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iLawyer

A Newsletter on International Justice

In This Issue...

iLawyer Team

Release International Justice Professionals currently detained in Libya

The iLawyers and iCoordinator's second Newsletter is dedicated to international justice professionals working around the globe in conflict or post conflict environments.

We call on the Libyan authorities to release Melinda Taylor, Esteban Peralta Losilla, Alexander Khodakov and Helen Assaf, detained on 7 June 2012 whilst visiting Saif al-Islam Gaddafi to assist with his representation and to ensure his fundamental right to legal representation.

The iLawyers are friends and colleagues of Melinda Taylor. She is a lawyer of the utmost integrity and principle. We are confident that, given the opportunity, she will be able to demonstrate that any allegation that she breached any ethical tenet or principle of her profession during the visit to her client is entirely false. We therefore urge the Libyan authorities to respect Melinda and her three colleagues' immunity whilst on official ICC business and to immediately release them so they may return home to their families and loved ones.

This Month in Review

26 April 2012

Charles Taylor Convicted

Charles Taylor, the former President of Liberia, was found guilty of aiding and abetting rebels in the commission of war crimes and crimes against humanity in Liberia's neighbouring Sierra Leone. On 30 May he was sentenced to 50 years imprisonment.

15 June 2012

New ICC Prosecutor

Gambian lawyer Fatou Bensouda took over from Luis Moreno- Ocampo, commencing the 9-year term which will see her heading the ICC Office of the Prosecutor until 2021.

11 May 2012

Bush, Cheney and Rumsfeld convicted for Torture in Malaysia

The conviction came after a week-long trial in absentia held before a tribunal organized by a Malaysian NGO. The five-judge tribunal delivered a unanimous guilty verdicts against Bush, Cheney, Rumsfeld and their key legal advisors.

14 May 2012

ICC Prosecutor seeks two new arrest warrants for Congolese rebel leaders

The ICC Prosecutor's Office stated that it will seek arrest warrants for two Congolese rebel leaders, General Bosco Ntaganda and Sylvestre Mudacumura for crimes against humanity and war crimes.

16 June 2012

UN Suspends Mission in Syria

The mission's patrolling and monitoring activities have been suspended due to escalating violence in the country, which poses a significant risk to the observers and prevents them from carrying out their mandate.

16 May 2012

ICC Prosecutor presents third report on Libya situation to the UN Security Council

The report described the background to the conflict, outlining abuses committed by both pro and anti-Gaddafi forces during and following the conflict, as well as attempts by the Libyan government to bring to justice those guilty for these abuses.

4 June 2012

Justice Fisher Elected President of the Special Court for Sierra Leone

Justice Shireen Avis Fisher of the United States has been elected to a one-year term as Presiding Judge of the Appeals Chamber, a post which makes her President of the Special Court for Sierra Leone. She succeeds Justice Jon Kamanda of Sierra Leone, who has served as President since 2009.

3 May 2012

Libya asks ICC to abandon case against Saif Al-Islam Gaddafi

In an application to the ICC's Pre-Trial Chamber, the Libyan government asked that the case be considered inadmissible on the grounds that the Libyan criminal justice system is already actively pursuing proceedings against Mr Gaddafi. Libya also asked that the ICC's request that Saif Al-Islam be surrendered to its jurisdiction be quashed.

May 2012

Defence Teams Challenge the Special Tribunal for Lebanon's Jurisdiction

Among the challenges, the motions argue that the U.N. Security Council abused its powers by adopting Resolution 1757, which established the Tribunal. Defense counsel also argued that the agreement between Lebanon and the U.N. to establish the Tribunal was illegal and violated Lebanon's Constitution as Lebanon had never consented to be bound by the 'agreement' which was negotiated, adopted and signed on behalf of the Lebanese Republic by persons acting without the requisite legal capacity. Hearings to hear the parties' arguments took place on 13-14 June.

2 May 2012

Reserve Co-Investigating Judge Issues Decisions on Suspects in Case 003 at ECCC

Prior to his leaving the Extraordinary Chambers in the Courts of Cambodia (ECCC) on Friday 4 May, Judge Laurent Kasper-Ansermet issued his own Decisions on the two suspects of Case 003. In doing so he alleged that former Navy Chief Meas Muth and former Air Force Chief Sou Met, both high ranking commanders in the Revolutionary Army of Kampuchea should be considered two of those "most responsible for the crimes committed" by the Khmer Rouge.

Q&A 15 Questions for Mr Morris Anyah, Lead Counsel for Charles Taylor before the SCSL

1. You have replaced Mr. Taylor's previous lead counsel, Mr. Griffiths QC, as Lead Counsel for the Appellate process. Could you provide please a brief resume of your career to date?

MA: I started my legal career in Chicago with summer clerkships in the Criminal Appeals Division and Night Narcotics Unit of the Cook County State's Attorney's Office. I tried my first felony case to a judge while still a law student during the night drug court clerkship. I worked for the same office as a state prosecutor after graduation and being called to the Bar, serving in the Criminal Appeals Division, the Juvenile Justice Bureau, and the Criminal Prosecutions Bureau. I handled all sorts of cases in that capacity, undertaking appellate oral arguments and both bench and jury criminal trials. I left domestic prosecutions after 3 years and joined the Office of the Prosecutor at the ICTY as a Legal Officer. My two-plus years in that office were evenly split between the Appeals and Trial sections. It was in that capacity that I argued cases from the Rwandan genocide before the Appeals Chamber of both the ICTY and ICTR. I went into solo legal practice in Atlanta, after the ICTY and served as a criminal defense lawyer and plaintiff's personal injury lawyer for 5 years. I tried various criminal cases to jury, including capital felonies, as well filed civil suits for monetary damages and recovered compensation for injured victims. I returned to international practice to work on the Charles Taylor trial defense team. I served as co-counsel during the trial phase and now serve as Lead Appeals Counsel for Mr. Taylor. I also currently serve as the Common Legal Representative to 229 victims in one of two Kenyan cases now before the ICC.

2. Your client, Mr. Taylor, has been sentenced to 50 years imprisonment for planning and aiding and abetting war crimes and crimes against Humanity? Having been a committed member of his defence team from the outset, what was your reaction to the judgment and sentence?

MA: The judgment, as most people might know, exceeds 2,500 pages in length. Seldom should any case warrant such a lengthy judgment; indeed, and as far as we have been able to determine, it is the longest judgment ever issued by any international court throughout history. That fact raises more questions than it answers certainly for me, and I suspect for others as well. Significantly, the more we dissect the judgment with reference to the evidence that was adduced at trial, the more we find a

rather convenient way in which the evidence has been viewed, including instances where, in our view, certain evidence has been entirely ignored, while other evidence have been over-emphasized at the expense -- more often than not -- of defense evidence. All of that will be brought in due course to the attention of the Appeals Chamber. As far as the sentence is concerned, it was clearly excessive, in my view, and the Trial Chamber committed error in electing not to accept any of the factors in mitigation the Defense put forward, save for Mr. Taylor's good behavior in detention. To be sure, there is some variation in the range of sentences which the ad hoc/ hybrid international tribunals have handed down for aiding and abetting, but "50 years" exceeds by far the appropriate range of sentences imposed thus far for that mode of criminal liability. We will be appealing the excessive nature of the sentence.

3. What are the principal challenges you have faced in your job so far? First as a Co-Counsel for Mr. Taylor and now as his Lead Counsel?

MA: The challenges are typical of those faced by other defense teams who represent war crimes accused. We have an up-hill battle in the court of public opinion representing clients who have been demonized to the point where witnesses with helpful information want nothing to do with us, while simultaneously, others without first-hand knowledge of what happened come running to the prosecution to volunteer information. This ⏩

⏩ undoubtedly affects the quality of evidence produced and received in the courtroom, and this bad pre-trial publicity is exacerbated by other factors that arguably influence witnesses, notably "benefits" given by prosecutor offices to witnesses (e.g., access to medical care, housing, communications, and promises of relocation to Western countries, etc.) There is also the issue of significant funding disparities between prosecution and defense, with the frequent justification being that the prosecution has the burden of proof as opposed to the defense. The fact that Mr. Taylor was a former president brings a unique dimension to the experience, in the sense that he was perceived by many powerful nations as being too brash and ambitious as the ruler of a small West African nation and consequently there has been no shortage of enemies in powerful places. The Wikileaks code cables that we introduced into evidence at trial makes these facts plain for all to see.

4. How have you selected your team and who will assist you?

MA: I knew for a while that I would be serving as Lead Counsel on appeal and I consulted lawyers in the field whose views I valued for recommendations of suitable co-counsel and legal assistants. I also watched colleagues whenever we attended defense counsel seminars, and especially when we did exercises in the courtroom, to ascertain those with exceptional skill, professionalism, and collegiality. I did my research in the background for each prospective team member, contacting them only when I was virtually certain that they were the right person for the job. My co-counsel are Dr. Eugene O'Sullivan, Mr. Christopher Gosnell, and Ms. Kate Gibson. I am most pleased with the members of my team and they are, in my view, an exceptional group of lawyers that I feel privileged to lead.

5. After selecting your team, what happens next in the Appellate process?

MA: The typical starting point of the appeals process is to review the Judgment and Sentence, in light of the entire trial record and applicable standards of appellate review. The unusually lengthy judgment makes that exercise in this case a unique, very cumbersome and tedious experience. The familiarity one has with the standards of review on appeal and with the facts of the case neither obviates nor ameliorates the tedious and time-consuming exercise that must still be undertaken. That said, we have already commenced with a filing before the Appeals Chamber in relation to additional time for the filing of our Notice of Appeal. We have requested 5 weeks in addition to the 14 days that the Rules provide for, and the Prosecution has supported our request to the extent only of 3 additional weeks. Nonetheless, the Prosecution wishes to be afforded the same amount of time that we are afforded to file our Notice of Appeal, whether 5 or 3 additional weeks. A Status Conference is scheduled for the 18th of June to discuss our request and other matters relating to the briefing schedule.

