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OKO

Одсјек Кривичне Одбране
Odsjek Krivične Odbrane
CRIMINAL DEFENCE SECTION

Contents

Introduction

Welcome to the second edition of the OKO War Crimes Reporter. The Reporter is intended to ensure that all lawyers working on war crimes cases in BiH have access to the latest information that they need from around the country, the region and the world. The Reporter focuses on developments in the Courts of BiH, Serbia and Montenegro and Croatia, as well as international tribunals. We cover issues of International Humanitarian Law and also Human Rights law as they apply to war crimes trials in BiH.

In this edition the Reporter contains summaries of recent decisions from the Court of BiH, the District Court of Banja Luka, the County Court of Split, the BiH Constitutional Court as well as the ICTY. Articles in this edition cover the role of the Registry of the Court of BiH, judicial notice of facts established by the ICTY, and the customary international law study by the ICRC.

I hope that you find this edition of the Reporter useful and we look forward to receiving your suggestions for the future.

Chris Engels

Editor

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Contributions

We are grateful to the following OKO Fellows and Pripravniks who prepared case summaries for this issue: Dino Bjelopoljak, Meris Dolić, Kelly Fry, Amel Kasapović and Muhamed Mujakić.

Submissions

The OKO War Crimes Reporter welcomes articles on current issues and international developments in war crimes law. Please contact the editor.

Citation

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Photograph

The picture on the front cover shows the new high security court room at the Court of BiH, Courtroom 6, which was opened in February 2006.

Update of OKO activities

Recent legal developments, training events, and library acquisitions

Legal developments

There have been several positive developments from the perspective of the defense in the last several months. A number of judges have allowed the appointment of a second *ex officio* lawyer to act as co-counsel. OKO is also working with several defense lawyers on a plan for the use of defense investigators. In two recent cases the preliminary preceding judge held that pretrial custody should not be extended to the maximum allowed, but rather limited to a period that was reasonable for the prosecution to complete its investigation. A further development of interest to the defense is the reversal of one trial panel's decision to hold an entire trial in closed session.

IHL and CPC training

OKO continued its certification training program in international humanitarian law (IHL) and the criminal procedure code of BiH (CPC). OKO staff and guest speakers combined to present 3 days of training on each topic in Sarajevo and Banja Luka. OKO continued its collaboration with the International Committee of the Red Cross (ICRC) on IHL training. Richard Desgagne, the new Regional Legal Advisor for Central Europe and South-Eastern Europe, and Neda Dojčinović, Legal Advisor to the ICRC Sarajevo office, gave presentations and led case study discussions on several topics.

There were also several guest speakers at the CPC trainings. These included Sebastian van de Vliet, the Director of the Office of Legal Aid and Detention at the ICTY, who discussed issues facing defense advocates at the ICTY, and Guenael Mettraux, co-counsel for Sefer Halilović, who discussed motion writing techniques at the ICTY.

Investigators training

OKO held a three-day investigators training in December. The training was conducted by OKO staff and guest lecturers. Veselin Londrović, a veteran ICTY defense attorney, Tursunović Samir, a defense investigator from the Legal Aid Office in the Brčko District, and Pizović Safet, a defense attorney in the Brčko District Legal Aid Office, each spoke on investigations and discussed their practical experience with the group.

Genocide seminar

OKO organized a half-day seminar on genocide with Professor William Schabas for lawyers participating in the Kravice case. Professor Schabas (*pictured to the right)* is the director of the Irish Centre for Human Rights at the National University of Ireland in Galway and is considered on of the leading experts on the crime of genocide. The seminar began with introductory presentations on genocide by Professor Schabas and OKO staff. Thereafter the lawyers had the opportunity to direct specific questions to Professor Schabas, who gave insight into several significant issues that might arise in genocide cases before the Court of BiH. Professor Schabas' book, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), is an excellent resource for anyone interested in the development of the crime up to 2000. The English language edition of the book can be found in the OKO Library.

OKO has planned its CPC and IHL training programs for the rest of the year. Please refer to the information on the last page of the Reporter for the specific dates. Throughout the year we will also

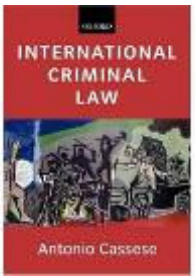
schedule several seminars on specific topics in IHL law. These will be advertised at a latter date.

OKO library

One of OKO's core functions is to provide legal resources to defense advocates representing clients before the Court of BiH. In furtherance of this role OKO is continually updating its library, which is open to all defense advocates. In the last month OKO has acquired several new resources. Three of them are available in both English and BCS. These three are summarized below. We encourage suggestions for future additions to our library, especially those available in BCS.

Antonio Cassese, International Criminal Law (Oxford: OUP 2003) (English and BCS)

This book distils from an immense array of cases, both national and international, as well as the relatively few available treaties, the fundamental rules proscribing inadmissible conduct as



international crimes, and outlining international proceedings for the prosecution and punishment of such crimes.

The book is mainly divided into four different parts: substantive criminal law, fundamentals of international criminal responsibility, the prosecution and punishment by national courts, and to conclude it deals with the prosecution and punishment by international courts.

John Jones and Steven Powles, International Criminal Practice (3rd edn., Oxford: OUP 2003) (English and BCS)

The subject of this book is international criminal practice, that is the practice of international criminal courts and tribunals. Accordingly, this book does not deal with international criminal law as applied by national courts, except when those courts have referred in their decisions and judgments to international criminal practice.

The book covers the issues of the organization and working of international tribunals, jurisdictional matters, substantive international criminal law, international criminal proceedings, and state cooperation.

Human Rights Watch. Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina, February 2006 (English and BCS)

Available at: http://hrw.org/reports/2006/ij0206/

As the Court of BiH is still in the early stages of conducting trials, this report offers an overview of the key organs whose effective operation is essential to ensure the Court of BiH's functioning and success. In particular, the following areas are discussed: the Special Department for War Crimes within the Office of the Prosecutor of the State Court, OKO, the Witness and Victim Support Section, and the Public Information and Outreach Section. Within each section, an outline is given of the strengths and accomplishments of the Court of BiH. Human Rights Watch also highlights particular areas of concern, and makes recommendations about where it believes the Court of BiH can improve operations.

OKO invites all defense lawyers who have not already made use of its library and other research facilities to visit the OKO office in order to gain a better understanding of the full range of available resources.

TPO Briefs

Summaries from the defense support teams

Within OKO, there are 6 teams of lawyers covering 5 geographical areas. These defence support teams are known by their title in the Bosnian-Croatian-Serbian language of 'Tim za Podršku Odbrani' or TPO for short. The following is an update, by TPO, of the cases before the Court of BiH and ICTY transfer cases where appropriate.

