ADC-ICTY Newsletter

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ICTY Cases

Cases in Pre-trial

Haradinaj et al. (IT-04-84)

Cases at Trial

Đorđević (IT-05-87/1)

Gotovina et al. (IT-06-90)

Karadžić (IT-95-5/18-I)

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ICTY News

Prosecutor v. Radovan Karadžić

-James Jackson, Defence Legal Intern, Karadžić Defence Advisory Team

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Radovan Karadžić

In the case of Radovan Karadžić, General Sir Michael Rose, the former commander of UNPROFOR in Bosnia-Herzegovina from 1994-1995 has recently been testifying before the tribunal. During the course of cross-examination General Rose confirmed that the investigations could not determine unequivocally where sniper fire had been launched in Sarajevo and that the Bosnian government had been against the demilitarization of Sarajevo.

The witness could not confirm Radovan Karadžić's allegations that "the Muslim forces deliberately chose their own civilian targets in order to provoke media attention" at the time. He did say, however, that Bosnian forces "opened fire in some politically important times in order to provoke reactions from Serbs so the Bosnian authorities could show that its people were suffering".

The Judges of the Trial Chamber also moved to maintain an intensified schedule of hearings, amid estimations that the legal proceedings may not end until 2014. The sitting time of each hearing is also to be extended. The ICTY had already raised the number of weekly hearings from three to four during October. The intensified schedule will now continue into November and 'until further order.'

Court spokesperson Nerma Jelacic had the following to say in response to the intensified schedule: "While the chamber does not consider that a five-day sitting schedule would violate the rights of the accused, it is also of the opinion that maintaining the current four -day sitting schedule with extended sittings may be equally conducive to ensuring an expeditious trial."

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 Mile Mrkšić and Veselin Šljivančanin

- Habibatou Gani, Defence Legal Intern, Stojić Defence Team

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Veselin *Šljivančanin*, a major in the JNA.

Earlier this week on 12 October 2010, a Review Hearing, the first of its kind before the ICTY, was held in the case against Veselin Šljivančanin, a major in the JNA.

On 27 November 2007, the Trial Chamber convicted Šljivančaninfor having aided and abetted the torture of prisoners of war and imposed a single sentence of five years imprisonment. At trial a central issue of contention was whether Šljivančanin was aware of Mrkšić's order to withdraw JNA troops. Migaro Panic played a central role in the determination of this issue. The Trial Chamber acquitted Šljivančanin of crimes charged as crimes against humanity and for murder as a violation of the laws or customs of war.

Mr Stephane Bourgon, Counsel for Sljivancanin, in an impassioned address, invited the Court to consider Panic's attendance as demonstrative of an individual who seeks to ensure that 'injustice is not done'.

- Habibatou Gani

On 5 May 2009 the Appeals Chamber quashed Šljivančanin's acquittal for having aided and abetted the murder of prisoners of war and increased his sentence, finding that "*that the sentence of five years imprisonment is so unreasonable that it can be inferred that the Trial Chamber must have failed to exercise its discretion properly*". Šljivančanin's sentence was increased to 17 years imprisonment in order to properly reflect the seriousness and the 'level of gravity' of the crimes for which he was convicted. In his partially dissenting opinion, Judge Pocar suggested that the majority in Appeals Chamber exceeded its power by imposing a new and higher sentence than that rendered by the Trial Chamber. In his view, such power is not '*self-evident*'. Further, he recalled that the ICTY Statute does not exonerate the Tribunal from observing article 14(5) of the International Covenant on Civil and Political rights, which embodies the right to have both a conviction and sentence reviewed. Thus, Judge Pocar was of the view that the Appeals Chamber ought to have remitted the matter to the Trial Chamber who, in the circumstances of this particularly 'factually intensive case', were better equipped to decide and thereby preserve the accused's right to appeal, in totality.

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Šljivančanin, on 28 January 2010, filed an application for review, on the basis that 'Miodrag Panic was prepared to offer testimony invalidating Šljivančanin's conviction for aiding and abetting murder as a violation of the laws or customs of war'. In accordance with Article 26 and Rule 119 of the Rules and Procedure of the ICTY, a new fact is "*new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings*". On 14 July 2010, the Appeals Chamber granted the application, stating that although the '*Panic New Fact*' was obtainable by Šljivančanin's counsel, review of the impugned decision is "*necessary because the impact of the Panic New Fact, if proved, is such that to ignore it would lead to a miscarriage of justice*".

