

12 March 2012

ICTY Cases

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Hadžić (IT-04-75)

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• NEWS FROM THE ICTY •

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Prosecutor v. Šešelj (IT-03-67)

Last week the Prosecution presented its closing arguments before the Chamber, asking the judges to find Vojislav Šešelj guilty of the crimes alleged in the indictment and to give him a 28-year prison sentence. He is facing nine charges of war crimes and crimes against humanity - which include persecution, deportation, murder, torture, cruel treatment, and destruction of property – alleged to have occurred during the Balkan War in the early 1990's. The Prosecution alleges that these crimes served the purpose of ethnically cleansing parts of Croatia, Bosnia and Herzegovina and Vojvodina of non-Serbs. He is accused of being part of a joint criminal enterprise (JCE) involving other participants such as Slobodan Milošević, Veljko Kadijević, Blagoje Adžić, Ratko Mladić, Jovica Stanišić, Franko Simatović, Goran Hadžić and Radovan Karadžić.

Šešelj, 57 years old, is a Serbian Radical Party leader, who is accused of contributing to the JCE with the aim



of creating a "Greater Serbia" during the dissolution of Yugoslavia. He surrendered to the Tribunal voluntarily and pleaded not guilty to all the charges brought against him. He requested, in March of 2011, to have all the charges against him dropped, arguing that there was no evidence to convict him. He further requested compensation for over eight years of detention. The Tribunal has dismissed this request.

In its closing arguments, the Prosecution outlined three ways in which it says

Šešelj contributed to the goals of the JCE. First, it focused on Šešelj's contribution through his position as the leader of the second largest party in Serbia and as a member of Serbian parliament. Moreover, it asserted that he had influence as a "quasi-military leader", despite later conceding that he did not have any operational military command. In essence, it argued that he influenced others to commit crimes because of his position of authority. It sought to connect this with its second point that he contributed to the crimes through his public speeches, which the Prosecution says incited his followers to commit crimes.

The next day, the Prosecution focused on the third aspect of Šešelj's supposed contribution to the JCE. It argued that his role in recruiting and financing volunteer militia groups and sending them to the frontline made him responsible for the actions of those groups because he exercised control over them. It sought to prove this by using written statements of

Ljubisa Petković and Aleksandar Stefanović, members of Šešelj's War Staff, in which they supposedly claimed that he had "absolute power, made decisions on his own and inspected volunteers in the training centers". However, these two associates did not stand by their written statements in court and alleged that the Prosecution had pressured them to accuse Šešelj. Nonetheless, the Prosecution asked the judges to rely on the written statements and disregard the witnesses' in-court recantations.

Šešelj will have the opportunity to present his closing arguments this week. He has chosen not to call any witnesses or mount his own separate defence, in line with his argument that the Prosecution has not presented sufficient evidence to convict him. The Parties will also submit written final trial briefs, outlining in greater detail some of the arguments presented last week and this week during oral closing arguments.

Prosecutor v. Karadžić (IT-95-5/18-1)

The trial in the case of Prosecutor v Karadžić continued with the testimonies of the witnesses Obradović, Erdemović, Milovanović and Manning.



Ljubomir Obradović

The testimony of Ljubomir Obradović began on Wednesday, 22 February and continued through Monday, 27 February. Obradović was a career military officer, serving first in the Yugoslav National Army (JNA) and then in the Republika

Srpska Army, eventually serving as chief of the operative department for training and operations. Karadžić questioned Obradović about reports received regarding activities at the Srebrenica enclave. Although the prosecution alleged that Karadžić was fully informed about the goings-on in the enclave, the witness revealed that the reports did not contain enough "dramatic" information for them to be relayed to the president from his advisors.

Drazen Erdemović, who took the stand on 27 February, has testified before the Tribunal in previous cases and, through the use of Rule 75, was afforded the same protective measures: image and voice distortion. Despite the protection, it is known that Erdemović was part of the Bosnian Serb army and was questioned about

his role in Srebrenica. The witness said he had no genocidal intent and did not know the motives of others involved.

