HAGUE CASE LAW – LATEST DEVELOPMENTS

International Court of Justice

(1) *Maritime Dispute (Peru* v. *Chile)*

On 27 January 2014, the International Court of Justice (ICJ) rendered its judgment in the dispute between Peru and Chile concerning the delimitation of the boundary between the maritime zones of these respective countries in the Pacific Ocean. The jurisdiction of the ICJ was based on Article XXXI of the 1948 American Treaty on Pacific Settlement, officially designated as the Pact of Bogota. The ICJ reviewed various instruments relevant to the issue of maritime rights and maritime delimitation and ultimately concluded that the Parties had tacitly agreed upon a maritime boundary which had been cemented by the 1954 Special Maritime Frontier Zone Agreement. The nature of this agreed maritime boundary was that it was an all-purpose boundary, namely a single maritime boundary applicable to the water column, the sea-bed and its sub-soil. On the basis of all the relevant practice of the parties (fishing activities in the early 1950s), the relevant practice of other states, and the practice of the International Law Commission at the time, however, the ICJ concluded that the agreed boundary, which followed the parallel from its starting point (established pursuant to the 1968-1969 lighthouse arrangement between the Parties), did not extend beyond 80 nautical miles from the coast. Therefore, the ICJ established the maritime boundary between the Parties beyond the 80 nautical mile limit using the three-stage methodology it usually employs. First, the ICJ established a provisional equidistance line and subsequently it ruled that there were no circumstances which required an adjustment of this line and that there was no significant disproportion which would call into question the equitable nature of the boundary.

(2) *Whaling in the Antarctic (Australia* v. *Japan: New Zealand Intervening)*

On 31 March 2014, the ICJ rendered its judgment in the dispute between Australia and Japan (New Zealand intervening) concerning Japan's whaling programme in the Antarctic under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (JARP II). The jurisdiction of the ICJ was based on the declarations made by the Parties pursuant to Article 36(2) Statute. The Court ruled that Japan could not rely on Australia's reservation contained in its declaration, which excluded disputes concerning the delimitation of maritime

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zones or disputes relating to the exploitation of any disputed area of or adjacent to any maritime zone pending its delimitation from the jurisdiction of the ICJ since no such dispute existed between the Parties in the Antarctic Ocean. First, the ICJ established that the legality of a whaling programme under Article VIII of the Whaling Convention, which allows the killing of whales for the purposes of scientific research, depended on objective criteria. Such a programme had to be designed and implemented in such a way that it is reasonable in relation to its stated research objectives. Although JARPA II was indeed broadly intended for scientific research, the ICJ was of the opinion that its design and implementation did not reach the required standard. Therefore the ICJ concluded that Japan had breached several provisions of the Schedule relating to the Whaling Convention including the moratorium on commercial whaling and decided that Japan shall revoke any authorizations in relation to JARPA II and refrain from granting any further permits pursuant to that programme.

Permanent Court of Arbitration

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

On 20 December 2013, a Court of Arbitration constituted under the Indus Waters Treaty and assisted by the Permanent Court of Arbitration rendered its Final Award in the dispute between the Islamic Republic of Pakistan and the Republic of India concerning the Kishenganga Hydro-Electric Project (KHEP) located on the Kishenganga/Neelum River. 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 (KHEP); and (2) the permissibility of the depletion of the reservoirs of hydro-electric plants in India below certain levels.

In the Court's Partial Award of 18 February 2013, which was final with respect to the disputes decided therein, the Court had already decided that India could divert water from the Kishenganga/Neelum River for power generation by the KHEP, provided that it would maintain a minimum flow of water in that river. Further, the Court had already decided that India could not reduce the level of the water in its hydro-electric power plant reservoirs, located in rivers which are allocated to Pakistan under the Indus Waters Treaty, below a particular level (in order to flush accumulated sediment downstream).

In its Final Award of 20 December 2013, the Court established the minimum flow which India must release into the Kishenganga/Neelum River (9 cumecs). The Parties may seek a reconsideration of this decision through the Permanent Indus Commission and the mechanism in the Indus Waters Treaty after a designated time period in view of uncertain environmental responses to changing conditions and the potential for climate change.

