ADC-ICTY Newsletter, Issue 14

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* 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. Mladić (IT-09-92)

On May 26, General Ratko Mladić , former Commander of the Bosnian Serb Army (VRS) Main Staff, was arrested, 16 years after his indictment was originally filed at the ICTY. Mladić is charged with crimes committed during the war in Bosnia in the 1990's. Darko Mladić , his son, told the media that his father said he was not involved or responsible for those combat operations. The initial indictment was issued in 1995 and was originally a joint indictment with Karadzić.

General Ratko Mladić and Duty Counsel Aleksandar Aleksić

Mladić appeared before a Belgrade War Crimes Court who ruled that he met all the criteria for extradition to The Hague. Mladić's lawyer appealed this decision but the appeal was rejected.

Mladić was transferred to the United Nations Detention Unit (UNDU) on 31 May where he will be medically assessed in line with the normal procedures. During a Press Conference John Hocking, Registrar of the ICTY, stated that he had met Mladić in the airport and spent some hours with him on his arrival at the UNDU.

The ICTY announced that the Pre-Trial Chamber would be composed of Judge Alphons Orie, Judge Christoph Flügge, and Judge Bakone Justice Moloto. The initial appearance took place on 3 June and Mladić was represented by Defence Counsel Alexsandar Aleksić . He decided not to enter a plea to the charges that are leveled against him. Judge Orie adjourned the hearing and announced that the next appearance will take place on 4 July 2011, allowing Mladić to carefully read the documents that he was provided with.

The arrest of Mladić raises a number of issues for the ICTY including the Completion Strategy. Chief Prosecutor, Serge Brammertz stated that there is a possibility of joining Mladić with the trial of Karadzić, which has been ongoing since March 2010. The Prosecutor also filed an amended indictment which he hoped would speed up the trial proceedings.

The arrest of Mladić has caused a media frenzy which has largely concentrated on the victims of Srebrenica and there has been little reference to the fundamental right to a presumption of innocence. Mladić is entitled to a fair trial with all his rights being guaranteed, however much of the media coverage indicates he is guilty before any proceed-

dings have commenced. This coverage coupled with the apparent need to expedite the trial, could infringe upon Mladić's right to fair trial and ability to present a Defence case. Many see the arrest of Mladić as a step for closure in the Balkan region, however despite this, the need to establish a proper trial and justice should be upheld.

Prosecutor v. Haradinaj *et al.* (IT– 04-84bis-AR73.1)

On 31 May 2011, the Appeals Chamber handed down its much anticipated decision on the *Scope of the Partial Retrial.* The decision dismissed the Appeal on all three grounds with Judge Robinson, the President of the ICTY, partially dissenting. The appeal was submitted by Ramush Haradinaj. His co-accused, Idriz Balaj and Lahi Brahimaj, also submitted an appeal requesting clarification from the Appeals Chamber. The Appeals Chamber outlined its decision on the Scope of the Partial Retrial in the Haradinaj decision, thus rendering the issues raised by Balaj and Brahimaj moot, which resulted in the dismissal of their appeal.

As outlined in the last issue of this newsletter, the three grounds of appeal submitted by the Haradinaj Defence were:

1. Whether the Trial Chamber should only hear Kabashi and the other witness, the only two witnesses who were the subject of the Prosecution's original appeal;

2. Whether the Operative Indictment should include the same JCE (Joint Criminal Enterprise) alleged at the original trial;

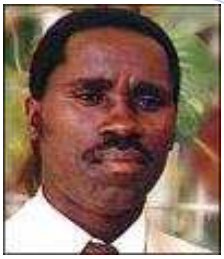
3. Whether the allegations unrelated to the six counts that are subject to the retrial should be deleted from the operative indictment.

For the first ground of appeal, the Appeals Chamber relied primarily on the case of Tharcisse Muvunyi heard before the ICTR Appeals Chamber, which considered the question of bringing new evidence in a partial retrial. The Chamber pointed out that the decision in *Muvunyi* involved a partial retrial following a conviction, whereas the Haradinaj case deals with a partial retrial following a full acquittal. The Chamber did not find this distinction necessarily affected the "parameters of a retrial" (para 23). Nonetheless, the Chamber recognised that whether a retrial follows an acquittal or a conviction can be significant, depending on the individual context. It noted that the potential for undue prejudice towards the Accused in a retrial following an acquittal can be addressed by the Trial Chamber itself. To this end, it directed the Trial Chamber "to be particularly mindful of any potential prejudice that the admission of new evidence may cause the fair trial rights of the Accused". If the Prosecutor seeks to introduce evidence that was excluded in the original trial, the Trial Chamber is directed to "explicitly consider whether re-litigation of this same issue in the retrial would be unduly prejudicial" (para 26).

The Appeals Chamber dismissed the second ground of appeal by agreeing with the Trial Chamber's Impugned Decision that the original Appeals Chamber did not intend to change the common purpose of the Joint Criminal Enterprise (JCE). It noted that the Appeals Chamber decision did not envision a narrower JCE, but "a narrower participation by the Accused" in the JCE. It argued that the decision merely limited the charges to be brought against Haradinaj and did not alter the broader scope of the alleged JCE. This will inevitably affect the scope of the facts that the Prosecution must prove to establish the JCE. The Chamber took note of this, but decided that it is within the Trial Chamber's discretion to assess the evidence submitted.

Ramush Haradinaj

Goran Hadžić is now the last remaining fugitive out of the 161 people indicted by the ICTY. Croatian-born Hadžić was the President of the Government of the self-proclaimed Serbian Autonomous District Slavonia, Baranja and Western Srem (SAO SBWS) and was subsequently the President of the Republic of Serbian Krajina (RSK) during the War in Croatia.



