ADC ICTY TPIY

NEWSLETTER

ISSUE 54

16 October 2013

Head of Office: Isabel Düsterhöft
Assistant: Katka Velicka
Contributors: Shubhangi Bhadada, Samie Blasingame, Emma Boland, Sarah Coquillaud, Michelle Gonsalves, Eva Maria Jellinek, Jolana Makraiova, Aoife Maguire, Julie Malingreau, Marialejandra Moreno Mantilla, Ellen Naughton
Design: Sabrina Sharma

ICTY CASES

Cases at Trial

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-I)

Mladić (IT-09-92)

Šešelj (IT-03-67)

Cases on Appeal

Đorđević (IT-05-87/1)

Popović *et al.* (IT-05-88)

Prlić *et al.* (IT-04-74)

Šainović *et al.* (IT-05-87)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

Judge Meron and Judge Agius Re-elected President and Vice-President of the ICTY

In a special plenary held on 1 October 2013, the judges of the ICTY re-elected Judge Theodor Meron as President of the Tribunal and Judge Carmel Agius as Vice-President for two year terms starting 17 November 2013.

In the vote for President, Judge Meron received twelve votes, while Judge O-Gon Kwon received six votes. After Judge Meron was re-elected, he nominated Judge Agius as Vice-President, who was re-elected by general consensus.

Judge Meron has been the President of the ICTY since 17 November 2011 and also held this position between March 2003 and November 2005. He was appointed the President of the Mechanism for International Criminal Tribunals (MICT) by the United Nations Secretary-General on 1 March 2012 for a period of four years.

Judge Agius had previously been elected Vice-President on 19 October 2011. He is also an Appeals Chamber Judge of both the ICTY and the ICTR.

Judge Meron

Judge Agius

ICTY NEWS

Also in this issue

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

Radovan Karadžić has requested the appointment of a Special Chamber to investigate a possible contempt of Tribunal by former Chief Prosecutor Carla Del Ponte in the *Prosecutor v. Slobodan Milošević* case.

Due to the recent publication of documents on Wikileaks, it has been discovered that Del Ponte may have knowingly been in contempt of court by disclosing the names of top United States officials listed in Milošević's confidential Defence witness list.

Following the "Request for Appointment of Special Chamber" filed by Radovan Karadžić on 27 September, the President of the Tribunal, Theodor Meron, has ordered that a Specially Appointed Chamber be created to investigate this matter. The Chamber is to be effective immediately and will be composed of three judges: Judge Christoph Flügge, Judge Bakone Justice Moloto and Judge Burton Hall.

Prosecutor v. Vojislav Šešelj (IT-03-67-T)

At the end of August 2013, the Chamber, appointed by order of the Vice-President comprised of Judges Bakone, Justice Moloto, Liu Daqun and Burton Hall, disqualified Judge Frederik Harhoff from the proceedings in the *Šešelj* case on the basis of a letter written by Judge Harhoff two months earlier (see Newsletter issue 51). The Prosecution filed a motion for reconsideration, followed by the request for clarification from two other judges.

On 7 October 2013, the Chamber convened by order of the Vice-President, dismissed the Prosecution motion for reconsideration. Having noted, *inter alia,* that Stanišić and Župljanin, whose Defence Counsel had sought leave to make submissions on the motion, have another forum to raise their arguments, the Chamber moved on to assessing three arguments submitted by the Prosecution regarding the reconsideration request.

First, the Chamber concluded that the impartiality standard was applied. The contents of the letter sent out in June 2013 were both reliable and sufficient to rebut the presumption of impartiality. Also, the excerpts were read in isolation and the letter assessed in its entirety. The Chamber specifically noted that: "Judge Harhoff's reference to a set practice of convicting Accused was such that a reasonable, informed observer would conclude that he was not merely disagreeing with the jurisprudence of the Tribunal, but rather, that there was an appearance of bias on his part".

Second, the Prosecution interprets the "deep professional and moral dilemma" as relating to his colleagues that "have been behind a short-sighted political pressure". While the Chamber acknowledged that this might be one way of interpreting the deep professional and moral dilemma, it certainly does not show any error in the Chamber's reasoning.

Thirdly, the Chamber assessed that it was not bound to consider the Report, and the mentioned Report is – as it stands – "immaterial to the issue of whether a reasonable, informed observer would apprehend bias on the part of Judge Harhoff when the letter became publicly available".

Judge Moloto filed a separate opinion on the interpretation of Rule 15 of the ICTY Rules of Procedure and Evidence. Judge Liu filed a dissenting opinion agreeing with the Prosecution on the first and second point, and also arguing that granting reconsideration would be in the interest of justice.

