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NEWSLETTER

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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)

Cases on Appeal

Popović *et al.* (IT-05-88)

Prlić *et al.* (IT-04-74)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

Prosecutor v. Mladić (IT-09-92)

On 15 April the Trial Chamber in the *Mladić* case rendered its Judgement pursuant to Rule 98*bis* of the Rules of Procedure and Evidence of the Tribunal. Rule 98*bis* provides an opportunity for the Defence to present an oral submission to the Trial Chamber after the close of the Prosecution's case-in-chief, seeking a dismissal of all or some counts of the indictment for the failure of the Prosecution to present sufficient evidence for there to have been any case for the Defence to answer. Rule 98*bis* was amended in 2004, in an effort to streamline the submissions and process. This amendment changed the nature of Rule 98*bis* motions, making the submissions and the decision oral rather than written, and changed the wording to apply to counts rather than specific charges. Hence, the Trial Chamber's 15 April Judgement was rendered orally, and addressed the oral submissions of the Defence and Prosecution, which had previously been given in court, from 17 March to 19 March. The Trial Chamber, during two sessions of hearings, detailed some of the submissions of the parties and rendered its decision, in essence denying in their entirety the various Defence submissions for acquittal under Rule 98*bis*.

Under the Rule, a Trial Chamber can enter a Judgement of acquittal on counts in the indictment if there is no evidence capable of supporting a conviction. At this stage of the proceedings the Trial Chamber does not consider the credibility of witnesses or evidence, unless a witness is so lacking in credibility and reliability that no reasonable Chamber could find them credible or reliable. Thus, if a reasonable Chamber could be satisfied beyond a reasonable doubt of the guilt of an Accused on the basis of the evidence adduced in relation to a count, then the count must stand. There must be sufficient evidence for each element of the alleged

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crimes and for one of the modes of liability contained in the indictment. The test would not be satisfied if there was no evidence. If the Prosecution has presented evidence, that evidence is entitled to credence unless incapable of belief. At this stage, the evidence should be taken at its highest for the Prosecution.

At the time of the oral submissions by both the Defence and Prosecution, the Defence argued that judicial economy and the intent behind Rule 98*bis* required the Chamber to look at individual charges rather than just counts of the indictment. Legal Consultant Dragan Ivetić argued, among other things, that the Defence would be forced to expend valuable resources and time presenting evidence as to counts that the Prosecution has failed to present sufficient evidence on. It was argued that, only with a firm ruling by the Chamber, the Defence could be guided as to what charges the Prosecution had presented a colorable case for which the Defence was expected to rebut or answer the same.

Further, the Defence argued that with the lack of specificity that was in the Indictment, unless there was some guidance offered under Rule 98*bis*, the Defence would be left with an impossibly overreaching case to answer, within the limited time and resources available to it. In this manner, the Defence asked for several specific incidents to be dropped from the case, including the Jadar River, Sirokaća, and Skrljevita, for which it was argued that the evidence presented by the Prosecution even if given the benefit of the doubt as is due under the Rule, in favor of the Prosecution, failed to establish a case whereby the Accused could be found liable. For Jadar River it was the existence of the incident at all that was called into question, and for the other two it was whether the alleged perpetrators could be linked to Mladić, insofar as in one case the victim said the shell came from the Army of Bosnia and Herzegovina (ABIH) side, and in the other, investigation named perpetrators were minors, who could not have been Army of Republika Srpska (VRS) soldiers, whereas the VRS military police and judicial organs fulfilled their duties to investigate the incident and prosecute the perpetrators.

The Defence also called into question some of the incidents of destruction of religious and cultural sites from the indictment, again asking the Chamber to look at the evidence (or lack thereof) presented for various charges. The Defence focused on the charged instances relating to Bjeljina, Pale and Kalinovik, for purposes of their oral submissions, yet inviting the Chamber to look at all of the charged incidents in the same manner. It was argued that scant evidence had been presented to even establish the presence of such monuments, let alone their time and manner of destruction, so as to link the same to Mladić.

The Defence then also asked for certain modes of liability to be stricken from the case, in particular the alleged Article 7(3) command-superior and Joint Criminal Enterprise (JCE) liability of Mladić over para-militaries, the Serbian Police (MUP) and specific groups like “Arkan’s Tigers” and the “Scorpions”, under the Prosecution evidence that had been presented. The Defence warned of the far-reaching consequences of including this many actors as sharing in the common purpose in light of the lack of specificity in the indictment.

Lastly, the Defence asked for the two counts of Genocide to be dismissed under Rule 98*bis*. More specifically, the Defence challenged the framework of a third category JCE in which Mladić is charged with genocide.

