ADC ICTY TPIY

NEWSLETTER

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Prosecutor v. Ratko Mladić (IT-09-92)

On 6 September, the Mladić trial continued with the expert witness Butler , who testified about various documents and intercepts which he stated illustrated "proof of an attempted cover-up" of the Srebrenica operation. He said intercepted conversations between the Army of Republika Srpska (VRS) officers showed the executions were referred to as 'the job' and the prisoners were referred to as 'parcels'. He stated the executions were finished by 17 July 1995, with very few survivors. Butler also stated how the 'meticulous records' of the VRS Engineering Units proved the use of excavators and backhoes at various execution sites from 14 to 17 July 1995.

On 9 September, the end of Butler's examination-in-chief concerned the VRS and their interaction with the local Médecins Sans Frontières staff in the Srebrenica enclave from 17 to 19 July 1995. Butler proposed the primary concern of the VRS to be related to the 'number of able bodied Muslim men' and whether these 'individuals should be allowed to accompany the international staff' out of the enclave. Before finishing his examination-in-chief, Peter McCloskey, Counsel for the Prosecution, took the opportunity to introduce into evidence various documents relating to the movements of the military police of the Drina Corps around February 1995, the arrest and detention of prisoners of war in April 1995, as well as the movement of Muslim men from Milići Hospital in July 1995.

After the first break, Mladić did not return to the courtroom. The Defence reported that he was once again feeling unwell and was unable to follow proceedings. Mladić did not waive his right to be present, so trial was temporarily adjourned *sine die*.

ICTY NEWS

Also in this issue

Mladić did not attend court on 10 September, citing medical issues. He had reported feeling stressed, with no energy to socialise in the United Nations Detention Unit (UNDU), eat, drink or do anything other than rest. He had a medical, whereupon the doctor reported that his blood pressure was acceptable, as were his sugar and oxygen levels. The Detention Unit doctor once again stated that it would be advisable for trial to be reduced to four days a week from five with Counsel for the Defence, Branko Lukić, arguing strongly that this decision on the part of the Trial Chamber could not be delayed any longer.

On 11 September, the cross-examination of Butler began. Defence Legal Consultant, Dragan Ivetić , began by questioning the methodology Butler used in his analysis. Ivetić raised the issue of new documents being found, post 2003, including ones relating to the activities of the Drina Corps. Butler responded that after checking these new documents, he found no additional relevant information and thus no reason to update his reports. When asked if he had found any documents containing orders from Mladić to his men asking them to commit crimes, Butler pointed to an order from Mladić for five tons of fuel to units in Srebrenica as proof of a cover-up but confirmed that no orders expressly calling for the execution of prisoners from Srebrenica were issued by Mladić.

Butler was allowed a brief respite from his ongoing testimony on 12 September, to allow for the testimony of Prosecution employee Maria Karall. Karall was testifying about an incident which occurred on 18 February 2013, regarding the utterances of the Accused during a break in the trial. There was some discussion as to whether utterances by the Accused to his Counsel, during a break in trial, when both the Chamber and witness were absent from Court, were to be considered 'privileged communication'. The Trial Chamber stated that if the Accused 'shouted out loud', he waived his right to privileged communication with his Counsel. The Defence waved that an appeal would be filed.

On 13 September, the Defence revisited some of Butler's earlier testimony regarding intercepts and documents received from the Bosnia Herzegovina (BH) Army. The Defence questioned the authenticity of the documents, whereupon Butler responded he had painstakingly checked for authenticity. The Defence countered that the absence of audio recordings of the transcripts goes to the credibility of the material, as well as questioning the authenticity of the language used in the transcripts.

On 16 September, the Defence put it to Butler that the Srebrenica enclave had never been fully demilitarised. Butler agreed that this made the enclave a legitimate military target. The Defence submitted documents showing the logistical support local civilians provided to the BH Army. Butler also admitted the actions of some civilians in accompanying the BH Army as they cleared villages, called for 'further analysis'.

Butler's re-examination by McCloskey concluded on 17 September, drawing to a close one of the longest appearances by an expert witness in the case so far.


Manojlo Milovanović

General Manojlo Milovanović was the next witness called to testify. General Milovanović was Mladić's Chief of Staff. He testified about the friendship between himself and Mladić, stating that their relationship was first and foremost 'strictly military'. On 18 September, Milovanović stated his view that Directive 7 was illegal, but blamed its implementation on Karadžić. Milovanović was also questioned on the use of modified air-bombs during the siege of Sarajevo, and explained he knew little about them.

During his cross-examination on 19 September, Milovanović spoke about the two versions of Directive 7 which existed; Karadžić's version and Mladić's version. The two differed in only one respect. Karadžić's version included the contentious sentence directing troops to create "by planned and well-thought-out combat operations [...] an unbearable situation of total insecurity, with no hope of further survival or life for the inhabitants of Srebrenica and Žepa". On the last day of his testimony, 20 September, Milovanović was reminded that it was Mladić who warned Serb Assembly deputies in 1992, that any action to force non-Serbs from Republika Srpska would be 'genocide'.

