ADC-ICTY Newsletter, Issue 19

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ICTY Cases

Cases in Pre-trial

Mladić (IT-09-92)

Hadžić (IT-04-75)

Cases at Trial

Haradinaj et al. (IT-04-84)

Karadžić (IT-95-5/18-I)

Prlić et al. (IT-04-74)

Šešelj (IT-03-67)

Stanišić & Simatović (IT-03-69)

Stanišić and Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

Cases on Appeal

Đorđević (IT-05-87/1)

Gotovina et al. (IT-06-90)

Lukić & Lukić (IT-98-32/1)

Perišić (IT-04-81)

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)

Inside this issue:

ICTY News

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

Prosecutor v. Perišić (IT-04-81)

The case against Momcilo Perišić came to an end Tuesday 6 September after an almost three year long trial which saw 3,794 exhibits. The trial chamber found Perišić guilty for providing crucial military aid to Bosnian Serb forces responsible for crimes committed in Srebrenica and for the campaign of shelling and sniping in Sarajevo. Perišić was unanimously acquitted of charges of aiding and abetting extermination as a crime against humanity in Srebrenica and of command responsibility in relation to crimes in Sarajevo and Srebrenica. The majority then found that, although General Perišić was immediately notified of both of the SVK's rocket attacks on Zagreb; he failed to take "necessary and reasonable measures" to punish the perpetrators and found him culpable of failing to punish his subordinates for their crimes in Zagreb. The trial chamber sentenced Perišić to 27 years in prison with credit for 1,078 days time served. This was the first time that the ICTY has rendered a verdict against a Serbian state official for crimes committed in Bosnia during the war.

Under the indictment Perišić was charged under article 7(1) of the Statute for aiding and abetting war crimes and crimes against humanity perpetrated in Sarajevo and Srebrenica, Bosnia, between 1993 and 1995 by the Army of Republika Srpska, known as the VRS. In addition to aiding and abetting, General Perišić was charged under article 7(3) of the Statute, with having failed to prevent crimes perpetrated by his subordinates and/or punish them for their criminal behaviour. The crimes in question included the previously mentioned crimes in Sarajevo and Srebrenica, as well as separate crimes related to the shelling of Zagreb, Croatia, by the Army of Serbian Krajina, known as the SVK.

Momčilo Perišić

Judge Moloto gave a lengthy dissent from the majority's finding as to Perišić's individual criminal responsibility pursuant to Article 7(1) and Article 7(3) of the Statute. In his dissent, Judge Moloto stated that he was not persuaded that Perišić had effective control over Serbian Army of Krajina (SVK) troops in Croatia stated that providing assistance to the VRS to wage war should not be equated with aiding and abetting the crimes committed during the war as it was "too remote". "To conclude otherwise, as the majority has done, is to criminalise the act of war, which is not a crime according to the statute of the Tribunal," Judge Moloto wrote in his dissent. "In addition, it raises the question: where is the cut off line? For instance, would a manufac-

turer of weapons who supplies an army with weapons which are then used to commit crimes during a war also be criminally responsible?" .

Furthermore, Judge Moloto noted "notwithstanding numerous opportunities to do so, no superior has been charged before the Tribunal with aiding and abetting the crimes of his soldiers merely for the reason that he supplied them with arms, sent them to war and they committed crimes". In addition "Perišić was not supplying his soldiers, but soldiers of another army, thus placing him in a more remote position in relation to the crimes."

Judge Moloto also disagrees with the majority finding that Perišić had knowledge that his support for the VRS would aid crimes in Sarajevo and Srebrenica, and further states that evidence on these points is "largely circumstantial".

Judge Moloto respectfully disagreed with the majority's finding that Perišić exercised effective control over the perpetrators of the crimes committed by the shelling of Zagreb in May 1995. Moloto pointed out that the evidence "paints a picture in which members of the 40th PC were re-subordinated to the SVK and therefore, acted solely within its chain of command". "Perišić did not consider himself to be the superior officer of the members of the 40th PC and the latter did not view themselves as their subordinates".

The initial indictment against **Radovan Karadžić** was confirmed on 25 July 1995. It charged Karadžić with crimes committed against civilians throughout the territory of Bosnia and Herzegovina. The second indictment was confirmed on 16 November 1995 and referred to the events that took place in and around the enclave of Srebrenica in July 1995. On 21 July 2008, Serbian authorities announced the arrest of Karadžić and on 29 July 2008, he was transferred to the Netherlands to face trial at the ICTY. The trial commenced on 26 October 2009.

Prosecutor v. Kabashi (IT-04-84-R77.1)

Shefqet Kabashi was charged with contempt of the Tribunal for failing to answer questions in the Haradinaj *et al.* trial in 2007 and pleaded guilty on 26 August 2011. The trial chamber determined that any reasons Kabashi had for failing to answer questions were vague and could not be taken into consideration. The trial chamber did take into mitigation that he suffers from Post-Traumatic Stress Disorder and also his family situation. The trial chamber also took into consideration that Kabashi had not presented himself to the Tribunal in over 4 years.

Shefqet Kabashi

Kabashi was sentenced to two months of imprisonment with credit being given for the 31 days he has already spent in the UN Detention Unit.

Prosecution v. Radovan Karadžić (IT-95-5/18-T)

On 11 August, the Prosecution filed an *ex parte* motion, as the matter did not concern the Defence, according to the Prosecution. After the Chamber lifted the *ex parte* status, the motion was disclosed to the Accused. After reviewing it, Karadžić stated that the matter in fact did concern the Defence and he, therefore, requests that the Trial Chamber discloses all filings which no longer need to be filed *ex parte*. Furthermore, he stressed that "a pleading should only be filed as *ex parte* as a last resort and only where the disclosure of the pleading would prejudice the Prosecution or some other person". On 15 August, the Accused filed publicly the "Motion for Review and Disclosure of *Ex Parte* Filings".

Radovan Karadžić

On the 14 September, following this submission by Karadžić, the Trial Chamber denied his Motion, as the Motion filed by the Prosecution mentioned a confidential and *ex parte* decision of another Trial Chamber. The Chamber does recognise the importance of the Accused's right to access information, and therefore, will reclassify certain documents as confiden-

Armin Bazdar

tial *or inter partes*. However, the Chamber does not see the need to review all *ex parte* filings in this case.

On 5 September, Karadžić finished the cross-examination of Sefik Hurko. This witness had been called by the Prosecution to testify about the situation during his detention in Rogatica. After this cross-examination, the next witness was called to the stand. Armin Bazdar is a survivor of the shooting in Duljevci, for which Dragoje Paunovic (a former Bosnian Serb soldier) was sentenced to 20 years in prison in 2006 by the War Crimes Chamber in Sarajevo. Bazdar confirmed his previous statement, in which he stated that Paunovic ordered the shooting in Duljevci.

