ADC-ICTY NEWSLETTER

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PRLIĆ ET AL.

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ICTY News

Prilić et al. (IT-04-74)

On 18 July 2016, the Appeals Chamber decided to decline the 'Application by the Republic of Croatia for leave to appear as *amicus curiae* and to submit *amicus curiae* brief' in the Prlić *et al.* case. On 29 May 2013, Trial Chamber III of the ICTY convicted Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić of crimes against humanity and war crimes on the basis of their participation in a joint criminal enterprise (JCE) with the common criminal purpose of dominating the Muslim population of the Croatian Republic of Herceg-Bosna through ethnic cleansing; these findings are being appealed. In an Application filed on 28 March 2016, Croatia challenged the Trial Chamber's findings that besides the six Accused in the case, the JCE includes as well, among others, Franjo Tuđman, Gojko Šušak and Janko Bobetko, three Croatian officials who were deceased before the Indictment was filed.

Croatia submitted that the Judgement relies upon evidence which "in no way suggests that the leadership of Croatia intended for the commission of the crimes". It further claimed that the Trial Chamber conflated the alleged political objective to

recreate the Banovina with the criminal intent to commit crimes in order to achieve this objective. Croatia additionally submitted that the Trial Chamber violated the presumption of innocence of the three officials. In accordance with the decision of the European Court of Human Rights in *Valukh and others v. Russia* (2012), the Chamber should have refrained from making any statement that would have contradicted the presumption that the three Croatian officials are innocent of allegations that they were members of a JCE. As a result, the findings of guilt against the six Accused also amount to a posthumous conviction of the three Croatian officials. In support of its argument Croatia noted that, when the Judgement was rendered, Prosecutor Kenneth Scott declared to the press that "one of the most historical, remarkable things about the case" is that the conviction of the six Accused was also a conviction of President Tuđman and Minister Šušak.

The Prosecution highlighted two grounds in its Response filed on 31 March. Firstly, it alleged that Croatia does not meet the standard for standing as *amicus curiae* because its submissions would not assist the Chamber in its proper determination of the case. Secondly, it alleged that the Croatian officials were not indicted and therefore do not benefit from fair trial rights in relation to this case.

The Appeals Chamber declines the Application, consistent with ICTY Chambers' denial of previous Croatian applications to use *amicus curiae* status to defend the State or state officials. It recalls that, in general, *amici curiae* shall be limited to questions of law and emphasises that the Croatian officials were neither indicted nor charged, and that the Trial Chamber did not make explicit findings concerning their participation to the JCE and did not find them guilty of any crimes. Accordingly, "the Trial Chamber's findings regarding the mere existence and membership of the JCE does not – and cannot – constitute findings of criminal responsibility on the part of any persons who were not charged and convicted in this case".

Finally, the Appeals Chambers recalls that the ICTY's jurisdiction is restricted to natural persons and that the Trial Chamber's findings in no way constitute findings of responsibility on the part of the State of Croatia.

The Trial Judgement is currently being appealed by the six Accused and the Prosecution, with briefs filed by all parties during the first half of 2015; Judge Agius, ICTY President and Pre-Appeal Judge in the Prlić *et al.* case, has indicated that the Chamber anticipates being prepared to hear oral submissions in February 2017 and to render its judgement in late 2017.

Prosecutor v. Mladić (IT-09-92)

On 19 July, the Defence filed several motions relating to systemic bias within the Tribunal. The Defence filed those motions because it

seems that Mladić is not getting the benefit of the presumption of innocence to which he is entitled – and to which any Accused is entitled to in front of a court of law.

These filings point out that a number of Judges of the Trial and Appeals Chambers have previously found Mladić guilty to a criminal standard in previous cases, and that a number of staff members drafting the Judgment against Mladić have also worked on these prior cases. Therefore, in anticipation of the final Judgement, the Defence is of the view that this raises fundamental questions about the fairness of future proceedings concerning the accused. The Defence is currently awaiting the decisions of the Trial Chamber.

On 16 August, Mladić appeared before the Trial Chamber, where Russian Colonel Andrei Demurenko gave evidence via video link from Moscow. Demurenko gave evidence relating to the angle of desent from which munitions were fired into the Markale market.

Following Demurenko's testimony, the Defence team had expected to call several further witnesses.

Despite this, the Trial Chamber considered outstanding litigation related to these witnesses to be irrelevant to the closure of the case and "established" that the Defence case was closed, over Defence objections. In an unusual move, the Trial Chamber further requested the parties to tender any evidence relevant to sentencing by 25 August.

The Prosecution outlined two categories concerning undecided evidentiary matters. Firtstly, any further submissions related to the bar table motions and secondly, the possibility of additional witnesses arising from rulings in connections with the bar table motions. Regarding both categories, the Prosecution felt that a one-week deadline, slightly varied depending on translation or decisions of the Chamber, would be appropriate for motions to be filed in response. In the Prosecution's view, this would not impose an unreasonable burden on the Defence and will accelerate the conclusion of the case.

MICT News

Prosecutor v. Karadžić (MICT-13-55)

Radovan Karadžić is requesting an acquittal, a new trial or a fair trial. He appealed the ICTY Trial Chamber's Judgment dated 24 March 2016. The appeal notice contained 50 grounds of appeal and was filed pursuant to Rule 133.