The next witness called by the Prosecution, Milomir

Šoja, a technician who worked on modified air bombs used by the Bosnian Serb Army. Šoja was doing his compulsory service and assisted in modifying the launchers for the bombs. During cross-examination, Šoja stated that he could not comment on how accurate or inaccurate the bombs were.

The trial continues with more expert witnesses scheduled to testify during the coming weeks.

Prosecutor v. Goran Hadžić (IT-04-75)

The Hadžić trial continued on 9 September, with the testimony of Prosecution witness GH-168, whose testimony was in closed session. Later on 12 September, the Prosecution called witness GH-085, from the village of Opatovac, area of Vukovar, to testify about her detention in Serbia in October 1991. During cross-examination, Defence Counsel asked the witness about her membership in the Croatian Democratic Union.

On 17 September, the Prosecution witness GH-061 was called to stand and testify about the war events in her village in Croatia. On 18 September, Vilim Karlović, a former Croatian Army soldier in Vukovar later detained at Ovčara, gave his testimony before the Tribunal. During cross-examination, Karlović confirmed that Yugoslav People's Army (JNA) officers controlled the situation at Ovčara camp. Karlović stated that after the JNA and Serb paramilitaries took over the city, he was taken from the Vukovar hospital to a nearby farm at Ovčara. The witness recalled that "three days after 17 November [1991], around 200 of us were transferred with JNA buses... When we arrived, I saw soldiers of the JNA, volunteers, territorial defence". Karlović claims that he was beaten by a number of soldiers while entering the farm, but managed to survive when one of the JNA soldiers helped him to escape. Furthermore, the Prosecution witness explained that he managed to escape from the detention camp with help of two Serb fighters, Marko Ljuboja and Predrag Milojević, who were later jailed for war crimes in Ovčara.

Vilim Karlović

On 23 September, the Trial Chamber commenced a five-day site visit to relevant locations in eastern Croatia. The principal aim of the visit is to obtain a first-hand impression of the field and the topography of the relevant areas.

The trial is set to continue on 7 October 2013.

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

In an initial scheduling order of 12 April, the Judgement in the case *Prosecutor v. Vojislav Šešelj* was set to be rendered on 30 October 2013. However, the Accused has recently filed a motion for *Disqualification of Judge Frederik Harhoff,* which is based on a letter sent by Judge Harhoff in which he criticised recent judgements by the ICTY Trial and Appeals Chamber.

On 28 August, a Panel of Judges rendered a decision in which they disqualified Judge Harhoff. Subsequently, the Prospection has requested a reconsideration of the decision on several grounds. Therefore, and due to on-going proceedings and the fact that the coordinator of the team of legal officers of the Chambers has left her post several days ago, the judgement has been adjourned. A new scheduling order will be given for the Judgement.

Vojislav Šešelj

For further information on the letter sent by Judge Harhoff consult Newsletter Issue 49.

LOOKING BACK...

International Criminal Tribunal for the Former Yugoslavia

Five years ago...

On 2 October 2008, the trial of Momčilo Perišić began at the ICTY. Perišić was the most senior officer of the Yugoslav Army (VJ) and was charged with crimes against humanity and war crimes including murder, inhumane acts and attacks on civilians committed in the former Yugoslavia between 1993 and 1995.

His indictment states that he allegedly established two personnel centers within the VJ for the purpose of paying off VJ members who secretly aided the Army of Republika Srpksa and Army of Serbian Krajina. Perišić was therefore *inter alia* charged with aiding and abetting military actions of shelling and sniping which killed thousands of civilians in Sarajevo. Perišić's indictment was made public on 7 March 2005 and he was brought in to the Tribunal's custody on 7 March 2005. On 9 June 2005 he was granted provisional release within the confines of the municipality of Belgrade, Serbia until he was to return to the Tribunal's Detention Unit on 18 September 2008.

Momčilo Perišić was sentenced to 27 years of imprisonment on 6 September 2011. However, the Appeals Chamber recently acquitted him of all charges on 28 February 2013.

International Criminal Tribunal for Rwanda

Five years ago....

On 1 September 2008, the former President of the International Criminal Tribunal for Rwanda (ICTR), Judge Navanethem Pillay, moved on to her new post as the UN High Commissioner for Human Rights.

Judge Pillay, a South African native, began her work as a judge with the ICTR after being elected to the position by the UN General Assembly in 1995. She was elected as President of the ICTR in May 1999 and re-elected to a second term in 2001. Her work at the ICTR has established precedents for various international jurisdictions including the Kambanda case, which saw the first conviction of a head of the government by an international court, and the Akayesu case, known for the first judgement in conviction of the crime of genocide in international court history. Judge Pillay's mandate as UN High Commissioner was renewed for two years beginning on 1 September 2012.