TPO 1 – North-Western BiH

Cases stemming from this area mostly relate to hostilities that took place in the Prijedor area and the atrocities committed in the Omarska, Trnopolje and Keraterm Camps. Currently, there are two cases pending before the BiH State Court from this region. Marko Samardžija is alleged to have been responsible for initiating, instigating and assisting in the murder of 239 Bosniaks from several villages located in the municipality of Ključ, and is charged with a crime against humanity, based on his individual criminal responsibility under for these murders.

Nikola Kovačević is charged with several crimes against humanity alleged to have been committed in the Sanski Most area. Specifically, Kovačević is charged with the torture of several civilians in the Betonirka facility and the murder of several detainees who were transported from the Betonirka facility. In addition, he is charged with persecutions, illegal detention and other inhumane acts in connection with these events.

The case against Mejakić, Gruban, Knežević, Banović and Fuštar is currently before the ICTY Appeal Chamber following the decision of the referral bench to transfer the case to BiH pursuant to Rule 11*bis* of the ICTY Rules of Evidence and Procedure. The indictment alleges a joint criminal enterprise of ill-treatment within the Keraterm and Omarska camps.

TPO 2 – Central BiH and Lašva Valley

The only case before the Court of BiH relating to events in Central Bosnia is the case against *Abduladhim Maktouf.* He is accused of accessorial liability for war crimes by consciously aiding Abu Jafar and other members of El Mujahedeen brigade in abducting 3 Croat civilians and transporting them to Orašac camp. Maktouf was found guilty by a first instance judgment and was sentenced to 5 years of imprisonment. The appellate panel has revoked the first instance judgment. The decision revoking the judgment states that the evidence is to be re-presented before the appellate panel. Presently the proceedings are in the main trial stage before the appellate panel.

The case against Paško Ljubičić is currently being considered by the ICTY under the 11*bis* transfer procedure. The indictment alleges that as the commander of the 4th Military Police Battalion of the HVO Military Police, he persecuted Bosniaks in the Vitez and Busovača municipalities, during the course of which approximately 100 people were killed.

TPO 3 – Eastern BiH

The case against Dragoje Paunović is currently before the Court of BiH. Paunović is charged with the murder of 24 people on 15th August 1992 in a field near Rogatica, as persecution as a crime against humanity. A number of prosecution witnesses have given evidence, with the main issue in the trial being the identification of the defendant.

Boban Šimšić is currently being tried before the Court of BiH for persecution as a crime against humanity. It is alleged that Šimšić took part in attacks on the villages of Žlijeb, Velji Lug and Kuke in the Višegrad municipality and participated in the killings, rapes, torture and illegal detention of Bosniak civilians at the premises of the Hasan Veletovac elementary school and the Fire Brigade premises in Višegrad.

TPO 4 – South-Eastern BiH

The trial of Neđo Samardžić for crimes committed in the Foča region is currently ongoing before the court of BiH. Samardžić is alleged to have committed killings, forced relocations of persons, deprivations of liberty, sexual slavery, rapes and persecution of Bosniaks. Of significance in the charges is Samardžić's alleged participation in events that took place in the so-called *Karaman kuća* (Karaman's House) in Miljevina. Together with Radovan Stanković, the first 11*bis* transfer from the ICTY, Samardžić allegedly enslaved several Bosniak women (some minors) for the purpose of obtaining sex and other physical labour from them.

Radovan Stanković, the first 11*bis* transfer from the ICTY, is alleged to have committed, incited, aided and abetted the enslavement, torture, rape and killing of non-Serb civilians in the Foča region and charged as crimes against humanity. Notable, Stanković is accused of setting up „Karamanova kuća", which the soldiers also referred to as the „Brothel". The indictment alleges that at least nine female persons were detained in the house, most of them juveniles. The women were allegedly exposed to multiple rapes and forced labour

throughout the time they were detained in the house.

Gojko Janković was also transferred from the ICTY. He is alleged to have been in command of a group of approximately twenty soldiers in the Foča area, who allegedly attacked Bosniak civilians, killing some and raping others. He is also charged with the rape of several other women, many of whom were juveniles at the time. In addition, Janković is charged with sexual slavery for the alleged abuse of two women in his custody. The indictment states that he treated them as slaves for sex and other purposes, with full control over their lives. He is charged with crimes against humanity relating to these acts.

There is currently an investigation ongoing against Dragan Damjanović**,** on the basis of a grounded suspicion that he committed mass killings, physical harassment and beatings of detainees in camps, which may amount to crimes against humanity. The indictment has not yet been issued in this case.

TPO 5 - Neretva River and Western Herzegovina

The forces of the Croatian Defense Counsel (HVO) and the Army of Bosnia and Herzegovina (BiH Army) worked together in the beginning of the Bosnian conflict against the forces of the Bosnian Serb Army (VRS). This alliance fell apart in January of 1993. Most crimes charged in this region occurred during and were the result of the hostilities between the HVO and BiH Army after the collapse of their confederacy.

In this region there are currently no cases in the post-indictment phase and two under investigation. Nikola Andrun, as Deputy Commander of the "Gabela" Camp, is suspected of being responsible for the torture and inhuman treatment of camp detainees, one murder and the disappearance of several detainees.

The Prosecutor's Office is also conducting an investigation against Mithad Novalić concerning the killing of nine members of the Army of RBiH on the road from the village of Repovci to Bradina in the Municipality of Konjic.

TPO 6- Special Projects

TPO 6 is the only TPO not attached to a geographical region. This TPO was established as a balance to the Special Projects team within the prosecution and will deal with certain cases before the Court of BiH without regard to their geographical location.

The only case currently being handled by this TPO is the Mitrović *et al* (Kravice Case). This is the largest case currently before the Court, with 11 accused. The accused are all alleged to have participated in the killing of more than one thousand detained Bosniaks at Kravica farm, near Srebrenica. They are charged with genocide, as accomplices, under article 171 of the CC of BiH. The accused are: Stupar Miloš, called «Mišo», Trifunović Milenko, called «Čop», Mitrović Petar, called «Pera», Džinić Brano, called «Čupo», Radovanović Aleksandar, called «Aca», Jakovljević Slobodan, called «Boban», Stevanović Miladin, Maksimović Velibor, called »Velja», Živanović Dragiša, called «Kele», Medan Branislav, called «Bane» and Matić Milovan.

Published Criteria

The latest criteria for admission to the list of advocates licensed to appear before the Court of BiH, valid until 31st July 2006

Application form

In accordance with Rule 3.3 of the 'Additional Rules of Procedure for Defence Advocates' please complete the "OKO Application Form" for February 2006 in order to apply to be admitted to the list of authorized advocates.

Professional Criteria

Article 3.2 of the Additional Rules requires that applicants must be a current and valid member of either of the Bar Associations, and must possess as an advocate, judge or prosecutor at least seven years of relevant working experience on legal matters in order to be appointed as the only advocate or the primary advocate.