ICTY RPE Article 15(B)(i)

Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial.or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President

Popović *et al.* (IT-05-88)

In accordance with the scheduling order issued on 3 October, the appeal hearing in the Popović *et al.* case will take place from 2 until 13 December 2013.

The Appeals Chamber is currently seized of six appeals against the judgement rendered on 10 June 2010. No appeal was filed against Borovčanin. The trial judgement against Gvero became final in March 2013, following his death, and subsequent termination of the appellate proceedings against him.


Popović et al. Judgement

The Trial Chamber convicted these seven former high-ranking Bosnian Serb military and police officials of crimes committed in 1995 in relation to the fall of the enclaves of Srebrenica and Žepa, eastern Bosnia and Herzegovina.

Prosecutor v. Ratko Mladić (IT-09-92)


John Clark

On Monday 23 September, the trial began with the testimony of John Clark, a British pathologist who has testified in seven previous cases before the ICTY. Clark was the head of a Prosecution team who carried out several exhumations in Bosnia from 1999 to 2001. Clark conducted many post-mortems on bodies found at the alleged Srebrenica mass graves and submitted annual reports.

During cross examination by Counsel for the Defence, Miodrag Stojanović, problems encountered by Clark's exhumation team and outlined in his 1999 annual report were discussed. Clark confirmed that he encountered communication problems with team members not all speaking the same language, as well as having different medical and legal backgrounds. However, Clark stated that everyone used the same methodology and that the final analysis did not differ too much.

Two protected witnesses were the next to be called by the Prosecution to testify and trial continued in closed session for two days. Prosecution investigator Barry Hogan was called on 26 September and gave his evidence about the reconstruction of sniping incidents in Sarajevo. Hogan also spoke about being tasked with collecting documents relating to the operations of the Sarajevo-Romanija Corps.

Branko Lukić, Defence Counsel for Mladić, objected to the admission of some of the panoramic shots of the alleged sniping scenes. While agreeing that not a lot could be seen in one picture in particular, the Chamber eventually rejected the Defence's objections and admitted the panoramic photos into evidence.

Hogan's testimony was briefly halted on 30 September to allow for the testimony of a protected witness. Witness RM 70 testified about her detention in various prisons over the course of a few months in 1992. During the open session portions of her testimony, the witness identified various Bosnian Serb army soldiers and police officers as some of her attackers. During her brief cross-examination, the witness spoke about how she was saved from captivity by two Serb soldiers and her gratitude to the two.

Hogan resumed his testimony on 1 October, with cross-examination by Defence Counsel Lukić. The Defence contested the conclusions reached by Hogan regarding the shelling of Markale Market as well as various other sniping and shelling incidents. Hogan concluded his testimony on 3 October. The next witness called was RM97, who testified with protective measures in closed session.

The Mladić trial will resume on Wednesday 16 October.

Prosecutor v. Goran Hadžić (IT-04-75)

The trial of Goran Hadzić, continued on 7 and 8 October 2013 with protected witness GH-169. GH-169 testified with voice and image distortion and gave most of his evidence in closed session. From June 1991 to the end of 1993 his employment was associated with the judiciary. He was therefore questioned about the justice system in Eastern Slavonia, and later self-declared Republic of Serbian Krajina (RSK), including the structure of municipal and higher courts; the role of police, investigators, judges and prosecutors; and the laws that were in force in Serbian Autonomous Oblast (SAO) of Eastern Slavonia and the RSK. The witness said that all state authorities and ordinary citizens had a respective legal and moral duty to report crimes at this time.

The Court was shown an interview dated 20 November 1991 wherein Hadzić indicated that those accused of committing war crimes against Serbs would be tried. The witness commented that after the fall of Vukovar, tensions in the SAO of Eastern Slavonia "ran high because of the war propaganda efforts of both sides in that period". GH-169 confirmed that military courts were in charge of trying prisoners of war, though "it was difficult to imagine a proper and fair trial".

The witness confirmed the detonation of the Catholic Church near the court building in Dalj. Given the damage to the both the church and the witness's nearby office, the witness concluded that there had to be "a lot of explosives, crates and crates". Relying on documents sent from the First Military District to the Federal Secretariat of Defense (SSNO), the witness indicated that Arkan's men likely planted the explosives and committed crimes against non-Serbs.

On 8, October the witness testified about the rumors surrounding the displacement of Croats in October 1991, claiming that spontaneous expulsion was impossible. Therefore, the police, local communities and military had to participate in, or at least tolerate, the process.

