ADC-ICTY Newsletter, Issue 18

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* The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Tribunal for the Former Yugoslavia or the Association of Defence Counsel Practicing before the ICTY.

Prosecutor v. Haradinaj *et al.* (IT-04-84 *bis*)

On 18 August, the re-trial of Ramush Haradinaj and his co-accused Idriz Balaj and Lahi Brahimaj began with opening statements by the prosecution and defence. This marked the first retrial in the 18 year history of the ICTY. Former Kosovan Prime Minister Ramush Haradinaj served as commander of the Kosovo Liberation Army (KLA) during the war in Kosovo. In April 2008, at the conclusion of the trial of first impression, Haradinaj and Balaj were acquitted for war crimes and crimes against humanity committed in Kosovo between March and September 1998. Brahimaj, however, was sentenced to six years of imprisonment for torture. The acquittals came after judges found prosecutors had failed to provide enough evidence to show a deliberate campaign to kill and expel Serbs from Kosovo.

On 21 July 2010, the Appeals Chamber ordered a partial retrial on six charges against Haradinaj along with Idriz Balaj and Lahi Brahimaj**.** The Appeals Chamber found that the Trial Judges had not given the prosecution enough time to secure the testimony of two crucial prosecution witnesses.

Shefqet Kabashi, a former member of the Kosovo Liberation Army, refused to testify in the first trial of Haradinaj and was charged with contempt of court. When ordering a partial re-trial, the Appeals Chamber found that the Trial Chamber had erred in failing to secure Kabashi's testimony thereby depriving the Prosecution of vital support for its case. According to an ICTY press release, Kabashi's testimony is relevant to the re-trial of the Ramush Haradinaj *et al.* case as it relates to the defendants' alleged responsibility for crimes committed at the KLA headquarters and the prison in Jablanica/Jabllanicë.

Shefqet Kabashi

On 17 August 2011, Kabashi voluntarily surrendered and on entry to The Netherlands was arrested by Dutch authorities and subsequently transferred to the United Nations Detention Unit. Kabashi was brought to testify and although attempts were made by the prosecution to gain evidence, Kabashi stated he was unable to testify.

During direct examination by the Prosecution, Kabashi stated "it's not that I'm unwilling to reply to your questions; but I am unable to answer any other question and I cannot provide any more assistance to this Chamber". When the Prosecutor inquired whether this was due to fear, Kabashi replied "No, I am not afraid, but I am unable to testify. It's not a matter of fear". Kabashi then proceeded to explain his inability to testify in a passionate speech where he accused the Office of the Prosecutor of elaborating and changing his prior statement. Kabashi asserted that "the money used on the case would have been best spent somewhere in Kosovo...you could have helped the homeless, people who were maimed, who lost their loved ones during the war".

During the time Kabashi spent in the courtroom he did not say anything about the crimes which had allegedly taken place in Jablanica. On 2 September 2011, the Trial Chamber issued an Order directing the Prosecution to investigate a further possible contempt of the Tribunal by Kabashi.

Prosecutor v. Kabashi (IT-04-84-R77.1)

On 26 August 2011, Kabashi pleaded guilty to charges of contempt of court. Sentencing was delayed when Judge Bakone Justice Moloto and Judge Guy Delvoie asked to be replaced as judges on the panel in order to avoid any appearance of partiality as they both are involved in the Haradinaj *et al.* case. According to the Tribunal rules, the sentence for contempt can be up to seven years imprisonment and/or up to €100,000 fine.

Prosecutor v. Radovan Karadžic IT-95-5/18-I

Radovan Karadžic

The Prosecution case continued as the Tribunal returned from its recess on 15 August 2011. Upon returning, the Trial Chamber handed down its decision on Karadžic's Application for Certification to Appeal Decision on Reconsideration of Protective Measures for Witness KDZ531. The decision had been made by the Pre-Trial Chamber based on *ex parte* information given to it by the Office of the Prosecutor. The Trial Chamber had denied Karadžic's motion to reconsider protective measures through an oral decision. As a result, Karadžic requested that the Trial Chamber considered the application *de novo*, as opposed to reconsideration. Nonetheless, the Chamber denied the Application for Certification to Appeal, noting that the two prong test to certify an application for appeal was not met. It further added that Karadžic would not suffer any prejudice from their approach.

Rule 68

Disclosure of Exculpatory and Other Relevant Material

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence

The Trial Chamber also decided on Karadžic's Fifty-Fifth Disclosure Violation Motion, in which Karadžic asserted that the Prosecution had violated Rule 68 of the Tribunal's Rules of Procedure and Evidence related to the July 2011 disclosure of an interview with the former Head of UN Civil Affairs in Bosnia and Herzegovina, Sergio Viera de Mello and an interview with a former Police Station Commander in Vogošća, Vlado Kelović. Karadžic submitted that the de Mello interview was potentially exculpatory because it showed that he "did not have control over the attack on Goražde, and that the shell which landed on Markale market came from no more than 2000 meters away". He pointed out that this late disclosure prejudiced him because he could not use the information in developing his pre-trial defence strategy and was further unable to confront UN personnel who already testified about these events.