In Ground 6 of the appeal, it was submitted that there was a failure to limit the scope of the indictment and to ensure that the prosecution complied with its disclosure obligations. Grounds 7-9, 16 and 31 argued that Karadžić's presumption of innocence was violated during the pre-trial phase of the case, making the trial unmanageable and the right to a fair trial impossible. Grounds 10-15 and 17-21 highlighted the double standards in granting and denying requests made by the Defense and the Prosecution, while Grounds 1 and 2 of the appeal focused on the fact that Karadžić's right to self-representation was not respected. Ground 27 addressed his right to an impartial tribunal, while Grounds 22-26 dealt with the errors in the admittance of evidence which contributed to the lack of a fair trial.

The Trial Chamber's reliance on debatable inferences was highlighted in Grounds 28, 36-43 and 45, while Grounds 40-41 focused on where this error was most pronounced. Grounds 32-33 and 35 argued that the Tribunal erred in law by failing to apply the rules of Law of Armed Conflict in Sarajevo. In Ground 34, it was submitted that it was erroneous to conclude that it was the Bosnian Serbs who fired the shell which landed in the Markale Marketplace in Sarajevo. Grounds 3-5 and 30 argued that the Tribunal erred in convicting Karadžić of crimes not charged in the indictment or for crimes which insufficient notice was given. Additionally, Ground 29 focused on the fact that there was insufficient connection between Karadžić and the crimes committed. In Grounds 44 and 46, it was argued that the Tribunal erred in its criminal assessment of hostage taking, and failed to consider Karadžić's mitigating circumstances in Ground 47-50.

Pursuant to Article 23 and Rule 133, the Prosecution filed a Notice of Appeal setting out its grounds of appeal against the Trial Chamber's Judgment. The appeal notice contained four grounds. Ground 1 of the appeal addressed the trial Chamber erring in law and or in fact in failing to find that JCE3 crimes formed part of the common criminal purpose and that Karadžić shared the intent for those crimes. Ground 2 addressed the Trial Chamber erring in law and/or in fact in failing to find that members of the Bosnian Muslim and Bosnia Croat groups were subjected to the destructive conditions of life within the meaning of Article 4(2)(C). Ground 3 addressed the Trial Chamber

erring in law and or in fact in failing to find that Karadžić and other JCE members possessed genocidal intent. Finally, Ground 4 addressed the Trial Chamber erring in law and or in fact in imposing a 40 year sentence on Karadžić.

Milan Martić (MICT-14-82-ES)

A motion for breach of *Ne Bis in Idem* was filed on behalf of Milan Martić (Applicant) before the Mechanism for International Criminal Tribunal (MICT). The motion requested that pursuant to Rule 16 of the Rules of Procedure and Evidence (RPE), the President should designate a Chamber and that the Chamber should issue an order requesting the Court of Croatia to permanently discontinue its proceedings against the Applicant, since the proceedings before the Court of Croatia concern acts already dealt with by the ICTY.

ADC-ICTY News

ADC-ICTY Issues Press Release

On 15 August, the ADC-ICTY issued a press release requesting the immediate release of Mir Ahmed. On 9 August 2016, Mir Ahmed Bin Quasem, a member of a defence team at the Bangladesh International Crimes Tribunal, was abducted in Dhaka by law enforcement authorities without a lawful order. At this stage little is known about his whereabouts or safety.

Mir Ahmed is a member of the Bar of England and Wales and the Bangladesh Bar. He is an essential member of a defence team in Dhaka on the war crimes trials and his father is Mir Quasem Ali who has been convicted by the Bangladesh Tribunal and is facing execution in a matter of weeks. The ADC-ICTY condemns detention without lawful reason which is in contravention of the international standards which Bangladesh is obliged to follow as a State Party to international human rights treaties.

The ADC-ICTY believes strongly in the right of an accused to be represented by independent defence counsel of their choice, who are free from political interference. This is paramount to ensure that the rights of the accused to fair trial are upheld and that the proper function of defence is respected. The detention of Mir Ahmed is a direct attack on the legal profession.

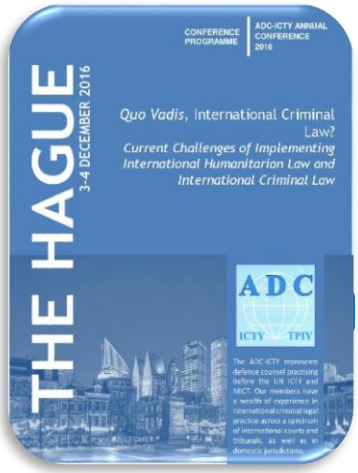
The ADC-ICTY respectfully calls for the immediate safe release Mir Ahmed Bin Quasem. For further information, please click here.

MICT Practice Direction on the Amendments to the Rules of Procedure and Evidence

On 21 July, the MICT issued a revised version of the Practice Direction on Procedure for the Proposal, Consideration, and Publication of amendments to the Rules of Procedure and Evidence of the Mechanism. The original Practice Direction was published on 2 May 2016 and stated that proposals from the Association of Defence Counsel 'may' be considered. The ADC-ICTY requested that the Practice Direction be amended to state that proposals from the Association of Defence Counsel 'shall' be considered. The amended Practice Direction now includes this provision which puts any proposals by the ADC-ICTY on equal status to that of the Judges, Prosecutor and Registrar.

The ADC-ICTY has an elected Rules Committee, composed of three members, which represents the interests of defence on the ICTY and MICT Rules Committees.

