ADC-ICTY Newsletter, Issue 7

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ICTY Cases

Cases in Pre-trial

Haradinaj et al. (IT-04-84)

Cases at Trial

Đorđević (IT-05-87/1)

Gotovina et al. (IT-06-90)

Karadžić (IT-95-5/18-I)

Perišić (IT-04-81)

Prlić et al. (IT-04-74)

Šešelj (IT-03-67)

Stanišić & Simatović (IT-03-69)

Tolimir (IT-05-88/2)

Župljanin and Stanišić (IT-08-91)

Cases on Appeal

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

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)

Inside this issue:

ICTY News

* The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Tribunal for the Former Yugoslavia or the Association of Defence Counsel Practicing before the ICTY.

Prosecutor v. Šešelj (IT-03-67)

Vojislav Šešelj

In the trial of Vojislav Šešelj, the Trial Chamber ordered a Rule 98bis hearing to be held from 7 March 2011 onwards. The Accused has been granted 3 and half hours to present his arguments and the Prosecution has been granted 4 hours to present theirs. Upon request of the Accused, at the close of the Prosecutor's case, in accordance with Tribunal rules, the Trial Chamber shall enter a judgment of acquittal on any count if there is no evidence to support a conviction.

In other news, the Trial Chamber has received the expert report of Slovenian handwriting expert Dorijan Kerzan in order to admit the Ratko Mladić diaries into evidence. Kerzan concluded that his findings strongly supported the proposition that the diaries were indeed written by Mladić and he did not find any significant additions, deletions or alterations.

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

Testimony

A number of important witnesses testified this month in the trial of Radovan Karadžić in continuation of the Prosecution's case. Notably, BBC news journalist Jeremy Bowen, a war correspondent for the BBC since 1987, with a particular interest in reporting the plight of civilians during times of war, took the stand on 13 and 14 January. Bowen provided an eloquent testimony arising from his experiences as an on-field journalist in Sarajevo from July 1992 until the end of the conflict. Bowen's testimony included descriptions of the living conditions endured by civilians during the siege: the dangers posed by constant shelling and sniping, and the lack of electricity, running water, and adequate medical care. Furthermore, Bowen recounted his version of specific incidents that occurred during the war, for example the attack upon a bus carrying children in Ljubica Ivezic on 1 August 1992 and the subsequent shelling of a funeral of several Muslim victims. Bowen openly expressed his view that such practices were "heartless".

Bowen, carefully prefacing such statements with the fact that they were his own personal opinion, expressed his view that the siege of Sarajevo by Bosnian Serbs was used as much as a weapon of war as bullets or shells. Bowen stated that as a journalist, he was interested in the theory that the Bosnian Muslim side was shelling their own people. Bowen stated that he understood the term "ethnic cleansing" to mean the expulsion, by force or by acts of terror of parts of a population, to render the community in which they had lived a place where there was only one of the communities left. He expressed his

Jeremy Bowen is a BBC special correspondent. He joined the BBC in 1987 as a news trainee. Bowen became the Middle East correspondent in 1995 and reported extensively from the Kosovo region during the crisis of 1999.

Jeremy Bowen

belief that based on what he saw and read, all sides of the war practiced ethnic cleansing. In cross-examination, Dr. Karadžić attacked the credibility of Bowen, focusing upon alleged breaches of impartiality in Bowen's reporting, accusations which Bowen denied.

From 28 January Janusz Kalbarczyk testified regarding allegations of the use of UN personnel as "human shields" against NATO strikes in May and June 1995. In May 1995, Kalbarczyk was a Major acting as a military observer in Pale, and was one of 200 UN staff taken as hostage by Bosnian Serb forces. Kalbarczyk recounted that on 26 May 1995, Serb soldiers "barged in" and informed them of their new status as VRS hostages. He also recounted the series of events and mistreatment he said he endured up until he and 13 other UN personnel were handed over to the Red Berets on 13 June 1995. In cross-examination, Dr. Karadžić attempted to categorise the witness and his colleagues as prisoners of war, rather than hostages.

Procedural Matters

In procedural matters, Dr. Karadžić has asked for a three month suspension of the trial due to the alleged failure of the prosecution to disclose on time what Karadžić believes was potentially exculpatory material.

Karadžić is also requesting a reversal of a Registry decision to record and monitor his phone conversations. This motion was filed in response to a report by US diplomats pertaining to a conversation with the former Commanding Officer of the UN Detention Unit, which was published on Wikileaks. Karadžić alleges that given his "exemplary behavior" since his arrival in The Hague, the decision was "unreasonable" and open for abuse, as it was in his opinion in Slobodan Milošević's case.

