



ADC-ICTY Newsletter

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ICTY News

- Ece Aygun, Sofie Breslau, James Jackson, Taylor Olson, Jovana Parades

* The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Criminal Tribunal for the Former Yugoslavia.

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

A pre-trial status conference was held on 23 September 2010 regarding the retrial of *Haradinaj et al.* where the pre-trial Judge Moloto has requested that the parties file a joint statement of agreed fact by 18 November. During the status conference the major point of contention was the scope of new evidence that can be introduced by the Prosecution during the trial. In other words, the question is whether the Prosecution will be restricted to calling the two witnesses who did not appear during the original trial and whose absence had been instrumental for the Appeals Chamber's decision to quash the decision by the Trial Chamber or whether the Prosecution could call other witnesses to testify.



Idriz Balaj, one of the defendants in *Haradinaj et al.*

This contention is linked with the recent disagreements over the merits of the decision of the Appeals Chamber in *Haradinaj* as the dissenting judge in the case, Judge Patrick Robinson, remarks that "there are boundaries to what an appellate body can do" and that "an appeal is not a retrial." He further notes in his dissenting opinion that "the mere fact that the Appeals chamber would have exercised discretionary power differently is not a sufficient basis for invalidating the Trial Chamber's exercise of that discretion, provided the Trial Chamber has properly exercised jurisdiction." Judge Patrick Robinson, disagrees with the majority opinion on counts that the Trial Chamber failed to take sufficient steps to counter witness intimidation. He quoted the three extensions granted to the Prosecution by the Trial Chamber and the fact that the Trial Chamber remained open to the possibility of granting a further extension upon demonstration of a dramatic change of circumstances.

As it stands, the Prosecution has committed to filing its pre-trial brief by 30 November 2010 and the Defence has been asked to respond by 14 December; the question of the scope of new evidence remains unresolved.

ICTY Cases

Cases on Appeal

Milan Lukić & Sredoje Lukić (IT-98-32/1)

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)

Prosecutor v. Momčilo Perišić (IT-04-81)

The Defence case continued with the testimony of Siniša Borović from 20-23 September 2010. Sinisa Borovic, a former Yugoslav Army Officer, served as Perisic's chef de cabinet between November 1994 and September 1996. During his testimony he commented on the relationship between former President Slobodan Milosevic and the Yugoslav Army, meetings with General Mladic and the situation in Srebrenica, as well as incidents in Sarajevo. In relation to the incident in summer 1995 at the Markale market in Sarajevo, Borović stated during testimony that "it seemed, from the very outset, very unconvincing that it had been fired from positions marked as positions of Serb forces".



Momčilo Perišić

The trial is now adjourned until 4 October 2010.

Prosecutor v. Tolimir (IT-05-88/2) "Srebrenica"



Zdravko Tolimir

from Srebrenica 'requested on their own' to leave the enclave and the 'UN forces helped them'. Bringing up a letter the mayor of Srebrenica sent to President Alija Izetbegovic on 9 July 1995, Tolimir argued that the military and political leadership of the enclave had a detailed plan to leave Srebrenica even before Mladic's troops launched the attack.

In the week of 20 September 2010, in the case against Zdravko Tolimir, three witnesses were brought before the court; Joseph Kingori, UNMO member in Srebrenica during the relevant period, Richard Wright, an anthropologist, and Dušan Janc, investigator in the Office of the Prosecutor of the ICTY. In his cross examination of Joseph Kingori, Zdravko Tolimir, the accused, held that Muslims

ICTY: Establishment: 1993 by Security Council Resolution 827 Establishment of Defence Counsel: Association of Defence Counsel, 2002 (September) under Dutch law by a decision of the ADC-ICTY General Assembly

ICTR: Establishment: 1994 by SC Resolution 955 Establishment of defence counsel: Association Des Avocats de la Defense, 2002 (March) by a decision of the ADAD General Assembly

ICC: Establishment: 2002 when the Rome Statute entered into force Establishment of defence counsel: The Office of Public Counsel for the Defence, 2002 pursuant to regulation 77 of the court

STL: Establishment: 2007 pursuant to SC resolution 1664 (2006) and 1757 (2007) Establishment of defence counsel: The Defence Office, Head of Office appointed in 2009 pursuant to Article 13 of the statute of the Tribunal and it is one of the four organs of the Special Tribunal

SCSL: Establishment: 2002 by an Agreement between the United Nations and the government of Sierra Leone pursuant to Security Council resolution 1315 Establishment of defence counsel: The Defence Office-Registry, 2007, article 13 of the court's statute and is included under the Registry

ECCC: Establishment: 2001 by the Cambodian government and the United Nations. It functions, however, independent from the United Nations Establishment of defence counsel: Defence Support Section, 2001 and works together with the Bar Association of the Kingdom of Cambodia

"The Defence case continued with the testimony of Siniša Borović from 20-23 September 2010."

