ADC-ICTY Newsletter, Issue 15

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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. Tolimir (IT-05-88/2)

Zdravko Tolimir

Last week in the case the *Prosecutor v. Zdravko Tolimir*, Zoran Malinić, former commander of the Military Police Battalion of the 65th Motorised Protection Regiment of the VRS Main Staff, testified. Malinić has been mentioned at all the trials of crimes in Srebrenica before the ICTY and his appearance marked the first time he has been called as a Prosecution witness before the tribunal. He was called to give testimony regarding the supposed capture of a thousand Muslim men in Nova Kasaba after the fall of Srebrenica on 13 July 1995.

These men were allegedly captured after Malinić was given information that many soldiers were crossing the road Konjević Polje and Nova Kasaba. Malinić reiterated that the men in Nova Kasaba were treated fairly and in compliance with all orders he ever received.

The Prosecution presented an order signed by Commander Lieutenant Colonel Milomir Savčić, proposing conditions and rules for the treatment of the allegedly captured men. Malinić contested that this document was ever an order, as it resembled a proposal by Savčić, which was not in conformity with previous orders that Malinić received. Malinić stated "if I had received this order and not carried it out, then a criminal report should have been filed". Hence, he testified that he never received such a document.

Malinić was given the opportunity by General Tolimir to respond to false accusations that were made against him earlier in other cases before the tribunal. Malinić addressed accusations made by General Radislav Krstić in *Prosecutor v. Krstić,* stating that he could not identify the reasons why his name and his unit's name were mentioned for the crimes of Srebrenica. He had his own opinion about why Krstić would make such accusations, however, he stated he would rather not voice his opinion before the tribunal as this constituted a personal matter.

Furthermore, Malinić refused to make any counter-accusations against anyone for incidents that he was not aware of, nor certain about.

The Prosecution case will continue on Wednesday, 29 June 2011.

Key dates applicable thus far for the **Haradinaj *et al.*** case:

16 June 2011: Defence submits list of objectionable witnesses

20 June 2011: Prosecution files Pre-Trial Brief

27 June 2011: Prosecutions files its motions

11 July 2011: Defence files Pre -Trial Brief

22 July 2011: Start of Recess

14 August 2011: End of Recess

17 August 2011: Pre-Trial Conference

18 August 2011: Opening Speeches

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

Having received the Appeals Chamber decision on the scope of the retrial on 9 June 2011, the parties were finally able to hold a Status Conference aimed at advancing the proceedings. The primary objective of the Defence going into the Status Conference was to set a date for trial. However, Judge Moloto had several other issues on the agenda. He first inquired about the progress made in regard to *Agreed Facts*. The parties, Defence and Prosecution, explained that the matter of *Agreed Facts* was not fully resolved but they shared the optimism that the remaining issues would be resolved shortly.

Judge Moloto

The Prosecution has signalled that it will be relying on 45 witnesses from the original trial, whose testimony will not need to be given again live. The Parties will agree on a mode of tendering the evidence of those witnesses, with the Defence showing a preference for the review of their testimony via video recording. The Prosecution also submitted that it intended to potentially call 11 witnesses to give live testimony. The Defence pointed out that they objected to some of the Prosecution's proposed evidence on the basis of relevance. Therefore, Judge Moloto ordered the Defence to provide a list for the Prosecution of the witnesses they object to by 16 June 2011. The Defence have provided these lists by the date requested. This will allow the Prosecution to meet its deadline for filing the appropriate motions in response by 27 June 2011.

The Prosecution also submitted that it would file an amended Pre-Trial Brief by 20 June 2011. Judge Moloto accepted this submission and ordered the Defence to file their Pre-Trial Briefs by 11 July 2011.

Finally, Judge Moloto was able to come to the issue of setting a trial date. The Defence indicated its preference for setting a formal trial date on a day before recess, which begins on 22 July 2011 and ends on 14 August 2011. The Prosecution preferred a start day after recess. Judge Moloto ordered the start of the trial on 17 August 2011, which will begin with a pre-trial conference. The Chamber will sit for the remaining days of that week and all of the week after. Thereafter, the Chamber will sit in two-week blocks, meaning two weeks on and two weeks off.

Prosecutor v. Šešelj (IT-03-67-R77.3)

Vojislav Šešelj's second contempt of court trial concluded before the Special Trial Chamber composed by the Tribunal on 8 June 2011. The Prosecution began their case on 22 February 2011. Šešelj is accused of breaching protective measures ordered by the Tribunal after disclosing the identities of eleven protected witnesses in a book he authored. This is the second time that Šešelj faces charges of contempt. On 24 July 2009, he was found guilty of contempt and sentenced to 15 months of imprisonment for disclosing the names and other personal details of protected witnesses in his first contempt proceedings.

The second contempt trial ended abruptly after one Defence witness refused to testify under court appointed protective measures. Subsequently, Šešelj refused to call the rest of his defence witnesses unless their identities were revealed publically. A few witnesses who testified on Šešelj's behalf were among some of the same protected witnesses that prompted the contempt charges. While some witnesses had their protective measures removed, all witnesses discussed that they had revealed their identities to the public themselves or gave Šešelj permission. One witness stated that "it was an honour to be mentioned" in one of Šešelj's books.