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International Criminal Court

(1) *Prosecutor* v. *Katanga*

On 7 March 2014, Trial Chamber II of the International Criminal Court (ICC) rendered its judgment in the case against Katanga. Katanga was the commander of the Ngiti militia, which gradually adopted the name 'Force de résistance patriotique en Ituri' (FRPI) (Patriotic Force of Resistance in Ituri). He was prosecuted for crimes committed on 24 February 2003 during the attack on the village of Bogoro in the Ituri district of the Democratic Republic the Congo (DRC). He was convicted as an accessory by the Trial Chamber of crimes against humanity (murder) and war crimes (murder, attacking a civilian population, the destruction of property and pillage), within the framework of a non-international armed conflict. According to the Trial Chamber, Katanga had made a significant contribution to the commission of the crimes committed by the FRPI and had assisted the members of the FRPI to plan the attack on Bogoro. It had not been established, however, that he was responsible as a principal perpetrator rather than as an accessory. Katanga was acquitted of other charges, including rape, sexual slavery (as crimes against humanity and war crimes) and the use of child soldiers (as a war crime). Although the Trial Chamber found that these crimes had been committed, the Prosecution had insufficiently established Katanga's responsibility for these crimes. A decision on his sentence will be rendered later.

International Criminal Tribunal for the Former Yugoslavia

(1) *Prosecutor* v. *Šainović, Pavković, Lazarević, Lukić* (Appeals Chamber)

On 23 January 2014, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) rendered its judgment on appeal in the case against four senior Serbian officials. The case was the first case relating to crimes committed by Serbian forces in Kosovo in 1999. On 26 February 2009, Trial Chamber III convicted five high-ranking Yugoslav and Serbian political, military and police officials, all of whom were associates of the former President Milošević. They had participated in an organized campaign of violence against Kosovo Albanians using significant state resources in the execution of a joint criminal enterprise. The crimes consisted of mass expulsions of civilians, and incidents of killing, sexual assault and the destruction of mosques. Former Yugoslav Deputy Prime Minister Šainović, Yugoslav Army General Pavković, and Serbian Police General Lukić were each sentenced to 22 years' imprisonment; Yugoslav Army General Lazarević was sentenced to 15 years' imprisonment.

The Appeals Chamber confirmed that Yugoslav and Serbian forces had committed the crimes in the 13 Kosovo municipalities and that the defendants had participated in a joint criminal enterprise with the goal being to displace the Kosovo Albanian population. Further, the Appeals Chamber upheld most con-

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victions for war crimes and crimes against humanity, but granted a number of challenges from the defendants and from the Prosecution in relation to specific convictions. The Appeals Chamber subsequently reduced Šainović's sentence from 22 years' imprisonment to 18 years; Lukić's sentence from 22 years' imprisonment to 20 years; and Lazarević's sentence from 15 years' imprisonment to 14 years. Pavković's sentence of 22 years' imprisonment was confirmed.

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

On 27 January 2014, the Appeals Chamber of the ICTY rendered its judgment on appeal in the case against Đorđević. Đorđević was the former Assistant Minister of the Serbian Ministry of Internal Affairs and the Chief of the Public Security Department. On 23 February 2011 Trial Chamber II convicted him of war crimes (murder) and crimes against humanity (deportation, other inhumane acts (forcible transfer), persecutions on racial grounds, murder) committed against Kosovo Albanians in Kosovo in 1999 and sentenced him to 27 years' imprisonment. The Trial Chamber held that Đorđević had participated in a joint criminal enterprise (together with Milošević, the late former President of the Federal Republic of Yugoslavia, Šainović, the former Deputy Prime Minister of the Federal Republic of Yugoslavia, and other high officials) in order to change the ethnic balance of Kosovo by means of a campaign of terror and violence; and that he had aided and abetted these crimes.

The Appeals Chamber confirmed Đorđević's participation in the joint criminal enterprise to change the ethnic balance of Kosovo and thus his responsibility for the war crimes and crimes against humanity committed in Kosovo in 1999. However, the Appeals Chamber reversed his convictions on the basis of aiding and abetting these crimes since the Trial Chamber had failed to articulate why both modes of liability (joint criminal enterprise and aiding and abetting) were necessary in this case. Further, the Appeals Chamber reversed a number of convictions in relation to particular incidents. With respect to the Prosecution's appeal, the Appeals Chamber entered a conviction for the crime of persecution through sexual assault as a crime against humanity. Since the reversals outweighed his new convictions (with regard to the number of victims and the level or responsibility), the Appeals Chamber reduced Đorđević's sentence from 27 years' imprisonment to 18 years' imprisonment.

