HAGUE CASE LAW – LATEST DEVELOPMENTS[1]

International Court of Justice

(1) *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia* v. *Greece)*

On 5 December 2011, the International Court of Justice (ICJ) delivered its judgment in the dispute between the Former Yugoslav Republic of Macedonia (Macedonia) and Greece. The case concerned the interpretation and implementation of the Interim Accord which was signed by both states on 13 September 1995. The Interim Accord was concluded after Macedonia's independence and after its United Nations membership and provides for diplomatic relations between both states. Article 11 of the Interim Accord provides that Greece would not object to the membership application of Macedonia in international organizations of which it is a member if it acts under the name 'the Former Yugoslav Republic of Macedonia' (as used in S/RES/817 of 1993). The dispute before the Court related to the discussion of Macedonia's NATO membership at the Bucharest Summit on 2 and 3 April 2008 after which Macedonia was not invited to begin talks on accession. Macedonia claims that Greece objected to its admission to NATO in violation of its obligations under Article 11 of the Interim Accord.

The Court first held that it had jurisdiction to hear the dispute pursuant to Article 21(2) of the Interim Accord and that Macedonia's claim was admissible. The Court subsequently ruled that Greece had indeed breached its obligations under Article 11 of the Interim Accord. The Court held that evidence shows that Greece objected to Macedonia's admission to NATO and that Greece's objection did not fall under the exception as provided in Article 11 Interim Accord. The Court rejected Greece's alternative arguments which would justify its objection to Macedonia's NATO membership such as a prior breach of the Interim Accord by Macedonia. According to the Court, its finding that Greece had breached its obligations under Article 11 constituted appropriate satisfaction as a remedy against Greece's wrongful act. Ordering Greece to refrain from similar conduct was unnecessary since Greece's good faith must be presumed.

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

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(2) *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*

On 1 February 2012, the ICJ delivered an advisory opinion upon the request of the International Fund for Agricultural Development (IFAD). The request related to the judgment (No. 2867) of the International Labour Organization's Administrative Tribunal (ILOAT) of 8 February 2010 upon the complaint of Ms. Saez Garcia, a former staff member whose contract had not been renewed. The ILOAT had quashed the decision of the President of the IFAD not to renew her contract and had made orders for the payment of damages and costs.

The jurisdiction of the ILOAT is provided by the IFAD's membership of the ILOAT (through its recognition of the jurisdiction of ILOAT pursuant to Article II(5) Statute ILOAT). Pursuant to Article XII of the Annex to the Statute of the ILOAT, member organizations may challenge a judgment of the ILOAT if the ILOAT has wrongly assumed jurisdiction or if the judgment of the ILOAT suffers from a fundamental fault in the procedure.

The Court first confirmed its jurisdiction to render an advisory opinion pursuant to Article 96 UN Charter, Article 65 Statute of the ICJ and the Relationship Agreement between the UN and the IFAD. Further, with regard to its discretion under Article 65 Statute ICJ to refuse a request for an advisory opinion, the Court considered that there were no compelling reasons (such as the inequality of access to the Court and the inequality of the proceedings before the Court) that would justify such a refusal.

The Court subsequently considered that the ILOAT had jurisdiction to hear Ms. Saez Garcia's complaint both *ratione personae* and *ratione materiae*. According to the Court, it was established that Ms. Saez Garcia was employed by the IFAD (despite her work for the Global Mechanism which was an entity established by the UN Convention to Combat Desertification and hosted by the IFAD) and that she therefore qualified as a staff member of the IFAD. Further, the Court concluded that Ms. Saez Garcia's complaint fell within the scope of the jurisdiction of the ILOAT (terms of appointment and provisions of staff regulations and rules of the IFAD as provided for in Article II(5) of the Statute of the ILOAT). Since the Court did not establish any fundamental faults in the ILOAT's procedure, the Court concluded that the ILOAT judgment was not invalid.

(3) *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)*

On 3 February 2012, the ICJ delivered its judgment in the dispute between Germany and Italy, with Greece intervening. The case concerned recent judicial decisions of Italian courts relating to crimes committed during World War II which denied Germany jurisdictional immunities as well as measures of constraint against German state property in Italy following the recognition and enforcement of Greek civil judgments against Germany.

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First, the Court ruled that Germany was entitled under customary international law to immunity before the courts of Italy and that the denial of this immunity by the Italian courts constituted a breach of Italy's obligations towards Germany. The Court did not accept Italy's appeal to the so-called 'tort exception' (which would entail that a state is no longer entitled to immunity if it is sued in relation to tortious acts committed in the forum state). Nor did the Court accept Italy's argument that the denial of immunity was justified because of the nature of the claims (a serious violation of the law of armed conflict) and the nature of the rules violated by Germany during World War II (which arguably qualify as *ius cogens* rules). The Court concluded that customary international law does not allow for an exception to the immunity of states if it is accused of serious violations of the law of armed conflict. Further, the Court considered that the rules on state immunity and the laws of armed conflict address different matters and do not conflict with each other (the former does not determine the responsibility of a state accused of committing crimes).

Second, the measures of constraint taken against German property in Italy qualified as a violation of Germany's immunity under customary international law. The Court found that the property was used for governmental non-commercial purposes and that Germany had not consented to the legal measures.

Third, the Court held that Italy had violated its obligations towards Germany for declaring enforceable civil judgments rendered against Germany in Greece. According to the Court, *exequatur* of a foreign judgment must be refused if the Court seized would deny jurisdiction if it had been seized to decide on the merits.

