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ICTY CASES

Cases at Trial

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-I)

Mladić (IT-09-92)

Šešelj (IT-03-67)

Stanišić & Simatović (IT-03-69)

Cases on Appeal

Đorđević (IT-05-87/1)

Popović et al. (IT-05-88)

Prlić et al. (IT-04-74)

Šainović et al. (IT-05-87)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

ADC-ICTY President Gives Speech at ICTY's 20th Anniversary

ADC-ICTY President Novak Lukić was invited to give a speech at the ICTY's 20th anniversary celebrations in The Hague on Monday, 27 May 2013.



Novak Lukić, ADC-ICTY President

Twenty years after the UN Security Council passed Resolution 827, establishing the ICTY, the Tribunal commemorated its important legacy. The event was held in the presence of His Majesty King Willem-Alexander of the Netherlands and was attended by senior Tribunal officials, Secretary-General of the Ministry of Foreign Affairs, Renee Jones-Bos, and The Hague Mayor, Jozias van Aartsen.

UN Under-Secretary-General for Legal Affairs, Patricia O'Brien, gave the keynote speech. Richard Goldstone, former Prosecutor of the ICTY, and Judge Alphons Orie, former Defence Counsel at the ICTY, looked back in history at the beginnings of the Tribunal and the case of Duško Tadić. Judge Carmel Agius, Vice-President of the ICTY and Judges O-Gon Kwon and Christoph Flüge elaborated on the challenges of being a Presiding Judge at the ICTY.

President of the ADC, Novak Lukić, was invited to reflect on the past twenty years of the ICTY alongside Serge Brammertz, Prosecutor, and John Hocking, Registrar. The participation of Lukić in this important event marks an outstanding achievement for the recognition of the essential nature of the Defence at the ICTY.

ICTY NEWS

- Karadžić: Defence continues
- Mladić: Prosecution continues
- Hadžić: Trial continues

Also in this issue

Looking Back.....	5
News from the Region.....	6
News from other International Courts	7
Defence Rostrum.....	11
Blog Updates & Online Lectures.....	14
Publications & Articles ...	13
Upcoming Events	14
Opportunities	14

Prosecutor v. Radovan Karadžić (IT-95-5/18-1)

On 21 May 2013 the cross-examination of Karadžić's ballistics expert continued. Zorica Subotić claimed that the explosion on 5 February 1994 at the first Markale incident, which killed 66 persons and injured 140 in a blast, was caused by a 'stationary explosive device'. Subotić stated that it was planted at the market by highly skilled saboteurs who also brought a number of dead bodies to the scene to increase the casualty count. Subotić added that the angle of the 120 mm shell stabiliser buried in the ground was to make it look like as if the shell had been fired from the Republika Srpska Army (VRS) positions.

On 22 May the war-time president of the Executive Board in Skelani municipality, Dane Katanić stated Karadžić never mentioned the killing of Bosnian Muslims during meetings in the days after the takeover of Srebrenica in July 1995. Katanić stated that he had heard of riots but did not know about the shooting of some 1,000 Muslim men in the nearby village of Kravica.

On 23 May Svetozar Kosorić Čiča, Lieutenant Colonel in the Yugoslav Army testified that neither he nor Vujadin Popović, Security Chief in the Drina Corps, stated on 12 July 1995 that the Muslim men would be separated from the rest of the people in Potočari and killed. Kosorić said he learned about the mass murders of the people from Srebrenica from the media in September or October 1995. He further added that civilian facilities were only collateral damage or a result of 'isolated acts of revenge'.

On 28 May Vladimir Lukić testified and stated that during the war the government cared for the refugees regardless of their ethnicity and facilitated their return. Lukić also stated that he helped Muslim civilians leave the parts of Sarajevo that were under Serb control and helped them find shelter.

On 29 May and 4 June the Defence's ballistics expert, Mile Poparić, denied allegations that the VRS was responsible for the murder of civilians in 17 attacks in Sarajevo, as alleged in the indictment.

On 31 May Nenad Kecmanović a postwar Republika Srpska (RS) official called the multi-ethnic make-up of the Presidency of Bosnia and Herzegovina (BiH) a

facade for the world which President Alija Izetbegović used to camouflage his policy of Muslim domination in unitary Bosnia. He said that Izetbegović's expectation that NATO would intervene on behalf of the Muslims negatively affected his readiness to compromise. Later, Kecmanović stated that he learned that the sufferings in BiH were 'proportionate' to the size of the three ethnic communities.

On 6 June former RS police officer, Ljubomir Borovcanin said that after the fall of Srebrenica in July 1995 he did not know about a plan for the execution of Bosniaks and that it was hard to believe that Radovan Karadžić would consent to the murder of captives. He continued testifying on 7 June stating that he believed there was more evidence showing that Karadžić would have had to be informed about the massacre and thus could not have known about it.

On 10 June Vojislav Šešelj, leader of the Serbian Radical Party and accused at the ICTY testified that Karadžić did not have a hostile attitude towards members of the Bosniak and Croat population.

On 11 June Gordan Milinić, Karadžić's former Security Advisor, said that Karadžić did not control the army, claiming that Generals were propagating that Karadžić was not their supreme commander. Milinić suggested that Karadžić's signature on 'Directive 7' from March 1995, which ordered the Bosnian Serb Army to create hopeless, unbearable conditions for living and survival of civilian population, was not authentic. According to Milinić, Karadžić received information from the VRS in February 1994 and August 1995, stating that it had not fired the grenades which caused numerous victims at the Markale market. Milinić continued his testimony on 12 June and stated that most of the several thousands of Muslims were killed in combat when they attempted to break through to Tuzla through the woods in July 1995. Milinić highlighted that the accusation that the VRS shot about 7,000 Muslim men was propaganda and that the main Headquarters of the VRS were practically a military junta, which used the President as a cover.