Prlić *et al.* (IT-04-74)

The first Status Conference in the case *The Prosecutor v. Prlić et al.* took place in open session on 8 October 2013, presided by Judge Theodor Meron. The Status Conference was held in accordance with Rule 65 *bis,* which provides that a status conference should be convened within 120 days of the filing of a notice of appeal to allow the appellants the opportunity to raise issues relating to their appeal or detention conditions, including the mental and physical condition of the appellant. Slobodan Praljak and Berislav Pušić both filed their notices of appeal on 28 June 2013. The notices of appeal of Jadranko Prlić, Bruno Stojić, Valentin Ćorić, and Milivoj Petković should be filed, by order of Judge Meron, within 60 days of the issuance of the English translation of the Trial Judgement.

Judge Meron inquired into the detention conditions and health situations of the six appellants. Ćorić indicated that he was being monitored in relation to his heart problems, but indicated that he had nothing major to report concerning the treatment. Pusić also indicated that there were some problems with his health. After confirming that the appellants had no other issues concerning their detention conditions on health situations, Judge Meron provided a short account of the procedural history. Additionally, Judge Meron stated that the urgent motion for a stay of proceedings until the translation of various documents into Bosnian, Croation and Serbian filed by Praljak on 3 October 2013 had not yet received a response from the Prosecution. Judge Meron further indicated that the Appeals Chamber would consider Praljak's requests of 3 and 4 October when it has received responses in this matter.

In the course of the Status Conference, Praljak raised the issue that he was now representing himself due to the fact that his two Counsel, Nika Pinter and Natacha Fauveau-Ivanović, had been removed by the Registrar as a result of the judgement about his financial status. Praljak addressed Judge Meron regarding a letter he had sent to him with the question to reconsider the decision on his financial status. Judge Meron replied by pointing Praljak to *the Decision on Slobodan Praljak's request for further review* that was filed 7 October. Praljak was cordially asked to read this answer before introducing any problems that he may have.

LOOKING BACK...

International Criminal Tribunal for Rwanda

Five years ago….

On 8 October 2008, Augustin Ngirabatware, Rwandan's Minister of Planning in the Interim Government at the time of the 1994 genocide, was transferred from Frankfurt, Germany, to the UN Detention Facility in Arusha, Tanzania.

Ngirabatware was arrested in Germany on 17 September 2007, in relation to an arrest warrant issued in 2001 by the ICTR. On 10 October 2008 he made his initial appearance before Trial Chamber II composed of Judges William Sekule, presiding, Arlette Ramaroson and Solomy Bossa, pleading not guilty all counts. The trial of Ngirabatware began on 23 September 2009.

On 20 December 2012 the Trial Chambers found Ngirabatwe guilty of genocide, direct and public incitement to commit genocide and rape as a crime against humanity. He was sentenced to 35 years of imprisonment.

At present, the Appeals Chamber is hearing his appeal under the mechanism for International Criminam Tribunals (MICT), being represented by ADC Members, Mylène Dimitri and Guénaël Mettraux .

Augustin Ngirabatware

Extraordinary Chambers in the Courts of Cambodia

Five years ago….

On 8 October 2008, the ECCC published a code of judicial ethics ('Code') that was adopted by the Court on 31 January 2008 and amended on 5 September 2008. The Code was adopted keeping in mind the hybrid character of the ECCC and the fact that it would apply to both Cambodian and international judges. Thus, it incorporates both international and national norms on judicial ethics.

The Code is an attempt to lay down the fundamental principles that would serve as guidelines on the essential ethical standards required of judges in the performance of their duties. The central tenant of the Code is judicial independence. At the same time, the Code reinforces the principles of impartiality and integrity of judges and maintenance of confidentiality. In addition, the Code provides for diligence by the judges and avoidance of undue delay.

The Code also provides guidelines for the conduct of judges not only during proceedings but also during extra-judicial activities, including barring judges from exercising any political functions. It attempts to balance the freedom of expression and association of judges with their responsibilities as a judge so as to ensure that judicial independence, impartiality and integrity of the ECCC is not called into question.

The Code is a laudable attempt to lay down the core principles that the judges of an international tribunal should keep in mind to ensure that judicial independence and integrity is maintained.

NEWS FROM THE REGION

Bosnia and Herzegovina

Bosnian Court orders the Retrial of Damjanović Case

On 18 June 2006, the Trial Panel of the Bosna Herzegovina (BiH) Court had found that the Accused Goran and Zoran Damjanović were both guilty of torture and Goran of illegal manufacturing and trade of weapons or explosive substances. Both were members of the Army of the Serb Republic of BiH and played a prominent part in the beating of a group of about 20 to 30 male Bosniak prisoners, who were *hors de combat*, in June 1992. Goran was sentenced to 12 years of imprisonment and Zoran to 10 years and 6 months. On 19 November 2007, the Appellate Panel had upheld the verdict with regard to the crime of torture only.

