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ANALYSIS

Special Court for Sierra Leone

by Sylvain Savolainen, Freetown and Geneva

Taylor, last chance for the Sierra Leone model

Former Liberian President Charles Taylor's trial will open before the Special Court for Sierra Leone (SCSL) on June 4. The Court has been relocated to the Hague [IJT-44] to try the case, which will be both its most important trial and its last. The Special Court, which was created in 2002, was expected to last just three years. In the end, it will have taken eight years to try nine individuals. And the jury is still out as to whether the Court will live up to expectations.

The SCSL was supposed to stand as a new "model" for international criminal justice. The Court had several novel aspects: a narrowly focused mandate, founded in a strategy of limited prosecutions; justice carried out in the country where the crimes were committed before a mixed court composed of both Sierra Leoneans and members of the international community (to enhance the national impact); and a tightly controlled budget based on voluntary contributions.

So far, after more than five years of trials involving 13 defendants (four died or disappeared before being judged), the Court has produced no verdicts and has cost an estimated 140 million dollars. The February 2007 death in prison of Sam Hinga Norman, the key defendant in the trial of the Civil Defense Forces, (CDF) [IJT-63], brought still more ambivalence to the Court's legacy. A month later, Lovemore Munlo's departure as registrar of the court, which was politely disguised as a voluntary stepping down, threw the court's unsteady management into even sharper focus. In this context, the trial of Charles Taylor, whose arrest in March 2006 was an undeniable triumph for the SCSL, is a precious opportunity for the court to fulfill the world's expectations.

In addition to the Taylor trial, which will be held outside of Sierra Leone following a political agreement amongst, notably, Nigeria, Liberia, Sierra Leone, and the United States [IJT-44-45], three trials have been held in Freetown before the Special Court. Trials for the two remaining defendants from the CDF (following Norman's death) and for three former members of the Armed Forces Revolutionary Council, (AFRC), the military junta in power from 1997 to 1998, are coming to a close. "Verdicts regarding the AFRC are expected on June 20, 2007; no date has been set for the CDF verdict, but it should be handed down by July," Herman von Hebel, the acting registrar, has announced. On the other hand, the defense's presentation of evidence in the third case, which brings together three members of the former Revolutionary United Front (RUF), only began on May 2. "For the RUF, we estimate that the defense phase should be done by the end of 2007, with the judges' verdict handed down in June or July of 2008. Counting appeals in the three [trials], another six month phase is expected, which means the proceedings should come to a close in the beginning of 2009. As to Charles Taylor's trial, a judgment by the trial chamber could be rendered at the beginning of 2009, with a final decision by the Appeals Chamber at the end of 2009", von Hebel predicts.

EDITORIAL

Butare, a trial out of bounds at the ICTR

by Thierry Cruvellier, editor in chief

On June 11, it will be six years since the International Criminal Tribunal for Rwanda (ICTR) began the trial for six genocide suspects who come from the Butare region in southern Rwanda. The six Rwandans, whose positions and background were quite different, were joined together to "speed up the proceedings." However, this produced just the opposite effect, and the trial has been dragged out with irreparable consequences. This month, two of the accused will begin their thirteenth year in prison with still no verdict in sight. In July, three others will be celebrating their tenth year in prison. So much for international human rights law, which guarantees a defendant the right to be tried "without undue delay." This affair has done much to tarnish a tribunal that was supposed to uphold human rights. The prosecution has taken three and a half years to present 59 witnesses. In two and a half years, four defense teams will have called approximately 80. At this rate, it will take another two years to hear the 60 remaining witnesses listed by the defense. The six accused will by then have spent between 11 and 14 years in preventive detention. In all, this has been a ruined, ruinous trial. Its cost – already a record for the ICTR when it opened – may never be calculated, but it will run to several tens of millions of dollars. If nothing else, will it serve as a lesson? The trial of the former leaders of the president's party [IJT-65] suggests not. That trial, which began in November 2003, had to be cancelled a year later because of the presiding judge's conduct. It was restarted in 2005, and has already been all but discredited. Only 13 prosecution witnesses have been heard, though the three accused have already spent nine years in prison. It seems that records – even the most dishonorable ones, alas – are made to be broken.