Tharcisse Muvunyi was the most senior military officer in the Butare Préfecture and Commander of the École des sous-officiers (ESO) in Butare, Rwanda in 1994. He was arrested in the UK in 2000 for acts of genocide, direct and public incitement to commit genocide and other inhumane acts. In December 2006 he was convicted and sentenced to 25 years imprisonment. The Appeals Chamber quashed the conviction in August 2008 and ordered a partial retrial, which began in June 2009. In February 2010, Muvunyi was found guilty of public and direct incitement to commit genocide and was sentenced to 15 years imprisonment.

The third ground of appeal deals with numerous allegations found in the Operative Indictment that are not related to the six counts which are the subject of the retrial. Some of these allegations involve alleged crimes for which the Accused has been finally acquitted without appeal from the Prosecution. Others allegedly involve incidents which occurred prior to the start of the armed conflict, as determined by Trial Chamber I. The Appeals Chamber argued that despite the inclusion of these general allegations in the Indictment, the Trial Chamber cannot make findings in relation to the allegations that fall outside these six counts. It concluded that these allegations do "not expose Haradinaj to any additional charges or render the retrial unfair per se" (para 39). Once again, it delegated the decision making on the relevance and probative value of evidence related to these allegations to the Trial Chamber.

Judge Patrick Robinson's partially dissenting opinion emphasised that this was the first retrial before the ICTY and, as such, the Appeals Chamber had to deal with many issues that had not previously been considered. In his opinion, the majority had relied too heavily on the ICTR Appeals Chamber's decision in *Muvunyi* – which, he pointed out, deals with a person retried following a *conviction*. He did not believe this provided all the answers raised in the current case, which concerns a person *acquitted of all charges* in the first trial. He stated that while in his opinion *Muvunyi* was an important starting point, "the Appeals Chamber could and should have given further consideration to other relevant legal principles and their scope of application in the context of retrial following acquittal which may have also assisted the Trial Chamber in its determination of admissibility challenges that will inevitably arise in the course of retrial" (para 1).

Judge Patrick Robinson, President of the ICTY

The dissenting opinion concerned mainly Grounds 2 and 3 of the Appeal, however Judge Robinson stated that while he agreed with the outcome of the Decision on Ground 1, he did not believe that the reasoning put forward by the majority "fully addresses all the submissions advanced by the parties or identifies all the relevant legal principles at stake" (para. 2).

Judge Robinson stated that Haradinaj's acquittal in relation to "all other crimes alleged in the Operative Indictment are final, and any re-alleging of Haradinaj's responsibility on those counts are barred by the principles of *non bis in idem* and *res judicata*". He argued that an Accused who has been acquitted must not be placed at risk of being thought guilty or of being treated as guilty in any way. This is meant to keep the prosecutor from re-alleging the responsibility of the Accused when it has already been determined. It applies *a piori* to the Indictment because, as noted by Judge Robinson, the whole purpose of the Indictment is to outline with precision the charges, allegations and modes of responsibility against the Accused. He further noted that "the findings of Trial Chamber I with regards to acquitting the Accused of the broader JCE was undisturbed by the Appeal Judgment, save in the limited sense of the six counts the subject of the retrial". For these reasons, as well as others put forward in his dissent, he agreed with Haradinaj that "the JCE as currently pleaded in the Operative Indictment requires the Prosecution to prove allegations for which Haradinaj has been finally acquitted and that are outside the scope of the crimes to be tried in the retrial". As such, Judge Robinson disagreed with the ruling on Ground 2 of the appeal.

In relation to Ground 3 of the appeal, Judge Robinson particularly disagreed with the inclusion of paragraphs 34-38 and 42-46. He argued that these make specific references to alleged crimes for which Haradinaj has been acquitted without appeal. In his opinion, the inclusion of these paragraphs violates the principles of *non bis in idem* and *res judicata* or "would amount to an abuse of process." (See para 8). The other paragraphs in the Indictment - specifically paragraphs 28(a)-(f), (j)-(m), 32-33, are broad factual allegations which the Judge argued do not impact Haradinaj's final

acquittals. However, the Judge pointed out that it is not clear what evidence the Prosecution intends to use to prove these broad allegations. The Prosecution would be estopped from relying on evidence that, if accepted by the Trial Chamber, would tend to overturn the final acquittals.

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

On 19 May 2011, in the case of Zdravko Tolimir, Prosecution witness Manojlo Milovanović was asked to testify about two different types of convoys: UNPROFOR convoys for the troops and humanitarian aid convoys. Milovanović testified that an initial agreement regarding convoys had been reached between UNPROFOR BiH Command and the Main Staff in the first half of 1992. The witness said that convoys had to be announced at least 24-hours in advance along with the proposed route, the contents, and those in charge of the convoy. Those on the territory of Republika Srpska were obligated to carry out checks of the convoys, sometimes examining just one vehicle and at other times all of the vehicles. UNPROFOR convoys were permitted to resupply their troops with ammunition, but humanitarian aid convoys were not allowed to carry any weapons. Milovanović said that everything functioned properly until the UN safe areas or enclaves were established.

Manojlo Milovanović

Milovanović recalled one incident in April 1994 when General van Baal, Chief of Staff for BiH UNPROFOR, asked for one of the UNPROFOR contingents to be supplied with ammunition, just one week after they had already been resupplied with the same ammunition. Milovanović asked van Baal if there had been any combat activities in that area in the previous week, seeking an explanation for why UNPROFOR needed additional ammunition. When van Baal did not respond Milovanović said that it was their conclusion that UNPROFOR was using their convoys to "bring ammunition into enclaves" and that there were "problems between us and UNPROFOR were related to supplies of ammunition".

In addition, Milovanović testified about the Muslim side violating cease-fire agreements, NATO bombings and events leading up to the fall of Srebrenica and Zepa.

Prosecutor v. Šešelj (IT-03-67)

On 24 May 2011, Trial Chamber II publicly filed an order initiating contempt proceedings against Vojislav Šešelj , the leader of the Serb Radical Party. This order was originally filed on 9 May 2011. Šešelj is charged with contempt for "failing to move confidential information from his personal website in violation of orders of a Chamber". The confidential information contains three books authored by Šešelj and five confidential filings submitted by him during his main trial and previous trials for contempt of court. These documents are alleged to reveal confidential information about various protected witness who testified in his main trial before the ICTY.