However, because the Bosnian judges had applied the 2003 Criminal Code instead of using the sentencing provisions of the 1976 Code, the European Court of Human Rights had ruled on 18 July 2013 that there had been a violation of Article 7 of the European Convention of Human Rights, namely the non-retroactivity of criminal law. It stated that "this conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied in the applicants' cases" and not the 2003 Code.

Consequently, the BiH Court decided on Friday 4 October that the judgment taken by the Court of Strasbourg required the cases to be reopened. In the statement, the BiH Court said that in the retrial, it would act in accordance with the European Convention. According to Senad Kreho, lawyer of Goran Damjanović , the facts of the case will not be re-examined and only the punishment, the mitigating and extenuating circumstances will be discussed. On 11 October the BiH Court ordered the release of Goran and Zoran Damjanović .

Declassification of Bosnia War Documents by the CIA

On 1 October 2013, Bill Clinton addressed the audience at a symposium called, "Bosnia, Intelligence, and the Clinton Presidency". The former President of the United States spoke about the Bosnian conflict in 1992-1995, and praised the recent declassification of a collection of Bosnian War documents.

The collection deals with the Clinton administration's intelligence operations and its role in brokering the Dayton Peace Accords, which were a crucial contribution to the peace process. The collection further sheds light on the difficulties Clinton faced when trying to get NATO support for the bombing-campaign in Bosnia. It exposes details about a meeting held at the White House in 1993. Then-White House National Security Adviser Tony Lake warned that if they pursued an air strike, "at the end of the road, we would be under great pressure to help implement a settlement including forces on the ground".

The declassification is the most recent historical collection released in 20 years where the CIA has been declassifying documents under the Historical Review Program. It marks a point in history as the United States have taken a step forward from its Cold War centred approach to intelligence sharing, to a more recent one.

Appeals Court in Brčko Reduces Sentence

On 11 October, the Appeals Court in Brčko reduced Monika Karan-Ilić's sentence to two and a half years. Karan-Ilić is one of the only women convicted of war crimes committed during the 1990s wars and was found guility of participating in torture and inhumane treatment in the Luka detention camp and the Brčko police station in 1992.

On appeal, Karan-Ilić was acquitted of two of eight counts, which resulted in a reduction of her sentence. She has been in custody in Bijeljina since December 2011, this time spent in detention will be subtracted from her sentence, leaving her with only a few more months until she has served the two and a half years.

NEWS FROM OTHER INTERNATIONAL COURTS

The International Criminal Court

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

On 4 October 2013 Trial Chamber IV of the ICC issued a termination decision in regards to the case *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, specifically against the defendant Saleh Jerbo. The Court accepted the evidence it had received concerning to the death of Jerbo in April 2013, despite an absence official death certificate.

The case had originally been brought before the ICC in regards to the conflict in Darfur, Sudan and was referred by the United Nations Security Council. On 7 March 2011, the Pre-Trial Chamber unanimously confirmed the charges of three war crimes against Jerbo and Banda.

The Pre-Trail Chamber found it on substantial grounds that they were both criminally responsible for crimes committed during an attack which was led by the Accused and directed at the compound of African Union Mission in Sudan on 29 September 2007. Twelve soldiers were killed and eight were severely wounded during the attack.

The Pre-Trial Chamber determined that the attack had been carried out in a coordinated manner, with a prior intention arising from the organisation of troops, materials and equipment.

Saleh Jerbo

The trial for the remaining defendant, Abdallah Banda, will start on 5 May 2014. He is represented by ADC member Karim Khan QC and Nicholas Koumjian.

Special Court for Sierra Leone

By Michael Herz, Associate Appeals Counsel, Office of the Prosecutor, ICTR. Former Legal Consultant to the Charles Taylor Defence Team.

Any views expressed in this article are entirely his own and are not necessarily those of the ICTR, SCSL, or the United Nations.

On 26 September 2013, the Appeals Chamber of the Special Court for Sierra Leone ('Appeals Chamber') upheld Charles Taylor's 50-year prison sentence and his convictions for aiding and abetting and planning crimes during the Sierra Leonean civil war. To arrive at its decision, the Appeals Chamber endorsed certain conclusions in the *Taylor* Trial Judgment that have been criticised by academics and practitioners alike, and significantly departed from the ICTY appellate jurisprudence in *Perišić*. This article summarises some of the more significant findings in relation to the law on individual criminal responsibility in the *Taylor* Appeal Judgment.