Prosecutor v Prlić et al.

- Habibatou Gani, Defence Legal Intern, Stojić Defence Team

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Judge Árpád Prandler

Decision on Motion to Disqualify: On 4 October 2010, President Judge Robinson of the ICTY rendered his decision on Jadranko Prlić 's motion for the disqualification of Judge Árpád Prandler.

Throughout the trial, the Prlić Defence expressed its concern regarding the objectivity of United Nations personnel. On 30 August 2010, pursuant to Rule 15(B) of the Tribunal's Rules of Evidence and Procedure, the Prlić Defence submitted a Motion seeking the disqualification of Judge Prandler. Consequentially proceedings were stayed. The Prlić Defence did so, on the basis of alleged bias resulting from Judge Prandler's association with Mr Victor Andreev, Head of the United Nations Civil Affairs in Bosnia and Herzegovina. Though it had reservations *vis a vis* Mr Andreev's disclosed association with Judge Prandler, it only became necessary to seek clarification of said association following the disclosure of the Mladic diaries. It averred that only then could it properly "*surmise Andreev's dark character and questionable pro-Bosnian Serb/anti Bosnian Croat activities*". Potentially, according to the Prlić Defence, such bias could be physically translated to the '*contamination*' of approximately 630 documents and 37 witnesses. The Praljak Defence joined the Prlić Motion, alleging Judge Prandler's possible inability to bring an "*impartial and unprejudiced mind to issues*" in the case.

Throughout the trial, the Prlić Defence continuously expressed its concern regarding the objectivity of United Nations personnel.

- Habibatou Gani

President Robinson was assisted by a confidential report compiled by Judge Kwon, President of Trial Chamber III, who conferred with Judge Prandler regarding the latter's association with Mr Andreev. Initially, the motion for disqualification was presented to Judge Antonetti. The President of the Tribunal later clarified that the Tribunal's jurisprudence required that the motion be addressed to the Presiding Judge of Trial Chamber III, not the Presiding Judge of the case. In reaching his decision, President Robinson focused on an exchange between Petkovic and Judge Prandler, which occurred on 8 March 2010. Essentially, Judge Prandler put to Petkovic "*it happened to me that I knew Mr Andreev from the United Nations or and from New York so when you said that, No I do not accept what he wrote* [...] *I would like to ask you if you have anything* [...] *which you base your position on him* [...]". President Robinson took the view that this constituted a "*voluntary disclosure*" by Judge Prandler's of his previous association with Mr Andreev and was "*helpful to the trier of fact*". Moreover, President Robinson considered Judge Prandler's comments as demonstrative of "*a responsible exercise of his* [Judge Prandler's] *judicial functions*". In the view of President Robinson, the Prlić and Praljak Defence failed to substantiate their claims of bias, denied the motion and the stay of proceedings was subsequently lifted.

President Robinson was assisted by a confidential report compiled by Judge Kwon, who conferred with Judge Prandler regarding the latter's affiliation with Mr Andreev.

-Habibatou Gani

Decision on Motion to Reopen: On 6 October 2010, Trial Chamber III rendered its decision granting the Prosecution's motion to reopen the case, in light of the discovery of the Mladic diaries. Though the Prosecution sought to admit fifteen extracts, the Chamber only admitted eight. The Chamber stressed that the reopening of a case after its case in chief, in accordance with the Tribunal's jurisprudence, occurs in exceptional circumstances and to enable a party to present "*fresh*" evidence not previously available to it and "*where justice so demands*". The Defence have until 20 October 2010 to file for certification to appeal the reopening decision. Finally, the Trial Chamber specified that the Defence may only tender documents which contradicts those admitted in the present motion for reopening.

Zdravko Tolimir

Prosecutor v Tolimir

- Taylor Olson, Defence Legal Intern, Karadžić Stand-by Team

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On 30 September 2010, in the case against Zdravko Tolimir, the Trial Chamber granted Tolimir access to confidential and inter partes materials from the *Prosecutor v. Momcilo Perisic* case. The Trial Chamber found a strong nexus between the two cases in regard to alleged crimes committed in Srebrenica in July 1995. The Trial Chamber found that Tolimir showed legitimate forensic purpose for being granted access to confidential transcripts, exhibits, submissions, and confidential decisions of the Trial and Appeals Chambers related to the Srebrenica counts of the Indictment, general allegations in the Indictment and to Zdravko Tolimir personally. However, the Trial Chamber agreed with the Prosecution that Zdravko Tolimir's request for other confidential material and confidential material not tendered into evidence would not be considered confidential material from the Perisic case and therefore not competent to decide on the Tolimir's request for "other confidential material."