The cross-examination continued with the next witness: Sead Hodzic, a survivor of the massacre in Zaklopace in 1992. The witness stated that Serb forces seized Vlasenica and neighbouring villages, together with the JNA Novi Sad Corps. In the cross-examination, Karadžić claimed that the JNA entered Vlasenica, after the BH Territorial Defense were ordered to attack the JNA and Serbs. In addition, the Accused added that the JNA had the right to enter Vlasenica, as it was there to "protect" its citizens.

In the last week, Munira Selmanovic took the stand to testify about the events in Sokolac during the relevant period. Lastly, witness KDZ-601, a former Bosnian Serb police officer, testified on the detention centres Kula in Lukavica and the school building in Pale.

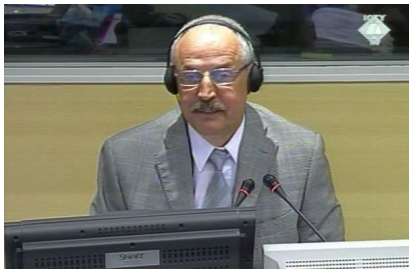
Article 7

Individual criminal responsibility

(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime

Prosecutor v. Stanisic and Zupljanin (IT-08-91)

The Župljanin defence began on 5 September by calling military expert and retired JNA general Vidosav Kovacevic. Kovacevic has previously testified at the trials of several RS military and police officers who were tried for crimes committed in Srebrenica and Zepa.



Vidosav Kovačević

Kovacevic testified that the use of police units in combat operations was not defined by the law. Kovacevic noted that there is only one law in the SFRY on All-People's Defence and Social Self-Protection stipulating that the police 'can be used in combat'. Kovacevic went on to note that when the police were used in combat they were always subordinated to the military commander in charge.

Kovacevic continues his testimony this week.

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

The trial of Milan and Sredoje Lukić began on 9 July 2008 and ended on 20 July 2009 with the Trial Chamber III judgment. The Chamber convicted cousins Milan Lukić and Sredoje Lukić for crimes against humanity and war crimes committed in the eastern Bosnian town of Višegrad during the 1992-1995 conflict. Milan Lukić was convicted of killing five Muslim civilians on 7 June 1992 and seven others on or about 10 June 1992. He was also found guilty of mistreating Muslim detainees in the Uzamnica detention camp. The most serious convictions dealt with two alleged incidents in which Muslim civilians were put in a house and the house was subsequently set on

Milan Lukić

fire. These incidents are claimed to have occurred on 14 June 1992 in house on Pionirska Street in Višegrad and on 27 June 1992 in a house in the Bikavac settlement of Višegrad, where 119 Bosnian Muslims lost their lives. Overall, he was found guilty of 19 out of 21 charges brought against under Article 7(1) of the Statute.

Sredoje Lukić was found guilty of aiding and abetting in the commission of crimes. He was found guilty of the Uzamnica camp mistreatment and the Pionirska Street fire, but not of the Bikavac settlement fire. He was convicted of 7 out of the 13 charges brought against him, which included crimes of persecution, murder, and inhumane acts as crimes against humanity and murder and cruel treatment as a violation of the laws or customs of war. He was sentenced to 30 years of imprisonment, whereas Milan Lukić was sentenced to life imprisonment.

The initial indictment of both **Milan Lukić & Sredoje Lukić** was confirmed on the 26 October 1998. The indictment alleges that on 6 April 1992 units from the Yugoslav People's Army ('JNA') began bombarding the town of Višegrad and its environs with artillery. It further alleged that many of the Muslims who were not immediately killed were detained at various locations in the town, as well as the former JNA military barracks at Uzamnica, five kilometres outside of Višegrad.

The Appeals Hearings of 14 and 15 September 2011 were as a result of appeals brought by both the defence and the prosecution. Milan Lukić appealed against the 20 July 2009 judgment and submitted eight grounds of appeal. He submitted that errors of law and of fact were made in the Trial Chamber's conclusions leading to his guilt. He argued that errors were committed in the assessment of his alibi. He further invoked a number of violations of his rights to a fair trial and challenged the findings in regards to his sentence.

The Counsel for Milan Lukić also directly challenged the Trial Chamber's approach to witness recognition, noting that the "Trial Chamber even held that witnesses recognised Milan Lukić when the Prosecution had conceded in its closing brief that there was an insufficient basis for recognition". He placed particular focus on in-court identification of his client by witnesses, arguing that even if in individual cases the in-court identification was permissible, the Appeals Chamber should look at the cumulative effect this had on the judgment. In effect, it asked that the Chamber afford no weight to the in court identifications. Among the arguments related to identification, Counsel argued that his client was mistakenly identified and for one incident, referred to poor lighting as the basis for the inability of witnesses to appropriately identify him.

Sredoje Lukić

The Defence also claimed that the Trial Chamber misapplied the appropriate legal standard related to the crime of extermination. It argued that the alleged house fire incidents where 60 and 59 people were killed respectively could not meet the standard of "massiveness" which sets extermination apart from murder. It pointed the Chamber to the Martić trial judgment, which did not enter a conviction for extermination despite recognising the number of victims to be 165.

Sredoje Lukić applied to overturn the Trial Chamber judgment based on 15 grounds of appeal. He submitted errors of law and of fact related to his guilt of the Pionirska Street fire, invoking errors in the assessment of Prosecution and Defence evidence in regards to his alibi as well as "as errors committed relating to the legal findings in respect of the *mens rea* and *actus reus* elements of the crimes he is charged with". Specifically, counsel for Sredoje Lukić argued that he was not present during the Pionirska Street house fire. It was submitted that the four witnesses who testified to him being there gave contradictory testimony which could not place him there beyond a reasonable doubt. He submitted further errors of law and fact for his other grounds of appeal and also alleged that the Trial Chamber misapplied the principle of in *dubio pro reo*. He also alleged errors of law as regards the in -court identification procedure and against the sentence imposed on him.

The Prosecution submitted two grounds of appeal against the acquittals of Sredoje Lukić. The Prosecution argued that the Trial Chamber should have convicted him for the crime of extermination due to his involvement in the crimes committed at the Pionirska Street house fire. The Prosecution submitted that because the Pionirska Street house fire was considered a crime of extermination, he

should have been convicted for aiding and abetting in this crime, and not simply aiding and abetting for the crime of murder. The Prosecution submitted that "his acquittal as an outcome of the trial judgment is not only wrong in law but it conflicts with the findings set out in that same judgment". The second ground of appeal also alleged errors of law committed by the Trial Chamber in not convicting him for the crime of persecution committed during the events in the Uzamnica camp. The Prosecution pointed out that Sredoje Lukić had been found to have repeatedly beat detainees there and had the discriminatory intent. Consequently it argued that he should have been convicted of persecution. As such, the Prosecution requested that his 30 year sentence be increased accordingly.

