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ICTY CASES

Cases at Trial

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-I)

Mladić (IT-09-92)

Prlić et al. (IT-04-74)

Šešelj (IT-03-67)

Stanišić & Simatović (IT-03-69)

Stanišić and Župljanin (IT-08-91)

Cases on Appeal

Đorđević (IT-05-87/1)

Perišić (IT-04-81)

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)

Tolimir (IT-05-88/2)

Prosecutor v. Ratko Mladić (IT-09-92)

Ratko Mladić

The trial of Ratko Mladić continued on 10 January 2013 with the testimony of OTP expert Patrick van der Weijden. Mr. van der Weijden testified to the investigation of incidents of sniper fire in Sarajevo, based on maps and witness testimony and elimination of sites that were either technically or tactically unlikely origins of fire. By visiting the sites Mr. van der Weijden came to findings that contradicted earlier UNPROFOR investigations, and placed responsibility on Serb snipers for several incidents, such as the 8 Oct 1994 firing on a tram near the Holiday Inn. Defence Legal Consultant, Dragan Ivetić challenged Mr. Van der Weijden's report for providing few sources or citations. He also suggested that the witness did not eliminate the possibility of stray bullets firing at a completely different target, such as a BiH army position nearby, or the possibility that BiH soldiers themselves had occasionally simulated sniper fire to place blame on Serbs.

On 14 January Dr. Milan Mandović, a surgeon at the State General Hospital testified to surgeries he had performed on numerous sniping and shelling victims and authenticated hospital records. Mandović also testified to targeting of the hospital itself. The Defence challenged Mandović's assertions by suggesting that there were BiH Army positions firing at the Serbs from the hospital, and the south side of the hospital was directly facing the front. Mandović noted that the hospital compound itself was never occupied by any active military except medics and that the Serbs who

ICTY NEWS

- *Mladić*: Trial continues
- *Hadžić :* Trial continues
- *Karadžić*: Defence continues
- *Tolimir :* Trial Judgment

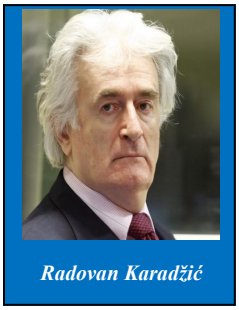
Also in this issue

were on higher ground should have been firing downwards.

After Munira Selmanović, a victim of Sokolac, British General Michael Rose testified on NATO operations in Bosnia. He asserted that Mladić was in complete control of the VRS military and he had never heard of any VRS officers doing anything against Mladić's wishes. On 17 January Defence Counsel Branko Lukić cross-examined Rose on the NATO bias against Serbs, noting that airstrikes had never been conducted on BiH army positions. Rose responded that intervention was only in response to violations of NATO ultimatums and it was rare that the BiH army would violate NATO ultimatums. Regarding Goražde, Rose noted that the Serbs were responsible for the use of force against them, since they had begun the attack, and furthermore they were warned several times before any NATO attacks. General Rose did agree that in the final negotiations the Serbs were probably offered less territory.

Rose's testimony was followed by two protected witnesses, a doctor from Foca (RM-46) who testified to killings at the KP Dom and a French officer (RM-55) who was a witness of the Markale II incident on 28 Aug 1995, and also testified the fact that in his opinion the sniper fire was a continuous and deliberate policy. Defence Counsel Branko Lukić challenged RM -55's account of deliberate and controlled sniper fire, since he had never visited any sniper positions or talked to any snipers. Lukić also challenged accounts of Markale II – based on photographs of bodies on victims that appeared planted based on blood pooling or injury type.

Prosecutor v. Radovan Karadžić (IT-95-5/18-1)



Radovan Karadžić

On 15 January 2013, the trial of Karadžić resumed after winter recess with the testimony of Milosav Gagović, a retired colonel, former commander in the JNA 4th Corps in Sarajevo. Durng his testimony he stated that Serbs in Sarajevo had to get organised to defend themselves against the constant attacks of the paramilitary and police units from the city. He further stated that the JNA was neutral and tried to prevent the conflict from escalating. Gagović also testified that he never heard Karadžić issue any unlawful orders.

On the same day, the defense called Professor Ronald Hatchett. In his statement, Hatchett said he witnessed Karadžić's peace efforts during his visit to Pale in 1994. According to Hatchett, Karadžić proposed in a conversation to divide BiH into two autonomous republics, Serb and Muslim-Croat. Professor Hatchett contended that he conveyed the proposal to US President Bill Clinton, who 'liked' the idea, but the State Department dismissed the idea although an almost identical solution was accepted in Dayton at a later date. In the cross-examination, Hatchett said he knew there were numerous crimes in BH, but he was not sure to what extent Karadžić was responsible for them.

The next witness to testify on 16 January, was Vere Hayes. In the spring of 1993, he was chief of the staff of UNPROFOR in Bosnia; he took part in the negotiations to demilitarize Srebrenica.

After Hayes completed his evidence, Karadžić called a protected witness, KW571. It was disclosed that this witness investigated one of the two artillery attacks on the Markale market in Sarajevo.