Vojislav Šešelj

This is the third time that Šešelj is charged with contempt of the Tribunal, having been found guilty in the first contempt case while the second is still on-going. The previous charges also related to the publishing of confidential information and disclosing personal details of protected witnesses.

The date of Šešelj's Initial Appearance at which he will be called to enter a plea will be determined in due course.

The initial indictment for **Vojislav Šešelj** was made public on 14 February 2003, followed by his surrender on 23 February and his transfer to the ICTY on 24 February 2003. The trial initially commenced on 27 November 2006 in the absence of Šešelj who had been on hunger strike for 26 days. Due to Šešelj's health, the trial was adjourned until 7 November 2007. The presentation of evidence commenced on 11 December 2007. Since then, the trial has been suspended twice due to previous contempt cases and is one of the longest cases pending before the ICTY.

News from International Courts and Tribunals

International Criminal Tribunal for Rwanda

Prosecutor v. Ndindiliyimana *et al* Judgment

Paul Bradfield, Nizeyimana Defence team

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

Article 6(1) Individual Criminal Responsibility

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

On 17 May 2011, the Trial Chamber in the case of *The Prosecutor v. Ndindiliyimana et al.* delivered its Judgment to a packed courtroom and with the public gallery full to capacity. The Accused were the most senior military figures in Rwanda during the 1994 genocide to be judged to date at the ICTR.

Augustin Ndindiliyimana

The Accused in this case were Augustin Ndindiliyimana, the former Chief Staff of the Gendarmerie nationale, Augustin Bizimungu, the former Chief of Staff of the Rwandan army, Francois-Xavier Nzuwonemeye, Commander of the Reconnaissance battalion of the Rwandan army during the events of 1994, and Innocent Sagahutu, the Commander of Squadron A of RECCE battalion. All of the Accused were charged with conspiracy to commit genocide and murder as a crime against humanity and as a violation of Common Article 3 to the Geneva Conventions, with other counts consisting of genocide or complicity in genocide, rape and extermination as crimes against humanity and rape and humiliating and degrading treatment as violations of Common Article 3 to the Geneva Conventions.

With regard to the count of conspiracy to commit genocide, the Chamber assessed the evidence supporting the Prosecution's allegation that the Accused were involved in a conspiracy to commit genocide and found that the evidence, in most cases, was open to inferences that were not consistent with a finding that the Accused were involved in conspiracy to commit genocide against Tutsi. The Chamber noted that the evidence adduced was 'circumstantial' and it was not satisfied that the Prosecution proved beyond reasonable doubt that the four Accused were implicated in such a conspiracy.

The Chamber found that on 7 April 1994, Bizimungu went to Ruhengeri and gave a speech in which he called for the killing of Tutsi. Following this speech, many Tutsi were killed in Ruhengeri prefecture and the Chamber found Bizimungu criminally responsible pursuant to Article 6(1) of the Statute for these crimes. It also held Bizimungu responsible under Article 6(3) for other crimes perpetrated at places such as Musambira commune office. However, the Chamber was not satisfied the evidence established beyond a reasonable doubt Bizimungu's responsibility for other killings perpetrated in places such as Busogo and Egena camp or for other incidents which occurred prior to Bizimungu assuming his position as Chief of Staff of the Rwandan Army. It also held that the Prosecution failed to adequately plead a number of crimes with sufficient specificity and therefore Bizimungu was deprived of proper notice of the facts underpinning some allegations.

With regard to Ndindiliyimana, the Chamber found that Ndindiliyimana bore superior responsibility under 6(3) for gendarmes' involvement in the killing of Tutsi civilians in places such as at Kansi Parish and Saint André College. There was no evidence that he took any measures to punish his subordinates for these crimes. However, the Chamber was not satisfied that Ndindiliyimana was responsible for a number of other incidents as it found witness testimony not to be credible or was uncorroborated.

The Chamber stated that the killing of Prime Minister Agathe Uwilingiyimana was of great significance as her planned radio address calling for calm from such a prominent figure 'would have had a significant effect in ameliorating the fraught situation'. It was satisfied that an armoured unit from RECCE battalion under instructions from the Accused Nzuwonemeye and Sagahutu was involved in her death. The Chamber also held Nzuwonemeye responsible under 6(3) and Sagahutu under Article 6(1) and 6(3) for the notorious and brutal killing of 10 Belgian UNAMIR soldiers, which prompted Belgium's withdrawal from the UNAMIR peacekeeping force. The Chamber considered Sagahutu's 6(3) command responsibility to be an aggravating factor.

Augustin Bizimungu

Article 6 (3)

The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

In its disposition, the Chamber found both Bizimungu and Ndindiliyimana guilty of genocide, murder, extermination with Ndindiliyimana also guilty of degrading and humiliating treatment. They were acquitted of the charges of conspiracy to commit genocide and complicity in genocide. The Chamber found both accused Nzuwonemeye and Sagahutu guilty of murder but not guilty of the charges of conspiracy to commit genocide and rape and humiliating and degrading treatment.

The most controversial moment in the Judgment delivery came when the Chamber handed down its sentences to the Accused. In deciding the appropriate sentence for Augustin Ndindiliyimana and despite convicting him for genocide and murder, it found there were significant mitigating factors in his favour. They included: Ndindiliyimana's limited command over the gendarmerie after 6 April 1994, his consistent support for the Arusha Accords and a peaceful resolution of the conflict between the Rwandan government forces and the RPF and his opposition to the massacres in Rwanda. The Chamber controversially announced he was sentenced to time served, and directed the Registry to make the appropriate arrangements for his immediate release. Ndindiliyimana was arrested in Belguim in January 2000 and had spent just over 11 years in detention. Bizimungu was sentenced to 30 years in prison, with Nzuwonemeye and Sagahutu each given terms of 20 years, with credit being given to all three for time served to date.

