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NEWSLETTER

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Prosecutor v. Gotovina and Markač (IT-06-90)

Ante Gotovina

The ICTY Appeals Chamber, Judge Theodor Meron, Presiding, reversed the Trial Chamber's sentence of 24 years for Ante Gotovina and 18 years for Mladen Markač and entered acquittals for both on Friday 16 November 2012. Both had been found guilty under JCE I of persecution and forcible transfer as crimes against humanity and under JCE III of crimes against humanity and violations of the laws of war. Counsel for Gotovina on Appeal included Gregory Kehoe, Luka Mišetić, Payam Akhavan and Guénaël Mettraux. Counsel for Markač included Goran Mikuličić, Tomislav Kuzmanović, John Jones, and Kai Ambos.

The majority of the Appeal Chambers judgement focused on the lawfulness of the artillery targets in the four villages of Knin, Benkovac, Obrovac, and Gračac, targeted in Operation Storm, from July to September 1995, and on the Trial Chamber's 200 metre standard used in its impact analysis of this shelling. The Trial Chamber had concluded that the political and military leadership of Croatia "shared a common objective of the permanent removal of the Serb civilian population from the Krajina by force or threat of force". According to the Appeals Chamber, the core of the Trial Chamber's determination that a JCE existed was based on the indiscriminate nature of the shelling in the four towns, which in turn depended heavily on its new creation of the 200-metre standard: where impact was more than 200 metres from a lawful target, the Trial Chamber had

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found it was indiscriminate shelling and thus directed primarily at terrorizing civilians. The Appeals Chamber held the 200 metre standard to be a "legal error," and thus found reasonable doubt as to whether the targets were lawful, and insufficient evidence of any objective of indiscriminate shelling- thus discrediting the existence of a JCE objective in the attacks on the towns and necessitating a reversal of all convictions. The Appeals Chamber also discredited other evidence, including Gotovina's order and the Brioni Transcript, which it considered to be ambiguous.

The Appeals Chamber also asserted its authority to convict under alternate modes of liability where such conviction would not compromise the accused fair trial rights. The Appeals Chamber considered alternate modes of liability, but found insufficient evidence of aiding and abetting and little evidence for command responsibility for failure to take measures to punish, if the targeting itself was not clearly unlawful, and on the contrary cited testimony that Gotovina had enforced discipline among his troops. Regarding Markač the Appeals Chamber also found that the attack on Gračać was not clearly unlawful and that his failure to act was not in itself sufficient for liability.

Judge Meron wrote a separate opinion to emphasise that convictions under alternate modes of liability should be used sparingly, and that in this case, after reversing the core finding that a JCE existed, such conviction would be inappropriate and compromise the right to a fair trial.

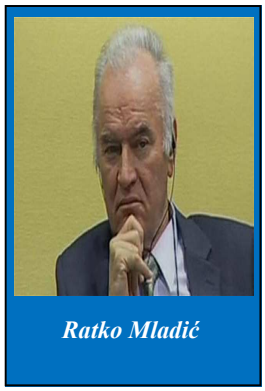
Judge Carmel Agius wrote a strong dissent, insisting that the overall approach by the majority was "artificial and defective" for failing to take into account the totality of the evidence and its import. Although he agreed with the wrongfulness of the 200 metre standard, he strongly disagreed with the overall conclusion that the attacks could have been lawful. Based on the totality of the evidence, in his opinion, there was no basis for giving the HV the benefit of the doubt. He therefore concluded that there was sufficient basis to convict either for JCE or alternate modes of liability.


Mladen Markač

Judge Fausto Pocar also dissented, arguing that if the 200-metre standard was in fact a mistake of law, the Appeals Chamber should have articulated a new standard and remanded the case to the Trial Chamber. The Majority's approach in his opinion "does not leave a good legacy in terms of respecting IHL principles when assessing the legality of an attack on towns where civilians and civilian objects are present". He further noted that it would have been more appropriate to focus on the contributions of Gotovina and Markač to the JCE rather than quashing the entire existence of the JCE. He further noted that sustaining convictions under alternate modes of liability is not at all equivalent to being convicted of a new crime on appeal.

By Friday evening, Gotovina and Markač had already returned to Zagreb in a government plane and were greeted by a crowd of over 100,000. In Belgrade, on the other hand, Serbian President Nikolić called the judgement "scandalous" and government officials have announced that they plan to downgrade cooperation with the ICTY to "merely technical levels".

Prosecutor v. Mladić (IT-09-92)


Ratko Mladić

After a two week recess from 12 October to 29 October, the proceedings in *Prosecutor v. Mladić* continued with several witnesses from the Krajina region and Sarajevo. Grgo Stojić testified to surviving a killing of several Bosnian Croats on 2 November 1992 near the village of Škrljevita, in Sanski Most municipality. Defence Counsel Dragan Ivetić cross-examined the witness on the relationship of the organised army to this incident, as shown by the investigation conducted immediately afterwards about this incident by Banja Luka authorities. The witness confirmed that the participants were irregular soldiers acting outside of orders – just "criminals who were armed".