For the Prosecution Dermot Groome responded to the Defence submissions essentially arguing that under Rule 98*bis* the Trial Chamber was bound by the jurisprudence to consider counts as a whole, rather than addressing individual charges. Further, Peter McCloskey focused on evidence it believed demonstrated that the Genocide counts were supportable under the evidence, including focusing on the words used by others, including the Accused. Camille Bibles focused on the crimes of sexual abuse in an attempt to demonstrate that Mladić knew of the same and that these were central to the allegations of Genocide and the other crimes. The Prosecution likewise focused on the so-called “Six Strategic Goals” that were presented by the Bosnian Serb Political Leadership as being evidence of the criminal plan and purpose of the JCE, as well as to commit Genocide.

In reply, the Defence stressed that Mladić did not adopt the “Six Strategic Goals” as they were, but rather called for a moderate position, which was contrary to genocide, and that his own words during the Assembly in question demonstrate that fact. The Defence pointed to other evidence that Mladić did not share an intent common with other alleged JCE

members, by highlighting the evidence of General Milovanović as to Directive 7 and Directive 7/1, where General Mladić removed precisely the wording inserted by Karadžić, which the Prosecution was relying upon for its allegation. Further, the Defence focused on the destruction of religious sites as evidence of genocidal intent, given the serious lack of evidence complained of prior, and that some of the incidents in question are not scheduled incidents.

During its rendering of the Rule 98*bis* Judgement, the Trial Chamber declined to take a charge-based approach and sided with the prior jurisprudence that Rule 98*bis* permitted a chamber only to consider the count as a whole rather than individual charges within the same. In doing so, the Chamber negated the Defence arguments as to Jadar River, Sirokaća, and Skrljevita. The Chamber also stated that so long as one mode of liability survived Rule 98*bis*, other modes of liability would not be dismissed, since the allegations of the indictment collectively charges all the modes together. Thus, in this matter the Defence complaints as to para-militaries, the MUP and Arkan's Tigers and Scorpions were dismissed. The Chamber said the Defence was still in a position to choose whether to present a defence as to the aforementioned and other charges, or at all, despite of the decision of the Chamber, if it believed that there was no case to answer for individual charges.

The Chamber's decision likewise went into some detail as to incidents and charges which had not been raised by the Defence in its submission, to demonstrate why the Chamber was declining to enter an acquittal on other counts of the indictment. Most importantly, the counts on Genocide, which were both upheld by the Chamber for this instance, stating the Chamber has carefully examined the evidence and is satisfied that there is sufficient evidence under the applicable legal standard at this stage of the proceedings for these counts to stand.

The Chamber adjourned the trial until 12 May, at which time a pre-Defence conference is to be held, prior to the commencement of the Defence case-in-chief.

Prosecutor v. Karadžić (IT-95-5/18-I)

On 2, 7 and 14 April, the Trial Chamber delivered its Decisions on the Defence bar table motions concerning Karadžić's statements, Intercepts, municipalities and the Sarajevo component, filed on 4 March.

In a bar table motion, admission of evidence is sought without it being brought up in court through a witness. According to the Trial Chamber, the most appropriate method for the admission of a document is considered to be through a witness, who can answer questions about it. Admission of evidence from the bar table is, however, a practice established in the case-law of the ICTY. Evidence may be admitted from the bar table if it fulfils the requirements of Rule 89, namely that it is relevant, of probative value and displays sufficient indications of authenticity.

If these requirements are satisfied, the Trial Chamber has discretionary power over the admission of the evidence and may exclude evidence if for example its probative value is substantially outweighed by the need to ensure a fair trial. In its present decisions, the Trial Chamber has partly granted the admission of the evidence requested in the Defence motions.

Furthermore, on 7 April the Trial Chamber delivered a decision on the *Defence's Sixth Motion for a Binding order for the United States of America (U.S.),* filed on 3 March. In this Motion, Karadžić requested an order compelling the U.S. to provide him with four documents he had previously requested, since he considers them relevant and necessary for his defence. The U.S. submitted that it has notified the Defence that it is continuing to work on responding to the requests and that it will inform the Defence promptly when it completes its work. The Trial Chamber held that this shows that the U.S. is voluntarily co-operating and is searching for and providing documents in response to the Defence requests and denied the motion.

Additionally, on 9 April the Trial Chamber decided on the Defence's *Eighth Motion for an Order Pursuant to Rule 70,* filed on 1 April. Rule 70 of the Tribunal's Rules of Procedure and Evidence concerns reports, memoranda, or other internal documents with sensitive information prepared by, for example, states that are not subject to disclosure or notification, to ensure co-operation. In the Motion, Karadžić requests that the provisions of Rule 70 should apply to a document

requested from the U.S., which the U.S. is now willing to provide as declassified and redacted, on the condition that Rule 70 applies. The Trial Chamber was satisfied that the provider of the document, the U.S., has consented to provide the document if Rule 70 applies and accordingly granted the motion.

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

On 2 April, the Appeals Chamber in the case of Mićo Stanišić and Stojan Župljanin, issued its *Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement* and dismissed both Motions filed. Župljanin's motion was filed on 21 October 2013 and Stanišić's on 23 October. The Prosecution filed its consolidated response on 25 October and the Applicants filed their replies on 28 and 29 October.