(3) *Prosecutor* v. *Hadžić*

On 20 February 2014, Trial Chamber II dismissed Hadžić's motion for acquittal on a number of charges pursuant to Rule 98*bis* of the ICTY's Rules of Procedure and Evidence. Hadžić is the former President of the Republic of Serbian Krajina and he is being prosecuted for war crimes and crimes against humanity committed in Croatia from June 1991 to December 1993.

Rule 98*bis* provides: '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

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a judgment of acquittal on any count if there is no evidence capable of supporting a conviction.' The Trial Chamber dismissed Hadžić motion for acquittal. On the basis of the legislative history of Rule 98*bis* and the settled practice of the Tribunal following the amendment of the rule in 2004, the Tribunal ruled that it was appropriate to entertain such motions for acquittal only in relation to all the counts of an indictment or with regard to entire counts. Motions in relation to individual charges within a count, as had been argued by Hadžić, could not be entertained. Despite the dismissal, the Tribunal was of the opinion that it would be appropriate to discuss Hadžić's challenges to specific charges. It concluded that there was sufficient evidence for a Trial Chamber to establish responsibility. Therefore, even if the Trial Chamber had adopted the approach as advocated by Hadžić, it would have denied his motion in its entirety.

International Criminal Tribunal for Rwanda

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

On 16 December 2013, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) rendered its judgment in the case against Ndahimana, who is the former *bourgmestre* of Kivumu Commune. On 17 November 2011, he was convicted by Trial Chamber II of crimes against humanity (genocide and extermination) in relation to the events at the parish of Nyange of the commune of Kivumu in Rwanda on 15 and 16 April 1994, when thousands of Tutsi civilians were killed after seeking refuge in the church of Nyange. He was sentenced to 15 years' imprisonment.

The Appeals Chamber dismissed Ndahimana's appeal in all respects and partly granted the appeal by the Prosecution. The Appeals Chamber reversed the Trial Chamber's finding that Ndahimana was responsible for aiding and abetting genocide and extermination as crimes against humanity. Instead it found that he was responsible for these crimes through participation in a joint criminal enterprise, which most appropriately reflected the full scope of his criminal conduct. Further the Appeals Chamber found that the Trial Chamber had erred by considering various factors, such as his lack of genocidal intent and duress, in mitigation of Ndahimana's sentence. Finally, the Appeals Chamber affirmed his other convictions for crimes against humanity (genocide and extermination). In view of the extraordinary gravity of the crimes for which Ndahimana was convicted and the form and degree of his participation in these crimes, the Appeals Chamber increased his sentence to 25 years' imprisonment.

(2) *The Prosecutor* v. *Ndindiliyimana, Nzuwonemeye, Sagahutu (Appeals Chamber)*

On 11 February 2014, the Appeals Chamber of the ICTR rendered its judgment in the case against Ndindiliyimana, Nzuwonemeye, and Sagahutu. The case

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is known as the Military II Case. Ndindiliyimana is the former Chief of Staff of the Rwandan gendarmerie; Nzuwonemeye is the former commander of the Reconnaissance Battalion; and Sagahutu previously served as the commander of Squadron A within the Reconnaissance Battalion. On 17 May 2011 they were convicted by Trial Chamber II of the ICTR of war crimes and crimes against humanity. Ndindiliyimana was convicted of war crimes (genocide and murder) and crimes against humanity (genocide, extermination, and murder) based on the participation of the gendarmes in attacks in Kansi Parish in Butare Prefecture and Saint André College in Kigali Prefecture in April 1994. He was sentenced to a single sentence of the time served and immediately released. Nzuwonemeye and Sagahutu were both convicted of crimes against humanity (murder) and war crimes (murder) in relation to the killing of Prime Minister Uwilingiyimana and with respect to the killing of Belgian peacekeepers who were part of the UNAMIR peacekeeping mission. They were each sentenced to 20 years' imprisonment.

The Appeals Chamber dismissed the Prosecution's appeal but granted the appeals by the three defendants. First, the Appeals Chamber reversed the convictions of Ndindiliyimana and acquitted him of all counts in the indictment. Second, the Appeals Chamber reversed the convictions of Nzuwonemeye and acquitted him of all counts in the indictment. Third, the Appeals Chamber affirmed the conviction of Sagahutu in relation to the killing of at least two Belgian peacekeepers (only reversing his conviction for ordering the killings) but reversed his conviction in relation to the killing of Prime Minister Uwilingiyimana. The Appeals Chamber subsequently reduced his sentence of 20 years' imprisonment to 15 years' imprisonment.

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