Knowledge Criteria

Article 12(3) Law on Court of BiH allows the court to set the qualifications of advocates appearing before the Court. Article 3.2(3) of the Additional Rules requires that applicants must possess knowledge and expertise in relevant areas of law in accordance with the criteria published by OKO. The knowledge criteria can be satisfied by experience or by participation in an alternative training course.

Element	Qualification by Experience	Training
New Criminal legislation in BiH	Completion of 1 criminal trial as an advocate before Court of BiH, *or* Completion of 2 serious criminal trials as an advocate before lower courts using the new CC/CPC, *or* Completion of a training course on the CC/CPC approved by OKO	3 day training course on CPC and CC provided by OKO
War Crimes Law (*only required for those wishing to do war crimes cases*)	Completion of post-graduate study of IHL, *or* Substantial work as counsel in the trial phase at ICTY, *or* Completion of 2 domestic war crimes trials as an advocate in any civilian Court, *or* Completion of a training course on IHL approved by OKO	3 day training course on IHL provided by OKO

Continuing Professional Training Criteria

There is no requirement for continuing professional training in 2006. It will become a requirement in 2007.

Period of Validity

These criteria will apply to applications received by OKO before 31st July 2006 when the criteria will be revised and new criteria will be published.

Transfer of Defence Files

Memorandum of Understanding between OKO and the Office for Legal Aid and Detention Matters (OLAD) of the ICTY on the transfer of defence files

Introduction

1. A number of individuals are expected to be transferred from the ICTY to the Court of BiH for trial. In many of these cases, existing lawyers (ICTY lawyers) and their teams have been preparing the case for a period of time, sometimes years. The law in Bosnia and Herzegovina (BiH) allows foreign lawyers to be 'specially admitted' to defend cases before the Court of BiH. All lawyers acting before the Court of BiH (BiH lawyers), including foreign lawyers specially admitted, will be paid according to the BiH "State Tariff", which provides for substantially lower fees than those payable under the legal aid regime at the ICTY.

2. The transfer of the defence files and passing of information to a new lawyer (BiH lawyer) is a difficult but important process. An adequate transfer of the file will ensure the proper continuation of the accused's legal representation and thereby the protection of the accused's rights and avoid duplication of work by the ICTY and BiH lawyers.

3. Relying on the ethical duty of lawyers to transfer the defence files properly is not sufficient to ensure a smooth transfer, as the only sanction is an ethical complaint, which can only be submitted after substantial time and resources are spent and which does not necessarily yield results. Hence, it is considered desirable to establish a basic formal protocol.

Legal basis for transfer of defence files

4. Pursuant to Article 9(D) of the ICTY Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal (Code of Conduct), "upon termination or withdrawal of representation, counsel shall take steps to the extent reasonably practicable to protect the client's interests, such as giving sufficient notice to the client, surrendering papers and property to which the client or the Tribunal is entitled and refunding any advance payment of fee that has not been earned." The ICTY Code of Conduct confers an obligation on the ICTY lawyer to protect the client's interests upon termination or withdrawal. In cases of referral under Rule 11 *bis*, this reasonably includes the obligation to ensure a proper transfer of the case file to a new lawyer.

5. This Memorandum of Understanding establishes a basic protocol for facilitating the transfer of defence files and, as such, does not create legal obligations for either the ICTY or OKO.

Retention of existing lawyer

6. When the ICTY renders a decision to refer a case under Rule 11*bis* (Referral Decision), OLAD shall contact the ICTY lawyer without delay to ascertain whether s/he is prepared to continue to represent his/her client under the terms and conditions of the Court of BiH.

7. If the ICTY lawyer accepts to continue the representation of the accused before the Court of BiH, OKO shall inform the Court of BiH of that intention and assist with the preparation of such applications as may be necessary under the Additional Rules of Procedure for Defence Advocates appearing before the Court of BiH.

8. Consequently, the lawyer should plan for the physical transfer of the files to Sarajevo, for which s/he will be reimbursed in accordance with OLAD's policies.

Transfer of a case to a new lawyer

9. Where there is a change in the representation of the accused before the Court of BiH, a new lawyer will have to be appointed. Under the law of BiH, a lawyer cannot be appointed until the accused is within the jurisdiction of the Court of BiH. Therefore, the defence file transfer procedure can only commence upon the accused's arrival in Sarajevo.

10. Awaiting the physical transfer of an accused, the ICTY lawyer shall prepare a workplan detailing the activities that need to be performed in order to transfer the defence file properly to the BiH lawyer. The workplan shall be submitted to OLAD as soon as possible but no later than two weeks from the date of the Referral Decision and shall include at least the following:

- Activities to ensure that all documents are properly filed;
- Activities to ensure that all documents are properly indexed;
- Activities to ensure that confidential information which is not related to or relevant for the case is excluded from the defence file;

- All steps considered necessary by either the ICTY lawyer or the new lawyer to amend orders for confidentiality with regard to information within the defence file, sufficient to allow access for the new lawyer, either by application to the Trial Chamber directly or to seek the OTP's request to the Trial Chamber to lift the confidentiality and/or the protective measures of witnesses for the new lawyer;
- Activities to type up essential handwritten work products which are otherwise illegible;
- An overview of all work product which is not provided in the local language (Bosnian-Croatian-Serbian), and a proposal for which documents need translation;
- A proposed schedule of briefings with the new lawyer in order to discuss the strategy of the case and/or any other important matter for the transfer of the defence file;
- A proposed schedule for the transfer of the files directly to the new lawyer;
- Any other necessary activity for a proper transfer of the defence file;
- A timetable for all of the above actions.

11. The documents that should be transferred to the new lawyer shall include, *inter alia*:

- Any statements or notes arising out of interviews with potential witnesses;
- Any other material collected in the course of the defence investigation;
- Any filings, whether they originated from the ICTY lawyer, the prosecution or the Court, that are in the possession of the ICTY lawyer;
- Any disclosure material received from the prosecution that is not subject to confidential or protective measures;
- A detailed list of measures taken to prepare the case for trial.

12. The following documents shall be transferred to the new lawyer only with the written permission of the accused:

- Any communication between defence counsel and the accused;
- Any communication between defence counsel and third parties involved in the case;

13. Upon receipt, OLAD will assess the workplan and approve it or request further information from the ICTY lawyer if needed.

14. The workplan shall be implemented within one month of being approved, or if a new lawyer has not been appointed at that time, within one month of the appointment of the new lawyer.

15. In order to prove implementation of the workplan, the new lawyer shall send a written and reasoned confirmation of satisfactory receipt of the defence file to OKO. OKO will inform OLAD accordingly.

16. Should the ICTY lawyer fail to transfer the defence file properly as detailed in this Memorandum of Understanding, thus breaching his/her ethical obligations, s/he may be subject to a disciplinary complaint as envisaged in the Code of Conduct. This remedy is without prejudice to any other legal action against the ICTY lawyer at the domestic level.