Rule 75(D) of the Rules of Procedure and Evidence (RPE) states that once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other pro-

ceedings. If, at the time of the request for variation or release, the original Chamber is no longer constituted by the same Judges, the President may authorise such variation or release after consulting with any Judge of the original Chamber who remains a Judge of the Tribunal and after giving due consideration to matters relating to witness protection. All members of the public, including journalists, are subject to the Trial Chamber's orders. Any violation of such an order, especially matters relating to the protection of witnesses, could constitute a contempt of court and as such, incur a penalty as stipulated by Rule 77 of the RPE.

Šešelj argued before the special chamber that the witnesses had decided to testify without protective measure and the Chamber did not have the right to impose protective measures on witnesses who did not want them. The Chamber reiterated to Šešelj that this was not the way protective measures operated at the ICTY. This raises the question of the usefulness of the protective measures if the witnesses themselves do not want them.

Prosecutor v. Karadžić (IT-95-5/18-I)

On 6 June 2011 Karadžić filed his 50th Disclosure Violation Motion to the Chamber under Rule 68 for failing to disclose material undermining expert witness Patrick Treanor's testimony. Treanor claims that Karadžić had tasked Jovan Czimovic to ensure various municipalities carried out the Variant A and Variant B instructions and that Czimovic travelled to these municipalities in order to carry out this purpose. However, during Treanor's testimony, Karadžić uncovered that the Prosecutor had in possession two interviews of Czimovic conducted by Treanor's colleagues which indicate that Czimovic denied knowing of the Variant A and B document and that he travelled to various municipalities to implement the plans. According to Karadžić, the Prosecutor failed to disclose these documents that undermine Treanor's testimony. Karadžić has requested that the trial be suspended to ensure the full disclosure of materials and has requested a Special Master be appointed to oversee the disclosure process. The Chamber has not yet ruled on the motion.

During the week of 13 June to 17 June 2011, expert witness Dorothea Hanson testified that the SDS crisis staffs implemented a policy of removing non-Serbs based on their religion and ethnicity. Karadžić challenged Hanson's impartiality due to the creation of SDA and HDZ crisis staffs before the SDS created their own crisis staffs. Additionally, Karadžić challenged Hanson's conclusion that there was removal of non-Serbs from various municipalities. According to Karadžić, the non-Serbs were removed in order to protect them from the hostilities around the municipalities.

On 20 June 2011 Karadžić filed another Disclosure Violation Motion to the Chamber because the Prosecution recently disclosed 99 items, ranging from OTP interviews to videos, under Rule 68. Specifically, some of the recently disclosed material relates to exculpatory information undermining the upcoming testimony of Nebojša Ristić, a member of security detail. According to Karadžić the Prosecution recently disclosed interviews with other members of his security detail, allegedly containing information about instructions not to attack Srebrenica or retaliate against NATO airstrikes in Pale. Karadžić has requested Ristić's testimony to be delayed until after summer recess and for the trial to be suspended to allow time to examine all recently disclosed documents.

ADC Proposes Amendment to Rule 98 *bis*

On 9 June 2011, the ADC proposed to the ICTY Rules Committee that Rule 98 *bis* be amended to allow for allegations to be stricken at the close of the Prosecution case when there has been no evidence capable of sustaining it. Currently, the Rule allows only for the dismissal of "counts" of the indictment.

Indictments at this Tribunal frequently contain large numbers of scheduled incidents, or alleged acts of persecution, which do not themselves constitute a "count". The proposed amendment allows a Chamber to strike allegations which have not been proven so that the Defence does not have to bring evidence against those allegations in its Defence case.

The Statute of the ICTY, in line with the major legal systems around the world, states that the International Tribunal *"shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."*

Rule 98 *bis*

Judgement of Acquittal

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

The ADC also proposed that Rule 98 *bis* revert to its original language which allowed either oral or written submissions and decisions. Research conducted by ADC Legal Intern Lisa Scott showed that the 2004 amendment which required that Rule 98 *bis* proceedings be entirely oral had not achieved significant time savings between the Prosecution and Defence cases. The opportunity for a written judgment of Rule 98 *bis* decisions will make those decisions a more accessible part of the Tribunal's jurisprudence. The Rules Committee is expected to consider the proposed amendment in the coming months.

News from International Courts and Tribunals

International Criminal Tribunal for Rwanda

Special Deposition Proceedings in the case of Félicien Kabuga

Paul Bradfield, Nizeyimana Defence team

Rule 71 *bis*

Preservation of Evidence by Special Deposition for Future Trials

A) If within a reasonable time, a warrant of arrest has not been executed, the Prosecutor may submit a request to the President that evidence relating to the indictment be preserved for a further trial by special deposition recorded in a proceeding conducted by a single Judge.