► SPECIAL TRIBUNAL FOR LEBANON CREATED

On May 30, the UN Security Council voted a resolution creating a special tribunal for Lebanon, with ten yes votes and five abstentions, including China and Russia. Countries in the west decided to impose the creation of the court, which has been under discussion for a year and a half, after the ratification of the agreement signed on February 6 between Beirut and the UN had been blocked for four months in the Lebanese parliament. The future tribunal is charged with trying "the persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators." In addition to an international pretrial judge, the trial chamber(s) will include two international judges and a Lebanese judge. An international prosecutor will be assisted by a Lebanese deputy, and a defense office will be directed by an independent party appointed by the UN secretary general. The international judges and prosecutor will be appointed to a three year term by a jury comprising, among others, two former international judges. The tribunal will be located outside of Lebanon, and will try "acts of terrorism," if necessary, in absentia. Its official languages will be Arabic, French, and English. Its budget, which is just as original, should be provided by the Lebanese government (49%) and by voluntary contributions from other states (51%).

And yet the Special Court began at a rapid clip. Just seven months after investigations started, David Crane, the prosecutor at the time, had already prepared most of the indictments, including Taylor's. The pace dropped off afterwards. As von Hebel's explained: "First, our expectations at the beginning were unrealistic – the cases are extraordinarily complex. Second, the Chamber's alternating between one case and another slowed the work down considerably. Then, greater authority on the part of the judges regarding the different parties' demands could have speeded things up. And finally, with the kind of trial we have here, with a common law system and the number of witnesses that implies, procedures take a very long time. Most likely, a greater use of civil law [the Romano-Germanic legal tradition], could have at least partially accelerated [trials]."

Judges at fault

For their part, two lawyers from the defense blame the prosecution's strategy. "The size of the indictments was a mistake – they shouldn't have been so extensive. Inevitably, it led to too many witnesses and too many procedures. The RUF trial is a good example," Clare Da Silva, Hinga Norman's former lawyer, comments. Wayne Jordash, who is defending Issa Sesay, the former head of the RUF, adds, "I know that people accuse the defense of excessively long, systematic cross-examinations. But what the indictment implies in terms of facts, places, geographic reach, and time frame, is quite simply colossal. We asked that the indictments be cut down, but our request was refused. And the result is a never-ending procedure."

Some of the fault also lies with the judges. In a 2006 report, the Berkeley War Crimes Studies Center pointed out that "some of the slow pace of the trials can be attributed to the Chamber's approach to the proceedings. This is not so much due to the lack of judicial intervention, as it is to the adoption of certain formalities that tend to cause procedural delays. This has included adopting the practice of issuing a written decision in open session…; asking witnesses to spell the names of people and places, sometimes repeatedly (despite the availability of transcripts); and engaging in lengthy discussions about points of law or the language used by counsel which are either not directly related to the proceedings or that seem to focus unnecessarily on less relevant issues that in turn, slow the proceedings." Polite – but limpid – criticism. In response, von Hebel says, "Does the exercise of international criminal justice take time, in a case like that of Sierra Leone's? Yes. Does it entail certain expenses? Yes. Could we provide high-quality justice more rapidly and at a lower price? I don't think so." Like the international tribunals for Rwanda and the former Yugoslavia, the SCSL will go well beyond its planned budget, which was 56 million dollars over three years. With more than 140 million dollars already spent, another 89 million dollars have been budgeted for the years 2007 to 2009, with 64 million allocated to Freetown and 25 million for Taylor's trial at the Hague.

After five years of work, one Court employee, who preferred to remain anonymous, made this assessment: "Successes include the arrest of Taylor and the other defendants, which created a strong precedent in the fight against impunity in Africa. Then we have the Court's information and outreach program for the local population, which is a universally recognized success. On the down side, I would cite cases of manifest incompetence, combined with administrative inertia. Finally, no effort will have been made to change local courts. You might say that wasn't in the mandate, but it's perplexing nevertheless."

Although a mixed international-national tribunal, the Special Court has had very few Sierra Leone nationals in high-level posts. This is partly the fault of the Sierra Leone government, which, for example, did not exercise its right to name a Sierra Leonean as deputy prosecutor. But the blame doesn't end there. Since the Court's creation, three chief prosecutors, two deputy prosecutors, two chiefs of prosecution, two chiefs of investigations, and three chiefs of legal operations have been appointed – and not one has been a Sierra Leonean. "I can only observe it as a fact. I don't think that it's very correct vis-à-vis Sierra Leone," the acting registrar admits. As for "administrative inertia," Professor Antonio Cassese, former president of the International Criminal Tribunal for the former Yugoslavia has been asked to produce a report on the functioning of the SCSL and its strategy for concluding the trials. According to several sources at the Court, the report does not contain any earth-shattering revelations. But the report, which has been talked about for months, has yet to be published – a sign of the court's nervousness on the subject. It would seem that the "Sierra Leone model" is eager to forestall any judgments about itself.

