# ADC-ICTY Newsletter, Issue 13



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## ICTY News

* The views expressed herein are those of the author(s) 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. Radovan Karadžic IT-95-5/18-I

On 10 May 2011, the Trial Chamber denied the Accused's motion under Rule 54 *bis* for a binding order to the Islamic Republic of Iran and a motion under Rule 54 for a Subpoena to interview General Director Sadeghi. The Accused was seeking to obtain further information regarding an order of ammunition from the Iranian Ministry of Defence, which was allegedly destined for Bosnian Muslims. Sadeghi was thought to act on behalf of Iran at the time for this order of ammunition. The Accused attempted to obtain such information on his own accord by writing a letter directly to Iran but received no response. The Trial Chamber noted that "Rule 54 of the Rules provides that a Trial Chamber may issue a subpoena when it is 'necessary for the purpose of an investigation or the preparation or conduct of the trial'. A subpoena is deemed 'necessary' for the purpose of Rule 54 where a legitimate forensic purpose for obtaining the information has been shown".

**Radovan Karadžic**

On the same day, the Trial Chamber found the Prosecution had violated its disclosure obligations under Rule 68. The Accused noted that the documents in question, amounting to over 100,000 new documents, were in the Prosecution's possession for a "number of years" but were only disclosed to him in March 2011. Thus, the Accused submitted that he was prejudiced by the late disclosure because he could not evaluate the documents to prepare for the trial or use them during cross-examination of witnesses that have already testified. As such, the Accused requested the Chamber find a violation of Rule 68 on the part of the Prosecution and to further extend the current suspension of proceedings for another eight weeks. This would allow him adequate time to review the documents.

The Chamber found that the Prosecution's previous approach to the disclosure of documents demonstrated "a failure to comply with the Chamber's repeated instructions to disclose, as soon as practicable, all Rule 68 materials in its possession". While finding that the Prosecution had made multiple Rule 68 violations, it did not find that the Accused had suffered a prejudice as a result of these violations. Nonetheless, the Chamber extended a suspension of the proceedings for an extra week, until 31 May 2011. The Trial Chamber stated that "Rule 68 of the Rules imposes a continuing obligation on the Prosecution to disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

Another decision by the Chamber was released on 10 May 2011, related to the Accused's request of 26 April 2011 to have assistance of Defence experts in the courtroom. The Accused requested the presence of Professor Radomir Lukić during the Prosecution expert testimony of Patrick Treanor and Dorothea Hanson, as well as the presence of Mladen Bajagić during the testimony of expert Christian Nielsen. The Chamber granted the request in part, allowing the presence of Mladen Bajagić in the courtroom during the testimony of Christian Nielsen, but not the presence of Professor Radomir Lukić.

On 16 May 2011, the Trial Chamber Judges began a site visit to various locations in Sarajevo and the surrounding area. The visit was requested by Karadžic and accepted by the Trial Chamber. The Judges agreed that a site visit would help them in the proceedings, as the Indictment includes many locations in and around Sarajevo. Along with the Judges, the visit included representatives from both the Prosecution and Defence, as well as Tribunal support staff.

**Prosecutor v. Tolimir (IT-05-88/2)**

On 11 May 2011 in the case of Zdravko Tolimir, Prosecution witness Dragomir Keserović testified. Keserović was Chief of the Military Police in the Sector for Intelligence and Security of the Main Staff in the Security Administration.

Keserović testified that there is a difference between a regular task and a military order, so work "carried out in the Intelligence and Security Sector, [...] were not military orders". Furthermore, all of the tasks that Keserović carried out during his time in Bratunac were within the purview of the security organs and were professional tasks, not military orders. He further testified that Tolimir never changed any order issued by his commander before passing the order down the military chain of command and on to Keserović .

In discussing Srebrenica, Keserović testified that the Muslim forces led a "forcible march" on 16 July 1995, where they had strength in numbers, rather than firepower. The Muslim forces were able to "hit the area of defence of the Zvornik Brigade" when they attacked from the rear, resulting in major losses for the Brigade. According to a report issued by the Command of the 2nd Corps of the BiH, there were activities from both, the protected area of Srebrenica and from the direction of the 2nd Corps and that "were parallel co-ordinated activities aimed at linking up two of the groups of the BiH Army".

Keserović added that ultimately, the international forces and commanders confirmed in their reports that "none of the areas that were supposed to be demilitarised were devoid of forces and weapons". A report issued by General Smith confirmed what Keserović testified, notably, "The enclaves were too strong and the BH Army within them constituted a clear threat, especially because the Bosnian Serb army felt it was likely they will be confronted with attacks at several fronts".

Keserović will continue his testimony on 16 May 2011.