On Monday 23 May 2011, the ICTR commenced special deposition proceedings in the case of Félicien Kabuga, who is yet to be arrested, in order to preserve the Prosecution's evidence against him. The proceedings are taking place before presiding Judge Vagn Joensen.

Earlier this year, the Office of the Prosecutor began proceedings for the taking of a special deposition, seeking to safeguard evidence against Kabuga and two others, Augustin Bizimana, former Minister of Defence and Major Protais Mpiranya, who was Commander of the Presidential Guard, pursuant to Rule 71 *bis* of the Rules of Procedure and Evidence (RPE).

The Prosecutor feared that evidence against the aforementioned Accused may be lost or depreciated due to the passage of time, death, incapacity and the potential unavailability of witnesses in the future.

During the events for which he was indicted, Kabuga, now aged 76, was President of the Comité Provisoire of the Fonds de Défense Nationale (FDN) and President of the Comité d'initiative of Radio Télévision Libre des Mille Collines (RTLM). He was also related by marriage to the family of President Juvénal Habyarimana, whose plane was shot down on the 6 April 1994 and was the event which triggered the genocidal events in Rwanda.

Bahame Tom Nyanduga

The indictment alleges that Kabuga was the main financier and backer of the main political parties – Mouvement Républicain National pour le Développement et la Démoctratie (MRND) and the Mouvement Démocratique Républicain (MDR) – and their militias.

He is charged with eleven counts of conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder, extermination, rape, persecution, inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II. He is being represented by Duty Counsel Bahame Nyanduga (Tanzania) who was appointed by the Registrar.

Rebuttal Evidence Ordered in the Nizeyimana case (ICTR-2000-55)

The Trial Chamber in the case of *Prosecutor v. Nizeyimana* has permitted the prosecution to call three extra witnesses to challenge the defence of alibi for Captain Idelphonse Nizeyimana that he was not in Butare prefecture as of 21 and 22 April 21 1994 and between 26 April and 17 May of the same year.

According to the decision on 7 June 2011, the Chamber ordered the Prosecution to present its rebuttal evidence starting 22 June 2011, following the close of Defence case on 17 June 2011. It considered the alibi defence to constitute a central issue in the case and, therefore, highly relevant and probative.

The Chamber recalled that the purpose of rebuttal evidence is 'to afford the Prosecution an opportunity to refute new evidence arising in the course of the Defence case that was not reasonable foreseeable' but such evidence must not be used by the Prosecution to 'reopen or perfect its case.'

The Trial Chamber considered it to be 'in the interests of justice to allow witnesses A, B and C to testify as Prosecution rebuttal witnesses in response to the alibi defence for the dates of the morning of 21 April to the late afternoon of 22 April 1994 and from 26 April to on or about 17 May 1994'.

Citing relevant case law, the Trial Chamber stated that when the Prosecution seeks to present rebuttal evidence, the Prosecution must make a showing of the following two elements:

- The evidence it seeks to rebut arose directly *ex improviso* during the presentation of the Defence's case in chief and could not, despite the exercise of reasonable diligence, have been foreseen; and
- The proposed rebuttal evidence has significant probative value to the resolution of an issue central to the determination of the guilt or innocence of the Accused.

The Chamber held that the proposed evidence of rebuttal witnesses was relevant, of probative value and not of a cumulative nature. It was of the view that hearing the evidence of the witnesses may assist in assessing other evidence adduced during the course of the trial and more generally in its quest to ascertain the truth.

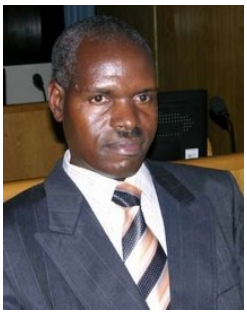
In its motion seeking leave to call the rebuttal witnesses, the Prosecution had submitted that it did not receive sufficient notice of the Accused's alibi evidence and that the resulting prejudice would be best cured by the presentation of rebuttal evidence, which will show that during the disputed period, Nizeyimana was in fact in Butare and left at the end of May 1994.

The Defence had opposed to the motion, arguing it provided timely and adequate notice of the Defendant's alibi and the Prosecution did not demonstrate it had suffered prejudice. It further alleged that contents of the alibi evidence was reasonably foreseeable by the Prosecution and it failed to locate the three witnesses before closing its case.

John Philpot

The Trial Chamber's decision prompted a vociferous response from Lead Counsel for Ildephonse Nizeyimana, John Philpot, in court the following day. He informed the Chamber that he considered the decision 'profoundly unfair, fundamentally flawed, affecting the equity of the trial' and that the decision 'severely undermined the defence'. He further added that there was insufficient time to investigate the three proposed rebuttal witnesses.

Following the stated intention of the Defence to appeal the decision, Judge Muthoga presiding, advised the Prosecution not to transport the proposed rebuttal witnesses to Arusha on the specified dates. At the time of writing, the Defence is awaiting the outcome of its application for certification to appeal the rebuttal decision to the Appeals Chamber. The Defence case is expected to close on 17 June 2011.