The final witness to testify on 16 January was KW554, who claimed that on his arrival in Canada he saw Canadian intelligence documents which could not serve as a basis for the conclusion that Karadžić knew about the mass executions in Srebrenica in July 1995. He further claimed that he saw 'from a distance of three meters' a photo showing a bomb being thrown out of a window at the Markale town market in February 1994. The witness did not find it at all strange that the photo was purportedly taken from a place where 66 persons were killed and 140 wounded while the photographer and his camera remained unscathed.

On 17 January, Janko Ivanovivć and Ilija Miscević testified. Both stated that they saw armed Muslim soldiers regularly in Hrasnica and that there were several military targets in the neighborhood. The Headquarters of the BiH Army 4th Brigade was located in the post office, while artillery ammunition was

manufactured in an elementary school and in the garages of the tower blocks. Miscević stated that fire was opened from Hrasnica from mobile mortars and only then Serbs would respond fiercely' and fire on the residential area. He continued one 'should be honest and say' that shells fell on civilian buildings 'in other cases, when there was no fire'.

The next witness was Milutin Vujacić, a former Bosnian Serb army soldier from Foca, In his statement he accused the Muslims from the Foca municipality of arming themselves first, attacking Serb villages and perpetrating 'gruesome crimes'. The Serbs responded to this and 'placed' the women and men in separate locations in the town. He denied knowing anything about Muslim women who had been raped. He further stated that the evacuations of Muslims were voluntary and that the Serb authorities only 'met' the demands of the Muslims who wanted to join their relatives who had fled earlier.

On 18 January, witness KW570, a former member of the UNPROFOR British Battalion in BiH, stated that he believes that the Serbs were unjustly blamed for the Markale market attack. He based this on the suspicious elements that only one shell was fired. He claimed that UNPROFOR did not find any shrapnel and that the shell must have been fired from close proximity. He further claimed that after the attack UNPROFOR received intelligence that the Mujahideen fired the shell: they targeted Jews who were leaving the city that day, but the shell missed and hit the town market. In cross-examination the witness admitted that he never saw any Mujahideen in Sarajevo.

On 21 January, witness Trivko Pljevaljcic, a former member of the Bosnian Serb army from Foca, testified that after Serbs liberated Foca from Muslim artillery attacks, the Muslims did not want to stay in Foca and left voluntarily. He stated that Serbs helped them by providing busses. The prosecution contended that the 'help' took the form of detention, rape, abuse, murder and other forms of repression. The witness replied he had no knowledge of these events.

Slavko Mijanović was called to the witness stand after Pljevaljcic completed his evidence. Mijanović is a former member of the municipal Crisis Staff in Ilidza. In his statement to the defense, Mijanović said that Muslims from Ilidza left 'of their own will'. The witness stated that the Serb authorities in Pale never ordered the ethnic cleansing of Muslims from Ilidza or endangered their rights.

Prosecutor v. Tolimir et al (IT-05-88/2)


Zdravko Tolimir

After 242 days of trial and 19,000 pages of transcript, the Trial Chamber pronounced its judgment in the case of the *Prosecutor v. Zdravko Tolimir*. Tolimir was charged with 8 counts of genocide, war crimes, and crimes against humanity under two joint criminal enterprises, the first "to murder the able-bodied Bosnian Muslim men from the enclave of Srebrenica, between approximately 11 July and 1 November 1995", and the second "to forcibly remove and deport the Bosnian Muslim population from the enclaves of Srebrenica and Žepa," beginning with the 7 March 1995 Directive and until the actual removal of populations in July and August of 1995. As a foreseeable consequence of both JCE's, Tolimir was also charged with various other crimes: opportunistic killings of smaller groups of men, targeted killings of three Bosnian Muslim leaders of Žepa, and other persecutory acts.

The Chamber found, by majority, Judge Nyambe dissenting, that the Directive of 7 Mar 1995 by Radovan Karadžić was evidence of the beginning of the policy of forcible removal through the creation of an unbearable situation in Srebrenica and Žepa through careful and well-planned military operations and was the start of a period of intensive activity by the VRS in blocking humanitarian aid and a variety of other operations designed to make "life unbearable with no hope of survival" for the civilian population.

As evidence of the first JCE of murder of the able-bodied men, the Chamber found, by majority, that the meetings at the Hotel Fontana on 11 and 12 July 1995, led by Ratko Mladić and attended by Radoslav Janković, Tolimir's Intelligence Officer, Mladić stated that the Muslim population could either "survive or disappear"; and that before the third meeting members of the security organs, under Tolimir's direct command, referred to a plan to murder the men. The JCE was implemented from that point onwards in various killings all around the enclave.

The Trial Chamber, by majority, found evidence of intent to destroy the Bosnian Muslim population of eastern Bosnia, and evidence of serious bodily or mental harm that amounted to genocide both in the murder of 4,970 men, and in the forcible removal of women elderly and children. Most notably, the Chamber also found that the murder of Bosnian Muslim leaders, even though only three in number, was the core of the Bosnian Muslim leadership in Žepa and also constituted genocide. The Chamber also made specific findings on all other crimes in the indictment.

As for Tolimir's individual responsibility, the Chamber found, by majority, that Tolimir was Mladić's "right hand" man, that he was fully informed about all operations on the ground, and that he not only had knowledge of the genocidal intent of others, but shared that intent himself. He also shared the intent to forcibly remove, and actively furthered all the crimes in the indictment.

