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NEWSLETTER

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Prosecutor v. Hadžić (IT-04-75)

Goran Hadžić

On Monday 15 October the Pre-Trial conference in the case of *Prosecutor v Goran Hadžić* was held, where a number of issues were raised by both parties. This was followed by the commencement of trial on Tuesday 16 October starting with the prosecution's opening statement.

At the Pre trial conference the trial chamber decided not to call upon the prosecution to shorten the estimated length of examination-in-chief of any of its witnesses pursuant to Rule 73 bis (B), nor will the trial chamber determine pursuant to Rule 73 bis (c) (i) the number of witnesses that the prosecution may call. However, the Trial Chamber has set a global time limit for the presentation of the prosecution's case in chief. The Prosecution has been granted a total of 175 hours for its case, during which the Prosecution has stated it would call 85 witnesses.

The trial chamber also issued two oral rulings at the pre-trial conference. The Trial Chamber granted the prosecution leave to amend its Rule 65 *ter* exhibit list with regard to two witnesses.

The Defence requested to meet all prosecution witnesses prior to their appearance in court. The Trial Chamber found no reason to intervene in the already cordial relationship established between the Prosecution and the Defence in relation to this issue. Therefore the parties will continue to negotiate together regarding logistics for such meetings to occur.

The trial then commenced on 16 October with the

ICTY NEWS

- *Karadzić*: Defence Case commences
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Also in this issue

Prosecution's opening statement. The prosecution alleged that with Serbia's guidance and influence, Hadžić helped eradicate non-Serb populations from Serb Krajina and supplied armed forces to achieve that goal. "Goran Hadžić was Slobodan Milošević's man on the ground in Croatia", Prosecutor Stringer told the court on the first day of the trial.

The prosecution brought attention to the massacre that occurred at Lovas, Croatia in 1991 and alleged ties between Hadžić and Arkan's Tigers, stating that Hadžić acted as a link between his civilian government and Serb military forces. The Defence did not use its opportunity to present an opening statement; it will do so instead at the beginning of Hadžić's Defence case.

Following the prosecution's opening statements, the first witness, Zlatko Antunović, a former member of the youth branch of the Croatian Democratic Union (HDZ), started his testimony. Zlatko Antunović is from the area of Erdut and Dalj in Croatia and he testified about his alleged detention in Dalj.

Prosecutor v. Karadžić (IT-95-5/28-I)

Radovan Karadžić

Appearing on the first day of his defence in The Hague on 16 October 2012, Radovan Karadžić told the ICTY that he should be rewarded for "reducing suffering", rather than being accused of carrying out war crimes.

Karadžić told judges that he was innocent and was a "tolerant man" who had sought peace in Bosnia during the war from 1992-1995.

Upon beginning his personal statement in open court, Karadžić said he had done "everything within human power to avoid the war and to reduce the human suffering". He further substantiated that he was a "mild man, a tolerant man with great capacity to understand others".

Karadžić contended that he had had sought peace agreements, applied humanitarian measures and honoured international law.

He then insisted that there had been no history of conflict between ethnic groups: "Neither I, nor anyone else that I know, thought that there would be a genocide against those who were not Serbs". He criticised media coverage of the war as biased and disputed the official number of victims of the war, saying the true figure was three to four times less.

Karadžić stated that "As time passes this truth will be stronger and stronger, and the accusations and the propaganda, the lies and hatred, will get weaker and weaker".

In regard to the accusations in relation to his role in a military strategy of using snipers and shell attacks on the civilian population of Sarajevo, he responded that every shell that had fallen on Sarajevo had "hurt [him] personally".

After the opening statement, Karadžić called his first witnesses, who mainly testifyed on the Markale Market incident of 28 August 1995 and the alleged sniper campaign of the city of Sarajevo.

Colonel Andrei Demurenko, former member of UNPROFOR in Sarajevo at the time testified on the Markale incident of 28 August 1995 with a special focus on whether a mortar shell had actually been fired. Demurenko stated that according to the investigation he led along with a team of experts, no mortar shell had been fired at Markale but rather, an explosive device had probably been placed in the market by locals as an act of provocation.

General Paul Conway, former member of UNPROFOR in Sarajevo as well stated that on 28 August 1995 at about 11 a.m., he heard several muted explosions and subsequently reported to his command that he saw smoke rising from the direction of the town market. However, Conway stated that he was unable to determine whether he had heard the rounds being fired or exploding as they impacted.

General Blagoje Kovačević, former commander of the 3rd Infantry Battalion of the VRS 1st Sarajevo Motorised Brigade, stated that the Serb forces did not use snipers and mortars to target civilians in Sarajevo. Kovačević stated that the VRS did not launch attacks on Sarajevo but rather that fire was opened only in self-defense cases and in not with the aim to cause civilian casualties and terrorise the population.

Miloš Škrba, former commander of the 2nd Company of the Sarajevo Brigade of VRS, testified that the Bosnian Serb army had no mortars or other artillery weapons at the time of

the incident which could be have been used for killing and targeting civilians near Sarajevo.