In relation to the Kelović Interview, Karadžic submitted it contained exculpatory information showing that Muslims from Vogošća were neither expelled nor mistreated. He argued to have suffered the same prejudice with this interview as well, due to his inability to develop his pre-trial defence strategy and to use the information in cross-examination. In a Decision issued on 19 August 2011, the Trial Chamber agreed with Karadžic that the Prosecution had violated its disclosure obligations. However, it only granted his Application in part. While finding a violation of disclosure, the Chamber did not agree with the remedy proposed by Karadžic, mainly that the "Chamber appoint a special master to oversee disclosure and consider reducing the scope of the case".

Mušan Talović

On 19 August 2011, the Chamber also decided on Prosecution Motions for Protective Measures for Witnesses KDZ601 and KDZ605, which included image distortion, voice distortion, and pseudonyms. It granted the protective measures to these two witnesses, noting that having considered their circumstances it was satisfied that there was an objectively grounded risk to their security if it became known that they testified before the Tribunal.

The Prosecution case continued on 22 August 2011 with the testimony of Witness KDZ029 in closed session, as well as the testimony of Mušan Talović who testified about the events in Bratunac during the relevant period. The next day, the Prosecution called Izet Redžić to testify about events in Vlasenica and Dragan Vidović, who was a member of Republika Srpska Army in Zvornik during the relevant period.

On 24 August 2011, the Chamber heard the testimony of Dževad Gušić, who was President of the SDA Party in Bratunac during the relevant period. The week ended on 25 August 2011 with the testimony of Witness KDZ605 about the events in Bratunac and witness Ibro Osmanović about the events in Vlasenica during the relevant period.

Prosecutor v. Mladić (IT-09-92)

Chief prosecutor Serge Brammertz has filed a motion to sever the Mladić indictment into two parts, which would result in Mladić standing accused in two separate trials. The motion filed on 16 August proposes that Mladić should be tried in relation to the incidents in Srebrenica in the first instance. Following the judgement in the proposed Srebrenica trial, Mladić would then be tried for the other alleged crimes including ethnic cleansing in the municipalities Bosnia and Herzegovina, the siege of Sarajevo and the hostage taking of UN members.

Ratko Mladić

This is the first time that the Prosecution has attempted to sever the indictment of an accused so that the accused would stand trial more than once. The Prosecutor has stated that the trial will not prejudice the rights of the defence, as the separate indictments will not contain any additional charges or modes of responsibility.

Aleksandar Kontić of the OTP has stated that the Prosecution was not considering formally joining the charges of Mladić and Karadžić in relation to the events in Srebrenica. He disclosed that the Prosecution was considering the possibility of having witnesses come to testify in both trials at the same time.

The Motion is now pending before Trial Chamber I. At the Status Conference on 25 August, Branko Lukic, who was recently appointed Lead Counsel for Mladić, has indicated that the Defence will object to the motion for severance, stating that the severance would be 'illogical'. Judge Orie has instructed the defence that they have until August 31 to file a written response to the motion.

Prosecutor v. Hadžić (IT-04-75)

Goran Hadžić has pleaded not guilty to all charges at his further initial appearance held on 24 August 2011. Hadžić is the former President of the self-proclaimed Republic of Serbian Krajina (RSK). He is charged with a number of crimes allegedly committed in eastern Slavonia, Croatia, from August 1991 to June 1992, including persecutions, murder, imprisonment, torture, inhumane acts, cruel treatment, deportation and wanton destruction.

Goran Hadžić

On 23 August, the Trial Chamber issued a decision in relation to the Prosecution motion requesting protective measures for victims and witnesses and documentary evidence. Pursuant to Rule 66(a)(i), the Trial Chamber ordered the Prosecution to provide the defence team with material supporting the indictment. The Prosecution have until 23 September to inform the Trial Chamber and the defence team whether the materials are subject to restrictions under Rule 70. Defence counsel were able to confirm that supporting documents had been received. Judge Delvoie indicted that the 30 day time limit for the filing of preliminary motions will not commence until permanent defence counsel is assigned.

Hadžić previously declined to submit a plea at his first appearance on 25 July. A Status Conference

Rule 66 (a)(i)

Disclosure by the Prosecutor

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused

News from International Courts and Tribunals

Article 68

Protection of the victims and witnesses and their participation in the

proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses….The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

International Criminal Court

Trial Chamber II, Situation in the Democratic Republic of the Congo, In the case of The Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui (ICC-01/04-01/07)

Fabrice Bousquet, Intern, Office of Public Counsel for the Defence, ICC*

*The views expressed herein are those of the author(s) alone and do not reflect the views of the International Criminal Court.

"Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute", 22 June 2011, n° ICC-01/04-01/07-3033.

In a previous decision rendered on the 9 June 2011 Trial Chamber II (hereafter "the Chamber") concluded that the return of three detained witnesses to the Democratic Republic of the Congo (hereafter "DRC") will be ordered under two conditions. First, the protective measures proposed by the Registry in consultation with the DRC must be satisfactory. Second, the Dutch authorities must deny the detained witnesses' application for asylum. Hereby, the Chamber is looking back at the first condition since the detained witnesses and the DRC submitted their observations about the Registry's report on the outcome of its consultations with DRC concerning such protective measures.

The Chamber recalled to the DRC's authorities that, for the reasons explained in its decision of 9 June 2011, the Chamber's mandate places on it an obligation to find a balanced solution on competing rights and interests. The Chamber considered that if the detained witnesses are to be returned to the DRC they must be protected against every potential source of danger that may be linked to their public testimony before the Court, even if the DRC authorities have no intention of harming them. However, the Chamber took note of the formal assurances provided by the DRC that no harm will befall the detained witnesses if they are returned to the DRC. In its view, such diplomatic assurances reflect the mutual trust on which the framework for cooperation between the Court and the DRC is based and must be treated with great respect and presumed to have been made in good faith.

Germain Katanga

The Chamber then established protective measures which, in its view, will fulfill the Court's obligation under article 68 of the Rome Statute to protect the three detained witnesses. The Chamber ordered the Registry to dispatch urgently a cooperation request to the DRC in order to put in place these protective measures. These protective measures must be operational and maintained until the end of the respective trials for the detained witnesses in the DRC. After that, the Victims' and Witnesses' Unit (hereinafter "the VWU") will proceed to an evaluation and determination on the protective measures, if any.

On one hand, the Chamber established protective measures concerning the detention conditions of the detained witnesses: (1) the detention centre where they can be legally detained must be the most conducive to offering maximum protection in terms of infrastructure and population, an issue that the VWU will determined with the DRC authorities, (2) their conditions of detention shall protect them from possible aggression by co-detainees, but without leading to their permanent isolation, and (3) they shall be under permanent surveillance by security guards who are specifically selected and trained for this purpose, the process being overseen in close consultation between the Congolese prison authorities and the VWU, which includes the entitlement to reach these guards at all times.

On the other hand, the Chamber required protective measures to ensure the monitoring of the detained witnesses: (1) the Congolese authorities must give the VWU prior information about detained witnesses' transport or transfer, (2) a member of the VWU must be able to visit each detained witness twice per week and must be allowed to speak with them confidentially, and (3) an observer of the Court must be allowed to attend any legal proceedings involving the detained witnesses, which requires that the Registry must be informed in advance of their date and location.

Furthermore, the Chamber invited the DRC to arrange with the Registry the provision of technical or logistical assistance in order to allow the detained witnesses to participate in any procedural step of the ongoing national proceedings without violating their due process rights, especially when facilitating communications with their Congolese lawyers.

Article 57

Functions and Powers of the Pre-Trial Chamber

(3) In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures ...or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

"*Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan,'" ICC-02/05-03/09-16, 1 July 2011 and "Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union,'" ICC-02/05-03/09-170, 1 July 2011*

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*The views expressed herein are those of the author alone and do not reflect the views of the Intentional Criminal Court.

During the Court's infancy, the relationship between the ICC and international organizations is being played out on a daily basis. Questions regarding the interplay between organisations, nations and the Court, which at the outset appear more political than legal, are being raised, once again, in the Darfur situation.

Evidence collection in Darfur is by no means an easy task – entering a country which is hostile to the very existence of the Court poses seemingly insurmountable problems. In light of these difficulties, the Defence has sought recourse to the Chamber itself, and several fundamental questions of international law have subsequently arisen.

Abdallah Banda Abakaer Nourain

In November 2010, the defence submitted an application pursuant to Article 57(3)(b) of the Statute for a judicial order for the preparation and transmission of an official cooperation request to the Government of Sudan ("GoS"). This request was denied because it was found not to meet the "necessary" requirement at that stage of the proceedings. This effectively deferred the decision to the Trial Chamber, in the event the charges were confirmed.

In May 2011, the defence filed two motions to Trial Chamber IV. The first sought cooperation from the GoS in order for the defence to effectuate site visits, interview putative witnesses and record evidence. The second was a request to order cooperation from the African Union ("AU"), an intergovernmental organization under Article 87(6), particularly to turn over certain documents seen as necessary for preparation of the defence case.