At the end of the hearing, the Accused were given an opportunity to speak. Milan Lukić decided to use this opportunity and began by saying: "I want you and the public as a whole to know that before you are sitting innocent persons..." He stated that he had never lived on Pionirska Street, as stated by the Presiding Judge at the beginning of the hearing, and denied any involvement with the paramilitary group known as the "White Eagles". In fact, he stated, that when the war broke out, he was still in Switzerland working as a barman. He concluded by saying that: "Muslims are my brothers. We are the same people, the same culture. I still have Muslim friends. I don't hate them. I'm not a fascist. I am sorry for my innocent people, for all the suffering they've had to go through". Sredoje Lukić chose not to make a statement.

Rule 65

Provisional Release

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

ADC Proposes Amendment to Rule 65

The ADC has proposed to the Rules Committee that Rule 65(B) be amended to provide that "compelling humanitarian reasons for release need not be shown" for provisional release.

The motivation for the proposed amendment is as follows:

Christoph Flügge, a permanent judge at the ICTY

In April 2008, the Appeals Chamber announced a new standard for provisional release. Once the prosecution had completed its case, an accused would have to demonstrate compelling humanitarian reasons to obtain provisional release. While a slim majority of the Appeals Chamber has maintained support for this standard, half of the permanent judges of the Tribunal have expressed their reservations or opposition to this standard, finding it inconsistent with the presumption of innocence and international human rights instruments.

The purpose of the proposed amendment is to repeal the standard adopted by the majority of the Appeals Chamber to reflect the views of the majority of permanent Judges and to eliminate the requirement of demonstrating compelling humanitarian reasons for provisional release in the period between the close of the prosecution's case and the entry of a judgement of conviction.

While the Appeals Chamber has the power through jurisprudence to write the compelling humanitarian reasons requirement into Rule 65(B), the plenary of Judges has the power to write the requirement out of the Rules. This is a normal function of the system of checks and balances found in many national systems, where legislative bodies are allowed to limit or negate the effect of judicial decisions through enactment of legislation or rules.

Release after a judgement of conviction, provided for in Rule 65(I), would remain unaffected by the proposed amendment.

Article 93

Other forms of co-operation

(7) (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State

News from International Courts and Tribunals

International Criminal Court

Trial Chamber II, Situation in the Democratic Republic of the Congo, In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

Fabrice Bousquet, Intern, Office of Public Counsel for the Defence, ICC

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

"Decision on an *Amicus Curiae* application and on the « Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile »", 9 June 2011, n° ICC-01/04-01/07-3003.

The three Judges of Trial Chamber II ("the Chamber") had to rule on a complex question. They had to clarify the duty incumbent on the Court as to the protection of three persons (detained witnesses) detained in Democratic Republic of the Congo (DRC) and transferred to The Hague for the purpose of giving testimony before the Court on the request of the Defence for Germain Katanga.

In their application, the Duty Counsel of the detained witnesses asked the Chamber to present them to the Dutch authorities for asylum. By "presentation", Duty Counsel meant that the Chamber should grant the detained witnesses : a) suspension of the application of article 93(7) of the Rome Statute (hereafter "the Statute"), which requires the Court to return without delay detained witnesses once their testimony is finished; b) permission to file an application for asylum; c) authorisation to communicate with their Dutch Counsel from the detention centre in Scheveningen and d) a transfer to the Dutch authorities, which involves the Court explicitly recognising that detained witnesses are under the jurisdiction of the Netherlands for the purpose of asylum process. Two reasons were advanced in support of this application. On the one hand, the detained witnesses expressed fear for their lives upon their return to the DRC, their safety and their right to a fair trial. Their fear comes from the dangers associated with becoming a political opponent of the sitting government and because of their testimony in which they emphasised the involvement of the most senior authorities of Kinshasa in the Bogoro attack. On the other hand, they considered the protective measures proposed by the Registry patently inadequate because the Registry's protection program was designed for people at liberty.

Germain Katanga

Since the Duty Counsel considered that the submission of an asylum application was beyond the scope of his mandate, two Dutch Counsel appointed for the detained witnesses for the purpose of filing an asylum application submitted an *amicus curiae* application. The Chamber rejected this application; it considered that it was not useful for a proper determination of the case and it would not provide indispensable assistance or information that it could not procure by other means.

To rule on the request of the Duty Counsel, the Chamber essentially analysed the application as a request for the Court to adopt effective protective measures for the benefit of detained witnesses, pursuant *inter alia* to article 68 of the Statute.

As a preliminary matter, the Chamber considered that it is no longer necessary to rule on points b) and d) mentioned above. The Chamber said that because an application for asylum has effectively been submitted to the Dutch authorities, it cannot take further action to enable detained witnesses to make formal application to the said authorities. Besides, the Chamber emphasised that these authorities have clearly indicated that an application for asylum would be considered if presented to them. In doing so, the Chamber has not ruled explicitly on the jurisdictional question of the Netherlands pertaining to detained witnesses. The decision focuses on three points of the duty of the Court as to the protection of witnesses.

Firstly, the Chamber clarifies the precise scope of the duty incumbent to the Court to protect witnesses, as enshrined *inter alia* in article 68 of the Statute. The Chamber deemed that the Statute unequivocally obliges the Court to take all protective measures necessary to prevent the risk witnesses will incur "on account of their cooperation with the Court". This obligation, in accordance of article 21(3) of the Statute, must be consistent with internationally recognised human rights. In contrast, the Chamber found it is not bound to assess risks arising from human rights violations by the authorities of the country of origin or to assess risks of persecution faced by witnesses who are applying for asylum. Those two assessments are under the duty of the Dutch authorities who are empowered to determine the scope of their obligations under the right to asylum and the "*non-refoulement*" principle. The Chamber reinforced its position by noting that only a state with a territory is truly in a position to apply this principle. Assuming the assessment of the Dutch authorities on this point, the Chamber recognises implicitly its jurisdiction on the detained witnesses in this matter.

Mathieu Ngudjolo Chui

Secondly, the Chamber decided to stay the return of the detained witnesses to the DRC by suspending the immediate implementation of article 93(7) of the Statute. Three reasons are advanced. To begin with, the Chamber notes that the issue of protection has not been resolved yet because the parties' and participants' submissions are expected on the report of the Registry concerning the final assessment on risks and protective measures which could be taken. Next, the Chamber considers that a return without delay of the detained witnesses to the DRC will be a violation of internationally recognised human rights. These human rights include the right for detained witnesses to seek asylum, which belongs to every person regardless of whether detained or not, and the fundamental right to exercise an effective remedy. Finally, the Chamber added that it can not impose a requirement on the host State to cooperate with the Court to immediately return the detained witnesses to the DRC, in transporting them to the airport, without forcing the Netherlands to disregard the rights of detained witnesses to invoke the "*non-refoulement"* principle. The Chamber also states that the detained witnesses are to be held for the time being by the Court on the basis of article 93(7) of the Statute and Rule 192 of the Rules of Procedure and Evidence, but that the Court cannot consider ensuring custody indefinitely.