- James Jackson

News from International Courts and Tribunals

International Criminal Court

The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Decision on the “OPCD Request for authorization to submit observations concerning Guardian Article dated 15 July, 2010” on 13 September

- Kotomi Moriguchi

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Pre-Trial Chamber I issued a decision dismissing the request by the OPCD concerning the Guardian newspaper article titled 'Now end this Darfur Denial'.

The OPCD requested the Chamber (i) to either authorize the OPCD to submit observations on the Guardian article, published by the OTP, that infringes the presumption of innocence or affects the fairness and impartiality of the proceedings (ii) or to proprio motu seize itself on this issue. The Chamber found that 'the behaviour neither occurred in the context of proceedings, nor was in violation of any direction given by the Court.' Hence, the Chamber rejected this request based on the fact that the Prosecutor's article falls outside the scope of the powers vested in the Chamber by rules 170 and 171 of the Rules of the Court.



Omar al-Bashir

The Guardian newspaper article was posted by the Prosecutor, Luis Moreno Ocampo and concerned the issuance of the second arrest warrant on 12 July 2010. The article contained some inaccurate and unclear statements about the findings of the PTC. Particularly, the statement that the PTC "found that Bashir's forces have raped on a mass scale in court and also found that Bashir is deliberately inflicting on the Fur[...]" were highly controversial.

This is the third motion concerning the Guardian article and all the requests have been dismissed. (Decision on 30 July 2010 requesting participation of the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG) as an amicus curiae, decision on 24 August 2010 requested by Ad-hoc counsel for the Defence, and this OPCD request.) These three decisions demonstrate the ongoing issue of the challenges faced by the Defence to effectively enforce the presumption of innocence, which is of central importance to the proceedings.



Omar al-Bashir is the first sitting Head of State to be indicted by an international court.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)”, 14 September 2010.

- Kari Panaccione

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The Trial Chamber in Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui recently issued a disclosure decision that extends defence disclosure obligations further than ever before at

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-Kotomi Moriguchi

“ how heavily should efficiency of the proceedings and ability of the Prosecution to prepare be weighed against traditional tenets of criminal procedure ... ?”

-Kari Panaccione

the ICC. The Chamber ordered the Defence to disclose, information relating to the identification of Defence witnesses and witness statements or summaries thereof, among other things. This obligation arose under Regulation 54 of the Regulations of the Court, which - beyond the parties' normal disclosure obligations - permits the Chamber to order disclosure of various information “in the interests of justice.” Specifically, the Chamber found that these disclosures would allow the prosecution to adequately prepare its case and ensure the efficient conduct of the proceedings.

The Chamber had previously found, in *Prosecutor v. Thomas Lubanga Dyilo*, that detailed witness statements or summaries could be ordered to be disclosed if such disclosure was proportionally appropriate; however, disclosure orders must only be given based on their relevance and applicability in the case at bar, and the Chamber retains an “absolute duty” to ensure that such orders do not violate the rights of the accused. Therefore, it was not appropriate to order disclosure of such details, considering the little time and resources the Defence was able to spend with its witnesses coupled with the witness information that it had voluntarily provided. After noting that the Defence has significantly lesser disclosure obligations than the Prosecution, the Chamber declared in more detail what a summary of a witness statement should consist of and set a deadline of two weeks before the start of the Defence case for production. These new requirements raise the question – how heavily should efficiency of the proceedings and ability of the Prosecution to prepare be weighed against traditional tenets of criminal procedure, which put the burden of proof on the Prosecution alone and allow the accused the right to remain silent?



Germain Katanga

The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the “Prosecution’s application to take testimony while proceedings are stayed pending decision of the Appeals Chamber,” 24 September 2010.

- Kari Panaccione



Thomas Lubanga

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Emphasizing again the “profound and enduring concern” that the Prosecutor does not consider himself bound to comply with certain judicial decisions ordered by the Trial Chamber, the Chamber in the *Prosecutor v. Thomas Lubanga Dyilo* issued a decision refusing to allow provisional evidence to be taken during the current stay of proceedings. On 8 July, the Chamber found that a fair trial was no longer possible and ordered a stay of proceedings when the Prosecutor refused, after several orders by the Chamber, to reveal the identity of intermediary 143, citing the inability to implement certain protective measures. The two reasons detailed by the Chamber were (1) that the Defence had a right to disclosure of intermediary 143’s identity, and (2) the Prosecutor’s perception that “he has autonomy to comply with, or disregard, the orders of the Chamber” relating to protection of persons who may be at risk on account of their interaction with the Court.

