The Taylor Appeal Judgment: Achievement or Fragmentation of International Criminal Law?

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MARINA AKSENOVA, OCT 20 2013

The *Taylor* Appeal judgment, issued on the 26th of September 2013 by the Special Court for Sierra Leone (SCSL), upheld Charles Taylor's conviction and 50-year sentence for aiding and abetting and planning murders, rapes and other acts of violence committed during the Sierra Leonean civil war. As the former president of Liberia, Taylor was involved in organizing and funding the attacks on the civilian population in the neighboring country. In practical terms, this punishment amounts to life incarceration for the sixty-five-year old Taylor.

The SCSL Trial Chamber's judgment and sentencing judgment stirred some debate about the place of accessorial responsibility in international criminal law. Is such a lengthy sentence compatible with Taylor's role as a 'mere' accomplice to the crimes? Is it even adequate to apply secondary modes of participation to the former head of state when there is nothing secondary about the magnitude of his involvement in political violence in another state? The SCSL Appeals Chamber had to rule on these contentious issues. The mission of the appellate judges was further complicated by the recent developments in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) – the acquittals in the *Perišić* and *Stanišić* cases. In both instances, the accused were absolved of accomplice responsibility based on a technicality – the assistance they provided was not specifically directed towards the crimes, but was merely geared to the general war effort. This new vision of complicity narrowed down the scope of its applicability, and it was up to the SCSL appellate panel to embrace it or not.

The significance of the *Taylor* Appeal judgment is thus threefold: first, it underscores the prominent role of the secondary modes of participation in international criminal law; secondly, it attempts to rectify the emerging undesirable trend – the requirement that culpable assistance is directed towards the specific crimes; and finally, it upholds the judicial discretion at sentencing.

Reinforcing Complicity

International criminal law usually targets high-level offenders removed from the scene of the crime by the temporal and spatial barriers. Their connection to what is happening in the field is frequently remote and their involvement manifests itself at the executive level only. It does not follow, however, that the decision-makers are less culpable than those who pull the trigger of a gun. This contradiction feeds the constant quest of international criminal justice for the right way to label the behavior of the accused removed from the scene of the crime. [1]

There is no one-size-fits-all solution, but it is important to recognize that various forms of complicity – aiding and abetting, instigating, ordering, and planning are indispensible tools in accurately describing the conduct of the accused in international criminal law. The *Taylor* Appeals Chamber positions aiding and abetting exactly in this way:

383. The Appeals Chamber further notes that individual criminal responsibility for aiding and abetting the planning, preparation or execution of a crime, as *expressly* provided for in Article 6(1), is unquestionably well-established and fundamental in customary international law. […]

The judges hint in this statement towards the fact that aiding and abetting is particularly well-established and fundamental *because* it is expressly provided by the SCSL Statute. Indeed, it is a classical form of criminal participation with solid foundation in domestic and international law.[2] It is thus not surprising that different forms of complicity are listed in the statutes of international courts and tribunals. This is in contrast with the joint criminal enterprise and (in)direct co-perpetration – the mechanisms implied by the ad hoc tribunals and the International Criminal Court (ICC) from the text of their respective statutes. While these legal tools strive to achieve the same objective as complicity, they may not enjoy the same level of legitimacy precisely because they lack proper foundation.

Altering the Emerging Custom

The second important achievement of the *Taylor* Appeal judgment is the rejection of the recent trend demanding that the aid and assistance must be geared towards the specific offence – the so-called 'specific direction' requirement. The new case law by the ICTY practically narrowed down the scope of complicity in international criminal law to the extent that it became hardly applicable to some factual situations. The *Perišić* Appeals Chamber introduced (or reinvented) the element of the specific direction, which has to be proved in instances when there is temporal or geographical gap between the assistance and the crimes. Knowledge of the offences alone is not sufficient to establish the necessary level of specificity. As a result, culpable general assistance with the substantial effect on the crime does not attract liability for the mere lack of the physical proximity between the crime and the assistance. This is detrimental to aiding and abetting – the mode of responsibility that targets precisely the situations where the accused is removed from the scene of the crime.

I leave aside the grounds for the rejection of the specific direction requirement, as they are subject for a separate discussion. The effect is, however, clear – an obvious counter-current in the formation of a custom.

The rejection of the specific direction requirement is a two-edged sword, however. The positive aspect of it is upholding the standard of complicity that is suitable for the purposes of international criminal law. The negative side is the lack of coherence and coordination between different courts and tribunals applying international criminal law. The discipline is becoming highly fragmented because of being pulled apart by the multitude of considerations, many of which are extra-legal.