Župljanin requested the Appeals Chamber to vacate the Trial Judgement on the basis that the Trial Chamber was not a properly constituted trial chamber consisting of three impartial judges. This relates to the Harhoff incedent as elaborated on in previous newsletter issues. Stanišić, for the same reason, requested the Appeals Chamber to delcare a mistrial and to vacate the entire trial process. Both Applicants argue that "a reasonable observer, properly informed, could reasonably apprehend bias in favour of conviction on the part of Judge Harhoff."

It was argued that the rebuttal of the presumption of impartiality attached to Judge Harhoff was 'equally' and 'directly' applicable to their case. The Appeals Chamber was not persuaded that the findings of the Special Panel in the Šešelj case constitute extraordinary circumstances that require an interlocutory decision on this matter. It concluded that the Applicants had failed to show the necessity of an interlocutory order and declined to exercises its discretion under Rules 45 and 107 of the Rules of Procedure and Evidence.

The Appeals Chamber further found no justification to stay or terminate appellate proceedings in the case, but noted that both Applicants have filed motions to amend their Notices of Appeal and Stanišić has also requested to have the Harhoff Letter introduced as additional evidence on appeal, purusant to Rule 115.

In two decicisons of 14 April, the Chamber granted Župljanin's and Stanišić's respective motions to amend their Notice of Appeal and ordered the Applicants to file the amended documents by 23 April. The Chamber also ordered Stanišić and Župljanin an addition to the Appeal Brief no later than 5 May. The Prosecution shall file an addition to its Response no later than 26 May and the Applicants to file an addition to their respective Reply Briefs by 2 June.

In another decision of 14 April, the Appeals Chamber granted Stanišić's motion to admit into evidence the Harhoff letter under Rule 115 and ordered the Prosecution to present its rebuttal evidence by 1 May.

In an order of 15 April, Judge Theodor Meron, Presiding, assigned, effectively immediately, Judge William Hussein Sekule to replace himself on the Bench seised of the appeal in the case. The Appeals Chamber is hence composed of Judges Agius, Sekule, Robinson, Daqun and Ramaroson.

ICTY Rules of Procedure and Evidence

Rule 115(A)

A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.

LOOKING BACK...

Special Court for Sierra Leone

Ten years ago…

On 19 April 2004, the bank account of Samuel Hinga Norman, founder and leader of the Special Defence Forces in Sierra Leone, was unfrozen following the orders of the Trial Chamber Judge Bankole Thompson.

Norman had been accused of crimes against humanity, war crimes and other serious violations of international humanitarian law before the SCSL. He was charged on the basis of command responsibility for the criminal acts of his subordinates. The arrest warrant issued in March 2003 included a provisional order to freeze his assets.

In 2014, Prosecutors filed an *ex parte* motion demanding the interim closure of every account that belonged to the Accused until the Court determined whether the funds in Norman's account were transferred illegally by the Civil Defence Forces (CDF).

Following Judge Thompson's *Interim Order* of 2 April, a closed-door hearing including the Defence and the Prosecution took place on 13 April.

Judge Bankole Thompson

In response to the Prosecution's claims that the funds in the account may have been transferred illegally, Judge Thompson argued that "there is no clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired." He also noted that the international jurisprudence on the issue of freezing assets of an Accused remained unclear.

After the failure of the Prosecution to provide sufficient evidence, Norman's accounts were ordered unfrozen on 19 April.

International Criminal Tribunal for Rwanda

Ten years ago…

On 7 April 2004, a commemoration service marking the 10th anniversary of the Rwandan Genocide was organised by the ICTR External Relations and Strategic Planning Section and the Genocide Anniversary Task Force.

The event which took place at the ICTR Headquarters in Arusha, Tanzania, included speeches from ICTR officials, staff and from local religious institutions. Judge Andresia Vaz, Vice-President of the Tribunal, offered her condolences to genocide survivors and called on staff to show tolerance and understanding.

In addition, a series of initiatives, such as the launch of a new website explaining the progress of the Tribunal through the years, were introduced.

This year, marking the 20th anniversary of the genocide killings in Rwanda, a website called "The ICTR Remembers" was launched. It features overviews of the ICTR's work, milestones reached and highlighting the remaining work to be done by the Tribunal and its successor the Mechanism for the International Tribunals (MICT).

The website is available at: *http://tinyurl.com/lkrfdx2*

International Criminal Tribunal for the Former Yugoslavia

Fifteen years ago…

On 19 April 2004, the Appeals Chamber rendered its Judgement in the *Prosecutor v. Radislav Krstić* case. Earlier, in 2001, the Trial Chamber found that Krstić participated in the criminal plan to ethnically cleanse the Srebrenica enclave of all Muslim civilians and to kill the military aged men of Srebrenica. It found him guilty of murder, persecutions and genocide for participation in these crimes. Based on these considerations, on 2 August 2001, the Trial Chamber convicted Krstić to 46 years imprisonment.