**Ramush Haradinaj**

The retrial in Prosecutor v. Haradinaj *et al.* is the first of its kind in an international criminal tribunal that has been ordered following an acquittal. Since only a partial retrial was ordered, the issue of scope was identified early on as a key area of contention. The Prosecution has argued that a re-trial entitles them to call evidence against the Accused, which the Defence argues is far outside the scope of the partial retrial.

On 10 February 2011, the Defence for Ramush Haradinaj filed its Appeal *Brief on Scope of Partial Retrial*. The Defence brief was underpinned by the principle of finality, i.e., that a final decision in criminal proceeding has the force of *res judicata*. The Defence argued that the basis for the appeal was that two witnesses failed to appear. Any other issues now introduced by the Prosecution that go beyond the testimony of those two witnesses, taken together with the evidence on record, violate the fundamental principle of finality and have no place in the retrial. With the Appeals Chamber dec-

**Rule 54 (A) *bis***

**Orders Directed to States for the Production of Documents**

(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall:

(i) identify as far as possible the documents or information to which the application relates;

(ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and

(iii) explain the steps that have been taken by the applicant to secure the State's

ision expected shortly, the following is a summary of the argument put forward by Haradinaj's Defence Counsel. It should be noted that this is distinct from a separate issue also on appeal, which was put forward by the Defence Counsel for co-defendant Idriz Balaj.

The Defence for Haradinaj argued that, since a retrial is one of the rare departures from the principle of finality, "the scope of such a retrial must be clearly defined and narrowly construed," providing a "tailored remedy capable of rectifying a clearly identified error in the original proceedings, and no more. In particular where the identified error doesn't impugn the original proceedings as a whole, but affects only a circumscribed and severable aspect of those proceedings, the appropriate remedy will not be a general retrial but a partial retrial which puts right what the appeals chamber has found to have been wrong. In such a case it is essential to distinguish between those findings of the original Trial Chamber which remain binding, and continue to have the force of *res judicata*, and those which have been set aside on appeal by reason of a clearly identified error".

The Defence pointed out that once the Prosecution decides to appeal on a "circumscribed and severable" ground so as to obtain a partial retrial, and once that relief has been granted, the Prosecution is "barred from pursuing a retrial for any other purpose other then the one that formed the basis of its grounds for appeal".

In Haradinaj's case, the single, circumscribed and severable ground, (which the Prosecution characterised as a 'limited appeal'), was that "the Trial Chamber erred when it refused the Prosecution's requests for additional time to exhaust all reasonable steps to secure the testimony of two "crucial" witnesses, Shefqet Kabashi and another witness, and ordered the close of the Prosecution case before such reasonable steps could be taken" (see Appeals Judgment, para. 14). The Defence, therefore, argued that the re-trial should be limited to hearing the testimony of just those two witnesses.

**Shefqet Kabashi**

Thus, the Defence was concerned that the Prosecution should not be allowed to use the appeal as a "Trojan horse to bring a second case against Haradinaj in the partial retrial by relying on evidence that was not the subject of its appeal". It was pointed out that if the Prosecution does not appeal the acquittal, it is clear that the judgment becomes final and as such is regarded as irrevocable, "and it thus acquires the quality of *res judicata*".

For these reasons, the relief sought by the Haradinaj Defence was threefold:

**1.** The scope of the retrial is limited by the express terms of the Prosecution's own appeal (and the resulting order of the Appeals Chamber) to the calling of two witnesses, Shefqet Kabashi and the other witness, which evidence should be considered in conjunction with the admissible evidence on the record from the original trial that is relevant to the 6 Jabllanicë counts;

**2.** The alleged JCE [Joint Criminal Enterprise] for the retrial must be limited to a JCE to commit crimes charged in the 6 Jabllanicë counts and cannot by virtue of the Prosecution's own appeal be pleaded to include criminal conduct unrelated to those counts or conduct for which Haradinaj has been finally acquitted; and,

**3.** All allegations that concern criminal conduct wholly unrelated to the 6 Jabllanicë counts and for which Haradinaj has been finally acquitted should be struck from the operative indictment for the retrial.

The decision on scope is expected shortly and will have a major effect on proceedings. This will be followed in the upcoming edition of the newsletter (14).