Further on 11 June former Minister of Defence of the RS, Dusan Kovacević, said that the Bosnian Serb

Army never committed crimes such were the fault of “irresponsible individuals” who failed to obey their orders. Kovacević stated that Muslims voluntarily left the territory under Serb control. He further claimed that the army planned and executed operations on its own, without the knowledge of Supreme Commander Karadžić.

Nedjo Nikolić former Director of the Brick Factory in Bratunac, testified that VRS officers contacted him on 14 July 1995 and asked him whether they could accommodate captured Muslims from Srebrenica in the factory. Nikolić confirmed that in September and October 1995 the Brick Factory’s backhoes were used for exhumations from mass graves in Glogova, where victims from Kravica had been buried. He also confirmed the transfer of those bodies to secondary mass graves.

The last witness to testify, former President of the Zvornik Municipality Government, Jovan Ivanović, emphasised that it was the paramilitary formations led by Željko Ražnatović (Arkan) and others who committed the crimes against Muslims in the spring of 1992, adding that the local authorities were not able to prevent them due to the chaos and anarchy.

This was reiterated on 13 June by former Chief of the Zvornik Police, Marinko Vasić, who stated that when Arkan took over command of Zvornik in April 1992, the civilian authorities were incapable of confronting the anarchy and lawlessness imposed by the paramilitary formations. The witness said that local police officials were left at the mercy of the paramilitaries.

Prosecutor v. Ratko Mladić (IT-09-92)

The trial of Ratko Mladić continued this month with the testimony of Republika Srpska Army (VRS) Commander of the 2nd Romanija Corps, Mirko Trivić, from 21 to 22 May 2013. The Prosecution witness testified as to the content of ‘Directive 7’, which related to the direction of VRS personnel to “create an unbearable situation of total insecurity, with no hope for further survival or life for the inhabitants of Srebrenica or Žepa.” Trivić stated that he had not personally received that Directive and maintained that this specific aspect of Directive 7 had not related to his area of responsibility.

When questioned by Defence Counsel Branko Lukić, Trivić confirmed that he received the direction to order the Drina Corps to gather civilians and UNPROFOR members and protect them. In relation to the Drina Corps order, Judge Flüge requested Trivić to explain his interpretation of the term ‘collect them together’. Trivić explained that it meant that civilians and UNPROFOR members had been kept in a certain area, which was guarded to prevent the approach of soldiers. The civilians and UNPROFOR members could only leave when a report was sent to the VRS superiors.

Protected witness RM306 gave his testimony from 22 to 24 May. The Prosecution witness testified how he had seen the murder of five Muslim captives in front of Kravica. Additionally, he stated there were more

bodies nearby and that he had been ordered by the then-Security Chief of the VRS main headquarters to dig four large graves.

Tomasz Blaszczyk, a Prosecution investigator, testified on 24 May, as well as on 6 and 7 June. Blaszczyk’s role was to identify people, places and events, which had been recorded on a videotape taken by a Serbian journalist during the events occurring in Srebrenica. The video analysed by Blaszczyk has been admitted into evidence in previous trials regarding Srebrenica. Dragan Ivetić, Defence Counsel, stated that the video provided exculpatory evidence that most of the victims had died during heavy fighting with the VRS after it had entered Srebrenica. In answering the Defence’s evaluation that local Serbs instead of the VRS, undertook the kill-

Directive 7

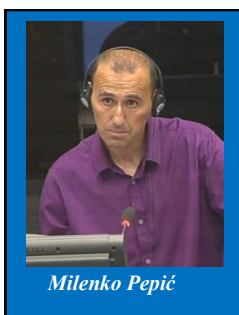
“On 8 March 1995, RS President Radovan Karadžić issued Operational Directive 7 from the Supreme Command of the VRS. Directive 7 was drafted by Radivoje Miletić. This Directive ordered “complete the physical separation of the Srebrenica and Žepa enclaves as soon as possible, preventing even communication between individuals between the two enclaves. By planned and well-thought-out combat operations, create an unbearable situation of total insecurity, with no hope of further survival or life for the inhabitants of Srebrenica or Žepa.”

ICTY, IT-98-33-A, *Prosecutor v. Krstić*, Appeals Chamber Judgement, 19 April 2004.

ings, Blaszyk pointed out that the detainees were overseen by the Bosnian Serb Army and police. Finally, Ivetić referred to the investigation report and highlighted that it had only been police, rather than the VRS, which had been deployed in the Kravica area during the death of a 1,000 prisoners in a warehouse.

Jean-René Ruez, the Prosecution Lead Investigator for the events in Srebrenica, resumed his testimony on 28 May after having last testified in April. Defence Counsel Branko Lukić raised questions regarding his allegedly exclusive use of intelligence data. Ruez pointed out that he and his team had collected forensic evidence, evidence taken from the VRS, aerial photographs and witness statements.

