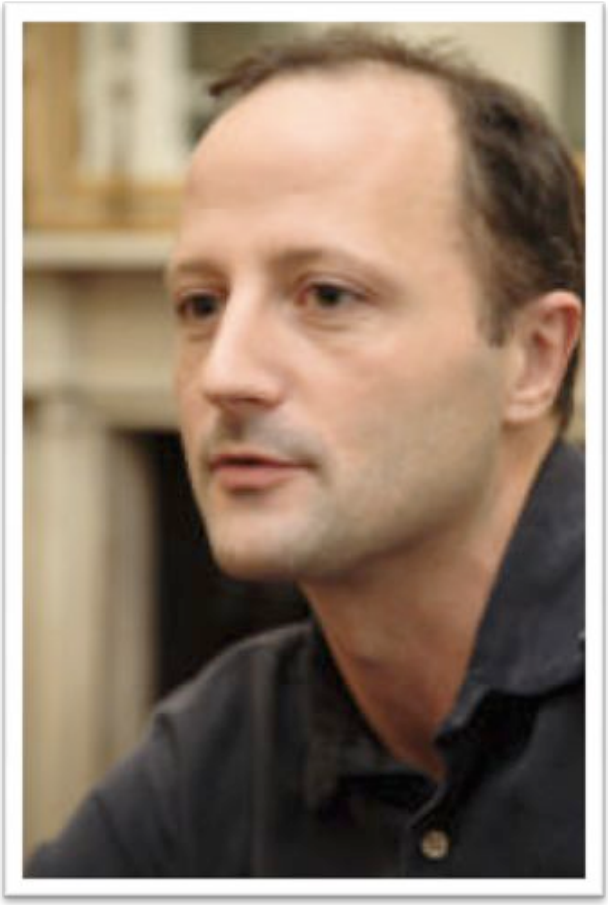
UN Commission on Syria Calls for Referral to the ICC

The Commission found in its latest report that both pro- and anti-government forces have violated international humanitarian law by perpetrating massacres of civilians. The Commission told the Security Council that a referral to the International Criminal Court might constitute an appropriate action.

Q&A 10 Questions for John Jones, Defence Counsel before International Jurisdictions

1. How does the absence of a client before the STL affect your mandate as counsel?

I think it's fair to say that all Defence Counsel at the STL are grappling with that question and with what latitude we have within the confines of a trial in absence to advance our own theories of the case. On the most basic level, having no client means that rather than advancing a defence which is based on your client's instructions, you are reduced – if that's the right word – to testing the Prosecution case. That in fact makes the job a lot harder because, in principle, that means having to test every aspect of the Prosecution's case, whereas when you have a client, he or she will provide you with a roadmap to the case and to the evidence which means that, in the end, you may only be challenging a small part of the Prosecution's case.



2. What is the main change which you regard as necessary to make the ICC a more effective judicial institution? Is the ICC the answer to the need for accountability for international crimes?

I think the lynchpin to effective international criminal justice is to have judges of the highest quality, because if the judges are not up to the task, then no amount of good prosecutors or defence counsel can render the trial fair. Unfortunately in the international sphere, Judges have traditionally been chosen on the basis of States "horse-trading" among themselves to divide up the various positions at the international courts, and some States put forward candidates on the basis of political connections rather than pure judicial calibre. The result is that while there are some excellent international judges, the process is too arbitrary to be reliable, particularly considering what is at stake. In my opinion, there should be competitive, rigorous examinations set for ICC candidate judges and only those who pass may be elected. The process for selecting judges to sit in the highest courts is extremely rigorous in national systems – why should it be any less rigorous at the ICC? The ICC is at best only a partial answer to accountability for international crimes – as the principle of complementarity itself recognises. But it is needed.

3. What impact have victim-participants had on international criminal trials? Do they improve the ability of a tribunal to reach the truth or have any other positive impact? Do they hamper your ability to defend your client?

I've not had sufficient experience to date of victim-participants to give an informed opinion, except the very limited experience of the pre-trial phase of the STL where there is a victim's representative. I think the principle is sound – victims should be included in the process – but whether the impact is positive or not depends very much on the modalities. The devil is in the details. Victim participation can be abused. It can hamper one's ability to defend one's client in that it can add another opponent to the process in addition to the Prosecutor.

4. How does the existence of an international commission (eg UNIIIC) or commission of inquiry that precedes an international prosecution affect the trial process? Are such commissions a good precedent for dealing with international conflicts in the future?

The existence of an international commission undoubtedly complicates things. For example, who has ownership of documents created by the commission – the prosecutor who takes over from the commission or the public – this is obviously a key question from the point of view of trial disclosure issues. It is also not obvious to me what the point is of combining a truth-finding commission with an adversarial prosecutorial process. Surely one should opt for one or the other. What if the

commission and the tribunal reach different results and/or conclude that different actors are responsible for the crimes in question? Personally I doubt whether investigative commissions are a good precedent, unless they are of the truth and reconciliation variety, which can work in the context of a society that is willing to knit itself back together after violent political conflict (Sierra Leone, for example, but not the former Yugoslavia).

5. In your experience what is the role of the media in international criminal trials? Do they report fairly and accurately on the conduct and outcome of the process?

I think one has to distinguish the mass media from the specialist media (eg the Institute of War and Peace Reporting). The mass media tends to sensationalise the issues in war crimes trials, and also to presume that everyone at trial must be a war criminal, so reporting can often be inaccurate. Specialist media which regularly cover war crimes trials tend to be more accurate. But having said that, good journalists will report fairly and accurately, and where they interview defence counsel, are, in my experience, willing too to put across the defence perspective.

6. Is equality of arms a reality in international criminal trials? Do states cooperate on an equal basis with defence and prosecution and if not what impact does this have on your ability to defend your client?

I think most Counsel would agree that procedurally, equality of arms is a reality, in that every Statute and RPE of each tribunal notionally protects equality of arms. But of course the Office of the Prosecutor is always better staffed, equipped, resourced and supported in every tribunal I have seen. The Defence is always the first line of budgetary cuts.

So it is a constant battle to make sure the Defence are not completely outgunned. Vigilance is the watchword. The presumption of guilt is pervasive in international courts and tribunals, and that has a knock-on effect in many ways. For example, States which fund the tribunals will always question why so much money is needed on defence when they presume that only the guilty have been indicted. Some tribunals have shown more respect for the equality of arms than others. On that record, I hope, they will be judged.

7. Is it acceptable for an international court to impose the death penalty, or allow a trial to take place in a state that does?

Clearly not. All international human rights norms are contrary to the death penalty and there is a clear worldwide abolitionist movement. The death penalty is barbaric, pure and simple. So an international court never could and never will impose the death penalty.

In my view, an international court also should not countenance, or be in any way a party to, a trial where the death penalty is a possible outcome.

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?

In international criminal law more, perhaps, than any other field, the key is to get your foot in the door in one way or the other, because once you are in the world of ICL, opportunities tend to abound allowing you to remain in it, but when you're on the outside, it can seem impossible to break in. Many a successful international criminal lawyer started off as an intern and then climbed their way up.