6. How long do you expect the appellate process to last and when will the final judgment be rendered?

MA: I expect the appeals process to last between 6 to 9 months, and an additional 6 months for the final judgment on appeal. Should these estimates hold true, it would mean that a final judgment might not be forthcoming until around August – September 2013.

7. How will you define success in your current role?

MA: Success would mean leaving no stone unturned in our legal and factual challenges to the judgment, and exhibiting excellence in our written and oral submissions to the Appeals Chamber. We are not naïve of the political context in which the case began and continues to unfold, however, and we will remain vigilant for the possibility of unearthing additional disclosures, such as the Wikileaks documents during the trial phase of the case.

8. What are the benefits and challenges of working in a "hybrid" system such as the SCSL? Was this solution right for Sierra Leone, instead of having a purely national or international process?

MA: A key benefit of a "hybrid" system is that the affected peoples – Sierra Leoneans in the context of the SCSL -- probably have more of a sense of "ownership" of the dispensation of justice. The same cannot be said of the Balkans vis-à-vis the ICTY, for example. The removal of the Taylor case to The ⏩

⏩ Hague has naturally diminished this sense of 'ownership' for Sierra Leoneans. However, a key drawback is the possibility of political interference with the national component of such systems, as has been alleged in the case of the ECCC. National legal processes for the gravest of crimes have either been a misnomer because officialdom is seldom without criminal responsibility for mass atrocities, or have had a mixed record in those instances where there is enough political will to charge and prosecute offenders. All-in-all, and save for the funding difficulties which have plagued the SCSL since its inception (due to its reliance on voluntary contributions), the hybrid system has been appropriate for Sierra Leone, in my view.

9. Is the court too expensive and has the tribunal secured funding for the remainder of the appellate process?

MA: I must give the SCSL credit for making every effort to provide adequate funding for my appeals team. The Court learned from the false-start that happened on 4 June 2007 with the commencement of the trial phase of the case when everything ground to a halt after repeated demands by the first defense team for adequate time and facilities for the preparation of Mr. Taylor's defense. Since then, successive Registrar's of the Court (and the current one, in particular) have paid particular attention to ensuring the smooth progression of the Taylor case, given its high visibility and the reality that delay occasioned by lack of adequate resources to the defense ultimately proves far more expensive than providing the defense with what resources are needed to effectively and competently defend Mr. Taylor.

10. There are some, especially the Defence, who argue that the Tribunal cannot deliver fair justice because of the limited jurisdiction of the court and the notoriety of the crimes that were committed in Sierra Leone?

MA: This is a complex question for many reasons. I often give every trier of fact the benefit of the doubt when a case starts, presuming that they are able to divorce themselves from the contextual matrix in which a case happened (political, social, ethnic, etc.) and the locale in which the court sits. But even the most disciplined and fair-minded trier of fact cannot overcome certain idiosyncrasies of these courts/ cases that dilute the quality of justice that can be dispensed even when everything works as it should. Those idiosyncrasies are systemic and include, the significant passage of time between when the crimes occurred and when the cases are tried (this causes unreliability of testimonial evidence), the large temporal and geographic scope of the cases, bad pre-trial publicity against the defense, the severely diluted nature of critical legal standards (such as "proof beyond reasonable doubt") which should otherwise be immutable across space and time, on account of specious logic – "if not so, then such cases would never be tried," the non-existence or the giving of short-shrift to other critical evidentiary principles, involving hearsay, authentication, and the best evidence rule, to name but a few. So these features are what the Defense often and rightly complains about because they render a "fair trial," in the truest sense of the phrase, very difficult. The SCSL is no different than other tribunals in these regards.

11. Every Accused at the SCSL has been convicted and sentenced to long prison sentences. None of the convicted person, including Mr. Taylor, received any reduction in their sentence as a result of mitigating factors. Is there any explanation for this? Does ⏩ ⏩

the cost of an international trial have any relationship to its propensity to punish?

MA: The first question regarding excessive sentences and failure to consider factors in mitigation implicates an issue I have already said we will be appealing. It seems professionally prudent that I say no more about that, even in relation to sentences that were imposed on other SCSL convicts. The second question is an interesting one, but I know of no empirical studies -- qualitative or quantitative -- which have explicated a correlation between cost of an international trial, on the one hand, and propensity to punish, on the other hand. I would be speculating to suggest such a correlation. Indeed, the propensity to punish and the severity of the sentences could, in certain instances, be justified as much on the gravity of the crimes and culpable conduct in question, as on other factors in the overall scheme of things.

12. How do the Sierra Leonean and Liberian public perceive Mr. Taylor's conviction and sentence?

MA: I wish I had been in the region shortly after the judgment and sentence were pronounced to better gauge the sentiments of common folks. I suspect it has generated very mixed, diverse, and conflicting reactions in both countries. The name "Charles Taylor" is one that evokes passion and variegated feelings for particular folks and all that is certain is that what opinions people hold will be strongly held, in support of, or against, our client. What is equally certain is that contrary to media reports, Mr. Taylor is still well loved by a significant number of Liberians today.

13. What do you think the lasting legacy of the Tribunal will be? Does it set a precedent for an international response to similar crimes in the future?

MA: The lasting legacy of the SCSL will likely be its completion of all cases that were taken to trial and on appeal in a relatively timely manner, other tribunals considered. Whether or not it will set a precedent for international responses to similar crimes remains to be seen. However, there are certain species of international crimes which, in my view, lend themselves to specialized courts/ tribunals of an ad hoc nature, notwithstanding that the ICC remains the future. The Special Tribunal for Lebanon and the crime of terrorism is one such example.

14. You are presently also representing victims in the Kenyan case at the ICC. How do you feel about wearing these two hats – representing victims and doing defence work? How is it perceived in legal and social circles?

MA: To be sure, I am far from unique in our field when it comes to fulfilling both roles simultaneously. There have been many others who have taken a similar path as I have – starting first in prosecutions, then doing defense work and later representing victims. I thoroughly enjoy wearing both hats because it illustrates that things are not always "black and white" as most people would have it. I often tell people that trial lawyers are like surgeons and we welcome and try and save all comers as best as we can, making a living along the way but also believing that we are a necessary and indispensable part of a larger process that we as civilized peoples inherited and preferred. The key is to fight as hard as possible for whomever is your client – victim or defendant. My "two hats" are consequently easily understood by practicing lawyers, but can intuitively seem incongruous to common folk, in the absence of some reflection.

15. What is the most important lesson you have learned from your experience as an international criminal lawyer so far?

MA: Nobody comes out a winner more often than not. Victims are unlikely to be made "whole" emotionally, financially or otherwise by virtue of the criminal process (including any reparations phase because of limited resources), there is a danger of reducing complex matters to cases of "good" versus "evil," as far as offenders are concerned when, in reality, not only those who are in the dock could or should have been charged, and prosecutors and judges can earn no pat on the back when neither victim nor accused have received fundamental fairness.

Wayne Jordash

SCSL: Delayed Justice

As the celebration of Taylor's conviction is played out in the international media, the fact that the Trial Chamber, after nearly 14 months, has still to complete the drafting of the actual Judgment has received scant attention. As pointed out by Geoffrey Robertson QC on 16 April 2012 in Newsweek Magazine, one "disquieting feature of the case is the time the court has taken to deliver this judgment—thirteen months, no less, since the final speeches finished". Obviously, hurriedly completing a 44 page summary of the highlights of Taylor's guilt to ensure that the 26 April deadline was met is not the same as completing a carefully drafted judgment that can circulate within Chambers and be the focus of finely tuned deliberations and frank exchange of judicial views on the myriad of relevant detail.

Accordingly, the controversy arising from Justice Sow's stifled but poignant 'dissent' must be looked at in light of his forthright remarks that he would have acquitted Taylor and was unable to proffer his opinion prior to the hearing on the 26 April 2012 because "no serious deliberations" had taken place. Whilst rumours of the lack of, or serious impediments to, deliberations had been circulating for many months amongst insiders at the Special Court for Sierra Leone (SCSL), there is a good deal of difference between views quietly expressed in the living rooms and restaurants of the Hague and the view of an experienced judge, who, despite a questionable locus to intervene, felt sufficiently strongly about perceived irregularities, to risk bringing himself, the Taylor Judgment and the SCSL into disrepute on such a momentous occasion.

Equally disturbing was the attempt by the SCSL to remove all trace of Justice Sow's intervention from the court records. As reported here previously, as Justice Sow made this statement, the other three Judges walked out of the room, while the court technicians cut off an in-house video feed to reporters, turned off the Judge's microphone and closed the public gallery. Better for the cause of international justice, had we all heard what Justice Sow had in his mind after observing the Trial Chamber at work for the last 5 years or more? Aside from the old adage that justice should be done and seen to be done, Justice Sow's views are highly relevant for the inevitable appeals against conviction and sentence that will take place later this year. Underpinning the Statute, and the subject of several Rules of Procedure and Evidence, is the proposition that the Judges deliberate without fear or favour, affection or ill will and honestly, faithfully, impartially and conscientiously decide on the guilt or innocence of the Accused person. Therefore, whilst Judge Sow's views may well have been cut off in their prime, they make him a prime candidate as a key witness in the forthcoming appeals against conviction and sentence for the Prosecution and the Defence. The SCSL Appeal Chamber may well be advised, for the sake of the appearance of justice, as well as justice itself, to avoid the appearance of attempting to silence critics, especially one as well placed as Judge Sow in a trial as significant as Taylor's.

