

ADC-ICTY Newsletter

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Head of Office Dominic Kennedy

Editor Ece Aygun

Team Sofie Breslau, James Jackson, Taylor Olson, Jovana Parades

* The original idea for this newsletter was by the former Head of Office Bath-Shéba van den Berg, and the template design was created by Niloofar Sarwar.

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ICTY News

- Sofie Breslau, James Jackson, Taylor Olson, Jovana Parades

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

In the case of Radovan Karadžić, the Trial Chamber issued an order to Bosnia and Herzegovina to attend a hearing pursuant to Rule 54bis on Friday, 15 October at 10:00 a.m. in Courtroom I. The purpose of this hearing will be to hear from BiH on its efforts to date to provide the Accused with a number of documents on the alleged clandestine supply of arms. The Chamber has found the government's co-operation in that particular respect to have been "problematic and fraught with delay" and considers it beneficial to hear from BiH before deciding on the Accused's motion for the issuance of a Binding Order.



Radovan Karadžić

Denmark's Defence Ministry has also been under scrutiny, for allegedly failing to comply with a request from Radovan Karadžić, to disclose documents that may call into question whether the Serbs were responsible for the Markale bombing in Sarajevo in 1994. Despite claiming to have no such material, Danish newspaper Kristeligt Dagblad purports to have discovered several relevant documents in the Ministry Archives. As well as causing embarrassment to Denmark's Ministry of Defence, experts have commented that Denmark's failure to comply has the effect of undermining the credibility of the ICTY.

Prosecutor v. Momčilo Perišić (IT-04-81)



Momčilo Perišić

Testifying in defence of General Perisic on 6th September 2010, General Kadijevic claimed that military equipment, which Perisic is alleged to have been supplying to the Serb army in Bosnia and Krajina, in fact belonged to the federal government, not the Yugoslav Army. Therefore only the federal government could have decided how to dispose of the property.

ICTY Cases

Cases on Appeal

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

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)

Prosecutor v. Gotovina et al. (IT-06-90)

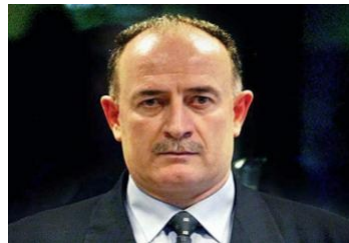
The Closing Arguments in the trial of Gotovina et al. finished on Wednesday, 1st September 2010, with the Judgement to be rendered in due course at a date to be determined by the Chamber. The conclusion of the trial also attracted some controversy amid allegations of underhand tactics by the prosecution, due to the submission new arguments in the closing statement – something prohibited under the rules of procedure and evidence.



Ante Gotovina

Prosecutor v. Veselin Šljivančanin (IT-95-13/1-R.1)

The case concerned is that of Veselin Šljivančanin, a former officer in the Yugoslav army, who was sentenced to five years imprisonment in 2007. The Appeals Chamber decided not only to uphold the judgment, but also increased the sentence to 17 years on 5 May 2009.



Veselin Šljivančanin

The recent decision by the ICTY Appeals Chamber to review the appeal decision of 2009 comes after a contention by Šljivančanin's lawyers that a new fact had come to light after the judgment was delivered by the Appeals Chamber. The new fact came in the testimony of Miodrag Panic, the chief-of-staff of Šljivančanin's unit in November 1991. Panic contended that Mrksic did not inform Šljivančanin that he ordered

that JNA protection be withdrawn from the prisoners of war held at Ovcara. This was significant in that the Appeals Chamber held that in the 2009 appeal, the Court relied on the reasoning that "Mrksic must have told Šljivančanin that he had withdrawn the [Yugoslav People's Army ("JNA")] protection from the prisoners of war held at Ovcara." They concluded that Šljivančanin possessed the *mens rea* for aiding and abetting murder as a violation of the laws or customs of war. Accordingly, the appeals judges held that the "review of the... appeal judgement is necessary because the impact of the new fact, if proved, is such that to ignore it would lead to a miscarriage of justice".