I do think experience in the domestic field is important, because it gives you a point of comparison. If your only experience of criminal law is at the international tribunals, your perspective will be somewhat warped. It is also very important, as Counsel, to be well grounded in your own national codes of conduct and legal culture and traditions, as that will be your lodestar at the international tribunals. There will be times when you need to stand firm against an international judge or official; if you know your traditions as a defence advocate, and the important points of principles to fight for, you will be able to stand firm where a lawyer not steeped in such traditions may be at a loss, and either give way or be overly dogmatic for want of a point of reference.

9. What has been your proudest professional moment?

When Naser Oric was acquitted by the Appeals Chamber of the ICTY. No-one deserved more to have his name cleared and it was of huge historical importance for Bosnia.

10. Is there any client you would not defend? Is there anyone you would like to prosecute?

I have to draw a distinction here between my international practice and my domestic practice. In England and Wales, as a practicing barrister at the independent bar, I observe the cab rank rule, that is to say I defend anyone if the case is within my ability and I am available. That rule does not apply to international work, for good reason (I can't be obliged by the rules of my profession to uproot to The Hague or Cambodia or Arusha whenever a client asks me to represent him). So in the international work, one has a choice. I was fortunate to defend Bosnian Muslim clients and Genreal Mladen Markac at the ICTY, in whose cases I believed and all of whom were either acquitted (Naser Oric , Mladen Markac) by the ICTY or were on their way to being acquitted when they died (Mehmed Alagic and Rasim Delic). There are plenty of ICTY accused whom I would not represent, and it's my right and privilege to decline those cases if offered them. I would like to prosecute the UN officials, Janvier and Akashi, who refused to help Srebrenica when it was falling, and who had the means and ability to do so. They have blood on their hands and they should be prosecuted for complicity in genocide.

Amal Alamuddin

Will Syria Go to the ICC?

The UN Security Council (UNSC) kick-started international criminal justice in the 1990s by creating courts to try those suspected of international crimes in the former Yugoslavia and Rwanda. When the International Criminal Court (ICC) opened its doors in 2002, it became the world's first permanent international criminal court, covering crimes across the world. But it was not created by the UN. It was set up by treaty – the Rome Statute – meaning the court only has jurisdiction over states that have signed up.

With one exception. Under article 13 of the ICC's statute, the UNSC can "refer" a situation in a state to the court, even if that state has not ratified the statute. The UNSC also has the power under article 16 to "defer" a case, meaning it can pause an ICC prosecution against an individual for a renewable one-year period. Decisions under articles 13 and 16 must be adopted under chapter VII of the UN Charter, which means, in theory, that they are taken when the interests of "international peace and security" require it.

The UNSC's ability to trigger or stunt the ICC's work means justice may become political and selective. In the ICC's 10 years of practice, the UNSC's deferral power has never been used to pause an imminent or ongoing case. But the UNSC has used its referral power to send two files to the court – Darfur and Libya – allowing ICC judges to issue arrest warrants against presidents Bashir and Gaddafi.

These referrals filled a jurisdictional gap, because Sudan and Libya had not voluntarily signed up to become ICC members. But two main problems emerge from the practice. First, in both referral-resolutions, the UNSC excluded the actions of nationals of some non-state parties from the ICC's reach. This exclusion, pushed by the US, effectively gave immunity to potential suspects from about 70 countries that are not members of the ICC, and in doing so potentially compromised the independence of the judicial process. The second problem with the referrals is that there have not been more. When the UNSC referred Libya to the ICC, about 300 people had been killed. But with more than 70,000 already killed in Syria and no referral, can the system be credible?

In October 2012 the UNSC held its first debate on the ICC. Several states highlighted that referrals should be based objectively on the severity of crimes, and should not include exemptions for certain nationals. This is in line with the ICC statute, which only allows the UNSC to refer "situations" to the Court, not "cases" against specific persons or excluding others. It is up to the prosecutor to decide who to charge and what with, if they decide to proceed at all. As a member of the prosecutor's office stated during the debate: "once the Security Council decides to refer a situation… the judicial process has been triggered and the matter is fully in the hands of the prosecutor and the judges".

As for referrals that never happen (or possible future deferrals), many states highlighted during the debate that peace can trump justice. Japan stated that the UNSC should consider ICC justice "from the viewpoint of contributing to a peaceful solution [of] a particular situation [and] also as a deterrent of future crimes". New Zealand argued that when a conflict is ongoing, the question is whether the ICC would be an "incentive or a disincentive" for more violence. Russia announced that the ICC's activities "must be carried out in the light of common efforts to settle crisis situations". And for China, "justice cannot be pursued at the expense of peaceful processes".

The UNSC is the body best-placed to determine questions of international peace and security. But in doing so it should remember that both peace and justice are UN values. Justice can ⏩

⏩ be delayed but not forgotten in the name of peace – indeed a sustainable peace is not possible without it.

During the recent UN debate, the elephant in the room was Syria. Russia and China – which oppose a referral – did not mention it. A handful of states supported a referral or highlighted the need for accountability generally. Only a few states took a stronger stance. France argued that the UNSC's non-referral is "an incitement to the Syrian authorities to pursue the path of violence". Switzerland agreed, adding that it "falls to the Council to find a political solution that brings lasting peace… accountability is [however] a necessary precondition of such a solution".

When Kofi Annan resigned as UN and Arab League peace envoy for Syria he blamed "finger-pointing and name-calling" in the Security Council. The ongoing debate in the Council shows that divisions still run deep. And while states continue to argue about the priority to give to peace versus justice, the Syrian people have neither.

iLawyer Amal Alamuddin is a barrister at Doughty Street Chamber and former adviser to Kofi Annan on Syria. This article is based on an article originally published in The Lawyer magazine.

Daniel Robinson

Legal Avenues for Palestine?

The United Nations ("UN") Human Rights Council has issued a report warning Israel to cease settlement activity in the West Bank or potentially face legal action at the International Criminal Court ("ICC").

The report, released on 31 January 2013, states that Israel is in violation of international law and calls for both a cessation of all settlement activity 'without preconditions' and the initiation of 'a process of withdrawal of all settlers'. Turning to the ICC, the report highlights the court's jurisdiction over the settlements under the Rome Statute, stating: "Ratification of the statute by Palestine may lead to accountability for gross violations of human rights law and serious violations of international humanitarian law and justice for victims".

The report follows an historic vote in November by the UN General Assembly ("the Assembly") recognising Palestine as a non-member observer state, a step up from its former status. Its timing had agreeable symmetry, occurring as it did on the 65th Anniversary of the United Nations vote for a plan of partition of British-mandated Palestine into what would become Arab and Israeli states. Although Palestine cannot vote at the Assembly as a non-member and enjoys the same status as the Vatican, the only other non-memb er observer state, the change of designation to 'state' may prove of more than simply symbolic importance.

Britain and Germany both abstained from the vote, the British government expressing concerns that Mahmoud Abbas had failed to promise he would resume peace negotiations with Israel. It was clear prior to the vote that worries over potential international legal action by Palestine were high on the agenda; the US and Britain among others sought explicit assurances from the Palestinians that they would not seek to join the ICC in the near future.