The majority sentenced Tolimir to life imprisonment finding that his education and his high position of control were factors in aggravation and found no factors in mitigation.

Judge Nyambe dissented from the entire judgement. This is one of the only instances where there has been such diversity in the findings of judges in a trial judgement. She found that all of the evidence connecting Tolimir with the crimes was "entirely circumstantial, based on presumptions, suppositions" and chain of command, and that this simply did not meet the standard of proof beyond a reasonable doubt. In particular she discounted the evidence of Momir Nikolić and Dražen Erdemović, given in their plea agreements as being tainted by self-interest, she minimised the importance of Directive 7 when taken in context, and disagreed with the characterisation of the Hotel Fontana meetings. As regards the JCE to murder, she found that the separation of the men could originally be explained as a legitimate attempt to address war crimes against Serbs, and that the killings were not part of a plan, but uncoordinated acts of criminally-minded VRS soldiers who took advantage of the general disorder. In conclusion, she found Tolimir lacked the requisite intent, and gave specific examples contradicting a finding of criminal intent. In Judge Nyambe's view, she would acquit Tolimir of all

Prosecutor v. Hadžić (IT-04-75)

The trial of former Krajina Serb political leader Goran Hadžić resumed on 7 January with Prosecution witness Davor Strinović, a forensic medicine expert from Zagreb. In his duty as a member of the Commission for Detained and Missing Persons of the Croatian government, he conducted post- mortems and identification of bodies from, inter alia, the Ovcara farm near Vukovar,Dalj, Erdut and Lovas. Hadžić, charged with crimes against victims buried there, was absent during the Monday session, after waiving his right to be present.

Strinović explained when and where first post mortems had been conducted as well as the procedures after the end of the conflict. He had been actively involved in identifying the victims, who total around two hundred. He further testified about the finding of a mass grave by US forensic anthropologist Clyde Snow in 1992 and the recovery and exhumation, which had been protracted until 1996. Following data from the Commission for Detained and Missing Persons, 986 persons, mostly Croats, are still missing from the conflict that lasted between 1991 and 1992. According to Strinović, almost 950 bodies of the victims of the conflict in Croatia have been recovered. As he said, his Commission estimates that more than 11,000 persons were killed in the conflict.

During cross-examination. the defence focused on two issues, the first concerned the secrecy of the exhumation data, carried out by the Croatian Commission for Detained and Missing Persons. Strinović was unable to answer the question why case files containing requests and orders for the exhumation, the records of participants and photographs and videos had not been made accessible for the Prosecution or Defence. Secondly, defence focused on the distinction between forensic medicine experts and pathologists and asked the witness why both professions were involved in the exhumations, as exhumation records reveal. Strinović explained that owing to the large number of victims, both professionals were neces-


Goran Hadžić

sary.

On 10 January, the trial continued with the evidence of prosecution expert Christian Nielsen, Professor of South-eastern European studies at the University of Arhus in Denmark and former analyst for the Office of the Prosecutor.

Nielsen's report for the Hadžić trial included historical and political developments in the former Yugoslavia and Croatia from 1990 to 1993 as well as an analysis of the structure of the Ministry of Interior of self-proclaimed Serb entities. He explained that Serbs' actions to establish their autonomous regions in Krajina, Slavonia, Baranja and Western Srem and later Western Slavonia was a response to Croats strive towards independence. Furthermore he described the dynamics between Serbs and Croats, which were aggravated by media, political parties' actions, rhetoric and manipulations. The prosecutor pointed out the good relationship between Serb leaders in Croatia and Bosnia, in reference to, inter alia, Momcilo Krajišnik's letter of support.

During the final part of Nielsen's examination as a prosecution witness, which took place on 11 January, the prosecutor insisted on existing connections between Goran Hadžić and Zeljko Raznatovic (Arkan). According to Nielsen's report, many documents exist that speak of close ties between Hadžić and Arkan.

Christopher Gosnell, Defence Counsel, contested the allegations by dismissing this prosecution strategy as a plain attempt to discredit Hadžić, since "the 'easiest' way to discredit someone was to link him with Arkan". The defence contested the credibility of the witness by stating that his expertise had been based on analysing the police in Republika Srpska, instead of focusing on Croatia.

Nielsen's testimony was postponed until further notice due to the witnesses other obligations. The Trial Chamber will rule on whether to admit Christian Nielsen's report into evidence and in what manner, after Nielsen completes his evidence.

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

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

by Marie Leonie Monteiro and Nafissa Guey, Legal Interns, Office of Public Counsel for the Defence

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

Summary of the

"Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons",

and of the

"Dissenting opinion of Judge Christine Van den Wyngaert in the decision relating to the implementation of Regulation 55 of the Rules of the Court and pronouncing the disjunction of the charges made against the accused",

ICC-01/04-01/07-3319, 21 November 2012.

On 26 September 2008, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that that during the attack on Bogoro on 24 February 2003, Germain Katanga and Mathieu Ngudjolo jointly committed, through other persons, war crimes and crimes against humanity. After the presentation of evidence, the oral and written submissions as well as the oral statements of the two accused it appeared to the Majority of the Trial Chamber that there was evidence to the effect

that Germain Katanga contributed to the preparation of the attack on Bogoro.