On 31 October, Mohamed Kapetanović testified to a shelling incident in Alipašino Polje, Sarajevo, when he was nine years old. Defence Counsel Miodrag Stojanović confirmed with the witness that the incident had occurred near a BH Army facility, and suggested that Kapetanović himself had no idea of the direction or type of fire.

Richard Mole, a chief UN Military Observer in Sarajevo in 1992 followed with testimony on Serb shelling and sniping policy in Sarajevo. Cross examination by Ivetić focused on the legitimacy of targeting mortar fire coming from within

Sarajevo. Mole admitted that there were legitimate military targets such as tanks and military facilities in the city, and that many incidents were direct provocations of the Serb forces. Deployment of the BH Army in Kosevo Hospital for example was "bringing fire down upon the hospital". Nonetheless, Mole noted that targeting movable targets such as mortars mounted on trucks was ineffective and therefore should have been avoided.

Elvir Pasić testified to incidents in Rogatica and Susica camp, and Ismet Svraka, a victim of the Markale Market incident in August 1995, testified to the effects of the explosion there, but was unable, on cross by Stojanović , to confirm the direction or source of the fire. They were followed by protected witness RM-082, a VRS insider from Kotor Varoš, who testified to the lack of an effective system of responsibility for reporting crimes in the VRS. RM-082 was challenged on cross by Stojanović with two reports showing investigation of incidents in Kotor Varos in November 1992 relating to the witness's testimony. The witness denied that the reports were a genuine effort at investigation.

On 7 and 8 November Lt. Colonel Richard Philipps, an OTP expert on SRK command structure, testified about the order of command in Sarajevo and the SRK, placing Mladić clearly at the top of an organised and effective force, and concluding that the campaign of shelling and sniping in Sarajevo could not have gone on without orders from the VRS main staff. Philipps has testified several times before for the OTP, and is responsible for the OTP's most authoritative diagrams of the chain of command of the SRK. Defence counsel Branko Lukić sought to oppose Philipps testimony by showing documentation that the SRK was relatively disorganised, and that it was the SDS leadership, and not Mladić that was responsible for SRK policy in Sarajevo.

The OTP recently sought urgent admission of 13 key documents relating to Philipps' testimony that it claims to have recently discovered amidst the numerous SRK-related materials in its possession that further attest to the responsibility of Mladić for the policy of shelling and sniping. The Defence have opposed these admissions on the grounds of lateness and prejudice. The Defence has also recently opposed several expert witnesses that have testified in prior cases such as Dorothea Hanson and Richard Butler on the grounds of bias and lack of expertise or qualifications. These motions have been denied.

A 92-bis application by the OTP for Sarajevo witnesses was only partially granted on 19 October, with witness RM -160, an insider VRS technician who worked on modified air-bombs to testify live, as his testimony is the only insider witness on this topic.

Nusret Sivac, a victim of the Prijedor area camps testified on 8 and 9 November about the responsibility of the army for security in Omarska and Trnopolje, and witness RM-110 a former member of the BH security service testified to investigations of shelling and sniping by the Army of BH in Sarajevo.

Prosecutor v. Karadžić (IT-95-5/28-I)

During the last days of October and the two first week of November, Karadžić called 12 witnesses, who testified on the Markale Market incident of 5 February 1994, the defensive nature of the SRK activities and the alleged campaign of terror against Muslim civilians.

On 31 October 2012, Karadžić called a defense expert, Professor Allsop, to determine which conclusions could be drawn from various investigation report of the Markale I incident. Derek Allsop's main conclusion is that there is no sufficient evidence to determine the speed and angle of impact of the shell and that without these parameters, it is impossible to establish the origin of fire and even determine the distance from which the shell was fired.

On 1 November 2012, two defense witnesses called by Karadžić, Sergey Moroz and Milorad Džido denied that the shell that hit the Markale market on 5 February 1994 was fired from Serb positions.

Ukrainian Lieutenant Colonel Sergey Moroz stated that he had been told by a Russian UNMO officer that the explosion could not have been a mortar shell and that the shell could not have originated from the Serb side but rather that the explosion had been caused by a special explosive

device that had been planted at the market.

Former Major Milorad Džido, who served as was a Company Commander in the 216th JNA Brigade at the time of the incident of 5 February 1994, denied that the mortar shell that caused the massacre at the Sarajevo Markale market had been fired from Serb positions. Džido also stated that the Muslim warring side constantly violated cease fire agreements.

Appearing on 5 and 6 November 2012, Momir Garić, former commander of the Novo Sarajevo Brigade of the SRK, denied that he took part in several intercepted conversations describing an attack his unit allegedly launched on the area around Vrbanja Bridge in Sarajevo. Garić testified about the defensive nature of the VRS and stated that the VRS did not attack civilians in Sarajevo and suffered heavy losses due to the attacks the Muslim forces launched from the city.

On 6 November 2012, Slavko Gengo, former commander of the 7th Battalion in the 1st Romanija Brigade, stated that he did not hear any mortar fire from the position on Mrkovici and that a day later a joint commission comprising the representatives of UNPROFOR and the VRS Main Staff visited the positions, and the commission concluded that fire had not been opened from the positions. Gengo further stated that his unit never opened fire on civilian targets but simply returned fire.