These fears are not groundless. On 22 January 2009, the Palestinian National Authority lodged a declaration with the ICC Registrar under Article 12(3) of the Rome Statute ("the Statute") accepting the jurisdiction of the ICC for acts committed on the territory of Palestine since 1 July 2002 – the date the Rome Statute legally came into force.

Article 12 deals with preconditions to the exercise of jurisdiction. The ICC is not based on universal jurisdiction but on jurisdiction provided by the United Nations Security Council or a state. Article 12 allows states who are not party to the Statute to accept the court's jurisdiction. However, the key word is 'state', and in order to begin an investigation, the Office of the Prosecutor ("the OTP") would have had to determine that Palestine was a state for the purposes of the Statute.

The decision of the OTP, delivered on 3rd April 2012, was that it had to rely on a legal determination of the issue by the relevant bodies at the U.N. The OTP did not consider those bodies to have determined that Palestine was a State. This is despite ⏩

⏩ UNESCO's vote in October 2011 to admit Palestine as a full member; UNESCO's constitution provides that states who are not UN members may be admitted to membership on a two-thirds majority vote of the General Conference. In concluding, the OTP focused on the UN General Assembly, observing:

"The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments…However, the current status granted to Palestine by the United National General Assembly is that of "observer", not as a "Non-member State"…

The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of State Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction."

The Security Council has not hinted that any referral is likely, and many consider that such a referral would not escape a veto from Israel's more public supporters. However, bearing in mind that the OTP considers it must follow the lead of the Assembly in determining such matters, the vote may lead the ICC to consider that Palestine is a state for the purposes of the Statute. On 30th November the ICC stated that the OTP took 'note of the decision' and would now consider the 'legal implications of this resolution'.

For Palestine, two potential routes are opened by the vote: a re-submission of the request to the new prosecutor, this time as a U.N. recognised observer state, or ratifying the Statute. For now, Palestine has declared no immediate intention of re-submitting the request, although in the context of those remarks the Palestinians' U.N. envoy Riyad Masour referred specifically to bringing Israel into compliance over the building of settlements in the West Bank. Presumably Palestine would seek to invoke Article 8 of the Statute, which defines as a war crime the transferring of an Occupying Power's own population onto territory it occupies. Traditionally the International Community has pointed to the similar provision in Article 49 of the fourth Geneva Convention, as does the UN report.

Any such ICC investigation would of course be fraught with hurdles, not least having to give consideration to what constitutes the borders of Palestine and the borders of any territory occupied by Israel and indeed whether that territory is occupied for the purposes of the Charter. Moreover, although the ICC could be invited to investigate the general situation, according to the Statute Palestine could refer a situation in which crimes had been committed and detail the circumstances, but cannot refer specific crimes only. Any ICC investigation could conceivably focus on actions committed by both sides.

Max du Plessis

Time for Universalizing International Criminal Justice

It has become fashionable to criticize the International Criminal Court (ICC) for its exclusive focus on African cases. The critical perception of the ICC and its work in Africa is a problem of history and international politics. Developing nations, particularly from the South, now repeatedly and rightly complain about the skewed power relations reflected in the Security Council. Those power relations – and the imbalance of power within the Council – have come sharply into focus in the case of the ICC. That is because of the role reserved for the Security Council, through the Rome Statute that created the ICC, within the ICC regime.

After a decade of the ICC's work, we have witnessed as the Security Council referred two African situations to the ICC (Sudan, and Libya) – but has repeatedly failed to do so in respect of equally deserving situations (in relation to crimes committed by Israel, and most recently in respect of the crimes unfolding before our eyes in Syria). Geographically we now have ten years of the ICC's work, and the reality that all the cases opened by that Court are in Africa.

At a conference recently held in Nuremberg in early October 2012, the new Prosecutor of the Court, Ms Fatou Bensouda, correctly responded to African critics by proclaiming powerfully, in her words, "that if you don't wish to be targeted by the ICC, then don't commit the crimes". And Ms Bensouda is right to highlight that there are good reasons for why each of the African situations are currently before the Court, not least of all because the bulk of the cases being investigated are on account of African governments "self-referring" cases to the ICC.

Furthermore, we might pause to note that African victims of the heinous crimes committed against them in the ⏩

⏩ DRC, or in Uganda, or in Cote d' Ivoire, or in Kenya, or in Sudan, or in Libya, don't particularly care that the ICC's focus is on African situations only – probably in their minds they are only too satisfied that the ICC (somebody, anybody!), is attempting to deal with the perpetrators of these crimes. It would be a double-tragedy to assume that their victims share the self-serving criticisms of the ICC by African despots and powerful elites. And self-serving criticisms they all too often are – one cannot imagine African leaders or the African Union caring much to criticize the ICC if it had decided to pursue a worthy case against the head of state from, say, a South American country. We are closer to the truth if we accept the obvious – which is that African criticisms of the ICC's focus on President al-Bashir of Sudan arise precisely because his case brings home to others geographically and graphically that they may be next.

Nevertheless, it is time to accept that all these African cases give rise to a perception problem, the sum of which can no longer be ignored, and which threatens to undermine the credibility of the court. Let me tell you why, for three reasons.

The first reason is because this exclusive African focus undermines claims that the international criminal justice project is truly universal in its justice aspirations; or free from the vicissitudes of international politics. At the same Nuremberg conference at which Ms Bensouda spoke, Judge Song, the President of the ICC, drew attention to the importance of the ICC being independent and universal in its aspirations, and Judge Hans Peter-Kaul, also of the ICC, spoke about equality before the law. However, there is a disconnect between these goals – laudable as they are – and the practice of international criminal justice. Ultimately, it is a question that any first year law student is taught to identify: being a question of fairness and equality. So long as the Security Council and the ICC ensure that the Court busies itself exclusively with African situations, and ignore or evade dealing with the sins of Syria, or the plight of the Palestinians, the Court will suffer from a credibility problem.

We would all have seen in early September this year that Archbishop Desmond Tutu refused to share the stage with Tony Blair at a leadership conference in Johannesburg. His refusal was motivated by his concern about the double-standard of international criminal justice. The concern expressed by the revered Archbishop symbolizes a powerful and morally profound view that the international criminal justice project is shot-through with hypocrisy. While it is easy to dismiss the self-serving criticisms of the ICC by African despots and warlords, it is not possible to do so in response to the criticisms of Archbishop Desmond Tutu. Tutu while no friend of tyrants, is a firm friend of equality and fairness.

That leads to a second reason why the ICC perception problem can no longer be ignored. Aside from the justice principles of equality and fairness, this exclusive focus on Africa affords the selfsame African tyrants and powerful elites a gift; an excuse; a weapon. It allows them to draw deserving attention away from African crimes and the plight of African victims, by insisting that the spotlight be kept trained on the skewed nature of international criminal justice. And ironically, it allows them to do so with a straight face. It gives them a stick with which to beat the ICC and the international criminal justice project. It is no coincidence that the African Union's resistance to the ICC reached its shrillest levels the moment the ICC, through the Security Council's referral of the Sudan situation to the Court, decided to focus on the crimes allegedly committed by an African sitting head of state in the form of President al-Bashir. As the net fell on him, it became clear in a flash to others similarly situated on the continent, that his fate might be shared by other elites – that the net might be extended to them.