Finally, whatever the background to Justice Sow's intervention, the fact remains that Trial Chamber II have yet to finalise the Judgment, leaving the unfortunate parties struggling to prepare meaningful written submissions on the appropriate sentence, or making any early assessments on the merits of any appeal. Whilst the separate sentencing procedure at the SCSL was considered to be a welcome and overdue improvement on the situation that prevailed at the International Criminal Tribunal for Yugoslavia (ICTY) and Rwanda (ICTR), this situation places both the Prosecution and Defence into the arguably worse position of having to make submissions based on the generalised findings without any real knowledge of which evidence was accepted and why. Given, inter alia, ⏩

⏩ that the parties must address the Trial Chamber on an individualized and proportionate sentence, requiring a careful analysis of the gravity of the offence, as well as the form and degree of participation in the crimes, as well as an analysis of the mitigating factors that must be carefully weighed, it is difficult to see how the parties will be able to materially assist the Trial Chamber to the extent required to ensure fairness and justice. Perhaps, it was this kind of concrete prejudice that Geoffrey Robertson QC had in mind when he correctly pointed out that "it remains true that justice delayed is justice denied, especially in a court whose first president promised that 'our justice, whilst it may not be exquisite, will never be rough'."

Wayne Jordash, a barrister at Doughty St Chambers, specialises in international and humanitarian law, international criminal and human rights law and transitional justice.

Akshaya Kumar

Libya's Controversial New Transitional Justice Laws Draw Critique from Activists and Civil Society

On 9 May 2012, Lawyers for Justice in Libya (LFJL) delivered an open letter signed by over 60 members of Libyan civil society to the National Transitional Council (NTC), the country's interim governing body. The letter demands the repeal of two pieces of legislation and the amendment of a third, arguing that the NTC's newly promulgated transitional justice measures undermine the nascent rule of law being established in the post-Gaddafi era. Warning that the vague and retaliatory quality of these laws are a "terrifyingly familiar echo" of Libya under dictatorship, the letter concludes "for us Libyans to be able to transition to a state that truly promotes responsible citizenship [...], accountability must be enshrined over impunity." Echoing the argument advanced in the letter, Mark Kersten's detailed post on the topic at Justice in Conflict evaluates the amnesties proposed in Law 38 and concludes that while a limited program might have had merits, the "problem" with the NTC proposal is that its blanket application excuses too much. Kevin Jon Heller at Opinio Juris reminds that these new amnesties evidence the need for the OTP to consider accusations of serious international crimes against the rebels, since "when it comes to accountability for the new Libyan government, it's the ICC or nothing."

The fact that Law 38 grants a broad amnesty for all acts "made necessary" for the "success and protection" of the February 17 revolution has gone unmentioned in Western media or by the United Nations mission in Libya, which has focused its recent advocacy efforts on allegations of torture in Misrata. When asked about Law 38, the spokesperson for the Secretary General was only able to say that he hadn't "seen anything" on the subject. Notably, Amnesty International's response emphasizes the restrictions on freedom of speech created by Law 37, but does not even mention the amnesties. Similarly, Human Rights Watch focuses its critique on Law 37's provisions authorizing jail time for those who spread "rumors" or "news" that weakens "public morale" or hampers the "national defense." Although unmentioned in the LFJL open letter, Human Rights Watch has also drawn attention to the NTC's problematic proposed vetting measures, which could severely restrict the eligible candidates for the upcoming June elections.

Unquestionably, the limits on free speech outlined in Law 37, which criminalizes statements that "offends" the uprising, and Law 15, which prohibits open media discussion of fatwas, are problematic. Similarly, the aggressive vetting procedures being used by the new Integrity and Patriotism Commission could potentially impact the freedom and fairness of the upcoming electoral process. However, the absence of discussion about the political and legal viability of amnesties created by Law 38, particularly in the shadow of a pending ICC investigation and open questions of about complementarity, is undeniably curious. While neither of the two current ICC indictees, Saif al-Islam and Abdullah al-Senussi, will benefit from these new amnesties, the OTP can and should continue investigations into alleged crimes by revolutionary forces. In the event that those investigations lead to warrants against February 17 revolutionaries, these newly promulgated amnesties could help the ICC make the case that the charges are admissible despite the complementarity restrictions outlined in Article 17 of the Rome Statute.

Akshaya Kumar is completing studies for a concurrent JD from Columbia Law School and an LLM in Human Rights, Conflict and Justice from the School of Oriental and African Studies.

Prof. Philippa Webb

Guinea v. Congo: The ICJ issues first decision assessing compensation in 6 decades

On 19 June, the ICJ delivered its Judgment on the question of compensation in the Ahmadou Sadio Diallo case (Republic of Guinea v. Democratic Republic of the Congo). When settling legal disputes between States, the ICJ typically declares that a party has violated an obligation under international law. The Court may order certain action to remedy the situation (eg, the cancellation of an arrest warrant that violates a foreign official's immunities, the enactment of legislation, or the review and reconsideration of certain national cases), but it almost never gets involved in the nuts and bolts of calculating damages. This is the first time in 63 years that the ICJ has issued a Judgment on compensation (see Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) 1949).

The case concerns the arrest, detention and expulsion from the DRC of a Guinean businessman, Mr Diallo, in 1995-1996. It is unusual for an ICJ case to focus on an individual, but Guinea had decided to exercise diplomatic protection over Mr Diallo's rights, in essence bringing the case as if the injury had occurred to the State itself. When the ICJ issued its Judgment on the merits in November 2010, it found the DRC had indeed violated Mr Diallo's rights and it was obliged to make appropriate reparation, in the form of compensation. It gave the parties six months to agree on the amount, which they failed to do.

A quick glance at the parties' submissions reveals why they were unable to reach agreement. Guinea estimated compensation of approximately US$11.6 million, plus a further US$500,000 for its 'unrecoverable costs' as a result of instituting the proceedings. The DRC, on the other hand, estimated US$30,000 would compensate Mr Diallo for his wrongful detention and expulsion, with each party bearing its own costs of the proceedings. Interestingly, when Guinea instituted proceedings before the ICJ in 1998, it requested the ICJ to order the DRC to pay US$31 billion for Mr Diallo's losses and nearly US$5 billion to Guinea in damages, an amount about 7 times its GDP…

In its Judgment, the ICJ awarded modest compensation: US$85,000 for the non-material injury suffered by Mr Diallo and US$10,000 for material injury in relation to his personal property. No compensation was awarded for alleged loss of remuneration or for alleged deprivation of potential earnings. Referring to Article 64 of the Statute, the Court decided each party shall bear its own costs. The Judgment was by a strong majority of 15-1 and was a clear win for the DRC.

The Judgment highlights the challenge of calculating damages for injuries suffered by an individual within the framework of the ICJ, a court designed to settled questions of international law in inter-State disputes. In a departure from its usual style, the ICJ actively looked to the practice in other international bodies (including the European Court of Human Rights, the Inter-American Court of Human Rights, the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the UN Compensation Commission) (para 13 of the Judgment). The challenge facing the ICJ was magnified by the sheer lack of evidence. The parties had each submitted a single written pleading. The ICJ noted that the abruptness of Mr Diallo's expulsion from the DRC made it difficult for him and Guinea to locate certain documents (para 16). Indeed, Guinea did not offer any specific evidence on most of the claims.

No experts were used, unlike in the Corfu Channel ⏩ ⏩ case, where the ICJ appointed three experts to assess of the

amount of compensation. The ICJ's predecessor, the Permanent Court of International Justice, had also sought expert advice on compensation in the Chorzow Factory case in 1928 (although the parties reached an agreement on the amount before the completion of the experts' report). In Guinea v. Congo, there was apparently little evidence for any hypothetical experts to assess. The Court relied on 'equitable considerations' (paras 24 and 33).

In its 2005 Judgment in Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), the Court found Uganda to be under an obligation to make reparation to the DRC for massive violations of human rights and the exploitation of natural resources. In wording similar to the 2010 Guinea v. Congo Judgment – but without setting a six-month time limit – the ICJ decided that failing agreement between the parties, reparations shall be settled by the Court. Negotiations between the DRC and Uganda have proceeded haltingly, and the ICJ may soon again be turning its mind to the question of compensation.

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

Julien Maton

Richard Rogers on the Interference in the Judicial Process of his Appointment as Defence Counsel at the ECCC

On June 5th, Richard J. Rogers, Lawyer at the Extraordinary Chambers in the Courts of Cambodia (ECCC), wrote a letter to the UN-Under-Secretary-General, concerning interference in the judicial process of his appointment as Defence Counsel to the suspect in Case 004.

Richard Rogers alleges that Knut Rosandhaug, the Deputy Director of the Office of Administration (DDOA), and Isaac Endeley, the Chief of the Defence Support Section (DSS), are continuing to flout a court order issued on 3 May 2012 by the former UN-appointed international reserve Co-Investigating Judge, Laurent Kasper-Ansermet, and thereby undermining the rights of his client.

The purpose of the letter is to request the Under-Secretary-General to instruct the DDOA and DSS to comply with the court order. This order was issued after the Suspect's completion of a DSS form in which the latter selected Richard J. Rogers and Mr Mom Luch as Counsel. The suspect later confirmed his choice in a letter dated 20 May 2012. However, says Rogers, the DDOA and DSS have refused to respect the Suspect's choice of Counsel or implement the ⏩

Order.

Instead, on 7 May, the very next morning after Judge Kasper-Ansermet's last day at the court, the DSS sent a letter to Rogers' national co-lawyer, Mom Luch, stating that "Mr Rogers is disqualified from being on any Defence Team at the ECCC" due to a conflict of interest.

Further than that, on 18 May, the DDOA sent a memorandum to the National Co-Investigating Judge, You Bunleng, requesting him to clarify the order of Judge Kasper-Ansermet. For Rogers, the bad faith of this act is threefold: first, Judge You Bouleng does not recognize as legally valid any of the investigative acts or decisions taken by Judge Kasper-Ansermet, arguing that he had not been sworn-in by the Supreme Council of Magistracy. In this context, it is unsurprising that Judge You Bunleng rejected the legal validity of the entire order. Secondly, the DDOA did not copy Rogers on the clarification request, nor did it inform him that it had been sent. Mom Luch and Richard Rogers are yet to be provided a copy of the DDOA request. Lastly, although the wording of the order was perfectly clear, had there been a genuine need to clarify the order, says Rogers, the DDOA could simply have requested clarification from Judge Kasper-Ansermet himself.