Decisions

A number of significant decisions were also passed by the Trial Chamber in the Karadžić trial this month. The Trial Chamber issued its *"Decision on Request from the Government of the Islamic Republic of Iran"* on 20 January 2011, in response to the accused's request that the Chamber order Iran to produce certain documents that might be of significance to the defence case.

In an earlier response, Iran requested an extra six months to respond to the motion, stating that it would be a difficult endeavour, "since the alleged documents, if ever existed, date back to a long time ago…".

The Trial Chamber in its decision, however, recalled the importance of dealing with such requests expeditiously, and further stated that "the completion of the work of the Tribunal within a reasonable time is a matter of great importance which requires that all Governments should take urgent steps to comply with their duty to co-operate with the Tribunal in its work, including with the defence and self-represented accused who are investigating issues relevant to their cases."

The Trial Chamber thereby ordered Iran to assist the Trial Chamber by providing a response to the Motion no later than 14 March 2011.

In the *"Decision on accused's motion to compel interview: General Sir Rupert Smith"* on 25 January 2011, the Trial Chamber denied the accused's motion requesting the Chamber to issue a subpoena directing General Sir Rupert Smith to submit to an interview by the defence prior to giving testimony.

The accused had submitted that it was necessary to interview General Smith, in order to question him on the relationship between NATO and UNPROFOR forces. The accused believes that such information may be relevant to his defence that UN personnel were detained lawfully as prisoners of war during the alleged hostage-taking of UN personnel of 1995.

However, the Trial Chamber stated that it will not issue a subpoena if other means of obtaining the information sought from General Smith are available. It stated that this appeared to be the case here, thereby ruling that it was not necessary to issue a subpoena requiring General Smith to submit to an interview with the accused.

General Sir Rupert Smith was Commander for UNPROFOR in Sarajevo in 1995 where he was responsible for breaking the siege of the city by creating the UN Rapid Reaction Force. He was also assigned Deputy Supreme Allied Commander covering NATO's Operation Allied Forces in the Kosovo war between 1998 and 2001.

Mićo Stanišić and Stojan Župljanin (IT-08-91)

Mićo Stanišić and Stojan Župljanin

In the case of Mićo Stanišić and Stojan Župljanin, the Prosecution closed its case on 1 February 2010. Since the beginning of trial on the 14 September 2009, the Prosecution called 125 witnesses over 243 days in court. The Defence case is due to start on 11 April 2011.

Before the Prosecution closed its case, there were several outstanding matters left to be decided on. One of these matters was the decision by the Trial Chamber on the Prosecutions motion to add the proof of a death database to its 65ter exhibit list and to tender it into evidence with confidential annexes A and B. The Trial Chamber was persuaded that the Prosecution showed good cause for its request to add the Consolidated Hyperlinked Spreadsheet ("CHS"), regarding the death database, to its Rule 65ter exhibit list. The Trial Chamber stated that "due to the nature of crimes alleged in the indictment which involved allegations of killings and extermination in the context of a widespread or systematic attack against the civilian population, it is to be expected that evidence collection concerning victims of these crimes may be conducted on an on-going basis."

For the above reason, the Trial Chamber found that the Prosecution was in fact not required to disclose all victim-related material "prior to filing its indictment" as asserted by the Defence. It was therefore decided that the Defence was not unduly prejudiced by the addition of the CHS to the Prosecutions Rule 65ter exhibit list. The Trial Chamber also decided to admit the CHS and the underlying material into evidence as requested by the Prosecution.

The Defence challenged CHS on several grounds. The Prosecution received lists of dead and/or missing persons from various agencies in BiH with very few or no underlying documents based on which it was concluded that the person is missing/dead. The Defence requested to be provided with underlying documents and proof of death for each alleged victim, which was not done.

The Defence also submitted that for a large number of alleged victims there was no indication of date of death or disappearance. Considering limited temporal scope of the Indictment from April until December 1992, the Defence claimed that it was inadmissible to include victims for which date of death/disappearance could be added to evidence.

Article 21(4) of the ICTY Statute

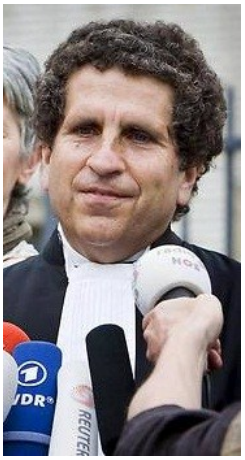
In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Fourth Defence Symposium for Interns

On 1 February 2011, the ADC held its third Defence Symposium entitled "Radovan Karadžić and the Right of Self-Representation". The symposium was led by Peter Robinson, Legal Advisor for Radovan Karadžić.