ADC-ICTY Annual Conference 2016



The ADC-ICTY will be holding its Annual Conference and training on Saturday 3 and Sunday 4 December 2016 in The Hague. The title of the Conference is: "Quo Vadis, International Criminal Law? Current Challenges of Implementing International Humanitarian Law and International Criminal Law.

The themes of the panels are:

- Positive Complementarity - National Jurisdictions and Effective Sanctions
- Transitional Justice: Experience of implementing IHL in Ukraine
- Relocated Justice: The Kosovo Specialist Chambers
- Non-Judicial Mechanisms as an Alternative or Complementary to International Criminal Proceedings
- The Mechanism for International Criminal Tribunals.

The provisional programme is available here, a full programme will be distributed once it is finalised. Registration is open to all, further information is available on the ADC-ICTY website: www.adc-icty.org.

News from other International Courts

Extraordinary Chambers in the Courts of Cambodia

June update by Khalil Souissi, Legal Intern, Meas Muth Team
July update by Chansophheak Sin, Legal Intern, Im Chaem Team
The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the ECCC.

Nuon Chea Defence

The Nuon Chea Defence Team continued to be engaged in case 002/02 on the Security Centres and 'internal purges' segment, including by examining Kaing Guek Eav (Duch) the former S-21 chairman. Alongside, the Defence filed a series of requests before the Trial Chamber.

On 7 June, the Defence filed its fourth witness request for the Security Centres and internal purges segment. Some of the proposed witnesses were working at S-21 at the time of the events, while others could provide evidence regarding the original documentation found at S-21 a few months after the fall of the regime. The team also filed a public redacted version of its second and third requests to call witnesses for the current segment, which had been filed confidentially in April 2016. Eight of the individuals the Defence sought to call are either former senior leaders of the treasonous rebellion within the Democratic Kampuchea regime, or individuals who can testify as to the rebellion's leaders and particularly Sao Phim and Ruos Nhim, who were the joint overall leaders of the rebellion. The Defence also sought the appearance of eleven individuals who could testify as to the preparations or attempts of treasonous rebellion led by the defecting CPK cadres with Vietnamese support against the CPK and legitimate DK government. It had also requested that all the witnesses appear prior to the appearance of Duch, in order to obtain his reactions to their evidence. To date, no decision has been rendered by the Trial

Chamber.

On 10 June, the Defence made submissions on the relevance of evidence of treasonous rebellion for Nuon Chea's individual criminal responsibility, at the request of the Trial Chamber, in order to provide context to its requests to call witnesses (as detailed above). The Defence emphasized the importance of evidence on the existence of a treasonous rebellion, which would help prove, among other things, that detainees at S-21 were not arbitrarily detained and executed without legal basis, contrary to the charges. It recalled that it had requested to hear a total of 35 witnesses who would be able to describe preparation and attempts to put into effect the internal rebellion against the government of Democratic Kampuchea across multiple zones and regions. Further, the Nuon Chea Defence emphasized the ramifications of such evidence regarding the individual criminal liability of Nuon Chea, and particularly, the allegations of participation in a Joint Criminal Enterprise.

Khieu Samphân Defence

In June 2016, the Khieu Samphân Defence remained fully engaged in preparing and attending the hearings in case 002/02 regarding the S-21 security center and the 'internal purges'.

Khieu Samphân

The Khieu Samphân Defence also filed several submissions. On 20 June, the Defence team opposed a co-Prosecutors' request for investigative action in relation to a witness. The same day, the Defence filed submissions regarding the Trial Chamber's request to Nuon Chea to further explain the relevance of demonstrating the existence of conflicting factions within the Democratic Kampuchea with respect to his criminal liability (E395/2). Khieu Samphân emphasized Nuon Chea's right to present his case without being bound to a higher *prima facie* relevance threshold, which would constitute a breach to his fair trial rights.

On 22 June, before the hearings on the 'internal purges', the Khieu Samphân Defence filed a request for clarification of the scope of case 002/02 concerning that topic (E420), in view of the fact that the expected testimonies of the witnesses selected by the Chamber do not *prima facie* coincide with the closing order and the crime sites selected in the severance decision for case 002/02. The Defence noted that the vast majority of the expected evidence was gathered during the ongoing investigations in cases 003 and 004. It expressed its concerns about a potential extension of the allegations against the accused in case 002. The Trial Chamber responded to the request in a short and opaque memorandum, apparently saying that the matter will be addressed in the Judgment stage (E420/1)

Meas Muth Defence

In June, the Meas Muth Defence team began preparing its response to the briefs submitted to the Office of the Co-Investigating Judges by 11 *amici curiae* on the question of whether an attack by a State against its own military could constitute an attack against a civilian population for purposes of crimes against humanity.

The Defence team also filed three motions that have been classified as confidential. The team continues to review material on the case file and to prepare and file submissions where necessary to protect Meas Muth's fair trial rights.

Ao An Defence

In June, the Defence for Ao An continued to review all materials on the case file in order to participate in the investigation, prepare Ao An's defence and protect his fair trial rights.

Im Chaem Defence

In June, the Defence team for Im Chaem replied to the International Co-Prosecutor's response to the Defence's annulment application before the Pre-Trial Chamber. The Defence continues to review the evidence in the case file in order to prepare Ms. Im Chaem's defence and to safeguard her fair trial rights in the proceedings remaining at the pre-trial stage in case 004/01.