The latest attempt to obstruct the order, says Rogers, came on 30 May when the DSS sought to deny his application to be on the ECCC list of lawyers, although he had been on the list since 30 March 2012, after his registration with the Bar Association in the Kingdom of Cambodia (BAKC).

Accordingly, Richard J. Rogers claims that in order to provide an 'effective defence' on the basis of the client's instructions, Mom Luch and he must be engaged on this case and be provided with the necessary funding and support to do their work. The refusal to comply with the Order is adversely affecting their ability to pursue the Suspect's instructions, as well as undermining the Suspect's right to counsel of choice and the right to an effective defence. Considering that the Suspect is 78 years old, in poor health, and is known publicly to be facing allegations of mass atrocities, the situation is seriously prejudicial.

In addition, says Rogers, in most tribunals, the Suspect would have a remedy for breach of an order and violation of his rights through the court system. However, due to the position taken by the national judges vis-a-vis Judge Kasper-Ansermet's work, the Suspect is left without a practical and effective remedy, either before the Office of Co-investigating Judges or before the Pre-Trial Chamber.

Richard Rogers concludes his letter by urging the United Nations to remain vigilant, highlighting the striking parallels to the DDOA and DSS's approach to his appointment, although his appointment should have been straightforward. "The Suspect has exercised his right to choose his counsel and has twice confirmed that choice in writing. I am clearly well-qualified and there is no conflict of interest […] The UN must now exercise the promised vigilance in relation to its own staff. The interests in this case are too important to descend into a bureaucratic farce", says Rogers.

The full text of Richard Roger's letter is available at: http://ilawyerblog.com/wp-content/uploads/2012/06/Richard-Rogers-Letter.pdf

Miša Zgonec-Rozej

No Reparation for the Victims of Nazi War Crimes – The Judgement by the International Court of Justice (ICJ) in Germany v. Italy, Greece Intervening

There seems to be a general consensus amongst scholars that the recent ICJ decision on the Reparation case was the "right" or "correct" decision. This assessment, of course, depends on the commentator's point of view. In my opinion, the judgement is disappointing as it adopts a conservative and restrictive interpretation of the rules of customary international law on state immunity in disregard of the well-established right of victims to remedies for serious violations of international humanitarian law and other crimes under international law.

On the positive side, the judgement is generally helpful to States as it provides clarification of the law on State immunity, thereby introducing a degree of certainty into this field of law. On this point see the blog on EJIL: Talk by Prof. Andreas Bianchi: On Certainty. On the negative side, the judgement leaves victims of war crimes without remedies even in situations where the victims are unable to bring a claim for reparation within the court of the responsible State, a regional court or any other compensation mechanism.

Ultima ratio: Departure from the Arrest Warrant

One of Italy's main arguments was that Germany was not entitled to immunity because the acts which gave rise to the claims involved the most serious violations of rules of international law of a peremptory character, for which no alternative means of redress was available (para. 61). The restriction recognised by Italy thus only applies to the claims relating to international crimes and only when no other alternative avenues of redress are available. In this case, the Italian and Greek victims of Nazi war crimes brought claims in Italian courts against Germany or sought to enforce foreign judgements after being unable to obtain reparation in proceedings in Germany as well as in the European Court of Human Rights (see Counter-Memorial of Italy, paras. 2.20-2.21).

In Italy, the Supreme Court (Corte di Cassazione) in its judgment of 11 March 2004 in the case Ferrini v. Germany held that Italian courts have jurisdiction over compensation claims of persons deported during the Second World War to perform forced labour in Germany on the ground that immunity does not apply for acts constituting international crimes. After this judgement, numerous other proceedings were instituted against Germany before Italian courts by prisoners of war who were coerced into forced labour and victims of massacres perpetrated by German forces during the last months of the Second World War.

In Greece, the request for reparation against Germany was submitted by the relatives of the victims of the massacre in the Greek village of Distomo where, on 10 June 1944, German forces killed hundreds of civilians, including women and children. In 2000 the Hellenic Supreme Court confirmed a judgement rendered in 1997 by the Greek court of first instance, in which the court rejected Germany's claim of jurisdictional immunity and awarded damages to relatives of the victims. The Greek Minister of Justice, however, had not granted the authorization required in order to enforce a judgement against a foreign State so it was not possible to enforce the two judgements.

The claimants in the Distomo case had subsequently brought proceedings against Greece and Germany before the European Court of Human Rights which had held in 2002, referring to the rule of State immunity, that the claimants' application was inadmissible. The Greek claimants had then sought to enforce the judgments of the Greek courts in Italy and the Italian Court of Appeal had ruled that the first Greek judgment delivered in 1997 was enforceable in Italy. The Italian Supreme Court confirmed this ruling.

Germany refused to provide reparations that had been awarded by the Italian courts to Italian and Greek victims. Consequently, measures of constraint were taken against German assets in Italy. Greek claimants, pursuant to a decision by the Italian Court of Appeal, registered a legal charge ("ipoteca giudiziale") in the land register over Villa Vigoni, the German-Italian centre of cultural encounters. Germany expected that other such measures might be taken against real estate that served German public purposes in Italy.

Amnesty International (AI) has argued in its position ⏩

⏩ paper that the restriction advocated by Italy is consistent with established state practice because "[it] is narrowly defined, manageable, and rooted in established principles of international law." AI argued that the restriction reflects the well-established fundamental right of the victims of the most serious crimes under international law to reparation. It concerns the conduct that - as recognized in the Pinochet judgment - cannot be considered a State function and therefore falls outside the authority of a State under the international legal system. Importantly, the restriction is only provided as an option of last resort: when a victim is not able to bring claims for reparation within the courts of the responsible State, before a regional court, or pursuant to any other compensation mechanisms. Moreover, the restriction "does not interfere with the core purpose of sovereign immunity: to ensure the effective orderly conduct of international relations." (paras. 10-15)

The ICJ rejected the Italian argument relating to the "gravity of the violations" and held that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict." The Court emphasised that its conclusion on the independence of the gravity of the violations or the peremptory character of the rule ⏩

Julien Maton

The Unintended Consequences of the Lubanga Decision

Last March, the International Criminal Court (ICC) has found Thomas Lubanga Dyilo guilty of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities in the Democratic Republic of Congo from September 2002 to August 2003. One of the main issues of the judgment concerns the interpretation of the concept of "active participation in hostilities" enshrined into article 8(2)(e)(vii) of the Rome Statute. This question was raised in relation to whether or not sexual violence against children, in the form of sexual slavery and forced marriages of child soldiers, fell within the scope of "active participation in hostilities".

In a post on the blog of the European Journal of International Law, Nicole Urban gives a broad analysis of the matter. She explains that the Chamber's majority made a quite controversial finding by saying that 'active participation', under the ICC Statute, is a distinct notion from, and broader than, 'direct participation in hostilities', while international humanitarian law treats the terms as synonymous. For her, even if the Trial Chamber did not set out a definition of those concepts, its reasoning strongly suggests that it considers 'direct' participation to mean involvement in front-line combat, and 'active' to be broader than this and to include 'combat-related activities'.

The author highlights the unintended consequences of this finding. If sexual exploitation of and violence against child soldiers render them 'active' participants in hostilities under one Article, there is notably a real risk that they will also be considered as active participants in hostilities under the others. This would result in the exclusion of these children from the protection of Common Article 3 to the Geneva Conventions as well as from Article 8(2)(c) of the Rome Statute which both protect "persons taking no active part in the hostilities". Nicole Urban urges great caution in future decisions which rely on the Lubanga interpretation of 'active' and 'direct' participation in order to avoid an overall net reduction in protection for those children.

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breached was only reached with regard to State immunity and not with regard to immunity of State officials in criminal proceedings which was not in issue in the case.

The ICJ also rejected Italy's argument that the rules of the law of armed conflict violated by Germany constituted jus cogens which prevails over the rules on State immunity. The ICJ held that assuming that the rules violated by German forces were rules of jus cogens, there is no conflict between these rules and the rules on State immunity because the two sets of rules address different matters. "The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State" (para. 93).

ICJ dismissed Italy's "last resort" argument by holding that "[it] can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress." (para. 101). In the Court's view, the application of any such condition would be exceptionally difficult in practice particularly when claims have been the subject of extensive intergovernmental discussion (para. 102).

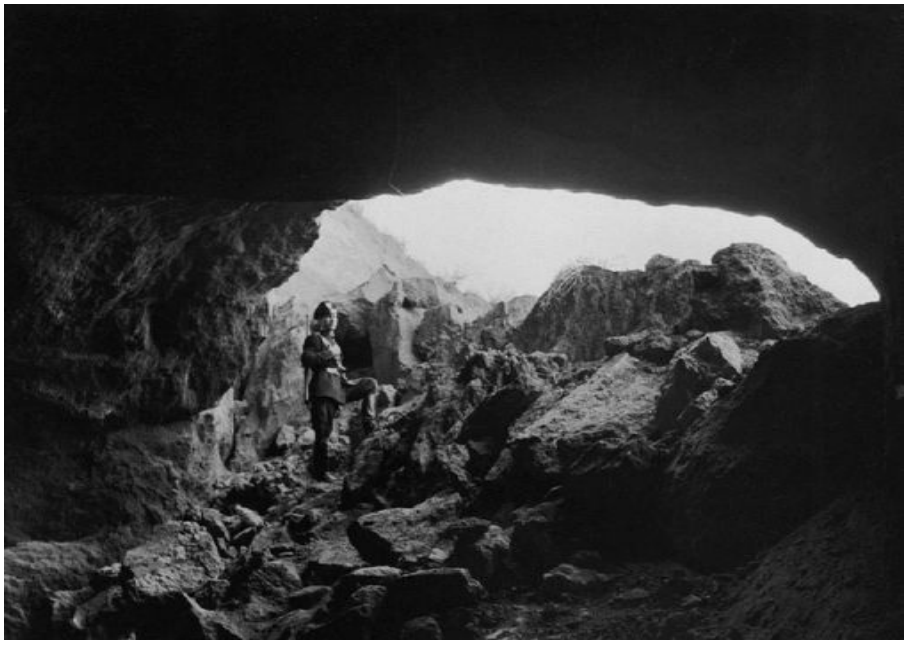
Interestingly, by ruling that immunity does not depend on the availability of an alternative avenue of redress the ICJ departed from its previous reasoning in the Arrest Warrant case where the "availability of avenues" argument was referred to in support of the Court's determination. In that case the ICJ upheld the immunity of an incumbent Minister of Foreign Affairs from criminal prosecution by a foreign State, but only after noting that other avenues for criminal prosecution existed. On that basis the ICJ concluded immunity from jurisdiction is not equivalent to impunity (paras. 60-61).