Thirdly, the Chamber considered that it is for the Registrar to authorise contact between the detained witnesses and their Dutch Counsel within the detention centre as soon as possible. The Chamber recalled that, although the conditions of access to detained persons comes under the exclusive purview of the Chief Custody Officer and the Registrar and, in case on appeal, of the Presidency, article 21(3) of the Statute applies to the Court, a term encompassing all of its constituent organs. The Chamber noted that an agreement of cooperation between the Registry and the Congolese authorities was concluded prior to the detained witness's transfer to the Court. This provided the prior approval of the Congolese authorities for any telephone contact between witnesses and the outside. In the Chamber's view this situation cannot continue: the right to seek asylum cannot be conceived if the applicants are unable to correspond and to meet with the lawyers of their choice.

Article 21

Applicable law

(3) The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Judge Ekaterina Trendafilova

As a final point, the decision considered that three possible scenarios that may arise. The first scenario is the return of the detained witnesses to the DRC under two conditions: that the protective measures proposed by the Registry are satisfactory and that the application for asylum is denied by the Dutch authorities. The second one is the non-return of detained witnesses to the DRC, if the protective measures proposed are definitely insufficient to meet the requirements of article 68 of the Statute, if the Dutch authorities grant the application for asylum or applies the *"non-refoulement"* principle. Lastly, in case the Court considers the protective measures satisfactory while the decision of the Dutch authorities on asylum or "*non-refoulement"* is still pending, the Court should seek a solution in order to determine whether the detention should be maintained and if so in whose custody.

On 15 June, 2011, the Prosecutor and the Dutch authorities have each introduced an application for leave to appeal. The day after, the Congolese authorities did the same.

Article 61

Confirmation of the charges before trial

(6) At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

Situation in the Republic of Kenya, Prosecutor v. Ruto, Kosgey, and Sang

Seth Engel, Intern, Office of Public Counsel for the Defence, ICC *

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

"Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit and Amended List of Viva Voce Witnesses," ICC-01/09-01/11-221, 25 July 2011

Judge Ekaterina Trendafilova, the Single Judge of Pre-Trial Chamber II (PTCII), issued a decision on the Defence's intention to call 43 live, or *viva voce*, witnesses. The Judge found that this amount of live witnesses to be "*per se* manifestly excessive and disproportionate for the purposes of the confirmation of charges hearing". Any other ruling, according to the Single Judge, would risk conflating the roles of the pre-trial and the trial stages by turning the confirmation of charges hearing into a "mere anticipation of the trial stage".

The Single Judge takes pains to carefully delineate her findings within the context of the confirmation of charges hearing in order to detach them from hearings in the trial context. She states that that the *sub judice* issue is not whether the Defence teams should be authorised to rely on live testimonies for their respective procedural strategies, but rather whether such testimonies can be elicited via oral questioning of witnesses at the confirmation of charges hearing. Instead of oral questioning, the Single Judge argues, the more appropriate method of eliciting evidence from a witness during the confirmation of charges may be written statements.

William Ruto

It is clear that the Single Judge is attempting to tread what she considers to be a fine line between two contrasting duties that are incumbent upon her. On one hand, the suspects have rights enumerated by the Statute in article 61(6) during the confirmation hearing, i.e. the rights to object to the charges, challenge the evidence presented by the Prosecutor and present their own evidence. On the other hand, however, article 67(1)(c) provides for the right of suspects "to be tried without delay," which the Single Judge translates as "expeditiousness of the proceedings".

In her decision, the Single Judge appears to resolve this tension by stating that she does not consider the principle of expeditiousness to be in conflict with the rights of the defence. In this way, she simultaneously refutes the Defence arguments supporting large amounts of live testimony as inherent to their article 66(1) rights while asserting the right to be tried without undue delay as paramount, regardless of the actual wishes of the accused.

The Judge strengthens her argument by stating that all three suspects enjoy the right to an expeditious trial equally and the procedural strategy of one suspect calling several live witnesses could "mutually and unduly prejudice" the other two suspects. In addition, the Judge recalls the defendant's article 67(1) rights, which never makes the right to live testimony explicit. This, coupled with the Judge's finding that written testimony is "not a *priori* accorded lesser probative value", leads the Judge to decide to limit the amount of *viva voce* witnesses permitted at the confirmation hearings.

Joshua Arap Sang

Before deciding on how many live witnesses the defence teams will be permitted to call, the Single Judge analyses what she calls the "substantial duplication of evidence" that would have taken place had all of the 43 witnesses been questioned. She found that several witnesses from all three defendants' witness lists would have overlapped in testimony and were indeed scheduled to be questioned on the same exact issue.

The Single Judge then decided that a maximum of two live witnesses for each suspect would permit the Defence to exercise its rights fully in light of her concern for expeditiousness. She further suggested that counsel should prioritise those witnesses who requested that their testimony be live or those who are expected to testify in relation to several elements of the crimes charged. Counsel is further reminded that if even one of the constituent elements of the crimes charged is not established under the threshold required by article 61(7) of the Statute, it would be sufficient for the Chambers to decide not to confirm the charges.

In the same decision, the Single Judge also considered the Prosecutor's request for reclassification of the list of *viva voce* witnesses by Mr. Ruto and Mr. Sang from "confidential *ex parte*" to "confidential." The Judge also *proprio motu* decided to include the witness list of Mr. Kosgey into the Prosecutor's request, although the Prosecutor did not know it existed. The reclassification, if accepted, would take place under a judge's *propio motu* regulation 23 bis ability to reclassify any document if there is no factual and legal basis for the chosen classification.

Judge Trendafilova held that the lists were already properly classified as *ex parte* since the Defence is only obligated to submit its list of evidence no later than 15 days before the commencement of charges under rule 121(6).

Although the Judge had asked for both sides to submit their lists of *viva voce* witnesses in advance, the request was merely designed to allow the Chamber to properly organise the proceedings and was not intended to be "an anticipation of the deadline for the submission of their respective lists of evidence". It was therefore held that the Prosecutor "cannot expect the Defence teams to disclose the identities of the proposed live witnesses" at this time, especially since these lists are currently provisional only and were set to be disclosed by 16 August 2011.

Article 82

Appeal against other decisions

(1) Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Trial Chamber II, Situation In The Democratic Republic of the Congo In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

Mariam SY, Intern, Office of Public Counsel for the Defence, ICC*.

*The views expressed herein are those of the author alone and do not reflect the views of the ICC

"Decision on three applications for leave to appeal" 9 June 2011

On 6 July 2007, the Pre-trial Chamber issued a sealed warrant of arrest for **Mathieu Ngudjolo Chui** (unsealed on 7 February 2008) listing three counts of crimes against humanity and six counts of war crimes. On 10 March 2008, Pre-Trial Chamber I joined Chui's case with that of Germain Katanga, confirming the charges on 26 September 2008 in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui. The trial of the two accused began on 24 November 2009.

