HAGUE CASE LAW – LATEST DEVELOPMENTS[1]

International Court of Justice

(1) *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*

On 19 November 2012, the International Court of Justice (ICJ) rendered its judgment in the dispute between Nicaragua and Colombia concerning sovereignty over a number of islands in the Caribbean Sea and the delimitation of their continental shelves and exclusive economic zones by means of a single maritime boundary. The ICJ held that it had jurisdiction to hear this dispute on the basis of Article XXXI of the Pact of Bogotá except in relation to the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina, the sovereignty of which was determined by the 1928 Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua (Judgment on Preliminary Objections of 13 December 2007).

The Court held, in short, that Colombia has sovereignty over the disputed islands (Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla) on the basis of acts manifesting a display of authority (*effectivités*) over the islands. These acts were undisputed at least before 1969 and Nicaragua had failed to provided evidence of *effectivités* which would contradict Colombia's claims. Further, the Court rejected Nicaragua's claim (held admissible by the Court) that its continental shelf extended beyond 200 nautical miles and far enough to overlap with Colombia's continental shelf measured from Colombia's mainland coast (Nicaragua had not met its obligations under Article 76 UNCLOS and had not otherwise established an extended continental margin). Finally, the Court established the maritime boundary between Nicaragua and Colombia and effected the delimitation between the overlapping maritime entitlements of both states within 200 nautical miles of the Nicaraguan coast. First, the Court determined the relevant coasts of Nicaragua (almost its entire coastline with a length of 531 km) and Colombia (the entire coastline of the above-mentioned islands, with the exception of Quitasueño, Serranilla and Bajo Nuevo, a total length of 65 km). It then proceeded to effect the delimitation by means of a three-stage methodology (established in its case law): 1. The construction of a provisional median line; 2. An adjustment of the median line to achieve an equitable result (e.g., the disparity between the length of the relevant coasts); 3. An assessment as to whether the division of the relevant area by the boundary line is inequitable (disproportionality test).

1. See: <www.icj-cij.org/>; <www.icty.org>; <www.unictr.org>; and <www.pca-cpa.org/>.

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Permanent Court of Arbitration

(1) *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)*

On 18 February 2013, a Court of Arbitration constituted under the Indus Waters Treaty 1960 and assisted by the Permanent Court of Arbitration rendered a Partial Award in the dispute between the Islamic Republic of Pakistan and the Republic of India in the matter of the *Indus Waters Kishenganga* Arbitration. The dispute concerned (1) the legality of the construction and operation of a hydro-electric project operated by India and located in India-administered Kashmir (the Kishenganga Hydro-Electric Project (KHEP)); and (2) the permissibility of the depletion of the reservoirs of hydro-electric plants in India below certain levels. First, the Court decided that India may divert water from the Kishenganga/Neelum river for power generation by the KHEP, provided that it maintains a minimum flow of water in that river. The minimum flow will be determined by the Court in its Final Award. Second, the Court held that Pakistan's second claim was admissible and decided that India may not reduce the level of the water in its hydro-electric power plant reservoirs, located on rivers which are allocated to Pakistan under the Indus Waters Treaty, below a particular level (in order to flush accumulated sediment downstream). The Partial Award is final with respect to the two disputes decided therein.

International Criminal Tribunal for the Former Yugoslavia

(1) *Prosecutor* v. *Gotovina and Markač* (Appeals Chamber)

On 16 November 2012, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) rendered judgment on appeal in the case against Gotovina and Markač. Gotovina is a former Colonel General in the Croatian Army and the Commander of the Split Military District. Markač is a former Assistant Minister of the Interior and in charge of Special Police Matters in Croatia. They were both convicted on 15 April 2011 by Trial Chamber I of crimes against humanity (persecution, deportation, murder and inhuman acts) and war crimes (the plundering of public and private property, wanton destruction, murder and cruel treatment) committed during Operation Storm in the Krajina region in Croatia in the summer of 1995. They were sentenced to 24 years' and 18 years' imprisonment respectively. According to the Trial Chamber, Gotovina and Markač had significantly contributed to a joint criminal enterprise the object of which was the permanent removal of the Serb population from Krajina by force or threat of force. This Joint Criminal Enterprise came into existence at the end of July 1995 and involved high-ranking Croatian military staff and politicians, including the former President Tuđman.