Fire and Safety and Security Briefing

- Taylor Olson, Defence Legal Intern, Karadžić Stand-by Team

On 5 October 2010, around 20 members of the ICTY Defence attended the monthly Fire and Safety and Security induction meeting. This marked the first time the Defence was invited to participate in the induction meetings held each month for incoming staff of the Office of the Prosecutor, Chambers, the Registry and General Service Staff. This session stressed the importance of fire safety, knowing your exit routes, your floor warden and evacuation procedures in case of an emergency. It is strongly recommended that if you have not already attended one of the monthly induction services that you do so. For more information about upcoming induction sessions please email, Head of Office, Dominic Kennedy at: dkennedy@icty.org.

This marked the first time the Defence was invited to participate in the informational meetings held each month for incoming staff of the Office of the Prosecutor, Chambers, the Registry and General Service Staff.

- Taylor Olson

Defence Symposium for Interns

-David Martini, Defence Legal Intern, Župljanin Defence Team

The discussion on Superior Responsibility was led by Dr. Guénaël Mettraux

The Association of Defence Counsel Practising before the ICTY held its first Defence Symposium covering the topic of "Superior Responsibility" on 5 October 2010. The Symposium was led by Dr.Guénaël Mettraux, a Defence Counsel at the ICTY and leading academic in International Criminal Law. Dr. Mettraux discussed the topic with approximately twenty-five Defence Interns. The discussion was both from a practical and a theoretical perspective and engaged the interns in active dialogue. Dr. Mettraux is the author of the newly published book on "The Law of Command Responsibility".

The aim of the monthly Defence Symposium is to enrich the experience of defence interns while completing an internship at the ICTY. It is hoped that by covering complex substantive and procedural issues in International Criminal Law these symposiums will assist interns and prepare them for a future career in International Criminal Law. The next Symposium of the series will take place during the first week of November and will explore the topic of Joint Criminal Enterprise.

News from International Courts and Tribunals

International Criminal Court

The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 15 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 of Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010

- Amy Di Bella, Intern, OPCD ICC

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Thomas Lubanga

The Appeals Chamber reversed the decision to stay proceedings and release Thomas Lubanga Dyilo. It found that Trial Chamber I erred in granting the stay and release of the defendant without having exhausted available measures, namely sanctions, to compel the Prosecutor to disclose the identity of intermediary 143.

The Appeals Chamber first explained that the Prosecutor had clearly failed to comply with the Trial Chamber's orders. Secondly, the Chamber covered the Prosecutor's general intention not to implement orders which they perceive to be in conflict with their statutory duties. In response to this "profound and enduring concern" about the Prosecutor's assertion of autonomy, the Appeals Chamber restated the authority of the Chambers; "only a judicial decision may alter the legal affects of a judicial order" (para. 49 -51).

Thomas Lubanga is a former rebel leader from the Democratic Republic of the Congo who has founded and led the Union of Congolese Patriots.

According to the Judgment, the Prosecutor's non-disclosure did not rise to the level to warrant a stay of proceedings. Thus, despite its finding of non compliance with the Trial Chamber's order, and its affirmative language about supremacy of judicial orders, the Appeals Chamber was ultimately of the view that the Trial Chamber's had erred in its decision. The Appeals Chamber confined its review to whether the Trial Chamber went beyond its margin of appreciation in determining that it was impossible to guarantee a fair trial. It held that the Trial Chambers could and should have "imposed sanctions and given such sanctions reasonable time to bring about their intended effects" in order to maintain control of proceedings in these circumstances (para. 61).

The practical implications of this Judgment will only be understood as they are worked out in subsequent decisions in the Lubanga and other cases. The Appeals Chamber focused on the procedural impossibility of the autonomy of the Prosecutor and the importance of seeking compliance through sanctions. Practically speaking, the non-compliance of the Prosecution on this occasion was arguably "time-limited" (para. 14, quoting the impugned decision). At this point, three months after the allegedly pertinent cross-examination was set to take place, imposing sanctions to secure compliance by the Prosecutor could not bring about the intended effects. As the spontaneous examination may no longer be possible, the Prosecutor's obligations in the instant matter may have become moot. Indeed, the Trial Chamber has already explained that it will not pursue sanctions or discuss the matter further (Hearing of 11 October 2010). However, the defendant's alleged inability to effectively cross-examine intermediary 321 might not have been resolved. Thus, it remains for subsequent decisions to resolve the implications on rights of the accused, in particular, the right of the accused to examine the witnesses against him under article 67(1)(e) of the Rome Statute.