Protective measures for intermediary 143 were implemented by the Registry on 13 September, separate from the limited disclosure ordered by the Chamber for which no protective measures were needed. The Prosecutor then “attempted - notwithstanding the stay of proceedings that is in place - to comply (for the first time) with the Chambers order” by offering to reveal to the Defence intermediary 143’s identity and submitted an application requesting the Chamber take provisional evidence during the stay. The Chamber rejected the application, noting that the Prosecutor has not addressed the second element of the Chamber’s decision. It held that while the Prosecutor “continues to reserve himself the right not to implement the Chamber’s orders,” the judges will lack control over the proceedings and the guarantees of a fair trial will disappear. The Chamber found that its obligation to ensure full respect for the rights of the accused could not permit proceedings to continue while “the Prosecutor refuses to accept the authority of the Court.”

Special Tribunal for Lebanon

-Adam Gellert, Legal Intern, Defence Office, STL

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Order of the Pre-Trial Judge, 17 September

Background

From 3 September 2005 to 10 April 2009, Mr El Sayed was detained by the Lebanese judicial authorities in connection with the Hariri case, prior to being placed under the authority of the Tribunal. On 29 April 2009, the Pre-Trial Judge ordered Mr El Sayed’s release, after the Prosecutor had considered that the information in his possession was not sufficiently credible to justify the issuance of an indictment against him. On 17 March 2010, Mr El Sayed wrote to the President of the Tribunal in order to obtain materials from the criminal file related to his detention. The President in his order referred the Application to the Pre-Trial Judge to ascertain whether the Tribunal had jurisdiction and whether Mr El Sayed had right of standing before it and, if so, to examine the merits of the Application. The Pre-Trial Judge received written submissions from and heard oral arguments by the parties. The Head of the Defence Office also made oral submissions before the Pre-Trial Judge.

The order

In his Order, Judge Fransen held that the Tribunal had jurisdiction to rule on the Application as, since 10 April 2009, it has had sole responsibility for the Hariri case, and holds the case documents. Relying on previous jurisprudence by other international tribunals, he held that the tribunal possesses implicit jurisdiction to rule on incidental issues that are connected to its mandate or have an impact on it and which must be settled in the interest of justice. It noted that given the exclusive jurisdiction of the tribunal, a ruling otherwise would exclude the Applicant from the right of effective judicial protection (paras 29-42).

The Pre-Trial Judge noted that a person’s right to his criminal case file is a customary right recognized both by the principal human right instruments and national and international case law (paras 43-52). Considering nevertheless that, under certain circumstances, the exercise of

“ The Pre-Trial Judge noted that a person’s right to his criminal case file is a customary right recognized both by the principal human right instruments and national and international case law”

-Adam Gellert



Jamil El Sayed [left] and Defence Counsel Akram Azoury [right]



Rafiq al-Hariri, former prime minister of Lebanon, and 22 others were killed in 2005 by a suicide bomber in a vehicle loaded with explosives.

this right could be limited, Judge Fransen set a time limit for Mr El Sayed and the Prosecutor to make their submissions as to how these limitations could be applied in the present case (paras 53- 57).

First training of counsel admitted to the list of counsel, 6-9 September

Forty counsels participated in the first training organized by the Defence Office of the STL. The training started with presentations made by the representatives of the organs of the Tribunal describing their functions, the background of the Tribunal and the judicial proceedings that have taken place to date. The session also included practical exercises about the role of defence counsel in light of the special features of the STL, such as the issue of trials in absentia and the crime of terrorism in both international and Lebanese law.

The second session of the training will take place in the beginning of October. It is planned that next year there will be further training for defence counsel.

Extraordinary Chambers of the Courts of Cambodia

-DSS at the ECCC

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Ieng Sary



Ieng Thirith



Khieu Samphan



Nuon Chea

On Wednesday, 15 September the ECCC's Co-Investigating Judges signed a Closing Order in Case 002. The Order indicts Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea of War Crimes, Crimes Against Humanity, Genocide, and multiple violations of the Cambodian Penal Code of 1956. The previous day a separate dismissal order was signed by the judges effectively ruling out further charges against Duch, who already stood trial in Case 001 and whose judgement and sentence are now on appeal.

