

August 2009

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Recommended Citation

Jett, Dennis (2009) "Thoughts on the Changing Face of International Law," *Florida Journal of International Law*: Vol. 21: Iss. 2, Article 1.

Available at: <https://scholarship.law.ufl.edu/fjil/vol21/iss2/1>

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THOUGHTS ON THE CHANGING FACE OF INTERNATIONAL LAW

*Dennis Jett**

The three articles in this issue of the *Florida Journal of International Law* cover very different topics, but a similar thread is woven through all of them. That underlying theme is that the law, its interpretation and enforcement, varies from time to time and place to place. Some of that variation is cultural, but even more depends on the politics of the moment. That fact argues for a measure of modesty when comparing legal norms in one country with those in others and is worth taking into account when prescribing solutions to problems that are identified.

In her article, Matiangai Sirleaf describes the need to adopt “a regional approach when designing transitional justice mechanisms in the aftermath of mass atrocities across societies.”¹ She believes a regional perspective will provide the best means for “achieving long-term peace, stability, and respect for human rights within the affected region.”² To demonstrate the need for such an approach, she looks at the challenges posed by the concurrent operation of the Special Court for Sierra Leone (SCSL) and the Truth and Reconciliation Commission for Liberia (TRCL) and finds that justice in Sierra Leone is related to truth in Liberia.³

The SCSL is currently considering the case of Charles Taylor, the former president of Liberia, for his alleged role in the conflict in Sierra Leone.⁴ After starting a rebellion in Liberia that brought down the

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1. Matiangai Sirleaf, *Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission*, 21 FLA. J. INT'L L. 205-84 (2009).

2. *Id.* at 205.

3. *Id.* at 218.

4. See, e.g., Daniel Doktori, *Minding the Gap: International Law and Regional Enforcement in Sierra Leone*, 20 FLA. J. INT'L L. 329, 346 (2008) (“Foday Sankoh of the RUF, Charles Taylor of Liberia and several others were all indicted by the [] [SCSL] in 2002, despite the amnesty provisions found in the Lome Accords”).

government of Samuel Doe in 1990, Taylor continued to struggle for power until he was elected President in 1997 with seventy-five percent of the vote. Part of his efforts to attain power included instigating in neighboring Sierra Leone a rebel movement that was among the most brutal and barbaric that Africa has seen.

Taylor held power until 2003, when the SCSL indicted him for the crimes he allegedly committed in Sierra Leone. A few months later, another insurrection and international pressure forced him to resign from the presidency and flee Liberia. After several years in exile in Nigeria, he was arrested when he tried to leave that country; he was returned to Liberia and handed over to the United Nations in 2006. He was transferred to The Hague and brought to trial before the SCSL. That proceeding, which began in 2007, is still underway. As of the end of March 2009, the prosecution had rested, and the defense was about to make its case.

When I was the deputy ambassador at the American embassy in Liberia from August 1989 to August 1991, I was a witness of sorts to the kinds of crimes committed by Taylor and others. On several occasions, I met with Taylor and Doe and the leader of another rebel faction, Prince Johnson, as the embassy attempted to protect American citizens, encourage an end to the fighting, and provide food and other assistance in the midst of an ever worsening humanitarian disaster.

After these encounters, I came away impressed by the fact that all three of them had several things in common. They all wanted to be president and would do anything to gain power, or in Doe's case, to continue in power. All three were surrounded by loyal aides who argued that only their man could save the country and that he would rule wisely. This shows that there has never been a politician so despicable that he or she did not attract a coterie of ambitious and self-serving supporters. Finally, the degree of ruthlessness they all employed in pursuit of their ambition is hard to describe, but suffice it to say that all three were responsible for numerous atrocities and were guilty of crimes against humanity.⁵ For instance, as the territory under the control of the government's forces shrank to a few square blocks of downtown Monrovia, all three factions set up check points around the city and murdered civilians who passed through the check points and who were

5. This was well documented in "The Mask of Anarchy" by Stephan Ellis. See generally STEPHAN ELLIS, *THE MASK OF ANARCHY* (1999). Hugo Slim's book "Killing Civilians" begins with a description of an entire village massacred by Charles Taylor's forces. HUGO SLIM, *KILLING CIVILIANS* 9-10 (2008).

from the wrong tribe or somehow suspected of being associated with the other side.