According to the Trial Chamber, Germain Katanga's mode of participation could be considered from a different perspective than that of the Confirmation Decision and it was therefore appropriate to implement regulation 55 of the Regulations of the Court.

Accordingly, the Majority informed the parties and participants that the legal characterisation of facts relating to Germain Katanga's mode of participation is likely to be changed and that the Accused's responsibility must henceforth also be considered having regard to another paragraph of article 25(3) of the Statute and proposed a change to the legal characterisation of one of the modes of liability, for the Accused Germain Katanga alone. The responsibility of the accused is no longer solely on the basis of the commission of a crime in the form of indirect co-perpetration (Article 25(3)(a)) but must henceforth be considered on the basis of the complicity in the commission of a crime by a group of persons acting with a common purpose (Article 25(3)(d)).

The decision severs the charges against Mathieu Ngudjolo.

II. Analysis

1. Legal basis

Provided a Trial Chamber does not overstep the factual and circumstantial framework described in the charges, Regulation 55 allows it to modify the legal characterisation of the facts to accord with the crimes under the Statute or to accord with the form of participation of the accused. In the *Lubanga case*, the Appeals Chamber clearly and unanimously upheld the legality of regulation 55 in the light of the provisions of the Statute.

The Majority recalled that the application of Regulation 55 is a power vested in Trial Chambers. Although the proceedings are at a very advanced stage, the Majority found that the application of Regulation 55 is without prejudice to the right to a fair trial.

2. Respect for the rights of the Accused in this case

a. The implementation of regulation 55 at the deliberation stage

Regulation 55 of Regulations of the Court stipulates that the Trial Chamber may change the legal characterisation of facts "at any time during the trial" as long as the rights of the accused set forth in paragraphs 2 and 3(a) and (b) of the Regulation are effectively guaranteed.

The Majority underscored that re-characterisation customarily occurs when the judges are in possession of all the evidence tendered, the written submissions of the parties and participants constituting a useful and final analysis of their respective positions and the statements made during their final oral submissions.

For the Majority, nothing stands in the way of implementing Regulation 55 considering that it appeared in this case that the application of Regulation 55 was not, *a priori*, violating any of the rights of the accused.

b. The right to be informed promptly of the nature, cause and content of the charges against him

A modification of the legal characterisation of the facts can only be envisioned in respect of the facts and circumstances described in the charges which ensures perfect compatibility between Regulation 55 and on the rights of the Accused who, pursuant to article 67 (1)(a) of the Statute, has the right to "[b]e informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks."

According to the Majority, the legal characterisation proposed to determine the responsibility of the Accused on the basis of the mode of complicity defined in article 25(3)(d)(ii), precisely reflects the facts described in the *Decision on the confirmation of charges*. The intended requalification still relates to the attack on Bogoro and on the crimes set out in the Pre-Trial Chamber's Decision.

The Majority stated that they are well within the factual description on the basis of which the Defence was able to express itself fully during the trial.

c. The right of the accused to have adequate time and facilities for the preparation of his defence.

The Regulation provides many guarantees with re-

gard to the protection of the rights of the accused, in the instant case, and although the proceedings are at an advanced stage, the parties and participants are placed by the Chamber in a position to exercise their rights and file any necessary submissions.

The Majority therefore is of the view that the Katanga Defence should be provided with all the information possible so that it is able to file observations which are as specific as possible.

In the view of the Majority, with regard to the contextual as well as the specifics elements of war crimes and crimes against humanity, the Defence has already expressed its position regarding this question and Katanga has already responded to the majority on the factual questions that were asked within the framework of article 23-3-d of the Statute.

d. The right to be tried without undue delay

The Majority recalled that the Appeals Chamber has specified that a requalification would not necessarily lead to an excessive delay. With regard to the case law of the International Criminal Tribunal for Rwanda Appeals Chambers and the European Court of Human Rights, the Majority concluded that every situation deserves a case by case examination.

The Majority stated that, if it is aware of the fact that an implementation of the Regulation at this stage of the proceeding would result in the lengthening of the proceedings, this would not mean that the rights of the two accused would intrinsically be undermined. First of all because Ngudjolo is being treated distinctly and secondly because the Majority is convinced that it is possible to allow the accused to prepare his or her defence in an efficient and effective manner without increasing the length of the proceedings to such an extent that it would result in excessive delay.

The Majority concluded that the activation of Regulation 55 could have an impact on the length of the proceedings but cannot at this stage of the proceedings be a violation of the rights to be judged without excessive delay.

e. The right not to be compelled to testify against oneself

In the view of the Majority, the recourse to this procedure also does not imply a disregard to the right to not have to incriminate oneself. This right is a consequence of the right to remain silent; its objective is to ensure that no confessions will be made under duress, pressure or as a result of subterfuge. In the present case the accused has freely chosen to testify and answer questions in the presence of his counsel. He was not put under pressure to do it. On the contrary, he spontaneously provided the Chamber with diverse accounts knowing that this information could be used against him. In addition, the parties were fully aware of the existence of Regulation 55.