Innocent Sagahutu

Arrest of Bernard Munyagishari

On 25 May 2011, the ICTR Prosecutor, Justice Hassan Bubacar Jallow, announced the arrest in the DRC of ICTR fugitive Bernard Munyagishari, former President of the Interahamwe militia for Gisenyi, he was arrested in an operation mounted by the DRC Armed forces, in collaboration with the OTP Tracking Unit in Kachanga, North Kivu.

Munyagishari, currently detained in Goma and pending transfer to the Tribunal, is wanted by the ICTR on charges of genocide and crimes against humanity, including rape. He is alleged to have recruited, trained and led Interahamwe militiamen in mass killings and rapes of Tutsi women in Gisenyi and elsewhere between April and July 1994.

Born in 1959 in Rubavu commune in Gisenyi, prefecture Munyagishari was arrested pursuant to an international warrant issued by Judge Alexei Egorov on 8 September 2005. He has featured on the U.S. Rewards for Justice programme as a fugitive from international justice.

Arrangements are being made for the Accused to be surrendered by the DRC authorities and transferred to the seat of the Tribunal in Arusha. Nine fugitives are still at large.

ICTR Court Building in Arusha

Extraordinary Chambers in the Courts of Cambodia

Christopher Ford, Legal Intern, Defence Support Section

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

Judge You Ottara

On 3 May 2011, the Defence team for Ieng Sary filed their observations to the Co-Prosecutor's notification of legal issues which it intends to raise at the initial hearing. Noting that under ECCC Internal Rule 89, any issues to be presented at the Initial Hearing must be made within 30 days of the Closing Order becoming final, the Defence team requested that the inclusion of rape as a crime against humanity and the mode of responsibility under the third form of joint criminal enterprise be inadmissible. The Defence also requested that the Co-Prosecutor should not be permitted to re-characterise the current charges as permitted in Rule 98 to include rape and joint criminal enterprise, due to the addition of new constitutive elements.

On 5 May 2011, the Defence team for Ieng Sary filed a request to reclassify as public Ieng Sary's motion for a hearing on the conduct of the judicial investigation. The Defence cited ECCC Internal Rule 21(1) and further argued that the motion did not fall under any applicable exceptions requiring its classification as strictly confidential, and that the interests of all would be served by its release.

On 9 May 2011, the Co-Prosecutors responded to Ieng Sary's Defence team's motion to exclude Kang Guek Eav's (alias "Duch") statements in the event he does not testify. The Co-Prosecutors stated that the Defence's motion was premature, as they intend to call Duch as a witness at trial. In response to the Defence's request for a list of previous occasions in which Duch had been found to be untruthful, the Co-Prosecutors maintain that they have produced no such list. The Co-Prosecutors further stated that they are not required to indicate which documents may be exculpatory or to create witness examination questions for the Defence.

Ieng Sary

Also on 9 May 2011, the Trial Chamber issued a decision on Ieng Thirith and Ieng Sary's applications for the disqualification of Judge You Ottara from the special bench. The Defence's concern stemmed from Judge You's previous role on a panel of the Cambodian Supreme Court which in June 2010 upheld the conviction of politician Mu Sochua for defaming Prime Minister Hun Sen. The Defence claimed that this willingness to deliver the "desired result" of the government by Judge You demonstrated his susceptibility to government pressure. The Trial Chamber held that under ECCC Internal Rule 34, evidence of an inability of a judge to rule fairly in another case does not by itself demonstrate the inability of the judge to rule fairly on the issues before him. A link is required between the alleged lack of independence and the case under consideration. Rule 34 stipulates that in order for a judge to be disqualified, his inability to rule fairly on the issues before him must be shown.

On 11 May 2011, the Defence team for Ieng Sary filed a request for expedited decision on certain issues raised at the 4 May 2011 trial management meeting. The Defence wished to know, based on Nuon Chea's Defence team's question, the meaning of the term "brief" when used to describe an opening statement under ECCC Internal Rule 98 bis. The Nuon Chea team also raised the concern of whether Defence teams were still not allowed to contact witnesses whom they have placed on their list and whether Defence teams were still not allowed to conduct their own investigations.

Rule 21(1)

Fundamental Principles

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

a. ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;

(continued on the following page)

Rule 21(1)
continued

b. Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;

c. The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and

d. Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.

Also on 11 May 2011, the schedule for the initial hearing for all parties in Case 002 was set. The hearing will begin on 27 June 2011 and will discuss potential witnesses, preliminary objections pursuant to ECCC Internal Rule 89 (Preliminary Objections), and initial specification of the reparations that the Co-Lawyers intend to seek pursuant to ECCC Internal Rule 23 quinquies (regarding Civil Party Claims).

On 12 May 2011, the Trial Chamber issued a decision on Ieng Sary's request for release. The Defence had previously argued that ECCC Internal Rule 68(3) imposes a three-year limit on provisional detention. In light of this three-year limit, and because Ieng Sary was first detained on 12 November 2007, the Defence submitted that he has been unlawfully detained since 11 November 2010. The Defence therefore requested Ieng Sary's release on bail in the form of house arrest. Furthermore, Rule 68(2) required that a ruling be made within four months of a request for release on bail. As the decisions of the Pre-Trial Chamber of 13 January 2011 regarding a previous request for bail did not provide reasons, the Defence argued that it was defective and the subsequent reasons provided on 11 April 2011 went beyond the four-month limit required by Rule 68(2).

In its decision, the Trial Chamber ruled that the omission of reasons in its denial of the Defence's request for bail constituted a procedural defect, but not one of sufficient weight to necessitate a disproportionate remedy such as immediate release. The Trial Chamber also agreed that continued detention is permissible pursuant to Rule 68(3) considering the well-founded reasons to believe the Defendant committed the crimes, as well as the Defendant's likelihood of flight upon release on bail. In its reasoning, the Trial Chamber cited Ieng Sary's contacts abroad and his possession of a Cambodian and a Chinese passport.