Yim Tith Defence

In June, the Yim Tith Defence continued to analyse the contents of the case file in order to participate in the investigation, prepare Yim Tith's defence and protect his fair trial rights. The Defence team also prepared their reply to the *amicus curiae* briefs submitted in response to the International Co-Investigating Judge's public call for submissions on the scope of 'crimes against humanity' in international customary law between 1975-79.

Nuon Chea Defence

In July, the Nuon Chea Defence Team continued to be engaged in the Security Centres and "internal purges" segment. Alongside, it filed a series of requests before the Trial Chamber.

On 4 July, the Defence filed a response to a request for leave to submit an amicus curiae brief on forced marriage filed on 14 June by a group of international legal scholars and researchers. The group had requested permission to discuss two issues: the legal characterization of forced marriage as a crime against humanity, and the distinction between forced marriage and arranged marriage. In its response, the Defence argued that it would be premature for the Trial Chamber to accept the amicus curiae brief at this stage, before the parties had an opportunity to put forward their submissions on matters related to forced marriage. It also expressed concerns regarding the lack of objectivity and neutrality on the part of the Applicants.

Furthermore, the Defence argued that the relevant expertise of the Applicants was unclear as they described themselves as a "group of scholars and researchers" without outlining the era of expertise of each of them in relation to the topic of forced marriage. Finally, the Defence argued that the extensive use of amici curiae could threaten equality of arms, and that the arguments the Applicants sought to make clearly benefit the Co-Prosecutors and the Civil Parties to the present case, which would unfairly increase the burden of the Defence, and eventually infringe upon the fundamental rights of Nuon Chea. Therefore, the Defence requested the Trial Chamber to dismiss the Application.

On 13 July, the Defence filed a Rule 87(4) and Rule 93 request in relation to upcoming expert witness Henri Locard. It sought the admission into evidence of two documents: his Curriculum Vitae and an article he wrote for the Cambodia Daily entitled "In Questioning of Becker, Nuon Chea's False History Prevails". The Defence argued that the admission into evidence of his CV would be relevant to establishing his background and expertise, and, therefore, his credibility, while the admission of the newspaper article would support the Defence's position that Locard is biased thereby preventing him from fulfilling his duty to testify with the utmost neutrality and objectivity as required for an expert witness. Finally, the Defence requested to be provided with Locard's PhD thesis on "Aspects de *l'extermination du Kampuchéa démocratique et de l'idéologie khmère rouge (1975-1979)".*

Khieu Samphân Defence

In July 2016, the Khieu Samphân Defence Team remained fully engaged in preparing for the testimony of upcoming witnesses and two expert witnesses, including Henri Locard, a French historian, who appeared in court at the end of July. In mid-July, the Defence was informed by the Trial Chamber that the other expert eventually refused to testify.

The Defence also filed several submissions. On 4 July 2016, the Defence filed a response to a request for leave to file an *amicus curiae* brief related to the regulation of marriage segment. On July 5, further to a Trial Chamber memorandum informing the parties of the final stages and deadlines of Case 002/02, the Defence filed a motion urging the Trial Chamber to provide the parties with the list of civil parties, witnesses and experts scheduled to testify during the last segment of Case 002/02. On July 14, the Defence filed a request seeking the admission of a document related to an upcoming witness expert. On July 22, the Defence responded to a motion filed by the Co-Prosecutor seeking the admission of a new document, and, on July 25, the Defence filed a response to a motion filed by the International Co-Prosecutor seeking the admission of several Case 003 and Case 004 documents.

Meas Muth Defence

In July, the Case 003 Defence filed a combined response to the *amici curiae* on the question of whether under customary international law in 1975-1979, an attack by a state or organization against its own armed forces could amount to an attack directed against a civilian population for the purposes of Article 5 of the Establishment Law of the ECCC. The Case 003 Defence also filed an appeal to the Pre-Trial Chamber, two submissions to the Office of the Co-Investigating Judges, and one submission to the Trial Chamber, all of which have been classified as confidential. The Case 003 Defence continues to review material on the case file and to prepare submissions to protect their client's fair trial rights and interests.

Im Cheam Defence

On 7 July, the Co-Investigating Judges officially recognised Wayne Jordash, QC, as the foreign Co-Lawyer to represent Im Chaem in Case 004/01 together with Dr Bit Seanglim, Im Chaem's national Co-Lawyer. On 27 July, the Co-Investigating Judges issued a forwarding order under Internal Rule 66(4) requesting the Co-Prosecutors to file their final submission within three months. The Im Chaem Defence Team continues to review the evidence in the case file in order to prepare Im Chaem's defence and endeavour to safeguard her fair trial rights in the remaining proceedings of the pre-trial stage of Case 004/01.

Ao An Defence

In July, the Defence Team for Ao An filed an eleventh request for investigative action and a joint request for the reclassification of certain decisions of the International Co-Investigating Judge and filings by the Defence.

In addition, the Ao An Defence team continued to review all materials on the case file to participate in the investigation, prepare for Ao An's defence and protect his fair trial rights.

Yim Tith Defence

In July, the Yim Tith Defence Team continued to analyse the contents of the case file in order to participate in the investigation, prepare Mr Yim Tith's defence and endeavour to protect his fair trial rights.