Shortly after signing the Case 002 Closing Order, international Co-Investigating Judge Marcel Lemonde announced his resignation. After four years of presiding over investigations at the ECCC, Lemonde will be replaced by Reserve International Co-Investigating Judge

Siegfried Blunk. In spite of the recent indictments in Case 002, it remains uncertain whether Cambodian Co-Investigating Judge You Bunleng will revisit his earlier refusal to conduct further investigations into prospective suspects in Case 003 and Case 004.

Civil Party Group 1 in the Duch Case has filed an appeal before the Supreme Court Chamber contesting the Trial Chamber's rejection of 9 civil party applicants in the final judgement. The appeal argues that the Trial Chamber acted *ultra vires* by retroactively dismissing civil parties in the final judgement, using criteria not plainly apparent in the Court's internal rules. In criti-

"Civil Party Group 1 in the Duch Case has filed an appeal before the Supreme Court Chamber contesting the Trial Chamber's rejection of 9 civil party applicants in the final judgement."

-DSS at the ECCC



Marcel Lemonde

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-DSS at the ECCC



Kaing Guek Eav
aka “Duch”

“... the ECCC’s judicial officers adopted a number of amendments to the Court’s Internal Rules, mainly intended to streamline Civil Party involvement in the upcoming Case 002 trial”

-DSS at the ECCC

cizing the Trial Chamber’s approach to civil party admissibility, the appeal also alleges that the Trial Chamber seemed ‘more willing to accept a statement by the accused regarding the validity of Civil Party evidence rather than take into account the documents and statements by the Co-Prosecutors.’

On 21 September, the Office of the Co-Prosecutors filed a response to the Defence Support Section request to submit an *amicus curiae* brief to the Supreme Court Chamber, which would assist with the proper deliberation of appeals launched by the Accused and the prosecution in the Duch Case. The Co-Prosecutors argue that the Court’s internal rules do not authorize the DSS to file submissions before chambers; further, they argue that the DSS lacks the independence necessary to act as *amicus* in this case.

Ieng Thirith, Ieng Sary, and Nuon Chea have all filed notices of appeal against their indictments in Case 002. It is widely expected that the remaining co-accused, Khieu Samphan, will also file a notice of appeal. The Court’s Internal Rules limit the grounds of appeal at this stage to jurisdictional matters.

At last week’s bi-annual Plenary Conference, the ECCC’s judicial officers adopted a number of amendments to the Court’s Internal Rules, mainly intended to streamline Civil Party involvement in the upcoming Case 002 trial. The Plenary also considered expanding the Court’s reparations scheme. One successfully adopted amendment will allow Civil Party Lead Co-Lawyers to request the Court’s recognition of certain specific reparations, designed in consultation with the Victims Support Section and possibly realized using external funding. The second proposed amendment was defeated because the Plenary considered it to be beyond the mandate and jurisdiction of the Tribunal; it proposed that the ECCC empower itself to issue non-binding recommendations to the Cambodian Government to implement certain reparations initiatives (such as the construction of public memorials) which could not be feasibly undertaken by the accused.

On Friday 17 September, Ieng Sary’s defence team requested the removal of Trial Chamber President Nil Nonn on the grounds that his continued presence on the ECCC bench violates Ieng Sary’s right to be tried by an impartial tribunal. The disqualification request argues that the presumption of judicial impartiality is effectively reversed by an interview Nil Nonn gave to journalist Amy Pike in 2002, in which he alluded to accepting bribes while presiding over the Battambang Provincial Court. The defence has also requested that the Court order Pike’s production of the interview footage in question, as she has thus far refused requests for voluntary disclosure.

The ECCC’s Defence Support Section has requested leave to submit an *amicus curiae* brief to the Supreme Court Chamber to assist its deliberation of Duch’s appeal against his judgement and sentence in Case 001. Because Duch’s national co-counsel have expressed the intention to limit their appeal submissions to matters of jurisdiction and national law, the DSS is offering to provide an *amicus* brief addressing certain other issues of international criminal law to assist the Supreme Court Chamber’s proper determination of the appeal.



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-DSS at the ECCC

Blog Update

- Olivia Bueno, Lubanga's Missing Co-Perpetrator: Who is Bosco Ntaganda?, 15 September 2010, available at: <http://www.lubangatrial.org/2010/09/15/lubanga%e2%80%99s-missing-co-perpetrator-who-is-bosco-ntaganda/>
- Gentian Zyberi, A Critical Assessment of the Appeals Judgment in the Haradinaj Case, 17 September 2010, available at: <http://internationallawobserver.eu/2010/09/17/a-critical-assessment-of-the-appeals-judgment-in-the-haradinaj-case/>
- Colum Lynch, What's a war crimes prosecutor doing at Kagame's presidential inauguration?, 3 September 2010, available at: http://turtlebay.foreignpolicy.com/posts/2010/09/03/what_s_a_war_crimes_prosecutor_doing_at_a_war_criminal_s_presidential_inauguration



Ramush Haradinaj,

“(about the Haradinaj case) Surprisingly, the Appeals Chamber considered this failure to appeal not a mistake of the Prosecutor, but rather an error of Trial Chamber!”

