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International Criminal Law in 2013: The Most Significant Developments (Proceedings of the ASIL Annual Meeting)

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THE FUTURE OF INTERNATIONAL CRIMINAL LAW

ANNUAL BEN FERENCZ PANEL

This panel was convened at 10:45 am, Thursday, April 10, by its moderator, David Kaye of the University of California-Irvine, who introduced the panelists: Hans-Peter Kaul of the International Criminal Court; Milena Sterio of Cleveland State University; Jane Stromseth of the Office of Global Criminal Justice, U.S. State Department; and Dire Tladi of the University of Pretoria and Institute for Security Studies.*

INTERNATIONAL CRIMINAL LAW IN 2013: THE MOST SIGNIFICANT DEVELOPMENTS

By Milena Sterio[†]

INTRODUCTION

While many events have shaped the development of international criminal law over the past year, the most significant ones, in my view, included the Special Court for Sierra Leone's appellate confirmation of the Charles Taylor verdict, as well as the United Nations Security Council's failure to refer the Syrian situation to the International Criminal Court (ICC).

THE *CHARLES TAYLOR* VERDICT

On September 26, 2013, the Special Court for Sierra Leone's (SCSL) Appellate Chamber upheld the same tribunal's Trial Chamber's judgment and sentence of Charles Taylor to 50 years of imprisonment for aiding and abetting murders, rapes, and other acts of violence during the Sierra Leonean civil war.¹ Charles Taylor served as President of Liberia during the 1990s, and in this capacity he actively supported Sierra Leonean rebel groups, responsible for some of the worst atrocities committed against this country's civilian population.²

The Appellate Chamber's confirmation of the verdict against Taylor was tremendously significant in international criminal law. First, the guilty verdict coupled with the lengthy sentence (Charles Taylor is 65 years old, so the 50-year sentence effectively amounts to life imprisonment) represents an enormous achievement of international criminal law. Taylor is the first former head of state to be criminally prosecuted and sentenced since Nuremberg, and his prosecution and eventual judgment send a strong message of deterrence to other heads of state. Additionally, the *Taylor* judgment stands for the proposition that impunity will not be tolerated in international criminal law, and that traditional notions of sovereignty will not stand in the way of an international criminal prosecution.

Second, the *Taylor* case underscores the importance of secondary liability in international criminal law. Taylor, like many other defendants in the Yugoslavia and Rwanda tribunals,

* Mr. Kaul, Ms. Stromseth, and Mr. Tladi did not contribute remarks to *The Proceedings*.

[†] Charles R. Emrick Jr.-Calfee Halter & Griswold Professor of Law, Cleveland-Marshall College of Law. I would like to thank ASIL for the opportunity to present these remarks at the 2014 Annual Meeting, as well as to commend my prestigious co-panelists (International Criminal Court Judge Kaul, Professor Jane Stromseth, and Professor Dire Tladi) for their insightful remarks, which have influenced the writing of these remarks.

¹ Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL 03-01-A, Sept. 26, 2013, at <http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=191>.

² Marina Aksenova, *The Taylor Appeal Judgment: Achievement of Fragmentation of International Criminal Law*, Oct. 20, 2013, at <http://www.e-ir.info/2013/10/20/the-taylor-appeal-judgment-an-achievement-or-another-step-in-the-fragmentation-of-international-criminal-law/>.

was prosecuted on the theory of accomplice liability—for having aided and abetted in the accomplishment of heinous crimes during the Sierra Leonean civil war.³ Since Taylor had no personal involvement or participation in the war, imposing secondary or accomplice liability on him was the only manner in which prosecution could proceed. The Appellate Chamber noted that “individual criminal responsibility for aiding and abetting the planning, preparation or execution of a crime, as expressly provided for in Article 6(1), is unquestionably well-established and fundamental in customary international law.”⁴ The Appellate Chamber thus confirmed that accomplice liability is a well-accepted mode of criminal liability in international criminal law, both under the SCSL Statute and in international custom. Moreover, the Appellate Chamber rejected the recent “trend” espoused by the International Criminal Tribunal for the Former Yugoslavia (ICTY or Yugoslavia Tribunal), which demands that the aid and assistance must be geared towards the specific offense—the so-called “specific direction” requirement.⁵ In fact, also in 2013, the Yugoslavia Tribunal acquitted two defendants, Perišić and Stanišić, holding that the assistance which these defendants had provided was not specifically directed towards the commission of specific crimes, but was merely geared to the general war effort.⁶ This vision of complicity embraced by the Yugoslavia Tribunal narrowed down the scope of accomplice liability; the *Taylor* case rejected this approach and chose not to follow the Yugoslavia Tribunal’s case law. While this seeming disagreement between the judges of the Yugoslavia Tribunal and the SCSL may have the negative consequence of preventing the development of a uniform norm of customary law on the issue of accomplice liability, the positive effects of the *Taylor* judgment are that it rejects any limitation on accomplice liability and that it may serve as an important precedent in any future prosecutions of former heads of state.