Peter Robinson

Robinson explained that the right of self-representation was first interpreted and applied in the case Prosecutor v. Slobodan Milošević on 1 November 2004. According to Art.21 of the ICTY Statute the defendant is entitled to a basic set of "minimum guarantees, in full equality" including the right "to defend himself in person or through legal assistance of his own choosing". The Trial Chamber noted that this right is a qualified one and is not absolute. Thus, the right may be restricted on the basis of substantial trial disruption. However, the Trial Chamber failed to recognise that restrictions on Milosevic's right to represent himself have to be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial.

On 20 October 2006, the case of Prosecutor v. Vojislav Seselj showed that a Trial Chamber may restrict the right of self-representation in appropriate circumstances where "a defendant's self-representation is substantially or persistently obstructing the proper and expeditious conduct of his trial". However, the accused must be duly warned before his right to self-representation is restricted. After Seselj continuously refused to accept his appointed standby council, the Trial Chamber decided not to impose standby counsel unless Seselj exhibited obstructionist behaviour. Should the Trial Chamber make such a decision, Seselj should be provided with the Rule 45 list of counsel to select standby counsel from that list.

Article 55(2) of the Rome Statute

Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

In 2008 Rule 45ter was adopted, stating that the Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign counsel to represent the accused.

Furthermore, on 19 February 2010 it was decided that remuneration shall only be provided for one full-time support staff member to assist Karadžić out of court. According to Peter Robinson this is not sufficient to allow Karadžić to effectively represent himself in court and that the right cannot be properly exercised as it is not interpreted in a meaningful way.

Nevertheless, Peter Robinson stated that in the case Prosecutor v. Radovan Karadžić the right of self-representation is alive and exercised.

News from International Courts and Tribunals

International Criminal Court

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07 -2635, 17 Dec. 2010.

Amy DiBella, Intern, Office of Public Counsel for the Defence, ICC.

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

The Chamber considered two Prosecution motions (16 July 2010, 8 December 2010) and defence objections regarding the admission of documents from the bar table. The Chamber elaborated on the three step approach developed by Trial Chamber I in the Lubanga case: first, look at relevance; then determine probative value; finally, weigh probative value against prejudicial effect.

Before applying its test, the Chamber clarified its duty to assess each piece of evidence individually before admitting it. These clarifications relate to a decision from the Bemba case, in which the majority admitted all documents from the prosecution list of evidence, stating: "there is a sufficient legal basis ... to consider *prima facie* admitting into evidence, before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial." (ICC-01/05-01/08 19 Nov. 2010).

The Chamber next went through the test, explaining while applying each step. First, the decision elaborates an exacting relevance standard. The tendering party must explain how its evidence supports a factual proposition which makes more or less probable a material fact of the case. Although this rule offers a strong legal basis to exclude information, the Chamber retains its discretion to admit or reject irrelevant evidence.

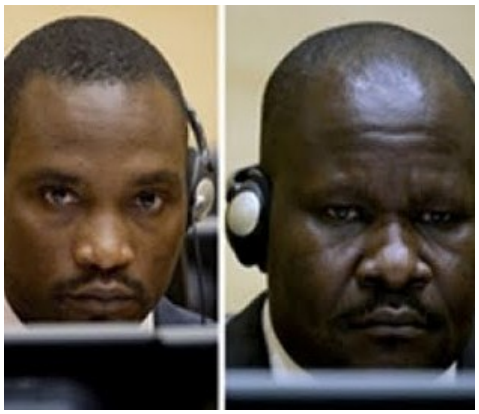
Second, the Chamber breaks down the complex consideration of probative value. Probative value measures the reliability and significance of evidence. For reliability, the Chamber noted that the party must show the document is authentic and that it should reasonably be believed. Even in the absence of an objection from the opposing party, the tendering party must submit evidence to demonstrate the authenticity of a document. Although most international criminal courts have rejected the common law rule against hearsay, the Chamber noted that the "inherent risks" of hearsay diminish the probative value of such evidence (para. 27).

Third, the Chamber considered prejudice in terms of unfairness, drawing attention to certain rights whose violation may have a systemic impact on the fairness of the trial.

These include the right to be tried without undue delay; the right to examine, or have examined, adverse witnesses; the right to remain silent; and the right to counsel.

The Chamber discussed the admissibility of testimonial documents which the accused persons had allegedly made before the judicial authorities of the Democratic Republic of the Congo (DRC).

For instance, the prosecution sought to use one statement by Matthieu Ngudjolo against Germaine Katanga. Ngudjolo could not be forced to testify, and thus could not be examined by Katanga. His statement could not come in as evidence of any fact involving Katanga. However, the Chamber admitted these documents for other purposes, that is, as evidence against Ngudjolo.