In this case, the ICJ confirmed Germany's jurisdictional immunity despite the fact that such recognition leaves the victims without any other avenues to seek reparation. The ICJ's approach to immunities, therefore, appears to be unfortunately selective and inconsistent. No one denies the difference between criminal and civil proceedings, highlighted by the ICJ in its judgement (paras. 87, 91). However, the Court has never explained the difference or the rationale behind making the distinction. Both proceedings arguably serve the same purpose: to hold those who are responsible for crimes under international law accountable and to give the victims access to justice and reparation.

On this point, in their joint dissenting opinion in Al-Adsani v. The United Kingdom, six judges of the European Court for Human Rights convincingly criticised the distinction between criminal proceedings (where jus cogens might potentially override the rules of sovereign immunity) and civil proceedings as being not consonant with the very essence of the operation of jus cogens rules. In their view the criminal or civil nature of the domestic proceedings is immaterial: "[i]t is not the nature of the proceedings which determines the effect that a jus cogens rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule." (para. 4).

The right of the victims to reparation: a missed opportunity

Italy's attempt to have the ICJ decide on the question of reparation owed to Italian victims was unsuccessful. Italy submitted a counter claim in which it requested the Court to adjudge and declare that Germany had violated its obligation of reparation owed to the victims in questions, that Germany's international responsibility is engaged for this conduct, and that Germany must cease its wrongful conduct and offer appropriate and effective reparation to the victims. The ICJ dismissed this claim in its Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80(1) of the Rules of the Court.



On the merits, seeing its competence to settle inter-state claims in contentious cases as a purely inter-State court, the ICJ avoided addressing the question of whether individual

victims have a directly enforceable right to claim compensation for war crimes. After having ruled that Italy breached its obligations owed to Germany, because Italian courts denied Germany the immunity to which it was entitled under customary international law, the Court saw it unnecessary to discuss the question whether international law confers upon the individual victim of a violation of the law of armed conflict such a right (para. 108). The only determination the ICJ made in the context of the right to reparation was to say that there is no peremptory rule under international law requiring the payment of full compensation to each and every individual victim (para. 94).

The lack of adequate analysis of the obligation to make reparation for violations of international humanitarian law was picked up by Judge Yusuf in his dissenting opinion. He found it regrettable that the Court had not considered it necessary to examine, at least in a general manner, the obligation to make reparation for violations of international humanitarian law in international law (Yusuf's dissenting opinion, para. 12). Judge Yusuf observed that the right to reparation has evolved since the Second World War and "[it] does not exclude the right of individuals to make claims for compensation for damages arising from breaches of international humanitarian law". (paras. 13-19). The right to reparation has also been examined in the AI's position paper (para. 12).

The right to reparation is recognised in a number of treaties and other international instruments, including Article 3 of the Hague Convention Respecting the Law and Customs of War on Land, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law (Van Boven-Bassiouni Principles), Article 91 of the Protocol I to the Geneva Conventions of 1949, Article 75 of the Rome Statute of the International Criminal Court, UN Fact-Finding Mission on the Gaza Conflict (U.N. Doc. A/HRC/12/48), Article 2(3) of the ICCPR, Human Rights Committee (General Comment No. 31), Principles 5 and 8 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Doc. A/RES/40/34), Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles), Article 41 of the European Convention on Human Rights, Article 63(1) of the American Convention on Human Rights, Article 27 of the African Charter on Human and Peoples' Rights, UN Security Council Resolution 687 (1991) (para. 16) which established the UN

⏩ Compensation Commission for Iraq, Agreement between Ethiopia and Eritrea establishing the Claims Commission (Article 5), etc. The ICJ has also confirmed the victims' right to reparation in its Advisory Opinion on in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004 I.C.J. Reports 136, para. 153).

Noting that international legal systems evolved over the past century from "a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State" Judge Yusuf argued that the rationale behind restrictions to State immunity, such as the tort exception, has been conceived for the protection of individual rights against States. In his view, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity. The assessment whether the immunity should be granted has to include the application of the right to an effective remedy, the right to compensation for damages suffered as a result of breaches of international humanitarian law, and the right to protection from denial of justice. (Yusuf's dissenting opinion, paras. 21, 22, 28, 30). Judge Yusuf concluded:

"[The Court] […] could have clarified the law in the sense in which it is already evolving of a limited and workable exception to jurisdictional immunity in those circumstances where the victims have no other means of redress. Such an exception would bring immunity in line with the growing normative weight attached by the international community to the protection of human rights and humanitarian law, and the realization of the right to effective remedy for victims of international crimes, without unjustifiably indenting the jurisdictional immunity of States" (para. 58).

Judge Cançado Trindade extensively discussed the victims' right to justice and reparation in his dissenting opinion. He

argued that the tension between State immunity and the victims' right to access to justice and reparation should be resolved in favour of the latter, particularly in cases of international crimes. He stated that "[i]t is nowadays generally acknowledged that criminal State policies and the ensuing perpetration of State atrocities cannot at all be covered up by the shield of State immunity" (Trindade dissenting opinion, para. 52). He also argued that victims have an individual right to reparation and consequently, a State cannot waive claims of reparation on behalf of the victims (paras. 70-71, 250).

Judge Trindade concluded that "the individual victims of State atrocities cannot be left without any form of redress. State immunity is not supposed to operate as a bar to jurisdiction in circumstances such as those prevailing in the present case…. It is not to stand in the way of the realization of justice. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, inter alia, enabling them to seek and obtain redress for the crimes they suffered. Jus cogens stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity" (para. 299).

Deterring effect of the judgement on the evolving State practice

Amnesty International's position paper points out that under international law States have continued to retain for more than a century considerable discretion to determine in legislation and jurisprudence when other states may bar a civil claim on the basis of an assertion of state immunity. The practice shows that since the late 19th century, States have been limiting the scope of jurisdictional immunity granted to other States before their national courts without interfering with the core purpose of sovereign immunity (see AI's position paper, paras. 5-9, 43).

This raises the question whether the ICJ's judgement might deter further evolution of such State practice? Prof. Damrosch argued convincingly in her recent article that "[n]ational courts have not shied away from taking the initiative to change state practice to meet the needs of justice" and "[n]ational legislatures have likewise moved the law forward in response to demands for change." She concluded with the hope ⏩

⏩ that the ICJ would not "block national institutions from moving the international law of sovereign immunity in a direction that is responsive to contemporary demands for remedies due to wrongs committed by States."

In her blog The International Court of Justice's Judgement in Germany v. Italy: Chilling Effect? Philippa Webb takes the view that the judgement by the Court "essentially closed off" further acceptance by other national jurisdictions of the exception to State immunity for jus cogens violations which has been developed by certain Italian and Greek courts. What about other restrictions or so-called exemptions that have been developed in the practice of States?

For example, the US Foreign Sovereign Immunities Act (FSIA) provides for a unique restriction on sovereign immunity when the defendant is a government-designated "state sponsor of terrorism" provided that the victims or a claimant is a US citizen and the personal injury or death was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act. (28 U.S.A. § 1605A).

The ICJ limited its determination to proceedings for torts allegedly committed in the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict (para. 78). The ICJ did not provide any guidance as to whether there are any lawful restrictions to State immunity under international law in situations not involving conduct of armed forces during an armed conflict and what the permitted scope of such exceptions is. The Court merely held that it was not called upon to address the question of how international law treats the issue of State immunity in respect of acta jure gestionis (para. 60). Likewise, the Court did not see it necessary to resolve the question whether there is in customary international law a "tort exception" to State immunity applicable to acta jure imperii in general (para. 65). Although the distinction between acta jure gestionis and acta jure imperii served as a basis for the Court's decision, the ICJ has not fully explained the criteria for differentiating between the two terms.

What impact will the judgement have on the cases before the U.S. courts which involve the question of the scope and limitations of immunity of foreign States before the U.S. domestic courts?

At the BIICL rapid response seminar, Lady Fox argued that a State which is refused immunity in the U.S. courts on the basis of the innovative exceptions developed in the U.S. practice could make a representation that its rights are violated. Chimène Keitner, on the other hand, assesses in her blog at EJIL: Talk that the ICJ judgement does not have much impact on legal proceedings in U.S. courts. As regards the FSIA "terrorist state" exception the ICJ noted that it has no counterpart in the legislation of other States (para. 88) which implies that it is not supported by State practice and it is therefore arguably inconsistent with customary international law (see also ASIL Insight by Chimène Keitner).

After arguing that States and their domestic courts do not uniformly and consistently interpret and apply the rules on State immunity, Judge Yusuf made the following observation:

"It is not therefore very persuasive to characterise some of the exceptions to immunity as part of customary international law, despite the continued existence of conflicting domestic judicial decisions on their application, while interpreting other exceptions, similarly based on divergent domestic courts' decisions, as supporting the non-existence of customary norms. This may give the impression of cherry-picking, particularly where the number of cases invoked is rather limited on both sides of the equation" (Yusuf's dissenting opinion, para. 23).