Momir Nikolić, former VRS Assistant Commander for Security and Intelligence, testified on 30 May and continued on 3 to 5 June. The focus of his testimony were the contentions surrounding a hand gesture allegedly made by Mladić during a meeting on 13 July 1995, which resembled moving and was interpreted by Nikolić as meaning to 'execute' a group of detained Muslims. Defence Counsel Nenad Petrušić contested



Milenko Pepić

the gesture and highlighted that the witness had not mentioned such a hand gesture in his previous statements made to the ICTY. In this respect, Nikolić conceded that many facts have been omitted in the original agreement with the Prosecution. The Prosecu-

tion highlighted that a similar hand gesture was mentioned in a report from Bruce Bursik.

Prosecution investigator Erin Gallagher returned to the witness stand on 5 and 6 June, when the Srebrenica video and an album with screen shots from the video recordings made between 10 and 21 July 1995 were admitted into evidence through her testimony. The witness identified the commander of the Zvornik Brigade, Vinko Pandurević, and the Commander of the 'Drina Wolves', Milan Jolović Legenda, in the clip, which shows the Serb forces advancing on Srebrenica on 11 July 1995.

Milenko Pepić, former member of the second Šekovići Detachment of the Special Police Brigade, gave evidence on 10 and 11 June with regard to the events in Kravica in 1995. The witness testified that he never learned who had fired at the detainees in Kravica but admitted that he had testified before a Bosnia-Herzegovina court in the trials of persons responsible for the Kravica massacre, which included people from his detachment.

On 12 and 13 June Zoran Malinić, a former Military Police Commander in the 65th Protection Regiment, gave his testimony regarding the events in Nova Kasaba in 1995. The transcript of Malinić's testimony at the trial of Zdravko Tolimir (IT-05-88/2) in June 2011 was admitted into evidence. Additionally, protected witnesses RM-302, RM-313, RM-253, RM-269 and RM-374 testified as well as Prosecution witness Dragomir Keserović.

Prosecutor v. Goran Hadžić (IT-04-75)

On 28 May the trial of Goran Hadžić resumed with the testimony of financial expert Morten Torkildsen. Having examined numerous documents, Torkildsen concluded that the Republic of Serbian Krajina (RSK) and Republika Srpska (RS) "were more or less funded exclusively by Belgrade."

The Prosecution expert stated that in early 1991 the Socialist Federal Republic of Yugoslavia (SFRY) budget received revenues from taxes. However, in the second half of 1991 the revenues came from the Yugoslav National Bank's primary emissions, which resulted in the rapid printing of money in early 1992. Torkildsen stated that, in his view, the money was used to cover the RSK's and RS' budgetary deficit and to provide

financial support to the Serbian Army of Krajina (SVK) and the RS Army (VRS). Torkildsen used the minutes of the meetings of the Supreme Defence Counsel of the Federal Republic of Yugoslavia (FRY), in order to illustrate that the VRS and SVK officers were paid by Belgrade.

During cross-examination Defence Counsel stated that Željko Ražnatović (Arkan) paid his own bills at least until 17 January 1992, contradicting the expert witness' report which claims that Hadžić's government supported Arkan. Torkildsen stated that, based



Morten Torkildsen



Stipan Kraljević

on the document shown in court, he saw 'indications' that might support the claim that the government of the Serb Autonomous Region of Slavonia, Baranja and Western Sirmia did not finance Arkan.

On 28 and 29 May Milorad Vojinović, former Commander

of the 80th Motorised Brigade of the Yugoslav People's Army (JNA), gave testimony about the incident at the Ovčara Farm. The Prosecution witness claimed that he "accidentally" found himself at Ovčara, where more than 200 Croats were massacred after the fall of the Croatian town of Vukovar in November 1991, and that he "couldn't prevent this."

On 4 June Stipan Kraljević, former mayor of the eastern Croatian border town of Ilok, testified about the events in the area. The Prosecution witness stated that the civil authorities tried on several occasions in 1991 to negotiate peaceful means to evacuate the town with the JNA. Kraljević explained that "the people of Ilok then organised a referendum in which they voted for a mass exodus from the town" and that Croats started leaving the town on 17 October 1991, after receiving safety guarantees from the army.

Milomir Kovačević, a former Serbian policeman, testified on 10 June. Kovačević claimed that he heard "from various sides that paramilitaries [fighting in Croatia] were controlled by [Serbian] state security."

On 11 June protected witness GH054 testified regarding his transfer from a hospital in Vukovar, Croatia, to a nearby farm in Ovčara on 20 November 1991, after Vukovar fell to the Serb forces. The Prosecution witness explained how he survived because one of the soldiers recognised him and vouched for him, confirming that he did not participate in the war as a Croatian soldier.

The same day Katarina Pitl, a Croatian woman, testified regarding her flight from her home village Erdut in August 1991. On 17 and 18 June protected witness GH023 described the escalation of the situation in Baranja, the process of arming, the strengthening of the Serb Territorial Defence and the capture of villages and towns.

Prosecution demography expert, Jakub Bijak, gave his testimony on 3 June regarding his expert report entitled: "Pre-war ethnic composition of, and population displacements from war-affected areas of Croatia in the period 25 June 1991-31 December 1993."

LOOKING BACK...

International Criminal Tribunal for Rwanda

Ten years ago...

On 26 May 2003 the ICTR received, as the first organisation of its kind, the Human Rights Award by the German Friedrich-Ebert-Stiftung. The award recognised the significant contribution to human rights and was conferred in acknowledgement of the ICTR's unswerving support for due process of law and its contribution to national reconciliation in Rwanda. It further commended the Tribunal's commitment to building-up confidence, law and justice in Rwanda and to furthering peace and democracy worldwide. The award was accepted by then-President of the ICTR, Judge Navanethem Pillay, current UN High Commissioner for Human Rights.

