HAGUE CASE LAW – LATEST DEVELOPMENTS[1]

International Court of Justice

(1) *Case Concerning Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*

On 20 April 2010, the International Court of Justice delivered its judgment in the dispute between Argentina and Uruguay concerning the construction of two pulp mills on the River Uruguay. Argentina instituted proceedings against Uruguay in 2006 claiming that Uruguay had breached both its procedural and substantive obligations towards Argentina under the 1975 Statute of the River Uruguay by authorizing, constructing and commissioning two pulp mills.

The Court ruled that Uruguay had violated its procedural obligations towards Argentina under the 1975 Statute since it had not transmitted the relevant information to the Administrative Commission of the River Uruguay (CARU) in relation to both pulp mills in violation of Article 7 of the Statute and despite being requested to do so by CARU on several occasions. Further, Uruguay had failed to notify Argentina through CARU of the environmental impact assessments (EIAs) for both pulp mills.

However, the Court ruled that Argentina had failed to establish that Uruguay had violated its substantive obligations under the 1975 Statute, including its obligation to prevent pollution and preserve the aquatic environment as laid down in Article 41 of the 1975 Statute. The Court acknowledged that currently general international law requires the undertaking of an EIA where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular on a shared resource, but neither general international law nor Article 41 of the 1975 Statute specified the scope of such an EIA. According to the Court, it is for each state to determine in its domestic legislation, or in the authorization process for each project, the specific content of the EIA. Moreover, such an EIA should be carried out before the implementation of the project and should continue throughout the duration of that project. In the present case, the Court was of the opinion that there was no conclusive evidence in the record to show that Uruguay had not acted with the requisite degree of due diligence in this context.

The Court considered that its finding that Uruguay had breached its procedural obligations under the 1975 Statute constituted a measure of satisfaction

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

Netherlands International Law Review, LVII: 525-530, 2010
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doi:10.1017/S0165070X10300118

https://doi.org/10.1017/S0165070X10300118 Published online by Cambridge University Press

for Argentina. The dismantling of one of the pulp mills was not an appropriate remedy under the present circumstances. All other claims were dismissed.

(2) *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*

On 22 July 2010, the International Court of Justice rendered it advisory opinion on the question by the General Assembly of 8 October 2008 as to whether or not the declaration of independence of Kosovo of 17 February 2008 violated international law. After concluding that it had jurisdiction and after concluding that there were no compelling reasons for it to decline to exercise its jurisdiction, the Court noted that the question of the General Assembly turned on whether or not the applicable international law prohibited Kosovo's declaration of independence. First, the Court concluded that general international law did not prohibit declarations of independence, particularly in view of the development of the international law of self-determination. The Court noted that the scope of the principle of territorial integrity is confined to the sphere of relations between states and not within states. Second, the Court considered Security Council resolution 1244 of 10 June 1999 and the Constitutional Framework established by the United Nations Mission in Kosovo pursuant to resolution 1244 – both of which form part of the international law the Court had to consider – and concluded that the declaration of independence did not violate either of them. In order to reach that conclusion, the Court determined that the declaration of independence of 17 February 2008 was not an act of the 'Assembly of Kosovo', which is one of the Provisional Institutions of Self-Government established under the Constitutional Framework, but rather an act of a group of people acting together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

International Criminal Tribunal for the Former Yugoslavia

(1) *The Prosecutor* v. *Tarculovski and Boskoski (Appeals Chamber)*

On 19 May 2010, the Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia (ICTY) affirmed the conviction of Tarculovski – upholding his sentence of twelve years' imprisonment – and affirmed the acquittal of Boskoski. Tarculovski is a former police commander in Macedonia and Boskoski is the former Interior Minister of Macedonia. Both were prosecuted – in the only case relating to the Macedonian conflict – for crimes committed against ethnic Albanians between 12 and 15 August 2001 in the village of Ljuboten in the northern part of Macedonia. Tarculovski was found guilty by the Trial Chamber on 10 July 2008 of having ordered, planned and instigated crimes against ethnic Albanians. These crimes included the killing of six unarmed ethnic Albanians and

https://doi.org/10.1017/S0165070X10300118 Published online by Cambridge University Press