On 6 and 7 November 2012, Stojan Džino, who was an Assistant Commander for Morale of the 4th Infantry Battalion, stated that Serbs in the Rajlovac area launched peace initiatives, while Muslims launched attacks. He testified that fire was never opened in the depth of the territory against civilian facilities and that neither he nor his unit, nor lower or superior commands ever harbored any intention to cause civilian casualties or terrorize civilians in the areas under Muslim control.

On 7 November 2012, Predrag Trapara, former commander of the 5th Company of the 2nd Infantry Battalion of the 1st Sarajevo Mechanised Brigade as well as Slobodan Tusevljak, former commander of the fourth platoon in the 1st Sarajevo Mechanized Brigade, both stated that the Serb army engaged only in defensive actions and did not fire on civilians in Sarajevo.

Radovan Karadžić

On 8 November 2012, Richard Gray, a former UN military observer in Sarajevo, testified that killing people in Sarajevo was part of a general strategy pursued by the Bosnian government the aim of which was to provoke an international intervention. He stated that whilst Karadžić had a genuine interest in peace, BH Army snipers on the other hand were firing at the UN staff in the PTT building in Sarajevo. Gray blamed the BH Army for the incident on 13 July 1992 in which a group of Sarajevo teenagers were shelled as the UN staff from Canada were throwing candy at them from the roof.

On 8 and 12 November 2012, Savo Simić former Chief of Artillery of the 1st Sarajevo Brigade, testified about the positions held by opposing units of the 1st Corps of the ABiH and their strength. He stated that there was a permanent order for his unit to open fire only in response to enemy fire and only at observed firing positions. Simić stated that he and the superior commands had no intentions of causing civilian casualties or terrorizing civilians during combat.

On 13 November 2012, Božidar Tomić, former member of the command of the 2nd battalion of the 1st Sarajevo Brigade, testified that the SRK was mainly engaged in defense activities and that the Muslim forces planned and based their brigade commands in the civilian zones. Tomić stated that the SRK had no intention to cause civilian casualties during combat and that some civilian facilities were being misused for military purposes by the 1st Corps of the ABiH.

Prosecutor v. Rašić (IT-98-32/1-R77.2)

On 16 November 2012, the Appeals Chamber affirmed the conviction and sentence of Jelena Rašić for contempt of court. Rašić was sentenced on 7 February 2012 for having knowingly and wilfully interfered with the administration of justice by procuring false witness statements. The conviction followed a plea agreement which was filed jointly by the Prosecution and Defence. The Appeals Chamber also affirmed the Trial Chamber's decision to suspend the last eight months of the 12 month prison sentence which was imposed. Rašić served 147 days in detention before being released.

Prosecutor v. Hadžić (IT-04-75)

Hadžić trial continues with the prosecution case. A number of protected witnesses as well as a former friend of Hadžić; Borivoje Savić have now testified.

On 5 November a protected witness was called with parts of her evidence being heard in open session. The witness stated that Zeljko Raznatovic (Arkan) trained his Serbian Volunteer Guard at the Territorial Defense centre in Erdut in 1991 where the witness worked in the kitchen. The witness described the soldiers as having 'iron discipline'. While the unit members 'were mostly criminals', the witness explained that they treated women who worked in the centre 'with respect'. It is alleged that Arkan's men committed a number of crimes in the region, under the patronage of Hadžić and his government. The witness explained how by the summer of 1992, Erdut, which used to be an ethnically mixed place, became almost purely Serb.

This witness was followed by a former friend of Hadžić: Borivoje Savic who described how Hadžić was loyal to Slobodan Milosevic and responsible for the outbreak of the war in Eastern Slavonia. Borivoje Savić stated that in Eastern Slovenia crimes were committed against non-Serbs from 1991 to 1993. However during cross examination the witness struggled to uphold his credibility as a 'peacemaker' when confronted with evidence that demonstrated how the witness had worked with Brana Crncević and Radmilo Bogdanovic, that he was involved in the volunteer admissions in Sid, that he carried Scorpion submachine guns and was in touch with the paramilitaries from the Dusan Silni unit.

Goran Hadžić

In the week of 11 November, the trial was postponed for two days because of defence counsel Zoran Zivanovic's health problems. The trial continued on the 14 November with the evidence of a protected witness testifying under the pseudonym GH-015.

On 25 October Hadžić made an urgent request to the Trial Chamber for provisional release in order to attend the funeral of his mother. This request was denied.

The prosecution filed a motion to have the Amalgamated Report of Military Expert Reynaud Theunens substituted with a Case-Specific Report filed on 5 October 2012. This motion was denied by the Trial Chamber. The prosecution has also made several motions for admission of evidence pursuant to Rule 92 *ter* in relation to a number of witnesses. All of which have been granted.

LOOKING BACK...

5 years ago...