Subsequently, after the Appeals Chamber dismissed the Defence appeal with regard to the legal definition of genocide and with regard to alleged factual errors it partly granted the Defence appeal, and it unanimously sentenced Krstić to 35 years imprisonment on four grounds: aiding and abetting genocide, aiding and abetting murder, extermination and persecutions, and murder and persecutions.

The Prosecution's challenge of the Trial Chamber's conclusion on impermissibly cumulative convictions was also granted. The Appeals Chamber considered that the Trial Chamber's conclusion that the offences of extermination and persecution were subsumed in the offence of genocide, rendering convictions for both impermissibly cumulative, was erroneous.

The Appeals Chamber therefore found Krstić guilty of extermination and persecution, as an aider and abettor, but reduced his sentence by eleven years.

Radislav Krstić

NEWS FROM THE REGION

Croatia

Last week, the Croatian government proposed a draft of a new law which suggests financial and physical support to be provided to those who suffered sexual abuse during the 1991-1995 war.

The draft legislation was voted on by Government officials and UN representatives on Monday in Zagreb. According to the War Veterans Minister Predrag Matić, the purpose of the proposal is to "encourage the victims to speak about their trauma and to provide adequate medical and psychological care, education [about their legal rights] and decent financial compensation."

Even though, as reported, the number of the sexual crimes during the war period is high, the majority of persons responsible have not yet been brought to justice. The legislation which will enter into force on 1 January 2015 is thought to be the "first step" towards broader rights for the victims.

Kosovo

The European Union is at the core of the recent initiative to establish an International Tribunal focusing particularly on crimes committed in Kosovo in the time period of the war with Serbia.

Proceedings at this court are expected to start in 2015 and will consider allegations of a harvesting organ and the disappearance of about 400 Serbs by the Kosovo Liberation Army (KLA), a terrorist organisation that has since been disbanded.

It is most likely that the establishment of such an institution may raise disagreements among the different states and their positions regarding Kosovo's independence. Countries such as for example Spain, Slovakia and Romania which were among the EU member states to reject Kosovo's secession, may feel uneasy about supporting the idea of a tribunal that would recognise Kosovo as a state and use its laws. The idea of this court has also not been greeted warmly by government officials in Kosovo, many of whom are former KLA members.

Serbia

A vote which condemns Russia's actions in Ukraine took place last week in the Parliamentary Assembly of the Council of Europe (PACE). Seven Serb delegates participated in the voting, three of whom voted for the resolution, three against and one abstained.

The votes gave rise to various disagreements in the region among party members. The Liberal Democratic Party (LDP) announced that its party's views were not accurately reflected by the Deputy's vote favouring Russia. The LDP's stance is that Serbia should side with the EU on the Ukrainian crisis.

Dusan Spasojević, Chairman of the Democrats' Foreign Policy Committee and International Secretary, resigned from the Democratic party because of its vote to suspend Russia's voting rights at the PACE, saying it goes against Serbia's foreign policy interests. Other members, such as the Vice President Nataša Vučković, insisted that the vote was in the best interest of Serbia.

For the most part, the Serbian government has been keeping silent with regard to the present Russian-Ukrainian clash in hope of maintaining a good relationship with both the EU and its ally Russia. Serbia has already started EU accession talks and aims at joining the European Union by 2020.

Bosnia and Herzegovina

While the European Union has been pressing for a constitutional change regarding the minorities in Bosnia and Herzegovina (BiH) and their active appointment in higher positions in the government, a recent meeting on the 14 April in Luxembourg showed first signs of a change on the agenda in negotiations in BiH.

Luxembourg Meeting

The demand for change arose from the European Court of Human Rights' *Sejdic-Finći Judgement*, which requested an amendment in the Constitution to allow BiH minorities to compete for higher positions within the government, which are currently only accessible for Bosniaks, Serbs and Croats.

At the meeting in Luxembourg, the top issue on the agenda concerned strengthening the BiH economy, in which the European Commission will assist with the preparation of a national reform plan. During the meeting, EU Ministers denied any kind of discriminative behaviour and reassured their "unequivocal commitment to the territorial integrity of Bosnia and Herzegovina as a sovereign and united country."

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

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

In an order on 2 April, Judges of the International Criminal Court (ICC) rejected a bid by the Prosecution to submit evidence of alleged witness tampering against Jean-Pierre Bemba in *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08). Admitting the material, which included an audio recording, a report and a financial chart, into the case record was not appropriate at the current stage of the trial, the ICC trial Judges ruled. Judges Sylvia Steiner, Joyce Aluoch and Judge Kuniko Ozaki noted the evidence also formed part of material in a separate case brought before the ICC.

The Judges stated that, "the Chamber does not consider it in the interest of justice for matters which may be central to the charges before the Pre-Trial Chamber to be litigated in parallel before the Trial Chamber." They continued to explain that the inclusion of the evidence could result in protracted delays, potentially impeding fair and expeditious proceedings.