On the afternoon of 28 February, the trial continued with testimony from retired general Manojlo Milovanović, who served as Ratko Mladić's deputy and chief of staff. Despite being called by the Prosecution, the cross-examination by Karadžić revealed the similar views which Karadžić and the witness hold. Milovanović denied that there was any sort of directive to expel Muslims and Croats from Serb-held territory, stating that in Sarajevo it was the Serbs who were expelled and killed.

The next witness was Dean Manning, a former investigator for the Office of the Prosecutor at the Tribunal and currently a senior police liaison officer for the Australian Federal Police based in Dubai. Manning worked for the Srebrenica Team, coordinating exhumation activities and examining and assessing on-site evidence. Karadžić questioned the witness as to the accuracy of his work, including his knowledge of local customs, in an attempt to shed another light on the events at Srebrenica.



Dean Manning

Rule 75

Measures for the Protection of Victims and Witnesses

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

Prosecutor v. Stanišić & Simatović (IT-03-69)

On 28 and 29 February, Jovica Simatović's defence witness Mladen Karen continued to testify. The examination-in-chief, conducted by Simatović's defence counsel Mihajlo Bakrač, finished early on 28 February. Karen, former Chief of Security of the 21st Corps of the Republika Srpska Krajina Army, was then briefly cross-examined by Franko Stanišić's defence counsel Wayne Jordash.

From 6 to 8 March, Petar Đukić, former officer in the Yugoslav People's Army (JNA) in Bosanski Šamac and chief inspector of the Republika Srpska Krajina police testified. Simatović's defence used Đukić to show that the unit responsible for crimes in Bosanski Šamac was under the command of the JNA, Vojislav Seselj and the local Serbian Democratic Party, not Stanišić and Simatović, former heads of the Serbian State Security Service (DB).

According to the indictment, special units of the DB took control of the city on 11 April 1992 and harassed Bosnian Croats and Muslims until 31 July 1992. The Prosecution alleges that these units were under the control of the DB which was controlled by Stanišić and Simatović. However, Đukić disagreed with the Prosecution claims.

During cross-examination, the Stanišić defence used Đukić's testimony to establish that the Scorpions and Arkan's Men were under the command of Army of Serbian Krajina and not under the control of the DB.



Petar Đukić

Prosecutor v. Stanišić and Župljanin (IT-08-91)

Slavko Lisica began his evidence in the trial of Mico Stanišić and Stojan Župljanin on 1 March. The former commander of the Tactical Group 3 in the Army of Republika Srpska (VRS) 1st Krajina Corps testified as one of the witnesses called by the Trial Chamber.

According to Lisica, military commanders in Republika Srpska were responsible for just about all aspects of public life and thus also for the police. Lisica has been referred to by other witnesses earlier when they testified on the subordination of the police to the military. In line with this, Lisica argued that, although he always tried to accommodate the views of the chief of the Doboj Security Services Center Andrija Bjelosevi, he, Lisica, retained the last word.



Slavko Lisica

Defence and Prosecution disagree about who was responsible for investigating and trying crimes committed in combat by the police. While the Prosecution claims that the police was obliged to do so, the Defence has argued that military courts, rather than the civilian judiciary, were responsible for trying these crimes.

Lisica testified that the military courts had *de iure* jurisdiction to prosecute those who committed crimes. He stated that in 1992, however, there were no "military courts, there was no state and no morality", therefore jurisdiction was left to the military commanders.

Although the Prosecution asserted that no state of war had been declared in the Republika Srpska in 1992, Lisica said that "in practice", there was "a war going on" and everybody had to obey his orders "without demur". Even though the police probably had to report to "the interior minister in a non-existent state", Lisica pointed out that the minister "probably would have to say to his men, do as the colonel says".

Župljanin's defence counsel argued that a state of war already existed in 1991, when armed conflict broke out in Croatia. The Prosecution wants an additional expert witness to testify on this issue.