On 23 May 2011, Ieng Sary's Defence team filed a motion to add new trial topics to the trial schedule that address issues from pre-1976 and post-1979. Specifically, they wish to introduce pre-1976 evidence explaining attitudes in the Democratic Kampuchea towards Buddhism, the ethnic Cham minority, the Vietnamese and the history of Cambodia from pre-colonialism up to 1975. The Defence also wishes to address post-1979 topics, including the continuing UN recognition of Democratic Kampuchea, the nature of government in the People's Republic of Kampuchea, and the historiography of Democratic Kampuchea.

In support of this motion, the Defence noted that the indictment contained a section of background information that covered the period from 1930 to 1975 and background on Ieng Sary that begins in the 1940's, as well as post-1979 information listed as "character information". The Defence also notes that the ICTR has ruled that acts prior to the temporal jurisdiction may be discussed when aimed at clarifying context and establishing elements of a crime. The Defence then pointed to the fact that the Office of the Co-Prosecutor has also discussed events outside of the designated time period.

On 24 May 2011, the Co-Prosecutors responded to a statement in response to a request previously filed by Ieng Sary's Defence team with the Trial Chamber to permit each of the four Defence teams in Case 002 to be allowed the same amount of time as given to the Co-Prosecutors. The Co-Prosecutors' response outlined the importance of the opening statement and the appropriateness of the 5-hour time limit. The Co-Prosecutors also claimed that witness-proofing (pre-trial, independently conducted witness interviews), although allowed in ad hoc tribunals, was not in accordance with either Cambodian or French civil law and thus should not be permitted.

Michael Karnavas and Ang Udom—Defence counsel for Ieng Sary

Case 003 and Case 004

Andrew Cayley

On 9 May 2011, the International Co-Prosecutor Andrew Cayley issued a Press Release regarding the International Co-Prosecutor's Introductory Submission in Case File 003. Cayley announced that he planned to request further investigation as part of Case 003 crimes taking place at several crime sites and criminal episodes covered by Case 002, as well as new investigation sites. He also planned to request further witness interviews, including re-interviewing witnesses from the Case 002 investigations, as well as requesting a six-week extension to the deadline for Civil Party applications. Cayley argued that the extended deadline is necessary due to the fact that the criminal investigation sites have not previously been made public and therefore more time is needed for victims to submit Civil Party applications. The International Co-Prosecutor encourages victims or witnesses who wish to make a complaint related to the crimes described in Case File 003 to do so as soon as possible.

The Office of the Co-Prosecutors is co-headed by a Cambodian and an international Co-Prosecutor and is staffed by both national and international personnel and interns. The national co-prosecutor is appointed by the Supreme Council of the Magistracy, and the international co-prosecutor is appointed by the Supreme Council of the Magistracy of Cambodia upon nomination by the United Nations Secretary-General.

On 10 May 2011, the National Co-Prosecutor Chea Leang issued a Press Release stating that the suspects mentioned in Case File 003 were not senior leaders or those who were most responsible during the period of Democratic Kampuchea, as required by the agreement between the UN and the Royal Government of Cambodia, and that investigations directed against them should therefore be ceased. Leang further stated that the Court's mandate can be adequately fulfilled through the Prosecution of the Accused persons already in the ECCC Detention Facility awaiting trial in Case 002.

On 12 May 2011, Civil Party Applicant Rob Hamill requested a suspension of the deadline of appeal against an order on admissibility of his civil party application pending a grant of access to case file 003 and 004. Hamill has insisted that without access to the case file, it will be impossible to form meaningful legal or factual grounds for an appeal.

On 18 May 2011, the Co-Investigating Judges issued an order to the International Co-Prosecutor to retract, within three working days, portions of his statement released on 9 May 2011. The International Co-Prosecutor was said to have released information "mentioning in detail as part of Case 003 alleged crimes, crime bases and criminal scenarios". The Co-Investigating Judges stated that the International Co-Prosecutor lacked legal basis for making the above-mentioned information public and also violated the rule of confidentiality by doing so.

Chea Leang

On 19 May 2011, Cayley filed his notice of appeal against the Co-Investigating Judges' order to retract portions of his 9 May 2011 statement.

On 18 May 2011, Civil Party Applicants Seng Chan Theary and Rob Hamill filed appeals against orders on admissibility of their respective civil party applications in Cases 003 and 004. Seng appealed the rejection of her application on the basis that she was not afforded fundamental procedural fairness due to insufficient information on the scope of investigations in Cases 003 and 004. Seng claimed that the Co-Investigating Judges had failed to conduct investigations of the relevant crime sites to Cases 003 and 004, the Co-Investigating Judges failed to correctly interpret the applicable "Joint Criminal Enterprise" law, and that the Co-Investigating Judges failed to provide reasoned decisions on the inadmissibility of her application to become a civil party.

On 26 May 2011, the Office of the Co-Investigating Judges released a press statement responding to the article "Cambodia's troubled tribunal" published in the 25 May 2011 edition of the International Justice Tribune. The statement explained that the Co-Investigating Judges had never threatened the International Co-Prosecutor with contempt of court as the article described and that allegation was merely a baseless rumour. The Co-Investigating Judges also refuted the statement that the Court is "heading for an irreparable crash" by describing the continued functioning of the Court despite the large workload placed before it.

Defence Rostrum

Equality of Arms in International Criminal Jurisdictions: What is the Role of Defence Offices?

The principle of equality of arms constitutes a fundamental principle of fairness in international criminal proceedings. Yet, already in Nuremberg Chief Prosecutor Robert H. Jackson remarked with realism that, in such trials, Defendants would face serious challenges that could undermine the judicial processes as a whole: "there is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate". In modern international criminal justice, equality of arms remains a critical issue and one specific aspect of this principle deserves a particular attention: institutional support for Defence teams. What form of institutional support do Defence teams receive and what role do Defence offices play in this regard?