Despite their similarities, their fates were quite different. As mentioned above, Taylor is on trial in The Hague for his crimes. President Doe, who by mid-1990 controlled only a small part of Monrovia, the capitol, made the mistake of thinking he could safely visit the West African peacekeeping force that had occupied the city's port. It proved to be a fatal mistake. Johnson learned of Doe's presence in the port and sent his troops to capture Doe. The peacekeepers largely melted away, and Doe was taken prisoner after a brief firefight in which he was wounded. Johnson interrogated Doe and demanded to know where he had hidden the government funds he had stolen. When Doe denied having any secret bank accounts, Johnson ordered one of his lieutenants to cut off Doe's ears. All of this was captured on videotape, which was copied and widely circulated in Monrovia.⁶ A few hours later, Doe bled to death because of his multiple injuries.⁷

While Johnson succeeded in eliminating the incumbent president, he lost his bid to replace him and eventually went into exile in Nigeria. He returned to Liberia in 2004 after Taylor had been forced out. Johnson took up politics as his route to power instead of rebellion and was elected to the Liberian Senate and is chair of its defense committee.

In 2008, Johnson appeared before the TRCL, where, according to one news article, he asserted the United States released Taylor from jail in Massachusetts in 1985 in order to have him overthrow Doe.⁸ I am quite certain that claim is total nonsense and is simply a backhanded attempt by Johnson to somehow lessen his responsibility for Doe's death. In 1985, the United States was still very much committed to Doe. He was reelected that year with fifty-one percent of the vote in a process that many observers were convinced had been rigged.⁹ The best the U.S. government could do was to offer the unconvincing argument made by Assistant Secretary of State for African Affairs Chester Crocker. He told Congress that the elections, while not perfect,

6. A brief portion of the tape has found its way to YouTube. See Video posting of Pajero Terrorista to <http://www.youtube.com/watch?v=QFdCcRsKxYg&feature=related> (Nov. 11, 2008); see also Lynda Schuster, *The Final Days of Doctor Doe*, 48 GRANTA (1994) (In the interest of full disclosure, it should be noted that she, Lynda, is my wife as well as a writer and former journalist.)

7. ADEKEYE ADEBAJO, *LIBERIA'S CIVIL WAR* 78 (2002).

8. *US Freed Taylor to Overthrow Doe, Liberia's TRC Hears*, MAIL & GUARDIAN ONLINE, Aug. 27, 2008, <http://www.mg.co.za/article/2008-08-27-us-freed-taylor-to-overthrow-doe-liberias-trc-hears>.

9. GlobalSecurity.org, *Liberia – Election and Coup Attempt – 1985*, <http://www.globalsecurity.org/military/world/war/liberia-1985.htm> (Apr. 20, 2009).

represented progress toward opening up the political system in Liberia.¹⁰

Such were the realities of the Cold War. Reprehensible and corrupt dictators were endorsed if they were deemed to be allies in the struggle against Communism. Liberia was of strategic interest to the United States because it was home to several of the most significant U.S. installations in Africa. In addition, even if the United States had become convinced that there was some reason for getting rid of Doe, the government would not have plucked someone like Taylor from a local jail in Massachusetts to overthrow Doe, given the unpredictability of the outcome of such an attempt and its aftermath.

So, while Doe is dead and Taylor is on trial, Johnson is a prominent politician in the country where all three committed war crimes. Although Sirleaf's suggestion that coordination of entities like the SCSL and the TRCL in a regional approach has merit, it would not necessarily lead to justice and peace.¹¹ Different people will still be treated differently depending on the politics of the moment and the willingness of the international community to deal with them.

Furthermore, it is very difficult to achieve justice and peace at the same time. Justice requires trying people for their crimes and punishing those found guilty. These criminals and their accomplices have no interest in telling the truth if it will incriminate them. The incriminating testimony, therefore, most often comes from the victims who cannot always identify those responsible. Or the testimony is a self-serving attempt to avoid the truth, as in the case of Prince Johnson.