Witnesses in Haradinaj et al. case Arrested for Contempt of Court
November 2007

Avni Krasniqi and Sadri Selca, witnesses in the first trial of Haradinaj et al., were arrested following the issuance of indictments for contempt of court.

Krasniqi and Selca committed contempt of court by knowingly and willfully interfering with the administration of justice by failing to comply with an order to appear before the Trial Chamber in the Haradinaj et al. case, according to the indictment.

The judges later withdrew the contempt of court indictments, when both men decided to testify.

NEWS FROM OTHER INTERNATIONAL COURTS

The Extraordinary Chambers in the Courts of Cambodia

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the Extraordinary Chambers in the Courts of Cambodia (ECCC)

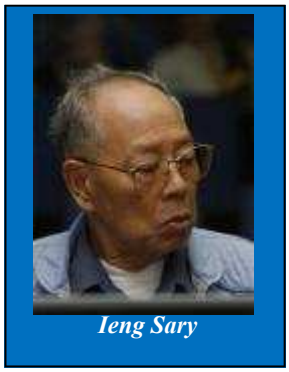
Anne Sibree, Legal Intern on the Ieng Sary Defence Team.

Case 002

The Trial Chamber continued to hear evidence in Case 002 in October pursuant to a revised schedule to accommodate Ieng Sary's health status. Ieng Sary has remained hospitalised since 7 September 2012, suffering from a condition which restricts the flow of oxygen to the brain, causing dizziness, nausea, loss of movement and fatigue. Ieng Sary has filed limited waivers of his right to be present for procedural hearings and the testimony of certain witnesses and Civil Parties. The Trial Chamber has ordered that Ieng Sary be examined by two medical experts (including Dr. Campbell who has previously examined Ieng Sary and was one of the experts who found Ieng Thirith not competent to stand trial) who will testify on 8 November 2012.

On 8 October 2012, the Trial Chamber ruled that the first trial in Case 002 be expanded to include one additional crime site, but rejected the other two proposed crime sites on the basis that their inclusion would risk "a substantial prolongation of the trial", as was argued by the Defence teams.

The Trial Chamber has continued to hear testimony from witnesses and Civil Parties on military structure, communications and the evacuation of Phnom Penh, amid ongoing challenges by the Defence teams to aspects of the ECCC's judicial investigation, including the occurrence of "off the record" interviews with witnesses by the Office of the Co-Investigating Judges (OCIJ). The Ieng Sary Defence made enquiries with the Trial Chamber as to its possible employment of OCIJ Investigator Thomas Kuehnel, raising concerns about the conflict of interest this would create, particularly in light of pending requests filed by the Defence alleging he engaged in improper investigative practices. The Trial Chamber confirmed tha Kuehnel had been employed in a limited capacity to assist in witness preparation.



Ieng Sary

During document presentation hearings on 18 and 19 October 2012, the Defence teams objected to the Civil Parties' presentation of a number of witness statements and advocated for the right to present similar documents as those presented by the Prosecution. The Co-Lawyers for Khieu Samphan criticised the lack of clarity in the process, describing it as a "press conference ... in which the rights of the accused are not respected".

The Supreme Court Chamber is expected to release its decision on the Prosecution's appeal against Ieng Thirith's unconditional release within the next two months.

Cases 003 and 004

The investigation into Cases 003 and 004 continues, with the announcement of Göran Sluiter's appointment as the international co-lawyer to represent a suspect in Case 004.

International Criminal Court

ICC Trial Chamber IV Rejects Stay of Proceedings Request in the Banda and Jerbo Case

On 26 October 2012, Trial Chamber IV of the International Criminal Court rejected the 'Request for a Temporary Stay of Proceedings' submitted by the Defence of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.

On 6 January 2012, the Defence had requested the Trial Chamber to grant a temporary stay of proceedings because it considered that no other option remained which would safeguard the fair trial rights of Banda and Jerbo.

It argued that this extraordinary remedy was necessary because current circumstances made it impossible for Banda and Jerbo to present an effective defence and precluded the Trial Chamber from adequately fulfilling its obligation to determine the truth.

In its submission, the Defence recalled that this case was unique because it is the first case pending trial before any international criminal court in which both the Office of the Prosecutor and the Defence are entirely unable to enter the country in which the alleged crimes occurred. The Defence also underlined that the situation in Sudan severely hindered the Defence team's ability to confer with the clients.

Saleh Mohammed Jerbo

The Defence based its request on several issues. Firstly, the Defence argued that there were severe restrictions on the Defence investigations, such as the impossibility of investigations in Sudan, the problems and dangers of interviewing witnesses in third countries, the deaths of some witnesses, the inability to access documents and the absence of alternative remedies.

Abdallah Banda Abakaer

Secondly, the Defence argued that the minimum guarantees for a fair trial could not be met as a result of the severe restrictions detailed above and in particular due to the fact that the Defence of Banda and Jerbo were unable to meet potential witnesses to assess their testimony. Thirdly, the Defence highlighted the inability of the Prosecutor to fully discharge its obligations pursuant to Article 54 of the Rome Statute.