Conclusion

The Court adopted the judgement in full awareness of its negative consequences for the victims' right to access to justice and reparation. The Court explicitly admitted in para. 104 that "[i]n coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned." In Judge Yusuf's view, the Court should have drawn some legal conclusions from this statement, particularly with regard to the legality or illegality of the decisions of the Italian courts (Yusuf dissenting opinion, para. 11).

Interestingly, the Court expressed surprise and regret over the fact that Germany decided to refuse compensation to internees that were denied their status of prisoners of war and were used for forced labour (para. 99). The Court then suggested a diplomatic approach stating that the unsettled claims of Italian victims, which formed the basis for the Italian proceedings, "could be the subject of further negotiation" between Germany and Italy "with a view to resolving the issue" (para. 104).

Unfortunately this statement is nothing ⏩

more than a moral view which has no legal effects in international law. In the absence of the legal determination by the ICJ of the issue of reparation, we can only hope that Germany will give weight to the Court's considerations and fulfil its obligations vis-à-vis the victims who have been left out of the existing reparation schemes. The Court, however, by adopting the above statement has not discharged its duty to give due consideration to the right of the victims to reparation.

As pointed out by Al-Adsani's counsel, John Macdonald Q.C., at BIICL rapid response seminar "it is not intellectually acceptable that States should be allowed to claim immunity from jurisdiction when they are responsible for torture". If the restrictions of State immunity may apply for commercial transactions, certain employment contracts, torts on the territory of the forum State and other situations then it is surely all the more compelling to allow States not to recognise State immunity for crimes under international law, at least where victims have no other avenues available to seek reparation.

The result of the ICJ judgement is thus that victims are left with no access to reparation for war crimes committed by forces of Nazi Germany and Germany cannot be held accountable for these atrocities. It should be noted that the judgement has detrimental consequences not only for victims of crimes committed during the Second World War but also for other victims of crimes under international law who are left without any reparation. Although practically challenging, the judgement should not be seen as closing the door altogether for the progressive development of international law through State practice. If that happens, the ICJ judgment may soon be seen to be out of step with the spirit of the times, with its urgent focus on international criminal justice and concern for victims of international crimes.

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Gillian McCall

The Diminishing Impunity for Historic Crimes

Since the International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in 1993, there has been an exponential increase in the use of international criminal law, something one might have otherwise thought had been left behind at Nuremberg

Although the current cases demonstrate the variety of different institutions which are set up to deal with mass atrocities, the pre-1993 cases must take more novel approaches, relying on courts that were never designed for this purpose. The 1948 Batang Kali case is not even the oldest to seek judicial assistance of this kind: in April 2012 the European Court of Human Rights ruled that Russia's unwillingness to conduct investigations had violated the rights of the relatives of those killed by the Soviet Secret Police in the 1940 Katyn massacre — despite the court not coming into existence until more than 10 years after the massacre, and the case not reaching the judges until 80 years after it took place. In Spain, groups continue to seek justice for Franco-era crimes that took place between 1936 and 1975. In Guatemala, Efraín Ríos Montt — who only left office this year — will go on trial for crimes, including genocide, committed in the 1980s. Victim groups have also filed complaints in Chile against former members of the Secret Police during Pincochet's rule, many of whom remain influential figures in Chile.

There are also criminal trials currently going ahead at the Extraordinary Chambers in the Court of Cambodia (ECCC) where there are potentially four cases trying senior members of the Khmer Rouge for crimes committed under the Pol Pot regime in 1975-1979; this is technically a hybrid court, established by agreement between the UN and Cambodian government, but it is based in Cambodia with a majority Cambodian judiciary. Less famously, there is also the Bangladesh International Crimes Tribunal (ICT), trying crimes allegedly committed in 1971.

Why, then, has there been this surge of interest in investigating — and prosecuting — crimes of the past?

The fact that there are high profile international courts trying current crimes may be of inspiration to those who still feel aggrieved about things that happened to them — or their relatives — years ago. It could also be that people have more legal knowledge about pursuing these crimes and are therefore better able to do something about it. The international focus on justice may also have created circumstances in which it is politically viable to pursue cases from long ago. Or, it could simply be that the passage of time alone has made it politically convenient — or possible — to investigate crimes committed in the past.

It's unclear, though, whether these developments are entirely positive. The mechanism is weak, often relying on a change in

⏩ the political circumstances that caused the delay, meaning that in many cases, it is only a selection of actors that are pursued. The Chilean criminal complaint is the only one against those currently in political positions, in comparison to Guatemala, where prosecutors were left patiently waiting for their alleged genocidaire to leave office.

On the other hand, the trial at the ECCC of Duch, a former leading member of the Khmer Rouge, has shown how these kinds of cases can have a significant effect on reconciliation in a country — having admitted his guilt during the trial, he then published a public apology. Despite his admission and apology, Duch has received a life sentence. Giving a sentence on appeal longer than the prosecution had requested feels like revenge more than justice and removes any incentive for others to plead guilty. The court has been heavily criticised for a lack of an independent judiciary, which has at different times been accused of corruption, political interference and accepting bribes.

The Bangladesh ICT has also had its share of criticism. Human Rights Watch has encouraged Bangladesh to conform to fair trials standards in the ICT, and has called for respect for due process, constitutional rights and equality of arms between prosecution and defence. Amnesty International has raised similar concerns about the fairness of trials.

There are more practical problems, too, with prosecuting such old cases. All case 002 defendants at the ECCC, for example, are now over the age of 80; even if they are fit to stand trial, there are significant problems with the credibility of evidence — both prosecution and defence — which is in some cases 40 years old; both witness memory, and physical evidence are likely to have degraded somewhat in the intervening period. This could either make criminal proof of guilt an impossible task, or prejudice a defence; either way, the purpose of the trial would be compromised.

One might think that, with the passing of time, older cases would present less political problems than cases which remain raw with victims of mass atrocities; conversely, given the number of hurdles those seeking a judicial answer must get over, it is only those situations where wounds have not yet healed that can turn into legal cases. Some situations may, on consideration, turn out to be so lacking in surviving evidence that any investigation becomes meaningless, and there must be confidence in a competent legal authority to ensure that the determination of victims' groups or the enthusiasm of politicians does not fill an evidential gap. But while there are victims seeking answers, and while there are courts able to assist them, then these cases could — albeit perhaps awkwardly and unpredictably — provide historic victories for justice over impunity.

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Wayne Jordash

Joint Criminal Enterprise: Results Orientated Pleading Requirements?

Joint criminal enterprise (JCE) is a mechanism employed regularly in international criminal law processes for assigning individual liability to those charged with 'committing' crimes. The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals' Chamber first recognized JCE as a mode of liability under customary international law in *Prosecutor v. Tadić*. The Appeals Judgment in *Tadić* articulated three different forms of JCE: basic (JCE I), systematic (JCE II), and extended (JCE III). The Tadić JCE framework and particularly the basic form of JCE has invariably been used to prosecute criminal cases at the ICTY. It is not an exaggeration to describe it as the mainstay of many of the prosecutions to-date. To prove liability under the basic form JCE, the Prosecution must establish the following three objective elements beyond a reasonable doubt:

• The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;

• A plurality of persons acting in concert in pursuit of a common purpose; and

• Participation by the Accused, in the form of a 'significant contribution' to the common plan, design or purpose.

In addition to establishing these objective elements, a Prosecutor must also prove that the Accused possessed the requisite mens rea for the crimes charged. The fundamental difference between JCE I and JCE III is that the former attaches to crimes that fall within the common criminal purpose of the JCE, while the latter attaches to crimes that fall outside the common criminal purpose.

In 2007, faced with a barrage of authoritative criticisms concerning the tendency of JCE to overreach its intended purpose, the ICTY Appeals Chamber in the case of *Brdanin* appeared to herald a move towards a new institutional determination to insist upon a more stringent application of the liability. In setting out this apparent intention, the Appeals Chamber observed the importance of establishing that the contours of the common criminal purpose are properly defined in the indictment and established beyond reasonable doubt. This was one of the essential stringent "safeguards" developed to prevent JCE overreaching or ⏩

⏩ lapsing into guilt by association. As a statement of intent, the Appeals Chamber's pronouncement could not be faulted. However, upon closer examination, it is plain that in practice the pleading safeguards, said to prevent this lapse, are inadequate, if not practically non-existent.

Whilst *general* pleading standards have progressed significantly over the life span of the international tribunals, JCE has been stubbornly impervious to these improvements. Current practice permits the Prosecution to plead criminal purposes that are defined by their outer geographical and temporal limits, rather than the essential links between the Accused, the JCE members, the direct perpetrators, the crimes and any shared intent or alleged foreseeability.

The salient jurisprudence demands that the Prosecution plead the common purpose of the joint enterprise, the identity of the participants, the nature of the Accused's participation in the enterprise and the *mens rea*. Astonishingly, apart from the requirement that these basic elements are *mentioned* in the indictment, the jurisprudence says little else. Despite the fact that JCE liability is imputed as a form commission under Article 7(1) of the ICTY Statute, the Prosecution is allowed to circumvent the usual requirements that the Accused's role in a course of conduct has to be pleaded in such a way that the constituent acts are particularised. Instead, indictments are permitted to particularise a *précis* of the alleged conduct in the broadest of generic terms (e.g. training, supplying, supporting, authorising, facilitating, failing, etc).

Further, there is no requirement that the indictment pleads the conduct of the JCE members said to demonstrate the shared intent at the heart of the JCE and whilst an accused may be found responsible for crimes committed by non-members of the enterprise, the links between the JCE members and these crimes on a case by case basis are not required to be explicitly pled in the indictment. The jurisprudence allows the Prosecution to omit or obscure the critical detail of the JCE that should provide the requisite framework for Trial Chambers to ensure that the Accused is fairly informed of the nature and cause of the charge and thereafter undertake a rigorous assessment of individual liability.