Arguing that even the most basic investigation into the case requires a site visit and access to documents by the defence team, the defence claimed that it had exhausted all of its other possibilities and that such orders were necessary. The defence further proposed that the legal basis for the order for cooperation for the GoS lay in UN Security Council ("UNSC") Resolution 1593, as well as Articles 57(3)(b) and 93(1)(l) of the Rome Statute.

This argument theoretically expands the scope of the Rome Statute to non-signatory states, as long as they are Member States of the United Nations. The Chamber largely accepted this argument, stating that "it is clear that Sudan is under an obligation to cooperate with the Court pursuant to Resolution 1593". The Chapter VII powers of the UNSC "may oblige all UN members or some of them to cooperate with the Court in a given case, whether or not they are parties to the Statute".

Article 87

Requests for cooperation: general provisions

(6) The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

There are two caveats, however, to this basic principle of international law. The first is that the influence of a UNSC Resolution hinges on its wording. For example, the word "shall" in Resolution 1593 obligates the GoS to cooperate with the ICC. The words "urges all concerned parties" or "invites" parties to cooperate, however, are only suggestive, only empowering the Chamber to "ask" the AU to cooperate.

The second caveat, according to the Chamber, is that a UNSC Resolutions can only expand the boundaries of "who" is obligated to cooperate with the ICC; the means of cooperation remain within the bounds of the Rome Statute. The Chamber first analyses the bounds of this cooperation in a piecemeal fashion in relation to the GoS, and then solidifies its jurisprudence in its decision regarding the AU.

Saleh Mohammed Jerbo Jamus

The overriding requirements are specificity, necessity and relevance. In its decision on the state cooperation request to the GoS, the Chamber first confirmed that all state cooperation requests must be executed by the state in context of its own lex specialis and must not breach domestic law pursuant to Articles 93(1) and 99(1).

The specificity condition, drawn from the requirement of "sufficient information" in Rule 116(1)(b), is found not to be met in the request for cooperation from GoS, as the defence requests the ability to be "unhindered and unmonitored" by the GoS and seeks what the Chamber calls an "open-ended expedition".

The Chamber declined to analyse the second condition imposed upon state cooperation requests by Rule 116(1)(a), "relevance," and instead moved on to "necessity," which the Chamber considered emanated from Article 57(3)(b). Although the defence "exhausted the steps to obtain the cooperation from Sudan", it was held that the possibility that the Prosecution possessed some of the evidence prevented the "necessity" requirement from being fulfilled. The Court waved away the defence's concerns of having to reveal its strategy to the OTP by asking for these documents and suggested an ex parte hearing with the Chambers on the topic.

Finally, the Chamber considered its duty under Article 87(4) to protect potential witnesses and victims in relation to requests for state cooperation. Without an explanation as to how the defence could avoid retaliation against victims on the ground or security risks to the defence team, the Chamber found that it could not authorise such a request without breaching its statutory duty.

In its decision on an order concerning the AU, the Chamber first decided that the AU is an intergovernmental organization under Article 87(6) and that it is not under an obligation to cooperate with the Court, similar to non-State parties to the Rome Statute. Despite this, and despite the "soft" wording of UNSC Resolution 1593, the Chamber found that AU cannot simply ignore the ICC petition, especially since its constituent countries are members of the UN and are obligated, pursuant to Article 2(5) of the UN Charter, to give "every assistance in any action [the UN] takes in accordance with the present Charter".

The Chamber proceeds to distill Article 57(3)(b), Rule 116(1) and Article 96(2) into the simple rule that all requests for cooperation, be it to a State Party or an intergovernmental organisation, must meet the requirements of (i) specificity (ii) relevance and (iii) necessity.

To meet the specificity requirement, the Chamber found, documents should be identified as far as possible and be limited in number, as opposed to painted in broad categories. Although categories are not prohibited "as such", they still must be "defined with sufficient clarity to enable ready identification". Some of the documents requested from the AU, listed confidentially, met this requirement while others did not.

The Chamber addresses "relevance" of a request for cooperation for the first time, requiring a link between the documents requested and the issues relevant to the defence, and tacitly accepts the defence argument that the likelihood that such documents contain relevant factual information renders their disclosure "a necessary step in providing a fair hearing enshrined in Article 67 of the Statute".

As for the "necessity" requirement, the Chamber notes that the defence exhausted the possible steps for obtaining the documents from the AU and UN. Once again, however, the Chamber considers that the defence's lack of communication with the OTP via the Rule 77 disclosure regime prevents the request from meeting the statutory requirements and must therefore be denied.

The two layers of these decisions contribute differently to the jurisprudence of the Court, but are equally important. The Chamber's pronouncements on the reach of UNSC Resolutions and their interaction with the Rome Statute will have a tremendous effect on the international law surrounding the ICC, while the delineation of the requirements of requests for state or intergovernmental organisation cooperation will shape the interactions of counsel with international actors for years to come.