3. Modalities of the application of regulation 55 for the parties and participants.

The Majority has decided that the participants to the procedure will need to be informed that the legal qualification of the facts can be modified. This will give room for observations, extra time and necessary facilities to prepare themselves. The Prosecutor, on the other hand, is not authorised to present new evidence because such a possibility would constitute an undue advantage.

4. Severance

The implementation of the Regulation only concerns Germain Katanga, the charges against Mathieu Ngudjolo have therefore been ordered to be dealt with separately. In addition, the victims validated to take part in the initial proceedings have been authorised to pursue their participations in both proceedings.

Dissenting opinion of Judge Christine Van den Wyngaert:

In her dissenting opinion, Judge Christine Van den Wyngaert mentioned two key points relating to the 25 (3)(d) notice decision. In her first point she elaborates as to why she believes that the notice decision exceeds the facts and circumstances of the charges and in the second she describes why the notice decision is, in her opinion, unfair. Her primary objections mentioned in her first point have to do with the fact that she believes that the Majority exceeded the boundaries of Regulation 55 by relying on subsidiary facts in the decision and also changed the narrative of the charges so fundamentally that it exceeded the facts and circumstances described in the charges. In her second point she mentioned the following three reasons why she believes the decision is unfair. The Majority threatens the right to a fair and impartial trial in the

proceedings; a recharaterisation to Article 25(3)(d)(ii) was not reasonably foreseeable to the defence, thus putting the accused's rights under both Article 67(1)(a) and 67(1)(g) in jeopardy; and finally because triggering Regulation 55 at this point in the proceedings creates an undue delay under Article 67(1) and is incompatible with the Trial Chamber's obligation under Article 64(2) to ensure that the trial is expeditious.

Notice decision exceeds the facts and circumstances of the charges

It is stipulated under Regulation 55(1) that the Chamber may only change the legal characterisation of facts and circumstances described in the charges. The Appeals Chamber stated that the text of Regulation 55 "only refers to a change in the legal characterisation of the facts, but *not to a change in the statement of the facts.*

1. Majority exceeds the boundaries of Regulation 55 by relying on subsidiary facts in 25(3)(d)Notice Decision

Pursuant to Regulation 55(1) only material facts can be relied upon for a proposed recharacterisation. Since subsidiary facts, by definition, are not part of the 'facts and circumstances described in the charges', and are not confirmed by the Pre-Trial Chamber, they do not form part of the factual matrix that can be recharacterised. It is of the opinion of Judge Van den Wyngaert that the majority is therefore misguided when it suggests, in paragraph 32, that Regulation 55 allows the Chamber to pick and choose any fact from the Confirmation Decision in order to meet the legal requirements of a different form of criminal responsibility. Unfortunately, neither the Prosecution, nor the Pre-Trial Chamber in this case made any effort to clearly separate the material facts from the subsidiary facts. What is more, she argues that to the extent that there is ambiguity on this point, doubts should be resolved in favour of the accused.

2. The 25(3)(d) Notice Decision changes the narrative of the charges so fundamentally that it exceeds the facts and circumstances described in the charges

It is of the view of Judge Van den Wyngaert that the Majority is "guilty" of fundamentally changing the narrative in the case as the Majority does not explain on what basis it proposes to apply Article 25(3)(d)(ii). She believes this is impermissible if the motive is to reach a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the Prosecution.

Notice Decision is unfair

Judge Van den Wyngaert finds the guarantees contained in paragraphs (2) and (3) of the Regulations, by themselves, insufficient to ensure a fair trial. The Trial Chamber is bound by its general obligation to ensure that the trial is fair and expeditious (Article 64 (2)) and must guarantee that the rights provided in Article 67 are fully respected.

1. With the 25(3)(d) Notice Decision, the Majority threatens the right to a fair trial and impartial proceedings

The Majority argues that it is impossible to say that triggering Regulation 55 in the deliberations stage of the proceedings is unfair. According to Judge Van den Wyngaert this is true in abstract terms: by triggering Regulation 55 to change the mode of liability at the end of the deliberation stage, the Majority has violated its obligation to ensure the trial is conducted fairly and impartially.

2. A re-characterisation to Article 25(3)(d) was not reasonably foreseeable to the defence, thus putting the accused's right under both Article 67(1)(a) and 67 (1)(g) in jeopardy

Judge Van den Wyngaert considers the 25(3)(d) Notice Decision to have been entirely unforeseeable to the defence. She elaborates by explaining that it was rendered at a point in the proceedings when the defence was unable to effectively respond to it. Article 67(1)(a) of the Statute requires that the accused is to be "informed promptly and in detail of the nature, cause and content of the charge". Article 67(1)(g) of the Statute guarantees the accused the right "not to be compelled to testify or to confess guilt and remain silent"; this right can be implicated by a Regulation 55 (2) decision if the Chamber uses the accused's own testimony at trial as a justification for considering recharaterisation. She is of the view that both of these rights are infringed by the Majority's approach.

3. The amount of time needed to effectively respond to the 25(3)(d) Notice Decision would necessarily create an unfair delay

The 25(3)(d) Notice Decision also has severe implications for the timeframe of these proceedings according to Judge Van den Wyngaert. Article 67(1)(b) of the Statute gives the accused the right "to have adequate time and facilities for the preparation of the defence". Judge Van den Wyngaert explains that this right is of such significance in the present context that it is recapitulated with additional language in Regulation 55(3)(a), which provides that the accused must be given "adequate time and facilities for the *effective* preparation of his or her defence". Article 67(1)(c) of the Statute also guarantees the right of the accused "to be tried without undue delay".

