HAGUE CASE LAW – LATEST DEVELOPMENTS[1]

International Court of Justice

(1) *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*

On 13 July 2009, the International Court of Justice (ICJ) rendered its judgment in the dispute between Costa Rica and Nicaragua pertaining to navigational and related rights on a section of the San Juan River. Costa Rica filed its application instituting proceedings against Nicaragua on 29 September 2005 claiming that Nicaragua had breached a number of international obligations towards Costa Rica. According to Costa Rica, the ICJ had jurisdiction to deal with this case on a number of grounds, including Article 36(2) of the Statute and the Tovar-Caldera Agreement of 26 September 2002. Nicaragua did not dispute the Court's jurisdiction.

The Court considered that the 1858 Treaty of Limits defined the rules applicable to the section of the San Juan River in dispute between the parties. The particular section of the San Juan River falls under Nicaraguan jurisdiction since the border between both states lies on the Costa Rican bank. However, Costa Rica has a right of free navigation on the river '*con objetos de comercio*', under the Treaty of Limits. The Court held this to mean free navigation for the purposes of commerce, including the transport of goods, passengers and tourists.

The Court held that Nicaragua did not have an unlimited right to regulate navigation on the San Juan River. Nicaragua must notify regulations with respect to navigation on the San Juan River to Costa Rica and it may not render the right to navigate freely impossible. Further, regulations must be consistent with the terms of the Treaty of Limits; they must have a legitimate purpose; and they may not be discriminatory or unreasonable. According to the Court, Nicaragua had violated the 1858 Treaty of Limits when it implemented measures requiring visas and tourist cards and the payment of charges in respect of vessels used for the exercise of the freedom of navigation. Finally, the Court also found that Costa Rica had a customary right of subsistence fishing.

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1. Through: <www.icj-cij.org/>; <www.un.org/icty/>; <www.un.org/ictr/>; <www.pca-cpa.org/>; and <www.haguejusticeportal.net/>.

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Permanent Court of Arbitration

(1) *Arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army (Abyei Arbitration)*

On 22 July 2009, an Arbitral Tribunal, established under the auspices of the Permanent Court of Arbitration (PCA), issued its final and binding award with respect to the delimitation of the Abyei Area in southern Sudan. The Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) had agreed upon arbitration in 2008 under the Court's Optional Rules for Arbitrating Disputes between Two Parties, of Which Only One is a State. They deposited the Arbitration Agreement with the PCA on 11 July 2008; the five-member Tribunal was constituted on 30 October 2008. Pursuant to the Arbitration Agreement, the Tribunal had to base its decision on the Arbitration Agreement, the Comprehensive Peace Agreement between the parties of 9 January 2005, the Interim National Constitution of Sudan of 2005, and general principles of law and practices that the Tribunal would find relevant.

The dispute focused on the issue of whether the Abyei Boundaries Commission, which had been established pursuant to the Comprehensive Peace Agreement, had exceeded their mandate. The borders of the oil-rich Abyei Area had not been clearly established by the Boundaries Commission. According to the Tribunal, the Boundaries had not exceeded their mandate by adopting a tribal interpretation of their mandate rather than a territorial interpretation. However, the Boundaries Commission had exceeded the implementation of their mandate by not providing sufficient reasons for some of their conclusions. Therefore the Tribunal established its own delimitation. Based on the evidence provided by the parties, the Tribunal reduced the size of the Abyei Area and awarded greater governmental control of the Area to the GoS without prejudicing the traditional grazing rights of the people in the Abyei Area. The Tribunal urged the parties to begin immediate discussions to mitigate hardships on the ground as a result of its decision.

International Criminal Tribunal for the Former Yugoslavia

(1) *The Prosecutor* v. *Krajisnik (Appeal)*

On 17 March 2009, the Appeals Chamber partly quashed the Trial Chamber's convictions of Krajisnik of 27 September 2006 and reduced his sentence from 27 years' imprisonment to 20 years. Krajisnik had been a prominent member of Bosnian Serb leadership during the war and the Trial Chamber had found that he had participated in a Joint Criminal Enterprise with respect to a number of crimes. The Appeals Chamber upheld the Trial Chamber's convictions of deportation, forcible transfer and persecution of non-Serb civilians but quashed its convictions of murder, extermination and persecution (other than forc-

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ible transfer and deportation). According to the Appeals Chamber, the Trial Chamber had failed to specify Krajisnik's individual criminal responsibility as to the scope of the common objective of the Joint Criminal Enterprise with respect to the crimes of murder, extermination and persecution (other than forcible transfer and deportation). The Appeals Chamber also found that on many occasions the Trial Chamber had failed to find the link between the perpetrators of the crimes and the members of the Joint Criminal Enterprise. Despite the quashing of the Trial Chamber's convictions of murder, extermination and persecution (other than forcible transfer and deportation), the Appeals Chamber held that the crimes for which he was convicted were of such gravity that a severe and proportionate sentence was required.

(2) *The Prosecutor* v. *Jokic (Trial Chamber and Appeal)*

On 27 March 2009, Trial Chamber II found Jokic guilty of contempt of the tribunal and was sentenced to four months' imprisonment. Jokic is a former Bosnian Serb Army officer and currently serves a 9 years sentence for aiding and abetting extermination, murder, and persecution of Bosnian men in Srebrenica in July 1995. Jokic was convicted by the Trial Chamber for refusing to testify in the case of Popovic and others, while being subpoenaed by the Prosecution. Witnesses summoned by subpoena have a duty to testify; this is a basic principle of the ICTY and one that goes to the heart of the notion of justice. Jokic's submission in a confidential statement in which he had cited the reasons for his refusal to testify did not justify his refusal according to the Trial Chamber. His conviction was confirmed by the Appeals Chamber on 3 July 2009.