Dusan Škrba, former artillery commander of the VRS Mixed Artillery Battalion in Lukavica, stated that his unit did not open fire at various places in Sarajevo where larger groups of citizens gathered such as hospitals, schools and mosques which are protected by the laws laid down in the Geneva Conventions of 1949. He added that his unit would not open fire if they had assessed that civilians would be endangered and that in order to avoid any error they would always do preparations by taking exact coordinates of the target and therefore only launch defensive operations.

Stevan Veljović, a former operative officer for the 1st Romanija Brigade of the VRS, denied that the Bosnian Serb army fired a shell which killed and wounded people at Sarajevo's Markale market. Veljović stated that it would have been an impossible hit from the Bosnian Serb positions around the city. Veljović further added that a 120 millimetre mortar battery from his brigade was not even positioned near Sarajevo, but in the vicinity of Trebinje. Veljović stated that he believed that the grenade at Markale was planted and activated from a distance by the Muslim warring side in order to provoke the international military intervention against Serbs.

Finally, Siniša Maksimović, former officer of the Igman Brigade of the VRS, stated that his unit opened fire only at military targets in Sarajevo and did not have any trained snipers.

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

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

ICC Prosecutor Visits Kenya: Post-Election Violence Case Will Continue

On Monday 22 October 2012, the Prosecutor for the International Criminal Court, Fatou Bensouda, held a press briefing in Nairobi just before commencing her official visit to The Republic of Kenya. She insisted that the Prosecution is opposed to deferring the trials of presidential aspirants *Uhuru Muigai Kenyatta* and *William Samoei Ruto*. Both accused are scheduled to commence their trials on 10 and 11 April 2013, after the ICC Presidency referred the cases to Chamber V on 29 March 2012.

Bensouda mentioned that she would not be amending the charges against the two Kenyan suspects, both of whom were indicted in January 2012 for crimes against humanity. However, her visit to Kenya comes against the backdrop of raging debates as to whether the two men should be allowed to run for the country's presidential elections on 4 March 2013.

Whilst the judiciary in Kenya is yet to rule on whether the two accused can stand for election, former UN Secretary General Kofi Annan said that the election of either Kenyatta or Ruto would negatively impact on Kenya's foreign relations.

In her press briefing, Bensouda stated that it is unfortunate that the trials have become politicised. However, she insisted that the ICC would not be influenced by the political events in Kenya. "The people of Kenya will decide the outcome of the upcoming election and ultimately, they will shape the future of this great country. The ICC judicial process will also take its own course irrespective of the political choices that the people of Kenya make".

Bensouda also informed the press that her office will be working at full speed to prepare for the start of trial, and that it will oppose any motions made by the defence to delay its commencement.

Amidst local concern, Bensouda stressed that neither Kenyans nor the Kenyan Government is on trial before the ICC. She assured that the four accused will have a fair trial and an equal opportunity to disprove the allegations.

These comments arose as a response to the potential problem of witness tampering by local Kenyans. Bensouda told the press that the Prosecution is not seeking out new witnesses and that the purpose of her visit is to reconnect with victims. She has pleaded for all interference with witnesses to stop.

Bensouda has now commenced her 5-day visit of Kenya, accompanied by Phakiso Mochochoko (Head of the Jurisdiction, Complementarity and Cooperation Division), and Shamiso Mbizvo (Cooperation Adviser). She plans to interact and listen to victims from various parts of the country, including the Rift Valley region, which saw the heaviest displays of violence following the country's 2007/08 elections.

NEWS FROM THE REGION

ICTY Prosecutor Serge Brammertz Travels to Belgrade and Sarajevo

Serge Brammertz, the Chief Prosecutor at the ICTY, travelled to Belgrade on 8 October and met with Prime Minister Ivica Dačić and others including the Serbian War Crimes Prosecutor Vladimir Vukčević. The main topic of talks involved the progressive investigations into the network of helpers and aides that assisted ICTY fugitives to escape arrest. Vukčević assured Brammertz that the public prosecutor's office is currently investigating people suspected of hiding Mladić. Brammertz praised the current cooperation between the ICTY and Serbian authorities.

Rasim Ljajić, chairman of the Serbian National Council for Cooperation with the Hague Tribunal insisted that these are internal investigations that Serbian authorities must carry out by themselves.

According to Ljaljić's office, Brammertz also promised in the meeting that any information that the OTP has regarding the organ trafficking case in Kosovo, relating to Serbs abducted in Kosovo, would be shared. The victims in this case are mostly ethnic Serbs allegedly killed by the Kosovo Liberation Army in a clinic near Tirana, Albania, where their organs were harvested. On 22 October 2012 Vukčević made a public announcement that the public prosecutor's office had gathered enough evidence on the charges in the organ trafficking case to warrant further investigation by those that had access to the area and called upon the EULEX Special Investigative Task Force headed by John Clint Williamson to investigate.

Brammertz also encouraged regional cooperation between Serbia and Bosnia and Herzegovina in the investigation and prosecution of war crimes and noted that the cooperation will become more important with the closure of the ICTY.