On 29 November 2013, Fatou Bensouda, Prosecutor in the case, called upon the Judges to permit submission of evidence of witness coaching and bribery by Bemba and two of his former lawyers. Defending the submission of evidence at a late stage of the proceedings, Bensouda contended that the supplementary evidence could not have been submitted previously because it had only come to her attention during the defence phase, and investigations had to be conducted to establish the reliability of the evidence. Bensouda argued that earlier disclosure of the material would have compromised the investigations and that the nature of the potential claim prevented the Prosecution team from doing so.

The evidence carried a significant weight in the case, Bensouda said, because it affected the credibility of 14 defence witnesses. Bensouda referred to the material as "unique" and "compelling", showing payments by Bemba's former lawyers and their associates.

Jean-Pierre Bemba Gombo

In response to the Prosecution's application, the Trial Judges dismissed the claims that the evidence could not have been submitted prior, stating that elements of the applicable material were available to the Prosecution ahead of the deadline for evidence submission.

The Judges continued that while the remaining material was not available in advance of the deadline, it seemed that investigations had been in progress for a substantial period of time. It followed, they claimed, that the Prosecution should have been aware of the future prospects of obtaining the evidence, and should have requested an extension of the 8 November 2013 deadline from the Judges.

Additionally, the Judges noted that the evidence related only to Defence witnesses, each of whom the Prosecution had the opportunity to question in court when they testified.

The Defence lawyers for Bemba had contested the Prosecution's bid, claiming that permitting the material into the case record would have ramifications as to the fairness and expeditiousness of the trial, as it would necessitate that the Defence team conduct further investigations, and that the 14 affected witnesses would need to be recalled.

Bemba's trial commenced at the ICC in November 2010. Bemba has been indicted as military commander for two counts of crimes against humanity and three counts of war crimes. He denies charges of murder, rape and pillaging, alleged to have occurred in the Central African Republic between 2002-2003.

Extraordinary Chambers in the Courts of Cambodia

Fernanda Oliveira, Defence Team Intern, Case 002.

In Case 002, the guardians for the Accused Ieng Thirith filed a request before the Trial Chamber (TC) to permit her temporary evacuation to Thailand in order to receive further medical treatment due to deterioration of her health condition.

The Accused Nuon Chea and Khieu Samphân both underwent a medical examination on 24-25 March, conducted by three Court-appointed medical experts to reevaluate the Accused's fitness to stand trial in Case 002/02.

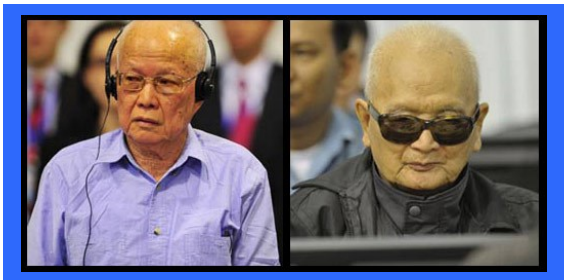
The Nuon Chea Defence team reviewed their client's medical report resulting from that medical examination and declined to request a hearing to question the experts on this report. The team has otherwise been fully focused on preparing for the Case 002/02 trial.

Similarly, the Defence team for Khieu Samphân did not request a hearing after receiving the report. Instead, they forwarded their observations by e-mail to the Trial Chamber regarding the matter. In the meantime, while waiting for a decision on the scope of Case 002/02, the team has started preparing for the trial, and learning about a few crime sites that might feature in the proceedings. The Khieu Samphân Defence has also opposed the Office of the Co-Prosecutors' (OCP) Amendment Proposals to Internal Rules 55 and 89*ter*, considering them to be incompatible with Cambodian law and detrimental to several rights of the accused.

The Case 003 Defence has filed a number of submissions, classified as confidential by the Office of the Co-Investigating Judges (OCIJ) and Pre-Trial Chamber (PTC), to protect the suspect's fair trial rights and continues to review publicly available material, as the case file remains inaccessible to the defence. The team has, in addition, submitted to the Rules and Procedure Committee its observations regarding the rule amendments proposed by the OCP, requesting that the proposal be rejected as being incompatible with applicable Cambodian rules and procedures.

In Case 004, Richard Rogers was assigned as the second international co-lawyer for one of the named suspects and recognised by the OCIJ, after winning his appeal before the PTC and being accepted to the list of Co-Lawyers. He will represent the client together with international Co-Lawyer Goran Sluiter and national Co-Lawyer Mom Luch. This Defence team also submitted observations in response to the OCP's proposed rule amendments. The team objected to the proposed changes because they are unlawful under Cambodian and French law and asserted that if accepted, in part or in whole, then the status of all civil parties must be reconsidered.

Also in Case 004, the Defence team of another named suspect has been pursuing its efforts to recruit more support staff. The suspect's Co-Lawyers have also continued their attempts to gain access to the case file while still preparing their client's defence by consulting publicly available sources.



Nuon Chea and Khieu Samphân

Special Tribunal for Lebanon

STL Public Information and Communications Section

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).