Given the apparent judicial acceptance of the need for clearly defined purposes to prevent a lapse into attributing guilt by association, it is difficult to escape the conclusion that the inadequacy of the pleading requirements is the result, at least in part, of the expectation that JCE will serve the ends-orientated objectives that underpinned its conception. As noted above, the usual requirements for liabilities other than JCE at the ICTY demand that the indictment particularises with a degree of precision the conduct that underpins the charges, especially the constituent acts of the Accused. These demands reflect an acknowledgment that the right of an accused to be informed promptly and in detail of the charges through the indictment benefits the Accused in innumerable ways. At the very least, the fact that the Prosecution states its case with precision provides the essence of an (ostensibly) adversarial process: that which is stated must be proven and the Accused must have sufficient notice of that defined case to have the best chance to present an effective defence.

The fact that JCE pleading standards demonstrably fail to meet this threshold and allows much of the essential detail of the case to be buried within tens, even hundreds, of thousands of pages of evidence is instructive. Both the Accused and the Judge have to scour this evidence to ascertain the precise links that the Prosecution may seek to rely upon at the close of the case. Rather than the criminal purpose being precisely defined in the indictment followed by an assessment of the evidence against this benchmark and the Accused being informed of such, the judges are left to define the purpose themselves under the auspices of so-called judicial discretion, "insofar as the evidence permits", with predictable and far reaching consequences for the delicate process ⏩

⏩ of assessing individual criminal responsibility.

The contradiction between the ICTY jurisprudence that acknowledges with such apparent conviction the need to carefully define the contours of the criminal purpose, whilst simultaneously failing to develop rules to achieve this objective, may therefore be little more than an unfortunate manifestation of the proposition that all who are accused before the ICTY must be punished. Since the Accused must be punished, the Prosecution must be allowed to use JCE in such a way that it will yield the desired result. Requiring little more than the creation of a cavernous criminal pleading of the purpose in the indictment into which evidence may be poured until an evidential link of some kind emerges, encourages gut determinations that attribute guilt by association, rather than enable and enhance the careful application of the burden and standard of proof. This is not procedural justice, but result orientated justice, that ultimately may have contributed to the almost inevitable demise of JCE as a mode of liability, as well as undermining the legacy of the ICTY and the fledgling system of international justice.

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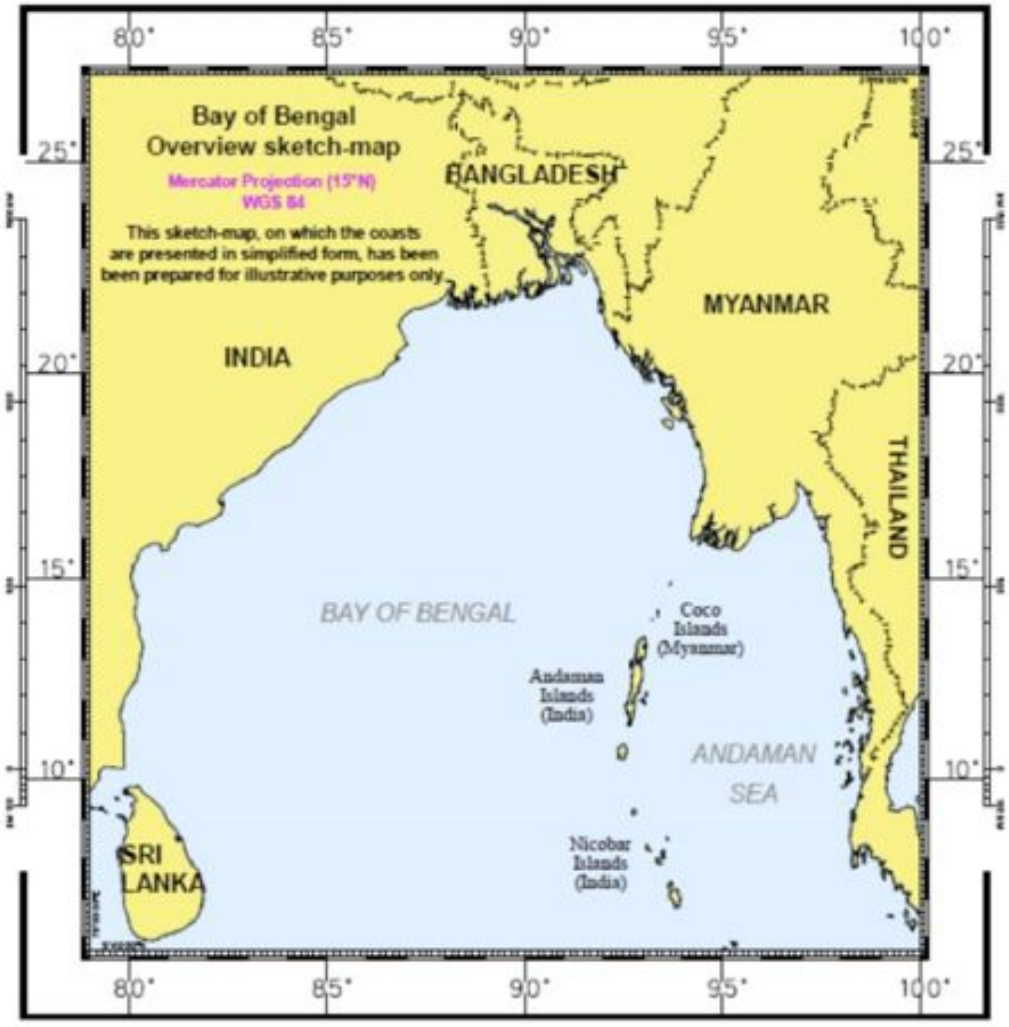
Tessa Barsac

First Maritime Boundary Delimitation Judgment for ITLOS

On 14 March 2012, the International Tribunal for the Law of the Sea rendered its first Judgment pertaining to maritime boundary delimitation in the dispute between Bangladesh and Myanmar in the Bay of Bengal.

The stakes for the Tribunal were to increase its 'attractiveness' for States after 16 years of semi-lethargy while the two Parties aimed at ending, peacefully and according to international law, 38 years of unfruitful diplomatic negotiations with swift judicial proceedings. Proceedings were instituted by Bangladesh on 14 December 2009, notably because the ⏩



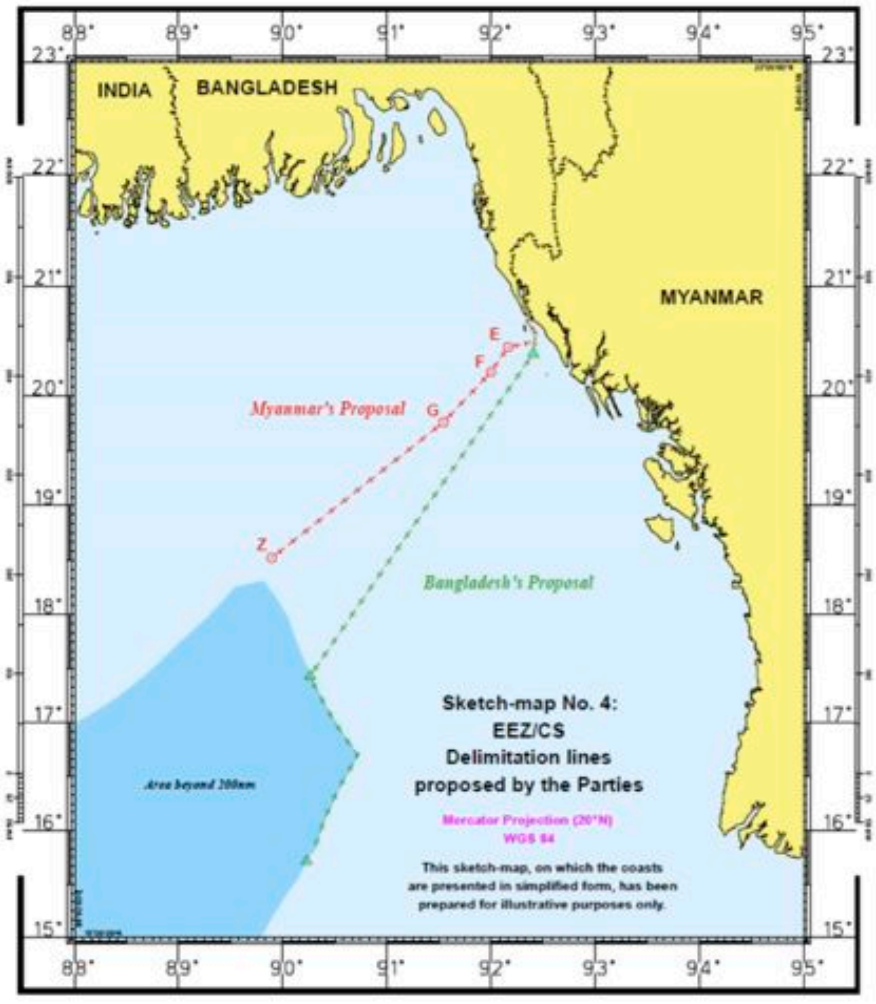
⏩ difference was undermining the development of resources in the disputed areas, including oil exploration and exploitation activities.

Regarding the delimitation of the territorial sea, the claim made by Bangladesh that it had already been agreed by the Parties (de jure in the form of "Agreed Minutes" in 1974 and 2008 but also de facto and under the doctrine of estoppel) was rejected by the Tribunal who thus faced the responsibility of drawing the line pursuant to article 15 of the 1982 United Nations Convention on the Law of the Sea. In this context, it underlined that "the delimitation of maritime areas is a sensitive issue" and "a matter of grave importance".