Navanethem Pillay

NEWS FROM THE REGION

Kosovo

Kosovo Commander Limaj Acquitted of War Crimes

On 17 September, the Court in Priština cleared numerous defendants including Fatmir Limaj, a ruling party lawmaker and former transport minister, of war crimes against Serb and Albanian detainees at the improvised jail in Klecka during the 1990s conflict. Kosovo's Prime Minister Hashim Thaçi welcomed the acquittal, saying it vindicated the Kosovo Liberation Army's actions during wartime. "With this process, the cleanness of the Kosovo Liberation Army's war was proved once again," Thaçi said.

This was the second time that Limaj has been found not guilty of the charges. He was acquitted in May 2012 by a lower court, when the Prosecution case collapsed. The indictment was mainly based on the secret diaries

and testimony of an official at the Klecka prison, Agim Zogaj, known as 'Witness X', and a former ally of Limaj, who provided information about the murders of some of the prisoners held there. Presiding judge Malcolm Simmons said Zogaj's evidence was "inconsistent and contradictory" and sometimes "pure fabrication". He said that "the court found that some parts of Zogaj's diaries were not written by him, but by someone else". "The evidence of witness X was wholly unreliable and it would be unsecure to rely on it in order to convict the defendants on the charges in the indictment", the EU rule-of-law mission Judge explained.


Fatmir Limaj

However, the Prosecution successfully appealed against the verdict and the case was sent for a retrial, with Zogaj's evidence ruled admissible again. Betim Musliu, senior researcher at the Kosovo Law Institute, told Balkan Investigative Reporting Network that the Prosecution's approach was unprofessional, because it established an ill-constructed and unstable indictment. For the second time, the Court confirmed there was no evidence to prove the defendants were guilty, Musliu said.

In another trial at the ICTY in 2005, Limaj was similarly acquitted and returned home to a hero's welcome.

Montenegro

Justice in Montenegro: 15.000 Verdicts not Enforced

Montenegro's Justice Minister Duško Marković warned on 10 September that there were more than 15.000 verdicts which had not been enforced yet and said that action had to be taken to resolve the problem and to ensure that courts could uphold the country's laws.

According to Marković, the current situation is a threat to the credibility of the country's legal system. At the meeting of the Council of Foreign Investors in Montenegro on 10 September, Marković explained that enforcement of courts' decisions was the largest burden to legal safety in the country and recalled the legislation which came into force in 2011. This envisages the introduction of public enforcement officers into the Montenegrin judiciary to accelerate the enforcement of court decisions. The government plans for the officers to start working from January 2014, with the Minister stating that acceleration of enforcement was one of the key goals for judicial reform in the country. Moreover, he also stressed the importance of constitutional amendments aimed at satisfying calls from the EU for the Montenegrin judiciary to be freed from political influence.

This being said, Marković concluded by stating that the proposals for the new legislation were a fundamental guarantee of the rule of law and offered better protection for people's interests. Discussions should lead to concrete actions and decisions as fast as possible, especially when finding that the same figures about enforcement were already mentioned in March 2012.

Croatia

Ex-Minister Charged With Second World War Killings

Josip Boljkovac was indicted on 17 September for command responsibility in the killing of thousands in 1945, including 21 civilian prisoners from the Duga Resa region of Croatia, who were condemned as being adjacent to the Nazi-affiliated Utasha regime. Boljkovac, and was fought as a member of the Yugoslav communist guerrillas against the occupying German and Italian troops, a senior officer of the secret service which was generally accused of going on a revenge shootings of the anti-communists after the war ended.

Today, aged 93, Boljkovac has the reputation of an official who tried to prevent the 1990s war and to bridge the conflicts between Croats and Serbs in the country. On that occasion, he denied the charges, claiming that the indictment was politically motivated by the EU. "The charges are shameless," Nobilo, Boljkovac's lawyer said. "He cannot be charged with command responsibility because he did not have command over those units".

In 2011, Boljkovac was detained for a month as part of a probe into the crimes. At the time he denied the allegations and the Constitutional Court ruled in favor of his release due to procedural deficiencies. "In view of Croatia's consistent failure to prosecute criminals of the Nazi-allied Ustasha regime in its midst, its action against a fighter who opposed the evil Ustasha forces is hypocritical and unacceptable", said Elan Steinberg, Vice President of the American Gathering of Holocaust Survivors and their Descendants.

NEWS FROM OTHER INTERNATIONAL COURTS

The Extraordinary Chambers in the Courts of Cambodia

By Eric Husketh, Defence Legal Officer

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

Throughout September, the Defence teams in Case 002 continued to prepare their closing submissions in Case 002/01. Also this month, the Co-Lawyers for the suspect under investigation in Case 003, Ang Udom and Michael G. Karnavas, were permitted to establish a Defence team.

The Case 003 Defence is awaiting a decision on a request for access to the Case 003 Case File, which was filed last month. The team is currently preparing a number of submissions dealing with investigative modalities and jurisdicial issued, as well as reviewing publicly available evidence relating to Case 003.