On 9 June, Trial Chamber II issued its decision on the *amicus curiae* application and on the "Requête tendant à obtenir presentation des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile", (articles 68 and 93(7) of the Statute), (hereafter "the impugned decision"). In this decision, the Chamber noted that an application of asylum request had already been submitted by the three detained witnesses before the Dutch authorities. The Chamber decided therefore to suspend the immediate return of the detained witnesses to DRC pending a decision of the Dutch authorities on their asylum request and the adoption of satisfactory measures according to the meaning of Article 68 of the Rome Statute.

On 15 June, the Prosecution and the Government of the Kingdom of the Netherlands sought leave to appeal the decision on the basis of article 82 (1) (d) of the Rome Statute. Furthermore, the authorities of Democratic Republic of Congo submitted a filing requesting the Appeals Chamber to order the immediate return of the detained witnesses to the DRC.

Responding to these three applications, Trial Chamber II considered whether an appeal against the impugned decision was in fact subjected to the Chamber's authorisation. The Chamber noted that article 82 (1) (d) was the sole provision pursuant to which it may grant appeal.

Mathieu Ngudjolo Chui

Raising the analysis of the Appeals Chamber regarding the aforementioned article, the Chamber recalled its power to decide whether it may grant leave to appeal. In fact, a right to appeal arises only if the Trial Chamber is of the opinion that an interlocutory or an intermediate decision must receive the immediate attention of the Appeal Chamber. The Chamber emphasised the fact that the purpose of Article 82 (1) (d) was to pre-empt the repercussion of erroneous decisions on the fairness of the proceedings or the outcome of the trial and unequivocally concerns decisions falling within the ambit of the conduct of the trial.

Recalling the fact that the impugned decision was rendered at the request of the detained witnesses in relation to their asylum claim which have been addressed to Dutch authorities, Trial Chamber II underlined that the impugned decision made a clear distinction between matter pertaining to asylum claim and those pertaining to witness protection and article 68, which the latter issue was not resolved in the impugned decision.

Noting that the three applications for leave to appeal dealt with the asylum request, the Chamber held that these applications did not fall directly within the scope of "The prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui" proceedings. Moreover, the Chamber emphasised that the impugned decision seemed entirely discrete of the proceedings.

Trial Chamber II therefore considered that it would overstep its vested power in agreeing to examine applications for leave to appeal submitted in respect of a decision which did not fall by its nature under article 82(1)(d). Noting that these applications could be lodged directly with the Appeals Chamber without its prior authorisation, the Chamber declared the three applications inadmissible.

On 15 July, the Government of the Kingdom of the Netherlands filed an application before the Appeals Chamber requesting directions as to the procedure to follow concerning the Appeal which it intends to file.

The Appeals Chamber, Situation In The Democratic Republic of the Congo, In the case of The Prosecutor v. Callixte Mbarushimana (ICC-01/04-01/10)

Mariam SY, Intern, Office of Public Counsel for the Defence, ICC.

*The views expressed herein are those of the author alone and do not reflect the views of the ICC

"Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the' Defence Request for Interim Release" 14 July 2011.

On May 19th, the Pre-Trial Chamber issued its decision on the Defence Request for Interim release (hereafter "the impugned decision"). In this decision, the Pre-Trial Chamber examined the Defence request in light of Article 58(1)(b) of the Rome Statute and declared that continued detention of the accused appeared to be essential.

The suspect appealed the Decision on the ground that in formulating the impugned decision the Pre-Trial Chamber erroneously evaluated the evidence presented against him in support of the grounds of arrest either by failing to attribute its appropriate weight in the circumstances or by misinterpreting it. Thus, the suspect asked to the Appeals Chamber to reverse the impugned decision.

Noting that the defendant submitted his application on error of fact, the Appeals Chamber explicated its power of interference with the Pre-Trial Chamber's evaluation of evidence in the sole case of clear error of fact from the Pre-Trial Chamber that could vitiate the decision. Moreover, the Appeals Chamber underlined the obligation of the appellant to set out the alleged error and to demonstrate the consequences of the error on the impugned decision.

Callixte Mbarushimana

The suspect argued that the Pre-Trial Chamber gave inappropriate weight to the prospect that a potential significant prison sentence can increase his motivations to abscond and neglected the previous conclusion that there were grounds to believe that he was an accessory perpetrator. Recalling the power of the Pre-Trial Chamber to determine the existence of the factors and the weight they shall be given, the Appeals Chamber held that the suspect only identified a disagreement with the Pre-Trial Chamber as to the proper weight to give to these factors.

Then, the Appeals Chamber rejected the Defence's arguments that the suspect did not have the means to abscond and considered that all others suspects' access to international financial networks has no impact on Mbarushimana's potential access to such a network. Moreover, the Appeals Chamber estimated that despite the lack of evidence that FLDR funds would be used to enable Mbarushimana to abscond, it could not interfere on the Pre-Trial Chamber's determination that such funds could be potentially provided to the suspect in the future. Finally, the Appeals Chamber confirmed the finding of the Pre-Trial Chamber based on the UN Security Council report stipulating that the FLDR had access to sufficient resources and the ability to transfer it despite an UN asset freeze to provide the suspect with means to abscond.

Regarding the MONUC documents related to FLDR found at Mbarushimana's residence, the suspect argued that the Pre-Trial Chamber did not request the Prosecutor prove the legality of the documents. The Appeals Chamber responded that the suspect did not challenge the legality of the material seized at his residence in the proceedings which lead to the impugned decision.

The suspect submitted that the confiscated documents were not related to Prosecution's investigations. Moreover, he advanced that the Pre-Trial Chamber's findings as to the role of the MONUC and the current activity of the FDLR were not supplemented by relevant evidence. For the first issue, the Appeals Chamber held that the suspect distorted the Pre-Trial Chamber's conclusions. Therefore, the Appeals Chamber found that despite the fact that the seized documents were unre-

Callixte Mbarushimana was arrested on 11 October 2010 after the ICC unsealed a warrant for his arrest issued in September of the same year. The Prosecution had applied for the arrest warrant under Article 58 of the Rome Statute in August 2010. On 25 January 2011, Mr Mbarushimana was transferred by the French justice authorities to the ICC detention centre in The Hague. The initial appearance of Callixte Mbarushimana before Pre-Trial Chamber I of the ICC took place in Courtroom I, on Friday, 28 January 2011. The confirmation of charges hearing was set to take place on the 16 September 2011.

Article 58

(1) 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:

(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

lated to Prosecution's investigations, it could not hamper the Pre-Trial Chamber's prediction that the existence of a channel of communication between MONUC and FDLR through which relevant and confidential information could be leaked, created a risk that the suspect might use such information to interfere with ongoing investigations. For the second issue, The Appeals Chamber found that the Pre-Trial Chamber could have further demonstrated its conclusions but considered that the lack of evidence did not vitiate them.