Some would argue that peace is more important than justice in some cases if it results in fewer innocent people being killed. In a *New York Times* article, the son of Evangelist Billy Graham argued against indictment of the President of Sudan, Omar Hassan al-Bashir, by the International Criminal Court (ICC) for multiple counts of war crimes.¹² Graham did not oppose the indictment because al-Bashir was innocent, but because Graham, who operates a hospital in Sudan, thought it would result in a greater number of deaths.¹³ Al-Bashir was indicted, nonetheless, but he may never be brought to trial because the ICC

10. David K. Shipler, *Shultz Ends Tour By Chiding Liberia*, N.Y. TIMES, Jan. 15, 1987, at A5.

11. Sirleaf, *supra* note 1, at 267-77.

12. Franklin Graham, *Put Peace Before Justice*, N.Y. TIMES, Mar. 3, 2009, at A27.

13. Office of the United Nations High Commission for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 10-11 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>

cannot enforce its indictment without international cooperation.¹⁴ Such cooperation seems unlikely, as al-Bashir has made several trips to countries in the region and has been received warmly by his fellow heads of state.¹⁵ So, like Johnson, he may escape justice due to the lack of political will to serve justice.

Jennifer Everett's article tackles a different kind of problem of international justice.¹⁶ She argues that both international and domestic law obligates the United States to address the special needs of child soldiers seeking asylum.¹⁷ She cites the experiences of child soldiers to demonstrate that U.S. asylum law still fails to provide sufficient procedural and substantive protection to unaccompanied children in general and child soldiers in particular.¹⁸

She asserts that an asylum system focused and centered on the best interest of the child principle, as described in the 1989 Convention on the Rights of the Child, for both procedural and substantive asylum determinations is needed.¹⁹ This Convention is a widely accepted norm. In fact, only two of the 192 member states of the United Nations have failed to ratify it—Somalia and the United States.²⁰ Somalia, at least, has a good excuse for its inaction, because for much of the time since the Convention's adoption, it has not had a functioning government.

The United States signed the Convention in 1995, but the Senate still has not ratified it.²¹ Opponents of the Convention have asserted that it will usurp national sovereignty, undermine parental authority, and encourage children to sue their parents, join gangs, and have abortions.²² None of those charges are even remotely true, but that apparently has little impact on those conservative politicians and religious leaders that make them. Those politicians and leaders attract

14. See, e.g., Michael Slackman & Robert F. Worth, *Setting Aside Divisions, Arab Leaders Rally Behind Sudan's President at a Meeting*, N.Y. TIMES, Mar. 31, 2009, at A5.

15. *Id.*; Editorial, *In Defense of Genocide*, WASH. POST, Apr. 1, 2009, at A20.

16. Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285-356 (2009).

17. *Id.* at 288.

18. *Id.* at 289.

19. *Id.* at 290.

20. E.g., Amnesty International USA, Children's Rights, Convention on the Rights of the Child, http://www.amnestyusa.org/children/crn_faq.html.

21. The Campaign for U.S. Ratification of Convention on Rights of the Child (CRC), What is the Status of the CRC?, http://www.childrightscampaign.org/crcindex.php?sNav=getinformed_snav.php&sDat=status_dat.php.

22. Amnesty Int'l USA, Children's Rights: Convention on the Rights of the Child Frequently Asked Questions, http://www.amnestyusa.org/children/crn_faq.html.

supporters by mobilizing certain groups, and they have found that appeals to bigotry and xenophobia are very effective at mobilization. Some Americans suspect anything that every other nation in the world supports. The requirement for two thirds of the Senate to ratify such a convention makes it relatively easy for opponents of any international agreement to block ratification. Thus, thanks to domestic politics, a remedy to the problem Everett describes seems to be out of reach, even if it puts the United States in the same league as Somalia.²³ The kind of protection she seeks for former child soldiers will have to be created almost on an ad hoc basis if it is ever to occur in this country.