International Criminal Tribunal for the former Yugoslavia

Five years ago...

On 3 July 2008 Naser Orić was found not guilty by the Appeals Chamber of the ICTY after having been convicted for war crimes by the Trial Chamber in its judgment on 30 June 2006. Naser Orić was the former Senior Commander of the Bosnian Muslim forces in the municipalities in eastern Bosnia and Herzegovina, including Srebrenica from 1992 until 1995.

Pointing out a lack of evidence, the Appeals Chamber of the ICTY acquitted Naser Orić for all crimes committed against the Serb detainees. Naser Orić has, however, been sentenced to two years in prison by the Sarajevo court for illegal possession of weapons on 1 July 2009.

NEWS FROM THE REGION



Kosovo

Mass Grave Investigation in Raška

Kosovo is still characterised by a great number of missing persons ever since the war. As Sandra Orlović from the Belgrade-based Humanitarian Law Centre pointed out “the biggest problem is that Kosovo and Serbian institutions and societies in general, don’t perceive the finding of missing persons as issue of priority.” Exhumations have not yet occurred everywhere and a multitude of human remains are still unaccounted for.

However, mid-June it was reported that a mutual cooperation between Veljko Odalović, the Head of Serbia’s Commission for Missing Persons and Pajazit Nushi, the Head of the Kosovo Commission for Missing Persons has been established. This new cooperation has initiated an investigation lead by the Serbian authorities in the town of Raška, where it is presumed that at least 250 bodies are buried.

Limaj Back Under House Arrest

Former Kosovo Liberation Army commander Fatmir Limaj, on trial for war crimes alongside nine other accused, has been put back under house arrest. On 6 June the Judges had released Limaj and the nine other defendants from house arrest, accepting the Defence’s assurance that there was no danger of absconding. The European Union Rule of Law Mission (EULEX) Prosecution, however, argued that Limaj and the other defendants might interfere with witnesses.



Fatmir Limaj

Limaj’s Defence plans to appeal the new ruling that re-imposes the detention measures. At a previous trial at the ICTY in 2005, Limaj was acquitted of war crimes.



Bosnia and Herzegovina

Bosnian Serb Policeman Admits Killings

A former Bosnian Serb policeman in Prijedor, Radoslav Knezević, has admitted having taken part in killing more than 150 Bosnians at Korićanske Stijene in 1992. Knezević pleaded guilty to war crimes before his appeals hearing. A plea bargain agreement between the former policeman and the Bosnian Prosecutor proposes that he should serve between 12 and 15 years in prison.

He has also agreed to reveal to the Prosecution information about the crimes at Koricanske Stijene, as well as about other incidents. In the first instance verdict, Knezević was found guilty, alongside two other policemen and was sentenced to 23 years in jail.



Serbia

Serbia and Kosovo Exchanged Liaison Officers

Serbia and Kosovo exchanged liaison officers in support of the monitoring of the implementation of a European Union deal to normalise ties between the two sides. The deal is a condition for both countries to move closer to European Union membership.

Serbian authorities began implementing the accord by starting to shut down their offices in northern Kosovo, which have been linked to Serbia’s administration. The deal stipulates that ethnic Serbs, as the overall minority, will have a regional police commander in the areas where they make up the majority of the population in Kosovo, which is mostly ethnic Albanian. Although the plan was approved by the Serbian government and parliament, some Kosovo Serbs have opposed it, rejecting the acceptance of the authorities in Priština.

NEWS FROM OTHER INTERNATIONAL COURTS



International Criminal Court

Wilson Mbugua, Contractor, Office of Public Counsel for the Defence, ICC

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The Appeals Chamber, Situation in the Republic of Côte d'Ivoire in the Case of the Prosecutor v. Laurent Gbagbo

“Judgment on the appeal of Mr Laurent Koukoudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, rendered on 26 October 2012. (ICC-02/11-01/11-278-Red.)

On 27 April 2012 Laurent Gbagbo filed an application for interim release on the grounds that the conditions of detention had not been met as provided under Article 58(1)(b) of the Rome Statute. He argued that he needed to be released in order to recover from the ill-treatment he suffered whilst in detention in the Ivory Coast and to be fit to stand trial. He submitted that a third country which chose to remain confidential had offered to meet all the conditions of an interim release. However, the Pre-Trial Chamber dismissed his application for interim release. On 23 July 2012, Gbagbo filed an appeal, against the Pre-Trial Chamber I’s decision on four grounds.

The first ground of appeal was that the Pre-Trial Chamber erred by applying the incorrect standard in deciding the application for interim release. It was Gbagbo’s submission that under Article 60(2) of the Statute the Court ought to issue a fresh decision and it should not be reaffirming the warrants of arrest decision. In doing so, it would amount to a *de facto* reversal of the burden of proof. The Appeals Chamber held that the decision under Article 60(2) is a decision *de novo* and differs from one which would be issued under Article 60(3) which is a review of a prior decision on detention. The Appeals Chamber affirmed that the Pre-Trial Chamber carried out a *de novo* review by evaluating the new evidence presented by the Prosecutor and satisfying itself that the conditions set under Article 58(1)(b)(i) to (iii) were met and the continuous detention of Gbagbo was necessary. The Appeals

Chamber pointed out that the basis of a decision on a warrant of arrest may be similar to a decision under Article 60 (2) of the Statute. The Pre-Trial Chamber may therefore make a reference to the warrant of arrest decision without disturbing the *de novo* nature of a decision under Article 60 (2). The Appeals Chamber thus dismissed the first ground of appeal.