Ildephonse Nizeyimana was indicted by the ICTR on 7 November 2000 for allegedly conspiring with other military personnel, political leaders, members of the government etc. to set up a plan for the extermination of the Rwandan Tutsi population. He was captured on 5 October 2009 in Kampala, Uganda, and was transferred to the ICTR on 6 October. In his initial appearance on 14 October he pleaded not guilty to all charges.

Augustin Ngirabatware was indicted on 27 September 1999 and is jointly accused with Jean de Dieu Kamuhanda for having directly financed the genocide in Rwanda. After having fled Rwanda in July 1994, he subsequently worked in various research institutes in Gabon and France and was arrested in Frankfurt, Germany on 17 September 2007. Ngirabatware was transferred to the ICTR on 8 September 2008 and pleaded not guilty to all counts on 10 October 2008. His trial began on 23 September 2009.

Trial resumes in the case of Augustin Ngirabatware (ICTR-99-54)

The trial of former Rwandan Planning Minister, Augustin Ngirabatware, who is charged with genocide and crimes against humanity, resumed on 13 June 2011.

Peter Herbert

Ngirabatware, who completed giving his own evidence in February 2011, is represented by Lead Counsel Peter Herbert and Co-Counsel Mylene Dimitri. Approximately 60 witnesses are expected to be called as the Defence case resumes.

The former minister allegedly launched appeals to kill Tutsis during numerous meetings in his home region in 1994 and is charged with genocide and/or in the alternative conspiracy to commit genocide, direct and public incitement to commit genocide and extermination and rape as crimes against humanity.

He is the son-in-law of Felicien Kabuga, who is currently the subject of special deposition proceedings described above.

Judgment Scheduled in the case of Pauline Nyiramasuhuko et al - aka the 'Butare Trial' (ICTR-97-21)

On Friday, 24 June 2011, Trial Chamber II composed of Judges William Sekule, Arlette Ramaoson and Solomy Balungi Bossa, will deliver its Judgment in the case of *Prosecutor v. Pauline Nyiramasuhuko et al.*, involving Pauline Nyiramasuhuko, former Minister of Family and Women Affairs in the Interim Government; Arsène Shalom Ntahobali, former student and a leader of (MRND) militiamen, the Interahamwe; Alphonse Nteziryayo, former Commanding Officer of the Military Police, then Préfect of Butare; Sylvain Nsabimana, former Prefect of Butare; Elie Ndayambaje, former Bourgmestre of Muganza commune in Butare préfecture; Joseph Kanyabatshi, former Bourgmestre of Ngoma commune in Butare prefecture. Nyiramasuhuko was the first woman to be indicted by the ICTR and she was tried alongside her son, Arsène Shalom Ntahobali.

The Indictment charges the Accused with Genocide, Conspiracy to commit Genocide, Complicity in Genocide, Direct and Public Incitement to Commit Genocide, Crimes against Humanity (namely Persecution, Inhumane Acts, Murder, Rape and Extermination) as a, Violations of Common Article 3 to the Geneva Conventions and Additional Protocol II.

Judge Khan elected President of the ICTR

On 25 May 2011, Judge Khalida Rachid Khan (Pakistan) was elected President of the ICTR for a period of two years. Judge Khan has been Vice-President of the Tribunal since May 2007 and is currently the presiding Judge of Trial Chamber III. Prior to joining the Tribunal, she served as a Puisine Judge on the High Court of Peshawar and was the first woman to be appointed to such a position. She began her career as a civil Judge in 1974 and later became Solicitor to the Government of the North-West Frontier Province of Pakistan. She was also the first woman to be appointed as Sessions Judge in the Indian subcontinent.

Judge Khalida Rachid Khan

She replaces Judge Denis Byron who was president of the Tribunal since May 2007 and who now assumes the role of Vice-President.

International Criminal Court

The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05 -01/08)

Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"

Seth Engel, Intern, Office of Public Counsel for the Defense, ICC-CPI*

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

In a ground-breaking decision regarding the admissibility of evidence at the trial level, the Appeals Chamber unanimously ruled on the appeal simultaneously made by both Jean-Pierre Bemba Gombo and the Prosecutor. Both parties took issue with the "wholesale" manner in which the Trial Chamber admitted literally all evidence in the Prosecutor's list of evidence while requiring only *prima facie* relevance to the case for admittance. A virtual cornucopia of arguments was proffered both parties in favor of overruling the Trial Chamber's decision.

In his appeal, Bemba claimed that not only must admitted evidence be "consistent with full respect for the rights of the accused," but that admitting evidence without first evaluating it would inhibit judges from determining which witnesses were affected by otherwise inadmissible evidence.

Bemba also submitted that the Trial Chamber's decision would seriously infringe the rights of the Accused – it would prevent him from knowing the nature of the evidence against him, compromise his ability to have adequate time and facilities to prepare his case, and trample upon his right to be tried without unduly delay. Bemba added that the admissibility of witness statements who fail to appear before the Court would require him to challenge the statements' admissibility *ex post facto*, effectively reversing the burden of proof. Finally, Bemba claimed the article 69(2) "principle of orality" was violated by the Trial Chamber's failure to distinguish between oral and written-testimony.