On 7 and 8 March Tomislav Kovać, a former high official in the Ministry of Internal Affairs of Republika Srpska, testified as the third and last Chamber witness.

New Permanent Judge Sworn In

On 6 March, Judge Khalida Rachid Khan from Pakistan was sworn in as a new permanent Judge to the ICTY. She has been assigned to the Appeals Chamber.

Khalida Rachid Khan has been serving as Judge of the UN International Criminal Tribunal for Rwanda (ICTR) since July 2003 and as Tribunal's Vice-President since May 2007 until 27 May 2011, when she was elected President of the ICTR.



Khalida Rachid Khan

Meron Becomes President of Residual Mechanism



Theodor Meron

Judge Theodor Meron, current President of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was appointed President of the International Residual Mechanism for Criminal Tribunals.

Beginning on 1 March, his term will last for four years. Meron will continue serving as President of the ICTY while fulfilling his tasks at the residual mechanism.

Moreover, the UN Security Council appointed a Prosecutor for the residual

mechanism, namely Hassan Bubacar Jallow, the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR). As Meron, Jallow will serve for a four-year term and continue his work at the ICTR.

A statement issued by Ban Ki-moon's spokesperson stated that "The Secretary-General believes that the mechanism will benefit immensely from their considerable experience, outstanding leadership skills, and profound commitment to international criminal justice".

The International Residual Mechanism was established in 2010 to complete the work of the war crimes tribunals for Rwanda and the former Yugoslavia when their mandates expire.

Theodor Meron, a US citizen, was born on 28 April 1930 in Kalisz, Poland. He received his legal education at Hebrew University, Harvard Law School and Cambridge University. He was the President of the ICTY until 2005 and then served as a judge on the Appeals Chambers of the ICTR and the ICTY. Since November 2011, he served again as the ICTY's president. He has previously worked as a legal counsel to the Israeli Foreign Ministry and as Counsellor on International Law in the U.S. Department of State.

ICTY Outreach Programme Documentary on Sexual Violence Premieres

On 2 March, the premiere of the Tribunal's Outreach Programme's feature-length documentary "Sexual Violence and the Triumph of Justice" took place in Zagreb, Croatia. Some 80 guests attended the event; among them were Croatian government officials, members of academia, embassies and NGOs as well as journalists.

The documentary portrays the ICTY's historic role in the prosecution and adjudication of wartime sexual violence. The documentary includes interviews with former and current senior staff members of the Tribunal, as well as testimonies from witnesses and survivors of sexual violence.

The screening was followed by a roundtable discussion on pertaining issue in the prosecution and adjudication of sexual violence in war crimes.

The documentary is available in English and Bosnian/Croatian/Serbian (BCS). The Outreach Programme plans to distribute the material to victim organisations, local schools, and partner NGOs in the region, with a broadcast on main TV stations planned for 2012.

Farrell Appointed STL Prosecutor



Norman Farrell

UN Secretary General Ban Ki-moon announced on Wednesday, 29 February, that Norman Farrell will be the new Prosecutor of the Special Tribunal for Lebanon (STL). Farrell, currently serving as Deputy Prosecutor of

the International Criminal Tribunal for the Former Yugoslavia (ICTY), will take over the position from his fellow Canadian Daniel Bellamare. Bellamare has been serving as STL Prosecutor since 2009 and resigns from his duties due to health reasons.

As STL prosecutor, Farrell will take on the case against the four members of Hezbollah who were indicted in the 2005 assassination of former Prime Minister Rafik Hariri. Proceedings in absentia against the accused are expected to get under way this year.

Hariri and 22 others were killed on 14 February 2005 after a massive car bomb ex-

ploded as his motorcade passed through central Beirut.

Farrell will also be responsible for the ongoing investigation and any further indictments in the Hariri case or connecting cases.