17. Upon receipt of confirmation from the new lawyer that the ICTY lawyer has transferred the defence file satisfactorily, through OKO, the ICTY lawyer will be reimbursed for the completion of the tasks described in the workplan in accordance with OLAD's policies.

18. In case an accused has been transferred but the assignment of a new lawyer is delayed or poses problems, OKO and OLAD will consult as to the custody of the defence file awaiting the assignment of a new lawyer.

Payment

19. OLAD policies provide for a standard maximum allotment of hours for the ICTY lawyer in the amount of 150 counsel hours and 100 support staff hours to complete the tasks described in the workplan.

20. In addition, OLAD will reimburse a return trip to BiH and up to one week (five days) daily subsistence allowance to the ICTY lawyer (and a translator if necessary) for meetings with the new lawyer in order to discuss the strategy of the case and/or any other important matter for the transfer of the defence file as contained in the workplan.

21. Finally, OLAD policies provide for a single allotment of, at maximum, 1,500 Euros per case for the physical transfer of files to BiH.

Amendments

22. Both OLAD and OKO can propose amendments to the present Memorandum of Understanding. Amendments shall be adopted unanimously by OLAD and OKO.

An Introduction to the Registry

The Court of BiH has adopted the idea of a Registry to assist in the running of the Court. Doireann Ansbro describes the mandate, functions and future of the Registry.

The Court of Bosnia and Herzegovina consists of three divisions: criminal, administrative and appellate. The criminal and appellate divisions are divided into three sections, Section I for war crimes, Section II for organized crime, economic crime and corruption and Section III for all other crimes under the Court's jurisdiction.

The Registry for Section I and Section II and for the special departments for war crimes, organized crime, economic crime and corruption of the Prosecutor's Office, (The Registry), was established in December 2004, by agreement between Bosnia and Herzegovina (BiH) and the international community, as a temporary support office for the Court.. It was established in the context of the continuing judicial reform of BiH and the desire of the International Criminal Tribunal for the former Yugoslavia (ICTY) to transfer cases to a competent national court. The Registry is charged with carrying out the mandate of international assistance to the BiH Justice Sector, which is twofold. The first aspect is to provide the Justice Sector with the material, professional, and sustainable capacity to process complex criminal cases under Section I and II of the Court of BiH. The second is to ensure that the legal process, established within the Justice Sector, meets both national legal principles and international standards of fair trial and due process of law.

Prior to the establishment of the independent registry, a War Crimes Chamber Project (WCCP), affiliated to the Office of the High Representative, was set up to work with the Government of BiH to create the appropriate legal, administrative and financial conditions for the Registry to function effectively. This body secured substantial international financial support for the project through a donors' conference held in October 2003, raising approximately 17 million Euro. It presented a five-year, six-phase project implementation plan to the Peace Implementation Council in 2004. This plan detailed the specific aims of the project and the intended distribution of the international funds over a series of capacity building projects. A key element of the project plan is its emphasis on the sustainable nature of all capacity building. It foresees the phased absorption of the Registry and its support services into the BiH Justice Sector and the national funding system over a five-year period and the parallel phasing out of international involvement, a time span that reflects the period of international donor commitment.

The Registry itself consists of the Office of the Registrar, (charged with exercising the authority of the international mandate), an administration section, a finance unit, a language support unit and an architecture unit. It provides support services to the Court, the Prosecutor's Office, the SIPA Witness Protection Unit and the Ministry of Justice Execution of Criminal Sanctions Section.

The administration section provides the necessary infrastructure for the Registry's support services. It procures all goods and services, commissions construction companies and recruits personnel. The language support unit provides translation and/ or interpretation services when there is a minimum of one international involved at any stage of a trial. The finance unit is responsible for managing all international funds and ensuring transparency in the process through regular audits and quarterly published budget control reports.

During the course of 2004 and 2005, the architecture unit of the Registry undertook several construction projects to complete the necessary physical infrastructure of the Court of BiH. An ambitious project saw the complete refurbishment of the judicial complex, which now holds office space for 450 staff members, eight courtrooms, evidence rooms, archives, five interview rooms and a library. The unit also designed, in consultation with the relevant BiH authorities, a 21 bed pre-trial detention unit that meets international norms for detention and supervised its construction in 76 days. Security for all buildings within the judicial complex is provided by the Court Police, who have been supported by international security experts in the design, development and implementation of all security operations.

Additionally, the architecture unit has assisted the BiH Ministry of Justice in the pre-design of a 340 bed maximum security prison. This project is crucial to the success of the Court as present detention facilities within BiH are inadequate in light of the expected caseload of the Court of BiH and do not meet international standards of conditions of confinement. The prison was designed in consultation with the BiH Ministry of Justice, the entity Ministries of Justice and prison directors from Republika Srpska and the Federation of BiH, as well as a prison expert and prison security expert provided by Canada and Norway, respectively. A detention/prison project team, supported by the Registry, coordinated the drafting and adoption of the necessary legislation to create the Sector for the Execution of Criminal Sanctions in the BiH Ministry of Justice. This team of experts is also currently coordinating donors to raise the 15 million euro required for the prison's construction.

The Registry provided the necessary material, financial and administrative support to the Court to establish a court management section for Section I and Section II and an information technology and communication unit to provide computer systems for the Court, the Prosecutor's Office and the Registry. These sections have implemented efficient and modern systems for managing and recording court files and documents and have equipped courtrooms with the necessary technical facilities. The court management section operates all case and document management systems and databases, and maintains the electronic court schedule, the trial records and all case-related documentation and materials. It also operates the automatic case-allocation system for the entire criminal division of the Court of BiH.

In cooperation with the information communication and technology unit, the court management section has, so far, equipped six courtrooms for full operation. These courtrooms have been fitted with technical systems for recording trials, for simultaneous interpretations of court proceedings in up to three languages, for digital presentation of all evidence on a wide screen, for the ability to protect witness identities through distortion of image and sound, and for the ability to take testimony from a witness through audio/visual link, where necessary. A Memorandum of Understanding has been signed with the ICTY for the mutual use of audio/video links and for the electronic transfer of documents.

The Registry is further mandated to build the expert legal and professional capacity of the Justice Sector. It is responsible for the recruitment and administration of international judges and prosecutors and select international experts in witness protection and detention, who work within the Court of BiH to ensure that international standards of due process are met. It provides the necessary support for their work through support sections it has established for prosecution, defence, judicial support, witness support and witness protection. It recruits and manages international professionals for these support sections to facilitate training, consultation, and the transfer of expert skills.

The prosecution support section provides administrative, logistical and operational support to the special department of the Prosecutor's Office. It has facilitated training, the recruitment of qualified personnel, drafting of regulations, the development of an automated case management system and the creation of two new sections for the co-ordination of legal issues and research and analysis. It has also contributed to the development of an efficient organizational structure for the Prosecutor's Office and to the development of a strategy for the selection of cases to be pursued.