After his visit to Belgrade, Brammertz travelled to Sarajevo. In an interview with Bosnian media, Brammertz stated that he believed the Trial Chamber had made a mistake in the Karadžić case by dropping the count of genocide.

Bosnia and Herzegovina

Defence Counsel Argues *ne bis in idem* (double jeopardy) in Čelebići Guard Case, 24 Oct. 2012

Defence Counsel, Kadrija Kolić in the case of Eso Macić, who is charged with war crimes as a member of the Army of BiH serving as a guard in the Celebici camp, argued in closing, on 24 Oct 2012 before the War Crimes Chamber of the Court of BiH, that Macić should be acquitted for the murder of two Serb civilians, because the ICTY had already found that he was not responsible for their deaths. In Kolić's words, "One of the basic principles of law is that a person should not be prosecuted twice for the same offence, which is why we ask for dismissal of these counts". Macić is charged with beating Šćepo Gotovac, who died several hours later outside Hangar 6, in mid-June 1992, and with shooting Milorad Kuljanin.

The ICTY Trial Chamber discussed the murders of Šćepo Gotovac (Čelebići judgment paras 817-824), and found Hazim Delić and Esad Landžo to be directly responsible and Zdravko Mucić to be responsible as a superior. With regard to Milorad Kuljanin (paras 869-872) the Trial Chamber found insufficient evidence to convict. Macić is mentioned only once in the Judgement (in relation to a separate issue) and was never charged with any offense by the ICTY. Thus, the Defence counsel's argument appears to have been more illustrative than legal, i.e. that if a person cannot be charged twice, an offence cannot be attributed to two perpetrators in two separate courts.

Albina Terzić (former HVO) Sentenced to Five Years for Inhumane Treatment of Serbs in Odžak

The Trial Chamber sentenced Albina Terzić on 22 October 2012 to five years of imprisonment after finding her guilty of war crimes against civilians for inhumane treatment of Serb civilians who were detained on the premises of the Elementary School and the Strolit factory in Odžak (on the north-eastern border with Croatia), a violation of Article 173 of the Criminal Code of Bosnia and Herzegovina. Terzić was a member of the Croat Defence Council (HVO) Miltary Police and served as a guard at these camps.

Terzić was acquitted of another count of war crimes alleging that she sexually abused male prisoners, because the prosecution failed to disprove an alibi presented in her case. The Trial Chamber has not yet ordered Albina Terzić into custody as requested by the prosecution and she is currently held under prohibitory measures denying her right to travel and her passport has been confiscated.

LOOKING BACK...

International Criminal Tribunal for the Former Yugoslavia

5 years ago...

Appeals Chamber Dismisses Dragan Zelenović's Appeal and Affirms Sentence

Dragan Zelenović

On 31 October, 2007 the Appeals Chamber affirmed the sentence of 15 years' imprisonment for Dragan Zelenović, a former Bosnian Serb soldier and military policeman who earlier in the year had year pleaded guilty to charges of torture and rape of Bosnian Muslim women and girls from the Foča municipality in eastern Bosnia and Herzegovina.

The Appeals Chamber unanimously dismissed all grounds of appeal filed by Zelenović against the Trial Chamber's sentencing judgement of 4 April 2007 and thereby rejected his request to lower the sentence.

Zelenović, who came into the Tribunal's custody in June 2006 after several years on the run, pleaded guilty in January 2007 to three counts of torture and four counts of rape. In total he was found guilty of personally committing nine rapes, four of which were gang rapes. Many involved torture.

Zelenović is currently serving his sentence in Belgium under an agreement with the ICTY.

10 years ago...

Judge Carmen Maria Argibay Appointed to ICTY

Judge Argibay

On 1 November 2002, Judge Carmen Maria Argibay was appointed as an *ad litem* Judge to the International Criminal Tribunal for the Former Yugoslavia (ICTY) to replace Judge Fassi Fihri who was unable to continue at the ICTY for health reasons.

Judge Argibay was born in Buenos Aires, Argentina. She completed her law studies at the University of Buenos Aires, receiving her law degree from the Faculty of Law and Social Sciences in 1964. In 1965, she began working as a private lawyer but returned to the courts in 1969 where she remained until 1976. In that year she was removed from her position as general clerk to the National Court of Criminal and Correctional Appeals following the military coup d'etat in Argentina and was detained without charge for nine months.

On her release she began practicing privately as a lawyer. She returned to court work in 1984 when she was appointed trial Judge at Court "Q". In 1988, she was promoted to court Judge at the National Court of Criminal and Correctional Appeals, a position she held until 1993. In that year she took up a position as Judge to Criminal Oral Proceedings Court No. 2 – a position she held until her appointment to the ICTY.

Judge Argibay has also had a wide teaching career starting in 1968, teaching in the criminal law department at the University of Buenos Aires. Her academic career also includes a directorship of the Free Education for Women Workers and Retirees Programme of the *Associacion Biblioteca de Mujeres* (Women's Library Association) and lectureships at the Universities of Belgrano and El Salvador. Judge Argibay has also served as an "Ambassador" to the Campaign for the Eradication of Violence by the *Instituto Social y Politico de la Mujer* and UNIFEM.