Charles Taylor

Aiding and abetting—*actus reus*

The *actus reus* elements

The Defence submitted that the assistance of aiding and abetting must be given to the principal who perpetrates the crime, and the substantial contribution must be to the criminal conduct itself. By imputing to Taylor responsibility for crimes based on the conduct of the Revolutionary United Front and Armed Forces Revolutionary Council (RUF/AFRC) rebels as an organisation, and without making specific findings as to the perpetrator, aiding and abetting becomes a form of 'organisational liability', similar to Joint Criminal Enterprise (JCE)

The SCSL Appeals Chamber held that, according to a plain interpretation of the SCSL Statute, individual criminal liability is established in terms of the Accused's relationship to the crime, and not the physical actor of the crime. Furthermore, the Appeals Chamber reviewed customary international law and found that the *actus reus* of aiding and abetting is that "the Accused's acts and conduct had a substantial effect on the commission of the crimes". It found that, at international tribunals, it has never been a requirement that an aider and abettor must provide assistance to the crime in a particular manner, "such as providing assistance to the physical actor that is then used in the commission of the crime".

Violations of the principle of personal culpability

The Defence argued that, according to the SCSL's definition of aiding and abetting, any assistance to a party to an armed conflict would contribute to the commission of crimes because crimes are committed in any armed conflict. Furthermore, it argued that the Trial Chamber failed to distinguish between 'neutral' and 'intrinsically criminal' assistance. Neutral assistance could be described as assistance appropriate for the purpose of waging war, and not necessarily the commission of crimes.

Both arguments were dismissed by the SCSL Appeals Chamber on the basis that a sufficient causal link—namely, that the Accused's acts and conduct have a substantial effect on the commission of crimes—has to be established to attract criminal liability. Consequently, the provision of innocuous items would not fulfil the *actus reus* requirement of aiding and abetting if it did not have a substantial effect on the commission of crimes.

Aiding and abetting—*mens rea*

One of the main thrusts of the Defence appeal was that the Trial Chamber erred in adopting and applying a 'knowledge' standard for an Accused's mental state regarding the consequence of his acts or conduct in aiding and abetting liability. It argued that this knowledge standard is unsupported by customary international law. This was demonstrated by the adoption of the 'purpose' standard in the domestic practice of some States, and that the *opinio juris* of States manifested in the adoption of the purpose standard in Art. 25(3)(c) in the Rome Statute. Although the knowledge standard has been adopted at the ICTY, the Defence submitted that the reasoning supporting this standard, particularly as developed in the ICTY's *Furundžija* Trial Judgment, was manifestly incorrect.

ICC Rome Statue Article 25 (3)(c)

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

The Appeals Chamber found, after an assessment of the customary international law, that knowledge is a culpable *mens rea* standard for aiding and abetting liability. This conclusion was based on the post-Second World War jurisprudence—where an Accused's 'knowing participation' in the crimes was a culpable *mens rea*—as well as early ICTY jurisprudence such as *Tadić*, which held that "awareness of the act of participation coupled with a conscious decision to participate" in the crime led to criminal responsibility. Art. 25(3) of the Rome Statute was curtly dismissed as having no bearing on the *mens rea* elements of aiding and abetting liability under customary international law, whereas, the 1996 International Law Commission Draft Code, on the other hand, which supports the knowledge standard, was regarded as authoritative and may be evidence of customary international law. The Appeals Chamber's holding that "[d]omestic law, even if consistent and continuous in all States, is not necessarily indicative of customary international law" because different jurisdictions base "concepts of criminality on differing values and principles", has come under criticism from at least one commentator.

Specific Direction

One of the most significant aspects of the Taylor Appeal Judgment was that it departed from the precedent set in *Perišić,* in which the ICTY Appeals Chamber held that "no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly". Applying this standard, Perišić was acquitted of aiding and abetting and, shortly thereafter, so was Simatović. The Trial Chamber in *Taylor* failed to analyse whether specific direction was present. Considering the factual similarities between *Taylor* and *Perišić*, commentators had discussed that the aiding and abetting convictions against Taylor should, therefore, be reversed, too. However, the SCSL Appeals Chamber upheld the con-

viction by finding that 'specific direction' is not an element of the *actus reus* of aiding and abetting liability. To justify this departure from the ICTY precedent, the Appeals Chamber stated that the *Perišić* Appeals Chamber did not assert that specific direction is an element required under customary international law. Rather, the *Perišić* Appeals Chamber merely conducted an inquiry into ICTY and ICTR jurisprudence, which is not binding on the SCSL, to make its assertion.