As regards to witnesses' issues, the Appeals Chamber agreed with the Pre-Trial Chamber's statement that the future disclosure of DRC witnesses' names could provide the suspect with means to intimidate witnesses and obstruct proceedings. The Appeals Chamber rejected the suspect argument regarding the interpretation of its notebook entry, and thus refused to consider it as covered by privilege as it was not asserted to be of such a nature in previous proceedings.

On appeal, the suspect challenged the evidentiary basis of the Pre-Trial Chamber's finding regarding his IT skills. He also submitted that there was no evidence that he has ever contributed to the commission of crimes through phone call or emails. The Appeals Chamber reconciled the Pre-Trial Chamber's and the Prosecution's findings that the suspect had a reasonable IT experience and that he had the ability to have telephone and internet access in ways which could not easily be controlled.

Noting that the appellant failed to identify clear errors on the impugned decision in relation with the Pre-Trial Chamber's conclusions under Article 58 (1) (b), the Appeals Chamber confirmed the impugned decision.

Trial Chamber II, Situation in the Democratic Republic of the Congo In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

Mariam SY, Intern, Office of Public Counsel for the Defence, ICC*.

*The views expressed herein are those of the author alone and do not reflect the views of the ICC

"Décision relative au maintien du statut de victime participant à la procédure des victimes a/381/09 et a /363/09 et à la demande de Me Nsita Luvengika en vue d'être autorisé à mettre fin à son mandat de Représentant légal desdites victimes " 7 juillet 2011.

On the 31 July 2009, the Chamber granted the status of 'victim' to applicants' a/381/09 and a/363/09 through the representative pan/363/09. Furthermore, on 9 November 2010, the Chamber permitted the aforementioned victims to appear before the Court in order to testify in proceedings.

Germain Katanga

Following serious doubts on the veracity of the allegations of victims' a/381/09 and a/363/09, Me Nsita Luvengika asked the Chamber to withdraw the victims from the witness list. Furthermore, he advanced that despite serious doubts as to the veracity of the allegations and material submitted by the victims, he still had not reached the conclusion that the victims were not affected by the alleged crimes. The legal representative estimated therefore, that it was necessary to proceed with further investigations.

On the 11 February 2011, the Chamber ordered the legal representative to communicate the result of his investigations towards the victims.

Following the Chamber's order and as result of his investigations, the legal representative submitted a report requesting the termination of representation for the victims. However, Me Nsita Luvengika recalled international criminal jurisprudence and argued that he could not dis-

close positive or negative information which was likely to challenge his clients' victim status without their prior agreement even when ending their representation.

Responding to the legal representative request and to the Defence and Registry observations, the Chamber recalled its decision of 31 July 2009 and noted that at that time the applicants met the *prima facie* criteria to be granted victim status. Notwithstanding, the Chamber noted the serious doubt raised by the legal representative towards the veracity of the allegations of victims' a/381/09 and a/363/09. Indeed, Counsel Luvengika questioned the authenticity of the information submitted before the Chamber by the alleged victims in order to obtain the victim status, for instance the production of evidence which was not in the geographical and temporal scope of the charges. Following interviews with the victims, Counsel informed the Chamber that he did not reach satisfactory answers to eradicate the doubts. Therefore, and in accordance with the Rule 91 (1) of the Rule of Procedure and Evidence, the Chamber decided to withdraw the victim status from the alleged victims.

To the extent that the victims were no further allowed to participate in proceedings, the Chamber held that its decision of February 2011 was obsolete. The Chamber ruled similarly for the application requesting the ending of the representation of Counsel Luvengika.

The Chamber decided for fair trial purposes to proceed with the disclosure of confidential information related to victims. Accordingly, the Chamber ordered the Registry to reclassify confidential written documents into a public version and ordered the legal representative to provide the Court with a lesser redacted public version of ICC-01/04-01/07-2668-Conf written document.

The warrant of arrest for **Germain Katanga** lists six counts of war crimes and three counts of crimes against humanity The arrest warrant was issued under seal by the Pre-Trial Chamber on 2 July 2007 and unsealed on 18 October 2007. Germain Katanga was surrendered to the Court on 17 October 2007 by the authorities of the DRC and transferred to The Hague the following day. His case arises from the situation in the DRC, which has been under investigation by the Office of the Prosecutor of the ICC since 1 July 2002.

Trial Chamber II, Situation in The Democratic Republic of the Congo, In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

Mariam SY, Intern, Office of Public Counsel for the Defence, ICC*.

*The views expressed herein are those of the author alone and do not reflect the views of the ICC

" Décision relative à la seconde requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo " 6 décembre 2011.

On May 2010, Trial Chamber II sought the views of the Prosecution and the Defence regarding the Urgent Defence motion for Cooperation of the Democratic Republic of the Congo (DRC) Government. During this *ex-parte* hearing, the Prosecution proposed to facilitate the contacts between the Defence and DRC authorities so that the Defence could obtain the relevant material for trial preparation purposes.

On 27 September 2010, the Defence submitted before the Chamber its Second Defence Motion for Cooperation of the DRC Government. Raising the assistance of the Prosecution for the proceedings before DRC Ministry of Defence, the Defence claimed a lack of cooperation from DRC authorities as its request was still pending. The Defence provided, therefore, additional documents to support its motion.

Responding to the Defence motion, Trial Chamber II considered whether the request fulfilled the requisite criteria to order the DRC authorities' cooperation. Accordingly, Trial Chamber II recalled its power to determine the nature of the application and, its duty of verification of the accuracy of the request as regards Part 9 of the Rome Statute.

Trial Chamber II analysed the Defence request in light of Article 93(1) of the Rome Statute which stipulates forms of assistance that the State's Parties shall provide to the Court other than surrender and arrest and in light of Article 96(2), which defines the criteria that an application for other forms of cooperation must include in order to permit the execution by the requested State.

Trial Chamber II held that requests of DRC government's opinion on factual issues did not meet the provisions of Article 93(1). Trial Chamber II then considered that the Defence did not provide sufficient information in regard to the sought after documents. Moreover, Trial Chamber II em-

phasised that the Defence should have further demonstrated the necessity to request the DRC's co-operation. Consequently and in respect of the Article 96(2) provisions, Trial Chamber II rejected this aspect of the Defence motion.

However, Trial Chamber II held that the application submitted in point 9 of the Defence motion had sufficient degree of precision as it was referring to specific documents, such as the listing of the Ituri fighting militias which had been reintegrated in the Congolese's army and the listing of the proposed grades.

Recalling its power of intervention to facilitate Defence preparation, Trial Chamber II decided to seek the cooperation of the DRC authorities for the transmission of the listings. Therefore, Trial Chamber II ordered the Registry, in accordance with Article 87 and Rule 176 of the Rules of Procedure and Evidence, to provide DRC authorities with an urgent request for cooperation.