Germain Katanga and Mathieu Ngudjolo

The final consideration of the Chamber is perhaps the most interesting. The Prosecution had sought to admit Katanga's statements made to the DRC authorities outside of the presence of his own counsel. The Rome Statute provision, article 55(2), applies the right to counsel at pre-trial interrogations only to questioning by or on behalf of the ICC Office of the Prosecutor.

However, the Chamber suggested a discrepancy between the Rome Statute protections and the applicable international human rights norms. The Chamber reasoned that the main purpose of the right to counsel at pre-trial interrogations is to protect the accused from coercion and to guarantee his/her access to legal advice. Because neither Katanga nor his counsel were aware of the reason for interrogation, Katanga could not have obtained adequate legal advice. The Chamber expressed serious concerns that statements were obtained in violation of the right to silence and the right against self-incrimination and therefore refused to admit Katanga's statement. Although the third step of an admissibility determination is to weigh the probative value against the prejudicial affect, the Chamber stated that the probative value of evidence should not be considered in an admissibility decision if evidence was obtained in violation of an international or Statute-recognised human rights standard. Thus, the Chamber endorsed an exclusionary rule for evidence obtained in violation of international human rights standards, regardless of the source or the alleged probative value of the information.

On 26 January 2000, seven victims and the Chadian Association of Victims of Crimes and Repression in CHAD (AVCRP) complained to the Regional Court of Dakar against H. Habré, accusing him of torture and crimes against humanity.

On 3 February 2000, the Senegalese judge, Demba KANDJI, after hearing the victims, summoned Habré to appear and charged him of complicity in crimes against humanity, torture and barbarism and placed him under house arrest.

On 18 February, the Counsel of H. Habré lodged an appealed against the indictment issued by Judge Kandji.

Ruling of the Economic community of West African States (ECOWAS) Court of Justice on the appeal of Mr. Hissein HABRE v. Republic of SENEGAL on violations of its Human Rights.

Mor NDIAYE, Visiting Professional, Office of Public Counsel for the Defence, ICC.

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On 18 November 2010, the Economic Community of West African States (ECOWAS) Court of Justice in the case Hissein Habré v. Republic of Senegal issued a ruling on non-retroactivity. The ECOWAS Court held that there was consistent evidence of a likelihood of a nature to prejudice the rights of Habré on the basis of constitutional and legislative reforms made by the State of Senegal.

Hissein Habré

The Court's assessment concerning the alleged violation of human rights revolved around five key points:

1) The existence of proceedings against Mr. Hissein Habré ;

2) Interpretation of the Protocol on Democracy and Good Governance ;

3) The effective appeal ;

4) Separation of powers and the independence of the judiciary ;

The 15 West African States of the ECOWAS:

Benin
Burkina Faso
Cabo Verde
Cote d'Ivoire
Gambia
Ghana
Guinee
Guinee Bissau
Liberia
Mali
Niger
Nigeria
Senegal
Sierra Leone
Togo

The Warrant of Arrest for Callixte Mbarushimana was issued under seal on 21 September 2010 for war crimes and crimes against humanity falling under the jurisdiction of the ICC, committed by the troops of the Forces démocratiques pour la libération du Rwanda – Forces combattantes Abacunguzi (FDLR) in the provinces of North and South Kivu and in the Democratic Republic of the Congo (DRC) between January 2009 and 20 August 2010

5) The Non-Retroactivity of Criminal Law.

On the first point, the ECOWAS Court rejected Hissein Habré's assertion regarding the violations of his human rights in the absence of a prosecution on the basis of the legislation adopted by Senegal. Therefore, the violations were hypothetical in nature and should be excluded from the Court's consideration.

On the second point, the ECOWAS Court held that under article 10 of Additional Protocol to the Court, an individual has no standing to rely upon a community obligation of a Member State.

On the third point, the Court noted that the effective appeal means the right of an individual to be able to apply to a court for a declaration or a right to punish the infringement of a right. The ECOWAS Court found that the fact that the applicant had no avenue to challenge a constitutional modification did not violate his right to an effective appeal.

On the fourth point, the ECOWAS Court observed that the recent constitutional and criminal reforms undertaken by Senegal do not constitute a violation of a specific human right of Habré and do not violate the principle of separation of powers or the judicial independence. However, on the last point, the ECOWAS Court considered first of all, that the State of Senegal, in making these constitutional and legislative changes, had seriously infringed the provisions of article 7.2 of the African Charter on Human and Peoples' Rights and article 11.2 of the Universal Declaration of Human Rights prohibiting retroactivity of penal provisions. The Court concluded that there was a violation Habré's human rights, based on these international instruments was proved.