The third article, by Sharon Foster, considers whether the right to reproduce creative expressions should be given the status of a property right.²⁴ She concludes that such a right is a “Western notion,” which is not universal “except to the extent that all the different justifications seem to be rooted in the inexplicable desires to call an expression thing ‘mine.’”²⁵ She concludes there is no one theory or philosophy that best explains the essence of the justification for intellectual property law and that it exists because enough people for a length of time have called expressions and their reproduction “mine.”²⁶

The desire of a writer or artist to maintain a property right to his or her works is no more a mystery than a farmer’s wish to have the right to own what he grows in his fields. The issue of intellectual property rights was less of a problem before inventions like the printing press made the reproductions of such works easy and opened them up to a mass audience. Before that, artistic endeavors were subsidized by the rich for their own amusement. Without the ability to make a living from their works, fewer artists and writers would exist in the world today.

Does the absence of any single theory explaining the justification for such a right mean there is no explanation and never will be, as Foster maintains? It means that human endeavors are sufficiently complex that neither social science nor philosophy will be able to explain them with a single, simple theory. That won’t stop social scientists from trying, especially because it is easy to postulate a theory for human behavior and virtually impossible to conclusively disprove it. Much depends on culture, what people are willing to accept and believe, and the politics of the moment.

23. Everett, *supra* note 16, at 289.

24. Sharon E. Foster, *Invitation to a Discourse Regarding the History, Philosophy and Social Psychology of a Property Right in Copyright*, 21 FLA. J. INT’L L. 171-204 (2009).

25. *Id.* at 174.

26. *Id.* at 204.

The same is true for law and justice. In mid-April 2009, another example came from abroad that put in stark relief how the politics of the moment affect justice in this country today. In Peru, Alberto Fujimori, who had been president of that country from 1990 to 2000, was found guilty after a long trial.²⁷ A three judge panel held him responsible for the kidnapping and killing of a number of innocent civilians carried out by government death squads.²⁸

The conviction of Fujimori was a rare triumph of justice over the impunity of power. It was the first time in Latin America that an ex-president had been called to account in such a manner. This happened even though Fujimori had a number of accomplishments to his credit as president: he brought Peru's rampant terrorism under control, reformed its economy and signed a peace treaty with Ecuador ending a long-standing border dispute.²⁹

Had he stepped down in 2000, he probably would never have been brought to trial. Instead, he attempted to perpetuate his power by rigging his second re-election. He no doubt thought that the judicial system was too weak to try him while he was in office and that it would be used against him once he was out of office.

The charges against him were not new and were made repeatedly during his time in office. The charges, however, did not result in judicial action until Fujimori had been so thoroughly discredited that he was forced to resign from office and flee the country. The politics of the moment shifted against him and left him vulnerable to the judicial system. He initially went into exile in Japan, but he then made the mistake of going to Chile – a country willing to extradite him.

The official U.S. reaction to the outcome of the trial was “this verdict is a powerful statement against impunity, and underscores the importance of the rule of law as a foundation of democratic government.”³⁰ However, no journalist bothered to ask the State Department, so this press guidance was never released.

Perhaps, no one wanted to embarrass Washington since there is no small irony in all this. The Bush administration undoubtedly used torture and committed other illegal acts during its so-called war on terror. Vice President Cheney once said using waterboarding in

27. Simon Romero, *Peru's Ex-President Is Convicted and Given 25 Years for Killings and Other Abuses*, N.Y. TIMES, Apr. 8, 2009, at A6.

28. *Id.*

29. *See, e.g., id.*

30. Unused Press Guidance, U.S. Dep't of State, e-mailed to author on Apr. 13, 2009.

interrogating terrorists was a “no-brainer.”³¹ So is the fact that waterboarding is torture.