► ICTY: GENERAL TOLIMIR ARRESTED

Only five fugitives remain amongst those accused by the International Criminal Tribunal for the former Yugoslavia (ICTY). On May 31, Zdravko Tolimir, former general of the Bosnian Serb army and considered to be the third most important ICTY fugitive, was arrested on the border between the Serb Republic in Bosnia and Serbia. Notably accused of crimes against humanity for his presumed role in the 1995 massacre in Srebrenica, Tolimir is also considered a key player in the protection of the main accused fugitive, General Ratko Mladic. His arrest took place less than one week before chief prosecutor Carla Del Ponte's visit to Belgrade, at a time when Serbia must provide guarantees in its negotiations for membership in the European Union.

► BOSNIA: STANKOVIC'S ESCAPE

The Bosnian court in charge of war crime proceedings received a severe blow on May 25. Radovan Stankovic, the first ICTY defendant to be transferred from the Hague to be tried in Sarajevo, escaped during a transfer from a prison in Foca, in eastern Bosnia, to a hospital. The AP reported that the prison's director and nine of its guards were dismissed on May 30, and should be prosecuted. On November 14, Stankovic had been condemned to sixteen years in prison by the War Crimes Chamber in Bosnia and Herzegovina, and his sentence was lengthened to 20 years on appeal. According to the AP, the vehicle used for the escape - during which none of the guards discharged a weapon – was found on the border of Montenegro. Stankovic also has Serbian nationality, and will likely be protected from extradition to Bosnia if he stays in Serbian territory. "This shouldn't have happened," Meddzida Kreso, the president of the Court of Bosnia and Herzegovina, quoted in Reuters declared. "The security of our judges and prosecutors has been endangered and this sends a very bad message to victims and witnesses."

IJT continues its new diplomatic series dedicated to five key actors in five regions of the world and their policies regarding the International Criminal Court. After India [IJT-66], South Africa [IJT-67], and the European Union [IJT-68], the series now turns to Brazil.

4. Brazil: reliable, but far from dynamic

by Thierry Ogier, São Paulo

Brazil played an active part in the creation of the International Criminal Court (ICC). Yet the Latin American giant has mostly stayed on the sidelines when it comes to international criminal justice. This is because, for several years now, its diplomatic activity has focused on gaining a permanent seat at the United Nations Security Council. At the same time, Brazilian courts have been slow to act when it comes to judging human rights violations committed under the prior military regime.

While the ICC was being set up, the Brazilian government showed marked interest in it. "At that time, Fernando Henrique Cardoso's government was seeking to change the country's image after a series of unsavory precedents under the military regime. The creation of the ICC, along with a National Human Rights Secretariat, can both be situated in this context," explains former magistrate Walter Maierovitch, who was Brazil's national anti-drug secretary under Cardoso. Brazil's recognition of the Inter-American human rights system also dates back to the same period. Brazil was one of the last countries to ratify the American Convention – Chile and Argentina had already done so by the 1980s. Since then, Brasilia has steadfastly collaborated with the Inter-American Court of Human Rights.

Brazil ratified the Rome Statute, creating the ICC, in 2002. Brazilian judge Sylvia Helena de Figueiredo Steiner was elected as one of the magistrates of the international court, and the Ministry of External Relations in Brasilia has affirmed that "Brazil is firmly committed to consolidating the ICC. The Rome Statute is considered to be a major step in the current evolution of international law, bolstering the international community in the promotion and protection of human rights and international security."

The Brazilian government's support for the ICC has gone beyond the Rome Statute. It also amended the national constitution to incorporate ICC-related standards and the defense of human rights. "Not only did Brazil ratify the treaty, they gave it explicit constitutional status," emphasizes Oscar Vilhena, legal director at Conectas, a São Paulo-based non-governmental organization dedicated to the defense of human rights. "Brazil remains one of the rare countries to have taken such a significant step," explains Fabricio Pasquot Polido, a professor of international law at the Fundação Armando Alvares Penteado (FAAP) in São Paulo. "Brazil defends the constitutional state, both internally and externally, as well as an absolute respect for international law. It is an active participant in deliberations regarding the consolidation of the ICC, as international law is best promoted through international tribunals, particularly permanent ones," the Itamatry Palace, the seat of the Brazilian Ministry of External Relations, has stated. By choosing to participate, "Brazil is showing that it does not see these international institutions as a threat, but rather, an opportunity," adds a high-ranking civil servant. "Brazil recognizes the ICC's competence to judge affairs regarding human rights, while the United States [IJT-54], among other countries, has preferred not to join to avoid the risk of being pursued itself," Maierovitch adds.