Apathy Signals Open Season on Defence Lawyers in Case 002

By Michael G. Karnavas, 8 August 2016, the Cambodia Daily

On August 2, 2016, Henri Locard, testifying as an "expert" in Case 002, lashed out at Khieu Samphan's lawyer, Anta Guisse, claiming to have been put under "cold torture" the previous day when examined—"Historian Accuses Tribunal Lawyers Of 'Cold Torture,'" (August 3).

The reference to cold torture, for those who have not followed the trial, is about one of the methods employed by Kaing Guek Eav, better known as Duch, at S-21, or Tuol Sleng, in extracting confessions. Mr. Locard then went on to say that if Ms. Guisse continued to apply cold torture, after three days maybe he would gift his persona to Angkar, implying that the questioning was a form of re-education to conform his thinking to thatof the Democratic Kampuchea regime.

After his testimony, it was reported in The Cambodia Daily that he characterized the defense lawyers as "criminals" and "perverse." Strong words, especially when the word "perverse" has connotations associated with the judicial system of Nazi Germany.

Mr. Locard is entitled to his opinion, however ignorant, misguided or degenerate it may be. He obviously was under the misapprehension that he was in court to

HENRI LOCARD

pontificate, that his answers to the prosecution would be taken at face value by the defense and that he would not be challenged for his assertions and conclusions.

ANTA GUISSE

Foolish arrogance. Mr. Locard has been following the proceedings at the Extraordinary Chambers in the Courts of Cambodia (ECCC) since day one. He knew that he would be questioned and challenged, aggressively if necessary, by the defense lawyers. Of course, it can be uncomfortable for a witness when during the course of questioning, answers previously given are shown to be less than credible, bias is exposed and ignorance revealed. Poor Mr. Locard. Victimized by his own sense of self-worth and selfassurance. Rather than show deference to him for his erudite performance in answering the prosecution's questions with aplomb and flair, the defense lawyers had what he imagined to be the temerity to show him errors in his suppositions.

Mr. Locard's out-of-court statements are as regrettable as they are inane. However, I would be the first person to defend his right to publicly speak his mind about the trial proceedings or the parties, or the lawyers, however repugnant his remarks may be. Mr. Locard's in-court remarks are another matter. No doubt, having felt pummeled by the steady, direct and subtly delivered questions by Ms. Guisse, to which he labored to find convincing answers, Mr. Locard suffered a sleepless night. Poor thing.

Mr. Locard was testifying. If there was anything improper occurring, it was for the prosecution to raise it and for the Trial Chamber to rule, or for the Trial Chamber to simply take the initiative and intervene. Mr. Locard's job was not to editorialize on the process; it was to answer questions 5 about the subject matter of the charges, to the extent he has alleged knowledge or expertise. Not only were his remarks irrelevant, but they were designed to improperly influence the proceedings. Clearly this crafty fox spent his sleepless hours rehearsing how he might exact revenge for the public exposure of his inadequacies, and thereby put his irredeemably biased thumb on the scale of justice.

Though highly educated, Mr. Locard is just a man: emotional, vain, defensive, manipulative and ignorant of his place and obligations in the hall of justice. The same cannot, however, be said of the judges who sat passively by and allowed Mr. Locard to spout off.

Having heard Mr. Locard's offensive, unwarranted and irrelevant remarks, especially when he effectively likened Ms. Guisse to Duch in applying cold torture through her questioning, the judges should have reacted with a swift admonishment. Their duty was to remind Mr. Locard, and through swift and sure actions, the public at large, that Ms. Guisse was doing as is expected, nay, demanded, of her in representing her client—in the finest tradition of the legal profession.

The transcript reveals that Ms. Guisse invited the judges to intervene. Silence. Acquiescence and appeasement—a loaded word not chosen lightly. A chilling message to those both in the courtroom and beyond: Do not expect the judiciary to protect the integrity of the proceedings when it comes to unwarranted attacks on defense counsel by disgruntled witnesses.

The supreme irony is that if Ms. Guisse or any defense lawyer were to speak to a witness in such a fashion, she or he would be summarily rebuked. In the past, even when defense lawyers were doing what is expected of them, they were routinely silenced by having the microphone cut off by Presiding Judge Nil Nonn. In this instance, he, as well as the other judges on the bench, sat idly by—spectators, not referees. Hard to imagine that none of them, especially the international judges, were not aware that it is their responsibility to control the proceedings, including the behavior of witnesses, particularly when it comes to attacks on the integrity of the process. Indeed, during testimony, the only duty of the judges, beyond paying attention, is to control the proceedings and limit the testimony to that which is relevant. Legal Scholar John Henry Wigmore described cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." While Mr. Locard may have chafed at having his testimony and credibility publicly subjected to this legal truth serum, the law-trained who were sharing the courtroom knew that Ms. Guisse

was comporting herself as a lawyer should, and must. Unfortunately, the judges were too timid, biased or flawed to do their duty, and their failure to rein in Mr. Locard's fulmination to protect Ms. Guisse's examination on behalf of Khieu Samphan is scandalous. Their silence speaks volumes: It's open season on defense lawyers, and in all respects the pitch is tilted in the prosecution's favor.

Michael G. Karnavas is the international co-lawyer for former Khmer Rouge navy commander Meas Muth

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News from the Region

Bosnia and Herzegovina

21st Anniversary of the Srebrenica Genocide

On 11 July, the 21st Anniversary of the Srebrenica genocide was marked at the Potocari Memorial Centre. During the commemoration the bodies of 127 victims, were buried at the Memorial Centre.