On 10 April, the Trial Chamber of the Special Tribunal for Lebanon (STL) held a status conference in the *Ayyash et al.* case. During the conference, the Badreddine Defence Counsel updated the court on cooperation between Lebanon and the STL. The Defence is seeking call data records for the period between 2004 and 2006 from the two mobile telecommunication companies operating in Lebanon. Counsel for Badreddine said that the responses recently received from the two companies in the country were, in their view, unsatisfactory. Counsel requested that the Badreddine expert meets with the technicians of the companies with a view of solving the impasse. The Presiding Judge of the Trial Chamber, Judge Re, proposed that a meeting be convened between the Trial Chamber, the Defence and the Registrar to address the issue.

Several topics were covered throughout the status conference, including an oral ruling admitting into evidence the written testimony of a Prosecution witness. Judge Re also required that the witness be available for cross-examination.

The Merhi Defence indicated that they now agree on nine facts included in the indictment. The four other Defence Counsel did not contest those facts which extend to basic information (e.g., birth of date of former Lebanese Prime Minister Rafiq Hariri).

Defence Counsel Mohamed Aouini

Additionally, Counsel for Merhi indicated that a local resource person, a crime scene expert and a telecommunications expert joined the Defence team recently. Counsel requested that they submit their pre-trial brief (PTB) within four to five months, once the experts provide advice and they decide on a defence strategy. The Trial Chamber Presiding Judge said that PTBs can be submitted at different stages, and the Chamber's approach will take into concern the Defence view that everything in the indictment, in the exception of the nine agreed facts, need to be proved by the Prosecution in court. He added that no lengthy PTB is expected from the Merhi Defence. The Senior Prosecution Trial Counsel did not anticipate a PTB by counsel for Merhi to have an expanded benefit in light of the position of the other four Accused.

Judge David Re

Presiding Judge Re noted during the conference that Counsel for Salim Jamil Ayyash, Amina Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra contest admitting the evidence of 63 of the 68 expert witnesses, whom the Prosecution intends to call during trial. Thus, he instructed the Merhi Defence to file any motion challenging the remaining five experts and/or their expert reports by 24 April.

Before adjourning the hearing, the Trial Chamber issued an oral ruling, ordering the Merhi Defence to file a pre-trial brief by 26 May. The Trial Chamber also set a pre-trial conference on 16 June. Until then, other status conferences may be convened.

DEFENCE ROSTRUM

Survivors of Srebrenica Massacre Launch Civil Action

By Lucy Turner

Survivors of the 1995 Srebrenica massacre are commencing a civil legal action against the Dutch government for their involvement in the event. The survivors claim that the Dutch Peacekeeping forces are liable for failing to protect the civilians and prevent the killings.

The case was first brought in 2007 by the Mothers of Srebrenica group, a victims group that represents approximately 6,000 widows and victims' relatives. This civil suit has now been opened on 7 April and will be heard in The Hague. Addressing the District Court in The Hague, the group's lawyer, Marco Gerritsen, said that "[the Dutch forces] did not prevent the murder of thousands of civilians."

The Mothers of Srebrenica claimed the United Nations (UN) and the Netherlands did too little to protect husbands and sons in the Muslim enclave when it came under attack. "The protection of civilians is an overriding principle," Gerritsen said. Simon van der Sluijs, another lawyer, stated that "the Dutchbat's own safety was their priority – in contravention of UN instructions."

The Srebrenica enclave had been under UN protection until 11 July 1995, when the killings started. During this period of several days, around 8000 men and boys were killed. The Dutch peacekeepers, or Dutch battalion, had been charged with protecting the safe area where thousands of people from surrounding areas had congregated for protection. The implication of the Dutch state in the event culminated in the entire government resigning in 2002, following a report that attributed responsibility for the killings to the unit and senior military officials for not preventing the incident.

The Dutch Supreme Court and European Court of Human Rights said previously that the Mothers of Srebrenica group could not take the UN to court for failing to prevent the killings, asserting that the United Nations' immunity from prosecution was absolute.

On 10 April, the Dutch government stated that it intended to compensate the relatives of three Bosnian Muslim men who were killed in the massacre after having been ejected from the Dutch Battalion controlled compound. Each family will receive 20,000 Euros as compensation. In September 2013, seven months prior to this, the Dutch Supreme Court had ruled that the state was responsible for the deaths.

Liesbeth Zegveld, the lawyer representing the families of the three men, stated that the families had not decided whether to accept the compensation, and described the amount as 'shameful'. Irrespective of the fact that the three victims concerned were working for the Dutch Battalion at the time, the Mothers of Srebrenica group stated that the decision to compensate their families had motivated them to continue with their own case.

At the hearing Hatidža Mehmedović, one of approximately a dozen representatives, said that, "this procedure is not going to give us our sons and husbands back, but it will bring a bit of justice."

Gert-Jan Houtzagers, the lawyer for the Dutch state, told the court, "it is about Dutch soldiers, but Dutch soldiers wearing blue helmets and therefore completely under UN control."