-Gentian Zyberi

Publications

Books

Nancy Schweda Nicholson. “Interpreting at the International Criminal Tribunal for the Former Yugoslavia” *Translator as Mediator of Cultures*. Ed. Humphrey Tonkin and Maria Esposito Frank. John Benjamins Publishing Company, 2010. 37-53.

Articles

Beth A. Simmons and Allison Danner, *Credible Commitments and the International Criminal Court*. International Organization, Volume 64, Issue 02, April 2010, pp 225-256

Jarinde Temminck Tuinstra. *Defending the Defenders: The Role of Defence Counsel in International Criminal Trials*. J Int Criminal Justice (2010) 8(2): 463-486

Peter Murphy. *No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials*. J Int Criminal Justice (2010) 8(2): 539-573

Opportunities

International Criminal Court (ICC)

- Associate Legal Communications Officer (P2) (Registry)
Closing Date: 6 October 2010
- Monitoring & Evaluation Officer (P-3) (Secretariat of the Trust Fund for Victims)
Closing Date: 10 October 2010

Special Tribunal for Lebanon (STL)

A Defence Team may have many employment opportunities for jurists, lawyers, investigators and case managers. For more detailed information about these positions and the qualifications required, please consult <http://www.stl-tsl.org/sid/136>.

Other Organizations

- Criminal Law and Institution Building Specialist, Pristina
American Bar Association (ABA)
Closing Date: Saturday, 16 October 2010
- Crime Prevention and Criminal Justice Officer, Vienna
United Nations Office On Drugs and Crime (UNODC)
Closing Date: Monday, 11 October 2010

“... the move has drawn criticism from some of the court's most passionate defenders, who say that Bensouda's appearance sends the wrong signal”

-Colum Lynch



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Any contributions for the newsletter
should be sent to Dominic Kennedy at
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WE'RE ON THE WEB!

WWW.ADCICTY.ORG

Upcoming Events

- **15th International Metropolis Conference**

The 2010 Conference focuses on "Justice and Migration: Paradoxes of Belonging". It will deal with various aspects of belonging, the opportunities and challenges it poses in the context of legitimacy and justification of processes of migration and integration, as well as their consequences for social policies.

Date: 4-8 October 2010

Organizers: Metropolis network, Municipality of The Hague

Venue: World Forum Convention Centre, Churchillplein 10, 2508 EA The Hague

For more information: www.metropolis2010.org

- **Conference on Corporate War Crimes: Prosecuting Pillage of Natural Resources**

The illegal exploitation of natural resources has fueled and financed brutal conflicts around the world, yet there has been little success to date in holding companies accountable for trafficking in conflict resources. This conference, is meant to foster renewed public debate about how the law can—and should—be used against companies whose theft of natural resources has driven conflict.

Date: 29-30 October 2010

Organizers: Open Society Justice Initiative, Grotius Centre for International Legal Studies of Leiden University, University of British Columbia Faculty of Law, Dutch Ministry of Justice, Dutch Ministry of Foreign Affairs, Department of Justice Canada

Venue: Peace Palace, The Hague

For more information: www.pillageconference.org

Defence Rostrum

Fundraiser for Freetown Cheshire Home (Sierra Leone)

The Cheshire Home for children in Freetown, Sierra Leone is both home and school for girls and boys. These children are physically challenged, many of whom are victims of polio. In addition, most of the children are orphans who have been neglected or abandoned because of their handicap.

The Home and these children depend mostly on donations.

ICTY Defence Legal Assistant, Jovana Paredes, began working with the Freetown Cheshire Home in 2008 while working at the Special Court for Sierra Leone.

Since then, over \$7,000 USD in donations has been delivered to the Home. 100% of all donations goes directly to the care of the children in the form of food, medicine, school supplies, clothing, etc.

What the Home needs more than anything is a reliable source of light. This year, money raised will be used to purchase and install solar panels.

Please join us on Friday, October 15, 2010 at Happy Days located on Willem de Zwijgerlaan 78, beginning at 20.00. There will be a poker tournament and prizes will be raffled off. Additionally, Happy Days is generously **donating 50% of each drink sold** to Freetown Cheshire Home.

For more information, please contact Jovana at jovanaostojic@gmail.com