The **Appeals judgment** may be found at: http://www.icty.org/x/cases/haradinaj/acjug/en/100721.pdf
The **Appeals brief on behalf of Ramush Haradinaj on scope of partial retrial** may be found at: http://www.icty.org/x/cases/haradinaj/custom6/en/110210.pdf

**Shefqet Kabashi,** former member of the Kosovo Liberation Army, is one of two witnesses who were called to testify in the case against Ramush Haradinaj. Kabashi refused to testify and did not answer any questions on the substance of the case. Therefore, on 5 June 2007, the Trial Chamber issued an *Order in Lieu of Indictment for Contempt of the Tribunal*. However, before the start of his trial, Kabashi left the Netherlands to return to his place of residence in the USA. On 18 February 2008, an Amended Indictment was issued against Shefqet Kabashi. This contempt case is still pending his arrest and transfer to The Hague.

# News from International Courts and Tribunals

## International Criminal Court

**Callixte Mbarushimana** was arrested by French authorities on 11 October 2010, following an arrest warrant by Pre-Trial Chamber I in late September. On 25 January 2011 he was brought to the ICC detention center. Mbarushimana is alleged to have been the Executive Secretary of the FDLR since July 2007 and is supposedly responsible for crimes against humanity and war crimes. The Accused is represented by Defence Counsel Nicholas Kaufman and Yaël Vias–Gvirsman.

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

**"Second Decision on matters regarding the review of potentially privileged material", 15 April 2011, n° ICC-01/04-01/10-105.**

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

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This Decision deals with the effectiveness of Rule 73 of the Rules of Procedure and Evidence (RPE) about "privileged communications". While ensuring the speed of the proceedings, Pre-Trial Chamber I, responsible for protecting the rights of the suspect, which includes the right against self-incrimination, has a duty to ensure that material seized at the premises of Mbarushimana upon his arrest in October 2010 are not improperly disclosed to the Prosecutor.

In a previous decision, Pre-Trial Chamber I considered itself empowered to conduct the review of the relevant seized material in order to assess whether or not the documents were privileged in accordance with Rule 73 of the RPE. To this end, the Chamber entrusted to the Registry, within a specified time, to conduct a search on some of the seized material to provide the Chamber with a list of potentially privileged documents, based on the keywords provided by the Defence and the Prosecutor.

With this decision of 15 April 2011, the three Judges of Pre-Trial Chamber I deemed it appropriate to modify "partially the system for review of the potentially privileged material". This amendment reflects the concern of the Chamber that the confirmation hearing must take place as scheduled, although it does not appear technically feasible for the Registry to perform the search within the specified time.

First, the Chamber allows the Defence to conduct a review "by virtue of its familiarity with the relevant seized material". To do so, the Chamber ordered the Registry to provide the Defence with a list of files already identified as potentially privileged material and with a copy of all the relevant, non-faulty and unprotected devices in an accessible and searchable format. This will enable the Defence to review the material and submit to the Chamber a list of the documents in which the Defence claims privilege under rule 73 of the RPE, no later than 6 May 2011.

Second, the Chamber considers that the search previously entrusted to the Registry is entirely consistent with the role of the Registry as "an impartial organ responsible for the non-judicial aspects of the administration and servicing of the Court", according to article 43(1) of the Rome Statute. On this ground, the Chamber ordered the Registry to continue its search to assist the Defence in its task. An interesting point is that the Chamber makes it clear that this search must be conducted with the proper spelling of French keywords provided by the Defence. Indeed, the Defence had supplied French keywords without the appropriate accents and the Registry conducted the research as instructed. By including accent marks, the Chamber suggests that the Registry would have not overstepped its mandate for neutrality if it has performed this type of search from the beginning.

Finally, in its *"Decision On The Defence's Application for Leave to Appeal The Decision on Potentially Privileged Material",* released the same day, Pre-Trial Chamber I noted its reasons for rejecting the request of the Defence, in particular because its immediate resolution by the Appeals Chamber will not materially advance the proceedings in light of the revision made in the decision hereby summarised.

**Article 68 (1)**

**Protection of the victims and witnesses and their participation in the proceedings**

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

## The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (ICC-01/09-02/11)

### Decision on the Defence "Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press"

Lucie van Gils, Intern, Office of Public Counsel for the Defence, ICC

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In this decision, Judge Ekaterina Trendafilova, acting as Single Judge on behalf of the Pre-Trial Chamber II, had to determine whether certain comments made to the press by the Prosecutor regarding Francis Karimi Muthaura were extra-judicial.

The Defence filed an application on behalf of Muthaura alleging that the Prosecutor's statements referring to Muthaura's control over the police were one-sided and that theory was represented as fact. According to the Defence this could 'infect the investigation process' and significantly disadvantage the Defence. The Defence therefore requested that either the Prosecutor should refrain from making any further public comments touching on the merits of the case or he should in the future make clear that his assertions are mere allegations.

In response, the Prosecutor stated that he merely "expressed proper and legitimate concerns about the possibility that Muthaura could exercise authority over the witness protection program".

**Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali**

In her decision the Judge first reiterated the principles of law governing this area, as set out in article 68(1) of the Rome Statute and the relevant case law. She held that although it is not the role of the Court to comment and advise the Prosecutor on his interaction with the press, it does have to make sure the Prosecutor fulfils his duty to abstain from conduct which "could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court".

She then proceeded to conclude that the Prosecution did not in fact violate these principles as the topics addressed in the press meeting did not relate to the crimes for which Muthaura had been summoned or those which the Prosecutor might bring before the Court as charges. The Prosecutor merely commented on Muthaura's relation to the Kenyan police as it was at the time of the conference. The Chamber accepted the Prosecution's arguments that by doing so, the Prosecutor was discharging his duty to protect witnesses during the proceedings. Moreover, the Chamber found that the Prosecutor could not be said to have prejudiced matters which should later be determined by the Chamber because he properly reflected his own role in the criminal proceedings.

Therefore, the Application on behalf of Muthaura was rejected in its entirety.

### Decision Setting the Regime for Evidence Disclosure and Other Related Matters

In her decision, Judge Ekaterina Trendafilova determined the regime for disclosure of evidence between the parties with an eye to the organisation, efficiency and expeditiousness of the proceedings until the confirmation of charges hearing. She stated that a good system of disclosure of evidence between the parties, as facilitated by the Registry, is an essential step in reaching the right decision as to whether to send the cases to trial.

Judge Ekaterina Trandafilova decided that all evidence disclosed between the parties should be communicated to the Chamber, whether this evidence is intended to be relied upon or not. She held that there rests a heavy burden on the Prosecution to supply detailed lists of charges together with

**Article 71**

**Sanctions for misconduct before the Court**

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

For Article 70 (Offences against the administration of justice) please check: http://www.icc-cpi.int/NR/

lists of evidence. Furthermore, the Prosecution was expected to provide the Defence with careful in-depth analysis of each individual piece of evidence and the way it would support the allegations of crimes committed in order for the Defence to be able to answer to the charges. Lastly, Judge Trendafilova reminded the Prosecutor of his obligation to disclose to the Defence, as soon as practicable, all exculpatory evidence in his possession or control in accordance with article 67(2) of the Statute.

**Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-02/11-48)"**

In reply to the above decision, the Prosecutor lodged an application requesting leave to appeal on three grounds. All grounds related to specific duties resting on the Prosecutor, as set out in the previous decision. He challenged: firstly, the imposition of a duty to explain to the Defence the potential relevance of non-incriminatory evidence; secondly, the requirement to make available to the Defence exculpatory evidence which should be withheld pursuant to protective measures; lastly, the duty to provide the Chamber with all material disclosed to the Defence which was not intended to be introduced as evidence in the confirmation hearing.

Judge Trendafilova, again acting as Single Judge, first reiterated the test for interlocutory relief, namely: that the issue at hand must affect both the fairness and expeditiousness of the proceedings or the outcome of the trial and that an immediate resolution by the Appeals Chambers may materially advance the proceedings.

She then decided that none of the issues highlighted by the Prosecutor passed the above test with regard to the first ground the Prosecutor misread the law and with regard to the final two grounds both fairness and expeditiousness could not be held to be sufficiently affected.

**The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)**

**"Order relative to the implementation of the article 93-2 Of the Statute and rules 74 and 191 of Rule of Procedure and Evidence in favor of Germain Katanga defence witnesses"**

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

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This order followed a Defence motion requesting the Court to assure that the four Defence witnesses of Germain Katanga, currently detained at Kinshasa's central prison will not be prosecuted for any act or omission carried out by them prior to their departure from the DRC, in accordance with Article 93-2 of the Statute and Rule 191 of the Rules of Procedure and Evidence (RPE). The Defence also invoked Rule 74 of the RPE and recalled that the testimonies in Court of witnesses may contain elements that may incriminate them. The Defence asked the Chamber to provide witnesses coverage under that rule and against self incrimination. Trial Chamber II in this Order defined the main procedural steps to further implement the provisions of Article 93-2 of the Statute and Rules 191 and 74 of the RPE.

**Germain Katanga**

Under Rule 74, it is an obligation for the Chamber to notify the witnesses of their rights and obligations relating to "self-incrimination". This rule states that: "In the case of other witnesses, the Chamber may require the witness to answer the question or questions after assuring the witness that the evidence provided in response to the questions, will be kept confidential and will not be disclosed to the public or any state, and will be no used either directly or indirectly against that person in any subsequent prosecution by the Court, except under articles 70 and 71".