The second ground of appeal was that the Impugned Decision was devoid of factual reasoning or based on manifestly incorrect factual reasoning. The Appeals Chamber noted that the Impugned Decision in analysing Article 58(1) (b) was exiguous. There was no analysis of the evidence presented by the Prosecutor except a reference to footnotes. However, the Appeals Chamber found that the Impugned Decision did not manifestly lack rea-

soning as to amount to an error of law. The Appeals Chamber went on to state that it is not enough to merely express disagreement with the conclusion of the Pre-Trial Chamber, there has to be a clear error

Rome Statute Article 58(1) (b)

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(b) The arrest of the person appears necessary:

- (i) To ensure the person's appearance at trial,
- (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
- (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

which they did not find in the Impugned Decision. Consequently, the second ground of appeal was rejected.

Gbagbo averred in his third ground of appeal that the Pre-Trial Chamber's decision lacked legal basis. Gbagbo submitted that the Pre-Trial Chamber failed to evaluate the proposal made by a third party state which had proposed to host him. In its decision, the Pre-Trial Chamber had noted that it had the discretion to consider the risks envisaged under Article 58 (1)(b) and impose conditions to mitigate the risks. The Pre-Trial Chamber concluded that those risks could only be dealt with in detention at the seat of the Court.

The Appeals Chamber on the other hand observed that the Pre-Trial Chamber has discretion to consider interim release. Moreover, the discretion must be exercised judiciously, bearing in mind that a person's liberty is at stake. In circumstances where a state has offered to accept the detained person then it is imperative upon the Pre-Trial Chamber to consider conditional release. The Appeals Chamber opined that the Pre-Trial Chamber did not disregard the proposal from the third party state but took note of it. It concluded that the Pre-Trial chamber did not err in its decision and therefore the third ground of appeal failed.

Gbagbo submitted in his fourth ground that the Pre-Trial Chamber made a legal error in its finding that ill health cannot be a basis for interim release. The Pre-Trial Chamber had ruled that the Registry has provision in place under Rule 135 of the Rules of Procedure and Evidence to handle the health situation of an accused person and therefore conditional release cannot be ordered on the basis of the health condition.



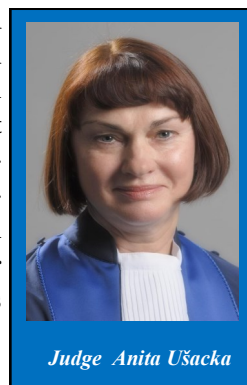
Laurent Gbagbo

The Appeals Chamber dismissed this ground of appeal and held that there is no legal provision specifically providing for conditional

release on grounds of health. The Appeals Chamber held that Regulation 103 of the Regulations of the Court provides for treatment of detained persons at the detention centre and in case of hospitalisation they will continue to be detained. As a result, the fourth ground was dismissed.

However, the Appeals Chamber made a significant finding on the role of medical grounds in an interim release decision. Firstly, the medical conditions of the detained person "may have an effect on the risks" envisaged under Article 58(1)(b) of the Statute, "potentially negating those risks."¹ Secondly, the medical conditions of the detained person may in itself be a reason for a Pre-Trial Chamber to grant interim release with conditions.

Judge Anita Ušacka delivered a Dissenting Opinion. She held that the impugned Decision lacked legal reasoning as it "did not assess specific evidence or show why such evidence supported the Pre-Trial Chamber's assessment" nor did it rely on concrete facts and circumstances.² It was essential that a detention decision provides reasons for detention. She stated that the right to liberty of an accused in criminal proceedings has been a subject of human rights bodies and international tribunals and that any decision requires adherence to high standards.



Judge Anita Ušacka

Judge Erkki Kourula concurred with the majority of the judges on the first, third and fourth grounds of appeal. However, he dissented in the analysis of second ground. He held that there was insufficient reasoning and that it could impact on future reviews of Gbagbo's detention under Article 60(3) of the Statute as an assessment of "changed circumstances" will be problematic.³ The Appeal Chambers, pursuant to Rule 158 of the Rules of Procedure, confirmed the Pre-Trial Chamber I's decision.

1. See paragraphs 2 and 87; 2. See paragraph 39; 3. See paragraph 3.

The Pre-Trial Chamber I, Situation in the Republic of Côte d'Ivoire in the Case of the Prosecutor v. Laurent Gbagbo (ICC-02/11-01/11)

Wilson Mbugua, Contractor, Office of Public Counsel for the Defence, ICC

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“Decision on the fitness of Laurent Gbagbo to take part in the proceedings before the International Criminal Court”, rendered on 2 November 2012. (ICC-02/11-01/11-286-Red.)

Laurent Gbagbo filed an application on 5 June 2012 before Pre-Trial Chamber I seeking the postponement of the confirmation hearing due to his ill health. He submitted that he is unfit to stand trial. However, on 12 June 2012, the Single Judge held that the allegations of Gbagbo's ill health were not sufficiently substantiated. The Defence submitted an application requesting medical and psychological evaluation of Gbagbo. On 26 June 2012, the Single Judge appointed three medical experts to conduct a medical, psychological and psychiatric examination. This was aimed at assisting the Court to determine whether Gbagbo could exercise the rights of the accused as provided in Article 67 of the Rome Statute.