Rule 77 Inspection of material in possession or control of the Prosecutor

The Prosecutor shall...permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial as the case

Prosecutor v. Callixte Mbarushimana

Decision on the "Prosecution's request for review of intercepted data" 8 July 2011, ICC-01/04-01/10

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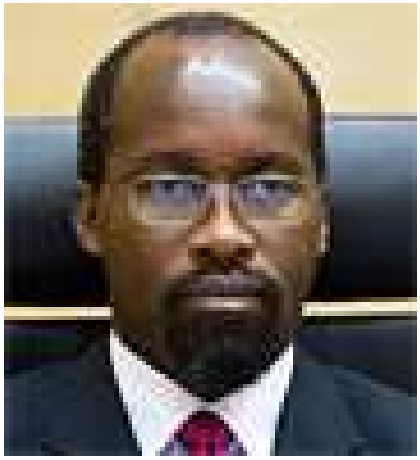
*The views expressed herein are those of the author(s) alone and do not reflect the views of the International Criminal Court.


Callixte Mbarushimana

In his judgment, Judge Cuno Tarfusser decided on the Prosecutor's application of 27 June 2011, in which the latter sought approval to retrieve data from a hard drive which had been intercepted from the suspect.

In his application, the Prosecutor set out his intention to have the data on the hard disc, which could not be exported or searched, converted by an unidentified service provider. This provider would be able, within three weeks, to make the data "readily accessible, searchable and compatible with the eCourt protocol". In addition, he proposed a procedure to make sure that any potentially classified material would be identified. He invited the Chamber to designate itself as the reviewer of the said material, after initial identification by the Prosecution and Defence.

The Defence had two main objections in response. Firstly, it objected to the Prosecutor's proposed procedure for the identification of classified material. Secondly, it opposed the imposition on the Defence of the requirement to engage in time-consuming review of material at this stage of the proceedings.

In his judgment, Judge Canu Tarfusser considered the quickly approaching date of the hearing on the confirmation of charges and found that the hard drive would not be available in a suitable format by that time. As a result, the Prosecutor would be unable to include the data on the List of Evidence or rely on it during the hearing. He therefore decided that a review of the hard drive would be unnecessary at this stage.

Finally, in light of the suspect's right to have adequate time to prepare his defence, the Judge concluded that the Prosecutor should "quarantine" all copies and formats of the hard drive until after the hearing on the confirmation of charges. Thereafter, the necessity of a review of the material would be reassessed.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court

Situation in the Libyan Arab Jamahiriya

"Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI,'" ICC-01/11-01/11-1, 27 June 2011

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*The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court.

On 27 June, 2011, the ICC issued arrest warrants for the second situation in the Court's history that was referred to it by the UN Security Council. In its decision, Pre-Trial Chamber I ("PTC I") decided that the situation falls within the Court's jurisdiction, affirmed a large portion of the Prosecutor's allegations of crimes against humanity and altered the Prosecution's characterisation of the accused's criminal responsibility.

Four days after the referral of Libya to the Court by the Security Council, the Prosecutor decided to open an investigation and applied to the PTC I two months later for the issuance of arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for the crimes against humanity of murder and persecution under Articles 7(1)(a) and (h), respectively, of the Rome Statute.

In its decision, the Chamber found that the situation fell under the *ratione temporis* jurisdiction of the Court, as the Prosecutor alleged events taking place between 15 February and 28 February, 2011. The Chamber also found there to be *ratione personae* jurisdiction, since the official position of an individual and whether he is a national of a non-State party has no effect on the Court's jurisdiction.

The OTP presented two counts of crimes against humanity and the Chamber analysed, under Article 58 of the Rome Statute, whether there were reasonable grounds to believe that the crimes were committed.

The Chamber began by presenting its contextual findings, deciding that there were reasonable grounds to believe that, despite his lack of official title, Muammar Gaddafi was the organiser and leader of a state apparatus of media control and repression of dissent. Basing its findings from speeches by both Muammar and Saif Al-Islam Gaddafi and the deployment and recruitment of troops in demonstrating areas, PTC I further found reasonable grounds to believe that there existed a state policy of quelling demonstrations by any means necessary, including lethal force. These findings lead to the conclusion that the chapeau elements of article 7(1) have been met, i.e. there are reasonable grounds to believe that a widespread and systematic attack occurred upon a civilian population.

Saif Al-Islam Gaddafi

After reviewing instances of crackdowns, shooting and shelling by security forces in Benghazi, Tripoli and elsewhere, the Chamber decided that there were reasonable grounds to believe that the crime against humanity of murder, pursuant to Article 7(1)(a), had been committed against civilian demonstrators and other alleged dissidents to the Libyan regime.