Since February 2005, Judge Arfibay has served as a member of the Argentine Supreme Court of Justice.

International Criminal Tribunal for Rwanda

5 years ago...

Defence Closes Case in Bikindi Trial

Simon Bikindi

On November 2007, the Defence closed its case in the trial of Simon Bikindi, a famous Rwandan singer. Closing arguments of the Prosecution and Defence were heard at a later date.

Bikindi was charged with Conspiracy to commit genocide (Count 1), Genocide (Count 2) or alternatively Complicity in genocide (Count 3), Direct and public incitement to commit genocide (Count 4), Murder as a Crime against humanity (Count 5) and Persecution as a Crime Against humanity (Count 6).

During the trial, the Chamber heard twenty Prosecution witnesses and thirty seven Defence witnesses, including the Bikindi, over a period of sixty-one trial days.

The trial began on 18 September 2006 before Trial Chamber III composed of Judges Inés Mónica Weinberg de Roca, presiding, Florence Rita Arrey and Robert Fremr.

Bikindi was represented by Andreas O'Shea, from England and Jean de Dieu Momo, from Cameroon. Headed by William Egbe, the Prosecution team included Peter Tafah, Veronic Wright, Sulaiman Khan, Disengi Mugeyo and Amina Ibrahim.

10 years ago...

Statement by the Register concerning change of Counsel under the Tribunal's Legal Aid Programme.

On 5 November 2002, the Registrar noted with great concern that some indigent accused, represented by counsel assigned by the Tribunal, request the withdrawal of their lead counsel just before the commencement of their trials or at the early stages of their trials. Withdrawal of lead counsel at such a stages of the proceedings resulted in a serious financial burden on the limited resources available for the Tribunal's Legal Aid Programme. Fees and disbursements paid to lead counsel, in most cases over a substantial period, were wasted costs when the said counsel was withdrawn. Further, the Tribunal is compelled to bear additional costs associated with the assignment of new lead counsel.

To prevent any abuse of the Legal Aid Programme and to efficiently manage its limited resources, the Registrar decided that co-counsel will not automatically be assigned as lead counsel where lead counsel have been withdrawn, unless exceptional circumstances so require. New lead counsel will be assigned in accordance with the Directive on Assignment of Defence Counsel

Special Tribunal for Lebanon

5 years ago...

On 10 October 2007, UN Secretary General Ban Ki-moon wrote a letter addressed to the President of the Security Council, Leslie Kojo Christian, where he informed the Security Council of his intentions to appoint Judge Mohamed Amin El Mahdi of Egypt and Judge Erik Møse of Norway to be members of the selection panel of the Special Tribunal for Lebanon (STL). Additionally, he also stated his plans to appoint Under-Secretary-General for Legal Affairs, Nicholas Michel, as his representative before the STL and third member of the selection panel.

In accordance to article 2, paragraph 5 (d) of the Annex in Resolution 1757 (2007), the selection panel has the duty of interviewing the candidates for the prosecution and judges before making recommendations to the Secretary General for the final appointments. On December 2007, the Secretary General announced that he had accepted the recommendations made by the selection panel which included appointment of, inter alia, Lebanese Judge Ralph Jacques Riachy who still holds today the vice-presidency of the STL.

Special Court for Sierra Leone

8 years ago...

On 24 October 2004 a "red notice" was made public by The International Police Organization (INTERPOL) calling for the arrest and transfer of Johnny Paul Koroma the former Head of State of Sierra Leone (1997-1998). The SCSL OTP released an indictment against Koroma in March 2003 consisting on 17 counts, including charges of crimes against humanity, war crimes and other serious violations of international humanitarian law.

Under Article 3 of the Cooperation Agreement between Interpol and the SCSL, the court has the right to request Interpol to publish and circulate red notices. Accordingly, Interpol released Koroma's red notice (no. 54777) in December 2003. However, it was not made public until 2004 by a request of the OTP.

Ever since Koroma fled Freetown in January 2003 his whereabouts are unknown and despite his death being declared in March 2003 in neighboring Liberia, the case still pending. Today many believe that Koroma was executed by former Liberian President Charles Taylor, nevertheless, such allegations have never been proven.

International Criminal Court

5 years ago...

Press Conference by ICC Register Concerning Arrival of Accused in The Hague and the Opening of a Field Office in Central African Republic

On 30 October 2007, Bruno Cathala, Registrar of the International Criminal Court, updated correspondents on the Court's activities at a Headquarters press conference.

He said Germain Katanga, a Congolese militia leader, had arrived in The Hague on 18 October, where he was to be tried by the Court. Katanga's arrest warrant had been issued in July 2007 on three counts of crimes against humanity and six counts of war crimes. He was said to have played an essential role in planning an attack against Bogoro village in the Ituri region of north-eastern Democratic Republic of the Congo in February 2003.