Activism lacking

And yet, once the ICC had been set up and the constitution amended, Brazil did not exactly manifest much activism on international criminal justice. For geopolitical reasons, it was all but absent from the ad hoc tribunals for Rwanda and the former Yugoslavia. "Brazil's foreign policy does not call for intervention in such

► CENTRAL AFRICAN REPUBLIC: ICC'S FOURTH INVESTIGATION

The International Federation for Human Rights, while lauding the announcement on May 22 by Luis Moreno Ocampo, prosecutor for the International Criminal Court (ICC) that an investigation would be opened in the Central African Republic (CAR), did not hide a certain irritation: "It was necessary to wait for the Central African State's referral in December 2004 [...], .the CAR Court of appeals decision in April 2006 – which confirmed the incapacity of Central African tribunals to try those responsible for the most serious crimes [...], and finally the request for explanations on the slowness of the analysis carried out by the office of the Prosecutor on the situation in CAR, made by the judges of the Pretrial Chamber III of the ICC, for the Prosecutor to finally respond to the hope that independent justice will attempt to break the cycle of impunity." Two and a half years of "preliminary analyses," which included only one onsite visit, finally managed to convince the office of the ICC, according to its press release, that "the peak of violence and criminality occurred in 2002 and 2003" in the CAR, during which "civilians were killed and raped; and homes and stores were looted," and, above all, that "the rape of civilians was committed in numbers that cannot be ignored under international law." Following Uganda, the Democratic Republic of Congo, and Darfur, the CAR is the fourth investigation to be opened by the ICC [IJT-47].

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situations," explains Paulo Sergio Pinheiro, former Brazilian state secretary for human rights. While Brazil was an active participant in the efforts to restore order in East Timor and in Haiti (particularly in the latter case, where it sent troops), it kept its distance from cases that did not touch its immediate interests directly – at the risk of tainting its strategic ambitions and aspirations in foreign policy.

Indeed, Brazilian diplomacy took care not to protest votes of opposition to the ICC from countries like India [IJT-66]. Nor did it choose to mobilize against China [IJT-55], in spite of its many human rights violations. Some sense that behind this realpolitik Brazil fears retaliation from states that could frustrate its ambitions to gain a permanent seat on the UN Security Council. Itamarty vigorously denies this conjecture: "Reforming the UN Security Council in no way attenuates the ICC's importance to the Brazilian government. To the contrary, its interest in reforming the Council and reinforcing the ICC both confirm Brazil's concern for international issues, including questions related to peace and international security."

Commercial diplomacy

Still, in general, Brazil remains extremely reticent when it comes to any kind of interference in the affairs of other states. This reticence is often in proportion to the economic interests at stake, and to the commercial goals of a large emerging economy. The government of Luiz Inácio Lula da Silva, who has been president of Brazil since 2003, has made the development of economic exchanges with other Southern Cone countries a major focal point. Unlike the other member countries of Mercosur, Latin America's common market, Brazil has been all but silent when it comes to denouncing human rights violations in other countries, such as Sudan or Zimbabwe. "The quality of human rights defense has declined over the past six years," says Oscar Vilhena, at Conectas. "Brazil seems to be privileging relations with other leading countries based on its diplomatic aspirations and on strictly economic interests, in the context of cooperation amongst southern countries." Thus, Brazil supported China's membership in the World Trade Organization (WTO), and abstained from voting on the resolutions against Beijing presented to the UN Commission on Human Rights. "Commercial diplomacy has now taken precedence over the defense of human rights and international justice," concludes Vilhena.

Brazil has not finished dealing with its dark past

But this explanation is not the only one. Brazil has not finished dealing with its own dark past when it comes to human rights violations committed under its military regime from 1964 to 1985. "Progress was made in recognizing international justice, but – yet another! – ambiguity remains in Brazil's position," observes Walter Maierovitch. For him, "the state is still greatly indebted to civil society." Even if a reparations program has been set up, the army has stated that a portion of the archives from that period has been destroyed. Also, certain disappearance cases have not yet been solved. Currently, only one judicial proceeding has been launched against an officer accused of torture, and a legal debate is underway to determine whether the amnesty law passed in the 1980s would apply. "Brazil would almost certainly gain greater legitimacy in its seeking a permanent seat on the UN Security council if it took a stronger line on issues linked to international justice and human rights, starting with its own past. But its successive governments have avoided reopening these wounds in the hopes that they will heal over with time," Maierovitch says. Cases submitted to the Inter-American Human Rights Commission are not linked to violations committed under the military dictatorship.

An honest broker

Pinheiro also admits that advances in this field have not been sufficient, but he doesn't feel that this negatively affects the Latin American giant's international status. "Compared to other Latin American countries, Brazil could take a more dynamic position. But at the same time, Brazil is not trying to hide anything, and this doesn't weaken its position in the international arena. Brazil has always been considered an honest broker," he concludes.