The International Committee of the Red Cross,³² the State Department lawyer responsible for detainee cases,³³ the top Bush administration official in charge of deciding whether to bring detainees at Guantanamo to trial³⁴ have all concluded that acts of torture were committed. The United States, when it ratified the Convention Against Torture, obligated itself to extradite or prosecute those who torture, or are complicit in its use.³⁵ In addition to being illegal, the use of torture, despite claims to the contrary by Cheney and others, does not produce useable intelligence.³⁶

That did not matter as Washington sought to portray itself as struggling for the country’s very survival.³⁷ Nothing, including the law and reality, was allowed to get in the way of the construction of that myth. For instance, according to Secretary of State Powell’s former chief of staff, “the U.S. leadership became aware of the lack of proper vetting [of those held at the Guantanamo prison] very early on, and thus, of the reality that many of the detainees were innocent of any substantial wrongdoing, had little intelligence value, and should be immediately released.”³⁸

Nevertheless, the American judicial system, the Obama administration, and Congress have all done nothing. Attorney General

31. Tom Regan, *Cheney Confirms Use of Waterboarding*, CHRISTIAN SCI. MONITOR, Oct. 26, 2006, <http://www.csmonitor.com/2006/1026/dailyUpdate.html>; Dan Eggen, *Cheney’s Remarks Fuel Torture Debate*, WASH. POST, Oct. 27, 2006, at A09.

32. Mark Danner, *The Red Cross Torture Report: What It Means*, 56 N.Y. REVIEW OF BOOKS, Apr. 30, 2009; Joby Warrick & Julie Tate, *Report Calls CIA Detainee Treatment “Inhuman”*, WASH. POST, Apr. 7, 2009, at A06.

33. Andrew O. Selsky, *Ex-State Dept. Lawyer Decries Torture after 9/11*, ASSOCIATED PRESS, Mar. 27, 2009.

34. Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A01.

35. See Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment art. 4, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (Dec. 10, 1984).

36. See Peter Finn & Joby Warrick, *Detainee’s Harsh Treatment Foiled No Plots*, WASH. POST, Mar. 29, 2009, at A01.

37. See, e.g., Liz Cheney, *Retreat Isn’t an Option*, WASH. POST Jan. 23, 2007, at A17 (“America faces an existential threat.”) Liz Cheney is a State Department official and the Vice President’s daughter.

38. Guest Posting of Lawrence Wilkerson to thewashingtonnote.com, *Some Truths About Guantanamo Bay*, http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/ (Mar. 17, 2009, 19:27 EST).

Holder, when asked about the advisability of a truth commission to investigate America's use of torture, dodged the question and passed the buck to Senator Patrick Leahy,³⁹ the Chairman of the Senate Judiciary Committee. Leahy has proposed such a commission, but insisted on at least some Republican support. He has all but given up the effort to create the commission⁴⁰ since no one in the minority party is willing to put principle above partisanship even though those who testify would enjoy immunity.

As for public opinion, there has been little notice, let alone outrage. Americans are too busy high-fiving each other over the rescue of a ship captain from Somali pirates to contemplate their complicity in the crimes committed in their name.

Some officials of the Bush administration may still have to face charges however. Indictments of a number of these officials are being considered in Italy, Spain and Great Britain.⁴¹ The Spanish court is expected to charge six former administration lawyers who said the treatment of the detainees was not torture unless it caused major organ failure, and if that treatment resulted in death, it was not murder.⁴² They defined the law as whatever the boss wanted to hear.

So the rule of law may yet prevail – just not now in the United States.

39. Andrew Cohen, *Feds Need Torture Commission Now*, CBS NEWS, Apr. 12, 2009, <http://www.cbsnews.com/stories/2009/04/12/opinion/courtwatch/main4937888.shtml>

40. Posting by Anonymous to TheBuzzflashBlog, Charlotte Dennett: Leahy's Truth Commission Hits the Skids, <http://www.buzzflash.com/articles/contributors/1944> (Apr. 2, 2009, 9:32 EST)

41. See, e.g., John Crewdson, *Suspected CIA Tactics Spread Outrage in EU: Human-Rights Concerns Arise Over 'Rendition' of Terrorist Suspects*, CHICAGO TRIBUNE, Jan. 1 2006, at News 4 (describing EU concerns about alleged torture by the United States and a possible expansion of the twenty-two indictments in Milan, Italy).

42. Marlise Simons, *Spain's Attorney General Opposes Prosecutions of 6 Bush Officials on Allowing Torture*, N.Y. TIMES, Apr. 17, 2009, at A10.