On 30 August 2013, the Defence team for a suspect in Case 004 filed an appeal to the Pre-Trial Chamber against a decision by the International Co-Investigating Judge rejecting that team's previous requests to access the case file and to take part in the judicial investigation

The International Criminal Court

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

The case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* presented before the ICC has been granted an adjournment to allow for Ruto to return to Kenya in order to deal with the ongoing terrorist attack on a Nairobi shopping mall.

William Ruto and his co-defendant are before the ICC on charges of crimes against humanity. Ruto is accused of being an indirect co-perpetrator in regards to charges of murder, deportation or forcible transfer of a population and persecution, which resulted from the ethnic violence he allegedly organised after the 2007-2008 Presidential elections.

His Counsel, Karim Khan, requested the adjournment to allow for Ruto to return and assist President Uhuru in dealing with the national security briefings. Khan contended that the national security issues fell within the mandate of a Deputy Head of State.

On 23 September, the Trial Chamber granted an adjournment for one week. The trial will be on hold until then or the Appeals Chamber decides on the Prosecutions appeal regarding the Trial Chambers decision to excuse Ruto from being continually present during the trial.

DEFENCE ROSTRUM

The Eighth Defence Symposium

By Ellen Naughton

ICTY Defence Counsel Colleen Rohan held the eighth Defence Symposium for ICTY interns by discussing "Ethical Considerations in the Practice of International Law".

In law, the first consideration advocated by Rohan was to never undermine the right to Counsel. Any person who has been accused of a crime should be provided a competent legal Counsel and a fair trial. Rohan has been a criminal defender for her entire professional career and stressed that the queries regarding her clients' right to representation are always present. Regardless of public opinion, it is a lawyer's ethical duty to defend any client to their utmost ability, regardless of their personal motivations.

A second consideration to take into account was that practising international law at various courts and tribunals in The Hague, meant that there are not always shared values between members of the judiciary, Counsel or Defendants. Different cultures and values stressed whilst being raised lead people from different regions to consider issues. Therefore, a Counsel from New Zealand may pose a question to a Macedonian Defendant before a Samoan judge and it can be interpreted in three different ways. This consideration has been especially important in trials before the current Yugoslavian tribunal.

The third consideration, which is relevant to both lawyers and interns at Tribunals, is the fact that the cases will be discussed outside of hours. Rohan acknowledged this and stated that generic facts could be talked about, however confidential facts should never be discussed – especially in a public area. The Hague is not a large area and Rohan stressed that one can never be sure who is nearby and listening to your conversation. As such, confidentiality is the most important issue for interns, especially Defence interns as they are subject to a stringent set of guidelines.
Rohan also provided two case examples in which she had been involved. In 2011, the Tribunal's Disciplinary Board heard the *Aleksić* case. Aleksić had made several statements to the Belgrade press regarding Šešelj's health and treatment at the Scheveningen prison. At first instance, the Panel decided Aleksić had brought the Tribunal into disrepute but on Appeal, the Board held that Aleksić had a right to free speech and if he honestly held those views regarding Šešelj's health and treatment, the Tribunal was unable to censor him.

This case should be contrasted by the *Toma Fila* case that was heard in 2013. This case also involved statements made to the Serbian press but it was in reference to the Tribunal directly, as opposed to a particular Defendant. On Appeal, the Disciplinary Board found the statements regarding the 'Tribunal's demonisation of the Serbs' to be misconduct'. It held that Counsel has a responsibility to affirm the Tribunal's reputation, which continues even after your tenure at the Tribunal ceases.

Rohan wrote a dissenting argument on the case. The key issue raised was whether a lawyer is required to affirm this reputation constantly and every time a slander is heard. This proposal is rather ludicrous, mainly due to its infeasibility. It would simply not be possible to address every issue raised regarding the Tribunal's competency – instead it should be evident through it's actions.

Rohan highlighted that Defence are often held to a higher behavioural standard than other aspects of the Court, and therefore are required to be more ethically conscious.

Colleen Rohan

For further information on the Disciplinary Board's decision in Fila Case see Newsletter Issue 51.

Looking Ahead: The Nuclear Summit

By Emma Boland

Next March, The Hague will host the international Nuclear Security Summit 2014 (NSS). The Summit calls for nations to devote additional attention to the issue of nuclear security. It aims to provide a forum in which the existing nuclear security regime can be strengthened and improved. On 18 September some key participants to the Summit met at the Global Peace Institute in The Hague to discuss the 2014 NSS.

At the September conference, the Ministry of Foreign Affairs' Marc Gerritson, who is on the Project Team for the 2014 NSS, confirmed that the Summit is expected to bring more than 53 nations, including 4000 delegates and 3000 journalists, to 'the legal capital of the world'.

The Summit compliments the 2010 NSS in Washington DC and the 2012 NSS in Seoul, and will be followed by a final conference again in Washington D.C. in 2016. The first Summit was called by United States President Barack Obama in 2009, following a speech he made in Prague, where he declared that nuclear terrorism is one of the greatest threats to international security, which must be addressed at the highest level.