Momčilo Perišić

Based on its own assessment of customary international law, the SCSL Appeals Chamber concluded that the cases examined did not require an *actus reus* element of specific direction in addition to proof that the Accused's acts and conduct had a substantial effect on the commission of crimes. However, the Appeals Chamber's assessment of the customary international law—of post-Second World War jurisprudence and the ILC Draft Code—has also drawn criticism. Although the post-Second World War jurisprudence, indeed, does not feature the specific direction requirement, Article 2(3)(d) the ILC Draft Code provided that aiding and abetting requires that the assistance in the commission of a crime be provided "directly and substantially", which the Chamber appears to have ignored or misinterpreted.

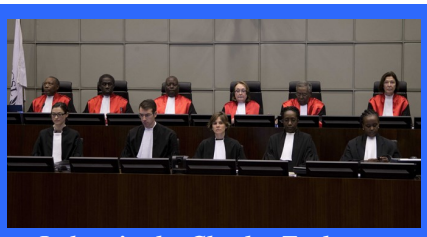
Planning-—*actus reus*

The issue with regard to planning was whether the *actus reus* of planning required that Taylor planned the commission of 'concrete crimes', as was required in the *Brđanin* Trial Judgment. The SCSL Appeals Chamber rejected *Brđanin* and agreed, instead, with the holding of the ICTY's Appeals Chamber in *Boškoski and Tarčulovski* that the "legitimate character of an operation does not exclude an Accused's criminal responsibility for planning … crimes committed in the course of this operation" if the goal is to be achieved by the commission of crimes.

Consequently, the *actus reus* of planning liability adopted by the SCSL Appeals Chamber is that an "Accused participated in designing an act or omission and thereby had a substantial effect on the commission of the crime". Furthermore, an Accused need not design the conduct alone or be the originator of the design or plan.

The Taylor Appeal Judgment in context of current proceedings at the ICTY

The ICTY Prosecution has already seized on the *Taylor* Appeal Judgment in support of its arguments that specific direction should not be an element of aiding and abetting. In addition to supporting the arguments made by the Prosecution in *Šainović*, on 27 September 2013, it filed a request in the case against Jovica Stanišić to admit 70 pages of the *Taylor* Appeal Judgment as supplemental authority. Stanišić has objected their inclusion, except for the paragraphs dealing with *Perišić* and specific direction, which it has argued as *obiter dictum*. Stanišić argued that specific direction was not raised by either party as an issue to be resolved and that, therefore, the SCSL Appeals Chamber did not require the existence of its requirement in customary international law to be decided. Stanišić can find support in the conclusion that the *Perišić* specific direction analysis in the *Taylor* Appeal Judgment is *obiter* from at least one commentator. Whether the ICTY Appeals Chamber will re-evaluate its position in *Perišić* in the upcoming appeal judgments in *Šainović* and *Stanišić* remains to be seen.



Judges in the Charles Taylor case

DEFENCE ROSTRUM

Celebrating Twenty Years of International Criminal Law

By Emma Boland

The year 2013 marks the 20 year anniversary of the ICTY and the 10 year anniversary of the International Criminal Court (ICC). On 2 October 2013, The Hague Institute for Global Justice hosted Judge Theodor Meron, President of the ICTY and Fatou Bensouda, Chief Prosecutor of the ICC, for a public discussion to commemorate the occasion. The distinguished international lawyers reflected openly on each institution as essential participants in international criminal justice. The talk was moderated by president of The Hague Institute, Dr. Abi Williams.

Meron and Bensouda addressed a myriad of topics, from the key accomplishments and criticisms of each judicial organ, to their role in bringing justice to past and present international conflicts.

Commencing the discussion, President Meron reflected on how the ICTY "has changed the way that the international community thinks about international criminal justice" for three main reasons: 1) it is the first international criminal tribunal to be established by the international community, whose judges are elected by the United Nations; 2) it has established principles and guidelines for other tribunals to follow, including the legal doctrine of joint criminal enterprise and superior criminal responsibility; and 3) it plays an eminent role in binding states and governments to civil responsibility, and individuals to criminal responsibility. Addressing the international outcry that often follows the acquittal of an accused war criminal, Meron aptly stated that "a healthy system of law must have convictions but also acquittals".