The backlash by the AU against the ICC is well chronicled. Whether out of a real concern to ensure equal justice under law, or to shield powerful African leaders, it is enough here to note that the AU has taken various steps to reflect its deep displeasure with the work of the Court on the continent. We know about the repeated requests by the AU for the Security Council to defer the case against al-Bashir; about Resolutions adopted by the AU commanding AU member states not to cooperate with the ICC in arresting African heads of state; and about the invidious position that a majority of African states have found themselves in, torn between fidelity to their regional motherbody, the AU, and their commitments to the ICC as treaty members of the Rome Statute.

Also, more recently, we have seen how the AU's ⏩

⏩ discontent with the ICC has fueled efforts to create a regional international criminal chamber, grafted onto the extant African Court on Human and Peoples' Rights. In November 2011 a draft protocol for the creation of such a chamber was rushed into existence under the AU's stewardship, and in May 2012 Ministers of Justice and Attorneys-General at an AU meeting considered and adopted the draft protocol for the establishment of international criminal jurisdiction for the African Court. We are now at a stage where the Protocol has been recommended for adoption by the AU Assembly, set for early in 2013.

Given the continent's human rights atrocities, some (again) with a straight face can claim that this is a laudable development. For my part, I'm not so sure – as I've written in detail elsewhere. For one thing, the Protocol has been rushed into existence with unseemly haste. While the AU has for some time been thinking about the creation of a regional international criminal tribunal (particularly because of perceived abuses of universal jurisdiction by European States), it is quaint to think that the invigorated push for the African Court's expansion has no connection with the AU's backlash against the ICC. The fact is that the protocol has been drafted with little or no meaningful consultation with African governments or civil society – being driven from the top-down by powerful players within the AU.

A second difficulty is the Court's proposed subject-matter jurisdiction. Aside from the African Court being asked to tackle the traditional international crimes of genocide, crimes against humanity, and war crimes, the proposal is for the Court to also tackle a raft of continental plagues – including terrorism, piracy, mercenarism, corruption, money laundering, trafficking in humans and drugs, and aggression. Again, these no doubt are crimes that deserve a response, but the obvious question is whether a meaningful one could ever be expected from the African Court, which to date has struggled even to fulfill its human rights aspirations. That the Court struggles is hardly the fault of its judges. The fault lies with the continent's politicians and their fudging and obfuscating within the AU, including their poor grasp of finances.

The risk now facing the Court is that it is expected to do too much, with too little. Certainly there is no realistic prospect of doing justice to this wide panoply of offences that are to be included on the Court's docket. Aside from the difficulty of complementing the Court's judicial role with fully capacitated prosecutorial and investigatory bodies that can meaningfully pursue cases against the accused, there is the little problem of money. A single unit cost in 2009 for an international criminal trial was estimated to be in the region of US $ 20 million, nearly double the approved 2009 budgets for the African Commission and African Court combined. Put differently, the ICC budget for 2012 – for investigating just three of these international crimes – is just about double the entire budget of the African Union as a whole for the same year! The question must therefore be asked: where is the money to come from? The answers to the question are vital. Without money the AU can't capacitate the African Court to do the type of international criminal justice work that ⏩

⏩ the ICC is already doing on the continent, in the service of African victims. It is just as well to reiterate that the African Court in its more modest role as a human rights court is already struggling (discussions with African Court judges confirm this to be the case, including their complaints about resource constraints). To over-expand the Court might be a headshot to a body that is already kneecapped.

The short point is that serious questions arise about the effectiveness, desirability and impartiality of an international criminal chamber within the African Court. Given these and other difficulties associated with the AU's recent rush to capacitate the African Court with international criminal jurisdiction, a fair argument might be made that the AU's decision to embark upon this expansion is less about regional justice, and more about regional obfuscation. Isn't the real motive behind this push by powerful AU figures aimed at throwing sand in the ICC's gearbox, by placing speed-bumps in the path of African states that are already party to the ICC, and by sending confusing signals to those thinking of ratifying the Rome Statute? Are we not witnessing what might be called cynical complementarity? Of course, one does not want to be read as unduly negative about the prospects for an African regional criminal chamber; or worse, as an Afro-pessimist. So let me say conclude this portion of the paper by saying the following: if in due course the African Union were to unveil a sufficiently funded, meaningfully resourced, legally sound, and capacitated African criminal court that would fearlessly and independently prosecute the likes of President al-Bashir or Hissen Habre, or other African warlords, while simultaneously performing without compromise the Court's parallel mandate of protecting African human and peoples' rights … then we should all applaud, and I would clap loudest.

That brings me almost to the end of this short piece. Allow me now to focus on the positives.

The first is to herald, despite all the AU's naysaying, the leadership role that Africa has taken in respect of the ICC. We have the world's first examples of self-referrals from this continent (whereby African leaders invited the ICC to open investigations into crimes committed in Uganda, and the DRC), most recently continued in the case of Mali calling for the Court's intervention in respect of atrocities committed in that country. This is smart politics too: while African states contribute a relatively small amount to the overall budget of the ICC, they receive disproportionality high levels of the ICC's service in the form of highly paid professional investigators, prosecutors and judges focusing attention on solving and prosecuting crimes committed in African states.

The second is to celebrate the important role that complementarity has played – positively – in the work of civil society and domestic institutions in responding to African crimes. Again, despite the AU's bitter contestation with the ICC at the political level, on the ground domestic investigations and prosecutions of international crimes have shown promising signs of a home-grown form of international criminal justice that should serve as an example beyond Africa.

In this respect, there is an important judgment recently handed down by the South African High Court confirming that South African authorities are under an obligation to act as a complement to the ICC in investigating – through the use of South Africa's universal jurisdiction provisions in South Africa's ICC implementation legislation – purported acts of torture committed in Zimbabwe by Zimbabwean police officials against Zimbabwean victims.

Not only that, but for all the AU's attempts to coordinate an "African" response to the ICC, various examples have undermined the attempts at a homogenous continental position. For example, South African civil society mobilized in 2009, after reports that al-Bashir (by then sought by the ICC) had been invited to attend the inauguration of President Zuma in Pretoria. Civil society threatened to seek a court order for the arrest of al-Bashir if he attended the inauguration, and ultimately the Government publicly stated that it was committed to the Rome Statute and undertook to arrest al-Bashir if he did arrive in the country. Al-Bashir chose not to visit South Africa on that occasion – and hasn't attempted to visit since.

In respect of Kenya, al-Bashir tried his chances on one occasion, turning up as a guest at the country's celebration of its new Constitution in August 2010. In response to varied criticism of its decision to host al-Bashir, and in reaction to a reported follow-up visit by al-Bashir to attend a summit in Kenya two ⏩

⏩ months later, Kenyan civil society went to court and obtained a court order for the provisional arrest of al-Bashir should he enter Kenya's territory. He hasn't been back there since.