On 18 October, the Court opened a field office in the Central African Republic, after the Prosecutor of the International Criminal Court decided to begin an investigation in that country in May. The purpose of that field office was to provide support to that investigation, including affording protection to witnesses. Cathala said the Court already had field offices in the Democratic Republic of the Congo, Uganda and Chad. He noted that such offices played an important part in the Court's outreach efforts.

10 years ago...

Exchange of Notes Between the Netherlands and the ICC Regarding establishment of ICC Headquarters in The Hague

On 19 November, the Director of Common Services of the International Criminal Court (ICC), Bruno Cathala and officials of the Treaty Division of the Ministry of Foreign Affairs of the Kingdom of the Netherlands exchanged Notes embodying an interim agreement between the ICC and the Kingdom of the Netherlands concerning the headquarters of the Court.

The Notes were intended to facilitate the work of the Court by providing for and regulating matters arising from the establishment and functioning of the Court in the interim period pending the conclusion of negotiations between the Court and the Government of the Netherlands regarding the Headquarters Agreement

Following the finaliSation of all negotiations, the agreement was presented to the Assembly of States Parties and thereafter concluded by the President of the Court.

Defence Rostrum

The Rejection of the Joint Criminal Enterprise Doctrine at the International Criminal Court

By Julian Elderfield

Joint Criminal Enterprise (JCE) is a mode of liability that has been used extensively in the prosecution of individuals at the ICTY and ICTR. Controversially, it was not included in the 1998 ICC Rome Statute, which has adopted the idea of indirect and co-perpetration. Given that JCE will not play a part in future international criminal law proceedings after the dissolution of the ad-hoc tribunals, should we automatically consign JCE to the bin of imperfect and démodé legal principles?

Often JCE, and particularly JCE III, has proved difficult for international criminal courts to apply uniformly. Glaring variances appear in separate judgments with respect to definitions, factual application, and in the imposition of sentences.

This has resulted in legal uncertainty over the doctrine's precision, and as a corollary, its legality, and has led to claims that the cases do not support the conclusions reached by the Chambers (Cryer, 2011). Some commentators believe this legal uncertainty has encouraged prosecutions to assert broad and general charges in their indictment in the hope of achieving a conviction (Mettraux, 2005), although this may be exaggerating somewhat.

Further, JCEIII has shaky legal roots. As a form of primary liability (*Kvocka et al.* AC) it classifies all participants as joint perpetrators. This lack of factual distinction results in situations where the guilt of all perpetrators in the criminal enterprise is often assessed equally, regardless of the perpetrator's individual role in the commission of the offence. Although the court in *Brdanin* said that sentencing could be used to distinguish the guilt of each individual, this has been true to only some extent in practice.

Finally, JCE III may conceivably permit individuals to be convicted for crimes they had no knowledge of, if the crimes are found to be foreseeable and natural extension of a common criminal plan. This has the adverse corollary effect of allowing individuals to be found guilty of crimes without a *mens rea* requirement (*Rwamakuba* AC). This is particularly dangerous when applied to the crime of genocide, which requires a special element of *dolus specialis* to destroy a particular group. Although the *Krstic* AC narrowed the scope by ruling that individual participators must each have the necessary intent, JCE III often resembles a loosely applied doctrine that seems to stretch liability beyond the appropriate bound of culpability.

At the Rome Conference in 1998, the ICC drafters recognised that these concerns were substantial enough to potentially impact on the court's legal legitimacy. States swam against the prevailing tide of international criminal law and endorsed what they obviously believed to be a 'more sophisticated' (Manacorda & Meloni, 2011) doctrine of indirect and co-perpetration. This has since subsequently been successfully applied at both pre-trial and trial stage of the ICC.

Not all, however, agreed. Both the ICTY and ICTR have declined to apply indirect perpetration in their tribunals (*Stakic*AC), and in 2011, Cassese rejected the ICC's updated modes of liability as being unrepresentative of customary international law in the STL AC's Interlocutory Decision on the Applicable Law.

Nevertheless, Article 25(3) (a)'s foundational principle of 'control over the crime' distinguishes it from JCE III. Although it sets a low requirement of participation, co- and indirect perpetration intention of the group has to be known to the defendant, which serves to limit the ambit of liability. It is this critical aspect that has led many to nominate Article 25(3) (a) as a step towards the re-legitimization of international law.

In conclusion, indirect and co-perpetration will be the primary methods used to prosecute international crimes in the future. In the ICC's first judgment *Lubanga* was found guilty as a co-perpetrator, which followed the PTC's' basis of the control of/over the act theory' (Ambos, 2012). Although lawyers practicing at the ad hocs may have do endure a sense of nostalgia, ultimately, moving away from JCE is a necessary departure from a checkered history, and one that will ultimately serve to enhance the legitimacy of international criminal jurisprudence. Although JCE was certainly a pragmatic response to the inherent difficulties of trying crimes at the international level, the ICC has managed to do this more successfully under Article 25.