Odsjek Krivicne Odbrane (OKO), the criminal defence section, is currently part of the administrative and management structure of the Registry. However, during 2006, it will be established as an independent institution that offers professional support to all defence advocates. At present, OKO houses five teams of lawyers who have in-depth knowledge on the relevant factual and legal issues involved in specific cases. They offer detailed legal advice and assistance with the preparation and presentation of legal arguments. OKO is located in an office separate from the Court, which is equipped with extensive research facilities for defence advocates. During 2005, it created, (and currently administers), a system for the licensing of advocates and it has agreed Rules of Procedure that apply to the defence. It has facilitated training in the new elements of criminal law and the law of armed conflict in both Sarajevo and Banja Luka and will continue its training programme into 2006, adding additional elements including advocacy, written legal argument, legal research, investigation and ethics.

The judicial support section, which supports the judges of Section I and Section II in the delivery of jurisprudence, is responsible for drafting decisions and judgements, performing extensive research on complex legal matters and providing various other forms of support to the judges.

The witness support office is a neutral body responsible for providing support to witnesses involved in all cases in Section I and Section II for both prosecution and defence. It aims to provide appropriate psychological support to witnesses before, during and after trial to ensure that the experience of testifying does not result in additional suffering for any witness.

The witness protection support unit was created, further to the signing of a memorandum of understanding between the Registry and the witness protection department of the BiH State Police Force (SIPA), in order to provide technical, material and professional assistance. Activities are co-ordinated by an international witness protection advisor and a senior SIPA police inspector. The Registry has also negotiated agreements with a number of countries on the international relocation of protected witnesses.

The Registry is of the view that only the support of the citizens of BiH can ensure the viability of the legal process within the Justice Sector. It has, therefore, also provided support for the public information and outreach section of the Court. This section is responsible for the widespread dissemination of general information about the Court and the Prosecutor's Office through the media and through direct communication with communities and non-governmental organizations throughout Bosnia and Herzegovina. It achieves this through a Court Support Network with centres in Tuzla, Mostar, Sarajevo and Prijedor, interaction with victim groups, media

cooperation, press releases, collaboration on television productions, extensive publications and video presentations.

The life span of the Registry, as envisaged by the original project plan, is spread over a five year period and consists of six implementation phases. These six phases contemplate the transition of an internationally supported institution to a fully national one by 2009. The phases include a 'planning stage', a 'development stage', an 'implementation stage', a 'management transition stage', the 'international judges and prosecutors transition stage' and the 'completion of the transition stage'. The Registry has, thus far, implemented the first three stages of this plan. Recognition that the Court of BiH now has the capacity to operate at international standards came in September 2005 when the first accused charged in an ICTY case referred to the Court, pursuant to Rule11*bis*, was transferred.

The fourth stage of the project implementation plan will see the gradual phasing out, during 2006, of the four international executive positions within the Registry: the Registrar, the international Deputy Registrar, the Chief of Finance and the Chief of Administration. The majority of the resources built over the course of 2005 by the Registry are already under the supervision of national officials.

Stages five and six of the project plan envisage the gradual phasing out of international judges and prosecutors from August 2006 to January 2008. Chambers that currently consist of two international judges and one from BiH will transition to two national judges and one international during the fifth phase. By August 2009, all international judges and prosecutors will have been phased out. Other international professionals currently working within the Justice Sector, (investigators, advisors, management and legal staff), will be phased out in line with the fulfilment of the Registry's mandate for sustainable capacity building. It is contemplated that the national staff of the Registry will be incorporated into the BiH justice institutions by law and through phased inclusion into the relevant budget.

The temporary support services provided by the Registry will be phased out completely during transition, including the Office of the Registrar and its support to capacity building projects. According to the Registry's Progress Report of October 2005, responsibility for the support services of the Registry with permanent functions will be integrated into the justice institutions of BiH, as follows. Prosecution support will be under the Prosecutor's Office. The defence support section will become an independent entity. Witness protection will fall under SIPA and, finally, witness support and judicial support will be under the supervision of the Court. By 2009, according to its project implementation plan and having fulfilled its dual mandate, the Registry will be completely absorbed into the Justice Sector of Bosnia and Herzegovina.

The Laws and Customs of War

***Neda Dojčinović**, Legal Advisor for the International Committee of the Red Cross (ICRC) in Sarajevo explains the rationale behind the ICRC study on customary international law*

Introduction

In addition to treaty law such as the four Geneva Conventions of 1949 and their Additional Protocols, customary international humanitarian law is a major source of rules applicable in times of armed conflict. While treaty law is based on written conventions, customary international humanitarian law derives from the practice of States as expressed, for example, in military manuals, national legislation or official statements. A rule is considered binding customary international humanitarian law if it reflects the widespread, representative and uniform practice of States accepted as law.

The Intergovernmental Group of Experts for the Protection of War Victims, convened by the Swiss Government, met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for international humanitarian law (IHL). Recommendation II proposed that the International Committee of the Red Cross (ICRC) be invited to prepare a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.

In late 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law. It was researched by ICRC legal staff and dozens of experts representing different regions and legal systems, including academics and specialists drawn from governments and international organizations. The experts reviewed State practice in nearly 50 countries across the world as well as international sources such as the United Nations, regional organizations and international courts and tribunals.

Nearly ten years later, in 2005, after extensive research and widespread consultation with experts, the study on customary international humanitarian law was published. The study was edited by Jean-Marie Henckaerts of the ICRC Legal Division and Louise Doswald-Beck of the Graduate Institute of International Studies and the University Centre for International Humanitarian Law in Geneva. It is published by the Cambridge University Press.