These positive examples are but a few amongst many – more fully explored in a recent paper published by the Institute for Security Studies.

Ultimately, in closing, it remains for the international community to take seriously the call by Archbishop Desmond Tutu for less double-speak and hypocrisy when it comes to international criminal justice. While it is so that the Security Council is often singled out as the source of this skewed unfairness, that would be to miss the full picture. It is also vital to recognize missed opportunities – and to learn from them – when it comes to the ICC and its various organs. Most notably in this regard has been the decision of the Office of the Prosecutor, under the leadership of the former Prosecutor, Luis Moreno Ocampo, effectively to avoid investigating the crimes committed by Israel during Operation Cast Lead. In April 2012, Ocampo indicated, in an official statement , that he was not competent to decide whether Palestine is a State such that it can accept the jurisdiction of the ICC under Article 12(3) of the ICC Statute. As a result, the ICC Prosecutor took the view that he could not take any action as a result of the January 2009 declaration made by the Palestinian National Authority, accepting the jurisdiction of the ICC over crimes committed on the territory of Palestine.

In that statement, the Prosecutor decided that "competence for determining the term "State" within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute."

A group of eminent international law scholars took up the Prosecutor's suggestion and wrote to the President of the Assembly of States Parties to the Rome Statute to urge her to place the question of the Statehood of Palestine, for the purposes of Article 12(3) of the Statute, on the agenda of the next meeting of the ASP – just recently held in The Hague. While the President of the ASP declined to do so, it is notable that in their letter to the President the academics, including Professors John Dugard and William Schabas, highlighted what they believed is really in issue. The professors wrote that "[w]e believe it is in the interests of international criminal justice and the reputation of the ICC that the question of the statehood of Palestine for purposes of Article 12(3) of the Rome Statute be properly resolved as soon as possible".

That question of the statehood of Palestine, in my view, might be recast more broadly. I think it is in the interests of justice of the reputation of the ICC that the Court stretch its work beyond Africa. By doing so the Court will deny the powerful African elites the stick which they so easily and distractingly wave at the ICC. It will also – where the evidence shows a need for the Court's intervention – be a means by which to pay homage to the principle of equal justice under law. At the same time we should embrace and encourage the existing work that is being done by the ICC in Africa.

There is then, a potential for a win-win situation. For the ICC to do justice as it should to the African victims of the cases that are rightly before it and to do justice to the victims of such crimes outside of Africa who equally deserve the Court's and the international community's attention.

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David Tolbert

After war, Syrians will need justice and forgiveness. It will not be easy.

Recent proposals on using transitional justice as a means of stabilising Syria in the aftermath of the eventual fall of the Assad regime – including by providing incentives for loyalists to give up a possible "fight to the death" in Damascus – are a significant development in the debate on Syria.

As someone who deeply believes in the importance of justice as the basis for recovery and sustainable peace in any society confronting a legacy of mass atrocity and repression, such as Syria, the proposals confirm that the concepts of transitional justice have ceased to be seen simply as idealistic and philosophical notions, but are credibly making their way into the politics of peacemaking.

Still, we must proceed with a great deal of caution and examine the preconditions necessary for measures of justice to have their desired effect. What levels of consultation and infrastructure will be needed for justice to have a genuine role in restoring trust between the state and its citizens? What will be needed for victims to feel that justice means something more than a short-term move in the chess game of post-war politics?

It has been rightly noted that all politics are local. The same can be said of transitional justice.

International law has authoritatively established the rights to justice, truth, reparations and non-recurrence for serious human-rights abuse. But how we make these rights a reality in Syria needs careful reflection. If transitional justice is promoted as a shortcut to peace, instead of as a foundation of a new rights-respecting society, it is not likely to succeed.

As Syrian groups and international actors gather as "Friends of Syria" and consider these proposals, it is of paramount importance to be clear about what is meant by transitional justice.

Transitional justice is based on two intertwined principles. Firstly, it is founded on the conceit of taking human rights seriously – victims of serious human rights abuses have a right to justice; transitional justice is premised on accountability, it is not "soft justice" or an alternative to criminal justice.

Secondly, transitional justice is focused on making accountability a reality in particularly difficult circumstances. Massive crimes followed by competing demand for services and limited resources mean that even a well-functioning system of justice will not be able to address all breaches of human rights. The challenge is overwhelming and accompanied by a complex political context, often paired with daunting technical challenges.

The idea that transitional justice somehow implies a form of "soft justice" is still a frequent misunderstanding and was, for example, noticeable among many human-rights activists in Tunisia and other countries in the aftermath of recent revolutions in the region. At the outset, many rejected discussion on transitional justice under the assumption that it advocated blanket amnesties for perpetrators of heinous crimes for the sake of national reconciliation. Anyone proposing such ideas is seriously out of touch with international law and practice over the last 20 years.

International law prohibits amnesty for perpetrators of serious international crimes, such as genocide, crimes against humanity, and torture. Further, if national authorities fail to meet their obligation to investigate such crimes and bring cases to trial, the International Criminal Court has been created to step in to ensure that some degree of justice takes place.

In a country such as Syria that has seen carnage of such tragic proportions – with the United Nations now estimating ⏩ ⏩ that about 60,000 have been killed – the most responsible perpetrators must be brought to justice if the society is to move forward on the basis of the rule of law and hope for a sustainable peace.

At the same time, it is important to underline that criminal responsibility is individual and cannot be ascribed to entire ⏩

⏩ groups, political or ethnic, or on the basis of guilt by association. Thus, in a situation where the majority of Alawites are mobilised by a fear of retribution for siding with the Assad government, any proposal for transitional justice measures must clearly communicate that perpetrators will not be judged by their political or ethnic allegiances, but by credible evidence presented in a court of law.

This message is even more significant in view of reports about crimes being committed by the Free Syrian Army. If transitional justice proposals are to have a chance at contributing to sustainable peace in Syria, there must be no victor's justice.

This type of accountability will not be possible without strong and independent judicial institutions that are free of political influence. Serious steps must be taken to reform institutions that either participated in abuses or failed to provide protection against them. Without those measures, all other transitional justice attempts risk withering on the vine.

Trials of Saddam Hussein and his cohorts in Iraq serve as a stark warning of how flawed criminal prosecutions can serve to further inflame wounds inflicted by a murderous regime, instead of healing them, and thus become counterproductive.

With these factors in mind, we need to recognise that not everyone who committed a crime will be prosecuted, given the massive numbers involved. Moreover, despite the importance of prosecuting those most responsible for the most serious crimes, such trials are not necessarily the best vehicle to address social and historical aspects underlying patterns of repression and crime. In some circumstances truth-seeking measures, such as truth commissions, may be a valuable tool in providing a different but effective form of accountability.

At the same time, we need to remember that justice cannot focus solely on perpetrators and retribution if there is to be a comprehensive, long-term recovery of Syrian society. Victims must be recognised and their suffering acknowledged and redressed, including through reparations programmes.