This year, no Serbian state officials were present at the commemoration after the victims' associations decided that "all those who deny genocide" were unwelcome. Srebrenica municipality President Ćamil Duraković said the decision was taken "due to genocide denial and disrespect for the victims and their families". Serbian Prime Minister Vučić said he "understood" the decision. On the other hand, Republika Srpska president Milorad Dodik said that the Serb entity will never recognise genocide because it did not happen.

Bosnia denies investigating Gotovina

The State Prosecution in Bosnia has denied media reports that they were investigating Ante Gotovina for alleged war crimes. The spokesperson for the Prosecution did state that a criminal complaint against Gotovina was filed with the Bosnian-Serb police in 2006. Media had reported on 16 August that the ICTY has sent documentation to Sarajevo regarding the alleged involvement of Gotovina and other Croatian officers in war crimes in Livno. The Bosnian Prosecution said the Gotovina rumors were part of "ongoing pressures" intended to disrupt its work.

Croatia

Croatian Supreme Court overturns verdict Branimir Glavaš

The Croatian Supreme Court overturned the verdict against Branimir Glavaš, a Croatian paramilitary leader, who was previously convicted of war crimes against Serb civilians during the war in Croatia. In 2009 Glavaš was found guilty of charges of torture and murder committed against Serb civilians in the eastern Croatian town of Osijek in 1991. He was sentenced to 10 years in prison. Glavaš then fled to neighboring Bosnia and Herzegovina where he was arrested in September 2010 and sent to prison to serve his sentence. On 20 January 2015, after serving five years in prison, he was released, after Croatia's Constitutional Court rescinded his war crimes conviction on procedural grounds. In July 2016, the Supreme Court quashed his verdict and ordered a retrial. The original verdict was annulled because of significant violations of criminal proceedings.

Zagreb District Court annuls verdict of Cardinal Alojzije Stephanic

On 22 July, the Zagreb District Court annulled a 70-years old guilty verdict of Croatian Catholic Cardinal Alojzije Stepinac. In 1946, Zagreb Archbishop Alojzije Stepinac had been found guilty of collaborating with Italian and German occupiers and the puppet Ustasha regime of the so-called Independent State of Croatia (NDH). Stepinac had also been convicted of forced conversions of Orthodox Christian Serbs to Catholicism, as well as for the hostile post-war propaganda against the Federal People's Republic of Yugoslavia (FNRJ).

Serbia

New Serbian Government elected

ALEKSANDAR VUČIĆ

On 11 August a new Serbian Government was elected by 163 votes in the parliament, 62 members of the parliament voted against. The previous Prime Minister, Aleksandar Vučić, has been re-elected as Prime Minister. The new cabinet has 16 Ministers of which three are Ministers without portfolio. Congratulating Vučić, Austrain Foreign MInister Sebastian Kurz said on Friday that Vučić is "an anchor of stability in the Balkans". In July, the European Union opened two more chapters in the accession negotiations with Serbia on the Judicial System and Rule of Law. It is "a great and exceptionally significant day for Serbia and its citizens", Prime Minister Vučić said in Brussels.

Montenegro

Transfer from Guantanamo to Montenegro

Malik Abdel Wahab al-Rahab, a former bodyguard of Al Qaeda leader Osama bin Laden, has been transferred to Montenegro. He was held in the U.S. military prison Guantanamo for the past 14 years, being neither indicted nor tried. This transfer comes as a part of the international "humanitarian" effort to help US Government to close Guantanamo prison.

Parliamentarian elections scheduled for 16 October

On 11 July, Montenegrin President, Filip Vujanović, scheduled parliamentarian elections for 16 October. The elections will be the tenth parliamentary elections since a multi-party system was introduced in Montenegro, and the fourth since the country became independent. Prime Minister Milo Đjukanović's Democratic Party of Socialists has been in power since 1990.

Looking Back…

International Criminal Tribunal for Rwanda (ICTR)

Ten years ago…

On 13 August 2006, the Trial Chamber of the ICTR found former priest, Athanase Seromba, guilty of genocide and extermination as a crime against humanity and sentenced him to a single term of 15 years' imprisonment. He was acquitted of the count of conspiracy to commit genocide. Athanase Seromba was a catholic priest of Nyange Parish in the Kvumu commune.

In the sentencing, the Trial Chamber considered several aggravating factors, namely his authority as a respected Catholic priest, the trust he had from the Tutsi refugees who had been seeking shelter in his parish and his failure to live up to this trust that they would be safe in his parish. However, it was this parish that had been attacked and it has been proven beyond reasonable doubt that Athanese Seromba spoke with the driver of the bulldozer as to where to start with the demolition of the parish and which parts were the weakest. This was seen by the Trial Chamber as aiding and abetting. The parish was as well attacked by Interhamwe, militiamen and gendarmes using grenades to destroy the parish. On the other hand, the Trial Chamber also considered mitigating factors, his good reputation prior to the events of 1994, his young age during the events and his voluntary surrender to the Tribunal.

Athanese Seromba was arrested and detained in Arusha after his surrender to the Tribunal in February 2002.

International Criminal Tribunal for the former Yugoslavia (ICTY)

Fifteen years ago …

On 2 August 2001, The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) sentenced General Radislav Krstić, the former Deputy Commander and Chief-of-Staff of the Drina Corps, to 46 years' imprisonment. Krstić was Commandor of the Drina Corps, which was the VRS military formation with the task of planning and carrying out operation 'Krivaja 95'. Krstić was indicted in 1998 by the ICTY and in 2001 found guilty of murder, persecutions and genocide. This was the first case the ICTY has convicted a person of genocide and this case is therefore to be considered as a landmark case for the ICTY. With this case it was also established by the ICTY that genocide has been committed in Srebrenica.