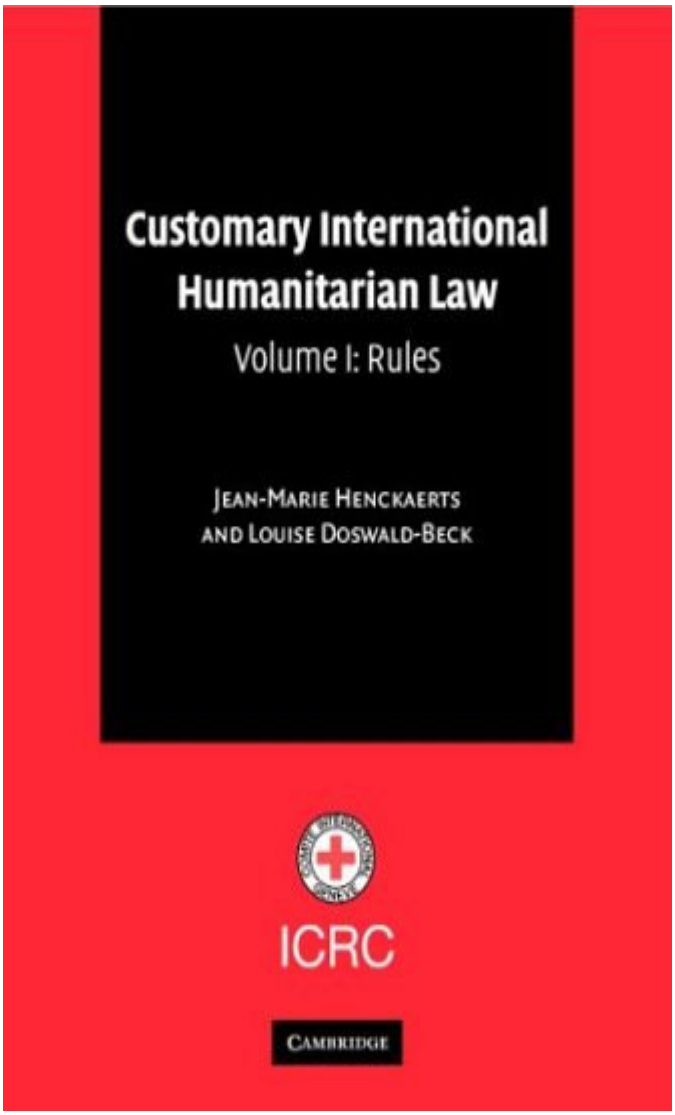
Purpose of the study

The purpose of the study on customary international law was to overcome some of the problems related to the application of international humanitarian treaty law. Treaty law is well developed and covers many aspects of warfare, affording protection to a range of persons during wartime and limiting permissible means and methods of warfare.

There are, however, few serious impediments to the application of these treaties in current armed conflicts which explain why a study on customary international humanitarian law is necessary and useful.

First, treaties apply only to the States that have ratified them. While the four Geneva Conventions of 1949 have been ratified universally, other treaties of international humanitarian law have not. This is the case, for example, of the 1977 Additional Protocols to the Geneva Conventions. The study shows, however, that a significant number of rules and principles contained in these treaties are customary, such as many rules governing the conduct of hostilities and the treatment of persons not or no longer taking a direct part in hostilities. As part of customary international law, these rules and principles are applicable to all States regardless of their adherence to relevant treaties.

Second, despite the fact that most contemporary armed conflicts are non-international in nature, treaty law covering such conflicts remains fairly limited. Only a limited number of treaties apply in non-international armed conflicts *(e.g. the Convention on Certain Conventional Weapons, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines; the Hague Convention for the Protection of Cultural Property and its second Protocol, the common Article 3 of the four Geneva Conventions and Additional Protocol II, etc.).* The study shows that there exist an important number of customary rules of international humanitarian law that define in much greater detail than treaty law the obligations of parties to a non-international armed conflict. This is notably the case with rules on the conduct of hostilities. For example, while treaty law does not expressly prohibit attacks on civilian objects in non-international armed conflicts, such a prohibition has developed under customary international law. Importantly, all conflict parties, not just States but also rebel groups, for example are bound by customary international humanitarian law applicable to internal armed conflict.



Finally, customary international humanitarian law can also be useful in the case of coalition warfare. Contemporary armed conflicts often involve a coalition of States. When the States making up such a coalition do not have the same treaty based obligations because they have not ratified the same treaties, customary international humanitarian law represents those rules that are common to all members of the coalition. These rules can be relied upon as a minimum standard for drafting common rules of engagement or for adopting targeting policies.

This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts**.**

As it identifies the rules of customary international humanitarian law, the study helps to ensure better knowledge of the applicable rules. The combined effect of knowledge of the law and the existence of possible sanctions, in particular those applied by national and international courts, allows international humanitarian law to ensure the protection of persons affected by armed conflict.

States recognize that treaties and customary international law are sources of international law and, as such, are binding. This is set forth, for example, in the Statute of the International Court of Justice.

Knowledge of the rules of customary international law may be of service in a number of situations where reliance on customary international law is required. This is especially relevant for the work of courts and international organisations. Courts are frequently required to apply customary international law. This is the case, for example, for the International Criminal Tribunal for the Former Yugoslavia which, pursuant to Article 3 of its Statute, has jurisdiction over violations of the laws and customs of war.

In addition, in many countries, customary international law is a source of domestic law and can be invoked before and adjudicated by national courts.

Customary international law is also relevant to the work of international organisations in that it generally represents the law binding upon all member States. In case of violation, international humanitarian law can be enforced through diplomatic means, including by international organizations, such as through measures adopted by the UN Security Council.

Organisation of the study

The study encompasses research into State practice as reflected in national, as well as international sources. The 161 rules have been catalogued in 6 parts:

- *Principle of distinction* (distinction between civilians and combatants, distinction between civilian objects and military objectives, etc.)
- Specifically protected persons and objects (medical and religious personnel and objects, protected zones, cultural property, etc)
- *Specific methods of warfare* (starvation and access to humanitarian relief, etc)
- *Weapons* (landmines, general principles on the use of weapons, etc)
- *Treatment of civilians and persons* hors de combat (fundamental guarantees, the dead, missing persons, combatants and prisoners of war status, etc)
- *Implementation (* compliance with IHL, enforcement of IHL, individual responsibility, war crimes, etc)

The publication is divided into two volumes:

Volume I. Rules is a comprehensive analysis of the customary rules of international humanitarian law applicable in international and non-international armed conflicts. Of the 161 rules identified, 159 apply in international armed conflicts and 149 apply in non-international armed conflicts.

Volume II. Practice contains, for each aspect of international humanitarian law, a summary of relevant treaty law and of relevant State practice, including reports on the behaviour of parties to an armed conflict, military manuals, national legislation, national case-law and official statements, as well as practice of international organizations, international conferences and international judicial and quasi-judicial.

Conclusion

The study represents a milestone in the effort to reinforce the relevance and universality of international humanitarian law as a protective body of law. Its basic premise is that the behaviour of all arms carriers in all armed conflicts is regulated by customary rules of international humanitarian law, regardless of the treaty commitments of the parties to the conflict. Thus, the victims of armed conflict are afforded greater legal protection.

The ICRC intends to make full use of the study in its work to protect and assist victims of armed conflict worldwide. It will draw on the study to remind parties to the conflict of their obligations under international humanitarian law to respect persons not or no longer taking a direct part in hostilities.

While the publication of the study represents the end of a lengthy endeavour, it should be seen as part of the dynamic process of the development of international law. In that respect the study will serve as basis for discussion on the clarification, implementation and development of international humanitarian law. The study provides a picture of the current state of customary IHL. As this body of law may evolve over time, the ICRC intends to keep its research up-to-date.