severely mistreating thirteen others as well as the wanton destruction of twelve houses. According to the Appeals Chamber, the Trial Chamber had not erred in its application of the laws and customs of war, even if Macedonia had been acting against terrorists in self-defence, and had not erred in its factual findings. The Appeals Chamber affirmed the Trial Chamber's findings that the predominant object of the operations in Ljuboten between 12 and 15 August 2001 was to attack ethnic Albanians and their property and that Tarculovski had been leading the operations. In the case of Boskoski, the Appeals Chamber dismissed the Prosecution's appeal and ruled that the Trial Chamber had not erred in its decision that under the relevant circumstances, Boskoski's reports of the offences had discharged him from his obligation to punish those responsible for the crimes in Ljuboten.

(2) *The Prosecutor* v. *Seselj (Appeals Chamber)*

On 19 May 2010, the Appeals Chamber of the ICTY affirmed Seselj's conviction for contempt and affirmed his sentence of 15 months' imprisonment. Seselj was the leader of the Serbian Radical Party and a prominent political figure in the former Federal Republic of Yugoslavia. His trial – for crimes against humanity and war crimes committed in Bosnia and Herzegovina and Croatia between 1991 and 1994 – was suspended indefinitely on 11 February 2009 due to witness intimidation. Seselj was convicted by the Trial Chamber on 24 July 2009 for intentionally disclosing the names and other personal information of three protected witnesses in a book he authored. The Appeals Chamber dismissed all of Seselj's grounds of appeal.

(3) *The Prosecutor* v. *Popovic et al. (Trial Chamber)*

On 10 June 2010, Trial Chamber II of the ICTY convicted seven former high-ranking officials of the Bosnian Serb military forces in relation to crimes committed in 1995 after the fall of the enclaves of Srebrenica and Zepa. The convicted officials were: Popovic (Chief of Security of the Drina Corps of the Bosnian Serb Army; life imprisonment for genocide, extermination, murder and persecution), Beara (Chief of Security in the Main Staff of the Bosnian Serb Army; life imprisonment for genocide, extermination, murder and persecution), Nikolic (Chief of Security of the Zvornik of the Bosnian Serb Army; 35 years' imprisonment for aiding and abetting genocide, extermination, murder and persecution), Borovcanin (Deputy Commander of the Special Police Brigade of the Bosnian Serb police forces; 17 years' imprisonment for, among other things, aiding and abetting extermination, murder, persecution and forcible transfer), Miletic (Chief of the Administration for Operations and Training in the Main Staff of the Bosnian Serb Army; 19 years' imprisonment for murder by majority, persecution, and forcible transfer), Gvero (Assistant Commander for Moral, Legal and Religious Affairs in the Main Staff of the Bosnian Serb Army; 5 years' imprisonment for persecution and inhumane acts; he was acquitted of the charges of murder and deportation) and Pandurevic (Commander of the Zvornik Brigade of the Bosnian

https://doi.org/10.1017/S0165070X10300118 Published online by Cambridge University Press

Serb Army; 13 years' imprisonment for aiding and abetting murder, persecution and inhumane acts; he was acquitted of the charges of genocide, extermination and deportation).

The Trial Chamber found that the attack against the civilian population had commenced with a directive of March 1995 issued by Karadzic setting out the plan to attack the enclaves of Srebrenica and Zepa. The Drina Corps of the Bosnian Serb Army was tasked to create an unbearable situation of total insecurity with no hope for survival for the inhabitants of both enclaves. According to the Tribunal at least 5,336 (may be as many as 7,826) identified individuals were killed following the fall of both enclaves.

(4) *The Prosecutor* v. *Delic (Appeals Chamber)*

On 29 June 2010, the Appeals Chamber of the ICTY terminated the appellate proceedings against Delic due to his death on 16 April 2010 while on provisional release in Sarajevo. Delic was the former Commander of the Main Staff of the Army of Bosnia and Herzegovina and was sentenced to three years' imprisonment by the Trial Chamber on 15 September 2008 for his superior responsibility for war crimes committed by a detachment of the Army of Bosnia and Herzegovina against captive Bosnian Serb soldiers. The crimes committed included severe beatings, electric shocks, and the forced kissing of severed heads of other detainees. The Appeals Chamber ruled that the ICTY's Statute and Rules of Procedure did not provide for the continuation of proceedings under these circumstances, as was requested by the Defence, on behalf of Delic's son on 21 April 2010. 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. The ICTY's jurisdiction does not extend to heirs or other interested persons. Therefore, and by reference to the relevant provisions in the Statute and the Rules of Procedure and to legal precedents in other jurisdictions, the Appeals Chamber ruled that the Trial Chamber's judgment must be considered final.