The Chamber ordered the Registrar to designate a lawyer so that he can notify the witnesses effectively of the guarantees provided by Rule 74 of the RPE. This counsel will have to explain to witnesses under which conditions the Chamber can give guarantees, their nature, and the content of provi-

sions of the Statute and the Rules referred into the Rule 74. The Chamber ordered the lawyers to take all necessary measures to explain to the witnesses Rule 74 and provide them with legal assistance.

The Chamber asked Germain Katanga's principal Counsel to provide his full cooperation to the appointed Counsel. The Chamber also reminded him that he has to inform the Assistant to the Victims and Witnesses Unit that these four witnesses are likely to incriminate themselves.

However, the Chamber found that to ensure that the security provided by Rule 74 is appropriate for the witnesses, the Chamber must ask the opinion of the Prosecutor. The Chamber therefore ordered the Prosecutor to give his *ex parte* opinion urgently in accordance of Rule 74(4).

**Rule 191**

**Assurance provided by the Court under article 93, paragraph 2**

The Chamber dealing with the case, on its own motion or at the request of the Prosecutor, defence or witness or expert concerned, may decide, after taking into account the views of the Prosecutor and the witness or expert concerned, to provide the assurance described in article 93, paragraph 2.

Furthermore, Article 93(2) permits the Court "to provide an assurance to a witness or expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State".

The Chamber replied to the Prosecutor and witnesses after hearing their comments that it has the jurisdiction to grant such assurance under that article and in accordance with Rule 191 of the RPE. In this capacity it ordered the Prosecutor to provide his comments as soon as possible.

The Chamber recalled the assurances given by the DRC through its Letter of the Minister of Justice to the Prosecutor in 30 January 2009 and wished to ask the Congolese authorities by notification of the Registrar if they intend to assure that the witnesses will not be subject to prosecution in their courts, as defined in paragraph 2 of the letter of the Minister.

### The Prosecutor v. Thomas Lubanga Dyilo, (ICC-01/04-01/06)

### Trial Chamber I's "Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005", ICC-01/04-01/06-2727-RED, 28 April 2011

Thomas John Obhof, Intern, Office of Public Counsel for the Defence, ICC

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**Thomas Lubanga Dyilo**

Trial Chamber I recently decided an issue dealing with the possible admittance of prior recorded testimony under Rule 68(a) of the Rules of Procedure and Evidence (RPE) of Witness DRC-OTP-WWWW-0005. In the alternative, the Chamber was also faced with determining whether the Witness could be called to testify before the Court.

Firstly, the Chamber examined the possibility for the Office of the Prosecutor (OTP) to call rebuttal witnesses. The Chamber immediately noted that "[t]he Rome Statute framework does not create different stages of the case, such as the prosecution case, the defence case, evidence in rebuttal or rejoinder evidence". With this in mind, the Chamber observed the broad language used in the Rome Statute when dealing with the calling of witnesses. Furthermore, the Chamber considered the practices of the two International Criminal Tribunals and Trial Chamber II when handling rebuttal evidence. As set out in the Chamber's decision, "the prosecution [must] demonstrate, first, that an issue of significance has arisen *ex improviso*; second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute".

Secondly, the Chamber analysed the OTP's attempt to admit the prior recorded testimony under Rule 68(a) of the Rules. When formulating the decision, the Chamber discussed other similar, yet distinct, applications under Rule 68(a). The Chamber remarked that: "For an application under Rule 68 of the Rules, it is necessary that the Prosecution and Defence have had or will have an opportuni-

**Rule 68**

**Prior recorded testimony**

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

ty to examine the witness, whether in court or otherwise. This must have been a real as opposed to a symbolic or theoretical opportunity. The questioning should have occurred in circumstances in which the parties were aware that it was necessary to exercise their right to examine the witness, or, in any event, they availed themselves sufficiently of this opportunity".

After looking through the facts at hand, the Chamber stressed the nature in which the prior recorded statement had been taken. In its request for the interview, the OTP stated that the interview's purpose was to prepare itself for the Defence case; a statement which the Chamber believed did not offer adequate notice to the Defence of its possible admittance under Rule 68(a) of the RPE. Moreover, the Chamber believed that the probative value far outweighed the prejudicial effect to the Accused.

Finally, the Chamber reverted back to the initial question of allowing the witness to testify before the Court. The Chamber reasoned that the OTP failed to prove that an issue of significance has arisen *ex improviso* and that the witness was not to be called as a rebuttal witness. In a somewhat foreseeable twist, the Chamber did decide that it would summons the witness before the Court under Articles 64 (6)(b) and 69(3) of the Rome Statute as a court's witness. The Chamber determined that while the issues raised during the final days of the Defence case were sufficiently foreseeable, the witness's testimony contained possible evidence relating to those final days of the Defence case that might be important for the determination of the truth.