Third, the *Taylor* judgment represents a significant development in the prosecution of gender-based crimes. The *Taylor* verdict is the first time that a former head of state has been convicted of various crimes of sexual violence.⁷ Both the trial and the appellate judges recognized that rape, sexual slavery, and other forms of sexual violence were used during the Sierra Leonean conflict as a strategic weapon of warfare. In addition, these crimes “were widespread and systematic, committed as part of a strategic campaign to impact the conflict by terrorising, demoralising, and destroying the affected civilian populations through sexual violence.”⁸ Charles Taylor was convicted of aiding and abetting in the commission of such crimes of sexual violence, by providing logistical, financial, technical, medical, and other

³ *Id.*

⁴ *Prosecutor v. Taylor*, *supra* note 1, para. 383.

⁵ *Aksenova*, *supra* note 2. ICTY Appeals Chamber, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Feb. 28, 2013, at http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf; ICTY Trial Chamber I, *Prosecutor v. Stanišić*, Case No. IT-03-69-T, May 30, 2013, at http://www.icty.org/x/cases/stanistic_simatovic/tjug/en/130530_judgement_p1.pdf.

⁶ Much has been written about the Perišić and Stanišić acquittals. See, e.g., Kevin Jon Heller, *Why the ICTY’s “Specifically Directed” Requirement Is Justified*, June 2, 2013, at <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/> (approving of the ICTY’s “specific direction” requirement); but see Marko Milanović, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perišić*, Mar. 11, 2013, at <http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/> (criticizing the ICTY’s acquittal of Perišić). See also James G. Stewart, *The ICTY Loses its Way on Complicity—Part 1*, Apr. 3, 2013, at <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>.

⁷ Kelly Askin, *Charles Taylor Judgment Is a Victory for Gender Justice*, *GUARDIAN*, Apr. 27, 2012, available at <http://www.theguardian.com/law/2012/apr/27/charles-taylor-judgment-victory-gender-justice>.

⁸ *Id.*

forms of support to the rebel groups.⁹ While other international tribunals had already convicted defendants of such crimes, all such prosecutions involved defendants who had personally participated in the commission thereof. The *Taylor* case represents the first instance of accomplice liability imposed on a political leader, who while far removed from the battlefield, aided and abetted in the commission of sex crimes by providing encouragement and support and by not punishing the offenders. For victims of sexual violence, this development in international criminal law has long been overdue.¹⁰

Fourth, the *Taylor* judgment has contributed tremendously to the development of international gender jurisprudence.¹¹ The *Taylor* case solidified the legal definition of sexual slavery.¹² In addition, the SCSL judges proposed to replace the term “forced marriage” with “conjugal slavery,” recognizing that many female victims of the Sierra Leonean war were not officially “married” to their abductors, but were instead enslaved for the dual purpose of being repeatedly subjected to rape and being forced to engage in domestic labor.¹³ This new term may better capture the nature of the heinous international crime which various rebel groups had been committing in Sierra Leone, and which Taylor aided and abetted.¹⁴ Finally, the *Taylor* trial judgment firmly established that an individual may be prosecuted for crimes against humanity of rape and sexual slavery, as well as for the war crimes of committing acts of terror and sexual violence. Thus, the *Taylor* case solidified the growing consensus that gender-based crimes can constitute both crimes against humanity (if committed on a systematic basis) and war crimes.¹⁵

In sum, the *Taylor* appellate verdict confirmed all of the relevant achievements of the trial chamber, which had, in its judgment, contributed to the development of both accomplice liability under international criminal law, as well as of the proposition that gender-based/sexual violence crimes can be prosecuted both as crimes against humanity and as war crimes.