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

.by Tatjana Savić

On 26 May 2010 in the *Prosecutor v. Mićo Stanišić and Stojan Župljanin* the Prosecution filed the *Prosecution's Motion to Amend its Rule 65ter Witness List as a Result of the Trial Chamber's 1 April 2010 Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), with Confidential Annex seeking to add 57 new witnesses.*

On 14 July 2010 the Trial Chamber partially granted the Prosecution's Motion allowing the Prosecution to add 44 additional witnesses.

On 23 July 2010 the Prosecution filed the *Prosecution's Motion to Add Proof of Death Database to its 65ter Exhibit List and to Tender it into Evidence with Confidential Annexes A and B*, which included an additional 1795 victims not listed in the indictment. The indictment itself has 1445 names, the addition would bring the total number of victims to 3240.



Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia is an independent professional association established under the laws of the Netherlands. It is not an organ of the International Criminal Tribunal for the Former Yugoslavia. It is, however, recognized as the Defence Counsel organization serving the tribunal pursuant to Rule 44 of the ICTY Rules of Procedure.

On 14 July 2010, for the first time in the history of the ICTY, the Appeals Chamber have decided to review one of their judgments.

-Ece Aygun

News from International Courts and Tribunals

International Criminal Court

-Celine Delprat, Geraldine Danhoui, with the assistance of Kathryn Panaccione

The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Decision on the "Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010", 24 August 2009

On the 24th of August 2010, a Single Judge declared inadmissible the "Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010". This was filed by Ms. Michelyne C. St-Laurent, the *ad-hoc* defence Counsel for Omar Al-Bashir, and was seen as falling outside the scope and purpose of the mandate vested with her. She was entrusted by the Chamber with the task of representing and protecting the interests of the defence only within the context and for the purposes of the proceedings related to victims' applications for participation. In his interview, following the issuance of an arrest warrant for Omar Al Bashir for the crime of genocide, the Prosecutor wrote among other things that "The court found that Bashir's forces have raped on a mass scale in Darfur" and that "The court found that Bashir is deliberately inflicting on the Fur". However, it may be recalled that pursuant to article 58 of the ICC Statute, at this stage of the proceedings the Court does not 'find' but "is satisfied that there are reasonable grounds to believe that the person had committed a crime". Thus a fundamental question arises: if the *ad-hoc* defence Counsel of a suspect has no *proprio motu* standing to protect human rights of the latter at the pre-trial stage, in particular his right to a presumption of innocence, then who has standing to do so - how may a suspect defend himself?

The Prosecutor v. Germain Katanga et Mathieu Ngudjolo Chui, ICC-01/04-01/07-2309-Red, Décision sur la « Requête de la Défense de Germain Katanga tendant à obtenir la communication de l'enregistrement d'un entretien avec le témoin P-219 », 30 août 2010

In its decision of 30 August 2010, Trial Chamber II granted the motion of Katanga's Defence team for disclosure of the recordings of Prosecution witness P 219. The Prosecution had disclosed the statement, but the Defence argued that access to the original recordings was necessary for the preparation of the cross examination of this witness. In his response of 19 July 2010, the Prosecutor argued that the obligation to disclose incriminating materials is limited to statements, and not the recordings of such statements. Nevertheless, Trial Chamber II decided that Rule 111 of the ICC RPE does not forbid disclosure of the recording if it appears necessary for the preparation of the Defence, in accordance with Rule 77 of the ICC RPE. The Chamber observed that the purpose of cross examination is to check the credibility of the witness and a good way to realize this could be to

ICTY: Establishment: 1993 by Security Council Resolution 827 **Establishment of Defence Counsel:** Association of Defence Counsel, 2002 (September) under Dutch law by a decision of the ADC-ICTY General Assembly

ICTR: Establishment: 1994 by SC Resolution 955 **Establishment of defence counsel:** Association Des Avocats de la Défense, 2002 (March) by a decision of the ADAD General Assembly

ICC: Establishment: 2002 when the Rome Statute entered into force **Establishment of defence counsel:** The Office of Public Counsel for the Defence, 2002 pursuant to regulation 77 of the court