The Court found that the State of Senegal must comply with decisions issued by its national courts, in particular, to respect the authority of *res judicata*. According to the Court, the mandate received from the African Union by the State of Senegal gives it a designated mission concerning the proper modalities to prosecute and judge Habré. This is in the framework of a special or ad hoc jurisdiction, as practiced in international law by all civilised nations.

After this ruling, the question is what will be the attitude of the African Union: Will this organisation follow the ECOWAS court recommendations? In other words, will it accept the establishment of a Special or Ad Hoc Court? The creation of such a court is always dependent on the political will of the international community and may even lead to high costs and long delays. Alternatively, will the African Union maintain the mandate of Senegal to try Habré?

The Prosecutor v. Callixte Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-51, 1 Feb. 2011.

Amy DiBella, Intern, Office of Public Counsel for the Defence, ICC.

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Shortly after Callixte Mbarushimana was arrested, the Prosecutor issued a Press Release describing his allegations (Press Release No. ICC-OTP-20101011-PR582, "New ICC Arrest: Leader of Movement Involved in massive rapes in the DRC is apprehended in Paris", 11 Oct. 2010). Eight days later, the Defence requested the Chamber to ensure the impartiality of the proceedings by ordering the Prosecutor to issue an immediate, public retraction. According to the Defence, the Press Release stated certain allegations from the arrest warrant as established facts; it suggested that Mbarushimana is a génocidaire and ran counter to principles of impartiality and the presumption of innocence.

by failing to consider that during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed

On 11 October 2010 Callixte Mbarushimana was arrested by the French authorities. He was extradited to the custody of the ICC on 3 November 2010. On 25 January 2011 he arrived at the ICC detention center in The Hague. The Pre-Trial Chamber I set the date of the beginning of the confirmation of charges for 4 July 2011.

Callixte Mbarushimana

The Chamber rejected the Prosecutor's arguments that the Defence Request was "pre-mature" and "purely speculative" (para. 4). It stated that Mbarushimana's enjoys rights irrespective of whether he has been surrendered to the Court. The Chamber noted that it has both the responsibility and necessary powers to guarantee a suspect's rights. It framed the allegations in terms of Mbarushimana's right to be presumed innocent until proved guilty by law, a right guaranteed to "everyone" under article 66(1) of the Statute.

The Chamber found that the Prosecutor's statements were framed without due care and may lead to misinterpretation. For instance, some of the statements may have given the impression that the Prosecution was asserting his allegations as if they were established facts. According to the Decision, the Press Statement could have been better formulated. For instance, the Prosecutor could have clarified the appropriate standard of proof at that stage of proceedings.

Although the Chamber rejected the Defence request and found that the risk prejudice was "not of such seriousness as to warrant the ordering of the measures sought" in this case, the decision might serve to vindicate defence rights in future cases (para. 17). The Chamber affirms its responsibilities as guarantor of suspect's rights and extends the protection of the presumption of innocence to cover not just accused persons or suspects, but more broadly, "everyone". Its informal warning that the Prosecutor "should be mindful" of the presumption of innocence when making future public statements serves as a reminder that the Chamber has the responsibility and power to take measures to protect rights both inside and outside of the courtroom (paras. 6, 17).

The Khmer Rouge regime took power on 17 April 1975 and was overthrown on 7 January 1979. Perhaps up to three million people perished during this period of 3 years, 8 months and 20 days. The end of the Khmer Rouge period was followed by a civil war. That war finally ended in 1998, when the Khmer Rouge political and military structures were dismantled.

Extraordinary Chambers in the Courts of Cambodia

In December 2010, the Supreme Court Chamber notified the parties in Case 001 that oral hearings on the appeals would commence in the final week of March 2011, with the exact dates to be determined at a later date. On 22 December 2010, the Supreme Court Chamber granted the Co-Lawyers for Kaing Guek Eav, alias Duch, exceptional leave to reply to the Co-Prosecutors' response to their Appeal Brief. In paragraph 2 of the Chamber's disposition, the Chamber reminded the Co-Lawyers "of the legal assistance and support available to them from the Defence Support Section". The Co-Lawyers filed their Reply on 17 January 2011, focusing their arguments on the personal jurisdiction of the ECCC.

On 13 January 2011, the Pre-Trial Chamber issued three decisions in response to the respective appeals of the accused persons in Case 002 – Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea – against the Closing Order issued on 15 September 2010. The three decisions were delivered without reasoning, which was to follow "in due course". The appeal filed by Khieu Samphan was found to be inadmissible and dismissed. The appeals filed by Ieng Sary, Ieng Thirith and Nuon Chea were found to be admissible in part.