And it is not only about material compensation, as important as it is. Uncovering the truth regarding the disappeared is critical – families must be able to know what happened to their loved ones if they are ever to be able to genuinely participate in the national reconciliation. Measures of reparation that reflect an acknowledgement of the harm done can take various forms but should be focused on the victims and the communities that suffered that harm, recognising their dignity as rights-bearers, and not as recipients of charitable largesse.

All these measures, applied in a comprehensive manner, constitute transitional justice and examples of their application (to varying degrees of success) can indeed be found in countries such as South Africa, but also Argentina, Chile, Germany and many others.

However, it would be dangerous to think of models applied in these countries as something to simply replicate in Syria. There are lessons that we have learnt over time from various successful and less successful attempts to employ transitional justice measures, but there is no ⏩

⏩ "one-fits-all" model. Syria will have to find its own way.

In this respect, proper consultation at the national level, especially with those most affected by decades of abuse, is of paramount importance for any credible transitional justice process.

The promise of transitional justice is that peace will be more than the end of hostilities; that the causes and consequences of war are going to be squarely faced and dealt with, to foster a more peaceful society. For that reason it is heartening to see that its mechanisms are being considered as a tool that could help bring peace to Syria.

There are few who are more committed to seeing transitional justice measures applied on the ground than those of us who have been working in this field and advocating the application of its solutions. But, let us be aware that transitional justice is not a magic wand, any more than it is an alternative to "traditional" justice.

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Dr Miša Zgonec-Rožej

Prosecutor v. Gotovina & Markač: Tribunal Acquits Croatian Generals

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), on Friday, 16 November 2012, overturned the convictions of two Croatian generals, Ante Gotovina and Mladen Markač, acquitting them of all and any crimes against the Serb civilian population in the Krajina region of Croatia. Two iLawyers, Guénaël Mettraux and John R.W.D. Jones, were members of the Gotovina and Markač defence teams, respectively.

1. Background

In 1995, Croatia carried out "Operation Storm", a military operation to take control over the territory in Croatia's Krajina region. An estimated 20,000 ethnic Serbs fled their homes and allegedly 150 were killed during the military operation. Before being recaptured by the Croatian Army forces in 1995, the region of Krajina was under the control of the self-proclaimed Republic of Serbian Krajina that had existed since 1991. Two Croatian Serb leaders of the Republic of Serbian Krajina, Milan Babić and Milan Martić, were convicted by the ICTY for their roles in the forcible removal of Croats and other members of the non-Serb population from the Krajina region.

Gotovina, the commander of the Split Military District of the Croatian Army, was the overall operational commander of Operation Storm, while Markač was the Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia. In its judgement delivered on 15 April 2011, the Trial Chamber found that Gotovina and Markač were part of a joint criminal enterprise led by late Croatian President Franjo Tuđman whose common purpose was to permanently remove the Serb civilian population from the Krajina region by force or threat of force.

The Trial Chamber found that Gotovina significantly contributed to a joint criminal enterprise by ordering unlawful attacks against civilians and civilian objects in Knin, Benkovac, and Obravac and by failing to make a serious effort to prevent or investigate crimes committed against Serb civilians in the Split Military District. The Trial Chamber found that Markač significantly contributed to the JCE by ordering unlawful ⏩

attack against civilians and civilian objects in Gračac and by creating a climate of impunity through his failure to prevent, investigate, or punish crimes committed by members of the Special Police against Serb civilians.

Consequently, the Trial Chamber found both accused guilty, under the first form of JCE, of persecution and deportation as crimes against humanity. It also found both guilty, under the third form of JCE, of murder and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war, either on their own or as underlying acts of persecution.

Although the Indictment alleged that Gotovina and Markač were liable for charged crimes not only on the basis of the JCE, but also other modes of liability, including planning, instigating, ordering, aiding and abetting, and superior responsibility, the Trial Chamber declined to enter findings on modes of liability other than JCE. Gotovina and Markač were sentenced to 24 and 18 years of imprisonment respectively. The third accused in the case, Ivan Čermak, was acquitted of all charges against him. Both accused appealed their conviction.

2. The Appeals Judgement

The Appeals Chamber reversed the Trial Chamber's judgement and acquitted both generals, by majority of 3 to 2, of all charges. The dissenting judges, Judge Pocar and Judge Agius, appended dissenting opinions. The ICTY ordered the appellants' immediate release upon which they immediately returned to Croatia.

a. JCE

The Appeals Chamber considered that the Trial Chamber's finding on the existence of the joint criminal enterprise was primarily based on the conclusion that unlawful artillery attacks targeted civilians and civilian objects in the towns of Knin, Benkovac, Obravac and Gračac ("the four towns") in the Krajina region and that these unlawful attacks resulted in the deportation of some 20,000 civilians from that region. By contrast, the Trial Chamber did not characterise as deportation civilians' departure from settlements targeted by artillery attacks which the Trial Chamber did not characterise as unlawful. Where civilian departures coincided with lawful artillery attacks, the Trial Chamber was not able to conclude that those who left were forcibly displaced, nor that those firing artillery at such towns had the intent to forcibly displace those persons.

The Trial Chamber's finding of an unlawful attack was premised on the Chamber's conclusion that a reasonable interpretation of the evidence was that an artillery projectile fired by the Croatian Army which impacted within 200 metres of a legitimate target was deliberately fired at that target. Using this 200-metre standard, which was not even suggested by the Prosecution at trial, the Trial Chamber deemed that any shell or artillery which fell more than 200 meters from a legitimate target was not aimed at that target and was, therefore, evidence of an unlawful artillery attack. The Appeals Chamber unanimously held that the Trial Chamber erred in applying the 200-metre standard because the Trial Chamber did not provide any specific reasons as to the derivation of this margin of error and there was no evidence to support this standard.

The Appeals Chamber concluded that the reversal of the impact analysis undermined the Trial Chamber's conclusion that the artillery attacks against the four towns were unlawful. The remaining evidence, which was additionally considered by the Trial Chamber in order to assess the lawfulness of artillery attacks, was in the Appeals Chamber's view not sufficient to support the conclusion that artillery attacks were unlawful. The Appeals Chamber then considered whether the Trial Chamber could reasonably conclude, absent the finding that the artillery attacks were unlawful, that the circumstantial evidence on the record was sufficient to prove the existence of the JCE.

In the context of Operation Storm, the Trial Chamber considered unlawful artillery attacks to be the core indicator that the crime of deportation had taken place or in other words, the primary means by which the forced departure

⏩ of Serb civilians from the Krajina region was effected. By contrast, Serb civilians' departure at the same time or in the immediate aftermath of artillery attacks was not categorised as deportation where artillery attacks were not found to have been unlawful. Having reversed the Trial Chamber's finding that artillery attacks on the four towns were unlawful, the Appeals Chamber considered unsustainable the Trial Chamber's finding of the existence of a joint criminal enterprise with the common purpose of permanently and forcibly removing the Serb population from the Krajina. The Appeals Chamber considered other evidence, including the planning of Operation Storm during a meeting in Brioni shortly before the operation started (recorded on what is referred to as the Brioni Transcript) and Tuđman's speeches, as insufficient to support the finding that a JCE existed.