In contrast to the Washington Summit, which was concerned with establishing political agreements regarding the possession of fissile materials; and the Seoul Summit, which centered on the progress made in meeting these agreements, and expanded the scope of the NSS to include the interface between safety and security at nuclear facilities, The Hague Summit will focus on results achieved and the future.

Opening the panel discussion on 18 September, Jun Wang, Director of External Relations at the Organisation for the Prohibition of Chemical Weapons (OPCW), addressed the OPCW's position in the global nuclear security debate. He confirmed the need for all nation states to 1) implement bans on nuclear weapons; 2) fulfill their existing treaty obligations; and 3) implement joint measures to create a nuclear-free international community. Wang identified the importance of recognising the relationship between nuclear and chemical weapons at the next Summit, given the diverse nature of threats faced by the entire international community today from a combination of countries such as Syria, Iran and North Korea.

Confirming that the aim of the Summit series was to 'prevent nuclear terrorism before having to respond to it', Ken Luongo and John Bernhard from the Fissile Materials Working Group, and the Ministry of Foreign Affairs' Kees Nederlof, who is Sous-Sherpa for the NSS 2014, considered the achievements of the NSS, and the importance of The Hague Summit.

Significantly, Luongo discussed four key government improvements to be analysed next year in The Hague: 1) creating a more cohesive regime, with universalised and maximally utilised components; 2) building international confidence in the system through improved cross-border communication of non-sensitive information; 3) the institution of an international peer review process; and 4) implementing best practices in a flexible and culturally sensitive manner, including by increasing cooperation between the government and industry.

Bernhard stated that although the Summit creates hope for the development of international relations, it must be followed with more concrete measures. Notably, Luongo observed the shortcomings of the NSS process which need to be addressed, including the fact that the current nuclear regime is too nationalistic for such a global problem, and that states are seldom aware of the urgency to act on nuclear security.

The 2014 NSS will be held on 24 – 25 March 2014. Two official NSS side events are the Nuclear Industry Summit and the Nuclear Knowledge Summit, taking place on 23 -25 March 2014, and 21 – 22 March 2014, respectively.

2012 Nuclear Summit in Seoul

A Humble Suggestion to the International Community: Do Not Cloak a Military Strike Against Syria With the Semantics of "The Responsibility to Protect"

By Eva Maria Jellinek

On 11 September 2013, the Secretary-General of the United Nations, Ban Ki-moon, held an informal dialogue with the General Assembly about Syria. Ban Ki-moon affirmed that, in accordance with the principle of "the responsibility to protect" (R2P), the international community has a responsibility to protect the Syrian people from the violence currently facing them. Whereas the brutalities have been ongoing since March 2011, it was the recent discovery of chemical weapons that provoked the international community to consider military action. This was epitomised when the President of the United States, Barack Obama, affirmed that a "red-line" had now been crossed. The international community's sudden willingness to discuss a military strike is troubling, as it could result in a dangerous misapplication of R2P.

In the wake of World War II, the United Nations Charter was drafted with the aim to prevent similar atrocities from reoccurring. Given that force against the territorial integrity of States was viewed as the greatest threat to international peace and security, the drafters ensured that such action was prohibited, albeit with a few exceptions. Intrinsic to the Charter was the collective action requirement, essentially demanding that the five permanent members of the Security Council must authorise force before a measure can be taken. The use of force prohibition, combined with the additional restriction against intervening in matters within the jurisdiction of sovereign States, was broadly interpreted by many as outlawing unilateral interventions for humanitarian purposes.

In the years following the promulgation of the Charter, the international attitude towards the impermeability of State sovereignty was mollified. With the adoption of the Universal Declaration of Human Rights in 1948, and the two major International Covenants on Human Rights in 1966, human rights were increasingly viewed as a challenge to the supremacy of sovereignty. Whereas these enactments were crucial, the real change in attitude towards sovereignty came as a result of the brutal events that occurred in the 1990s. The genocides in Rwanda in 1994 and Srebrenica in 1995 provided two salient examples of how the international community adopted a 'pick and choose' policy, whereby it only intervened when it was politically expedient to do so. The inability to proceed without a green light from the Security Council prevented a response and effectively permitted the bloodshed to continue in both places, among others. The failure to address these atrocities was a true embarrassment for the international community and a few years later when the next atrocity occurred in Kosovo, some States chose to ignore the international legal system and embarked upon a unilateral intervention. While many viewed the unilateral action in Kosovo as a moral necessity, it was given the ambiguous label of being an "illegal but legitimate" action.

The inability of the international community to effectively respond to the brutal legacies of the late 20th century prompted the articulation of R2P. This principle sought to redefine sovereignty and bring traditional international norms and emerging concepts of international morality closer together. By reconceptualising the vernacular from "the right to intervene" to "the responsibility to protect", an incentive was created to make States more willing to take action whenever and wherever atrocities occur. R2P primarily imposes a responsibility upon individual States to protect their civilian population from genocide, war crimes, ethnic cleansing and other crimes against humanity. However, in the event that States fail to live up to their responsibility, it falls on the international community. That being said, the conceptualisation did not remove the collective action requirement from the United Nations Charter. Instead, it was meant to enhance the decision-making process within the already established international legal order. As such, in order for a use of force action by the international community to be legal under the principle, a Security Council approval was still required.