The practical implications of this Judgment will only be understood as they are worked out in subsequent decisions in the Lubanga and other cases.

-Amy Di Bella

Special Court for Sierra Leone

-Hawi Isaya Alot, Defence Team for Charles Taylor

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The Special Court for Sierra Leone is adjourned while the Trial Chamber considers a number of Defence motions. The next status conference is scheduled for Friday, October 22, 2010. As per the last status conference (Monday, September 27, 2010), the position of the Defence was that there is a possibility that they shall need to call further witnesses, depending on the Court's decision on the Defence motions.

The Defence requested that the Prosecution review their disclosure obligations in light of the Court's decision on 23rd September 2010 relating to payments which are beyond that which is reasonably required for the management of witnesses or victims. The Prosecution responded that it has made and will continue to make disclosure based on its understanding of the rules and jurisprudence surrounding disclosure.

Charles Taylor is one of the defendants currently on trial in the Special Court for Sierra Leone

Opinion

Much Ado About Nothing - Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06

- Habibatou Gani, Defence Legal Intern, Stojić Defence Team

On 8 July 2010 and 15 July 2010, Trial Chamber I of the International Criminal Court ordered the stay of proceedings and the release of the accused in the case of Mr Thomas Lubanga Dyilo, respectively. On 8 October 2010, the Appeals Chamber reversed the above decision. Though the procedural voyage resulting in this decision has been journeyed above, this Appeals Chamber pronouncement is certainly indicative of the gradually evolving jurisprudence of this Chamber.

Over the course of the trial against Lubanga, the Defence have repeatedly questioned the utility of intermediaries *vis a vis* eliciting information and liaising with victims. In their view, this practice merited scrutiny. This is particularly so given that within the Court's abundant statutory and regulatory regime, there exists a definite lacuna with regard to the use and protection, liability and responsibilities of intermediaries. This has proved particularly worrisome given the fragile environments they operate within. Further, intermediaries range from non governmental organisations seeking to assist the Prosecution in uncovering the entire magnitude of atrocities perpetrated, to individuals that operate as *quasi* prosecution agents. As such, when the eighth Defence witness testified that an intermediary had financially incentivised his coming to the Court to falsely incriminate Lubanga, the Court was faced with the task of balancing the accused rights to a fair trial, the interests of the victims and the protection of the accused intermediary.

On 12 May 2010, the Trial Chamber ordered the confidential disclosure of the intermediaries. Over the course of 7 and 8 July 2010 implementation of disclosure was ordered several times but not honoured. The Chamber reiterated that "the limited disclosure […] has the result of ensuring that there is no deterioration in the security position" of that intermediary. It continued that "no criminal court can operate on the basis that whenever it makes an order […] it is for the Prosecutor, to elect whether or not to implement it, depending on his interpretation of his obligations". In the circumstances, the "fair trial of the accused is no longer possible"; proceedings were stayed. Previously, unilateral actions, by the Prosecutor, have resulted from his interpretation of his obligations regarding the protection of victims. (*Appeals Chamber decision of 26 November 2008 re Prosecution's Appeal against Preventative Relocation Decision*)

The Rome Statute is a fertile document, the result of years of lively debate, coloured by state interests. Its followers hope that it is as much married to the principle of legality as it is to its commitment to the acquisition of true justice. In this regard, the Rome Statute has afforded each Chamber with distinct responsibilities and competencies. Above all, it imbues judges with a great deal of discretion so as to properly balance several competing interests. It concurrently deposits considerable discretion to the Prosecutor. Given the highly politicised environments and not forgetting that the Court operates within ongoing volatile conflicts the "checking facility" inherent in each Chamber must be observed. Nonetheless and in accordance with article 64(2) of the Rome Statute, the Trial Chamber must guarantee that "the trial is fair and expeditious". It must be able to check the exercise of such discretion. Earlier, this year Judge Fulford 'decried the snail's pace at which international criminal trials progressed'. Thus, when the Trial Chamber ordered such drastic action as the stay of proceedings, it did so mindful of the above and within its 'policing' capacity.