The Appeals Chamber reversed both judgments, acquitted Gotovina and Markač of all charges and ordered their immediate release. The Appeals Cham-

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ber held that there was insufficient evidence demonstrating that the artillery attacks against four towns in the Krajina region, which had played a significant role in their convictions, had been unlawful. According to the Appeals Chamber, the Trial Chamber had, among other thing, failed to provide a reasoned opinion on its use of a 200-metre standard for considering an attack discriminate or indiscriminate. Because the unlawful artillery attacks had been identified by the Trial Chamber as the primary means by which the Serb population from Krajina had to be removed, Gotovina and Markač had not participated in a Joint Criminal Enterprise.

(2) *Prosecutor* v. *Rašić (Appeals Chamber)*

On 16 November 2012, the Appeals Chamber of the ICTY rendered judgment on appeal in the case against Rašić. Rašić is the former case manager of the defence team of Milan Lukić, who was the leader of a Bosnian Serb paramilitary unit in Višegrad in eastern Bosnia during the war. Rašić was convicted by Trial Chamber II of the ICTY of contempt of the Tribunal for procuring a false witness statement on 31 January 2012. She was sentenced to 12 months' imprisonment. The Appeals Chamber dismissed the Prosecutor's and Rašić's appeal and affirmed her conviction and sentence, including the Plea Agreement which had been sanctioned by the Trial Chamber.

(3) *Prosecutor* v. *Šešelj (Appeals Chamber)*

On 28 November 2012, the Appeals Chamber of the ICTY rendered judgment on appeal in the case against Šešelj. Šešelj – the former leader of the Serbian Radical Party and a prominent political figure in the former Federal Republic of Yugoslavia – is being prosecuted for crimes against humanity and war crimes committed in Bosnia and Herzegovina and Croatia between 1991 and 1994. His trial was suspended indefinitely on 11 February 2009 due to witness intimidation. On 31 October 2011, Trial Chamber II of the ICTY convicted him of contempt of the Tribunal and sentenced him to 18 months' imprisonment to be served concurrently with the 15 months' imprisonment he was sentenced to serve for his first contempt conviction on 24 July 2009. He had wilfully disclosed confidential information pertaining to protected witnesses in a book he authored and published in the course of 2008, in violation of the Trial Chamber's orders.

The Appeals Chamber granted the Prosecutor's appeal regarding the Trial Chamber's conviction that Šešelj was to serve his 18 months' imprisonment concurrently with his previous conviction, since, indeed, his previous sentence had expired before the Trial Chamber's judgment. However, in view of his time in custody, the Appeals Chamber found that his sentence had already been served. The Prosecutor's other grounds – the reasoning for the concurrent sentencing and the inadequacy of the sentence – were considered moot and were respectively dismissed. This was Šešelj's second conviction for contempt of the Tribunal (after a previous conviction on 24 July 2009 which was confirmed on appeal

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on 19 May 2010). Šešelj was convicted for a third time on 28 June 2012, a case which is currently the subject of an appeal.