STL: Establishment: 2007 pursuant to SC resolution 1664 (2006) and 1757 (2007) **Establishment of defence counsel:** The Defence Office, Head of Office appointed in 2009 pursuant to Article 13 of the statute of the Tribunal and it is one of the four organs of the Special Tribunal

SCSL: Establishment: 2002 by an Agreement between the United Nations and the government of Sierra Leone pursuant to Security Council resolution 1315 **Establishment of defence counsel:** The Defence Office-Registry, 2007, article 13 of the court's statute and is included under the Registry

ECCC : Establishment: 2001 by the Cambodian government and the United Nations. It functions, however, independent from the United Nations **Establishment of defence counsel:** Defence Support Section, 2001 and works together with the Bar Association of the Kingdom of Cambodia

ICJ: Establishment: 1945 by the Charter of the UN

“ If the ad-hoc defence Counsel of a suspect has no *proprio motu* standing to protect human rights of the latter at the pre-trial stage, then who has standing to do so”

-Celine Delprat, Kathryn Panaccione



In his interview, following the issuance of an arrest warrant for Omar Al Bashir for the crime of genocide, the Prosecutor wrote among other things that "The court found that Bashir's forces have raped on a mass scale in Darfur".

confront the witness with discrepancies between the statement and the recordings. This decision is significant because the Chamber recalls the main principles of justice: equality of arms, fair trials and public debate.

Special Court for Sierra Leone

-Simon Chapman, Legal Assistant, Defence Team of Charles Taylor

Prosecutor v. Charles Ghankay Taylor SCSL-03-01-PT:

Recent witnesses

Issa Sesay

The bulk of the recent evidence in the case has been provided by witness Issa Sesay, who began his testimony on 5 July and concluded on 27 August. As a former leader of the RUF (Revolutionary United Front of Sierra Leone), his account was crucial to rebutting the alleged links between Charles Taylor and the RUF. In particular, his testimony focused on rebutting allegations by Prosecution witnesses who had alleged Sesay had been acting under the authority of Charles Taylor and the Liberian government, and had been provided with arms and ammunition in exchange for diamonds. The Prosecution's cross-examination of Sesay focused on inconsistencies between what he testified to in his own trial and what he alleged in the Taylor case.

DCT-008

The most recent witness has been DCT-008, a former radio operator for the Liberian government. His testimony has concentrated on Charles Taylor's knowledge of any links between individuals in his own government and the RUF. DCT-008 has provided evidence that contact with the RUF was carried out unofficially by high-ranking members in Taylor's government, but that it was limited to a few secret deals involving the selling of arms and ammunition, and a number of radio communications. Cross-examination of DCT-008 focused on the likelihood of such contact taking place outside of Taylor's knowledge, as well as on areas of general credibility.

Extraordinary Chambers of the Courts of Cambodia

In Case 001, both the Co-Prosecutors and the Defence have filed notices of appeal against the judgement rendered on 26 July against Kaing Gak Eav (aka "Duch"). The Prosecutors intend to challenge, inter alia, the Trial Chamber's approach to characterization of certain offences as well as cumulative convictions in international law, and will contest the sentence. The Defence plans to present a jurisdictional challenge, a request for acquittal, and a retroactive declaration that the accused was held in detention for the purposes of witness protection.

On Monday 6 September, Ieng Sary's defence counsel filed an appeal with the Pre-Trial Chamber requesting a hearing and stay of proceedings in Case 002. The appeal argued that the Office of the Co-Investigating Judges (OCIJ) unfairly rejected the defence response to the Co-Prosecutors' final submission. At 66 pages in length, the response was deemed defective



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As a former leader of the RUF, his [Issa Sesay] account was crucial to rebutting the alleged links between Charles Taylor and the RUF.

-Simon Chapman



Kaing Gak Eav
aka “Duch”

by the OCIJ because it exceeded the 15-page limit set by the Court’s Practice Directive on filings. Ieng Sary argued that denying a right of reply to the Prosecutors’ submission violates the equality of arms principle and the fair trial rights of the accused. In its response to the appeal, the Co-Prosecutors noted the absence of any provision in the Court’s rules affording the defence a right of reply to its submissions during the investigative stage. The Co-Prosecutors argued that the accused will have ample opportunity to present a response during the trial itself. The Pre-Trial Chamber dismissed the request for a hearing and stay of proceedings, but ordered the OCIJ to place the defence’s ‘Response’ on the Case File.