It is of her opinion that if the Majority proceeds to examine the facts under Article 25(3)(d)(ii), the accused will have to defend himself against a new mode of criminal responsibility. This may have the effect of triggering an entirely new trial, as the bulk of evidence which the defence for Germain Katanga introduced in this case is irrelevant to Article 25(3)(d)(ii). To meaningfully defend itself against the charges under Article 25(3)(d)(ii), the defence may therefore have to present an entirely new case. Accordingly, allowing the accused to fully exercise his rights under Article 67(1)(b) of the Statute and Regulation 55(3)(a) – as the Chamber must when it triggers Regulation 55 – risks causing a *per se* undue delay under Article 67(1)(c) of the Statute. This would entail lengthy additional proceedings at a point in time where the trial should already have come to an end. Judge Van den Wyngaert argues that, surely, undue delay cannot reasonably be blamed on the defence, which is entitled to exercise its rights to the fullest extent.

The Extraordinary Chambers in the Courts of Cambodia

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the Extraordinary Chambers in the Courts of Cambodia (ECCC)

Mr Ang Udom and Mr Michael Karnavas Assigned as Defence Counsel to represent a suspect in case 003

The Defence Support Section (DSS) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has assigned Mr. Ang Udom as the Cambodian Co-Lawyer, and Mr. Michael G. Karnavas as the Foreign Co-Lawyer, to represent a Suspect named in the Second Introductory Submission submitted by the International Co-Prosecutor to the Office of the Co-Investigating Judges on 20 November 2008. The Second Introductory Submission is part of the Case File in Case 003. The identity of any Suspect named in the Second Introductory Submission remains confidential. Mr. Ang Udom and Mr. Michael G. Karnavas are experienced criminal defence lawyers currently practicing before the ECCC, where they represent Mr. Ieng Sary, an accused in Case 002. This is the first time in the history of the ECCC that the DSS has assigned any lawyer to represent multiple suspects or accused persons simultaneously. In making the assignment, the DSS took into consideration the Suspect's expressed preferences; the lawyers' overall experience in international criminal and humanitarian law; their level of familiarity with the prevailing rules, practices and procedures at the ECCC; their knowledge of the historical and political context of the Democratic Kampuchea era; and all the applicable conflict waivers. The Suspect has claimed indigence.

Legacy of the Extraordinary Chambers in the Courts of Cambodia

An article written by Michael Karnavas was published in the Cambodia Daily on 12 December 2012—the article is available here: http://www.cambodiadaily.com/opinion/salvaging-the-khmer-rouge-tribunals-legacy-6692/

DEFENCE ROSTRUM

The turbulent process of the Egyptian constitution - The situation in Egypt explained by an Egyptian Judge

Interview conducted in December 2012

by Sarah Coquillaud

Good morning Judge,

Good morning.

Could you tell us a little bit about your background and which position you currently hold in Egypt?

I am a Judge at the Egyptian Ministry of Justice working in a city nearby Cairo. I am from a judicial family without any political history.

I graduated from the faculty of law of Cairo University in 2003 with distinctions. I worked as lawyer from 2003 to 2005, as a prosecutor from 2005 to 2012 and finally as a judge from October 2012 to present.

What is your view on the current events in Egypt? Why such a mobilization in the streets of Cairo now?

I believe it is a pure case of polarization. Egypt is divided into two factions: on the one hand the Islamists, who include the Muslim Brotherhood (i.e. the ruling party) and the Salafists, and on the other hand the civilians, who include liberals (like Mohamed Al-Baradei and all the defeated candidates of the presidential elections such as Amir Musa and Hamdeen Sabahy), socialists, Judges, prosecutors, journalists, lawyers, moderate people (which constitute the majority of the Egyptian people) and Christians.

This polarization may lead to civil war because every party is trying to defend its opinions. Islamists have a 'conspiracy theory' according to which liberals want to defeat the president and they are against the application of al-sharia (i.e. Islamic rules); in addition, they are looking at the liberals as infidels who do not want to apply al-sharia. So they support whatever is issued by the presidency without thinking even if they are against the freedom of persons and the principles of the revolution of 25 January. On the contrary, Liberals are looking forward to a new constitution which respect human rights and social justice and allow diversity in the society. In addition, they are opposing a situation whereby the country institutions would be transformed so that they become led by Islamists who would consequently be able to dominate the State. Early December 2012 marked the first direct confrontation between both sides in front of the presidential palace. It resulted in 10 dead and hundreds of wounded.

The origin of this problem dates back to the final stage of the presidential election between the current president, Mohamed Morsy, who represented the Muslim Brotherhood and the other candidate, Ahmed Shafiq who was the last Prime Minister of the Mubarak era. The Liberals supported Mohamed Morsy under some conditions. First and foremost, that he would reconstitute the appointed committee which was predominantly composed of Islamists in order to draft a constitution and to make a presidency board composed of boh revolutionaries and liberals. But he did not do anything of that so there is now a lack of trust between Islamists and Liberals. Furthermore, he issued a decree on 21 of November 2012 which provided immunity from judicial review for the drafting committee although all liberals withdrew from it and there are numerous pending cases before the Constitutional Court regarding the legality of the formation of the committee. The court was supposed to deliver its judgment on 2 December 2012. Islamists surrounded the court and prevented judges to enter it for over two weeks.