(4) *Prosecutor* v. *Haradinaj, Balaj, Brahimaj*

On 29 November 2012, Trial Chamber II of the ICTY rendered judgment on appeal in a partial retrial of the case against Haradinaj, Balaj and Brahimaj. Haradinaj was a commander of the Kosovo Liberation Army (KLA); Balaj was the commander of the Black Eagles Unit of the KLA; and Brahimaj was a member of the KLA and briefly deputy commander of the Dukagjin Operational Zone and finance advisor of the KLA General Staff. In this partial retrial, they were charged with war crimes (cruel treatment, torture, murder), committed against 16 Kosovo Albanians, Kosovo Serbs, Kosovo Roma and other civilians, who were allegedly detained at the KLA compound in Jabllanicë/Jablanica. Haradinaj, Balaj and Brahimaj were charged with participation in a Joint Criminal Enterprise to consolidate the KLA's control in northwestern Kosovo. The Trial Chamber ruled that three of the six counts of war crimes had been established by the Prosecution (cruel treatment and the torture of three Kososo Albanian civilians and three Montenegrins; as well as the forceful removal of two Kosovo Albanian men). However, according to the Trial Chamber, there was insufficient evidence that these crimes had been committed within the framework of a Joint Criminal Enterprise (no common purpose) and there was insufficient evidence of alternative modes of individual criminal responsibility. Consequently, the Trial Chamber ordered their immediate release.

The retrial followed earlier proceedings before the ICTY against the three accused. On 3 April 2008, Trial Chamber I of the ICTY also found that there was insufficient evidence that Haradinaj, Balaj and Brahimaj had participated in a the above-mentioned Joint Criminal Enterprise. Haradinaj and Balaj were acquitted of all charges. Brahimaj was convicted of war crimes (torture and cruel treatment) and sentenced to six years' imprisonment. On 21 July 2010, the Appeals Chamber upheld Brahimaj's sentence of six years' imprisonment but quashed the acquittals of Haradinaj, Balaj, and Brahimaj for their participation in the Joint Criminal Enterprise to consolidate the KLA's control in northwestern Kosovo. The Appeals Chamber held, among other things, that, in view of the context of the serious witness intimidation surrounding the trial, the Trial Chamber had seriously erred by refusing the Prosecution's request for more time to exhaust all possible steps in securing the testimony of two crucial witnesses and ordered a partial retrial.

(5) *Prosecutor* v. *Lukić, Lukić (Appeals Chamber)*

On 4 December 2012, the Appeals Chamber of the ICTY rendered judgment on appeal in the case against Milan Lukić and his cousin Sredoje Lukić. Milan Lukić and Sredoje Lukić were members of a Bosnian Serb paramilitary unit in Višegrad in eastern Bosnia. Milan Lukić was the leader of the group; his cousin Sredoje

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Lukić was a member of the group. On 20 July 2009, Trial Chamber III of the ICTY convicted Milan Lukić of crimes against humanity (among other crimes, persecution, murder, extermination, cruel treatment, and inhumane acts) and war crimes, including the murder of 59 Bosnian Muslim women, children and elderly men in Višegrad and the murder of at least 60 Bosnian Muslim women, children and elderly men in Bikavac. He was sentenced to life imprisonment. Sredoje Lukić was convicted of aiding and abetting the commission of crimes against humanity (persecutions, inhumane acts, murder and cruel treatment) and war crimes, including the above-mentioned mass murder in Višegrad (he was acquitted of the mass murder in Bikavac). He was sentenced to 30 years' imprisonment.

The Appeals Chamber dismissed Milan Lukić's appeal (apart from two subgrounds which did not affect the judgment) and affirmed his convictions and sentence. Further, the Appeals Chamber dismissed all but two grounds of appeal by Sredoje Lukić. The Appeals Chamber reversed his convictions in relation to the beating of detainees in Uzamnica Camp and consequently reduced his sentence from 30 years' imprisonment to 27 years' imprisonment. The Appeals Chamber dismissed the Prosecution's appeal against the conviction of Sredoje Lukić.

(6) *Prosecutor* v. *Tolimir*

On 12 December 2012, Trial Chamber II of the ICTY rendered judgment in the case against Tolimir. Tolimir is the former Assistant Commander and Chief of Intelligence and Security of the Main Staff of the Army of the Republika Srpska (VRS). The Trial Chamber held that Tolimir had participated in a Joint Criminal Enterprise to forcibly remove the population from Srebrenica and Žepa. Further, it was held that Tolimir had participated in a Joint Criminal Enterprise to murder the able-bodied Muslim Men from Srebrenica. Tolimir was convicted of genocide and conspiracy to commit genocide, crimes against humanity (extermination, persecutions and inhumane acts through forcible transfer) and war crimes (murder) committed in 1995 after the fall of Žepa and Srebrenica. He was sentenced to life imprisonment.