In its decision of 26 October 2012, the Chamber rejected the request stating that, if need be, the defendant's complaint would be kept in mind in the course of the trial. The Chamber also indicated that disclosure of evidence is on ongoing process and invited the prosecution to continue its efforts to secure defence contacts, questioning or interviews with witnesses. The Chamber further requested the parties and participants to file written submissions on the possible date for the commencement of the trial by 19 November 2012. Judge Chile Eboe-Osuji appended a concurring separate opinion.

NEWS FROM THE REGION

Bosnia and Herzegovina

Acquittal in the case of Zoran Marjanović

Zoran Marjanović was acquitted of crimes against humanity by the appellate division of the Bosnian War Crimes Chamber on 23 October 2012, because the crimes were not proven beyond a reasonable doubt. Marjanović was charged with unlawfully detaining a Bosnian Muslim family returning from Žepa, and took them to Borike in Rogatica where they were separated by VRS forces – the mother and children were detained, and the father disappeared. The indictment was confirmed on 29 June 2011 and trial commenced on 19 October 2011. On 11 April 2012 Marjanović was acquitted of all charges, and this acquittal is now upheld

Guilty verdict for Jasko Gazdić

Jasko Gazdić was pronounced guilty on 9 November 2012 of crimes against humanity and other charges, including rape of three women (one of whom was aged 12) as a VRS officer in charge of the Partizan sports hall in Foča. The crimes were charged as part of a widespread and systematic attack. A number of rape victims at trial have testified in closed session due to protection of their privacy and the sensitive nature of their testimony, and the defence has not opposed these measures.

Gazdić was sentenced to 17 years of prison. He was acquitted of other charges involving sexual slavery of another minor.

Gazdić was arrested in April 2011 and has been in custody since then as a flight risk.

Jasko Gazdić

Republic of Serbia

Extended Indictment in Jackals Paramilitary Group Case

On 26 October 2012 the High Court in Belgrade confirmed the extended indictment of the Serbian Office of the War Crimes Prosecutor against Srećko Popović and 11 other members of the Jackals paramilitary group for crimes against Albanian civilians in Ljubenić, Pavljan and Zahač in Kosovo in April and May of 1999, involving at least 73 brutal killings. Srećko Popović was arrested on 13 March 2010 along with 8 other members of the group and charged shortly thereafter.

The main trial is scheduled to begin on 13 and 14 November 2012.

Defence Rostrum

Bringing Domestic Cases into Compliance with International Standards - Applicability of ECCC Jurisprudence and Procedural Mechanism at the Domestic Level

Michael G. Karnavas

Abstract

Although the Extraordinary Chambers in the Courts of Cambodia ("ECCC") deviates from national practice in terms of its adopted procedures and its jurisdiction to prosecute international crimes occurring between 1975 and 1979, it is nevertheless a domestic court grounded in the Cambodian Constitution ("Constitution") and judicial structure. As such, the jurisprudence and procedural mechanisms emerging from the ECCC lend themselves to application by domestic courts. Cambodia has ratified a number of the major international human rights conventions pertaining to fair trial rights, expressly incorporating them into its domestic system through the Constitution. With the ECCC being uniquely woven into the fabric of the Cambodian court structure, it can assist the judiciary to realize those obligations by setting an example as to how domestic courts should be applying international principles in their day-to-day consideration of domestic law. Bringing domestic cases into compliance with international standards by applying ECCC jurisprudence, in conjunction with additional measures, can enhance Cambodia's judicial system and promote respect for the rule of law.

Full article available at: http://adc-icty.org/Documents/Bringing Domestic Cases into Compliance - MGK.pdf

Revolution in the Air— International Human Rights and the Arab Spring

Conference Presented by 9 Bedford Row International, Middlesex University and BCL Burton Copeland Solicitors

Samuel Shnider

Sir Tony Baldry, Member of Parliament, and former chair of the House of Commons Select Committee on International Development, opened the conference with a broad challenge to international lawyers to develop new regimes for the protection of human rights, since the Security Council has effectively become dysfunctional, the responsibility to protect doctrine is at best a developing practice with high costs and uncertain authorization, and there is much uncertainty as to whether any of the existing frameworks will be taken seriously in years to come. He noted that the role of the Security Council will likely become diminished and instead we will see increasing use of "smart sanctions" to put pressure on rogue regimes.

Tim Stew, head of the Arab Partnership department in the Foreign & Commonwealth Office spoke next with an outline of the guiding principles of UK foreign policy in involvement with the countries of the Arab Spring. He described a "values-based" approach in which the UK – rather than impose a specific vision on these countries – encourage certain democratic values and liberties that the UK itself considered vital, and which it would like to see in other partners worldwide. These included transparency, and the rule of law, and dignity and justice; it would provide both practical and diplomatic assistance to developing countries that sought to implement these values as the "building blocks of democracy" in government and in the institutions of civil society. To this extent the UK had devoted £110 million over four years to a variety of programming in the region supporting political reform, fostering debate, and providing education and needed skills. In the Q & A session, Gillian Higgins, a barrister at 9 Bedford Row and a specialist in international criminal law, questioned what was in fact the evidence of UK involvement, since the UK had a long history of prioritizing its own interests in the region, which could easily lead to skepticism, especially among the youth that was the main driving force behind the Arab Spring. David Cameron for example had met with Tantawi, head of the Supreme Military Council only 10 days after Mubarak was ousted, apparently to encourage British trade with the new military regime; and despite condemning crimes against civilians in the Arab uprisings, the UK is still approving a significant number of licenses for the sale of British Arms to Syria, Egypt, Bahrain and Saudi Arabia with little or no review as to how these weapons will be used. She noted that it further remained to be seen whether the Arab Spring was in fact a development towards democracy at all.