The Prosecution argued that a determination of fitness to stand trial is discretionary in nature and the Court should not only take into consideration the reports filed by the experts but also pay attention to the demeanour of Gbagbo during the initial appearance. The Prosecutor further argued that Gbagbo does not need to possess the legal expertise of a trained lawyer for him to be able to instruct Counsel. It is enough for the Gbagbo to avail facts necessary for his Counsel to be able to mount a defence. On the other hand, the Defence submitted that Gbagbo is suffering from post-traumatic stress disorder, hospitalisation syndrome and depression. It would therefore be an infringement on his right to fair trial, if the trial was not postponed.

The Pre-Trial Chamber noted that the Rome Statute and the Rules do not contain an express provision addressing fitness to stand trial. Nonetheless, the Chamber was of the opinion that a fair trial includes exercise of procedural rights which can be impeded by the ill health of the accused. Hearing should therefore be adjourned until such a time when the impediment ceases to exist. The Pre-Trial Chamber defined fitness

to stand trial as “absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights.”¹ The Pre-Trial Chamber cited Article 21(3) of the Statute which calls for an application and interpretation of law in accordance with international human rights standards. The Pre-Trial Chamber recalled the Appeals Chamber decision in the Lubanga case where it was held that a right to a fair trial should be broadly perceived and applied in the entire judicial process.

The Pre-Trial Chamber held that in order to exercise the fair trial rights provided in Article 67(1) of the Rome Statute, the Accused has to have certain capacities which are, ‘(i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct Counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement.’² The Judges went on to state that Article 67(1) implies that the Court has to resolve the question of whether the medical conditions of an accused person will impair her capacity to meaningfully exercise his/her fair trial rights. Moreover, the chamber will take into consideration all the prevailing circumstances of every individual case. The fitness to stand trial is applicable at all stages of the proceeding be it pre-trial or trial.

The Pre-Trial Chamber acknowledged the findings of the European Court of Human Rights in *Stanford v the United Kingdom* where it was held that effective participation by the accused implies a holistic comprehension of the trial process including the implication of any possible punishment. Pre-Trial Chamber cited with approval the jurisprudence of ICTY Appeals Chambers in the case of *Strugar* where it was held that a mentally and physically healthy accused person is not expected to possess the legal expertise of lawyer to be able to analyse the complex facts and legal issues brought before the Court.

The Pre-Trial Chamber rejected the argument by the Prosecutor that the burden of proof is on a balance of probability. The Pre-Trial Chamber held that the role

of the parties is to assist the Court to discharge its obligation. The evidential standard applicable in determining whether the accused is fit to stand trial is as per Rule 135 of the Rules where the Court is 'satisfied that the accused is unfit to stand trial' the hearing will be adjourned.³

The expert who conducted the medical examination concluded that Gbagbo is suffering from a number of physical pathologies. However, during hearing the expert averred that Gbagbo has the physical capacity to follow the trial as long as he takes breaks to enable him recover the functions of his locomotor system. The Pre-Trial Chamber held that Gbagbo is not physically unfit to stand trial.

The Pre-Trial Chamber relied on the psychological and psychiatric examinations to assess the mental capacity of Gbagbo to stand trial. Dr Daunizeau who conducted a psychological examination concluded that Gbagbo is unfit to prepare for his defence. He went on to state that Gbagbo is a shadow of his former self. The Pre-Trial Chamber held that

Daunizeau's report did not assist the Court to determine whether Gbagbo is fit to stand trial. The Court stated that "the question before it is not whether Gbagbo is at present in full possession of the higher or better faculties he may have had in the past but whether his current capacities are sufficient for him to take part in proceedings against him, taking into account the applicable law."

The Pre-Trial Chamber was persuaded that Gbagbo was able to maintain sufficient focus and concentration by his ability to conduct lengthy interviews lasting several hours. The Pre-Trial Chamber relied heavily on the psychiatric report by Dr Lamothe and held that Gbagbo was capable of meaningfully exercising his fair trial rights and as such was fit to stand trial.

The Pre-Trial Chamber concluded that Gbagbo required practical adjustments during the confirmation of charges hearing. These include, provision for shorter court sessions, resting facilities during breaks and the possibility of Gbagbo to follow proceedings via video link.

1. See paragraph 43; 2. See paragraph 50; See paragraph 56.



The Extraordinary Chambers in the Courts of Cambodia

Anne-Charlotte Lagrandcourt, Intern on the Nuon Chea Defence Team

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)

Following the Trial Chamber decision on 26 April 2013 to sever Case 002, the Co-Prosecutors filed a Second Severance Appeal on 10 May.

In late May, the Nuon Chea Defence team appealed the Chamber's second decision on severance and responded to the Co-Prosecutors. The Defence team considered that the Trial Chamber erred in law in deciding to sever the Closing Order as the Judges neither gave consideration to the Defence's submissions concerning their decision nor did they resolve sufficiently the legal and practical impediments to holding sequential trials at the ECCC. Further, the Trial Chamber erred in fact or abused its discretion in failing to include charges relating to genocide, cooperatives and worksites in Case 002/01, as Case 002/01 must be reasonably representative of the full Closing Order.

The Nuon Chea team, however, agreed with the Trial Chamber's refusal to include S-21 within the scope of Case 002/01, as this site was not uniquely representa-

tive of the Closing Order, and most of all as the Chamber had previously adjudicated charges relating to S-21 in Case 001.

In the meantime, the Khieu Samphan Defence team filed an appeal of the Trial Chamber's decision to deny the release on bail of the Accused.