Bensouda affirmed that the ICC's worldwide acceptance and legitimacy – evidenced by the fact that 122 countries have ratified the *Rome Statute* – is an achievement of which the international legal community should be proud. The Chief Prosecutor stated that the Court has not been without its challenges, particularly due to international criminal cases being 'the most complicated legally and factually'. Addressing a common criticism of the ICC – that it focuses disproportionately on cases in Africa – Bensouda asserted that this claim is 'factually wrong' as states including Uganda, the Democratic Republic of the Congo, Mali and Côte d'Ivoire have been given the opportunity to try cases themselves, or have called on the ICC themselves to do so. As to the question of whether the ICC should intervene in Syria, Bensouda confirmed that Syria is not a state party to the *Rome Statute*, so an ICC investigation could only follow a referral by the United Nation Security Council on the matter.

Both Meron and Bensouda stressed throughout the Q&A session that like all international judicial organs, the ICTY and ICC rely on the cooperation of member and non-member states, particularly given their limited mandate and lack of police powers. Through such cooperation, they have sent a powerful message: the gravest crimes will not be met with impunity.

Fatou Bensouda

Supranational Criminal Law Lecture Series: "The Role of the Ombudsperson for the Security Council Al-Qaida Sanctions Committee and the Effectiveness of her Office"

By Aoife Maguire

On 26 September, the Supranational Criminal Law Lecture Series continued with the Asser Institute hosting a lecture by Kimberly Prost, the Ombudsperson for the Security Council Al-Qaida Sanctions Committee.

Prost delivered an energetic and informative lecture, with many pauses for laughter along the way. She spoke of the origins of targeted sanctions – a Security Council innovation – which require balancing between individual protections such as the guarantee of a fair process versus the State prerogatives regarding security and its obligations to protect its subjects' right to life.

Prost spoke of how the Security Council traditionally used untargeted sanctions with unfortunate consequences on innocent populations leading to the development of targeted sanctions to address this problem. In the aftermath of the 1998 embassy bombings in Tanzania and Kenya, the Security Council adopted Resolution 1267 in 1999, to impose sanctions on individuals and entities associated to the Taliban, with later amendments adding Al-Qaida and Osama Bin Laden to the sanctions list.

The classic three sanctions are the freezing of assets, a travel ban, and a weapons embargo. Prost spoke of the "Kafka-esque situation" that became clear post 9/11, after hundreds of names were suddenly added to the list. The problems related to issues of due process became apparent as individuals included on the sanctions list received no notification of their addition and no recourse to appeal. While the Security Council now tries to send notification to those added, Prost stated there is still a lack of due process.

In 2008, the Grand Chamber of the European Court of Justice, in the *Kadi* decision, took the position that measures for targeted sanctions must be implemented by members of the EU, in accordance with the Human Rights instruments of the EU. In December 2009, Security Council Resolution 1904 established the Office of the Ombudsperson. The original role of the Ombudsperson was to receive petitions, process these petitions, prepare and provide reports to the Security Council. There was no provision at the time for the Ombudsperson to provide recommendations to the Security Council, but this was remedied in June 2011, with Resolution 1989 expanding the mandate of the Ombudsperson to include consideration of requests for de-listing and the acceptance or rejection of requests.


Kimberly Prost

Prost went on to describe the process of consideration for delisting. Once a petition is received, the request is circulated to relevant 'reviewing states'- designating government, government of citizenship and government of residence - and subsequent responses are gathered. Here, Prost wryly mentioned missing her subpoena power from her time as a judge. She spoke of the problems encountered in the information gathering phase, due to many of the original additions to the sanctions list being the result of intelligence information and the resulting issues of access to confidential information. If States fail to provide convincing information to her (on the basis of confidentiality), and the States fail to meet the standard of 'sufficient reasons to believe', the person should be listed. Prost feels she has a relatively successful response rate so far. The time limit for gathering information is limited to four months, whereupon the process enters the "dialogue phase"; the Ombudsperson meets with the subjects of the sanctions themselves. Prost sees this as an essential part of a fair process. A comprehensive report is then prepared for the Committee, including the Ombudsperson's recommendation, which thus far has been binding, thanks in no small part, in Prost's opinion, to a diplomatic push by the European members of the Security Council.

There are approximately 15 active cases, with 50 applications for delisting filed in the last three years. Of those 50 applications, 32 have been concluded with 26 individuals and 25 entities delisted so far. There has been one application withdrawn, then resubmitted and delisted. Osama Bin Laden was posthumously delisted.

In concluding her lecture, Prost reiterated her belief in the use of targeted sanctions as part of the international community's duty to prevent humanitarian violations by all available means.