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Judicial Notice

Jim Wormington considers the judicial notice of facts adjudicated by the ICTY before the Court of BiH, and the fruitless search for expediency in war crimes trials

Introduction

The War Crimes Chamber of the Court of Bosnia and Herzegovina (BiH) has the power to 'accept as proven' facts which have been previously established by the ICTY. This power is conferred by Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Court of BiH (henceforth, 'The Law on Transfer'). Before exercising this power, the Court of BiH has some important questions to answer concerning its scope and effect. Most significantly, the Court of BiH must determine the necessary limits of this power. The aim of this article is to establish those limits.

Introducing Article 4 of the Law on Transfer

> *"Article 4: Facts established by legally binding decisions by the ICTY*
>
> *At the request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings."*

Where the Court of BiH uses Article 4 to 'accept as proven' facts that have been established by the ICTY, the Court of BiH is applying a form of 'judicial notice'. A court will take 'judicial notice' of facts which the court believes are pre-established. If the court takes judicial notice of a fact, that fact does not need to be proven through conventional evidentiary procedure (through, for example, the admission of live evidence such as witness testimony). As well as facts adjudicated by another juridical body, a court might also consider as pre-established facts of common knowledge or notorious facts. Article 4 of the Law on Transfer, however, refers only to adjudicated facts and to documentary evidence.

Where a court takes judicial notice of documentary evidence, the court accepts that the veracity of the source of the documentary evidence has been pre-established and so need not be established through conventional evidentiary procedure[2]. In reality, this involves taking judicial notice of an adjudicated fact: the 'fact' that the document comes from the source alleged. For this reason, this article will, from this point onward, refer only to the judicial notice of adjudicated facts.

Article 4 will be used more by the prosecution than by the defence in criminal trials before the Court of BiH. The judicial notice of adjudicated facts removes the obligation on the moving party to adduce evidence establishing that fact. According to CPC Article 3(2), a doubt which exists with respect to the existence of facts must be resolved by the Court in a manner that is the most favorable for accused; the prosecution must adduce sufficient evidence to remove the existence of doubt as to the accuracy of a given fact; otherwise the defendant can take advantage of this presumption. The prosecution will seek to use Article 4 to do this.

Consider an example of the operation of Article 4. It has been established in proceedings before the ICTY that there was an 'international conflict' in the Central Bosnia region[3]. If the Court of BiH were to resolve the question as to whether there was an 'international conflict' in Central Bosnia using the usual evidentiary rules, the Court would have to listen to conventional evidence from the prosecution that establishes that fact. They might, for example, have to listen to witnesses or examine documents. If, however, the Court uses Article 4 to take judicial notice of the fact of an 'international conflict'[4] in the Central Bosnia region then that fact is 'accepted as proven' and the court can avoid considering conventional evidence adduced by the prosecution. It is worth noting the extensive use the prosecution could make of Article 4. The existence of an international conflict in the Central Bosnia region is a very general fact, a threshold issue necessary to establish many of the potential offences in war crimes cases. Article 4 could also be used, however, to prove very specific facts,

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[2] It may also be that Article 4 does not allow the judicial notice of documentary evidence. Instead, it may only allows documentary evidence from the ICTY to be 'accepted' by the court, meaning 'admitted'. The veracity of the document would then be determined in the normal procedure during trial.

[3] For example, Kordic and Cerkez, Trial Judgment, 26th February 2001, paragraph 109.

[4] The choice of 'international conflict' as the fact is only meant as an example. It may not be possible to take judicial notice of such a fact as it may not fulfill the criteria discussed later in this article.

even facts which relate to the specific acts alleged in the indictment or, exceptionally, to the acts and conduct of the accused. Article 4 has the potential to be a very significant tool for the prosecution.

Article 4 has the twin aims of improving the expediency and consistency of war crimes trials in the Court of BiH and ensuring the consistency of the facts established by the Court of BiH with those established by the ICTY. There is nothing contained within the Law on Transfer itself or the Decision enacting it which might indicate its goals. However, Article 4 derives the vast majority of its text from the judicial notice provisions common to the Rules of Procedure and Evidence of the ICTY, ICTR, and the Special Court for Sierra Leone.

These provisions are contained within Rule 94 of each set of rules. Rule 94 allows for the judicial notice of both facts of common knowledge (Rule 94(A)) and adjudicated facts (Rule 94(B)). Rule 94(B) allows trial chambers to build on work already completed in previous trials by adopting facts already established by a previous trial chamber. For this reason, Rule 94(B) was the perfect model on which to base Article 4 of the Law on Transfer.

Rule 94(B) states:

> (B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

The International Tribunals, in discussing Rule 94, have stated the aims of judicial notice to be:

- Promoting judicial economy through narrowing the factual issues to be decided by the court.[5]
- Ensuring consistency of case law, by fostering uniformity on factual issues where diversity in factual findings would be unfair.[6]

Article 4 must have the same goals. It will increase expediency by bypassing the time-consuming presentation of live evidence, particularly witness testimony, for facts which have already been determined in previous proceedings before the ICTY. It will increase consistency by allowing the Court of BiH simply to adopt the factual findings of the ICTY.

The use of Article 4 to achieve expediency and consistency is one way in which the Court of BiH court can build upon the foundations already laid by the ICTY in its efforts to tackle impunity for offences occurring during the break up of the Former Yugoslavia. War crimes trials inherently struggle to be expedient. Cases have complex factual matrices which include broad historical facts which can be easily disputed. International humanitarian law itself is chimerical and requires frequent re-clarification. The ICTY and ICTR have been heavily criticized for their overly cumbersome trials[7], forcing the UN Security Council to emphasize expediency through a Security Council Resolution that created 'Completion Strategies' which envisage the closure of the Tribunals in 2010[8]. Cumbersome domestic trials, particularly those reaching the length of trials in the ICTY are unlikely to be tolerated by domestic governments, the domestic public or international donors. The planners of the Court of BiH, for example, expect a shorter trial period than that of the ICTY. The maximum envisaged length of trials occurring before the Court of BiH can only be the year-long period in which a suspect can be detained during trial.[9]

The Court of BiH is the first domestic war crimes court to operate in the slipstream of an international court or tribunal. There is not, therefore, a model for the Court of BiH to follow in determining how to co-operate with an international court, in this case regarding the adoption of facts accepted by the international court. The cooperation between the Court of BiH and the ICTY in this regard will therefore become the model for co-operation between future institutions. After all, the relationship between the Court of BiH and the ICTY will not be an exceptional one. In future years, a number of domestic courts will surely be initiated to work in the slipstream of a previously established international court, whether an ad-hoc tribunal or, more likely the International Criminal Court.

Establishing the limits of Article 4

The jurisprudence concerning Rule 94(B) has established a series of conditions which facts established by an ICTY trial chamber must fulfill in order to be accepted by a subsequent trial chamber. The majority of these conditions are, I believe, uncontroversial and have not been subject to dispute in the jurisprudence of the

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[5] See, for example, Milosevic, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003, Simic et al, Decision on the Pre-Trial Motion requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in BiH, 25 March 1999. Sikirica, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 March 1999. Hadzihasanovic Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubera, 20 January 2005.