(3) *The Prosecutor* v. *Sljivancanin, Mrksic (Appeal)*

On 5 May 2009, the Appeals Chamber partly quashed the Trial Chamber's judgment of 27 September 2007 against Sljivancanin and upheld the judgment against Mrksic. The Appeals Chamber increased Sljivancanin's sentence from 5 to 17 years' imprisonment while upholding Mrksic's sentence of 20 years. The Prosecution had not appealed the acquittal of Radic, the third suspect in the original trial. Mrksic was a colonel in the Yugoslav People's Army and commander of all Serb forces including the Territorial Defence and paramilitary forces in the Vukovar area; Sljivancanin was a major in the Yugoslav People's Army and held the post of head of security. Both men had been indicted with the aiding and abetting the torture and murder of over 200 prisoners of war at a farm building at Ovcara. The prisoners had been taken from the Vukovar Hospital by members of the Serb Territorial Defense Forces and paramilitary forces after the fall of Vukovar in November 1991 and brought to a farm building at Ovcara where they had been tortured and executed.

Mrksic had withdrawn the troops of the Yugoslav People's Army that guarded the prisoners, leaving them to the mercy of the Territorial Defense and

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paramilitary forces who subsequently tortured and killed at least 194 of the prisoners. The Appeals Chamber, therefore, reaffirmed his conviction of aiding and abetting torture and murder and maintaining inhumane conditions of detention at Ovcara.

Sljivancanin had been found guilty by the Trial Chamber of aiding and abetting torture because he had carried out Mrksic's order and had failed to deploy guards at Ovcara to protect the prisoners. However, the Appeals Chamber held that the Trial Chamber had erred in acquitting Sljivancanin of aiding and abetting the murder of the prisoners, since the only inference he could have made after learning of the order from Mrksic to withdraw his troops was that the prisoners would be killed by the members of the Territorial Defense and the paramilitary forces. Sljivancanin was under a duty to protect prisoners of war and when he withdrew his troops he had the responsibility to satisfy himself that the prisoners would not be harmed. Although he no longer had *de iure* authority over the troops at Ovcara, an officer may sometimes be required to go beyond his *de iure* authority to counteract an illegal order. In view of the gravity of the crimes, a sentence of 17 years' imprisonment was justified.

(4) *The Prosecutor* v. *Lukic and Lukic*

On 20 July 2009, Trial Chamber III found Milan Lukic and his cousin Sredoje Lukic guilty of crimes against humanity and war crimes and sentenced them to life and 30 years' imprisonment respectively. Milan Lukic and Sredoje Lukic were members of a Bosnian Serb paramilitary unit in Visegrad in eastern Bosnia. Milan Lukic was the leader of the group; his cousin Sredoje Lukic was a member of the group.

Milan Lukic was convicted for various crimes, including persecutions, murder, extermination, cruel treatment, and inhumane acts, as crimes against humanity and war crimes. He was found guilty for several murders, as well as the murder of 59 Bosnian Muslim women, children and elderly men in Visegrad by barricading the house in which they were kept and setting it on fire. Milan Lukic was also found guilty of the murder of at least 60 Bosnian Muslim women, children and elderly men in Bikavac, by barricading the house in which they were kept, and subsequently throwing in several explosives and setting the house on fire. Milan Lukic was also found guilty for beating Muslim detainees in the Uzamnica detention camp.

Sredoje Lukic was found guilty of aiding and abetting the commission of various crimes, including persecutions, inhumane acts, murder and cruel treatment, as crimes against humanity and war crimes. He was found guilty of the murder of 59 Bosnian Muslim women, children and elderly men in Visegrad, as well as the beating of Muslim detainees in the Uzamnica detention camp. He was acquitted of the murder of at least 60 Bosnian Muslim women, children and elderly men in Bikavac.

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(5) *The Prosecutor* v. *Haraqija, Morina (Appeal)*

On 24 July 2009, the Appeals Chamber reversed the Trial Chamber's conviction of Haraqija and affirmed Morina's conviction of 17 December 2008 for contempt of the Tribunal. They had both been sentenced to five months' and three months' imprisonment respectively. Haraqija was the Kosovo Minister for Culture, Youth and Sport and co-founder of the 'Defencce Committee for Ramush Haradinaj'; Morina was an employee of the Ministry. The Trial Chamber had held that Haraqija had instructed Morina to intimidate a protected witness in the Haradinaj trial so that he would not testify before the Tribunal. According to the Appeals Chamber, the evidence for convicting Haraqija was insufficient to conclude that he had instructed Morina to intimidate the witness.

(6) *The Prosecutor* v. *Seselj*

On 24 July 2009, Trial Chamber II found Seselj guilty of contempt of the Tribunal and sentenced him to 15 months' imprisonment. Seselj was the leader of the Serbian Radical Party and a prominent political figure in the former Federal Republic of Yugoslavia. He is currently on trial and 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.

The Trial Chamber convicted Seselj for intentionally disclosing the names and other personal information of three protected witnesses in a book he authored. According to the Trial Chamber, the disclosure interferes with the administration of justice given the potential adverse effects on potential witnesses' confidence in the Tribunal's ability to guarantee the effectiveness of witness protection. The Trial Chamber ordered Seselj to remove the book from his website.

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