(7) *Prosecutor* v. *Perišić (Appeals Chamber)*

On 28 February 2013, the Appeals Chamber of the ICTY rendered judgment on appeal in the case against Perišić. Perišić was Chief of the General Staff (the most senior officer) of the Yugoslav Army between 1993 and 1998. He was convicted by Trial Chamber I on 6 September 2011 of crimes against humanity (murder, inhuman acts (injuring and wounding civilians, forcible transfer) and persecution) and war crimes (murder and attacks on civilians) committed in Bosnia and Herzegovina (Sarajevo and Srebrenica) and Croatia (Zagreb) between 1993 and 1995. He was sentenced to 27 years' imprisonment. The Appeals Chamber reversed his convictions and ordered his immediate release. According to the Appeals Chamber, Perišić had supported the Army of the Republika Srpska

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(VRS) upon the directions of the Yugoslav Supreme Defence Council within the framework of legitimate war efforts. There was insufficient evidence that Perišić had specifically directed assistance at criminal activities of the VRS in Bosnia and Herzegovina. Therefore he could not be convicted of aiding and abetting such crimes. Further, the Appeals Chamber ruled that there was insufficient evidence that Perišić had effective control over the Serbian Army of the Krajina (SVK) which means that he could not be held liable as a superior for failing to punish soldiers for crimes committed by the SVK in Croatia.

(8) *Prosecutor* v. *Gvero (Appeals Chamber)*

On 7 March 2013, the Appeals Chamber of the ICTY decided to terminate the proceedings in the case against Gvero after his death on 17 February 2013. Gvero – the former Assistant Commander for Moral, Legal and Religious Affairs in the Main Staff of the Bosnian Serb Army – was one of seven former high-ranking officials of the Bosnian Serb military forces convicted on 10 June 2010 (*Prosecutor* v. *Popovic et al.*) for crimes committed in 1995 after the fall of the enclaves of Srebrenica and Žepa. Gvero was convicted of crimes against humanity (persecution and inhumane acts) and sentenced to five years' imprisonment. Although the Statute does not explicitly provide for a course of action following the death of an appellant, it follows from some of its provisions that the jurisdiction of the ICTY is limited to natural living persons and may only hear appeals from people convicted by one of the ICTY's Trial Chambers (*Delić* decision of the Appeals Chamber of 29 June 2010).

International Criminal Tribunal for Rwanda

(1) *The Prosecutor* v. *Mugenzi, Mugiraneza (Appeals Chamber)*

On 4 February 2013, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) rendered its judgment on appeal in the case against Mugenzi and Mugiraneza. Mugenzi was the Minister of Trade and Industry in the Broad-Based Transitional Government in Rwanda and he remained a member of the Interim Government in April 1994. Mugiraneza was the Minister of Labour and Social Affairs and the Minister of Public Service and Professional Training in Rwanda and was also the Minister of Civil Service in the Interim Government in April 1994. On 30 September 2011, both men were convicted by Trial Chamber II of the ICTR of conspiracy to commit genocide and direct and public incitement to commit genocide because of their role in the removal of the prefect of Butare Prefecture on 17 April 1994 and the installation ceremony of the new prefect on 19 April 1994 which involved inflammatory speeches. Mugenzi and Mugiraneza were both sentenced to 30 years' imprisonment.

The Appeals Chamber dismissed Mugenzi's and Mugiraneza's appeal regarding their right to a fair trial, since the Prosecutor's (repeated) violations of its

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obligation under Rule 68 of the Rules to disclose exculpatory material had not materially impacted this case. It reversed their convictions of conspiracy to commit genocide and direct and public incitement to commit genocide, however, and ordered their immediate release. According to the Appeals Chamber, the Trial Chamber had erred in its assessment of circumstantial evidence, in particular their *mens rea*, in relation to the crimes of which they were convicted.

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