The Chamber then outlined instances where security forces punished civilians and demonstrators with tear gas, bullets and other less savory methods such as the *Fallga*, where a person is tied by their feet to a stick, turned upside down and whipped with an electric wire. These instances are found to amount to reasonable grounds to believe that "inhuman acts that severely deprived the civilian population of its fundamental rights" were inflicted upon political dissidents, amounting to persecution under Article 7(1)(h).

The PTC I then moved on to analyse the individual criminal responsibility of the three accused. In its application for the arrest warrants, the OTP had classified Muammar Gaddafi as an indirect perpetrator and Saif Al-Islam Gaddafi and Al-Senussi as indirect co-perpetrators, pursuant to Article 25(3)(a) of the Rome Statute. Due to the unique structure of the Libyan state and the power possessed by Gaddafi himself, however, the Chamber took issue with this characterisation, and decided that it had the power to alter it as long as the Chamber remains bound by the factual basis and evidence provided by the Prosecutor.

In a bold step towards judicial independence, the Chamber carved out the role of Al-Senussi as an indirect perpetrator only in the Benghazi region. Given the relationship between Gaddafi and his son, reasonable grounds to believe were found that Al-Senussi was more of an intermediary for the Gaddafis, although he retained full control over the military apparatus and thus fulfilled the objective elements of responsibility as an indirect perpetrator. These elements are: (a) the suspect has control over the organisation, (b) the organisation consists of an organised and hierarchical apparatus of power, and (c) the crimes are executed with almost automatic compliance with the suspect's orders.

What was found to be lacking in the Prosecutor's characterisation was sufficient evidence of the objective elements of the crime of co-perpetration between Al-Islam and Al-Senussi. As the PTC I declared, co-perpetration requires the additional elements of (a) existence of an agreement or common plan and (b) coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime. The PTC I shifted the cloak of co-perpetration, therefore, to the two Gaddafis, where reasonable grounds to believe were indeed found that they fulfil the additional elements of co-perpetration.

Reasonable grounds to believe were found to demonstrate that Muammar Gaddafi created a complex power structure that enabled him to transmit orders directly to every level of Libya's state apparatus, ensuring their immediate implementation. Reasonable grounds to believe that Saif Al-Islam held a prominent position within the Libyan hierarchy were also found, enabling him to orchestrate and implement his father's power. According to the Chamber, reasonable grounds to believe also exist to demonstrate that Saif Al-Islam also holds undisputed control over crucial parts of the State apparatus.

Muammar Gaddafi

The Chamber found reasonable grounds to believe that Muammar and Saif Al-Islam Gaddafi were mutually aware that implementing their plan to quell dissent with lethal force would result in the realisation of the objective elements of the crimes. Satisfaction of both the objective and subjective elements of the crime led the PTC I to find reasonable grounds to believe that the two co-accused were mutually responsible for the crimes against humanity of murder and persecution.

Article 25

Individual criminal responsibility

(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

Despite the fact that those individuals who act within a lower echelon of a hierarchy normally fall under one of the non-principal forms of criminal responsibility under Article 25(3), the PTC I attributed the principal commission of certain crimes to Al-Senussi. The Chamber attempts to resolve this seeming contradiction by stating that despite "the existence of a chain of command," Al-Senussi was in a "privileged position of supremacy" over the armed forces, allowing him to secure his orders almost automatically and meet the other objective elements of indirect perpetration. The PTC I thus finds reasonable grounds to believe that Al-Senussi was responsible as a principal to the crimes committed, although the PTC I expressly limits the geographical scope of the crimes committed to Benghazi.

Abdullah Al-Senussi

Finally, the Chamber analyzed whether the issuance of an arrest warrant was necessary under Article 58(1)(b), either to (i) ensure the appearance of the accused at trial, (ii) ensure that the investigation or proceedings are not obstructed, or (iii) prevent the continuing commission of crimes. Based upon defiant public speeches by both Muammar and Saif Al-Islam Gaddafi and actions indicating the willingness to continue the commission of the alleged crimes by all three of the accused, the Chamber found that all three require the issuance of a warrant of arrest.

Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, In the case of The Prosecutor v. Callixte Mbarushimana (ICC-01/04-01/10),

Decision on the "Prosecution's Request for an order regulating defence use of an inadvertently disclosed witness statement and lifting of redactions" and on the "Prosecution's Application for non-disclosure order and order on regulation of contact with witnesses", 29 June 2011.

- Mariam SY, Intern, Office of Public Counsel for the Defence, ICC*
*The views expressed herein are those of the author alone and do not reflect the views of the ICC

On 8 June and 14 June, the Prosecution requested to the Pre-Trial Chamber I that (i) the Defence and the Suspect be ordered not to disclose confidential information relating to Prosecution witnesses except for proceedings preparation, (ii) the Chamber regulates contacts of the parties with witnesses to be interviewed by the other party.