Given the institutional nature and practical realities of international criminal tribunals, one may reasonably have concerns as to the possibility for them to guarantee equality of arms. Practically, while the jurisdiction and its Prosecutor remain in place, the presence at the Tribunal of Defence teams is somewhat more precarious, as the teams come and leave. There is therefore a significant advantage for the Prosecution, which is a permanent organ of every international criminal jurisdiction. The Prosecution benefits from continuity and stability, as well as the experience and knowledge built up throughout years of activity. The fact that Defendants in the ICC are represented by external Defence Counsel is the necessary corollary of the Defendant's right to choose Counsel. However, the appointment of new external Defence Counsel for each case increases the risk that each Defence team might have to "re-invent the wheel". In order to counterbalance this effect, a variety of forms of Defence support services and administrations have progressively emerged and were put in place, with the general aim of creating continuous administrative and legal support for Defence teams. Although variably, these administrations have evolved in respect of several parameters: institutional, legal, organisational, functional, and budgetary parameters. In general terms, one can observe a growing recognition of the need for independent Defence offices capable of creating a form of collective representation of Defence Counsel and of providing them continuity in spite of the inherently temporary nature of their presence at the Tribunal.

At the initial stage of this evolution are the Nuremberg, Tokyo and the *ad hoc* tribunals, which provided no formally integrated entity to represent the interests of the Defence. At the ICTY, the Registry provides administrative support and an independent bar association, the Association of Defence Counsel practising before the ICTY (ADC-ICTY), represents the general interests of the Defence. In later jurisdictions, namely the ICC, SCSL and ECCC, this function was progressively integrated within the jurisdictional systems, within the remit of the Registry. The most significant development in this regard is the separate and autonomous organ created at the STL. One can similarly observe a growing recognition of defence support services in the legal frameworks of the various tribunals: from no mention in the legal frameworks of the *ad hoc* Tribunals, the existence of Defence support entities passed into the law through the Rules of Procedure (SCSL and ECCC), the Regulations of the Court (ICC), and was finally fully recognized at the STL where the Statute, the Rules of Procedure and the directives of the President of the Tribunal govern the existence of the Defence office.

One can furthermore observe an evolution in terms of organisation and distribution of functions among existing Defence support services. At the ICTY and the ICC, there is a plurality of entities fulfilling a variety of administrative, legal and financial functions in support of the Defence. Defence offices of the SCSL, the ECCC and the STL all have integrated entities with larger spectra of functions. Until the STL, Defence support services had never been envisaged at the stage of the creation of a jurisdiction. At the STL, a comprehensive legal framework systematized the support for the Defence with a very broad mandate covering legal, administrative and financial support to the Defence. The Office has extensive competencies in relation to legal aid, counsel-related issues including discipline and the establishment of a list of counsel able to appear before the Tribunal. Importantly, the STL Office ensures a high quality of defence as it collectively represents the Defence at the Tribunal, gives adequate legal advice and training to Defence teams. The office was furthermore entrusted with the responsibility to monitor the Defence teams and is authorised to take steps when an accused is properly not defended.

At the ICC, Defence support functions are distributed between the Counsel Support Section (CSS), which is responsible for providing the necessary logistical and administrative support to appointed counsel and the Office of the Public Counsel for Defence (OPCD), which embodies the legal support service for the Defence at the ICC. The OPCD is given the responsibility to represent the interests of the Defence during the investigation stage, that is, the stage at which the Defence of an Accused is particularly fragile. Furthermore the OPCD provides legal advice and research on pertinent legal and factual issues which are relevant to defence teams. Through the development of valuable institutional knowledge, the office participates in creating continuity and a form of collective defence memory for Defence teams. Finally, the OPCD represents the general interests of the Defence in connection with internal and external policies and agreements.

Throughout the evolution of Defence support services, one wonders whether it is possible to observe a progression towards a certain model. As the evolution has not reached its final step and is still on-going, the exact features of this possible model remain unclear. This lack of clarity is further reinforced by the great variety of functions exercised by the existing offices, which do not fit into the conceptual boxes of the institutions existing at the national level such as bar associations or public defenders: Defences offices are and shall remain *sui generis* institutions. Nevertheless, as recent developments show, there is a true recognition of a need for the Defence to be institutionally represented and to close the continuity gap. Defence support offices can and already play an important role in contributing to counterbalance the inherent disadvantages of defence teams which cannot build upon the experience of years of activities. Through legal support at the initial stages of a case, as at the ICC, or through the development of legal databases and institutional knowledge, defence offices play a significant role in seeking to render the principle of equality of arms effective. Potentially, Defence offices could truly constitute the institutional pillars of equality of arms and guarantee through their independent voice and legal support that suspects and accused before international criminal jurisdictions are indeed given equal opportunities to present their cases.

Provisional Release: Are international human rights standards applied in international criminal law?

General regime

On 11 May 2011, the Appeals Chamber of the ICTY denied the accused Mićo Stanišić's appeal against the decision on his motion for provisional release. Stanišić filed the appeal on 28 February 2011, three days after the Trial Chamber had denied his motion for provisional release following the close of the Prosecution's case. The Appeals Chamber decision came almost two months after the suggested end of the release period and the appeal was thus moot. It underlined, however, an important challenge faced by the international criminal tribunals today: the right of the accused not to be deprived of his liberty until proven guilty and the right to an expeditious and fair trial. As suggested in the dissenting opinion of Judge Robinson, the question arises – is detention in international criminal law an exception or rather a rule? Are international human rights standards applied at the international courts?

Release pending trial is one of the multiple consequences of the presumption of innocence principle. As such, one should speak of a *right* to provisional release, that is, a right not to be detained before guilt is proven beyond reasonable doubt and punishment is legally justified. In practice however, one is hesitant to speak of such a right, as the expression *provisional release* itself creates some confusion as to the very substance of the concept. In that context, one also encounters terms such as *interim release* and *pre-trial* or *provisional detention*.