The Defence and Prosecution appealed the judgment. The Appeals Chambers unanimously determined that genocide was committed in Srebrenica in 1995 but lowered the sentence of Krstić from 46 to 35 years' imprisonment as the Judges decided that the evidence suggested that Krstić was not supporting the plan of committing the genocide. As he was the Commander of the Drina Corps he was still convicted of aiding and abetting genocide.

International Criminal Tribunal for the former Yugoslavia (ICTY)

Twenty years ago…

On 5 August 1996, Trial Chamber II of the ICTY decided to reject the defence motion to exclude hearsay evidence in the trial for Dusko Tadić.

The Trial Chamber came to this decision since the Tribunal's Rules do not exclude hearsay evidence. The Tribunal is neither bound by national rules of evidence. In the Tribunal Rules it is stated that evidence has probative value unless it is substantially outweighed by

the need to ensure a fair trial. In general, the Rules state that in order for evidence to be considered probative it needs to be determined at a minimum that the evidence is reliable. With this the Trial Chamber needs to determine whether the hearsay evidence is voluntary, truthful and trustworthy.

Furthermore, the Trial Chamber noted that with the training and experience of the Judges they should be able to hear evidence in the appropriate manner and determine the relevancy of the value of the evidence presented.

The Trial Chamber concluded that in determining whether hearsay evidence should be excluded or not, it will determine whether the evidence has probative value and will hear both the circumstances of which the evidence came to existence as well as the content of the evidence.

Defence Rostrum

Standard of Proof of Death

By Anna McNeil

International criminal courts cannot exercise jurisdiction over a deceased person for the purpose of criminal proceedings. By virtue of this principle, when an accused is alleged to have died, proof of death is an important factual finding that the courts must make. Currently, no international criminal court or tribunal provides a standard of proof to apply in determining the death of an accused in any of their Statutes or Rules of Procedure. Jurisprudence has been slow to develop and a clearly defined standard has not emerged. Instead, what has developed is a myriad of guiding principles which, when accompanied by cogent evidence of death, have resulted in the acceptance of the death of the accused and termination of proceedings. This all changed on 11 July 2016. The Appeals Chamber of the Special Tribunal for Lebanon (STL), presiding over the case *Prosecutor v Ayyash et al* (the "*Badreddine* case"), examined the general approach to standards of proof in international criminal law. The Appeals Chamber held that the only standard of general application articulated by international criminal courts is the 'balance of probabilities'. This standard requires the evidence to be convincing enough that the Judge is satisfied the accused is deceased and enables the courts to consider each set of facts on their own merits. So how did the Appeals Chamber arrive at formalizing this standard?

TRIAL CHAMBER

Mustafa Amine Badreddine is one of five accused being tried in absentia for the 14 February 2005 attack in Lebanon. The attack killed 22 individuals, including the former Lebanese Prime Minister Rafik Hariri, and injured 226 others. On 13 May 2016, the Lebanese media aired claims that during the week of 8 May 2016, Badreddine had been killed in an explosion in Syria whilst serving as a senior military commander for Hezbollah. The evidence presented was circumstantial and included media coverage of funeral ceremonies, speeches by family members and Hezbollah officials, a media statement from Hezbollah explaining their investigation into Badreddine's death and a Prosecution investigator's notes establishing the nature of the evidence provided.

The Prosecution submitted the evidence to allow the Trial Chamber to come to its own conclusion. Counsel for Badreddine submitted that the evidence conclusively proved Badreddine's death and sought termination of proceedings against him.

The Legal Representatives for Victims (LRV) submitted that the evidence was

inconclusive, and more evidence was required to prove his death and discontinue proceedings against him.

After two days of hearings, the Trial Chamber made an interim oral decision that the evidence was not sufficient to prove Badreddine's death. The following day, the parties and the LRV were asked by the Presiding Judge, for the purposes of the written decision, to present guidance in relation to what the requisite standard of proof might be. The Presiding Judge admitted his understanding to be, where proceedings had been discontinued or terminated based on the death of the accused, that there is no set standard, only that a chamber is 'satisfied'.

The Prosecution, Counsel for Ayyash, Badreddine, Merhi and Oneissi agreed the standard should be high but not as high as 'beyond reasonable doubt', even the word 'certainness' was believed to be too high. The Prosecution argued that the Chamber should be satisfied 'to a sufficient extent.' Counsel for Ayyash put forward the terminology 'clear and convincing evidence.' The LRV disagreed, arguing the 'beyond reasonable doubt' standard should be applicable, that the evidence needed to be 'clear and compelling' requiring both a death certificate and identification of a corpse.

The Trial Chamber agreed that the standard of 'beyond reasonable doubt' was too high as proof of death is not a fact going to the guilt of the accused. The Trial Chamber held that the Chamber 'must be satisfied to a high standard' but decided it was not necessary to articulate a standard. The Trial Chamber was not yet satisfied to the high standard required to terminate proceedings against Badreddine. It held that the evidence presented was circumstantial and other avenues, such as requesting a death certificate via the Lebanese authorities, were still being sought. The Trial Chamber was prepared to reconsider the issue if further material was provided.