Shannonbrooke Murphy, a doctoral candidate at the University of Middlesex spoke on the "right to rebel," which is a secondary right that follows from the right to resist occupation or colonial rule, and is sometimes called the right to revolution, the right to disobedience or the right to use force. The right is

enshrined in various constitutions and is now a general principle of international law. In all its forms, it has a common legal core: a law of exception of self-determined peoples, and a secondary right to self-help. But it lacks a clear and precise definition in positive law. Her lecture thoroughly reviewed the international and national instruments addressing the right, and the developments toward codification. In the Q & A panel, Gregor Guy-Smith spoke about the difficulties of representing the KLA in the Haradinaj case, and presented a question as yet unresolved in international law: Is it law for a group of ill-defined insurgents or rebels to kill collaborators with an oppressive regime?

Mouaz Mustapha founder and chairman of the Syrian Emergency Task Force followed with a grass-roots activist's account of his meetings with international leaders and citizens on the ground in Syria. His account was illuminating, and his proposals for solutions were practical and detailed, involving unity among ethnic groups, by assuring the Allawites that the army would remain and massacres would be prevented, and endorsing cooperation with the Kurd forces in the North, but he warned that the window of opportunity was narrowing, and that Assad was not giving up, and that conflicts in Syria tended to escalate to bloodbaths rather than subside.

Clive Baldwin, Senior Legal Adviser at Human Rights Watch spoke on the Responsibility to Protect and its implications, and noted that few nations had fully endorsed the right, and those that had did not as yet comply with the doctrine in practice. In many cases the implementation of the right had problems, because it was not enshrined in a system of judicial review and application that assessed a situation on the ground and ensured commitment at an early stage, when many problems could be prevented, and there may be little need for the use of force. Issues of timing were crucial especially in relation to detainees and refugees. William Schabas noted in Q &A that there was a problem of defining what type of situation justified a forceful intervention, and whether there had to be evidence of actual crimes, and that he considered the ICC to be part of the solution in this case. Colleen Rohan, defence counsel at ICTY, noted that there was a problem in implementing stronger regimes of intervention for international crimes, because the long term implications could yet come back to haunt us, especially if we were not willing to address questions of transparency in the UN itself, and the basic problem of lack of shared values between states.

Prof. William Schabas spoke on proportionate responses in revolutions, reviewing the history of the concept since the French Revolution, and ending with an analysis of the SCSL Charles Taylor judgment. He noted that there was always a problem of double standards, because "If you support one revolution, why not support another?" But later in Q & A, responding to a question from a lead defence counsel in the case, he noted that all judgments would have an historical and political message, carefully chosen according to a specific agenda, and that that problem would not go away.

General Sir Jack Deverell gave a lucid and impassioned military perspective on the use of force against rebels or revolutionary groups. He noted that war always had different language, but was the same grammar – with the goal to neutralize the threat and to survive. Good men do bad things in war, to survive; and if war itself is criminalized, we risk making it harder for good men to act, and placing the advantage with the side that doesn't care.

Two films were screened, the *Law of the Jungle*, and the *Magnitsky Files*. The *Magnitsky Files* was preceded by a presentation by Bill Browder who has spearheaded the adoption of the Magnitsky Act in several countries, a law which freezes assets and denies visas to human rights violators. The scope and limits of the act were a subject of heated debate in the Q &A.

A Critical Assessment of Current International Law on Immunity with regard to International Crimes

Julian Elderfield

Introduction

The international law of immunities is a foundation upon which the entire system of international relations has been built. For States to effectively co-operate there has always been a need to send and receive emissaries, and a conjunctive and logical requirement for their protection. Due to its reciprocal nature, a high level of compliance with the law of immunities is traditionally ascribed to by States, and "despite certain notorious cases of [its] abuse, there is no substantial body of opinion which advocates [its] abolition or restriction" (Wickremasinghe in Evans, 2010).

This essay will argue that, in fact, this is not the case. Starting at the Treaty of Versailles in Paris after World War I, this 'traditional view' has encountered increasingly vocal opposi-

tion. The ensuing century has seen a discernable trend emerge, one of increasing restrictions to immunities of Heads of State and other State officials. In particular, it has developed in synchronisation with the growing power of the discourse of international human rights law. This essay will map this trend over the last century, to determine where the current boundaries lay between accountability and impunity (Cryer, 2010). This is an issue that requires examination in two parts, reflecting the two basic types of immunity from jurisdiction that international law recognizes; firstly, functional immunities, and secondly, personal immunities. Having reviewed the current state of the law of immunities, the essay will conclude that courts have not gone far enough in attenuating impunity for those perpetrators who are often most responsible for grievous crimes.