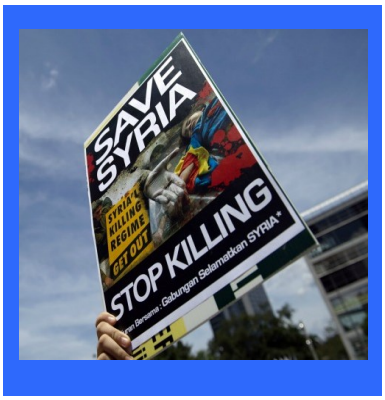
Recently, the potential application of R2P in the Syrian conflict has been a widely discussed topic. The verification by United Nations inspectors that chemical weapons were used can be seen to have pushed the envelope, and accelerated a debate on the necessity of military intervention, especially in the United States, the United Kingdom and France. However, the fact that this debate arose in earnest only after the exposure of a chemical attack is not without controversy. While it is undisputed within the international

community that R2P imposes a responsibility to protect the civilian population from further such attacks, it is equally evident that this responsibility has been present ever since the inception of the conflict, in relation to atrocities committed using more "conventional" means of warfare. For many reasons a military strike prior to the confirmation of chemical weapons use was viewed as utterly problematic, given the complexities of the ongoing civil war. For instance, States have previously abstained from a military attack on the basis that there is a relatively low chance of improving the situation for the Syrian people. This reality has not changed in the wake of the chemical attacks of last month, and an attack today would arguably serve the sole purpose of demolishing the Syrian regime's chemical weapons installations. There would likely be no discernible change in the central government and therefore an unrepentant regime could continue to pursue its brutal legacy of subjecting the civilian population to excessive violence with impunity.

At this juncture it should be noted that the threat of a military strike has recently caused Syria to admit the existence of its chemical weapons arsenal. This admission by the government is indeed positive, and, if complemented by a bona fide disarmament campaign overseen by the United States and Russia, could credibly reduce or even eliminate the risk of the civilian population being subject to yet another chemical weapons attack. Some might argue that under such circumstances, American and French threats of force under the R2P rubric indeed achieved a deterrent effect. Whereas this is indeed a positive development in the Syrian context, the timing of the reaction is troubling for the normative evolution of R2P. Given that the reaction came only after chemical weapons were used, it appears to be more motivated by a desire to punish the regime for its breach of one specific international norm than a pristine desire to protect civilians. If protecting civilians was the true motivation for a military strike, it bears asking why the international community waited two and a half years, as the casualty count in Syria steadily rose, before it seriously considered such action. With its singular focus on the use of chemical weapons, recent proponents of an R2P action in Syria have blunted the gravity of prior atrocities sustained by the Syrian people and created a potentially arbitrary distinction in terms of what constitutes an appropriate threshold for an R2P response.

The distinction between a punitive strike and a strike for the purpose of protecting civilians is significant. The articulation of R2P was not intended to give the international community an exception to the prohibition against the unilateral use of force; rather, its primary purpose was to improve the collective security system already in place. To extend the parameters of R2P to include unilateral punitive strikes is troublesome, as it would increase the risk of unilateral force being used more frequently in the future. Furthermore, utilising R2P in a punitive context would have a destructive impact upon the normative evolution of the concept, and ultimately dilute its true purpose. For R2P to maintain an incentive to take action whenever atrocities occur, it is crucial that it is being applied only when the purpose for using force is to protect civilians.

Whereas taking a sceptical approach to a military strike on Syria is logical from a legal standpoint, the bloodshed continues and the conflict has taken the lives of 100,000 people, 35000 of which have been identified as civilians. These numbers are troubling, and perhaps doing something as opposed to doing nothing is tempting from a moral point of view. Regardless of what the international community eventually chooses to do, it is crucial that a strike is not dressed in the semantics of R2P. The sudden willingness to strike clearly appears to be centred on chemical weapons use and a strike based on this reason would be an unfortunate misapplication of R2P. The principle should be modestly applied, and not be used as a cloak whenever incentives, other than protecting civilians, are present. Quoting the 1960s beat group Wayne Fontana & The Mindbenders, applying R2P would simply be "Just A Little Bit Too Late".



The Netherlands and Srebrenica: Altering the Concept of Attribution of Responsibility

By Michelle Gonsalves

On 6 September 2013, the Supreme Court of the Netherlands handed down its judgement in the case of *Hasan Nuhanović v. the Netherlands* and *Mehida Mustafić-Mujić, Damir Mustafić, and Alma Mustafić v. the Netherlands*. The Supreme Court upheld the decisions of the Hague Court of Appeals attributing responsibility for the acts of the Dutch battalion of peacekeepers ("Dutchbat") during the fall of Srebrenica to the Netherlands. This decision is controversial as it confirms a different attitude towards state responsibility during UN peacekeeping missions, supporting the possibility of dual or multiple attribution and the principle of effective control. Additionally, the case is remarkable as it is the first case to provide a civil remedy to some victims of this conflict.