The OTP similarly criticized the Trial Chamber's practices for failing to provide a reasoned decision for admissibility of evidence, as required under rule 64(2) of the Rules of Procedure and Evidence (RPE). In addition, the OTP claimed that the Trial Chamber was obligated to weigh the evidence's probative value against potential prejudice to a fair trial, as required by article 69(4) of the Rome Statute. Additionally, the OTP questioned what it meant to "submit" a piece of evidence, as it had not intended to submit all of the evidence that the Trial Chamber ultimately admitted. The OTP also asserted that the Chamber had denied the parties an opportunity to raise issues on the evidence's admissibility, thereby violating rule 64(1) of the RPE, and that priority should be given to oral witness statements. In contrast to Bemba's claims, however, the OTP denied that the Trial Chamber infringed Bemba's right to be informed of the charges because the pre-filing and disclosure of evidence was sufficient disclosure.

In its ruling, the Appeals Chamber acknowledged the Trial Chamber's discretion in choosing to defer consideration of the admissibility of the evidence until the end of the trial. However, this discretion must always be balanced by the article 64(2) imperative to respect rights of the accused. By admitting the evidence in a "wholesale" manner, the Appeals Chamber held that the Trial Chamber violated the parties' right to argue admissibility under rule 64(1) of the RPE, failed to properly assess the evidence under article 69(4) of the Rome Statute, neglected to give its reasoning for admission of evidence under rule 64(2) of the RPE, and overlooked the primacy of oral witness testimony that is enshrined in article 69(2) of the statute.

Rule 64

Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

Rule 64

Procedure relating to the relevance or admissibility of evidence

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, subrule 1.

Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide thefollowing assistance in relation to investigations or prosecutions:
J) The protection of victims and witnesses and the preservation of evidence;

The Appeals Chamber ruled against Bemba's arguments that his rights were being violated, as he only had a right to be informed of the nature, cause and content of the charges against him, a right that was satisfied by the evidence already disclosed by the OTP. In addition, the Appeals Chamber doubted that Bemba's right to be tried without undue delay and right to adequate time to prepare a Defence was hindered by the decision, as these arguments were purely speculative. Finally, the Appeals Chamber disagreed with Bemba in that the burden of proof to prove beyond a reasonable doubt, enshrined in article 66(2) of the statute, was not implicated by the Trial Chamber's decision. It was pointed out, however, that the *prima facie* presumption of admissibility by the Trial Chamber reversed the Accused's role from arguing against initial admissibility into disproving admissibility of evidence already ruled acceptable.

Jean-Pierre Bemba Gombo

In summary, the Appeals Chamber required that all Trial Chambers examine evidence on an item-by-item basis, weighing its probative value against its potentially prejudicial effect on the fairness of the trial and rights of the Accused. In addition, the decision further codified that oral testimony should be the rule, while out-of-court or written testimony the exception.

Trial Chamber II's Order to Provide Further Assurances Regarding the Security of DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, (ICC-01/04-01/07-2952)

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

Defence witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (the witnesses) were transferred from the Democratic Republic of the Congo (DRC) on 27 March 2011. Prior and subsequent to their transfer, the witnesses expressed concerns about their security upon their return to the DRC. The witnesses "explained why [their] fear for retaliation by the DRC was well-founded and argued that the protective measures proposed by the VWU were inadequate to offer genuine protection".

In light of both the testimony given at trial and after the 12 May 2011 status conference, Trial Chamber II asked the Victims Witness Unit (VWU) to reassess its observations made one month prior. The Registry submitted a new risk assessment for the Witnesses and the possible problems associated with their testimony. The VWU, while stressing its limited mandate, reaffirmed it previous statement that "the DRC authorities has not yet attempted to harm the [W]itnesses, even thought their intention to implicate the Congolese authorities in the Ituri conflict has been public knowledge for a long time". In essence, the threat risk to the witnesses remained the same as before the testimony.

During the Chamber's analysis, it noted that while the VWU reported that the threat assessment for the Witnesses had not increased, the VWU did not explicitly confirm that no risk existed. The Chamber appeared apprehensive when asserting its conclusion about the witnesses' future if they are returned to the DRC, recognising the Registry's limited power to protect the witnesses once returned. Calling on the VWU for assistance, the Chamber asked the VWU to contact the DRC authorities to discuss the methods that the DRC will employ to monitor and protect the witnesses upon their return to the DRC. Moreover, in the spirit of Article 93(1)(j) of the Statute, the Chamber wanted the VWU to explore alternative protective measures with the DRC "in the event that such measures are deemed necessary…in light of a changed risk assessment".

Finally, the Chamber acknowledged the competing interests and responsibilities under the Statute. The Court acknowledged the contractual obligation under Article 93(7) for the transfer and the return of the detained Witnesses, but emphasised the overarching duty to ensure the security of every person that appeared to testify before the Court. Highlighting this dilemma, the Chamber remained confident that the DRC authorities will understand the legal obstacles currently unfolding before the Court.