As for testimonies, this month expert Philip Short was heard for a few days and examined by the parties. During the Nuon Chea Defence team's cross-examination, the author of "Pol Pot: the history of a nightmare" stated that contrary to other books, such as those by Steven Heder or David Chandler, he based his, not on different written sources than the Khmer Rouges themselves, but on an understanding of their mentality. Heder and Short disagreed fundamentally over whether the Khmer Rouge revolution was more Cambodian or communist.



Special Tribunal for Lebanon

Eleonora Forte

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

STL Officials Hold a Briefing in Brussels and Geneva

As part of its efforts to establish wider networks with professional groups, the Special Tribunal for Lebanon (STL) held two meetings in Brussels and Geneva in June.

In the first meeting, held on 6 June, Senior STL officials held a background press briefing in Brussels at the headquarters of the United Nations Regional Information Centre (UNRIC). Daryl Mundis, Acting Registrar, Spokesperson Marten Youssef, and Christopher Roy Black, Legal Officer at the Pre-Trial Chamber, briefed the media on the latest developments and the preparation for the approaching start of the trial. A full audio recording of the press briefing can be found here: <http://tinyurl.com/oqf454z>

The second meeting on 11 June was a gathering in Geneva during which the Acting Registrar, the Presid-



Press briefing at UNRIC Headquarters in Brussels

ing Judge of the Trial Chamber, Judge Robert Roth and the spokesperson, met with a number of non-governmental organisations, academia and the representatives of international media.

The press conference was held at the Club Suisse de la Presse. A full video recording of the press briefing can be found here: <http://tinyurl.com/qeb7f7g>

DEFENCE ROSTRUM

New Rules Unlikely to Silence Critics of US Drone Assassinations

by Eoin Murphy

Since flying out of the pages of science-fiction shortly after America embarked on its “War on Terror”, the use of armed flying drones has become a key feature in the United States’ national security policy. From 2004 to 3 April 2013 there have been 412 to 523 drone strikes in Pakistan, Yemen and Somalia. The purpose of these strikes is the assassination of militant Islamic terrorist suspects that America deems to be a threat to its own national security interests and regional stability.



Barack Obama

Despite being heralded as a success by the US Government, the use of combat drones to assassinate individuals has attracted criticism from many different quarters. Such criticism includes the number of civilian casualties resulting from drone attacks, that these

attacks breach the sovereignty of the states where drones have their targets and the lack of transparency in how the drone programme functions.

Until recently, these criticisms seemed to have fallen on deaf ears at the White House while America continued in its unfettered expansion of its drone programme. However, signs of change emerged on 23 May when President Barack Obama, during a visit to the National Defence University in Washington, gave a speech that touched on many aspects of the “War on Terror.” One of the most significant announcements contained in Obama’s address was the intention of his administration to introduce new guidelines governing the use of drones in counter-terrorism operations. While much of these guidelines are still classified Obama asserted that drone assassinations will now only take place “against terrorists who pose a continuing imminent threat to the American people, and when there are no other governments capable of effec-

tively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured – the highest standard we can set.” The administration’s new policy was further fleshed out by officials at the event. There will be a shift away from covert and deniable CIA strikes to drone attacks carried out by the military, which are more transparent. The possibility of introducing further controls by way of a special court with powers to authorise such killings, or creating an independent overseer within the executive branch is also on the table.

While it is a welcome move by the Obama administration to finally address the criticism levelled towards its use of drones, many questions still remain unanswered. It is perhaps ironic that in a move to introduce guidelines increasing the accountability and transparency of drone operations, much of the guidelines themselves are still classified. Such opaqueness could render any reform ineffectual, especially if the workings of the proposed special court or independent overseer are kept classified. It is worth noting that most American intelligence surveillance activities are subject to the decisions of the Federal Surveillance Court of Review (FSCR). The judgments of the FSCR are not made available to the public and as the recent National Security Agency leaks showed, the court failed to act as an effective control against overly invasive intelligence operations. It is not unreasonable to expect that if forced to function under similar circumstances, the current proposed controls on America’s drone assassinations will be just as impotent.

Perhaps the most immediate impact of these new guidelines will be felt by those on the ground in countries affected by drone strikes. Two provisions in Obama’s statement are of particular importance. From now on drone attacks can only be sanctioned when “there are no other governments capable of effectively addressing the threat” and there must be “near-certainty that no civilians will be killed or injured.” The first of these provisions is undoubtedly designed to deflect accusations that drone attacks infringe the sovereignty of nations where such strikes are targeted. This criticism has been especially vocal in Pakistan where one opposition leader, Imran Khan, has called on the military to shoot down all American drones found in Pakistani air-space. However, given the notoriously lawless nature of the areas that drones currently operate in, it is unlikely that any other Gov-

ernment will have the capability to address such threats. Therefore it is doubtful that this provision will have any effect in reducing the incidents of targeted strikes in these regions.

The second provision touches on what has arguably been the most controversial aspect of drone attacks. 2,772 to 4,167 people have been killed by drone attacks from 2004 up until 3 April 2013. This number includes 423 to 955 civilian deaths. While US officials point out that drone strikes have far lower rates of collateral damage than conventional strikes, the fact that drone strikes take place on a more routine basis means they pose a significant risk to civilians. The requirement that there should be near-certainty that no civilians will be harmed is an admirable one and may help lead to a reduction of innocent casualties if followed through seriously. However an implicit factor for this provision to be successful is the notion that the US has not been adhering to this high standard until now. This begs the question, has the US been knowingly putting civilian lives at risk in its hunt for terrorists? Given the secretive nature of America’s drone operations until now concrete answers may never be forthcoming. Nevertheless serious doubts on the legality and morality of America’s drone strikes remain.