Last but not least, in a recent Decree, Mohamed Morsy sacked the Prosecutor General and appointed another one without the permission or any negotiations with the Supreme Council of Judges. So the Judges and prosecutors are suspending their works as an objection to these decisions that constitute an infringement to the independence of Judges.

What is your position on the current proposal for a Constitution?

The proposed constitution contains in its dispositions the independence of the judiciary as all the previous constitutions did, but it does not give any details as to how to apply such independence in practice, something that was previously detailed in the former texts.

The Judiciary is not independent in Egypt as it is the president who selects the Prosecutor Generals and the audit or inspection departments are subject to the Ministry of Justice and not to the Supreme Council of Judges.
The Committee refused to accept the proposals based on the lack of guarantees for a real independence of the judiciary as raised by many judges.

As a judge, what is your position on the recent decree you mentioned earlier that seem to infringe on the independence of the judiciary?

The decree of 21 November 2012 stipulated in the second clause that all decrees, laws and decisions issued by the president from 30 June 2012 till the election of a new lower parliament (i.e. people's assembly) – the lower parliament is supposed to be formed 60 days after the declaration of the new constitution - are protected and valid and they cannot be reviewed by judicial authorities. All cases before Judiciary are therefore cancelled.

In the third clause, he stated that the Prosecutor General will be appointed for one term of 4 years, applicable immediately and he will be appointed by another Prosecutor.

In the fifth clause, it is stated no judicial authority has the power to dissolve the Higher Parliament or the Draft Committee for the Constitution.

It is also worth noting that Judges and Prosecutors are subjected to the Supreme Council of Judges which consists of 7 persons (the Head of the Court of Cassation and the two eldest of his deputies, the three eldest Appeals judges and the Prosecutor General).

According to the previous decree, all courts even the Cassation court (for the first time in history) are suspending their works as an objection to the interference by the executive authority in the work of the Judiciary as:

- *it sacked the Prosecutor General and appointed another without the permission of the Supreme Council and*
- *it gave immunity to it decisions from judicial review.*

By the way, President Morsy issued another Decree on 8 December 2012 and cancelled the decree of 21st of November but all the consequences of the latter are still valid which means the sack of the Prosecutor General is still valid.

Hence the strikes.

What are your expectations for the future Constitution? Which substantive measures would you like to be implemented and in which way?

There will be a referendum about this constitution on 15 and 22 of December, but the problem is that this constitution does not represent all factions in the society but it only represents Islamists so far. So I hope the result will be 'NO' in order to reconstitute another committee to represent all people, otherwise the Liberals will not accept the result and will protest against it for it to be abandoned, which could eventually lead to a bigger crisis.

I hoped that President Morsy will cancel the new decree and referendum and reconstitute another Committee.

Regarding the referendum, here is a leaflet that circulated and highlights 20 reasons to vote 'no' to the referendum:

Egyptians-Without-Borders

20 REASONS TO VOTE NO

We found 20 problematic articles in the constitution itself.
They are listed here in numerical order to make it easy to locate them in the constitution.

1-Article 2: even though it was agreed to keep this article the same as in 71 constitution, article 219 was added to define article 2 as per Islamists views.

2-Article 15-20 ignored Tourism as a major sector of the economy.

3-Article 48: it is worded in such a way that allows the government to close any media that the government does not like, but by court order.

4-Article 51 gives the government the right to dissolve any Party or Society that the government does not like (it should be limited to its board of directors not the organization itself)

5-Article 52 gives the government the right to dissolve professional Syndicates that the government does not like (it should be limited to its board of directors not the syndicate itself)

6- Article 70: it does not criminalize child labor of 6 years old or older children

7-Article 72 does not criminalize human trafficking (it was eliminated by salafies).

8-Article 76 introduces a new concept that punishment for crimes is based on "constitution articles" which opens the door to apply sharia without approved laws, which regulate how and under what conditions.

9-Article 128. There is NO definition of what is the role of the Shoura Council. !! (only the role of House of Representatives was defied in article 116) so why it is a must to keep the shoura council ??

10-Article 139. Contrary to what we were told, the President does not appoint the Prime Minister from the Party of Majority in the House of Representative. He can appoint anyone he likes first., if the PM program is not approved, then the President will appoint a new PM from the majority party ????

11-Article 139 to 202 contrary to what we were told, the President authority did not shrink. It is the same as Mubarak's or more.

12-Article 141 contrary to what we were told, the system is still Presidential not mixed, and the President uses the government as his staff and gives them "directions" to do their jobs.

13-Article 153 There is NO Vice President position. The PM will take over if the President cannot perform his role temporality.

14-Article 159 contrary to what we were told, the responsibilities of the PM is the same or less. So, the system is still purely Presidential

15-Article 176 it targets the Supreme Constitution Court and reduces its membership from 19 to 11 to weaken it and remove certain judges from it.