The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11)

Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute

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

In this judgment, Pre-Trial Chamber II decided on the application filed by the Government of Kenya, in which the latter challenged the admissibility of the case against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang under article 19(2)(b) of the Rome Statute.

Apart from considering the Government's application, the Chamber also accepted observations from the Prosecutor, the Joint Defence of Ruto and Sang and the OPCV.

However, the main decision turned on the submissions made by the Kenyan Government, which tried to convince the Chamber of its willingness and ability to try those responsible for the 2007-2008 post-election violence.

In its submissions the Government referred to its newly adopted constitution and its efforts to investigate the alleged crimes. In particular, it vowed to provide a progress report on the investigations by the end of July 2011. The report would demonstrate how said investigations "extend up to the highest level".

In its decision, the Chamber first reiterated the fundamental right of State Parties to exercise their criminal jurisdiction over those alleged to have committed crimes, as set out in the Rome Statute.

Initial Appearance of Ruto, Kosgey and Arap

It proceeded by reiterating the two limbs of the admissibility test for trial proceedings at the International Criminal Court, namely complementarity and gravity, as found in article 17. They then continued that the former concerns the existence or absence of national proceedings. The first part of this principle of complementarity, as set out in article 17(1) (a), became the main focus of the judgment, turning on the question whether the Government's efforts amounted to the case "being investigated or prosecuted".

The Government argued that it was sufficient for the State to investigate "persons at the same level of the hierarchy" as those subject to the ICC's proceedings. However, the Chamber disagreed and ruled that although this test is appropriate in the context of the initial determination of "potential" cases, it does not apply to the determination of admissibility at the "case" stage. In the latter instance, the "same person" test applies, which means that the Government's admissibility challenge would only succeed if the persons investigated or prosecuted in Kenya are the same as those subject to proceedings before the ICC. This in its turn means that for the Government to pass the same persons test, Ruto, Kosgey and Arap should currently be investigated or prosecuted in Kenya.

When it applied the same person test to the facts, the Chamber found that "there are no concrete steps showing ongoing investigations against the three suspects in the present case". In support of its decision, the Chamber considered the Government's proposition to provide a progress report as evidence that the investigations had not yet been extended to the highest level of hierarchy, which includes the three suspects subject to the Court's proceedings. It expressed its suspicion that there are in fact no substantive proceedings against the three abovementioned suspects underway. Moreover, the Chamber scrutinised the judicial reform actions and promises and held that in reality and upon close examination, no concrete investigative actions had been undertaken against the three. Therefore, it could not be held that the case was being investigated or prosecuted by the State with jurisdiction over the three suspects, i.e. the Government of Kenya.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Defence Rostrum

Justus Majyambere detained and released in the USA

Major Justus Majyambare, one of the 40 Rwandan officials indicted by the Spanish judge Fernando Andreu Merelles since 2008 for crimes under international law, was reported detained in Washington D.C. on 20 May 2011.

Majyambere was arrested on charges of violations of immigration laws. An international arrest warrant has been in force since 2008. According to the Spanish indictment, evidence implicates the senior government and military officials in genocide, terrorism and other crimes against Hutu civilian population and against nine Spanish citizens. Majyambere has allegedly participated in military operations in the Ruhengeri region, aimed at the elimination of the Hutu civil population.

Three of the Spaniards, associates of the NGO Médecins du Monde, were killed in January 1997 after having reportedly uncovered and investigated mass graves of Hutu civilians allegedly killed by the Tutsi Rwandan Patriotic Army (RPA). The RPA is a military branch of the Rwandan Patriotic Front which under the leadership of Paul Kigame forms the government of Rwanda today.

President Kigame is also implicated in the alleged crimes. At the time, the indictment stirred up a lot of emotions, with the Rwandan authorities denouncing it as “full of hate and racist language, genocide denial and absolute falsehoods” and “an abuse of judicial process”. The authorities also pointed out that Judge Andreu had never been to either Rwanda or the Democratic Republic of Congo to conduct investigations, had never interviewed the alleged suspects and had never liaised with judicial authorities in either of the two countries.

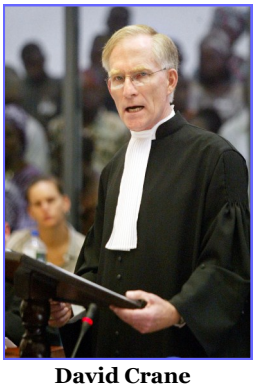
The case has two interesting dimensions. Firstly, the scope of jurisdiction of the International Criminal Tribunal for Rwanda (ICTR), tasked by the UN Security Council to try the atrocities committed during the long conflict in Rwanda and the Democratic Republic of Congo, is highly debated. There are numerous complaints that the ICTR openly favours one of the sides to the conflict and thus supports the current regime in Kigali, which has risen from the ranks of the Tutsi-dominated RPF.