Ban Ki-moon also announced the appointment of Ugandan Judge Daniel David Ntanda Nsereko to take the late Antonio Cassese's seat in the court's Appeals Chamber. Following Cassese's resignation, Judge David Baragwanath was elected as STL president, but the Appeals Chamber, normally comprised of three international and two Lebanese judges, remained one judge short.

Following the United Nations' announcement, STL spokesperson Marten Youssef said the court welcomed the appointments.

"Their respective roles are vital to the tribunal as we continue with our mandate," Youssef said.

Norman Farrell, Deputy Prosecutor at the ICTY since July 2008, obtained his degree from Columbia University, New York. After working as a Crown Counsel with the Attorney General for the Province of Ontario, Canada, he served in several capacities for the International Committee of the Red Cross (ICRC). In 1999, he joined the ICTR's and ICTY's OTP as an Appeals Counsel and subsequently became Senior Appeals Counsel and Head of the Appeals Section in the two courts. Before becoming Deputy Prosecutor, he worked as Principal Legal Officer for the ICTY's OTP.

• DEFENCE ROSTRUM •

Corporate Personhood in International Law: The Kiobel Case

By Kirsten Schlewitz

As every first-year law student in the United States should be able to tell you, corporations are considered persons under federal law, and afforded similar rights and responsibilities. This legal fiction has been part of U.S. law since 1886, when, in *Santa Clara County v. Southern Pacific Railroad*, the Supreme Court ruled that the Equal Protection Clause of the Fourteenth Amendment applies to corporations as well as natural persons. Much more recently, in *Citizens United v. Federal Election Commission*, the Court ruled that corporations have the same right to fund political speech as individual citizens. Why, then, should the decision in *Kiobel v. Royal Dutch Petroleum* require any argument at all?

Kiobel, for those of you not regularly reading blogs about the Supreme Court, alleges that Royal Dutch Petroleum, the parent company for Shell Oil, aided and abetted the Nigerian government in its torture and killing of environmental and human rights protesters resisting Shell's operations in Nigeria in the 1990s. The plaintiffs, a group of Nigerian nationals, brought suit under a U.S. law commonly referred to as the Alien Tort Statute (ATS), which allows foreign citizens to bring civil suits in federal courts for torts that violate the law of nations or a treaty of the United States. While there are multiple issues to be decided, the most interesting is the question of whether corporations are immune from liability for violations of international law.

Alas, the Court decided on 5 March to hold off on the decision until the next term. The reason for delaying *Kiobel* was not given, but it is thought that the petition for certiorari in another case, *Rio Tinto PLC et al. v. Sarei, et al.* could be a factor. *Rio Tinto* is a similar case in which residents of Bougainville, Papua New Guinea allege aiding-and-abetting liability against Rio Tinto mining group for crimes against humanity, war crimes, and racial discrimination. In October 2011, the U.S. Court of Appeals for the Ninth Circuit moved that the case should be dismissed, stating that a United States federal district court did not have jurisdiction over the matter.

Rather than grant review for *Rio Tinto* and start a separate examination of the ATS, the Supreme Court elected to expand review of *Kiobel*. The new question to be argued in briefs is: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

And so we are left with two considerable issues for the Supreme Court to decide: Whether the law allows actions to be brought in the United States when violations occur solely

within the territory of another state, and, if so, whether corporations, like people, can be held liable for these violations of international law. Despite the country's long tradition of corporate personhood, there is no guarantee that the justices will hold that liability for overseas conduct extends to corporations. Instead, they will be, essentially, creating new law.

In 2004, in *Sosa v. Alvarez-Machain*, the court clarified one point of the Alien Tort Statute: the law may only be invoked for a narrow class of violations that are "specific, universal and obligatory". Torture and murder, as alleged in *Kiobel*, do fit inside the narrow class, but if corporations cannot be sued, the extent of their violations is irrelevant. In the same case, the justices note that the question of scope of liability remains unanswered. The ATS itself is ambiguous as to what entities -- states, individuals, corporations -- may be sued under the law. Opinions in the lower courts remain divided. The Second Circuit ruled that the ATS makes no distinction between natural persons and corporations, and that both should be held liable for their actions.