It is too early to measure the effect of Obama’s speech on American national security policy yet. For the time being, however, the intensity of drone strikes show no sign of abating. Since the US president delivered his address on 23 May there have been at least 23 reported deaths from drone attacks. By tackling the issue of drones in his speech, Obama reasserted their importance in pursuing America’s national security objectives. However he also acknowledges that lack of oversight is a current problem in the way the US’ drone programme operates. While it is necessary to acknowledge that certain aspects of national security will always require strict levels of secrecy, these aspects should remain the exception rather than the rule. The routine nature of drone assassinations in recent years demonstrates that it is important that the public have a proper understanding of how the programme operates and proper controls are put on their use. Until the process is made effectively transparent the possibility of America abusing its drone capabilities remains, putting more innocent lives at risk.



BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Wayne Jordash and Scott Martin, **Acquittals at the ICTY: "Shows the Health of the System"**, 10 June 2013, available at: <http://tinyurl.com/ldeh9e8>.

Colleen Rohan and Gregor Guy-Smith, **Comment on Judge Harhoff's Letter**, 19 June, available at: <http://tinyurl.com/mmq6f5w>.

Jens David Ohlin, **Why Did the ICTY Acquit Stanisic and Simatovic?**, 1 June 2013, available at: <http://tinyurl.com/lwp6tql>.

Haru Mutasa, **Mugabe's opponent outsmarted - again**, 17 June, available at: <http://tinyurl.com/phezo6o>.

Rosalind English, **Supreme Court gives the go ahead for negligence and human rights claims for British service-men deaths in Iraq**, 19 June, available at: <http://tinyurl.com/nd375qj>.

Online Lectures

Human Rights and Institutions with Mary Robinson, 12 November 2007, published by Columbia University:

<http://tinyurl.com/l5ndnvc>.

Human Suffering and Humanitarian Response with Prof Craig Calhoun, 10 June 2013, published Durham University:

<http://tinyurl.com/luj4t3m>.

Online Course with John Hoberman: *Age of Globalization*, starting date 15 September 2013, published by University of Texas at Austin:

<http://tinyurl.com/ky3zql7>.

PUBLICATIONS AND ARTICLES

Books

William A Schabas, Yvonne McDermott and Niamh Hayes (2013), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate Publishing
The book includes chapters written by ADC members Colleen Rohan, Wayne Jordash and Christopher Gosnell.

James A. Sweeney (2013), *The European Court of Human Rights In the post-Cold War era: universality in transition*, Routledge.

Roberto Durrieu (2013), *Rethinking Money Laundering & Financing of Terrorism in International Law*, Martinus Nijhoff Publishers.

Ali Emrah Bozbayindir (2013), *Turkey and the International Criminal Court: A Substantive Criminal Law Analysis in the Context of the Principle of Complementarity*, Nomos.

Jr W. Cole Durham, Rik Torfs, David M. Kirkham, Christine Scott and W. Cole Durham (2013), *Islam, Europe and Emerging Legal Issues*, Ashgate.

Jessica Almqvist and Carlos Esposito (2013), *The Role of Courts in Transitional Justice: Voices from Latin America and Spain*, Routledge.

Articles

Aldo Zammit Borda (2013), "Precedent in International Criminal Courts and Tribunals", *Cambridge Journal of International and Comparative Law*, Volume 2, Issue 2.

Barbara Mikołajczyk (2013), "Is the ECHR ready for global ageing?", *International Journal of Human Rights*, Volume 17, Issue 4.

Cian O'Driscoll (2013), "Why Don't You Tell Us About Them Rabbits, George? The Tragedy of Just War", *International Studies Review*, Volume 15, Issue 2.

Ziv Bohrer and Mark Osiel (2013), "Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers", *Vanderbilt Journal of Transnational Law*, Volume 46 Issue 3.

Stephen Winter (2013), "Towards a Unified Theory of Transitional Justice", *International Journal of Transitional Justice*, Volume 7, Issue 3.

Glenn Mitoma and Kerry Bystrom (2013), "Introduction: Humanitarianism and Responsibility", *Journal of Human Rights*, Volume 12, Issue 1.

Daniel Bethlehem (2013), "The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Cambridge Journal of International and Comparative Law*, Volume 2, Issue 2.

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WE'RE ON THE WEB!

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GOODBYE

The ADC-ICTY would like to express its appreciation and thanks to Fabian Gems for his hard work and dedication to the Newsletter. We wish him all the best in the future.

EVENTS**Summer Course on European Criminal Justice**

Date: 24-28 June 2013

Location: Trier

More info: <http://tinyurl.com/kctrfz7>

Criminal Law Forum: The Future of National / International Criminal Law

Date: 18-20 July 2013

Location: Victoria, B.C. Canada

More info: <http://tinyurl.com/lw7lekd>

International Law in Practice

Date: 23-26 September 2013

Location: London

More info: <http://tinyurl.com/m4z5a7u>

EU Criminal Law for Defence Counsel 2nd Series 2013-2014

Date: 18-19 October 2013

Location: Dublin

More info: <http://tinyurl.com/ly94hln>

OPPORTUNITIES**Legal Coordinator for Detention Matters**

International Residual Mechanism for Criminal Tribunals
Closing date: 3 July 2013

Legal Officer

International Residual Mechanism for Criminal Tribunals
Closing date: 4 July 2013

Professorship in International Law with specific focus on International Courts

University of Copenhagen
Closing date: 12 September 2013