The principle of freedom as a rule and incarceration as an exception to the rule has been recognised by basic human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights and Fundamental Freedoms (ECHR). It is inseparable from the right to a fair and expeditious trial by an impartial tribunal, as well as detention being admissible only to the extent where it is reasonable. Article 9(3) of the ICCPR states: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge (…) and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody (…)". Pursuant to the ECHR, "No one shall be deprived of his liberty save (…)the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so" (Art. 5(1)(c)). In the same line, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art. 6(1)).

The above standards put on judges the burden to establish that there are factual parameters requiring detention and that detention of the suspect or accused is *reasonable*. Whether or not this is the case must be assessed for every individual according to

its special features: “continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty”.

While conditions for pre-trial or pre-conviction detention may vary from one jurisdiction to another, the above principles have been confirmed by jurisprudence. Among most common factors, judges may consider the gravity of charges, previous convictions of the accused, their voluntary surrender, the likelihood of the accused fleeing the court’s jurisdiction or continuing to commit offences.

At the international level, one can argue that specific circumstances call for specific approach – the charged crimes are often of exceptional gravity, the international judicial organs do not avail of own enforcement bodies and depend on the cooperation of states for apprehending and trying the alleged perpetrators. Some of the states have in practice shown favourable attitude towards sheltering the accused.

When not outweighed by these factors, the necessity to preserve the rights of the Accused should lead a court to order his or her release. A judge may however condition the interim release by a number of guarantees required from the accused.

ICTY theory and practice

Pursuant to the Rule 65(B) of the ICTY Rules of procedure and evidence (RPE), provisional release may be granted if i) the host country and the state to which the accused seeks to be released have been heard, ii) the chamber is satisfied that the accused will appear for the trial, and iii) if released, [the accused] will not pose a threat to any victim, witness or other person.

Until November 1999, this threefold regime was complemented by the requirement of “exceptional circumstances”, which put a significantly onerous burden on the defence. As a matter of fact, only two provisional releases had been granted prior to 1999. That suggests that the release before conviction was seen as exception, which obviously raised concerns about the Rule’s conformity with international human rights standards. (See *Prosecutor v. Brdjanin* where the Trial Chamber explicitly ruled that provisional release was not a rule.)

Following the amendment of the rule, provisional release became a more common feature at the ICTY. The development of jurisprudence has, however, brought about a new element, particularly concerning provisional release at a later stage of proceedings. On 21 April 2008, the Appeals Chamber in *Prosecutor v. Prlić* held that “an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution’s case, will only be granted when serious and sufficiently compelling humanitarian reasons exist”.

Arguing by the binding nature of the decision, the Trial Chambers have subsequently required the existence of sufficiently compelling humanitarian grounds. A new criterion has thus effectively been introduced by the ICTY’s jurisprudence, particularly for the advanced stage of the proceedings. With the exception of the 23 April 2008 decision in *Prosecutor v. Prlić et al.* (accused Pusić), all cases have until now followed this standard, although in *Prosecutor v. Krajišnik,* for instance, a dissenting opinion suggested an interpretation of the Rule 65(B) as a “power combined with a duty”, known from some common law jurisdiction, implying the term “may” would only relate to the competency, not discretion of the chamber, provided the two criteria have been fulfilled.

Other international criminal tribunals

The ICTY, nonetheless, may appear to be more favourable to the accused compared to other criminal tribunals. The ICTR, whose statute and RPE largely reflect those of the ICTY, had retained the “exceptional circumstances” condition until May 2003. Until 2002, the judges had never been obliged to decide on the remaining criteria since none of the applicants had in the chamber’s opinion fulfilled the exceptional circumstances requirement. Some of the accused spent over 10 years awaiting their trial. Moreover, even if provisional release had been granted, the court would have faced the major obstacle of finding a state willing to take up the responsibility to host the accused and provide for their security. For instance, it took four months from the court’s decision granting provisional release before France agreed to receive the accused Baglishema.

Even more dramatically, in the case of ICC and provisional release granted to Jean-Pierre Bemba in August 2009, none of the states parties accepted to host the accused who had to remain in custody, and ended up having the release decision reversed four months later. In the ICC regime, the interim release is governed by Article 60 of RPE – the detention is not necessary if conditions for arrest warrant are not met or if the detained has been in custody for unreasonable period of time due to “inexcusable delay” of the Prosecution. In addition, the decision on release is to be reviewed every 120 days.

A new dawn?

In February 2011, in line with the post-2008 jurisprudence, the Trial Chamber denied a motion for provisional release of the accused Mićo Stanišić, requested in order to be able to prepare for the commencement of the defence case. Despite being satisfied that the accused fulfilled the Rule 65(B) requirements and although it had granted him a release only two months earlier, the Court held that compelling humanitarian grounds requirement was also applicable and was not met. The Trial Chamber thus explicitly admitted having decided only because of the *ratio decidendi* nature of the Appeals Chamber's reasoning, while disagreeing in substance.

It also noted the absence in ICTY jurisprudence, since 2008, of references to the ICCPR and ECHR or to the presumption of innocence and the emphasis was put instead on policy considerations such as the perception of the ICTY in the former Yugoslavia. Judge Delvoie in a concurring separate declaration confirmed the Chamber's reasoning and further urged the Appeals Chamber to either reconsider the precedent for material errors in its reasoning or provide concrete guidance to trial chambers by setting out the exceptional circumstances justifying the departures from the applicable law in the interests of justice.

One can ask whether this is a positive sign of a possible turn in the ICTY jurisprudence or rather a reminder of a sad reality? The conclusion that may be drawn from a brief analysis of the case law of the ICTY and other tribunals is that international human rights standards related to the detention of accused prior to a conviction are not strictly followed. In addition, it is in practice for the accused to prove that his detention is not required.