ECCC Internal Rule 32

Medical Examination of the Charged Person or Accused

The Co-Investigating Judges or the Chambers may, for the purpose of determining whether a Charged Person or Accused is physically and mentally fit to stand trial, or for any other reasons, or at the request of a party, order that they undergo a medical, psychiatric or psychological examination by an expert. The reasons for such order, and the report of the expert, shall be recorded in the case file.

Extraordinary Chambers in the Courts of Cambodia

Contributed by: Kirsty Sutherland, Legal Intern, Defence Support Section

* 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.

Case 002 – Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thrith

The preliminary hearing on fitness to stand trial was held from 29-31 August. It was convened to allow adversarial questioning of expert geriatrician Professor John Campbell, who was appointed by the Trial Chamber following the Defence requests for assessment of the physical and mental fitness to stand trial of Ieng Sary, Ieng Thirith, and Nuon Chea under ECCC Internal Rule 32**.** According to Professor Campbell's reports to the Trial Chamber, no further expert assessment is recommended for Ieng Sary or Nuon Chea. However, he has recommended further expert examination of Ieng Thirith.

Under questioning by Ieng Thirith's Defence Team, Professor Campbell confirmed that he had diagnosed Ieng Thirith as suffering from moderate to severe dementia, most likely due to the chronic progressive disease Alzheimer's. Ieng Thirith's Defence Team posed a series of questions drawn from the test for fitness to stand trial as delineated in *Prosecutor v Strugar*. It was Professor Campbell's view that Ieng Thirith would have "great difficulty" in meaningfully exercising her fair trial rights, and further that in her current condition the challenges facing Ieng Thirith in communicating effectively with her counsel are "insurmountable." Neither the Office of the Co-Prosecutors nor the Civil Parties directly challenged Professor Campbell's findings.

Khieu Samphan

Nuon Chea's Defence Team disagreed with Professor Campbell's assessment that Nuon Chea is fit to stand trial. The Defence emphasised its concerns regarding Professor Campbell's lack of experience acting as an expert consultant on an individual's legal fitness in criminal proceedings. It also expressed doubt regarding his specific expertise in the assessment of concentration. Further questioning asserted that Professor Campbell's methodology was flawed, as were the reports and history upon which he relied in making his assessment, that he had made no serious attempts to assess Nuon Chea's mental abilities, and that Professor Campbell was insufficiently aware of relevant psychological tests that could be conducted. The Defence request for additional expert testing was opposed by the Prosecution on the grounds that there is no "adequate reason" to appoint an

additional expert. The Prosecution argued that Professor Campbell was fully qualified to make the assessment, noting that the Nuon Chea Defence Team had not objected to his qualifications until disputing his findings. They also argued that Nuon Chea's behaviour demonstrated his ability to follow and participate in the proceedings, that the Defence had made no submissions that Nuon Chea is actually unfit or unable to instruct counsel, and that Nuon Chea had earlier refused an offered psychiatric assessment.

Joint Criminal Enterprise III

On 22 July 2011 the Defence Teams filed Responses to the Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III ("JCE III") as an Alternative Mode of Liability. The Nuon Chea, Ieng Sary and Ieng Thirith Defence teams argued that JCE III is not applicable to the ECCC because it did not exist under customary international law during the 1975-1979 jurisdiction of the court and thus the Accused could not have foreseen this mode of liability at the time. Furthermore, all four Defence teams argued that the Co-Prosecutors were attempting to advance a jurisdictional argument after the deadline for Preliminary Objections had passed as their request amounted to an amendment of the charges and not merely to recharacterisation of the applicable facts.

Ieng Sary

On 5 August 2011, the Ieng Sary Defence Team filed a Request for Leave to Reply and Reply to the Civil Parties' Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III ('JCE III') as an Alternative Mode of Liability. The Ieng Sary Defence Team noted that certain Civil Parties had held consistently that JCE III is inapplicable in Case 002 as well as in Case 001, arguing that a Reply was therefore necessary as the Civil Parties' Brief misleads the Trial Chamber into concluding that all of the Civil Parties support the assertions of the Co-Prosecutors with regard to JCE III.

On 12 September 2011, the Trial Chamber issued its Decision on the Applicability of Joint Criminal Enterprise. The Defence Motions alleging that joint criminal enterprise was improperly included in the Closing Order of Case 002 were rejected and the applicability of JCE I and JCE II was reaffirmed. The Trial Chamber found that JCE III was not a part of customary international law between 1975 and 1979 and was therefore not a general principle of law at the time relevant to Case 002. The Chamber therefore also rejected the Co-Prosecutors' request to re-characterise the crimes alleged in the Closing Order to include JCE III in the verdict.

The extended form of Joint Criminal Enterprise ('JCE') or **JCE III**, entailing liability of the members of the group for acts that occur as a natural and foreseeable consequence of carrying out the common purpose. To be found liable under this extended form of JCE, it must be shown that an Accused intended to participate in and further criminal activity of a group, and to contribute to its joint criminal enterprise. It must also be shown that it was foreseeable that a crime outside the scope of this agreement might be perpetrated by one or other members of the group and that the Accused willingly took the risk that this would occur.

Cases 003 and 004

The Defence Support Section (DSS) continued to monitor closely the developments in Cases 003 and 004 and to work to ensure that the rights of the suspects are upheld in conformity with the highest international standards and best practices.

On 26 August 2011, DSS representatives and lawyers from the Ieng Sary Defence Team attended the Public Affairs Section-organised Outreach Forum in Samlot District, Battambang Province. The DSS explained the role of the DSS. With respect to Cases 003 and 004, the Officer-in-Charge of the DSS stated that it is the long-held view of the Defence Support Section that suspects in Cases 003 and 004 are entitled to their fundamental right to legal representation under the ECCC Law, the Court's Internal Rules, and the International Covenant on Civil and Political Rights, which is part of the ECCC legal framework.

Measures taken by the DSS to arrange for the assignment of counsel to individual suspects remain confidential at this stage and therefore cannot be disclosed.

Defence Rostrum

Ivica Rajić granted early release

Ivica Rajić was sentenced at the ICTY to twelve years imprisonment on 8 May 2006; as a reflection of his former authoritative position of command within the Bosnian Croat Army. Rajić had served over two thirds of his twelve year sentence, a total of eight years.

On 2 April 2011 The Embassy of Spain transmitted an order of the Spanish National High Court stipulating that Rajić was eligible for early release in accordance with Spanish law, pursuant to Article 28 of the Statute of the Tribunal, Rule 123; Rules of Procedure and Evidence of the Tribunal and paragraphs; 1 3(b) and 3(c) of the Practice Direction on the Procedure for the Determination of Applicants for Pardon, Communication of Sentence and Early Release of Persons Convicted by the International Tribunal.

Ivica Rajić

By letter dated 18 May 2011, the General Directorate for prisons addressed Rajićs behaviour during his incarceration, stating that “he is well mannered”, and partakes actively in the enrichment the prison provides. Additionally Rajić belonged to the Committee on Peaceful Coexistence and Conflict Resolution, a programme called Workshops for Respect. The official notes reflect a positive attitude and a focus on “obtaining early parole and [access to] his family”. However his acceptance of guilt, remains neutral, Rajić maintains the crimes lay with his subordinates.