Of the admissible parts of the appeals, the Pre-Trial Chamber dismissed all of the grounds of appeal except two. First, the Pre-Trial Chamber accepted that the Co-Investigating Judges erred

In 1997 the government requested the United Nations to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge.

In 2001 the Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime 1975-1979. This court is called the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

conflict. Secondly, the Pre-Trial Chamber accepted that the rape did not exist as a crime against humanity in its own right in the period of 1975-1979; rape could, however, be categorised as a crime against humanity within the definition of "other inhumane acts". The Closing Order was amended in accordance with the accepted grounds of appeal.

Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea

The Pre-Trial Chamber otherwise confirmed the indictments against the Accused Persons and ordered them to be sent for trial. The Pre-Trial Chamber also ordered that the Accused Persons continue to be held in provisional detention until they are brought before the Trial Chamber.

On 14 January 2011, the Nuon Chea and Ieng Thirith defence teams submitted urgent requests to the Trial Chamber for determination of filing deadlines in relation to witness lists and preliminary objections in light of the Pre-Trial Chamber's unreasoned decision of 13 January. Rule 89 of the ECCC Internal Rules requires preliminary objections concerning the jurisdiction of the Chamber and any issue requiring termination of prosecution to be made within 30 days of the Closing Order becoming final. A similar request followed from the Ieng Sary defence team on 17 January, which also requested an extension of the time limit and page limits for filing preliminary objections.

On 18 January 2011, the Nuon Chea and Khieu Samphan defence teams submitted applications to the Trial Chamber calling for the immediate release of their clients. A similar application followed from the Ieng Thirith team on 21 January. Rule 68 of the ECCC Internal Rules allows the Co-Investigating Judges to extend provisional detention for an additional term of four months beyond an initial three year limit, pursuant to a specific decision in the Closing Order. However, such a decision ceases to have effect after four months. The defence teams for Khieu Samphan and Ieng Thirith interpreted Rule 68 as requiring that their client be brought before the Trial Chamber within four months or released. The Nuon Chea defence team interpreted Rule 68 as requiring, within four months, either a decision from the Pre-Trial Chamber extending the term of provisional detention, or that their client be brought before the Trial Chamber. The team argued that without accompanying reasoning, the Pre-Trial Chamber's Decision of 13 January, which purported to extend the period of provisional detention, could not qualify as a 'decision' under the Internal Rules of the ECCC, and it did not therefore provide an adequate basis for the continuing detention of their client.

On 24 January 2011, the Ieng Sary defence team filed a motion requesting the establishment of guidelines for the participation of 2123 Civil Parties in the upcoming trial for Case 002. The team argued that the role of Civil Parties, as set out in the Internal Rule 23(1), should be read as meaning that the Civil Parties may support the Co-Prosecutors in their role of representing the general interests of victims; it should not be read as meaning that the Civil Parties may support the Co-Prosecutors generally (acting in effect as "second prosecutors") in discharging their burden to prove the guilt of the Accused. The motion noted the right of an Accused to equality of arms and to be tried without undue delay.

Special Tribunal for Lebanon

Office of the Prosecutor submits indictment to the Pre-Trial Judge

Adam Gellert, legal intern, Defence Office

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the Special Tribunal for Lebanon

Rule 68 (G) of the Rules of Procedure and Evidence

The Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment.

(added 10.11.2010)

On 17 January 2011, Daniel A. Bellemare, filed a confidential indictment in connection with the attack on former Lebanese Prime Minister Rafiq Hariri and others on 14 February 2005. In relation to the OTP's investigation it is worth mentioning that back in October the OTP carried out a controlled explosive experiment at the Captieux military base in France, which involved replicating an explosion in order to carry out forensic tests.

On 21 January 2011, the Pre-Trial Judge addressed fifteen preliminary questions of law to the judges of the Appeals Chamber pursuant to Rule 68(G) of the Rules of Procedure and Evidence. This new procedure was adopted in November by the Plenary of Judges after hearing the arguments of the OTP, the Defence Office and the Registry. According to the Explanatory memorandum to the RPE amendments issued by the President of the STL, this process allows the Pre-Trial Judge to submit to the Appeal Chamber interlocutory questions on legal issues that arise during the confirmation of the indictment. In this unofficial and unprecedented document in the history of the international criminal tribunals, the President explains that the procedure was meant to ensure the consistency in applicable law throughout the legal proceedings and at speeding up pre-trial and trial deliberations.

On 31 January 2011, the Defence Office and the OTP filed lengthy submissions concerning (1) the definition of terrorism in international and Lebanese law, (2) conspiracy (complot), (3) homicide, (4) modes of responsibility (co-perpetration, commission), (5) cumulative charging and the (6) applicable law before the STL.