The *Taylor* Appeals Chamber attempted to circumvent the difficulty related to the fragmentation of international criminal law by framing the discussion about the specific direction not along the lines of shaping the custom, but as a rejection of the ICTY precedent that is binding only internally. I agree with Kevin Jon Heller that this is an unconvincing reasoning.[3] International courts and tribunals operating in the field apply the sources of international law– treaty, custom, and the general principles of law.[4] Their statutes do not expressly mention the specific direction requirement for complicity, so the question is precisely whether it is a custom or a general principle.

Custom is a very tricky source of international criminal law: the tribunals often avoid making a distinction between the two constituent elements of the custom – *opinio juris* and state practice. It is understandable because the discipline is very peculiar – the state practice element of the custom often points to an undesirable outcome (i.e. a violation).[5] In addition to that, the field of international criminal law is relatively new and is still evolving, making it difficult to assess whether a particular provision has crystalized as a custom or not. It appears that the uniform approach by different courts and tribunals serves as the evidence of consensus on a given topic. Thus, the *Taylor* Appeals Chamber certainly weakened (if not disposed of) the emerging customary rule requiring the specific direction for complicity, even without expressly willing to engage with the issue.

If one looks at the other source of international law – the general principles of law – it seems that the requirement that the aid is directed towards the specific offence, in a sense that the ICTY attributes to it, does not find support in the majority of domestic legal systems.[6]

Upholding the Judicial Discretion

Finally, the *Taylor* Appeals Chamber successfully reinforced judicial discretion at sentencing by upholding the 50-year penalty for aiding and abetting and planning. I argued in another post that the length of this sentence is defendable despite the finding that Taylor is an accomplice.[7]

Some ICTY and SCSL Chambers maintained that aiding and abetting generally warrants a lesser sentence than that imposed for primary participation. In my view, this statement is false because it presupposes the existence of the hierarchy of participation modes in international criminal law – commission being more blameworthy than accessorial liability. This assumption goes against the essence of international criminal law that often targets individuals who do not commit crimes with their own hands but rather give orders, provide encouragement and support to the principals. The level of culpability of these figures is not automatically lower than that of the primary perpetrators. An adequate sentence in international criminal law does not hinge on the abstract label attached to the conduct of the convicted person, but stems from the overall assessment of the factors on a case-by-case basis – something that can only be performed if enough flexibility is afforded to the judges. This is precisely the approach of the *Taylor* appellate judges:

670. In light of the foregoing, the Appeals Chamber holds that the totality principle exhaustively describes the criteria for determining an appropriate sentence that is in accordance with the Statute and Rules, and further holds that under the Statute, Rules and customary international law, there is no hierarchy or distinction for sentencing purposes between forms of criminal participation. The Appeals Chamber concludes that the Trial Chamber erred in law by holding that aiding and abetting liability generally warrants a lesser sentence than other forms of criminal participation.

Overall, the *Taylor* Appeal judgment reinforced accessorial liability directly and indirectly. The direct impact is that the *Taylor* Appeals Chamber upheld the conviction for aiding and abetting and planning, and refused to adopt the requirement of the specific direction that has the potential of narrowing down secondary liability to the extent that it is no longer viable. Indirectly, the appellate panel allowed a lengthy sentence for complicity, implicitly acknowledging that is not a 'lesser' form of participation.

The most important achievement of the *Taylor* Appeal judgment lies beyond strictly legal considerations, however. It serves as a yardstick of the global values shared by humanity as a whole. Culpable involvement of the heads of states in political violence in another state is no longer accepted. In the words of the Appeals Chamber (paragraph 663), the sentences imposed by the SCSL reflect "the revulsion of mankind, represented by the international community, to the crime and the convicted person's participation in the crime."

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[1] For the detailed account of the forms of criminal participation in international criminal law see E. v. Sliedregt, *Individual Criminal Responsibility*, Oxford University Press, 2012.

[2] Marina Aksenova, "Complicity in International Criminal Law: A Case for Clarification", http://www.academia.edu/4792033/Complicity_in_International_Criminal_Law_A_Case_for_Clarification

[3] Kevin Jon Heller, "The SCSL's Incoherent — and Selective — Analysis of Custom" http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/

[4] The ICC is possibly an exception because of the special regime created by the Article 21 of the Rome Statute. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html

[5] Larissa van den Herik, “Using Custom to Reconceptualize Crimes Against Humanity” in Shane Darcy and Joseph Powderly (eds) *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 2010, p. 101.

[6] James Steward, “Specific Direction” is Unprecedented: Results from Two Empirical Studies”,

http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/

[7] Marina Aksenova, “Why 50 Years of Imprisonment is an Adequate Sentence for Charles Taylor”, http://opiniojuris.org/2012/06/04/guest-post-why-50-years-of-imprisonment-is-an-adequate-sentence-for-charles-taylor/.

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