On 23 May 2011 a report regarding the psychological condition of Rajić stated; he had shown demonstratively favourable and continual adaptation to his environment, with specific notation of his participation in a scheduled tour where “confidence in the balanced behaviour of the witness was crucial”.

With respectful observation of the gravity of the crimes; the positive reflection given in the official reports, coupled with the substantial co-operation Rajić gave to the Prosecution and the practices of the Tribunal, demonstrated a level of rehabilitation, thus cumulating in the unanimous decision for his early release sanctioned by President Robinson.

Sweden charges man over Kosovo war crimes

Swedish prosecutors have filed war crimes charges against a Serbian man for allegedly taking part in the massacre of ethnic Albanians in the village of Cuska in Kosovo in 1999. The village was the scene of mass executions of 44 Kosovo Albanians committed by Serbian forces on 14 May 1999. The indictment accuses a 34 year old Serb, Milic Martinović, of murder, attempted murder, kidnapping, robbery and arson in connection with the deaths. The accused had been a member of a special PJP police force that entered Cuska in May 1999 in search of "terrorists". The troops had allegedly taken a number of people captive, executed 31 of the 40 people murdered there that day, attempted to kill three others, burned down houses and robbed and manhandled civilians. Martinović is alleged to have repeatedly stood guard while his comrades shot and killed civilians.

Milic Martinović

The accused had sought asylum in Sweden and was arrested in April 2010. If convicted, he could face a life sentence, which in Sweden is typically commuted after 15 to 25 years. He could then be extradited to Serbia.

The trial is set to commence 19 September and is expected to last until December of the same year.

On 13 March 2010 the Serbian war crimes prosecution office arrested nine members of the so-called Šakal (The Jackals) unit on suspicion of involvement in the killings.

Fatmir Limaj faces war crimes trial in Kosovo

It has been announced by officials that a decision has been taken to put a member of the Kosovo parliament, Fatmir Limaj, on trial for the alleged execution and torture of three Serb prisoners during the 1998-99 Kosovo war. Limaj was formerly a commander in the Kosovo Liberation Army and has previously been indicted by the ICTY for other counts of wars crimes as well as accusations of corruption when serving as Kosovo's minister of transport. In 2005, the ICTY cleared Limaj of all charges relating to crimes allegedly committed at the Llapushnik KLA prison camp.

The decision follows on from the resolution to retry former Kosovo Prime Minister, Ramush Haradinaj, for his actions during the war. Haradinaj was acquitted in 2008 after two key witnesses refused to testify against him and two others charged with torture and murder of Serb civilians.

Fatmir Limaj is one of 11 former KLA members to be tried for crimes committed against civilians and prisoners of war

Fatmir Limaj

Blog Updates

- Toni Holness, **Participation as Reparations,** 7 September 2011, available at: http://intlawgrrls.blogspot.com/2011/09/participation-as-reparations.html
- Diane Marie Amann, **Nowhere to Stay?,** 9 September 2011, available at: http://intlawgrrls.blogspot.com/2011/09/nowhere-to-stay.html
- Richard Falk, **Preliminary Libyan Scorecard: Acting Beyond the UN Mandate**, 6 September 2011, available at: http://richardfalk.wordpress.com/2011/09/06/preliminary-libyan-scorecard-acting-beyond-the-un-mandate/
- Kevin Jon Heller, **How Not To Argue Libya Should Prosecute Gaddafi (Updated),** 7 September 2011, available at: http://opiniojuris.org/2011/09/07/how-not-to-argue-libya-should-prosecute-gaddafi/
- Ashley Benner, **Uganda Seeks to End Amnesty For LRA Rebels,** 8 September 2011, available at: http://www.enoughproject.org/blogs/uganda-seeks-end-amnesty-lra-rebels
- Kevin Jon Heller, **Criminal Membership's Lack of Precedential Value,** 12 September 2011**,** available at: http://opiniojuris.org/2011/09/12/criminal-memberships-lack-of-precedential-value/
- James A. Goldston, **All Change at the ICC: Time to Focus on Merit, Not Connections,** 19 September 2011, http://ijcentral.org/blog/all_change_at_the_icc_time_to_focus_on_merit_not_connections/

Dutch state liable for 1947 Indonesia Massacre

The Dutch government has been ordered by The Hague civil court to compensate the widows of seven villagers who were executed in a massacre during Indonesia's battle for independence from colonial rule. On 9 December, 1947, Dutch soldiers in Java, Indonesia walked into the village of Rawagede and executed all the male inhabitants. Saih Bin Sakam (pictured above) is one survivor of the event who seeks compensation from the government.

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Publications

Articles

Emmanuel Decaux, 2011, The Place of Human Rights Courts and International Criminal Courts in the International System, *Journal of International Criminal Justice,* 9, pp. 597-608.

Ralph Wilde, 2011, Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion, *Leiden Journal of International Law,* 24, pp. 149-154.

David Scheffer, 2010, The Complex Crime of Agression under the Rome Statute, *Leiden Journal of International Law,* 23, pp. 897– 904.

Barrie Sander, 2010, Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence, *Leiden Journal of International Law,* 23, pp. 105– 135.

Books

David Ormerod and Lord Justice Hooper, 2010, *Blackstone's criminal practice 2010,* Oxford University Press.

James Richardson (ed.), 2010, *Archbold: Criminal pleading, Evidence and Practice 2011,* 59th edition, Sweet and Maxwell.

Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's impact in an postwar state*, Cambridge University Press 2010.

Alette Smeulers (ed.), 2010, *Collective violence and international criminal justice: an interdisciplinary approach*, Intersentia.

Upcoming Events

Final conference of the International Criminal Procedure Expert Framework

Date: 27 October 2011 - 28 October 2011

Time: 08:15 - 18:00

Organiser: International Criminal Procedure Expert Framework

Venue: Peace Palace, Carnegieplein 2, 2517 KJ, The Hague

More Info: http://www.haguejusticeportal.net/eCache/DEF/12/703.TGFuZz1FTg.html

Fifty Years after the Eichmann Trial in Jerusalem

Date: Tuesday 11 October, 2011,

Time: 17.30-19.30 (lecture starts at 18.00)

Venue: Peace Palace Library, Historic Reading Room

Special Tribunal for Lebanon

Opportunities

Special Assistant to the Deputy Registrar (P-3), The Hague, Netherlands

Special Tribunal for Lebanon

Closing Date: 1 October 2011

Investigator (P3), Leidschendam, The Netherlands

Special Tribunal for Lebanon

Closing Date: Saturday, 31 December 2011

Legal Secretary, The Hague, The Netherlands

Permanent Court of Arbitration

Closing Date: 30 September 2011.