On 7 February 2011, the Appeals Chamber will hear oral arguments on these issues.

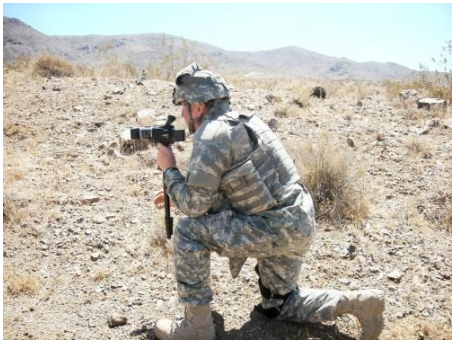
Jamil El Sayed

The Appeals Chamber confirms Tibunal's jurisdiction in El Sayed access to documents case

The Appeals Chamber rejected the OTP's appeal against the Pre-Trial Judge's decision relating to the request by Jamil El Sayed for access to documents about his detention by the Lebanese authorities. In this relation, the Appeals Chamber found that the Tribunal has jurisdiction to consider El Sayed's request and determined that El Sayed has legal grounds to bring this application before the Tribunal. As mentioned in Issue 2 of this Newsletter, El Sayed has claimed that he was wrongly detained by the Lebanese authorities on the basis of false testimonies, which he alleges is now in the possession of the Tribunal's Prosecutor. He has asked the Tribunal for access to this evidence so that he can pursue civil claims in national courts. The Pre-Trial Judge has received written submissions from the parties on the merits of the case and is expected to issue his ruling.

Defence Rostrum

On the Front Line of Accountability- War Reporting and Related Contemporary Issues in International Humanitarian and Criminal Law

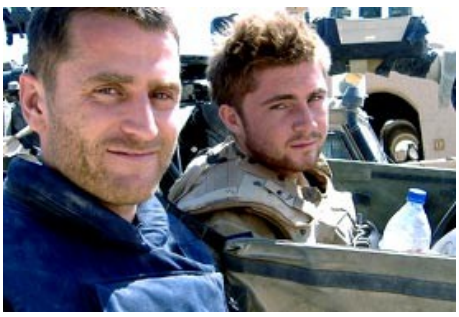


On 21 January 2011, the Asser Institute offered an all-day symposium on the current issues facing war reporters and their impact on international criminal proceedings. The symposium was divided into three topics covering; (1) Contemporary Issues in War Reporting - Views from the Front Line; (2) The Protection of Journalists under International Humanitarian Law - Is there an Adequate Framework in Place?; and (3) The Role of the Media in International Criminal Justice; as well as a keynote speech by Geoffrey Robertson QC. One of the panellists was ADC Executive Committee Member, Colleen Rohan.

The first panel, composed of journalists, discussed the differences between working as a freelance journalist or as a journalist working while embedded with a military contingent unit. Michael Kearney, of the London School of Economics, expressed concern for the new journalistic trend whereby journalists are using legal language to replace political speech. This is especially concerning when a reporter uses a word such as 'genocide' to describe a situation, without understanding the legal elements or future implications of broadcasting that term.

Keynote speaker Geoffrey Robertson QC represented journalist Jonathon Randal of the Washington Post before the ICTY in 2002-2003. He currently represents Julian Assange in his extradition proceedings in the UK. Robertson discussed how the legal protection of war correspondents is outdated and is not robust enough to apply to the new types of journalists or war correspondents. For example, in contemporary conflicts, journalists are no longer killed because they are civilians in combat zones. They are intentionally targeted because they are journalists and their death is meant to send a message to the world. Robertson argues for an expansion of the Geneva Conventions and Protocols in order to include a special class of protected persons, encompassing journalists, NGO workers, and human rights monitors, in which it will be considered a war crime to deliberately target these groups. Robertson reiterated that while journalists are desirable as witnesses in trials, they should be used only when absolutely necessary – when their evidence can make a difference between "innocent" and "guilty" verdicts or when their evidence is essential and cannot be obtained otherwise.

The second panel debated whether there was an adequate framework in place for the protection of journalists under International Humanitarian Law (IHL). Kinga Dery, of the ICRC, disagreed with the keynote speaker and stated that the "greatest protection IHL can offer is that of civilian status" and that what is needed is better respect for and enforcement of IHL. Robert Heinsch of Leiden University explained that the only time journalists will lose their status as a civilian is when they become a direction participant in the conflict and take up arms. Until this happens, journalists will not lose their protected civilian status under IHL.