Following the reversal of the Trial Chamber's finding that a JCE existed, the Appeals Chamber quashed the convictions for the common purpose crimes of deportation, forcible transfer, and persecution. The remaining convictions for the crimes of plunder, wanton destruction, murder, inhumane acts, and cruel treatment, and associated convictions for persecution, which were entered on the basis of the third form of JCE, were also quashed because the Appeals Chamber held that the reversal of the Trial Chamber's finding that a JCE existed meant that other crimes could not be a natural and foreseeable consequence of that JCE's common purpose.

b. Alternate modes of responsibility

Having quashed all the convictions, all of which were entered pursuant to the mode of liability of JCE, the Appeals Chamber considered the possibility of entering convictions pursuant to alternate modes of liability. Gotovina and Markač both challenged the Appeals Chamber's jurisdiction to enter convictions under alternate modes of liability.

(i) The Appeals Chamber's jurisdiction to enter conviction under alternate modes of liability

The appellants argued that the Appeals Chamber would have jurisdiction to enter convictions pursuant to alternate modes of liability only if a party had challenged the Trial Chamber's failure to make relevant findings. The Prosecution, by deciding not to appeal against the Trial Judgement, waived its right to seek conviction under alternate modes of liability, and Gotovina and Markač only appealed against the JCE findings by the Trial Chamber. In these circumstances, they argued, convictions under other modes of liability were precluded. The appellants also argued, among other things, that the Appeals Chamber is precluded from entering additional convictions per se, as this would deprive them of their right to appeal these convictions.

The Appeals Chamber made some important clarification regarding its power to enter convictions pursuant to alternate modes of liability. It observed, Judge Pocar dissenting, that it had previously entered convictions on the basis of alternate modes of liability and that it was not convinced that the appellants had presented cogent reasons requiring departure from this practice. The Appeals Chamber held that its power to do so was not dependent on whether the Prosecution had appealed or not. The Appeals Chamber recalled that it had rejected the proposition that additional convictions on appeal violate an appellant's right to a fair trial per se. However, the Appeals Chamber held that it would not enter convictions under alternate modes of liability where this would substantially compromise the fair trial rights of appellants or exceed its jurisdiction as delineated in the Statute.

In considering whether to enter convictions pursuant to alternate modes of liability, the Appeals Chamber assessed the Trial Chamber's findings and other evidence on the record ⏩

⏩ de novo. As the Trial Chamber's analysis was focused on whether particular findings on the record were sufficient to enter convictions pursuant to JCE as a mode of liability, the Appeals Chamber decided to consider, but not defer to, the Trial Chamber's relevant analysis.

(ii) Acquittals under alternate forms of responsibility

The Appeals Chamber, Judge Agius dissenting, decided not to enter convictions against Gotovina and Markač on the basis of alternate modes of liability for the following reasons.

As regards the appellants' responsibility for the artillery attacks on the four towns, the Appeals Chamber agreed with the Trial Chamber's finding that departure of civilians concurrent with lawful artillery attacks could not be qualified as deportation. According to the Appeals Chamber, given the reversal of the findings that the JCE existed and absent a finding of unlawful attacks, the Trial Judgement did not include any explicit alternative findings setting out the requisite mental element for deportation which could be ascribed to the appellants on the basis of lawful artillery attacks. The Appeals Chamber was not satisfied that the artillery attacks for which the appellants were responsible were sufficient to prove them guilty beyond reasonable doubt for deportation under any alternate mode of liability pled in the Indictment.

As regards Gotovina's potential responsibility under alternate modes of liability based on additional findings of the Trial Chamber, the Appeals Chamber observed that the Trial Chamber's finding that Gotovina failed to make a serious effort to investigate the crimes and to prevent future crimes, relied upon the finding of the unlawfulness of artillery attacks. The Appeals Chamber, Judge Agius dissenting, considered that the Trial Chamber's description of the additional measures that Gotovina should have taken was terse and vague, and it failed to specifically identify how these measures would have addressed Gotovina's perceived shortcomings in following up on crimes. The Appeals Chamber found that the Trial Chamber erred by not addressing expert testimony indicating that Gotovina took all necessary and reasonable measures to ensure that his subordinates in the Krajina enforced appropriate disciplinary measures. Considering also other evidence on the record indicating that Gotovina adopted numerous measures to prevent and minimise crimes and general disorder among the troops under his control, the Appeals Chamber could not conclude that any failure to act on Gotovina's part was so extensive as to give raise to criminal liability pursuant to aiding and abetting or superior responsibility.

As regards Markač's responsibility under alternate modes of liability based on Trial Chamber's additional findings, the Trial Chamber found that he failed to order investigations of alleged crimes by members of the Special Police and thereby created a climate of impunity among them, which, in turn, encouraged subsequent crimes committed by the Special Police, including murder and destruction of property. In the Appeals Chamber's view, the Trial Chamber reached this conclusion in the context of its finding that the artillery attacks on Gračac were unlawful. The Appeals Chamber noted that the Trial Chamber did not explicitly find that Markač made a substantial contribution to relevant crimes committed by the Special Police or that he possessed effective control over the Special Police. Consequently, the Appeals Chamber found that the Trial Chamber did not make findings sufficient to enter convictions against Markač on the basis of either aiding or abetting or superior responsibility. The Appeals Chamber, Judge Agius dissenting, declined to assess the Trial Chamber's remaining findings and evidence on the record as doing so would require the Appeals Chamber to engage in excessive fact-finding and weighing of the evidence and, in doing so, ⏩

⏩ would risk substantially compromising Markač fair trial rights.

3. Shortcomings on the part of the Trial Chamber and the Prosecution

It is clear from the Appeals Judgment that there were two significant shortcomings in the approach taken by the Trial Chamber and the Prosecution. These were such that the Appeals Chamber was unable to remedy them without jeopardising the appellants' rights to a fair trial. This, however, does not mean that the Appeals Chamber would have necessarily reached a different conclusion regarding the appellants' responsibility should the Prosecution and Trial Chamber have taken a different approach.

The Trial Chamber, first, can be criticised for its failure to enter findings on modes of liability other than JCE. The Indictment alleged that Gotovina and Markač were liable for charged crimes not only on the basis of the JCE, but also on other modes of liability, including planning, instigating, ordering, aiding and abetting, and superior responsibility. The Trial Chamber, incongruously, considered that it was not necessary to make findings on the other modes of liability alleged in the Indictment. It should be noted that the Appeals Chamber in Setako upheld the Prosecution's argument that the Trial Chamber's failure to make findings on alternate modes of liability, in particular command responsibility, constituted an error of law (Setako, Appeals Judgment, para. 268).

Given that the Prosecution argued during the appeals process that the Appeals Chamber could enter convictions for alternate modes of liability, it erred by not appealing against the Trial Judgement and therefore not challenging the Trial Chamber's failure to make relevant findings on other forms of responsibility. The Prosecution must have been convinced that the conviction on the basis of a JCE would be upheld on appeal otherwise their decision would not make any sense. It should be pointed out also that even when the Prosecution discussed other forms of liability, it frequently linked them to unlawful attacks. Given that Gotovina and Markač only appealed against the Trial Chamber's conviction for JCE, the written and oral pleadings were limited to the discussion of the existence of a JCE and the appellants' contribution thereto.