Therefore, Italy must ensure that the decisions of the Italian courts which infringe upon the immunity of Germany cease to have effect.

International Criminal Tribunal for the Former Yugoslavia

(1) *The Prosecutor* v. *Pećanac*

On 9 December 2011, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY) convicted Pećanac of contempt of court and sentenced him to three months' imprisonment. Pećanac is a former Security and Intelligence Officer of the Main Staff of the Army of the Republika Srpska. Pećanac was subpoenaed by the Trial Chamber to testify in the *Tolimir* case but he failed to comply with the subpoena and refused to testify. Pećanac was subsequently arrested and transferred to the ICTY's custody. According to the Trial Chamber, contempt of court is 'a serious offence, which goes to the essence of the administration of justice' and Pećanac's failure to testify 'deprived the Chamber of relevant evidence'.

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(2) *The Prosecutor* v. *Rašić*

Following a plea agreement between the Prosecution and the Defence, Trial Chamber II of the ICTY convicted Rašić of contempt of court on 31 January 2012 and sentenced her to twelve months' imprisonment on 7 February 2012. Rašić is a former Case Manager on the defence team of Milan Lukić, who was the leader of a Bosnian Serb paramilitary unit in Visegrad in eastern Bosnia during the war. Milan Lukić was convicted by the Trial Chamber on 20 July 2009 of war crimes and crimes against humanity, and sentenced to life imprisonment. Rašić was convicted of procuring a false witness statement from Tabaković for EUR 1,000 in cash as well as inciting Tabaković to procure false witness statements from two others. Tabaković was convicted of contempt of court on 15 March 2010 and sentenced to three months' imprisonment. According to the Trial Chamber, procuring false evidence is a grave crime and amounts to direct interference with the administration of justice with far-reaching consequences.

(3) *The Prosecutor* v. *Tupajić*

On 24 February 2012, Trial Chamber III convicted Tupajić of contempt of court and sentenced him to two months' imprisonment. Tupajić is the former President of the municipality of Sokolac in Bosnia and Herzegovina and was subpoenaed by the Trial Chamber to testify in the *Karadžić* case. Failing to comply with the subpoena, Tupajić was arrested in Bosnia and Herzegovina and transferred to the ICTY's custody in December 2011. According to the Trial Chamber, Tupajić's failure to testify 'deprived the Chamber in the *Karadžić* case of relevant evidence'. The Trial Chamber rejected Tupajić's claim that he could not testify due to health concerns as being insufficient.

International Criminal Tribunal for Rwanda

(1) *The Prosecutor* v. *Ntawukulilyayo (Appeals Chamber)*

On 14 December 2011, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) affirmed Ntawukulilyayo's conviction of aiding and abetting genocide. Ntawukulilyayo is the former Sub-Prefect of the Gisagara sub-prefecture, in Butare prefecture. He was convicted by the Trial Chamber on 3 August 2010 for his involvement in the killing of Tutsis at Kabuye hill, Butare prefecture. Ntawukulilyayo had instructed refugees to move to Kabuye hill and he had subsequently transported soldiers to Kabuye hill who would participate in the attack at that location. The Appeals Chamber held that the Trial Chamber had erred, however, by convicting Ntawukulilyayo also of ordering genocide in relation to the killings at Kabuye hill, for which he had not been properly charged,

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and subsequently reduced his sentence from 25 years' imprisonment to 20 years' imprisonment.

(2) *The Prosecutor* v. *Bagosora and Nsengiyumva (Appeals Chamber)*

On 14 December 2011, the Appeals Chamber of the ICTR rendered its judgment in the joined case against Bagosora and Nsengiyumva. Bagosora is the former '*directeur de cabinet*' for the Ministry of Defence; Nsengiyumva is the former Commander of the 'Gisenyi Operational Sector'. Nsengiyumva was tried in relation to killings committed in Gisenyi town, Mudende University, Nyundo Parish, the Bisesero area of Kibuye prefecture. Bagosora was tried in relation to a large number of crimes, including crimes committed at Kigali roadblocks, the killings of Prime Minister Uwilingiyimana and others (including the killings of 10 Belgian peacekeepers), and killings committed at various places, including Gisenyi town, Mudende University, and Nyundo Parish. Nsengiyumva was convicted by the Trial Chamber on 18 December 2008 of genocide, crimes against humanity and war crimes as well as aiding and abetting crimes and was sentenced to life imprisonment (taking into account the fact that he could also be held responsible as a superior for a number of crimes). Bagosora was convicted by the Trial Chamber of genocide, crimes against humanity and war crimes and was sentenced to life imprisonment.

With respect to Nsengiyumva, the Appeals Chamber reversed nearly all of his convictions but affirmed his convictions of genocide, crimes against humanity (extermination and persecution) and war crimes (violence to life) in relation to the killings at Gisenyi town. The Appeals Chamber reduced his sentence from life imprisonment to 15 years' imprisonment. With respect to Bagosora, the Appeals Chamber similarly reversed a number of convictions (including the nature of his responsibility for the crimes at Kigali roadblocks) but affirmed his conviction of genocide, crimes against humanity (extermination, persecution, murder, rape and inhumane acts) and war crimes (violence to life and outrages upon personal dignity). The Appeals Chamber reduced his sentence from life imprisonment to 35 years' imprisonment.

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