The Case of Abu Hamza: A Comparison of the Eighth Amendment and the ICCPR

By Samuel Shnider

Six persons, including the former Imam of Finsbury Park Mustafa Kamel Mustafa (better known as Abu Hamza Al-Masri), indicted for various terrorism charges by U.S. Federal Grand Jury, were extradited from the United Kingdom on 5 October 2012 and flown to New York to stand trial. On 9 October 2012, Al-Masri pled not guilty to 11-counts of terrorism related charges, including conspiracy to take 16 hostages in Yemen in December 1998, and other charges including arranging meetings for his followers with Taliban officials, advocating violent jihad in Afghanistan 2001, supporting the establishment of a terrorist training camp in Bly, Oregon in 1999 and 2000, and providing material and financial assistance to Al-Qaeda, and running a website advocating terrorism.

Al-Masri's original indictment was returned on 19 April 2004. About a month later, the U.S. requested his extradition. Al-Masri was detained shortly thereafter by British authorities, and has been in custody ever since. During extensive communications between British Authorities and the U.S. State Department, the U.S. Embassy in London sent a Diplomatic Note in which it assured the U.K. that Al-Masri that the U.S. would not seek the death penalty in his case, nor would he be tried before a military commission, and would be offered all rights under the U.S. Constitution and tried only in federal court.

Al-Masri opposed his extradition first in the District Court and later in the High Court of the United Kingdom based on claims that including a real risk of violation of Article 3 of the International Covenant on Civil and Political Rights (ICCPR) that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." Among other arguments, he noted that by the conditions of detention in the United States in a maximum security facility would amount to inhuman treatment because they would not take into account his poor health, including diabetes, loss of sight in one eyes, amputation of both forearms (which frequently became infected through abrasions), psoriasis, and hyperhydrosis (excessive sweating). The High Court found that while the conditions of the maximum security facility in the United were worrisome, the Eighth Amendment to the U.S. constitution allowed inmates to challenge the conditions in which they are confined and some of the challenges have "met with success." The High Court added that

> we too are troubled about what we have read about the conditions in some of the Supermax prisons in the United States. Naturally, the most dangerous criminals should expect to be incarcerated in the most secure conditions, but even allowing for a necessarily wide margin of appreciation between the views of different civilised countries about the conditions in which prisoners should be detained, confinement for years and years in what effectively amounts to isolation may well be held to be, if not torture, then ill treatment which contravenes Article 3. This problem may fall to be addressed in a different case.

After his opposition to his extradition was rejected by both, he appealed to the European Court of Human Rights (ECtHR) in 2008. His application was declared admissible, and extradition proceedings were halted pending the ruling of the Court.

Al-Masri's applicant was joined with the five other applicants, and distilled to two arguments: first, the applicants argued that if extradited they would likely be detained in the Administrative Maximum Facility (ADX) "supermax" prison in Florence, Colorado, and could be subject to special administrative measures there, including solitary confinement; and second, that if extradited they would be potentially sentenced to life sentences without parole. Either of these outcomes would be a violation of Article 3 of the ICCPR ban on inhuman or degrading treatment.

The ECtHR addressed the claims of the applicants, including Abu Hamza, in its judgement of 10 April 2012, which became final on 24 September. The Court addressed extensive submissions by the U.S. government, the federal board of prisons on the conditions in ADX supermax, and the applicants, and surveyed and compared the ICCPR to the

Eighth Amendment ban on cruel and unusual punishment. (The United States ratified the ICCPR in 1992, but with a reservation that the ICCPR does not create a private cause of action in U.S. courts; thus the covenant effectively does not form part of U.S. domestic law.)

With regard to solitary confinement the ECtHR noted that no precise rule could be laid down, but the question of whether such a measure amounts to a violation of the ECtHR depended on "the particular conditions, the stringency of the measure, the objective pursued, and its effects on the person concerned." In the case of Al-Masri, his particular health requirements appeared to make his detention at ADX impossible, so the court found a violation of Article 3 to be unlikely. For other applicants the Court nonetheless found that procedural safeguards would likely be sufficient to satisfy Article 3, "the range of activities and services provided goes beyond what is provided in many prisons in Europe," and that in most cases the isolation was "partial and relative".

With regard to the possible life sentence without parole the ECtHR held that none of the applicants sentences were grossly disproportionate, and that all sentences were reducible, in accordance with earlier ECtHR case law, and other cases discussed by the House of Lords.

The Court decided nonetheless to indicate to the British government that the applicants should not be extradited until further notice, and called for further submissions and discussion. On 24 Sep 2012 the judgement became final, and the ECtHr allowed the extradition.

The judgment of the ECtHR, and the entire Abu Hamza legal battle, is significant in the questions it raises about the relationship between U.S. human rights jurisprudence and international treaties. Although the ECtHR, after much handwringing, found the U.S. standards to meet the requirements of the ICCPR, the discussion itself is a form of mild rebuke, and a reminder for U.S. Courts, and the U.S. Federal Government, of the significance international and comparative human rights law. As noted by U.S. Supreme Court in *Roper v. Simmons* in discussing the juvenile death penalty, "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation...it does not lessen our fidelity to the Constitution to acknowledge...the express affirmation of certain fundamental rights by other nations." The Court was divided five to four on that decision, and Justice Scalia wrote a vigorous dissent, which is well worth reading.