The Pre-Trial Chamber also issued a split decision on 9 September dismissing an application by Nuon Chea and Ieng Sary’s counsel requesting an investigation into alleged political interference by the Cambodian Government into the work

of the Court. The Cambodian judges of the Pre-Trial Chamber held that the Co-Investigating Judges were within their mandate to decline further investigations into several high-profile suspects, a decision giving rise to initial allegations of political interference. In order to protect the fair trial rights of accused, international Pre-Trial Chamber judges Rowan Downing and Catherine Marchi-Uhel deemed it ‘imperative’ that an investigation into the possibility of political interference be held.

This week marks the ECCC’s Bi-annual Plenary Conference, where judicial officers will review the Court’s internal rules and make amendments as necessary. Changes on the agenda for discussion have been mainly proposed in anticipation of the upcoming trial in Case 002. The Plenary is expected to devote the majority of the Conference on finalising the in rules of Reparations.

Ieng Sary argued that denying a right of reply to the Prosecutors’ submission violates the equality of arms principle and the fair trial rights of the accused.

-DSS at the ECCC

International Court of Justice

-Ece Aygun

The International Court of Justice will hold public hearings in the case Georgia v. Russia, between 13 –17 September 2010 regarding the Application of the International Convention on the Elimination of All forms of Racial Discrimination. Georgia filed an application to the ICJ on August 12, 2008 regarding Russia’s “serious violations of its fundamental obligations” under the 1965 Convention on the Elimination of All forms of Racial Discrimination “during three distinct phases of its interventions in South Ossetia and Abkhazia” in the period between 1990 and August 2008. Accordingly, the ICJ will hold four public hearings during the aforementioned dates where Georgia and Russia will present their arguments that, according to a statement by the ICJ, “will concern solely the preliminary objections to jurisdiction raised by the Russian Federation”.



Nuon Chea

Blog Update

- Guido den Dekker & Jessica Schechinger, *The Immunity of the United Nations before the Dutch courts Revisited*. Available at: <http://www.haguejusticeportal.net/eCache/DEF/11/748.html>
- Wairagala Wakabi, *Defense Lawyers Say Halting Lubanga's ICC Trial Was Inevitable*. Available at: <http://www.lubangatrial.org/2010/08/18/defense-lawyers-say-halting-lubanga%e2%80%99s-icc-trial-was-inevitable/>
- Gentian Zyberi, *Diamonds, Celebrities and the Charles Taylor trial*, Available at: <http://internationallawobserver.eu/2010/08/09/diamonds-celebrities-and-the-charles-taylor-trial/>
- *Joan Donoghue has been elected to replace Judge Thomas Buergenthal at the International Court of Justice*. Available at: <http://www.haguejusticeportal.net/eCache/DEF/12/052.TGFuZz1FTg.html>
- *Lebanon Tribunal Prosecutor seeks information from Hezbollah 11 Aug 2010*, Available at: <http://www.haguejusticeportal.net/eCache/DEF/11/956.TGFuZz1FTg.html>



“with these celebrities stepping into the witness box, it seems that the trial is sliding into a soap opera ...”

-Gentian Zyberi

Publications

Books

Gerhard Werle, *Principles of International Criminal Law*, Cambridge University Press (2010)

Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press (2010)

Articles

Scott T. Johnson, *Neither Victims Nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court*, ILSA Journal of International & Comparative Law, Vol. 16, No. 2 (2010), at 489.

Katharina Margetts and Patrick Hayden, *Current Developments at the Ad Hoc International Criminal Tribunals*. Journal of International Criminal Justice (2010) 8(2): 649-693.