The cases of *Nuhanović* and *Mustafić* are based on a limited claim around the wrongful expelling of a few individuals from the Dutchbat compound in Srebrenica where they had sought refuge. Subsequent to the fall of the enclave of Srebrenica about 32 000 civilians took refuge in and around the industrial compound where Dutchbat was stationed. After the agreement between the Dutch government and the United Nations Protection Force ("UNPROFOR") commanders to evacuate the compound and withdraw forces, refugees started being evacuated by buses belonging to the Bosnian-Serb army. However, it quickly became clear that the refugees, especially the able-bodied men, were being separated and murdered.

Nuhanović, an interpreter for Dutchbat was allowed to leave with the Dutchbat contingent. However, despite the evidence of refugees being murdered, Nuhanović's parents and younger brother, who were also at the compound, were sent away and subsequently killed. Mustafić, an electrician working for Dutchbat, was also forced to leave the compound and was subsequently killed. The claims were brought against the Dutch State by the relatives of those that were presumably killed by the Bosnian-Serbs. In both cases the main claim was that the State had committed a wrongful act in affording insufficient protection to the victims and that it should compensate damages that were incurred as a consequence of the wrongful act.

In these two landmark cases The Hague Court of Appeals agreed with the victims and held that the Dutch State was responsible on the basis of effective control, overturning the District Court's decision that the alleged conduct was attributable to the UN only. The Dutch State maintained that the UN was responsible for the conduct of Dutchbat as it was part of a UN peacekeeping mission and brought the case to cassation. In the case before the Supreme Court of the Netherlands two issues are central: (i) whether the conduct of Dutchbat can be attributed to the State, and (ii) whether the conduct of Dutchbat constituted wrongful conduct.

(i) Could the conduct of Dutchbat be attributed to the State?

The Supreme Court concurred with the decision of the Appeals Court in finding that the question concerning which party is responsible for the conduct of Dutchbat should be judged according to international law and proceeded by relying on the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 ("DARS") and the Draft Articles on the Responsibility of International Organisations of 2011 ("DARIO"). Subsequently, the Supreme Court first rejected the State's submission that the conduct of Dutchbat should, in principle, be attributed to the UN under Article 6 DARIO. The Supreme Court rightly concurred with the Court of Appeal in finding that Article 7 DARIO is applicable to the situation in this case. This is supported by the Commentary to Article 7 DARIO, which provides that the attribution rule applies, *inter alia*, to the situation in which a State places its troops at the disposal of the UN in the context of a UN peace mission, where command and control is transferred to the UN, but the disciplinary powers and criminal jurisdiction ("organic control") remain with the sending State. This observation by the Supreme Court is correct and in line with the intricacies of today's peacekeeping missions as it is impossible for States, who always retain some form of command over their national contingents, to fully delegate military organs to an international organization. Therefore, UN peacekeepers are at all times under both the formal control of the State and that of the UN, ensuring that the appropriate criterion in determining attribution has to be effective control. Thus, even if Dutchbat was part of the UN peacekeep-

ing mission it did not cease to be an organ of the Netherlands which retained organic control.

Concerning the question of multiple attribution, the Supreme Court found that international law, in particular Article 7 DARIO in conjunction with Article 48 (1) DARIO, allows for dual attribution and for that reason it was not necessary for the Court of Appeals to definitively conclude whether the UN exercised effective control over the conduct of Dutchbat. Moreover, even if that would have been the case that conclusion does not necessarily lead to the *exclusive responsibility* of the UN. Thus, the Supreme Court dismissed the State's submission that international law excludes the possibility of multiple attribution.

The Supreme Court held that the fact that the mission had failed and that Dutchbat was no longer able to exercise control outside of the compound does not detract from the fact that the State was still able to exercise effective control over the conduct of Dutchbat on the compound. The fact that the State had effective control over the conduct of Dutchbat was further supported in the conclusion of the Advocate-General of 3 May 2013 in which he states that, in those instances where the (operational) command and control of the UN is not effective, the UN is not exclusively responsible for the actions of a peacekeeping contingent. In this case, the effective control over the contingent could no longer be exercised by the UN, therefore command and control was necessarily transferred back to the sending State. This transferral of command and control was apparent due to Dutchbat's withdrawal from the mission after evacuating the refugees and in this transition period Dutch national interests were directly involved. The substantial influence that the Dutch State exerted over the evacuation of the refugees amounted to effective control. Therefore, the Supreme Court concluded that "not only the United Nations but also the Dutch government in The Hague had control over Dutchbat and also actually exercised this in practice".

With these decisions the Supreme Court has applied the law on State responsibility in a way that makes it impossible for States to hide behind the UN when conduct of its national contingencies in a peacekeeping mission is wrongful. It is a positive development that adequately reflects the state of UN peacekeeping missions and a more realistic view towards responsibility for conduct during peacekeeping missions.