The Hague Coalition Conference

Is there room for politics in International Criminal Justice?

By Barbara Cervantes

On 12 and 13 October of the present year, the 9th Annual Conference of the Hague Academic Coalition (HAC) took place at the Institute of Social Studies (ISS) in The Hague. This year the Conference entitled *'The Politics of Justice: From a Human Rights Revolution to Global Justice?'* took a Q from the work of Finnish Professor Martti Koskenniemi who in 1990 published his article on "The Politics of International Law" in the European Journal of International Law. Within his work Koskenniemi scrutinises the way jurists and scholars have tried to construct a relatively stable framework for public international law while attempting to evade politics. According to Koskenniemi one of the main problems is that there is a tendency among international legal practitioners to place the rule of law at the top of the hierarchy chain setting politics aside. More than 20 years later, the HAC and professor Koskenniemi decided to analyse and debate the developments that the international community has experienced ever since the article was published.

One of the sessions of the conference addressed the topic of "Globalization and the Politics of International Criminal Justice" and while the debate focused more on ICC issues and the Rome Statue system in general, such a topic is relevant for the whole corpus juris of International Criminal law. For instance, in regards to International criminal courts, politics can hardly be avoided particularly when one looks into the significant role that international actors such as the UN Security Council, a primarily political body, have had in the creation and functioning of several courts.

The Hague Coalition Conference

Furthermore, even though International Criminal law is not commonly discussed at political debates, its relevance over some politically sensible subjects should not be neglected. In this sense, it is important to address the close connection between human rights and international criminal law. Such connection has somewhat been mentioned among scholars, usually by categorising the later as a specialised part of the former (Yves Beigbeder, 1999), but it has not been thoroughly analysed. In addition, politicians may feel less inclined to deal with this connection as there is already enough confusion regarding the interrelation and overlap between human rights and humanitarian law in armed conflict scenarios. Nevertheless, some authors maintain that the peak of the modern human rights movement "comes in the form of a tribunal that is not a human rights tribunal properly so called" (Frederic Megret, 2002). Ultimately, when dealing with International Criminal law one should think about the relation and consequences it has over politics in our globalised world of "sovereign" states.

The Hague Coalition Conference: *The Politics of Justice: From a Human Rights revolution to global justice?* Keynote lecture by Martti Koskenniemi

By Samuel Shnider

This conference coincided with celebrations for the sixtieth anniversary of the Hague Institute of Social Studies (located in the former Dutch Post and Telecommunications building), an institute which has endeavoured to create a distinctive Dutch brand of development studies in a post-colonial world. After brief introductions, the Keynote address was given by Martti Koskenniemi, whose seminal article *The Politics of International Law* - (1990) was the main inspiration for the conference.

Prof. Koskenniemi first suggested a change to the title of the conference. Justice, in his opinion, could not be part of the opening question since it already assumed an answer; the word itself is evidence of a particular perspective on what the law does, and the primacy of that perspective. Rather, he said, a better starting point would be to discuss *The Politics of Law*.

Koskenniemi noted that the relationship of law and politics had been assessed in diametrically opposite ways by two influential thinkers on international relations, both writing against the backdrop of German public debate in the Weimar Republic in the decade preceding the Second World War. The crucial question for both was non-justiciability in international dispute settlement: what type of international conflicts should not, or could not be suitable for judicial settlement or arbitration, and could there be a law that defined these exceptions?

Hans Morgenthau (1904-1980) was of the opinion that politics could not be delimited by law because it belonged to the realm of emotional intensity. In his doctoral thesis *International Justice: Its Nature and Limits* Morgenthau wrote that there were two kinds of conflicts, legal ones, focusing on defined issues, which he called "disputes", which could usefully be subject to legal mechanisms, and political ones, which could not. Political conflicts, or "tensions" arose whenever a state felt intensely about a matter, making legal process useless. Thus, there must first be a political decision to uphold the law, and the foundations of any legal order lie outside of the legal order, in political notions of sovereignty of states.

Hersch Lauterpacht (1897-1960) was of the opinion that legal order had primacy over political decisions. His teacher, Hans Kelsen had argued that any application of Article 48 of the Weimar constitution, which gave the executive emergency powers to strengthen the Reich, was properly within the jurisdiction of the constitutional court. Law defines its own limits; the question of when executive power can be used is a legal, not a political question. For Lauterpacht, political decisions by states to except themselves from judicial process can, and should be clearly defined by law. In his 1933 book *The Function of Law in the International Community,* Lauterpacht responded to Morgenthau by asking: What is the legal force of the notion that particular disputes relating to "vital interests" were unsuitable

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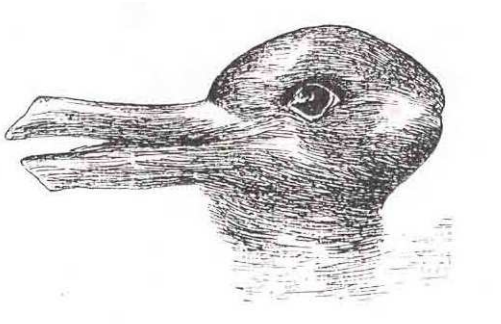

for judicial settlement or arbitration? If law always deferred to the sovereign will of states, then any State would be able to opt out of the law. Lauterpacht concluded that the opposite was true: "All international disputes are…capable of an answer by the application of legal rules".