Interim or provisional release should generally be framed in terms of a duty of the judges to carefully consider whether it is truly necessary to deprive an accused of their freedom. That said, it must be recalled that the fundamental principle of presumption of innocence prevails also at the international level and cannot be disregarded. In particular, as the European Court of Human Rights has repeatedly found, the gravity of the alleged crimes is not sufficient to justify continuing pre-trial detention. Furthermore, it should not be made incumbent on the detained person to demonstrate the existence of reasons warranting his release. Instead, policy considerations are sometimes openly preferred to human rights standards and while realistically such an inclination may be understandable, from a legal point of view, the accused's right to presumption of innocence is impaired.

Meet the current ADC-ICTY Newsletter Team:

From left to right: Daniel Gadelrab, Jovana Paredes, Kusthrim Zymberi, Isabel Düsterhöft, Tatiana Jančárková, Dominic Kennedy, Taylor Olson and Rens van der Werf;

Blog Updates

- Gentian Zyberi, **Mladic's Arrest and the ICTY Completion Strategy,** 26 May 2011, available at: http://internationallawobserver.eu/2011/05/26/mladic-arrested-what-does-that-mean-for-the-icty-completion-strategy/

- Marie O'Leary, **Mubarak to Face Trial Over Protestor Killings,** 26 May 2011, available at: http://www.internationallawbureau.com/blog/?p=2829

- Kenneth Anderson, **Pentagon Concludes Cyber Attacks Can Be Act of War,** 30 May 2011, available at: http://opiniojuris.org/2011/05/30/pentagon-concludes-cyber-attack-can-be-act-of-war/

- Benjamin Ward, **In Mladic Arrest, a Reminder How Far International Justice Has Come,** 31 May 2011, available at: http://www.hrw.org/en/news/2011/05/31/mladic-arrest-reminder-how-far-international-justice-has-come

- Deirdre Montgomery, **Pre-Trial Chamber Denies Kenya's Challenges to Admissibility of PEV Case,** 1 June 2011, available at: http://www.internationallawbureau.com/blog/?p=2852

- International Justice Desk, **Denmark Cannot Try Genocide Abroad,** 1 June 2011, available at: http://www.rnw.nl/international-justice/article/denmark-can-not-try-genocide-abroad

- Deirdre Montgomery, **Ratko Mladic in Tribunal Custody—What Happens Next?** 1 June 2011, available at: http://www.internationallawbureau.com/blog/?

On 31 May 2011, former member of the Bosnian Croat Defence Council (HVO), Miroslav Anic, was sentenced to 15 years in prison for war crimes. In March 2011 Anic had reached a plea agreement with the prosecution, pleading guilty to war crimes committed in Kiseljak and Vares in 1993. He had served as a member of the 'Maturice' special unit under the command of Ivica Rajic who was sentenced to 12 years imprisonment by the ICTY in 2006.

Publications

Books

John Deigh, David Dolinko, 2011. *The Oxford Handbook of Philosophy of Criminal Law*. Oxford: Oxford University Press.

Jonas Christoffersen, Mikael Rask Madsen, 2011. *The European Court of Human Rights between Law and Politics*. Oxford: Oxford University Press.

Michael Waibel, 2011. *Sovereign Defaults before International Courts and Tribunals*. Cambridge: Cambridge University Press.

Richard Ashby Wilson, 2011. *Writing History in International Criminal Trials*. Cambridge: Cambridge University Press.

Hitoshi Nasu, Ben Saul, 2011. *Human Rights in the Asia-Pacific Region: Towards Institution Building*. Oxon: Routledge.

Articles

Theo Boutruche, 2011. Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice. *Oxford Journal of Conflict and Security Law* 16(1), pp.105-140.

Saul Matthew, 2011. The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces. *Oxford Journal of Conflict and Security Law* 16(1), pp.165-206.

Gurnham David, 2011. Legal Authority and Savagery in Judicial Rhetoric: Sexual Violence and the Criminal Courts. *International Journal of Law in Context* 7(2), pp.117-137.

Solomon A. Dersso, April 2011. The Role and Place of Human Rights in the Mandate and Works of the Peace and Security Council of the AU: An Appraisal. *Netherlands International Law Review* 58 (1), pp. 77-101.

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WE'RE ON THE WEB!

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Upcoming Events

Launch of The Hague Institute for Global Justice
Date: 10 June 2011
Venue: Hall of Knights in The Hague
Organiser: The Hague Institute for Global Justice

The Role of Women in Peacebuilding and Peacekeeping
Date: 13 June 2011 - 24 June 2011
Venue: Leiden University, Campus Den Haag
Organiser: Grotius Centre for International Studies in cooperation with Oxfam Novib

Workshop: Multi Valued Law and Multivalent Logic
Date: 17 June 2011 - 18 June 2011
Venue: NIAS, Meijboomlaan 1, 2242 PR Wassenaar
Organiser: Hague Institute for the Internationalisation of Law & the Netherlands Institute of Advanced Studies

Second Peace Palace Library Lecture
Date: 22 June 2011
Venue: Peace Palace, The Hague
Organiser: Peace Palace

Research Seminar "Judicial Innovations by International Criminal Courts"
Date: 23 June 2011
Venue: T.M.C. Assert Instituut, The Hague
Organiser: T.M.C. Asser Instituut

Opportunities

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

Investigator, Leidschendam, Netherlands (P-3)
Special Tribunal for Lebanon (STL)
Closing Date: Saturday, 31 December 2011

Assistant/Associate Legal Officer, Leidschendam, Netherlands (P-1/P-2)
Special Tribunal for Lebanon (STL)
Closing Date: Saturday, 31 December 2011

Assistant/Associate Case Manager, Leidschendam, Netherlands (P-1/P-2)
Special Tribunal for Lebanon (STL)
Closing Date: Saturday, 31 December 2011

Legal Officer, Leidschendam, Netherlands (P-3)
Special Tribunal for Lebanon (STL)
Closing Date: Saturday, 31 December 2011