## Special Tribunal for Lebanon

### "Pre-Trial Judge orders Prosecutor to disclose materials to former detainee General El-Sayed

Adam Gellert, Legal Intern, Defence Office



From 3 September 2005 to 10 April 2009, El Sayed was detained by the Lebanese judicial authorities at the behest of the International Independent Investigative Commission in connection with the Hariri case, prior to being placed under the authority of the Special Tribunal for Lebanon. On 29 April 2009, the Pre-Trial Judge ordered El Sayed's release, after the Prosecutor had considered that the information in his possession was not sufficiently credible to justify the issuance of an indictment against him. On 17 March 2010, El Sayed wrote to the President of the Tribunal in order to obtain materials from his criminal file related to his detention. According to El-Sayed, these materials (including witness statements) may buttress his civil and criminal claims before national courts against witnesses who made false statements against him during the investigation. On 17 September 2010, the Pre-Trial Judge held that El-Sayed has a right to receive his criminal case file under certain circumstances. Since then the OTP, the applicant and the Pre-Trial Judge have been discussing behind closed doors the amount and scope of documents El-Sayed may be entitled to.

**General Jamil El-Sayed**

In its decision of 12 May 2011, the Pre-Trial Judge ordered the Prosecutor to disclose hundreds of documents to El-Sayed either in full or in a redacted format.

The Prosecutor submitted a second amendment to the Hariri indictment to the Pre-Trial Judge on 11 March 2011. This expands on the scope of the indictment filed on 17 January 2011 in connection with the attack on former Lebanese Prime Minister Rafiq Hariri and others on 14 February 2005.

## Defence Rostrum

### The Death of Osama Bin Laden: Denial of Justice or Lawful Assassination?

**Osama Bin Laden**

On 2 May 2011 news broke of Osama Bin Laden's death, caused by US Special Forces in a compound located in Abbotabad, Pakistan. While many Americans rejoiced and others believed that justice had finally been served, the circumstances around Bin Laden's death began to raise questions and concerns. More speculation arose when the US disposed of Bin Laden's body in the ocean without a public report or investigation. Most of the debate revolving around Bin Laden's death has been about whether or not Bin Laden's death was legal under the framework of international law.

President Obama delivered the official statement acknowledging that the United States had launched a targeted operation against the compound in Abbottabad in order to "get Osama Bin Laden and bring him to justice". Obama further stated that "after a firefight" the Special Forces killed Bin Laden and took custody of his body.

On 12 May 2011, US District Attorney Eric Holder stated that the Special Forces had acted in an appropriate way and "in the absence of any clear indication Bin Laden had been going to surrender". Holder further stated, "If the possibility had existed, if there was the possibility of a feasible surrender that would have occurred". Holder reiterated the legality of the operation and that under international law, the targeting of enemy commanders is allowed.

However, without more information than what has been issued by the White House and the US District Attorney, many still question exactly what had occurred on 2 May 2011. Whether or not Bin Laden was indeed armed or not has brought about the debate whether his killing was an extrajudicial killing or an act of self-defence. What rang in the headlines of almost every news source in the world was whether this was "justice by revenge" or "justice by law".

International law prohibits, without exception, extra-judicial killings and considers it a grave violation of International Humanitarian Law (IHL) and human rights. Under the Fourth Geneva Convention, extrajudicial killings constitute grave breaches and are subject to international jurisdiction.

However, the United States argues that Bin Laden was an enemy combatant, making him a legitimate military target in the "War on Terror". UN Resolutions 1368 and 1373 (2001) provide legal grounds for the war on terror, stating that "States may take all necessary steps to respond to the terrorist's attacks of 11 September 2001, and to combat all forms of terrorism". Enemy combatants who don't explicitly surrender are considered legitimate targets. If the White House scenario is correct, that is, if Bin Laden was resisting capture, it makes him a military target. However, IHL dictates that police must use the greatest possible effort to capture suspects alive, barring direct threats to the lives of officers or civilians.

Enemy combatants generally have two sub-categories: lawful and unlawful combatants. Lawful combatants receive prisoner of war (POW) status and the protections of the Third Geneva Convention. Unlawful combatants do not receive POW status and do not receive the full protections of the Third Geneva Conventions.

**Barrack Obama**

On 5 May 2011, Pakistan's foreign minister, Salman Bashir, stated that US forces may have breached his country's sovereignty. Bashir said "there are legal questions that arise in terms of the UN charter. Everyone ought to be mindful of their international obligations".

The US officials later released a statement that the Special Forces killed Bin Laden after they saw him reach for a weapon, furthering the argument of self-defence. However, a person using the defence of self-defence has the burden of proof to demonstrate that the action was proportional and the threat was genuine.