(ii) Was Dutchbat's conduct wrongful?

Finally, in reaction to the State's submissions that the European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR") were not applicable extraterritorially, the Supreme Court determined that the State was competent to exercise jurisdiction over the compound through Dutchbat, within the meaning of Article 1 ECHR, through the Status of Force Agreement concluded with Bosnia and Herzegovina. Moreover, it cannot be said that it was impossible for the State to exercise *de facto* jurisdiction on the compound after the fall of the enclave on 11 July 1995. Dutchbat exercised effective control over the Bosnians that had sought refuge on the compound, which was an established Dutchbat camp with 5000 refugees, and General Mladić had given the opportunity to Dutchbat to retreat with local personnel. Additionally, the Bosnian -Serb army had respected the authority of Dutchbat over the enclave of Srebrenica until its departure on 21 July 1995. Therefore the State, through Dutchbat, was able to ensure compliance with the human rights enshrined in the ECHR and the ICCPR.

The Supreme Court concludes with a strong, but valid warning for future courts, stating that they should not refrain from holding a State responsible because it was engaged in a peacekeeping operation and that such far-reaching restraint would be "unacceptable". The Supreme Court finally observed that this is not "altered by the fact that the State expects this to have an adverse effect on the implementation of peace operations by the UN, in particular on the willingness of member States to provide troops for such operations. This should not, after all, prevent the possibility of judicial assessment in retrospect of the conduct of the relevant troop contingent".

The decision in these cases will have some impact on future cases of responsibility in UN military operations before domestic courts and the ECtHR. With its clear stance on multiple attribution and effective control the Supreme Court has clarified the law that applies for the attribution of conduct during UN military missions and is thus a positive development in the international law of responsibility.

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Julien Maton, The Gotovina Acquittal: **A sound Appelate Course Correction**, 25 September 2013, available at: http://tinyurl.com/klxz7z4

Manuel Eynard, **The Creation of an International Criminal Tribunal for the Democratic Republic of Congo**, 22 September 2013, available at: http://tinyurl.com/nf56s47

Ray Barquero, **ICJ: Nicaragua Institutes Proceedings Against Colombia,** 18 September 2013, available at: http://tinyurl.com/qf8p2wc

Peter Dixon, **Legal Representative's report on "withdrawal" of 93 victims from Ruto case,** 16 September 2013, available at: http://tinyurl.com/pxmcrek

Online Lectures

The Evolution of International Society and International Law, published by UN Audiovisual Library of International Law: http://tinyurl.com/mzjjfl6

The Past, Present and Future of the Arab Spring, 26 September 2011, published by New York School of Law, available at: http://tinyurl.com/pkk5tf6

How Can Lebanon benefit from the work of the Special Tribunal for Lebanon?, 24 September 2013, published by the Special Tribunal for Lebanon, available at http://tinyurl.com/kscgng5

Philip Allott—The True Nature of International Law, 16 April, published by European Society of International Law, available at : http://tinyurl.com/mtz6pyj

PUBLICATIONS AND ARTICLES

Books

James Gow, Rachel Kerr, Zoran Pajic (2013), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for Former Yugoslavia,* Routledge.

Hélène Lambert *et al.* (2013), *The Global Reach of European Refugee Law,* Cambridge University Press.

Yaël Ronen, (2013) *Transition frm Illegal Regimes under International Law*, Cambridge University Press.

Christina Cameron, Mechtild Rössler (2013), *Many Voices, One Vision: The Early Years of the World Heritage Convention*, Ashgate

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Articles

Stephan Parmentier & Elmar Weitekamp (2013), "Punishing Perpetrators or Seeking Truth for Victims: Serbian Opinions on Dealing with War Crimes" , *The Realities of the International Criminal Justice System.*

Hannah Matthews (2013), "The interaction between international human rights law and international humanitarian law: seeking the most effective protection for civilians in non-international armed conflicts ", *International Journal of Human Rights,* Volume 17, No 5-6.

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Nesam McMillan & David Mickler (2013), "From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC ", *Global Responsibility to Protect*, Volume 5.

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EVENTS

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Date: 2 October 2013

Location: Koninklijke Bibliotheek Den Haag

More Info: http://tinyurl.com/pp7v3gd

SCL Lecture: The History and Current Status of the Crimes of Aggression Before the ICC

Date: 9 October 2013

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

More Info: http://tinyurl.com/oog4vg5

Armed Conflict and International Law; In Search of the Human face

Date: 15 October 2013

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

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

OPPORTUNITIES

Associate Legal Advisor

International Criminal Court (ICC)

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Senior Policy Officer

Organisation for the Prohibition of Chemical Weapons (OPCW)

Closing date: 11 October 2013

Senior Researcher

T.M.C Asser Institute

Closing date: 15 October 2013

Law Clerk to Judges of the Court (Associate Legal Officer)

International Court of Justice

Closing date: 23 October 2013