Houtzagers denies the culpability of the state and argued that the Netherlands had no direct control over the Dutch battalion unit during the peacekeeping operation. "Dutchbat did what it could with a handful of men," he said. "They tried to protect as many refugees as possible."

Dutch courts have previously declined to hear a request by the Mothers of Srebrenica to prosecute the UN for the killings, on the grounds that the international organisation had immunity. This decision was reiterated in 2013 when the European Court of Human Rights also found that the UN had immunity from such proceedings. The civil case against the Dutch state heard on Monday had been temporarily suspended, pending the outcome of the case against the UN, and is now able to commence.

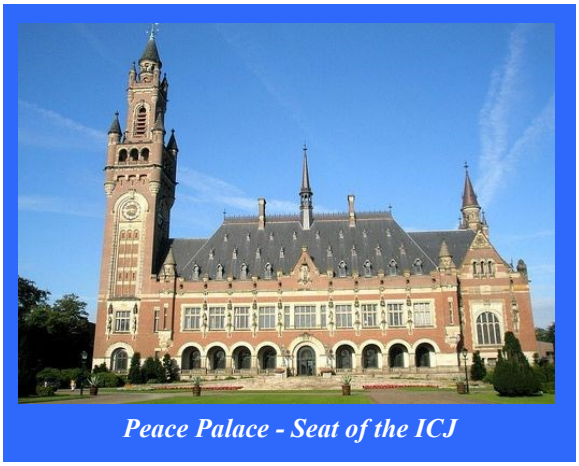
The International Court of Justice as the First Instance Court: Flattering or Reality?

By Relja Radović

On 1 April, the last session of the presentation of the oral arguments in the case of *Croatia v. Serbia* took place before the International Court of Justice (ICJ). After a month of oral presentations by the two parties, the Court retired for deliberation to reach a decision in the case, which has lasted for almost 15 years, comprising of a claim and a counter-claim on alleged genocidal acts. During a month of hearings where they presented their arguments, the two parties emphasised the importance of these proceedings and the Court's role in general. Emphasis was put on the role of the ICJ as the first court having to decide whether the atrocities committed during the conflict in Croatia constitute genocide. The question before us is, whether such a description of the Court's role – as the one of first instance for this subject matter – is justifiable?

First, the nature of the proceedings is quite different from the ones we had the opportunity to witness until now. Moreover, this is the first case aiming to establish State responsibility in the context of the conflict in Croatia. However, in the oral presentations this differential point was, one might say, shaded. The ICTY and its decisions were invoked numerous times and they formed a substantial part of the arguments brought by both parties, in one way or another. Besides making a link between the two forums, this primarily represents a new challenge for the ICJ.

Although the Court had, in its past, the opportunity to take a standing on the relevance of the ICTY's findings in its own proceedings, this time, the task of the Court seems more complex. During these proceedings, not only the issues regarding the relevance of the ICTY's findings were raised, but also issues regarding, *inter alia,* the relevance of the Prosecutor's decision to indict or not, to qualify some acts as one crime or another, and the fact that a Judgement was overturned on appeal. A special question, raised by Judge Bhandari, concerned the probative weight of the ICTY's findings in a Trial Judgement, after it is overturning on appeal. Therefore, the ICJ is faced with a new set of issues concerning the relevance of different aspects of ICTY case-law.



Peace Palace - Seat of the ICJ

In its previous practice, the ICJ accepted the ICTY's findings and described them as "highly persuasive", while on the matters of law, the Court tried to distinguish itself and highlight that it has the main word when certain legal standards are concerned (of course this depends on the questions in a particular case). In the proceedings at hand, the reliance on the ICTY's practice is much more on the factual findings, accompanied with some other aspects. It seems, however, that the previous practice of the Court on this matter will not be sufficient and that the questions before it are much more complex. As it can be noticed from the above-mentioned issues, especially the ones concerning the qualification of acts, many of them have lost their clear distinction between fact and law, and in a way they overlap. Therefore, it will be upon the Court to rule on the relevance of certain aspects of the ICTY's practice and to find a solid connecting or distinguishing factor.

Second, once the issues on the factual background are clarified, the central issue – the one regarding the qualification by the Court itself will reveal itself. The jurisdiction of the Court, with respect to both the initial claim and the counter-claim, is based solely on the Genocide Convention. The Court, indeed, has no jurisdiction to find any other violation of international law other than violations of the Genocide Convention. A general impression in the great hall of justice was, that no one was able to deny that very serious atrocities were committed. The real question therefore is: did they reach the level of genocide?

Looking at the proceedings from a distance, the mere purpose seems to be the qualification of acts. As a substantive part of the factual background presented by the parties relies on the findings of the ICTY, they do not ask the Court – in a large part – to conduct a real factual investigation. The parties are thus seeking the Court to merely qualify the acts as genocidal or not.