The Supranational Criminal Law Lecture Series, started in 2003 and is now in its 10th year. It shows no signs of losing momentum, with a fascinating lecture scheduled for 13 November 2013, entitled "The Importance of Narratives in International Criminal Processes: A Focus on the Bemba-Banyamaluenge Case before the ICC", delivered by Dr. Felix Mukwiza Ndahinda.

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Raphaelle Rafin, **Al-Senussi Case Inadmissible Before the ICC and to Proceed in Libya**, 11 October 2013, available at: http://tinyurl.com/k5lpt2u.

Steven Kay QC, **Bangladesh: The Molla Death Penalty Case**, 9 October 2013, available at: http://tinyurl.com/mo65n44.

Harold Hongju Koh, **Syria and the Law of Humanitarian Intervention (Part II: International Law and the way Forward),** 4 October 2013, available at: http://tinyurl.com/l2kfhdw.

Mark Leon Goldberg, **ICC Issues Warrant for Cote D'Ivoire Suspect,** 2 October 2013, available at: http://tinyurl.com/pet8orp.

Online Lectures

UN General Assembly Recap: From Syria to the Post-2015 Development Agenda, 10 October 2013, published by Council on Foreign Relations, available at http://tinyurl.com/leh8uo6.

Trita Parsi: Iran and Israel: Peace is Possible, 09 October 2011, published by TED, available at: http://tinyurl.com/nt2kfn8.

The Peace Palace, Court House or Temple? published by the Audiovisual Library of International Law, available at: http://tinyurl.com/lv402x6.

International Society and the Ideal of Justice, published by the Audiovisual Library of International Law, available at: http://tinyurl.com/kyqnsz4.

PUBLICATIONS AND ARTICLES

Books

Kristina Janjac (2013), *A Guide to International Criminal Tribunals and their Basic Documents*, Wolf Legal Publishers.

Stephen Hopgood (2013), *The Endtimes of Human Rights,* Cornell University Press.

John R. Morss (2013), *International Law as the Law of Collectives: Toward a Law of People,* Ashgate Pub Co.

Christian J. Tams and James Sloan (2013), *The Development of International Law by the International Court of Justice*, Oxford University Press.

Sundhya Pahuja (2013), *Decolonising International Law: Development, Economic Growth, and the Politics of Universality,* Cambridge University Press.

Articles

Margherita Melillo (2013), "Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo" , *Journal of International Criminal Justice,* Volume 11, No 4.

"The International Criminal Court's Involvement with Africa: Evaluation of a Fractious Relationship", *Nordic Journal of International Law* Volume 82, No 3.

Zachary Manfredi (2013), "Recent Histories and Uncertain Futures: Contemporary Critiques of International Human Rights and Humanitarianism", *Qui Parle,* Volume 22, No 1.

Bonnie Docherty (2013), "Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law", *Austrian Review of International and European Law,* Volume 15.

HEAD OFFICE

ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085.0870

Phone: +31-70-512-5418
Fax: +31-70-512-5718

Any contributions for the newsletter should be sent to Isabel Düsterhöft at iduesterhoeft@icty.org

WE'RE ON THE WEB!

WWW.ADCICTY.ORG

ADC-ICTY Legacy Conference 2013

The ADC-ICTY will hold its Legacy Conference on **29 November 2013** in the Bel Air Hotel in The Hague. You are cordially invited to register from 21 October 2013 onwards at: *http://adc-icty.org/LegacyConference2013.html*

Further information about the conference will be published in the upcoming Newsletter issue and may be found on our website.

We look forward to welcoming you on 29 November!

EVENTS

MATRA PATROL: Alternative Dispute Resolution

Date: 20-30 October 2013

Location: Asser Institute, R.J. Schimmelpenningcklaan 20-22, The Hague

More Info: http://tinyurl.com/qhxupfj

Peace-building Process in a Postwar Context: Reconstituting the 'National' and 'International' in the Western Balkans

Date: 24-25 October

Location: Bremen, Germany

More info: http://tinyurl.com/mwqax2s

Improved Guarantees for Fair Trial and Effective Protection against Discrimination

Date: 30 October 2013

Location: Sofia, Bulgaria

More Info: http://tinyurl.com/o73qnhw

OPPORTUNITIES

Law Clerk to Judges of the Court

International Court of Justice (ICJ)

Closing date: 23 October 2013

Senior Application Integration Assistant

International Criminal Court (ICC)

Closing date: 23 October 2013

Senior Investigator

Special Tribunal for Lebanon (STL)

Closing date: 24 October

International Cooperation Adviser

International Criminal Court (ICC)

Closing date: 03 November 2013