Omar Osama Bin Laden and his brothers issued a statement to the press, asking, "Why an unarmed man was not arrested and tried in a court of law so that truth is revealed to the people of the world". Bin Laden compared his father's situation to that of Saddam Hussein and Slobodan Milošević . Hussein and Milošević were tried of war crimes in a court of law and by denying Bin Laden a trial the US has set a "very different exam-

ple, whereby the right to have a fair trial and presumption of innocence until proven guilty by a court of law has been sacrificed on which western society is built".

Bin Laden's sons have threatened to take the issue to the ICC, ICJ or UN in order to have them take notice of international law and assist them in seeking answers. The threats of Osama Bin Laden's children, however, may be unfounded, as the United States is not a party to the Rome Statute of the International Criminal Court and has permanent member status on the Security Council. If International Law had been violated, the question that begs to be answered is "what next?"

### Libya: the ICC Prosecutor requests warrants of arrest against Gaddafi and his inner circle

On 16 May 2011, Luis Moreno-Ocampo, Prosecutor in Chief of the International Criminal Court, requested Pre-Trial Chamber I to issue three arrest warrants against Libyan leader Muammar Gaddafi, his son Saif Al-Islam and right-hand man and Head of the Military Intelligence, Abdullah Al-Sanousi.

**Luis Moreno-Ocampo**

The situation of Libya was unanimously referred to the International Criminal Court on 26 February 2011 by United Nations Security Council Resolution 1970 and almost immediately thereafter, on 3 March, the Office of the Prosecutor decided to initiate an investigation. On 16 May, the Prosecutor presented his evidence to Pre-Trial Chamber I and announced his intention to request three warrants of arrest.

The Prosecutor argued that from 15 February 2011 onwards, Muammar Gaddafi and his inner circle committed crimes against humanity through the Libyan State apparatus and Security Forces, with the goal of preserving absolute authority and putting an end to recent challenges to Gaddafi's power.

**Muammar Gaddafi**

The crimes alleged are that of murder and persecution under articles Article 7(1)(a) and (h) of the Rome Statute. In particular, it is alleged that Gaddafi's forces used live ammunition, heavy weaponry and snipers to attack civilians in their homes or during demonstrations. It is further alleged that Muammar Gaddafi's forces committed acts of persecution against dissidents, such as the preparation of lists of names of alleged dissidents who are being arrested, imprisoned, tortured and made to disappear.

The Prosecution further alleges that Gaddafi personally gave orders for these crimes to be committed. He is therefore considered as an indirect perpetrator of the crimes. In pursuit of his goal, he is said to have relied on his inner circle, including two co-perpetrators, Saif Al-Islam, considered as his de facto prime minister and Al-Sanousi, Head of the Military Intelligence. The OTP announced that it had evidence indicating that the three held meetings to prepare their operations and of Saif Al-Islam organising the recruitment of mercenaries to carry out these operations.

Interestingly, in case PTC I decides to issue warrants of arrest, the Prosecution requests the Court to "exclusively transmit a request for the arrest of the suspects to Libyan authorities", that is the State on the territory of which the persons currently find themselves. For the OTP "the submission to States of requests in the abstract, without concrete foundation, would run contrary to specific nature of the judicial assistance", as its past experience – the Al Bashir case, in particular – has shown that "sending requests to States that cannot be fulfilled (…) may occasion uncertainty in that State as to the purpose of the request, may lead the State to revert back to the requesting organ to ascertain whether it has any information that would support its conclusion that such a request is warranted, or may cause it to question the conformity of the request with statutory requirements or to reject the request".

**Saif Al-Islam**

The OTP furthermore indicated its intention to continue its investigation and do so with a particular attention to gender crimes and without disregarding crimes potentially committed by other parties to the conflict.

## Blog Updates

- Dapo Akande, **Is IMF Managing Director (DSK) Entitled to Immunity from Prosecution?** 18 May 2011, available at: http://www.ejiltalk.org/
- Ellie Goetz, **ICC Prosecutor Asks Court To Issue Arrest Warrant For Libyan Leader,** 17 May 2011, available at: http://www.internationallawbureau.com/blog/?p=2807
- Steven Kay QC, **No Prosecution Appeal Against Ivan Cermak,** 17 May 2011, available at: http://www.internationallawbureau.com/blog/?p=2802
- International Justice Desk, **ICTR protected witness to testify under his real identity in Denmark**, 13 May 2011, available at: http://www.rnw.nl/international-justice/article/ictr-protected-witness-testify-under-his-real-identity-denmark
- Rob Fransman, **'Demjanjuk's release is a masterstroke'**, 13 May 2011, available at: http://www.rnw.nl/international-justice/article/%E2%80%98demjanjuk%E2%80%99s-release-a-masterstroke%E2%80%99
- Thijs Bouwknegt, **FDLR - Waging war by mobile phone and emails**, 9 May 2011, available at: http://www.rnw.nl/international-justice/article/fdlr-waging-war-mobile-phone-and-emails
- Marie O'Leary, **Belarus Continues to Expel Trial Observers**, 9 May 2011, available at: http://www.internationallawbureau.com/blog/?p=2790