Functional immunities

Nuremberg was an important development in the restriction of the law of functional immunities. Previously, State officials had unmitigated freedom to draw on functional immunity as a substantive defence against all charges leveled against them (the principle o*f par in parem non habet iudicium)*, the rationale being that crimes are committed by states and that individuals act as mere vehicles for government policies (Schabas, 2010). This blanket amnesty was undermined at the International Military Tribunal in Nuremberg in *France et al v Goring*, where it was held,

> The principle of international law, which under certain circumstances, protects the representatives of the State, cannot be applied to acts which are condemned as criminal by international law.

Taking inspiration from Nuremberg, a number of judicial decisions like *Eichmann*, *Klaus Barbie*, *Pinochet*, *Blaskic, Taylor*, and even the United States' Fourth Circuit Court of Appeal in *Yousuf v Samantar*, have since confirmed that functional immunity does not apply to international crimes. A sceptical agrees with this principle. The categories of crimes have been extended as well, from crimes against peace, crimes against humanity and war crimes, to now encompass torture and genocide. This principle finds support in military manuals (UK Military *Manual on the Law of Armed Conflict*, 2004) and the majority of legal scholarship (Cassese, 2009; Cassese, 2008), and if not for the myopic (some would argue intentional) oversight by the ICJ in its *Arrest Warrant* judgment in 2002, the issue of functional immunities not being able to bar prosecution of international crimes would be well-established customary international law.
In a world where State officials often are instrumental in the commission of international crimes, the logic of this progression is sound. Since Robert Jackson's resounding calls for justice at Nuremberg, international law's contemporary emphasis on the respect for human rights has overridden traditional concerns of state sovereignty. As Cassese states, "The new thrust towards protection of human dignity has shattered the shield that traditionally protected state agents" (Cassese, 2010). Having made strong gains in the fight against impunity, courts should continue to hold victims rights as paramount and move to extend these boundaries even further.

Personal Immunities

The law of personal immunities has resisted far more robustly (than that of functional immunities) to attempts to limit its effects. Personal immunity ostensibly flows from a different rationale; its purpose is to preclude any pretext for interference with a State representative, in order to allow the effective discharge of diplomatic functions (the principle of *ne impediatur legatio*). It finds substantive basis in widely ratified treaty law, e.g. in the 1961 Vienna Convention, as well as state practice, and domestic and international legal jurisprudence (Blaskic, *Decision on the Objection of the Republic of Croatia to the Issuance of subpoena duces tecum*, 1999). It applies to both criminal and civil processes, and may even cover a Head of State during a private holiday in a foreign State. Although there is no rigid delineation, personal immunities cover Diplomatic agents, Heads of State, Heads of Government, Heads of international organisations, and some Ministers, including Foreign Ministers (*Arrest Warrant*), Ministers of Defence (*Mofaz*), and Ministers of Commerce (*Bo Xilai*). Importantly, and contrary to the fundamental purpose of international criminal law, several cases, including *Eichmann, Djibouti v France, Pinochet, Qaddafi, Castro, Jones v Saudi Arabia* and *Al Adsani*, have established that personal immunities will prevail even against international crimes.

Chinks in the plate armour of personal immunities, however, have begun to appear. Personal immunities can be

set aside with the consent of the relevant State under the 1961 Vienna Convention, or if States explicitly consent to waive their right to immunity under, e.g. the ICC Rome Statute. The Statutes of the ICTY and ICTR have also excluded personal immunities, drawing on the Security Council's Chapter VII powers, powers that have since been extended to all other international courts, regardless of their structure or origin by a SCSL Decision on Immunity from Jurisdiction in 2004.

More recently, the Security Council issued an international arrest warrant for President Al Bashir of Sudan in 2005, that purported to supplant personal immunity. The Pre-trial Chamber of the ICC have also weighed in, confirming an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes in its Malawi decision in 2011. Justifying its decision, the Court argued persuasively that the voluntary consent given by 120 States parties to the Rome Statute to waive personal immunities in favour of prosecutions for international crimes accurately reflects current opinion on the issue.

Whether these chinks amount to a movement in the customary law, however, is arguable; many of the above decisions have been criticized, and the ICJ continues to rule against the waiving of personal immunities, e.g. the recent case of *Germany v Italy*. Nevertheless, there are several factors that suggest a softening of the law. Cassese argues that lifting personal immunities before international courts is in harmony with the current thrust of international law, which is aimed at broadening human rights protections and acting against impunity. He also states that in its influential *Arrest Warrant* judgment the ICJ neither explicitly excluding that customary opinion had evolved on the matter, nor that international courts had to expressly waive personal immunities in their statutes. Finally, Cassese argues that although States may abuse the power to waiver personal immunities of foreign Heads of State, international courts are independent of States, and not interested in interfering in State affairs.