Koskenniemi emphasised that although these opinions are contradictory, they are both right. He then illustrated his point by reference to the duckrabbit figure used by Wittgenstein to illustrate how visual experiences are inherently subjects of interpretation and context, and not objective reality. The Law vs. Politics question is the same. The language of the law is a badge of a particular profession: in a room full of lawyers (ducks), we use the language of ducks, and in a room full of politicians (rabbits) we use the language of rabbits. "In the Hague, for example," Koskenniemi noted, "there are a lot of ducks."

The role of international lawyers in this view is to be aware of the interplays of these two languages, and to be able to operate in each independently of the other, according to what is necessary in context. In the current environment there is a fragmentation of institutions as well (see Joan Miro, Carnival of the Harlequin), each with its own language, creating a proliferation of legal vocabularies. The international lawyer must become fluent in these special regimes of knowledge and expertise, in order to affect outcomes by directing problems to the proper forums. In other words, a thorough awareness of institutional practices is necessary able to identify the nature of each room, and who belongs in which room.

Koskeniemmi then made some specific comments about the coherence of current international criminal law (ICL). In Koskenniemi's opinion, there are several justifications advanced for the role of international criminal tribunals and the Court; these include the arguments of deterrence of future human rights violations, the punishment of atrocities, the prevention of future war by a process of reconciliation and peace, and the creation of an historical record. These goals are often seen in ideological terms – as forms of truth, but they are actually choices to use a specific vocabulary to solve certain problems. Does it make sense, for example, to create an historical record of a war that focuses on the criminal guilt of one accused, as in the Milošević trial? The more important point therefore for international lawyers is to learn the predictability of legal practice, and to take a stance in the political choices to impose certain structural regimes.

One good example of this is the problem of creating a law governing the responsibility to protect and humanitarian intervention. Today, Western countries stand by as thousands are killed and tortured in Syria. These crimes against civilians are violations of basic human rights, which should be universal rules, but would it be desirable to create an overarching rule defining situations of overwhelming need when states are obligated to intervene (if capable)? A strict rule – say 500 or more killed, then intervene – is obviously inappropriate; as any competent lawyer knows, any rule of prohibition is also permitting everything else. One could easily imagine a legal advisor suggesting that the best way to clear a village would be to kill only 300 babies, because then no one would intervene. Complexity therefore requires soft standards; but this in turn requires authoritative interpretation, which is again subject to political pressures.

BLOG UPDATES

- Valerie Oosterveld, **The SCSL at the Security Council,** 18 October 2012, available at: http://www.intlawgrrls.com/2012/10/the-scsl-at-security-council.html
- William A Schabas, **Comment on the Victims Decision of Trial Chamber V,** 18 October 2012, available at: http://humanrightsdoctorate.blogspot.nl/2012/10/comment-on-victims-decision-of-trial.html
- Elli Goetz, **R2P: Trapped between Justice and Power Politics,** 18 October 2012, available at: http://www.internationallawbureau.com/index.php/r2p-trapped-between-justice-and-power-politics/
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- An Hertogen, **Book Discussion: Informal International Lawmaking,** 16 October 2012, available at http://opiniojuris.org/2012/10/16/book-discussion-informal-international-lawmaking/
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- Fiona de Londra, **On Feminist Approaches to International Law,** 16 October 2012, available at http://www.intlawgrrls.com/2012/10/on-feminist-approaches-to-international.html

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Iyrna Marchuk, *The Fundamental Concept of a Crime in International Criminal Law: A Comparative Law Analysis, (*Oct 2012), Springer

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EVENTS

The International Criminal Court at Ten.

Date: 11-12 November 2012

Venue: Washington University School of Law, St Louis, Missouri.

More info: http://law.wustl.edu/harris/conferences/ICCat10/ICCposterfinal.pdf

Old Wars in new bottles? Asymmetric Warfare and Challenges to to International Law

Date: 13 November 2012

Venue: European University Institute, Florence.

More Info: http://www.eui.eu/SeminarsAndEvents/Index.aspx?eventid=78734

Advanced Course in Jurisprudence

Date: 13 November 2012

Venue: European University Institute, Florence.

More Info: http://www.eui.eu/SeminarsAndEvents/Index.aspx?eventid=78746

OPPORTUNITIES

Legal Officer (P-4), The Hague

International Residual Mechanism.

Closing date: 11 November 2012

Linguist (Spanish), The Hague

Organisation for the Prohibition of Chemical Weapons (OPCW)

Closing date: 12 November 2012

Associate Legal Officer

International Criminal Tribunal for the Former Yugoslavia

Closing date: 10 November 2012