16-Article 198 allows for civilians to be prosecuted in Military Courts, still after the January 25 revolution!!!.

17-Article 199 the President still is the supreme commander of the Police forces.

18-Article 215 establishes a new Media National Council to regulate the different media (press and TV) within set of vague parameters.

19-Article 230 gives the current shoura council, which was elected by 7% of the voters and has mainly islamists, the legislation responsibility till the new house of representatives is elected.

20-Article 236 is added as revenge from certain members of the Supreme Constitutional Court. It defines which members stay in the court and who leaves it. This is not something a constitution ever gets into. The constitution should be above these matters.

IF YOU AGREE VOTE NO,

IF YOU DISAGREE TELL US WHY WE SHOULD VOTE YES

BLOG UPDATES

- Kevin Jon Heller, **Can the Security Council Implicitly Amend the Rome Statute?,** 15 January 2013, available at : http://opiniojuris.org/2013/01/15/can-the-security-council-implicitly-amend-the-rome-statute/

- Kenneth Anderson, **Jennifer Daskal in the NYT on why not to close Guantanamo (for now),** 11 January 2013, available at: http://opiniojuris.org/2013/01/11/jennifer-daskal-in-the-nyt-on-why-to-not-close-guantanamo-for-now/

- Elli Goetz, **ICC Trial chamber 2 permits witness preparation before evidence in the Hague,** 5 January 2013, available at: http://www.internationallawbureau.com/index.php/icc-trial-chamber-2-permits-witness-preparation-

- Kevin Jon Heller, **A few thoughts on a Syria Referral,** 14 January 2013, available at: http://opiniojuris.org/2013/01/14/a-few-thoughts-on-a-syria-referral/

- William A. Schabas, **Ukraine ordered to reinstate Supreme Court Judge by European Court of Human Rights,** 11 January 2013, available at: http://humanrightsdoctorate.blogspot.nl/2013/01/ukraine-ordered-to-reinstate-supreme.html

- William A. Schabas, **UN General Assembly Resolution indicates further progress on Capital Punishment,** 22 December 2012, available at: http://humanrightsdoctorate.blogspot.nl/2012/12/un-general-assembly-resolution.html

PUBLICATIONS AND ARTICLES

Books

Kai Ambos, *Treatise on International Criminal Law: Volume 1: Foundations and General Part* (15 April 2013), Oxford University Press.

Mangai Natarajan, *International Crime and Justice* (5 February 2013), University Press.

Gideon Boas, William Schabas, Michael Scharf, *International Criminal Justice: Legitimacy and Coherence* (13 February 2013), Edward Elgar Publishing.

Andre Klip, Goran Sluiter, *Annotated Leading Cases of International Criminal Tribunals—volume 30: The International Criminal Tribunal for the former Yugoslavia 2006* (14 March 2013), Intersentia.

Fleur Johns, *Non-Legality in International Law: Unruly Law (Cambridge Studies in International and Comparative Law)* (28 February 2013), Cambridge University Press

Robert Kolb, *Research Handbook on Human Rights and Humanitarian Law (Research Handbooks in Human Rights Series)* (March 2013) Edward Elgar Publishing

Articles

Charles Garraway, (2012), "*Comments on Illegal War and Illegal Conduct: Are the two related?"* , Netherlands International Law Review, Volume 59, Issue 3, pp 473-492.

Stephanie Gosnell Handler, (2012), "*The New Cyber Face of Battle: Developing a legal approach to accommodate emerging trends in Warfare",* Stanford Journal of International Law, 48 Stan J Int'l L 209.

B. P. Pieters, (2012), "*Inleiding Humanitair Oorlogsrecht (Introduction to the Humanitarian Law of War)*, Netherlands International Law Review, volume 59, issue 3, pp 502-505.

Anthea Roberts & Sandesh Sivakumaran, (2012) "*Lawmaking by non-state actors: engaging Armed Groups in the Creation of International Humanitarian Law",* Yale Journal of International Law, Volume 37, issue 1.

Ozan O. Varol, (2012), "*The Democratic Coup d'Etat",* Harvard International Law Journal, 53 harv, Int'l. L.J. 292, (2012).

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WE'RE ON THE WEB!

WWW.ADCICTY.ORG

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EVENTS

Towards a Human Rights-based Paradigm of Integration? Assessing the Contribution of International Human Rights Law

Date: 6 February 2013

Venue: Oxford Law Faculty, Oxford University

More info: http://www.law.ox.ac.uk/event=12103

Sir David Williams Lecture : 'The Relationship between The European Court of Human Rights and National Constitutional Courts

Date: 15 February 2013

Venue: Faculty of Law, Cambridge University

More info: http://www.law.cam.ac.uk/press/events/2013/02/sir-david-williams-lecture-the-relationship-between-the-european-court-of-human-rights-and-national-constitutional-courts/2072

OPPORTUNITIES

Senior Legal Officer

International Residual Mechanism for Criminal Tribunals, The Hague
Closing date: 9 February 2013

Humanitarian Affairs Officer

Office for the Coordination of Humanitarian Affairs, Geneva
Closing date: 16 February 2013

Chief of Service (3 posts)

United Nations Office, Geneva
Closing date: 12 March 2013