Conclusion

Personal immunities are slowly adjusting to the current legal climate, which emphasises accountability over impunity. The current state of affairs suggests reticence to lift personal immunities at the domestic level, balanced by a certain level of judicial activism at the international level. Although this is a start, international law has a long way to go before flagrant violations of international law carried out by those most responsible, cease. Although the ICJ stubbornly clings to its traditions, progressives like recently appointed Judge Cançado Trindade can only improve its connection with the real world. There are cogent reasons to uphold the existing system of diplomatic immunities and diplomatic communications, however these procedural concerns cannot stand in the way of justice for victims of international crimes. If States acted responsibly, and there was sufficient Security Council oversight, a gross lacuna of justice, propagated by international law's stubborn heritage, would be filled.

BLOG UPDATES

- Diane Marie Amann, **Look on! *Machuca* explores Pinochet's coup,** 4 November 2012, available at: http://www.intlawgrrls.com/2012/11/look-on-machuca-explores-pinochets-coup_4.html
- William A Schabas, **Seventy-five years since Adoption of First International Criminal Court Statute,** 5 November 2012, available at: http://humanrightsdoctorate.blogspot.nl/2012/11/seventy-five-years-since-adoption-of.html
- William A Schabas, **Britain favoured summary Execution of Nazi Leaders over International Trial,** 28 October 2012, available at: http://humanrightsdoctorate.blogspot.nl/2012/10/britain-favoured-summary-execution-of.html
- Benjamin Joyes, **ECCC holds public debate on Legacy,** 30 October 2012, available at: http://www.internationallawbureau.com/index.php/eccc-holds-public-debate-on-legacy/
- Kristen Boon, **From the trenches: Head of State Immunity Discussed in Sixth Committee of GA,** 6th November 2012, available at: http://opiniojuris.org/2012/11/06/from-the-trenches-head-of-state-immunity-discussed-in-sixth-committee-of-ga/
- Kevin John Heller, **New article on the Legality of signature strikes,** 30 October 2012, available at: http://opiniojuris.org/2012/10/30/new-article-on-legality-of-signature-strikes/
- Julien Maton, **STL Appeals chamber dismisses challenges against in Absentia trial,** 1 November 2012 , available at: http://ilawyerblog.com/stl-appeals-chamber-dismisses-in-absentia-appeals/

PUBLICATIONS AND ARTICLES

Books

Hazel Cameron, *Britain's Hidden Role in the Rwandan Genocide: The cat's Paw,* (19 Nov 2012), Routledge

Sonia C Grover, *Humanity's Children : ICC Jurisprudence and the failure to address the Genocidal Forcible Transfer of Children ,* (30 Nov 2012), Springer

Allan A. Ryan, *Yamashita's ghost: War Crimes, Macarthurs Justice and Command accountability (modern war studies),* (15 Nov 2012), University Press of Kansas

Samuli Miettinen, *Criminal Law and Policy in the European Union (Routledge Research in European Law),* (20 Nov 2012), Routledge

Eric Wilson, *The Dual State (International and Comparitive Criminal Justice),* (30 Nov 2012), Ashgate

Lavinia Stan, *Transitional Justice in Post-Communist Romania: The Politics of Memory,* (30 Nov 2012), Cambridge University Press

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Michael G Karnavas, (2012), "*Bringing Domestic Cases into Compliance with International Standards - Applicability of ECCC Jurisprudence and Procedural Mechanism at the Domestic Level*", http://adc-icty.org/Documents/Bringing Domestic Cases into Compliance - MGK.pdf

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Lucia Catani, (2012), "*Victims at the International Criminal Court: Some lessons learned from the* Lubanga *case",* Journal of International Criminal Justice, Volume 10 Issue 4.

Elies Van Sliedregt, (2012), "*Pluralism in International Criminal Law",* Leiden Journal of International Law, volume 25, issue 4, December 2012.

Christian Dahlman, (2012), *"The function of* Opinio Juris *in Customary International Law",* Nordic Journal of International Law, Volume 81, Number 3, 2012

EVENTS

The Self-Interests of Armed Forces in Accountability for their Members for Core International Crimes

Date: 27 November 2012

Venue: Stanford University, California

More Info: http://www.internationallawbureau.com/wp-content/uploads/2012/09/here.pdf

Critical approaches to International Criminal Law Conference

Date: 6—8 December 2012

Venue: International Slavery Museum, Liverpool

More Info: http://www.liv.ac.uk/law/Critical_Approaches_to_International_Criminal_Law_Conference.htm

International Humanitarian Law workshop for students.

Date: 3 Jan—6 Jan 2013

Venue: UC Berkeley school of Law, California

More Info: http://www.law.berkeley.edu/13854.htm

OPPORTUNITIES

Senior Investigator, International Criminal Court

The Hague, Netherlands

Closing date: 22 November 2012

Arabic Reviser, Special Tribunal for Lebanon

Leidschendam, The Hague, Netherlands

Closing date: 4 December 2012

Intern—Humanitarian Affairs, Bangkok

Office for the Co-ordination of Humanitarian Affairs

Closing date: 31 December 2012

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