THE ICC AND POLITICS: FAILURE OF THE SECURITY COUNCIL TO REFER THE SYRIAN CASE TO THE ICC

The second most significant development in international criminal law is the UN Security Council’s failure to refer the Syrian situation to the ICC. This “development” is less fortunate than the previously discussed *Taylor* verdict, but it remains significant because it underscores the specific role which the ICC currently plays in international criminal justice as a court of law heavily influenced by international politics of the Great Powers.¹⁶

⁹ *Id.*

¹⁰ *Id.* (“The Taylor verdict represents a welcome and long overdue recognition that civilian or military leaders who are far from the battlefield but who support and encourage sexual violence, or make no attempt to prevent or punish it, can be held responsible for sex crimes.”).

¹¹ Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 WM. & MARY J. WOMEN & L. 7 (2012).

¹² *Id.* at 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (arguing that “the Taylor trial judgment was a step forward in international gender jurisprudence.”).

¹⁶ The term “Great Powers” as used in these remarks refers to the five permanent members of the Security Council (the United States, Russia, China, France, and the United Kingdom). The term “Great Powers” has been used in other contexts to describe the G-8 countries, as well as other politically, militarily, and financially powerful nations. See, e.g., Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Secession and the Great Powers’ Rule*, 19 MINN. J. INT’L L. 137 (2010).

In August 2013, reports surfaced that Syrian President Bashar al-Assad had used chemical weapons against his own civilian population.¹⁷ Syria has been plagued by an increasingly violent civil conflict since the Arab Spring of 2011, and these allegations reinforced the increasing sentiment that the international community ought to do something about the Syrian situation. However, the Security Council remained deadlocked because of the threat of Russian, and potentially Chinese, veto over any resolution that would authorize forceful measures against the Syrian regime, including a potential resolution referring the situation to the ICC.¹⁸ The United States, while not directly threatening to veto a referral resolution, has so far not supported a referral to the ICC and has preferred exploring the possibility of establishing a Syrian ad hoc tribunal.¹⁹

Because of the ICC's jurisdictional structure, the Syrian situation may never be examined by this tribunal as Syria is not a state party to the court, and as all potential crimes seem to have been committed by Syrian nationals (nationals of a non-party).²⁰ Thus, the only way that the ICC could examine potential humanitarian violations by the Syrian leadership would be through a Security Council referral.²¹ The absence of the referral, because of the inherent veto structure of the Security Council, can be interpreted as having undermined the legitimacy of the tribunal, which appears powerless in the wake of Syrian violence. This in turn may be feeding a sense of impunity on behalf of the Syrian leadership. In fact, the latest report of the United Nations Commission of Inquiry on Syria stated plainly that "[t]he warring parties do not fear being held accountable for their acts."²² Most agree that ICC involvement in the crisis would send a stronger message of deterrence to the Assad leadership, by signaling that flouting international law leads to serious consequences and potential accountability before the world's only permanent international criminal tribunal.

Moreover, an ICC indictment of Syrian leaders could contribute to peace negotiations in Syria. Past practice from other conflicts and situations indicates that indictments of senior political and military leaders before international tribunals can actually contribute to strengthening peace efforts "by delegitimizing and marginalizing those who stand in the way of

¹⁷ *Syria Chemical Attack: What We Know*, BBC News, Sept. 24, 2013, available at <http://www.bbc.co.uk/news/world-middle-east-23927399>; see also United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, Sept. 13, 2013, available at http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf.

¹⁸ Louis Charbonneau & Michelle Nichols, *U.N. Security Council Powers Meet Again on Syria; No Outcome*, REUTERS, Aug. 29, 2013, available at <http://www.reuters.com/article/2013/08/29/us-syria-crisis-un-idUSBRE97S17R20130829> (noting that Russia and China had vetoed three proposed resolutions that would have condemned the Assad regime and threatened United Nations sanctions).

¹⁹ Balkees Jarrah, *The United States Should Support ICC Involvement in Syria*, HUMAN RIGHTS WATCH, Mar. 19, 2004, at <http://www.hrw.org/news/2014/03/19/united-states-should-support-icc-involvement-syria>.

²⁰ Article 12 of the ICC Statute specifies that the court may exercise jurisdiction if one of the following States is a party to the Statute: "The State on the territory of which the conduct in question occurred. . . ." or "The State of which the person accused of the crime is a national." Article 12 would thus preclude the exercise of jurisdiction by the ICC in a situation like Syria, where an alleged crime occurred on the territory of a non-state party, when such alleged crimes are committed by nationals of a non-state party. Rome Statute of the International Criminal Court art. 12, at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter ICC Statute].

²¹ Article 13(b) of the ICC Statute specifies that the court may exercise jurisdiction if "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." ICC Statute, *id.*, art. 13(b). The exercise of such jurisdiction by the ICC through a Security Council referral is not limited by the territoriality or nationality basis of jurisdiction specified in Article 12. See *id.* art. 12.