Other

International Committee of the Red Cross, *Customary International Humanitarian Law Database*, available at: <http://www.icrc.org/customary-ihl/eng/docs/home>

Book review by Scott T. Johnson: Antonio Cassese (editor-in-chief), *The Oxford Companion to International Criminal Justice* (Oxford 2009) and *Military Commission Reporter*, Vol. 1 (Oct. 17, 2006 – June 1, 2009) (National Institute of Military Justice 2009). It appeared in *The Champion*, Vol. XXXIV, No. 5 (May 2010), at 55.

Opportunities

- The Permanent Bureau of the Hague Conference on Private International Law has the following vacancy: [lawyer](#).

Deadline for applications: 1 October 2010

- The OSCE High Commissioner on National Minorities has the following vacancy: Legal Adviser.

Deadline for applications: 15 September 2010

The suspension of proceedings ordered by the chamber, far from being unjustified or excessive, appears to be the logical and inevitable consequence of the unacceptable behavior of the prosecutor in this case.
-Wairagala Wakabi



HEAD OF OFFICE



ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085.087

Phone: +31-70-512-5418
Fax: +31-70-512-5718
E-mail: dkennedy@icty.org

Any contributions for the newsletter should be sent to Dominic Kennedy at dkennedy@icty.org

WE'RE ON THE WEB!

WWW.ADCICTY.ORG

Upcoming Events

- **ICJ will hold public hearings in the case of Georgia v. Russia**

Date: 13 Sep 2010 - 17 Sep 2010

Organiser: International Court of Justice (ICJ)

Venue: International Court of Justice (ICJ)

For more information: <http://www.haguejusticeportal.net/eCache/DEF/11/949.TGFuZz1FTg.html>

- **International Day of Peace in The Hague**

Date: 19 September 2010 - 21 September 2010

Organiser: United Nations and The City of The Hague

Venue: The Hague

For more information: <http://www.haguejusticeportal.net/eCache/DEF/36.html>

- **Conference: International Criminal Law – An Emerging Market**

Date: 2 October 2010

Organizer: BPP School of Law

Venue: The Chamber of Anthony Berry QC, 9 Bedford Row, London.

– Conference for practitioners who want to learn more about working in the field of international criminal law.

– Anyone wishing to attend should contact Julian Bradley at 9 Bedford Row, <julian.bradley@9bedfordrow.co.uk>, to register for a place.

– For more information view poster: http://www.internationallawbureau.com/blog/wp-content/uploads/2010/09/Autumn_Conference_Poster.pdf

Defence Rostrum

1st Retrial ordered at ICTY

-Bath-Shéba van den Berg

On 21 July 2010, the ICTY Appeals Chamber in the Haradinaj case ordered a partial retrial—the first to be held at the ICTY and the first to be ordered after an acquittal in the history of international criminal legal proceedings (on 29 August 2008 the same Appeals Chamber at the ICTR ordered the very first retrial, on conviction, in the Muvunyi case). When reading the Haradinaj Appeals Chamber Judgement, one is left with the impression that either the bar for proving prejudice has been lowered for the Prosecution or that the rights of victims and witnesses trump those of the Accused. See for example, paragraphs 17, 25, 40 and 49 of the Appeals Judgement and Articles 20 (1) and 21 of the ICTY Statute.

Dutchbat in Srebrenica

-Sofie Breslau, Taylor Olson

On the 6th of July 2010, Hasan Nuhanovic, a translator at the Dutch base in Potocari and the survivors of Rizo Mustafic, a UN battalion electrician, filed a formal complaint with the Dutch Prosecution Office (DPO) against former Dutchbat commanders in Srebrenica. The family of Mustafic and Nuhanovic fled to the camp after the fall of Srebrenica. They were forced to leave the camp of the Dutchbat 3. The complaint includes the involvement of Thom Karremans, Major Rob Franken and Berend Oosterveen in genocide and war crimes. Due to this complaint, the Office of the Prosecutor announced on 20 August 2010 that they will begin an investigation. This investigation will include the analysis reports of previously conducted investigations such as the rapports of the “Commissie Van Kemenade”, the Institute for War documentation and the “Commissie Bakker”. Once this investigation has been concluded the Office of the Prosecution will decide whether to pursue a criminal investigation.