Third, this case and its consequences cannot be isolated from a broader context. A great emphasis was put on the importance of the present proceedings for the reconciliation in the whole region. Reconciliation was repetitively stressed to be the main goal of both parties. However, it was also emphasised that such reconciliation has to be based on historical facts, meaning that the issues at hand have to be solved first.

It will be interesting to see to what extent this ultimate goal of reconciliation will have a role in the expected decision. Whatever the outcome of the present case will be, the final effects of that Judgement, together with the effects of the 2007 ICJ Judgement in the *Bosnia case* (as it forms part of the same context of the Ex-Yugoslav conflict), should be closely monitored and followed with a great interest (in light of the long-expected goal of reconciliation).

When the question of State responsibility is taken out of context and isolated, it can be concluded that the ICJ indeed acts as the first instance court. However, having a look at the broader context and the arguments presented above, it has to be concluded that this is not the case. Rather, the ICJ's role might better be characterised as appellate – a second, not first instance court.

The parties have put it clearly: we do know – or believe to know – what happened, but we are not satisfied with who and for what was, or was not, held responsible. The ICJ now has the task to determine whether such an approach taken by the two parties is justifiable.

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Michael G. Karvanas, **Just How Relevant is the ICC-Part IV,** 14 April 2014, available at: http://tinyurl.com/ph4p876.

Student Editor, **Congo Militia Leader Appeals ICC Conviction,** 11 April 2014, available at: http://tinyurl.com/oawg6u6.

Raphaëlle Rafin, **Court Begins Jury Selection for Abu Hamza Terrorism Trial,** 14 April 2014, available at: http://tinyurl.com/ptckch9.

Reka Hollos, **ICTY Rejects Ratko Mladic's Request for Acquittal,** 16 April 2014, available at: http://tinyurl.com/ptckch9.

Online Lectures and Videos

"Bus Ride to Justice: A Conversation with Legendary Civil Rights Lawyer Fred Gray '54", published on 14 April 2014, available at: http://tinyurl.com/qbucmym.

"A Revolutionary Moment Session 7 Revolutionary Women in the Underground and Beyond", published on 16 April 2014, available at: http://tinyurl.com/nq4z8qj.

"Kenosian Chair Current Issues Series: The UN, Armenia, and the Sovereignty of Nagorno Karabagh", published on 16 April 2014, available at: http://tinyurl.com/nug7npx.

"STLR 2014 Symposium—California Online Privacy Protection Act", published on 16 April, available at: http://tinyurl.com/pg7lmfo.

PUBLICATIONS AND ARTICLES

Books

Michail Vagias (2014), *The Territorial Jurisdiction of the International Criminal Court,* Cambridge University Press.

Larry May (2014), *International Criminal Law and Philosophy",* Cambridge University Press.

Adrian Keane and Paul McKeown (2014), *The Modern Law of Evidence",* Oxford University Press.

William H. Boothby (2014), "*Conflict Law - The influence of new weapons technology, human rights and emerging actors",* T.M.C. Asser Press.

Articles

A. A. Cançado Trindade (2014), "The Universality of International Law, its Humanist Outlook, and the Mission of the Hague Academy of International Law", *Netherlands Quarterly of Human Rights,* No. 1

Elisa Hoven (2014), "Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia", *Journal of International Criminal Justice, Vol. 12, No. 1*

C. Beninger (2014), "The Effectiveness of Legislative Reform in Combating Domestic Violence: a Comparative Analysis of Laws in Ghana, Namibia and South Africa", *Netherlands Quarterly of Human Rights, No. 1*

CALL FOR PAPERS

The **European Conference on Politics, Economics, and Law** invites submissions on a theme: "Individual, Community & Society: Conflict, Resolution & Synergy.

Deadline: 15 May 2014 More info: http://tinyurl.com/ppu4auw.

The **American Society for Legal History** invites proposals on any facet or period of legal history, anywhere in the world.

Deadline: 1 July 2014 More info: http://tinyurl.com/nco578d.

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Any contributions for the newsletter should be sent to Isabel Düsterhöft at iduesterhoeft@icty.org

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EVENTS

Jus Post Bellum and Proportionality in International Law (Launch of Two Books)

Date: 30 April 2014

Location: The Hague Institute for Global Justice, The Hague

More info: http://tinyurl.com/lransab.

International and Comparative Law Quarterly Annual Lecture 2014

Date: 20 May 2014

Location: Charles Clore House, London

More info: http://tinyurl.com/q4xdz2t.

Countering Terrorism in the Post-9/11 World: Legal Challenges & Dilemmas

Date: 25-29 August 2014

Location: T.M.C Asser Institute, The Hague

More info: http://tinyurl.com/mgmjcxy.

OPPORTUNITIES

Associate Legal Advisor (P2), The Hague

International Criminal Court (ICC) —Presidency,

Closing date: 28 April 2014

Programme officer, London

Bertha Justice Initiative

Closing date: 1 May 2014

Project Coordinator, Brussels

International Court of Justice (ICJ)

Closing date: 4 May 2014