In its filing of 17 June, the Defence responded that the non-disclosure of confidential information request was superfluous. Concerning the second request, the Defence argued that it was not in the Prosecution's duties to discuss with its witnesses the issue of whether to consent to an interview with the Defence. The Defence therefore suggested that all contact with a calling Party's witness on the issue of the latter's consent to an interview by the other party should be regulated by the Victims and Witness Unit (hereafter VWU), a neutral organ of the Court.

Responding to the first order requested by the Prosecution, the Chamber recalled case law of the Court and Articles 8, 32(1) and 32(2) of the Code of Professional Conduct for Counsel, and estimated that the issue of non-disclosure of confidential information was already regulated by overarching principles and thus, was adequately served by the scope of the Defence inherent obligation to preserve the confidentiality of proceedings.

Concerning the requested order regulating contact by the parties with the witnesses interviewed by the other party, the Pre-Trial Chamber recalled that the issue had already been addressed by Chambers in other cases. However, the Chamber reminded its duty in light of article 57(3) to provide protection to witnesses. Furthermore, the Chamber invoked article 43(6) and 68 of the Rome Statute and Rules 87-89 of the Rules of Procedure and Evidence related to witness protection in the proceedings.

As regards Article 43(6), VWU shall provide protective measures, security arrangements, counseling and other appropriate assistance for the witnesses who appear before the Court. In addition, Article 68(4) stipulates that "the VWU may advise the Prosecutor and the Court on the appropriate protective measures, security arrangements, counseling and assistance [...]" Therefore, and in light of the law mentioned above, the Chamber held that VWU was the best organ to provide independent advice as to the security measures which are necessary and appropriate as a consequence of one party's wish to contact a witness to be relied upon by the other party.

Consequently, the Chamber ordered that:

- a party wishing to contact and interview a witness of the calling party shall notify VWU,
- VWU shall inform the calling party of the other party notification,
- VWU shall contact the relevant witness to secure his consent and assess all the necessary arrangements regarding logistics and timing of the interview,
- VWU shall ascertain the witness wishes as regards the participation by the calling party, and ensure that a representative of VWU is present at the interview.

Article 43

The Registry

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Pre-Trial Chamber I's "Decision on the Review of Potentially privileged material", ICC-01/04-01/10-237, 15 June 2011

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* The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court.

Trial Chamber I recently released a decision outlining the fate of 122 potentially privileged documents the case of The Prosecutor v. Callixte Mbarushimana. The Chamber classified these documents into five categories: 1) attorney-client communications in which privilege prevailed, 2) attorney-client communications in which privilege did not attach, 3) attorney-client communications that are still potentially privileged, but required more information before the Chamber could make a clear decision, 4) communications not deemed privileged in the context of a professional or other confidential relationship and 5) corrupted/password protected communications that need further explanation before a decision is made.

The Chamber explained that Rule 73(1) protects "communications made in the context of the professional relationship between a person and his or her legal counsel". The Chamber stressed the importance of the relationship and the work-product association with communications. As an example, documents appearing legal in nature but which are readily accessible to third parties, unless uniquely altered, would not be classified as privileged. In its assessment, the Chamber carefully examined the communications and separated the obviously privileged communications from ones appearing to be non-privileged.

As to be expected, the Chamber generated a third class of communications. According to the Chamber, this third class needed further clarification from Mr. Mbarushimana and the Defence team. Unsure of the true nature of the communications, the Chamber stated that "if the Defence wishes to maintain its claim of privilege over documents falling in the third category, it must provide additional information as to how the content of the document or the circumstances, context or purpose of its creation or communication may give rise to privilege". The Chamber reserved its decision on this third class, requiring that any explanation as to the nature of these communications needed to be submitted no later than 20 June 2011.

Rule 73

Privileged communications and information

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

(a) The person consents in writing to such disclosure; or

(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Within the fourth class, the Chamber ruled that a document containing medical information, while appearing personally confidential, was not made in the context of a doctor-patient relationship. Additionally, the Chamber ruled that every communication between Mbarushimana and his religious clergyman were not within the scope of Rule 73(3). In its reasoning, the Chamber asserted that the communications existed outside the scope of the clergyman's religious duties and the protections granted in Rule 73.

The final class of communications consisted of password protected and corrupted files/folders. The Chamber ordered Mbarushimana to divulge his password(s) to the Chamber. Additionally, the order also included a request that Mbarushimana provides details of any privileged documents that might exist within the corrupted and password protected files/folders. With an eye on caution for the suspect's rights, the Chamber appears to be attempting to facilitate disclosure in an expeditious manner between the parties.