Curiously, on 20 July 2012, more than two months after the Appeal Hearing which took place on 14 May 2012, in an Order for Additional Briefing, the Appeals Chamber, for the first time in its practice, requested the parties to provide a briefing on the potential for convictions pursuant to an alternate mode of liability. In particular, the Prosecution was requested to explain whether, in the event that Gotovina and Markač were not found liable for unlawful artillery attacks or to be members of a JCE, they could be held liable under superior responsibility or as aiders and abettors. This appeared to be an indication that the Appeals Chamber was at that stage seriously considering that the convictions on the basis of a JCE would fall. The appeal hearing is normally the last stage of proceedings, which comes at the end of all written pleadings, and following upon which the Appeals Chamber delivers a judgement.

In the light of the absence of a Prosecution appeal of the Trial Judgement, requesting additional briefing on alternate forms of liability at this stage of proceedings, runs the risk of undermining the appellants' fair trial rights. As explained above in section 2(b)(i), Gotovina, joined by Markač, challenged the Appeals Chamber's jurisdiction to enter convictions under alternate modes of liability. The Appeals Chamber, referring to its previous practice, without providing clear reasoning or legal basis, dismissed the appellants' challenges and confirmed its power to enter convictions on an alternate basis of liability.

The Appeals Chamber acknowledged that it had previously revised trial judgement by replacing convictions based on JCE with convictions based on alternate modes of liability (e.g. Vasiljević, Krstić, Simić). However, in none of these cases was the trial chamber's analysis concerning the factual basis underpinning the existence of a JCE materially revised. The Appeals ⏩

⏩ Chamber concluded in para. 155 of the Appeal Judgement:

"By contrast, in the present case, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that the Trial Chamber committed fundamental errors with respect to its finding concerning artillery attacks and by extension JCE, which stood at the core of findings concerning the Appellants' criminal responsibility."

The Appeals Chamber majority explained that any attempt to derive inferences required for conviction under alternate modes of liability would require disentangling the Trial Chamber's finding from its erroneous reliance on unlawful attacks, assessing the persuasiveness of this evidence, and then determining whether the guilt on the basis of a different mode of liability was proved beyond reasonable doubt. The Appeals Chamber – correctly in the view of this writer – considered that such an operation would transform the appeal process into a second trial, in violation of the rights of a fair trial.

In his separate opinion, Judge Robinson was the only one who considered the possibility of ordering a re-trial, which is an exceptional measure. He rejected this option because it would be too lengthy and expensive and would be unduly oppressive for the appellants. In addition, while in detention, Gotovina effectively served one-third of his sentence imposed by the Trial Chamber, while Markač already served one-half of his sentence. In this context, it is important to note that acquitted the ICTY defendants are not entitled to compensation for time spent in detention.

4. Significance of the judgement

The Appeals Chamber judgment is final and cannot be appealed. The only remedy left to the parties is a review procedure but which can only be requested if a new fact has been discovered which was not known at the time of the proceedings and which could have been a decisive factor in reaching the decision. To date one review judgment has been delivered by the ICTY in the case of Veselin Šljivančanin in which the ICTY modified his conviction for his role in the Vukovar hospital massacre and reduced his sentence from 17 to 10 years' imprisonment.

The Appeal Judgment will be remembered for its unanimous rejection of the 200-metre standard by which the Trial Chamber created a presumption that only artillery projectiles which impacted within 200 meters of an identified artillery target were deliberately fired at that target. It is important to point out that during the trial the Prosecution did not invoke, much less rely, on this standard when attempting to prove the unlawfulness of artillery attacks against the four towns. This rule was therefore the sole invention of the Trial Chamber, which, as found by the Appeals Chamber, had no support in the evidence. By rejecting the 200-meter standard, the Appeal Judgment has restored the ICTY's credibility within the military community that vigorously opposed to this standard.

The acquittals of the two generals by the Appeals Chamber mean that almost certainly no Croatian will ever be convicted by the ICTY for crimes committed by the Croatian armed forces in the territory of Croatia during the Yugoslav war. The ICTY Prosecutor indicted three other generals in the Croatian army for war crimes and crimes against humanity against Serb civilians. Janko Bobetko, the most senior commander in the Croatian Army, died before his transfer to The Hague. Two others, Mirko Norac and Rahim Ademi, have been transferred to Croatia to face trial in a domestic court. Norac was sentenced to 7 years' imprisonment while Ademi was acquitted. ⏩

⏩ Conversely, the acquittals of the Croatian Generals do not mean that no ethnic Croatian has ever been prosecuted and convicted by the ICTY for the crimes during the war in the former Yugoslavia. More than twenty Bosnian Croats have been indicted by the ICTY for international crimes predominantly committed in Bosnia and Herzegovina against Bosnian Muslims. Most of the accused were convicted for the charged crimes and given sentence of imprisonment. Some of them, however, are still awaiting the delivery of the judgement by the Trial Chamber, such as the accused in the case Prlić et al.

In Croatia, the judgment was received throughout the country with euphoria and has been seen as a victory for the entire nation and proof that the fight for liberation of Croatian territory was not unlawful. Conversely, in Serbia, the judgment has been received as shocking and as legitimizing crimes against Serbs in the Krajina region. According to the Serbian leadership in its statements after the verdict, the judgment might undermine the ICTY's credibility and impair the stabilization process in the region. The judgment, they say, has damaged Serbia's relationship with the ICTY which has now been downgraded to mere "technical" cooperation. As a result, the ICTY had to postpone a conference on its legacy scheduled for 22 November 2012 in Belgrade.

It is important to point out that the Appeals Chamber in this case did not deny the Trial Chamber's findings that crimes were committed against Serb population by Croatian military forces in the Krajina regions, including murders, destruction and plunder. This case, however, only deals with the responsibility of Gotovina and Markač and not the responsibility of other individuals or Croatia's responsibility for any such crimes. The acquittals do not discharge Croatia from its obligation to investigate and prosecute those crimes, including crimes committed by its own nationals, as has been acknowledged by the President of Croatia, Ivo Josipović upon the delivery of the judgment. Croatia's next step is to fulfill its obligation to ensure access to justice, truth and reparation to victims of these crimes.

Although some progress has been made in recent years in combating impunity, the Croatian authorities are reportedly still failing to investigate allegations against some high profile military and political officials. The European Union, to the membership of which Croatia is expected to accede in July 2013, calls in its report on Croatia's state of preparedness for EU membership to intensify the efforts to combat impunity for war crimes, as the majority of crimes have yet to be successfully prosecuted. Other republics of the former Yugoslavia face similar challenges in removing obstacles to the domestic criminal investigation and prosecution of international crimes committed during the Yugoslav conflict.

Finally, the Appeal Judgment will most likely have implications for Croatia's case against Serbia before the International Court of Justice for violations of the Genocide Convention, particularly in respect of Serbia's counter-claims.

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