The Court of Appeals for the District of Columbia came to the opposite conclusion, looking to international law for reference. Because no international tribunal has ever allowed a customary international law claim against a corporation, the D.C. Circuit concluded that United States law should not hold corporations liable. The argument in opposition is that each country considers the question as a matter of domestic law, and chooses whether or not corporations can be sued.

For most observers, the worry is that the Court will split down ideological lines, resulting in a narrow majority ruling that, under the ATS, claims may not be brought against corporations. Should such a ruling occur, the U.S. will find itself in an interesting situation: corporations, under *Citizens United*, will be allowed to contribute freely to political campaigns, but they will not be held liable for crimes committed against international law. An odd split, and one that likely will not sit well with the international community.

Of course, it is also possible that the Supreme Court will avoid the question of corporate liability altogether, dismissing the *Kiobel* case on jurisdictional grounds. If this is the path the Court chooses to take, what is there to prevent corporations from flaunting international law outside their home countries?

Update on Garzón's case: Acquittal and punishment

by Diego Naranjo

Baltasar Garzón has passed the test: He has been acquitted in the case regarding the investigation of crimes committed during Franco's regime. The Supreme Court of Spain found that there was no malfeasance in Garzón's attempt to investigate these crimes. However, the judgment estimates that there was a "mistake" when he thought that he was able to do that and that it is the state "through other organisms and with the help of all disciplines and professions, specially historians" that must initiate Transitional Justice mechanisms and not a judge.

With this judgment Garzón sees himself punished because of the wiretapping case, waiting for the response to an appeal from the Prosecution in the case where he was accused (and acquitted) of corruption, and acquitted in this last issue. In the meantime, the Bar of Lawyers of Seville has received notification from individuals related to Garzón regarding the former judge's intentions to become a lawyer in this Andalusian city. (1)

Despite the acquittal, there is the feeling that Spain has tried to keep its "human rights record" clean by punishing Garzón "politically" for investigating Franco's regime but punishing him "judicially" for a different cause. As Amnesty International put it, although Garzón was not convicted this time, there is still the need of investigating the crimes committed during the Dictatorship. Spain failing to do so would mean a violation of the obligations of Spain to end impunity and a disregard to victims.



Baltasar Garzón

(1) Garzón has been banned from working as a judge, but he is still allowed to work as a lawyer.

French genocide law struck down by Constitutional Court

The French Constitutional Court has struck down a controversial bill criminalising denial of the Armenian genocide. The Court considered the law, which was passed by the French Senate on 23 January, to infringe on freedom of expression.



Nicolas Sarkozy

France's President Nicolas Sarkozy was fast to order his government to draft a new version of the law. His office stated: "The President of the Republic considers that [genocide] denial is intolerable and must therefore be punished".

The proposed legislation has considerably strained diplomatic relations between France and Turkey. The lat-

ter welcomed the Court's ruling and considers lifting of economic sanctions and reinstatement of political and military co-operation with France.

Turkish law treats the public affirmation of an Armenian genocide as a crime. Historians widely believe that about 1.5 million Armenians were systematically killed by Ottoman troops beginning in 1915, amid the chaos of World War I and the Ottoman Empire's collapse.

More than 130 senators and MPs across the political divide had appealed to the Constitutional Court to examine the bill.

France already recognises the killings as an act of genocide, but the new law would have meant that anyone denying it faced up to a year in jail and a maximum fine of €45,000.