Lastly, the attendees had the privilege to listen to the more practical application of the use of journalists in international criminal proceedings. Tom Hannis, of the OTP for the ICTY, discussed the evidential value of media reports in international criminal proceedings. Hannis explained the advantageous role that journalists can play. On the other hand, Colleen Rohan, said that the media is used as a means of working up the public, which in turn undermines the rights of the accused. She mentioned examples of media using hot topics as a method of inflaming public opinion. She advised us to pay attention to these phenomena because we are all manipulated and the general public opinion becomes one of "convict him/her" regardless of the guilt or innocence of the accused. The growing trend in news reporting limits the length of news stories to an alarmingly short "sound bite" and as a result the complexities of the full story are lost. Furthermore, the slant that the journalist must take is determined by the media conglomerates. Rohan concluded by saying that once an accused is facing trial it is just as important for the media to cover what is actually going on during the proceedings as covering the events that led the allegations.

Wikileaks cable publishes document about Milošević's relationship with his amici and associates

Slobodan Milošević

On 18 January 2011, Wikileaks published a document about an alleged meeting between the former Commander of the Detention Unit of the ICTY in Scheveningen, Tim McFadden and representatives of the US Embassy in The Hague in 2003. During the meeting McFadden supposedly briefed the US authorities about Slobodan Milošević's life in the Detention Unit. The report includes detailed information about Milošević's health and the relationship with his legal associates and amici curiae.

The cable states that although Milošević solely saw his legal associates as "messenger boys" to associates in Belgrade and publicly distanced himself from his amici, he encouraged the secret continuous cooperation between his associates and the amici. It is said that Milošević took full advantage of the legal knowledge of the amici and allocated his time to the more political aspects of the trial. McFadden argues that the amici's work was central to Milošević's defence as he continuously refused to accept legal counsel. Wikileaks claims that Senior Prosecutors on the case were unaware of this collaboration.

However, according to Martin Petrov, Chief of the Registrar's office at the ICTY, the above-mentioned allegations have not yet been confirmed and it remains uncertain whether a meeting between the legal associates and amici took place and if the cable was in fact accurate.

Nevertheless, lack of respect for legal privilege and lack of adherence to confidentiality rules by those holding positions of authority are issues of great importance to all Defence Counsel working with International Courts worldwide.

The ICTY Detention Unit in Scheveningen

Blog Updates

- Deirdre Montgomery, **Netherlands Freezes Contacts with Iran over Hanging**, 31 January 2011, available at: http://www.internationallawbureau.com/blog/?p=2368
- Thijs Bouwknegt, **Rwanda Rebel Leader Condemns Congo Atrocities at ICC**, 28 January 2011, http://www.rnw.nl/international-justice/article/rwanda-rebel-leader-condemns-congo-atrocities-icc
- Elli Goetz, **ICC: President of the Assembly of States Parties visits Kenya – 27 to 28 January 2011**, 29 January 2011, available at: http://www.internationallawbureau.com/blog/?p=2364
- Philip Smet, **Shell in Nigeria: Unable or Unwilling?**, 26 January 2011, available at: http://www.rnw.nl/international-justice/article/shell-nigeria-unable-or-unwilling

Sahra Bahrami, a 46 years old Dutch-Iranian women was hanged for drug smuggling in Iran on Saturday, 29 January 2011. Following this incident the Dutch government has frozen all contacts with Iran.

Publications

Books

Ed. Karim A. A. Khan, Caroline Buisman, and Christopher Gosnell – Contribution: Colleen Rohan, 2010. *Principles of Evidence in International Criminal Justice*. Oxford: Oxford University Press.

Kenneth S. Gallant, 2011. *The Principle of Legality in International and Comparative Criminal Law*. Cambridge: Cambridge University Press.

Ed. Shane Darcy, Joseph Powderly, 2010. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford University Press.

Articles

Jens Dieckmann, Christina Kerll, January 2011. Representing the General Interests of the Defence: Boon or Bane? - A Stock-taking of the System of ad hoc Counsel at the ICC. *International Criminal Law Review*, 11(1), pp.105-136.

Jenny Lavery, December 2010. Codification of the Criminal Law: An Attainable Ideal?. *Journal of Criminal Law*, 74(6), pp. 557-578.

Israel de Jesús Butler, January 2011. Securing Human Rights in the Face of International Integration. *International and Comparative Law Quarterly,* 60(1), pp. 125-165.

Opportunities

Legal Officer, The Hague (P-4)
International Criminal Tribunal for Rwanda [Registry]
Closing Date: Friday, 11 March 2011

Senior Training and Staff Development Officer, The Hague (P-4)
Organisation for the Prohibition of Chemical Weapons (OPCW)
Training and Staff Development Branch
Administration Division
Closing Date: Monday, 14 February 2011

We wish all of you a very happy and successful new year!

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WE'RE ON THE WEB!

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