²² United Nations, Human Rights Council, 25th Sess., Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Feb. 12, 2014, A/HRC/25/65, at 1.

resolving the conflict.’’²³ Some successful examples include the indictments of Radovan Karadžić, the Bosnian Serbs’ political leader, and Ratko Mladić, their military commander, by the ICTY, which have been credited with preventing them from attending the Dayton peace talks, which led to the end of the Bosnian war.²⁴ Similarly, the unsealing of the arrest warrant against former Liberian President Charles Taylor at the start of negotiations to end the Liberian civil war was generally viewed as helpful in moving these negotiations forward.²⁵ Many have argued, in the Syrian context, that ICC involvement should not represent the only step that the international community would undertake toward resolving the ongoing crisis, but that instead, the ICC could play a key role in developing a comprehensive peace plan and strategy in Syria, by forcing indicted Syrian leaders to remain outside any negotiations and by thus allowing others to take on leadership roles in Syria.²⁶

It should be noted that the ICC has played an important role in other conflicts. In 2009, the ICC pre-trial chamber issued an arrest warrant against the Sudanese president Omar Al Bashir, who was indicted on various charges of crimes against humanity and war crimes; the ICC investigation into Sudan was made possible through a Security Council referral in 2005.²⁷ In that case, Russia voted in favor of the resolution, while the United States and China abstained.²⁸ The ICC has also been actively investigating the Libyan situation, referred to the court in a unanimously passed 2011 Security Council resolution.²⁹ While ICC involvement in countries like Sudan and Libya could contribute to peace processes and conflict resolution, the ICC’s jurisdiction unfortunately remains limited and tied to the politics of the Great Powers, such as the United States, Russia, and China. In cases where an ICC referral has coincided with the Great Powers’ strategic interests, these countries have voted in favor of a Security Council resolution referring a situation to the court (as in the cases of Sudan and Libya).³⁰ The Syrian situation, on the contrary, seems to have split the Great Powers along their geo-political interests, resulting in a veto threat by Russia and China, and in U.S. unwillingness to strongly support a referral (perhaps due to the United States’ general opposition to the ICC). According to Richard Dicker, International Justice Director at Human Rights Watch, “When it comes to ICC referrals, the United States, Russia, and China seem more concerned about prosecuting their enemies and protecting their friends. This checkered approach has left victims of abuses in Syria, Gaza, and Sri Lanka without recourse to justice.”³¹ In addition, according to Dicker, “The Security Council’s ‘on again,

²³ See Jarrah, *supra* note 19.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ For a detailed description of the Bashir case, see American Non-Governmental Organizations Coalition for the International Criminal Court, Investigations & Cases, Darfur, Sudan, Al Bashir, at <http://www.amicc.org/icc/albashir> [hereinafter AMICC]; see Security Council Resolution 1593, Mar. 31, 2005, S/RES/1593 (2005), at <http://www.icc-cpi.int/NR/rdonlyres/85FEED1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> (referring the Darfur situation to the ICC).

²⁸ AMICC, at <http://www.amicc.org/icc/referrals>.

²⁹ Security Council Resolution 1970, Feb. 26, 2011, S/RES/1970 (2011), at <http://www.onpcsb.ro/pdf/UN-SC%20Resolution%201970.pdf>.

³⁰ It should be noted that even these Security Council referrals were limited. “Both referrals imposed the entire financial burden of the new investigations and prosecutions on the court and its member countries. They also allowed exemptions for the nationals of non-member third countries should they be implicated in serious crimes committed in the referred country.” See *UN Security Council: Address Inconsistency in ICC Referrals*, HUMAN RIGHTS WATCH, Oct. 16, 2012, at <http://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals-0>. In addition, the Security Council has not actively supported the ICC in its investigations in Darfur and in Libya. *Id.*

³¹ *Id.*

off again' approach to ICC referrals undermines its credibility in promoting justice.'³² The ICC thus remains an important organ of international criminal justice whose role in world affairs has been limited by the politics of the Great Powers.

CONCLUSION

Many events in 2013 have contributed to the development of international criminal law; the ones which most profoundly impacted this field included the *Charles Taylor* appellate verdict and the Security Council's failure to refer the Syrian case to the ICC. The former is significant because it represents the first time since Nuremberg that a former head of state has been convicted by an international tribunal; the latter is important because it illustrates the ICC's peculiar role in international justice, as a court of law limited by international politics.

³² *Id.*



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