(5) *The Prosecutor* v. *Haradinaj, Balaj, Brahimaj (Appeals Chamber)*

On 21 July 2010, the Appeals Chamber partially quashed the acquittals of Haradinaj, Balaj, and Brahimaj, ordering a partial retrial of the case. The Appeals Chamber upheld Brahimaj's sentence of six years' imprisonment. 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 deputy commander of the Dukagjin Operative Staff of the KLA. They were suspected of having participated in a joint criminal enterprise in order to consolidate the KLA's control in northwestern Kosovo by the removal, mistreatment and murder of Serbian and Kosovar Roma civilians and Kosovar Albanians who were believed to have been collaborating with the Serbians and they were charged with 19 counts of violations of the laws and customs of war. All three were acquitted on 3 April 2008 by Trial Chamber I for lack of evidence to establish such criminal enterprise.

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Haradinaj and Balaj were also acquitted of all alternative charges; Brahimaj was sentenced to six years' imprisonment for torture and cruel treatment. 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. The Appeals Chamber generally dismissed Brahimaj's grounds of appeal against his conviction for torture and cruel treatment.

International Criminal Tribunal for Rwanda

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

On 20 October 2010, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) partially reversed the conviction of Rukundo and reduced his sentence from 25 years' imprisonment to 23 years' imprisonment. Rukundo is a former Roman Catholic priest and military chaplain of the Rwandan Army and he was convicted of genocide and murder and extermination as crimes against humanity by Trial Chamber II of the ICTR on 27 February 2009. His crimes consisted of his participation in the killing of Tutsis in the Gitarama prefecture in 1994, including the abduction and killing of refugees from St. John's College and St. Leon Minor Seminary as well as the sexual assault of a Tutsi woman at the seminary. The Appeals Chamber reversed Rukundo's conviction for committing genocide since committing genocide had not been pleaded in the charges. Instead, the Appeals Chamber convicted Rukundo of aiding and abetting genocide. Further, the Appeals Chamber reversed Rukundo's conviction for genocide for sexually assaulting a Tutsi woman at the seminary since the general context of mass violence cited by the Trial Chamber was insufficient to infer a genocidal intent from Rukundo's statement prior to the incident that the woman's entire family had to be killed for assisting the Inyenzi. According to the Appeals Chamber, this statement may be subject to other plausible interpretations. The Appeals Chamber also observed that the crime against the Tutsi woman was qualitatively different from the other acts of genocide perpetrated by Rukundo and appeared to have been unplanned and spontaneous.

(2) *The Prosecutor* **v.** *Kalimanzira (Appeals Chamber)*

On 20 October 2010, the Appeals Chamber of the ICTR affirmed one of Kalimanzira's convictions of aiding and abetting genocide but reversed his other convictions, including his conviction for direct and public incitement to commit genocide. The Appeals Chamber reduced his sentence of 30 years' imprisonment to 25 years' imprisonment. Kalimanzira is the former Chef de Cabinet at the Ministry of the Interior – the Ministry's second most senior official – who

https://doi.org/10.1017/S0165070X10300118 Published online by Cambridge University Press

took control after the death of President Habyarimana on 6 April 1994. He was convicted by Trial Chamber III of the ICTR on 22 June 2009 of instigating and aiding and abetting genocide at the roadblock on Butare-Gisagara road around 22 April 1994 and of aiding and abetting genocide at Kabuye hill on 23 April 1994 and at the inauguration of Ndayambaje as bourgmestre of Muganza Commune on 22 June 1994. Additionally, Kalimanzira was convicted of committing direct and public incitement to commit genocide on various occasions in April – June 1994. The Appeals Chamber affirmed Kalimanzira's conviction for aiding and abetting genocide with respect to the massacres at Kabuye hill but reversed all other convictions due to legal and factual errors by the Trial Chamber.

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https://doi.org/10.1017/S0165070X10300118 Published online by Cambridge University Press