This decision marks two unprecedented interpretations on evidence. Firstly, until now, the Court has never been called upon to decide issues relating to privileged communications between a suspect and his religious clergy or legal counsel. Secondly, by requiring Mbarushimana to divulge his passwords, the Chamber is requiring Mbarushimana to revoke his right to remain silent under Article 55(1)(a) and 67(1)(g).

Blog Updates

- William A. Schabas, **London riots: were they crimes against humanity?** 15 August 2011, available at: http://humanrightsdoctorate.blogspot.com/2011/08/london-riots-were-they-crimes-against.html
- Steven Kay QC, **Syria and the ICC,** 21st August 2011, available at: http://www.internationallawbureau.com/blog/?p=3136
- Deirdre Montgomery, **ICC: Confirmation of Charges hearing this week in Mbarushimana Case,** 15th August 2011, available at: http://www.internationallawbureau.com/blog/?p=3124
- Dapo Akande, **Can Libya Sue the UK on Recognition of the National Transitional Council?** 30th July 2011, available at: http://www.ejiltalk.org/can-libya-sue-the-uk-on-recognition-of-the-national-transitional-council/
- **Death Row and International Law,** 8th July 2011, available at: http://www.insidejustice.com/law/index.php/intl/2011/07/07/humberto_leal_garcia_vccr
- Diane Marie Amann, **Philippines embraces the ICC,** September 1 2011, available at: http://intlawgrrls.blogspot.com/2011/09/philippines-embraces-icc.html
- William A. Schabas OC MRIA, **Prosecutor seeks to hold trials of Mladic,** 18 August 2011, available at: http://humanrightsdoctorate.blogspot.com/2011/08/prosecutor-seeks-to-hold-trials-of.html

ICC rejects Kenyan government appeals

The ICC has dismissed an appeal by the Kenyan government to throw out the cases against six high-ranking national officials, including a deputy prime minister, two ministers and a police chief, for possible crimes against humanity in the post-electoral violence that wracked the east African country three years ago.

The Chamber ruled that the Pre-Trial Chamber made no error when it found that the government had failed to provide sufficient evidence to substantiate that it was investigating the six suspects for the crimes alleged in the ICC summonses.

Publications

Books

Kenneth S. Gallant, 2010, *The Principle of Legality in International and Comparative Criminal Law*. Cambridge University Press

Carsten Stahn and Mohamed M. El Zeidy *The International Criminal Court and Complementarity: 2 Volume Set*. September 2011, Cambridge University Press

Eimear Spain, *The Role of Emotions in Criminal Law Defences*. September 2011, Cambridge University Press

John Deigh and David Dolinko, *The Oxford Handbook of Philosophy of Criminal Law*. September 2011, Oxford University Press

Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice*. 25 August 2011, Oxford University Press

Articles and Reports

ICC Monitoring Report August 2011, International Bar Association available at: http://www.ibanet.org/Document/Default.aspx?DocumentUid=7D9DA777-9A32-4E09-A24C-1835F1832FCC

Katharina Margetts and Katerina I. Kappos 2011. Current Developments at the ad hoc International Criminal Tribunals *Journal of International Criminal Justice*, 9, pp 481-518

Nicolas A. J. Croquet, 2011, The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprrudence? *Human Rights Law Review* 11:1 , pp 91-131

Leslie Haskell and Lars Waldorf, 2011. The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences. 34 *Hastings Int'l & Comp. L Rev. 49*, pp.49-86

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WE'RE ON THE WEB!

WWW.ADCICTY.ORG

The ADC-ICTY would like to thank Jovana Paredes, Lisa Scott and Rens van der Werf for all their hard work and dedication on the newsletter. We wish them all the best for the future.

Upcoming Events

Final conference of the International Criminal Procedure Expert Framework

Date: 27 - 28 October 2011
Venue: Peace Palace, Carnegieplein 2, 2517 KJ, The Hague-
Organiser: Hague Institute for the Internationalisation of Law

Conference on Foundations of Shared Responsibility in International Law

Date: 17 - 18 November 2011
Venue: Amsterdam Centre for International Law

Organiser: SHARES - Research Project on Shared Responsibility in International Law

Supranational Criminal Law Lecture

Date: 7 September 2011
Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, The Hague

Organiser: T.M.C. Asser Instituut

Opportunities

Investigator, The Hague, The Netherlands (P-3)

Special Tribunal for Lebanon

Closing date: open

Legal Officer, The Hague, The Netherlands (P-3)

Special Tribunal for Lebanon

Closing date: open

Assistant/Associate Case Manager, The Hague, The Netherlands (P-1/P-2)

Special Tribunal for Lebanon
Closing date: open

Court Reporter - English, The Hague, The Netherlands (P-2)
International Criminal Court
Closing Date: Thursday, 8 September 2011

Assistant/Associate Legal Officer, Leidschendam, The Netherlands (P-1/P-2)
Special Tribunal for Lebanon
Closing Date: Saturday, 31 December 2011