A second interesting implication is linked to the reported release by the US authorities of Justus Majyambere shortly after his detention, suggesting that an Interpol red notice had been ignored. Instead of his extradition to Spain, the Rwandan authorities announced only two days later, on 22 May 2011, that Majyambere had indeed been present on US territory for a military training together with other Rwandan officers. He was, however, said to have safely returned to Kigali. The collection of US diplomatic cables recently published by the server Wikileaks suggests that the US government had repeatedly attempted to actively intervene with Spanish authorities regarding the proceedings in the case of the 40 Rwandan officials, as well as in other cases.

Such indications raise concerns with regard to the justice supposedly delivered at the ICTR, but also concerning the US approach going possibly as far as consciously ignoring international arrest warrants. They also lead back to allegations recently raised by and against Peter Erlinger, Lead Counsel before the ICTR (see Newsletter Issue 12).

International Criminal Law Breakfast Meeting

A new initiative of the Utrecht University Netherlands School of Human Rights Research, was inaugurated on Thursday, 9 June 2011. A morning lecture by David Crane, former Prosecutor of the Special Court for Sierra Leone was first of a series of informal meetings with key representatives of the international criminal law community intended for legal interns, scholars and professionals from the various criminal tribunals and courts in The Hague.



David Crane

The subject of the inaugural ICL Breakfast was the trial of Charles Taylor, the former president of Liberia and its possible political background. The event entitled “The Charles Taylor Case: Politically Motivated or Not?” aimed at illuminating the political connotations of the case, the first one of its kind to implicate a sitting head of an African state.

In his key note speech, Crane concluded that the process had indeed been political in the sense that it involved a lot of diplomacy and negotiations with political actors concerned. Talking about the unsealing of the indictment, Crane openly admitted that by timing it for the opening of a June 2003 peace conference in Accra

(Ghana) which Charles Taylor was going to attend, he wanted to embarrass him in front of his friends and that it was a political act and that it was a calculated operation, considering the political and military consequences.

The political character of the case reflected also in the decisions regarding the choice of persons to be indicted. In that regard, Crane particularly mentioned the case of Gibril Massaquoi whose information had apparently served to build the case against Charles Taylor. Being "one of the most ruthless and highest-ranking RUF commanders" as quoted in the Prosecution's final brief, Gibril Massaquoi has nonetheless never been prosecuted and neither has he been called as witness. The Defence has thus not had a possibility to hear and test his account.

Asked in the subsequent discussion session, about an emerging two-tier international justice and selective prosecution, Crane confirmed he was concerned about such possibility, but did not offer an opinion how this trend could be possibly reversed or what the international community should do to avoid it.

Talking about the alleged joint criminal enterprise led by the Libyan leader Muammar Gaddafi and involving among others Charles Taylor and Blaise Compaoré of Burkina Faso, Crane stated that Gaddafi had trained several individuals in Libya and sent them as surrogates to West Africa so that he could exert his control. When questioned by one of the participants about the Prosecution's decision not to indict Gaddafi, the former Chief Prosecutor replied he had decided not to issue an indictment on evidentiary basis.

The author would like to thank Michael Herz for his assistance in writing this article.

Karadžić Defence Team Meets Judge Greenwood and Visits Utrecht

A group of interns working on the Defence Team of Dr. Radovan Karadžić met Judge Christopher Greenwood at the International Court of Justice on 7 June 2011. It was a rare and inspiring opportunity for a group of aspiring lawyers to hear firsthand about international law from an authority on the subject and to ask questions pertaining both to Judge Greenwood's career trajectory and to specifics of the International Court of Justice (ICJ).

Judge Greenwood, who was knighted in 2009, is one of fifteen elected Judges currently serving at the ICJ. He hails from the United Kingdom, is Cambridge-educated and enjoyed a successful career as a professor at the London School of Economics and as a barrister. Greenwood acted as Legal Counsel for the government of the United Kingdom in a number of cases, including *Federal Republic of Yugoslavia v. United Kingdom* at the International Court of Justice and for Dragoljub Ojdanić in *Prosecutor v. Šainović et al.* at the ICTY. Judge Greenwood provided an overview of the life of an ICJ judge and how the Court reaches its judgments. He also offered advice to those considering a career in international law. He recommended that recent graduates obtain hands-on experience in the legal system of their own nation. He also counseled that a balance between academia and practical experience is vital in the legal profession. Despite its challenges, he said he has found international law to be a rewarding and exciting career and that, at the ICJ, he has felt gratified to play a role in helping states resolve conflicts and improving the lives of people globally and in real time. Judge Greenwood's testimony to the excitement, relevance and broad impact of international justice was especially resonant with a group of interns exploring the field at the ICTY.

Also, several members of the Karadžić Defence attended a lecture by Professor David Crane on "Atrocity Law and Policy" in Utrecht. The focus of the lecture was on the need to and difficulties of establishing sense of public service and respect for national governments in underdeveloped countries. According to David Crane, developing a sense of public service among the population would lower corruption and ease ethnic political cleavages, which have been strong precursors to violent outbreaks in various countries.