• BLOG UPDATES •

- Jennifer Easterday, **No Justice Cascade in Spain**, 7 March 2012, available at: <http://www.intlawgrrls.com/2012/03/no-justice-cascade-in-spain.html>
- Kevin Jon Heller, **Why Preventive Self-Defense Violates the UN Charter**, 7 March 2012, available at: <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/>
- Nadine Mansour, **Special Tribunal for Lebanon: Will Justice be served through in absentia trials?**, 22 February 2012, available at: <http://ijcentral.org/blog/special-tribunal-for-lebanon-will-justice-be-served-through-in-absentia-tri/>
- Otilia Maunganidze, **NTC Must Commit to Criminal Justice to Bolster Credibility**, 27 February 2012, available at: <http://ijcentral.org/blog/ntc-must-commit-to-criminal-justice-to-bolster-credibility/>
- William A. Schabas, **Has the Prosecutor Changed His Mind About Genocide in Darfur?**, 4 March 2012, available at: <http://humanrightsdoctorate.blogspot.com/2012/03/has-prosecutor-changed-his-mind-about.html>
- Beth Van Schaack, **Breaking News: Kiobel to be Re-Argued**, 5 March 2012, available at: <http://www.intlawgrrls.com/2012/03/breaking-news-kiobel-to-be-re-argued.html>
- Gentian Zyberi, **The Issue of Contempt of Court at the ICTY**, 28 February 2012, available at: <http://internationallawobserver.eu/2012/02/28/the-issue-of-contempt-of-court-at-the-icty/>

• PUBLICATIONS AND ARTICLES •

Books

- Antonio Cassese (Ed.) (2012) *Realizing Utopia: The Future of International Law*, Oxford University Press
- Erika De Wet and Jure Vidmar (2012) *Hierarchy in International Law: The Place of Human Rights*, Oxford University Press
- Christoph Safferling (2012) *International Criminal Procedure*, Oxford University Press
- Eimear Spain (2011) *The Role of Emotions in Criminal Law Defences*, Cambridge University Press
- Carsten Stahn and Mohamed M. El Zeidy (Eds.) (2012) *The International Criminal Court and Complementarity*, Cambridge University Press
- Elies van Sliedregt (2012) *Individual Criminal Responsibility in International Law*, Oxford University Press

Articles

- Mauro Politi (2012) "The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead", *Journal of International Criminal Law* 10(1), p. 267-288
- Lorne Neudorf (2012) "Promoting Independent Justice in a Changing World", *Human Rights Law Review* 12(1), p. 107-121
- Mary Ellen O'Connell and Mirakmal Niyazmatov (2012) "What is Aggression?: Comparing the *Jus ad Bellum* and the ICC Statute", *Journal of International Criminal Justice* 10(1), p. 189-207



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WE'RE ON THE WEB!

WWW.ADCICTY.ORG

The ADC-ICTY would like to say thank you to Tadej Koncar for his valuable contributions to the newsletter. Tadej has been a part of the newsletter team since January 2012. We wish him all the best.

• UPCOMING EVENTS •

Advocacy Training for Criminal Defence Lawyers

Date: 30-31 March 2012

Venue: Link Campus University of Malta, via Nomentana 335, Roma

More info: <http://international.lawsociety.org.uk/node/12058>

EU Criminal Law for Defence Counsel

Date: 20-21 April 2012

Venue: Faculty of Advocates, MacKenzie Building, Old Assembly Close, 172 High Street, Edinburgh

More info: <http://international.lawsociety.org.uk/node/12059>

Making Europe Safer: Europol at the Heart of European Security

Date: 18-19 June 2012

Venue: The Hague

More info: https://www.era.int/cgi-bin/cms?_SID=c942c4a33ed33e48b86b2dbod6875bd6224b76bd00185809609673&_sprache=en&_bereich=artikel&_aktion=detail&i_dartikel=122953

• OPPORTUNITIES •

Legal Internship, The Hague, Netherlands

Women's Initiatives for Gender Justice

Closing Date: 16 March 2012

Press Officer (P3), The Hague, Netherlands

International Criminal Tribunal for the former Yugoslavia (ICTY)

Closing date: 29 March 2012

Translator/ Revisor (French) (P4), The Hague, Netherlands

International Criminal Tribunal for the former Yugoslavia (ICTY)

Closing date: 2 April 2012