**On 12 May 2011, 91 year-old Ukraine-born John Demjanjuk was found guilty by a Munich court of serving as a guard at a Nazi concentration camp. Although he was sentenced to 5 years imprisonment, presiding Judge Ralph Alt announced that considering the fact that Demjanjuk had already been imprisoned on remand for 2 years and taking into account his age, he was to be released. On 16 May, the Prosecutors appealed the release and the lenience of the 5 year sentence. Throughout the trial, Demjanjuk maintained his innocence, claiming that he was himself a victim of the Nazi regime.**

## Publications

### Books

John Finnis, 2011. *Human Rights and Common Good*. Oxford: Oxford University Press

Nigel Rodley and Matt Pollard, 2011. *The Treatment of Prisoners under International Law*. 3rd ed. Oxford. Oxford University Press

R.A.Duff and Stuart Green, 2011. *Philosophical Foundations of Criminal Law*. Oxford: Oxford University Press

Tracy Issacs and Richard Vernon, 2011. *Accountability for Collective Wrongdoing*. Cambridge: Cambridge University Press

Onder Bakircioglu, 2011. *Self-Defence in International Criminal Law: The Doctrine of Imminence*. Oxon: Routledge

### Articles

Ruth Bettina Birn, May 2011. Criminals as Manipulative Witnesses: A Case Study of SS General von dem Back-Zelewski. *Oxford Journal of International Criminal Justice* 9(2), pp. 441-474.

Katharina Margretts and Katerina I. Kappos, Current Developments at the Ad Hoc International Criminal Tribunals. *Oxford Journal of International Criminal Justice* 9(2), pp.481-518.

Scott P.Sheeran, May 2011. International Law, Peace Agreements and Self-determination: The Case of Sudan. *International and Comparative Law Quarterly* 60(2), pp.423-458.

Nicolas A.J. Croquet, March 2011. The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence? *Human Rights Law Review* 11(1), pp.91-131.

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## Upcoming Events

Terrorists on Trial: Performative Perspectives
**Date:** 26-27 May 2011
**Venue:** NIAS, Meijboomlaan 1, 2242 PR Wassenaar, The Netherlands
**Organiser:** Netherlands Institute for Advanced Study in the Humanities and Social Sciences (NIAS) and the International Centre for Counterterrorism (ICCT)

'Spotlight on Armenia' - The Hague Launch Event
**Date:** 30 May 2011
**Venue:** Nieuwspoort, Lange Poten 10, 2511 CL The Hague
**Organiser:** Netherlands Helsinki Committee and the Foreign Policy Centre

Supranational Criminal Law Lecture Series: Seminar by Susan Marks and Christine Schwöbel
**Date:** 31 May 2011
**Venue:** AULA, Campus Den Haag, Lange Houtstraat 5, The Hague
**Organiser:** Supranational Criminal Law Lecture Series

The 9th Development Dialogue on "Inequality and Justice", 6-7 June, 2011
**Date:** 06 June 2011 - 07 June 2011
**Venue:** Kortenaerkade 12, 2518 AX, The Hague
**Organiser:** International Institute of Social Studies (ISS)

South Eastern Circuit Bar Mess Foundation Advanced International Advocacy Course
**Date:** 29 August—3 September 2011
**Venue:** Keble College, Oxford, UK
**Organiser:** Keble College
**Download Application Form at**: http://www.barcouncil.org.uk/news/events/401.html

## Opportunities

**Legal Assistant, The Hague, The Netherlands (G-4)**
International Criminal Court (ICC), Voorburg
**Closing Date:** 25 May 2011

**Judge's Assistant, The Hague, The Netherlands (G-5)**
International Criminal Tribunal for the Former Yugoslavia (ICTY), Chambers
**Closing Date:** 28 May 2011

**Chef de Cabinet, Leidschendam, The Netherlands**
Special Tribunal for Lebanon (STL), Defence Office
**Closing Date:** 11 June 2011

**Associate Legal Officer, The Hague, The Netherlands (P-2)**
International Criminal Tribunal for the Former Yugoslavia (ICTY), Chambers/Registry
**Closing Date:** 16 June 2011