Blog Updates

- Michèle Morel, **Turkey's development plans violate human rights**, 6 June 2011, available at: http://internationallawobserver.eu/2011/06/06/turkeys-development-plans-violate-human-rights/

- Deirdre Montgomery, **ICTY President Robinson and Prosecutor Brammertz update Security Council on ICTY work and issues related to the Completion Strategy**, 15 June 2011, available at: http://www.internationallawbureau.com/blog/?p=2879

- International Justice Desk, **Disagreement over proposals to hold ICC hearings in Kenya,** 17 June 2011, available at: http://www.rnw.nl/international-justice/article/disagreement-over-proposals-hold-icc-hearings-kenya

- Steven Kay QC**, Bangladesh war crimes trial: UK to provide assistance**, 20 June 2011, available at: http://www.internationallawbureau.com/blog/?p=2898

- International Justice Desk, **Negotiations for reconciliation commission & special tribunal to resume in Burundi,** 20 June 2011, available at: http://www.rnw.nl/international-justice/article/negotiations-reconciliation-commission-special-tribunal-resume-burundi

- International Justice Desk, **Sri Lanka president rejects US court summons**, 20 June 2011, available at: http://www.rnw.nl/international-justice/article/sri-lanka-president-rejects-us-court-summons

Tomislav Merčep, assistant interior minister of Croatia during the 1991-1995 war, has been charged by Croatia's state prosecutor with war crimes. He was arrested on 10 December 2010 and has been in detention ever since. He had suffered a stroke and was admitted into a hospital immediately after his arrest. The indictment was filed after a six months investigation by the Zagreb County Prosecutor's Office on 8 June 2010 and concerns the period between 8 October 1991 and mid-December 1991.

Publications

Books

Kimberley N. Trapp, 2011. *Principles of European Law*. Oxford: Oxford University Press.

Andrei Marmor, Scott Soames, 2011. *Philosophical Foundations of Language in the Law*. Oxford: Oxford University Press.

Hannah Quirk, Toby Seddon, Graham Smith (eds.), 2011. *Regulation and Criminal Justice*. Cambridge: Cambridge University Press.

Scott L. Cummings, 2011. *The Paradox of Professionalism*. Cambridge: Cambridge University Press.

Steve Foster, 2011. *Human Rights and Civil Liberties*. (3rd ed.). Upper Saddle River: Pearson Education Inc.

Articles

Roman Petrov and Paul Kalinichenko, 2011. The Europeanizaton of third country judiciaries through the application of the EU Acquis: The cases of Russia and Ukraine. *International and Comparative Law Quarterly,* 60(1), pp.325-353.

Siobhán Mullally, 2011. Domestic violence asylum claims and recent developments in international human rights law: a progress narrative? *International and Comparative Law Quarterly,* 60(1), pp.459-484.

Róisín Burke, 2011. Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity. *Journal of Conflict and Security Law,* 16(1), pp.63-104.

Peter Hilpold, 2011. WTO Law and Human Rights: Bringing Together Two Autopoietic Orders. *Chinese Journal of International Law,* 10(2), pp.323-372.

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WE'RE ON THE WEB!

WWW.ADCICTY.ORG

We would like to thank Taylor Olson for all her hard work and dedication to the newsletter throughout the past nine months. She was one of the founding members of the newsletter and her devotion and determination were highly appreciated. We are very sad to see her leave but wish her all the best for the future!

Upcoming Events

The Nicaragua Case 25 Years Later: Its Impact on the Law and the Court
Date: 27 June 2011
Venue: Hague Academy of International Law, Peace Palace, The Hague
Organiser: Leiden University Law School, University College London's Institute of Global Law and The Law Firm of Foley Hoag LLP

The EU as a Polity in International Law
Date: 28 June 2011
Venue: Academy Hall, Peace Palace, The Hague.
Organiser: T.M.C. Asser Instituut, Carnegie Stichting/Peace Palace Library, Euroknow and CLEER, in cooperation with the vfonds

Seminar: International Criminal Court and Terrorist Offences
Date: 30 June 2011
Venue: T.M.C. Asser Instituut, The Hague
Organiser: ICCT and T.M.C. Asser Instituut

2011 ILSA International Conference: Public Liability of Private Corporations
Date: 4-6 August 2011
Venue: Utrecht University, Utrecht
Organiser: The International Law Students Association, Washington University in St. Louis, Queen's University Belfast, Catholic University of Portugal, Utrecht University and University of Trento

Opportunities

Legal Officer - Recirculation, Leidschendam (P-3)
Special Tribunal for Lebanon (STL) (Defence)
Closing Date: Friday, 01 July 2011

Associate Legal Officer / Courtroom Officer, The Hague (P-2)
International Criminal Court (ICC), Court Management Section, Registry
Closing Date: Sunday, 03 July 2011

Document Management Assistant, The Hague (G-4)
International Criminal Court (ICC)
Court Interpretation and Translation Section, Registry
Closing Date: Sunday, 03 July 2011

Associate Public Affairs Officer, The Hague (P-2)
International Criminal Court (ICC)
Public Affairs Unit
Closing Date: Sunday, 03 July 2011

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

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