The brevity and scope of the Appeals Chamber's decision reiterates this vital role afforded to the Trial Chamber. It also confirms its reluctance to superimpose its judicial might upon the Trial Chamber's activities. As it has been noted by several academics, it clearly operates/ed with a great degree of judicial restraint by restricting its promulgations regarding the grounds of appeal. As such, it declined to comment, even in passing on the length of detention of the accused. Of the eleven page decision, only paragraphs 23 to 25 are operative. In essence, the Appeals Chamber considered that the Trial Chamber acted prematurely by circumventing article 71 of the Court's statutory framework, which details sanctions for misconduct.

The Appeals Chamber's decision is largely unsurprising, whereas the Trial Chamber's decision shows its readiness, rightly so, to insist that 'the rights of the accused' is not reduced to hyperbolised rhetoric.

Blog Update

- Steven Kay QC, Responses to "ICC to Charge between Four and Six people regarding Post-Election Violence in Kenya", 30 September 2010, available at: http://www.internationallawbureau.com/blog/?p=1794

- Emily Backes, Anniversary: The World's First Genocide Conviction, 4 October 2010, available at: http://www.enoughproject.org/blogs/anniversary-world-first-genocide-conviction

- *Wayne Jordash,* Fairness of Karadžić trial in question, 4 October 2010, available at: http://www.rnw.nl/international-justice/article/fairness-Karadžić-trial-question

The ICTR convicted Jean -Paul Akayesu, mayor of Taba township in central Rwanda in 1994, of nine counts of genocide, crimes against humanity, and rape.

-Emily Backes

Publications

Books

Mark D. Kielsgard, Reluctant Engagement: U.S. Policy and the International Criminal Court, Martinus Nijhoff Publishers, 2010.

Maria L. Nybondas, Command Responsibility and Its Applicability to Civilian Superiors, Cambridge University Press, 2010.

Articles

Marko Milanovic, The International Court of Justice and Mass Atrocities in the Former Yugoslavia (October 1, 2010). Available at SSRN: http://ssrn.com/abstract=1686780

Van Schaack, Beth, The Principle of Legality in International Criminal Law (August 09, 2010). Santa Clara Univ. Legal Studies Research Paper No. 10-08. Available at SSRN: http://ssrn.com/abstract=1657999

Geoffrey S.Corn, Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors? (August 16, 2010). Available at SSRN: http://ssrn.com/abstract=1659824

Opportunities

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 positions available and the qualifications required, please consult http://www.stl-tsl.org/sid/136.

Other Organizations
Anti-Corruption Advisor, Judicial Reform and Government Accountability, Serbia
Management Systems International (MSI)
Closing Date: Friday, 15 October 2010

Associate Case Manager (for Roster purposes only), Arusha (P-2)
International Criminal Tribunal for Rwanda (ICTR)
Closing Date: Sunday, 17 October 2010

Lawyer in the Legal Affairs Unit, The Hague
Europol
Closing Date: 25 October 2010

" If there is one designation that has come to symbolize the complexity of … the struggle against international terrorism as an armed conflict, it is "unlawful enemy combatant."

- Geoffrey S. Corn

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Upcoming Events

- **Appeals Chamber Judgment in Bemba Case**

On Tuesday, 19 October, 2010, the Appeals Chamber of the International Criminal Court (ICC) is scheduled to deliver its Judgment in the appeal of Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled 'Decision on the Admissibility and Abuse of Process Challenges'.

Date: 19 October 2010, 10 A.M.
Venue: International Criminal Court

- **Kalimanzira and Rukundo Appeal Judgments**

On 20 October 2010 the Appeals Chamber at the International Criminal Tribunal for Rwanda (ICTR) will deliver two separate appeal judgments in the cases of convicted genocidaires Callixte Kalimanzira and Emmanuel Rukundo.

Date: 20 October 2010, 14:00 – 17:00.
Venue: International Criminal Tribunal for Rwanda, Arusha

- **Talk: "How Can You Defend Such People? The Rights of Defence in International Criminal Tribunals."**

Richard Harvey, the lead counsel of the Karadžić Stand-By Defence Team, is giving a talk on the topic above.

Date: 27 October, 7.30pm.
Venue: TMC Asser Institute, R.J. Schimmelpenningcklaan 20-22, 2517 JN Den Haag

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