On 15 June 2016, Counsel for Badreddine submitted an interlocutory application to the Appeals Chamber seeking permission for the Trial Chamber to consider new evidence supporting their belief that Badreddine was deceased. The evidence included an official death certificate dated 6 June 2016 and an annexed medical report relating to his death. Counsel also alleged that the Trial Chamber erred in law and in fact in concluding that the evidence was not sufficient in proving Badreddine's death to the requisite standard. The Prosecution was of a similar mind, opposing the reversion of the matter to the Trial Chamber until an applicable standard of proof was determined by the Appeals Chamber.

THE APPEALS CHAMBER

The Appeals Chamber had great difficulty accepting that the Trial Chamber had made the interim oral decision, but then asked the parties to present submissions on the requisite standard of proof to confirm their original decision. The Appeals Chamber argued this decision was *ex post facto* as it was made without knowledge of the requisite standard. The Appeals Chamber held that the Trial Chamber's failure to apply a standard of proof when making its factual determination constituted an error of law which invalidated their finding.

The Appeals Chamber then had the task of determining what standard of proof applied.

Taking into account the lack of direction from the Statutes and Rules of Procedure and Evidence of current international criminal courts, the lack of jurisprudence and the Trial Chamber's vague 'high standard of proof', the Appeals Chamber held that the standard, based on an examination of the general approach to the standards of proof in international criminal law, was 'on the balance of probabilities'. This standard is an assessment on a case by case basis as to the truth of the fact and requires convincing evidence to satisfy a judge that the fact is proven. The Appeals Chamber specified that a judge is expected to take into account the nature of the matters to be proven and the consequences flowing from the particular finding of fact.

The Appeals Chamber accepted, on the balance of probabilities, that the circumstantial evidence proved Badreddine was deceased. It directed the Trial Chamber to terminate proceedings against him without prejudice and to resume proceedings should evidence surface proving he is alive.

Read the full Defence Rostrum with citations here.

Blog Updates and Online Lectures

Blog Updates

"Judges called to task for failure to defend the defence", by Michael Karnavas. Blog available here.

"Meaningful victim participation – but only if you can pay for it?", by Maria Radziejowska. Blog available here.

"The Mistrial, An Innovation in International Criminal Law", by William A. Schabas. Blog available here.

Online Lectures and Videos

"The future of International Criminal Justice", by Justice Richard Goldstone. Lecture available here.

"The Role of International Law in Humanitarian Assistance" by Humanitarian Academy at Harvard. Lecture available here.

"Knowing what we know now. International crimes in historical perspective" by Professor Willem de Haan. Lecture available here.

Publications and Articles

Books

Sangkul Kim (2016). **A Collective Theory of Genocidal Intent,** Asser Press.

Michelle Jarvis (2016). **Prosecuting Conflict. Related Sexual Violence at the ICTY,** Oxford University Press.

Gabriel Hallevy (2016). **The Matrix of Necessity in Modern Criminal Law,** Springer.

Andrew Clapham, Stuart Casey-Maslen, Gilles Giacca, and Sarah Parker (2016). **The Arms Trade Treaty: A Commentary,** Oxford University Press

Articles

Karen J. Alter, James T. Gathii and Laurence R. Helfer (2016). **"Backlash against International Courts in West, East and Southern Africa: causes and Consequences",** The European Journal of International Law, Volume 27, No. 2.

Elizabeth A. Wilson (2016), **"People Power" and the Problem of Sovereignty in International Law",** Duke Journal of Comparative & International Law, Volume 26, Issue 3, P. 551-594.

Rebecca Ingber (2016). **"International Law Constraints as Executive Power",** Harvard International Law Journal, Volume 51, Issue 1.

Calls for Papers

The European Society of International Law Research Forum has issued a call for papers on **"The Neutrality of International Law: Myth or Reality?"** Deadline: 30 September 2016, for more information, click here.

Tilburg University has issued a call for papers on several topics on **"Translating Law".** Deadline: 15 December 2016, for more information, click here.

Events

Representing Perpetrators of Mass Violence

Date: 31 August – 3 September 2016

Location: Utrecht University

For more information, click here.

A vision for the Future of the United Nations

Date: 6 September 2016

Location: Chatham House, London

For more information, click here.

Asser-ICJ Series "The International Court of Justice at 70: Impact and Functions"

Date: 15 September 2016

Location: T.M.C. Asser Instituut, The Hague

For more information, click here.

The Mechanism for International Criminal Tribunals and the Kosovo Specialist

Date: 19 September 2016

Location: The Hague Institute for Global Justice, The Hague

For more information, click here.

Opportunities

Associate Legal Officer (P2)

International Criminal Court

Secretariat for the Assembly of States Parties, The Hague

Deadline: 22 August 2016

For more information, click here.

Legal Office (P3)

World Health Organization

UNITAID, Geneva

Deadline: 24 August 2016

For more information, click here.

Legal Officer (P3)

Office of Legal Affairs

OLA, New York

Deadline: 2 September 2016

For more information, click here.

Human Rights Officer (P3)

Office of the High Commissioner for Human Rights

OHCHR, Geneva

Deadline: 29 September 2016

For more information, click here.

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GOODBYE AND THANK YOU!

The ADC-ICTY would like to express its sincere appreciation to Ruby Lau and Ailsa McKeon for their contributions to the Newsletter, we wish them all the best for the future!