The central question was the effect to be given to St. Martin's Island (which belongs to Bangladesh) as a special circumstance, or not, due to its position immediately in front of Myanmar's mainland coast. The Tribunal pointed out that the island was located almost as close to the coasts of Bangladesh and that it was a significant maritime feature by virtue of its size, population and because of the extent of economic and other activities on the island. It concluded that the delimitation should follow an equidistance line up to the point beyond which the territorial seas of the Parties no longer overlapped and where Bangladesh had the right to a 12 nautical miles territorial sea around St. Martin's Island (thus granting it full effect, and not half effect, i.e. 6 nm, as Myanmar had wished).

Regarding the delimitation of the exclusive economic zone and the continental shelf, the Parties disagreed as to the appropriate method to be used (in fact, articles 74(1) and 83(1) of UNCLOS simply prescribe the achievement of an equitable solution). While Bangladesh pleaded for the angle-bisector, Myanmar relied on the most recent case law developed in favour of the equidistance/relevant circumstances method and the three-stage delimitation process. The Tribunal adopted the latter approach after recalling the evolution of the jurisprudence, from the North Sea Continental Shelf cases to the Black Sea case, which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries. Accordingly, the Tribunal proceeded in (1) constructing a provisional equidistance line after choosing the appropriate base points; (2) determining whether there were any relevant circumstances requiring an adjustment of the line; (3) verifying whether it resulted in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party.

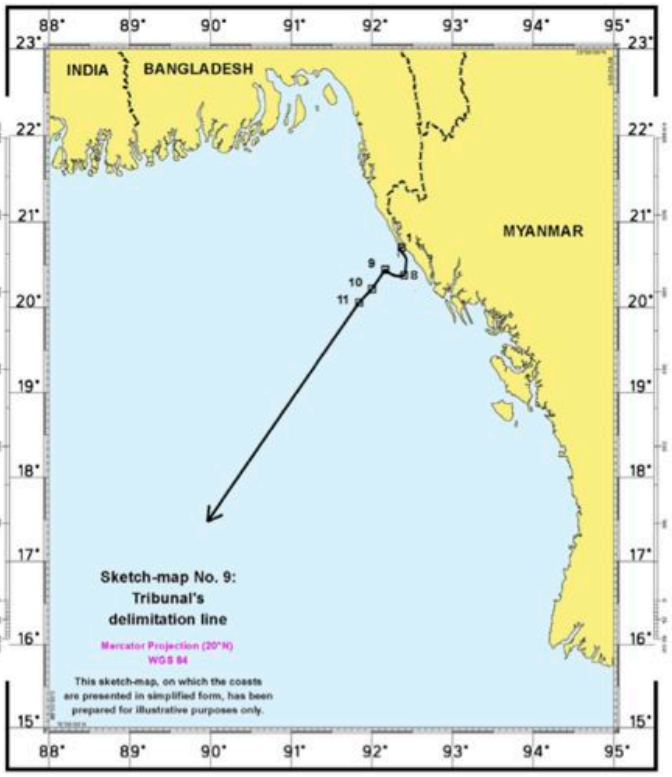
At the second stage of the delimitation process, Bangladesh raised three main geographical and geological features to justify an adjustment of the provisional equidistance line: (i) its location at the northern limit of the Bay of Bengal in a broad and deep concavity between Myanmar and India, (ii) St. Martin's Island and (iii) the Bengal depositional system. The Tribunal stated that the first was a relevant circumstance (because the provisional equidistance line produced a cut-off effect), the second could have been but was not (because it may be an important feature but, due to its position, giving it effect in the delimitation of the EEZ and the continental shelf would cause an unwarranted distortion of the line), and the third was simply not. While noting that there were no magic formulas but various adjustments possible within the relevant legal constraints to produce ⏩



⏩ an equitable result and avoid drawing a line having a converse distorting effect on the seaward projection of Myanmar's coastal façade, the Tribunal decided to deflect the provisional equidistance line at the point where the direction of the coast of Bangladesh shifted markedly from north-west to west and where the line began to cut off the southward projection of Bangladesh's coast, in order to award it a 200 nm EEZ and continental shelf. The Tribunal believed that there was reason to consider an adjustment by drawing a geodetic line starting at an azimuth of 215° (as Bangladesh requested). It added that the fact that this adjustment may affect most of the line in the present case was not an impediment, so long as the adjustment was tailored to the relevant circumstance justifying it and the line produced an equitable solution.

It is to be noted that some Judges expressed their concern about the implementation of the equidistance/relevant circumstances method, stating that if the Tribunal affirmed to follow it, it actually abandoned the equidistance line after few miles to draw an azimuth line (see notably Joint declaration of Judges Nelson, Chandrasekhara Rao and Cot or Opinion individuelle de M. le Juge Cot).

The Tribunal then turned to the request of Bangladesh that the continental shelf beyond the 200-nautical-mile limit be delimited, what Myanmar had firmly opposed. It declared having jurisdiction to do so in accordance with UNCLOS which does not distinguish between the inner and outer continental shelf (in fact, article 76 embodies the definition of a single continental shelf, which is confirmed by article 77 on the rights of the coastal State and article 83 concerning the delimitation of the continental shelf in its entirety). The Tribunal subsequently considered



whether, in the circumstances of the case, it was appropriate to exercise that jurisdiction. It first recalled that the direction of the seaward segment of a maritime boundary could be determined without indicating its precise terminus, for example by specifying that it continues until it reaches the area where the rights of third parties may be affected. In addition, the delimitation in question is situated far from the Area and thus does not prejudice the rights of the international community. Finally, the Tribunal noted that the exercise of its jurisdiction regarding the delimitation of the continental shelf under article 83 was without prejudice to the functions of the Commission on the Limits of the Continental Shelf regarding the delineation of its outer limits under article 76, and conversely. The Tribunal concluded that it had an obligation to adjudicate the dispute and to delimit the continental shelf beyond 200 nm.

The Tribunal went on to say that the first step in any delimitation was to determine whether there were entitlements and whether they overlapped. Yet, while both Parties made claims to the continental shelf beyond 200 nm, each disputed the other's entitlement. The Tribunal reaffirmed that the fact that the outer limits of the continental shelf had not been established yet did not imply that it should refrain from determining the existence of entitlement to the continental shelf beyond 200 nm. While the Commission is entrusted to consider scientific and technical issues arising in the implementation of article 76, the Tribunal can interpret and apply the provisions of the Convention, including article 76, and especially determine ⏩

⏩ the question of entitlements which raises predominantly legal issues. In the present case, the Parties did not differ on the geological and geomorphologic data; rather, they differed on their legal significance.

Bangladesh submitted that it had an entitlement to the continental shelf beyond 200 nm because it met the physical test of natural prolongation in article 76(1) by virtue of the geological and geomorphologic continuity between its land mass and the seabed and subsoil of the Bay of Bengal. On the contrary, there would be overwhelming and unchallenged evidence of a "fundamental discontinuity" between the landmass of Myanmar and the seabed beyond 200 nm. Myanmar did not contradict the scientific evidence but it emphasized that it was irrelevant as the entitlement of a coastal State to a continental shelf beyond 200 nm is not dependent on any "test of natural geological prolongation"; what determines such entitlement is the physical extent of the continental margin, that is to say its outer edge, to be identified in accordance with article 76(4). The Tribunal validated this approach: natural prolongation is not an independent basis for entitlement and should be interpreted in the context of the subsequent provisions of article 76, in particular paragraph 4.

Both Parties produced data indicating that their entitlement to the continental margin beyond 200 nm was based to a great extent on the thickness of sedimentary rocks pursuant to the formula contained in article 76(4)(a)(i). These data satisfied the Tribunal which observed that article 76 did not support Bangladesh's view that the geographic origin of the sedimentary rocks was of relevance to the question of entitlement.

The Tribunal accordingly concluded that both Bangladesh and Myanmar had entitlements to a continental shelf extending beyond 200 nm. The submissions of Bangladesh and Myanmar to the Commission clearly indicated that their entitlements overlapped in the area in dispute.

The Tribunal finally noted that the applicable law and the delimitation method to be employed for the continental shelf beyond 200 nm should not differ from that within 200 nm – i.e. article 83 and the equidistance/relevant circumstances method. It re-examined the question of the relevant circumstances raised by Bangladesh in this particular context. It qualified the new argument that Bangladesh had "the most natural prolongation" as irrelevant but admitted that the concavity had a continuing effect beyond 200 nm. Therefore it decided that the adjusted equidistance line delimiting both the EEZ and the continental shelf within 200 nm should continue in the same direction beyond the 200-nautical-mile limit of Bangladesh until it reached the area where the rights of third States may be affected.

Yet, such delimitation gave rise to an area (referred to by the Parties as the "grey area") located on the Bangladesh side of the line and beyond 200 nm from its coast but within 200 nm from the coast of Myanmar. The Tribunal noted that the boundary delimiting this area was only delimiting the continental shelves of the Parties since they overlapped, but not their EEZ since Bangladesh's one stopped before. Thus, the boundary delimits the Parties' rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar's rights with respect to its EEZ, notably those with respect to the superjacent waters. The Tribunal contented itself with underlying that any delimitation may give rise to complex legal or practical problems and left it for the Parties to determine the measures that they considered appropriate to ensure the proper exercise of their respective rights and duties (it notably proposed the conclusion of a specific agreement in this respect).

Finally, the Tribunal found that the test of "non-disproportionality" was satisfied.

The very important majority of the large Tribunal's bench voted in favour of the judgment giving it great authority. It will most notably influence the "Annex VII" arbitral tribunal who will rule on the delimitation of the maritime boundary between Bangladesh and India by 2014 (knowing in particular that 3 of its 5 members were sitting in the case before ITLOS).

The maps reproduced here are selected from the Judgment.

Tessa Barsac worked as an Adviser for Myanmar in the dispute. The article reflects the views of the author only and does not necessarily represent the views of either ITLOS or the Myanmar authorities.

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