[6] See, Semanza Decision On The Prosecutor's Motion For Judicial Notice And Presumptions Of Facts Pursuant To Rules 94 And 54, 3 November 2000, at paragraph. 20. Ntakirutimana, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, para 28.

[7] The average length of trials at the ICTY is sixteen months. Statement of Florence Hartmann, Spokesperson for the Office of the Prosecutor, at ICTY Weekly Press Briefing on 15.01.2003

[8] Resolution 1503 of 28 August 2003.

[9] According to CPC Article 137(2), an accused can only be detained for one year following confirmation of the indictment. This may be extended under Article 137(3) for a further six months if there is an appeal from the first instance verdict.

ICTY, ICTR and the SCSL. These conditions must also apply to the judicial notice of adjudicated facts under Article 4.

The 'uncontroversial' conditions require that the relevant adjudicated facts must be:

- the subject of adjudication by another Chamber, meaning that the fact has not been the subject of an appeal or appellate proceedings have concluded[10];
- purely factual findings; not the legal characterisations of facts[11];
- not too broad, too detailed, too numerous; sufficiently significant; repetitive of other evidence already admitted; or not sufficiently relevant to the case.[12]

Debate concerning the limits of Rule 94(B) only begins when we consider a final condition, whether a fact must be 'not in reasonable dispute' between the parties. The resolution of this dispute will resolve another important question, the question of the legal effect of judicial notice; specifically whether judicially noticed facts are conclusively proven and can no longer be disputed at trial or whether judicial notice only establishes a presumption as to the accuracy of a particular fact; a presumption which can be rebutted by the opposing party.

From the outset, it is important to understand that the questions concerning legal effect and the 'not in reasonable dispute' requirement are inherently interlocking. The Court of BiH's resolution of one issue necessarily determines its response to the other. If the legal effect of the judicial notice of facts in Article 4 is that those facts are conclusively proven, courts patently cannot take judicial notice of a fact which is in reasonable dispute between the parties. A factual-finding in previous legal proceedings should not prevent a party to the current proceedings from adducing evidence which proves that fact to be incorrect. However, if judicial notice creates only a presumption as to the accuracy of the fact, a presumption which can be rebutted by the opposing party, then judicial notice cannot be limited to facts which are not in reasonable dispute. It would be contrary to try to rebut a fact which is not in reasonable dispute.[13]

The Court of BiH must, therefore, choose between the following two interpretations:

- Imposing a requirement that facts are 'not in reasonable dispute' and recognizing conclusive legal effect.
- Removing the 'not in reasonable dispute' requirement but recognizing only presumptive legal effect.

It is the Court of BiH's choice between these two interpretations which will determine the true limits of Article 4. Choice (i) represents a restrictive interpretation of Article 4 as the Court of BiH can only accept as proven facts which are 'not in reasonable dispute' between the parties, although those facts will be conclusively proven. In this case, where the court takes judicial notice of a fact, the court can, from that point on, refuse to hear evidence which attempts to prove that fact. Choice (ii) gives Article 4 a far more expansive definition. Facts can be judicially noticed even where they are 'in reasonable dispute', but those facts are not accepted as conclusively proven. Instead, it is only presumed that the facts are accurate. This presumption may be rebutted if the opposing party raises sufficient evidence to establish that the accuracy of the fact is 'in reasonable doubt'. This removes the burden on the prosecution to adduce evidence to prove facts which have already been proved before the ICTY if the defendant cannot prove that the fact is in reasonable doubt.

Choosing a Condition

The Court of BiH must choose between the two interpretations outlined above. The text of Article 4 offers little guidance to the court. The jurisprudence concerning Rule 94(B) is more instructive although, as I hinted above, there still exists some considerable dispute as to which interpretation should be adopted. Only the policy considerations affecting each interpretation are decisive.

Textual analysis

The text of Article 4 does not determine which of these interpretations the Court of BiH should adopt, even though Article 4 does contain one change in text to Rule 94(B), the rule around which this debate arose. Whereas Rule 94(B) states that the court may 'take judicial notice' of adjudicated facts, Article 4 is more descriptive, stating that the courts may, 'accept as proven those facts that are established by legally binding decisions'. This change is not, however, decisive as between the two interpretations. On the one hand, the word 'proven' might favor conclusive legal effect; as it implies a final, conclusive acceptance of a fact. On the other hand, Article 4 might favor the presumptive approach: 'to *accept* a fact as proven' could mean accepting that a party has successfully satisfied its obligation to prove that fact, whilst still leaving the other party able to

[10] Prosecutor v. Slobodan Milosevic, Decision on Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Motion for Judicial Notice of Adjudicated Facts, 28 October 2003,
[11] Ibid.
[12] Mejakic, Decision On Prosecution Motion For Judicial Notice Pursuant To Rule 94(B), 1 April 2004. Ntakirutimana Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, paragraph 27.
[13] The interlocking nature of these questions was recognized by Judge Shahabuddeen his Separate Opinion in the Milosevic Appeals Chamber Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's Decision on Prosecution Motion for Judicial Notice, 28 October 2003.

rebut the fact.

Unsurprisingly, given the controversy that has arisen in this regard for Rule 94(B), the text that Article 4 shares in common with Rule 94(B) is not decisive. The strongest textual argument deriving from Rule 94(B) concerns the phrase 'relating to matters at issue in the current proceedings'. It has often been argued in the ICTY jurisprudence that this phrase favours the judicial notice of facts which are 'in reasonable dispute'. For example, Judge Shahabuddeen argues in his *Separate Opinion to the Milosevic Appeals Chamber Decision* that a 'matter at issue' is a matter which is in reasonable dispute.[14] However, the requirement that a fact be 'at issue' in the proceedings does not concern the disputability of that fact but simply the relevance of that fact to the particular case. As we saw earlier, a relevance requirement based upon the 'at issue' text has been consistently applied in the jurisprudence of the International Tribunals.[15] Judge Shahabuddeen acknowledges this possibility when he states: 'the words 'at issue' could include factual issues involved in the case but about which the parties are not divided'.[16] The relevance requirement ensures that the admission of irrelevant adjudicated facts and documentary evidence does not significantly undermine the aim of judicial notice in expediting the trial.[17]

Jurisprudence

The jurisprudence of the two International Tribunals and the SCSL pertaining to the two interpretations in both inconsistent and, at times, confused.

ICTY

The ICTY Appeals Chamber appears to adopt, in Milosevic, the second more expansive interpretation of Article 4. The court settled debate as to the legal effect of judicial notice in favour of the presumptive approach. The Court stated, without giving the reasons for their decision, that:

> "[By] taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at trial."[18]

However, despite the interlocking nature of the two questions, the Appeals Chamber was not successful in abolishing the 'not in reasonable dispute' requirement. Up until the Appeals Chamber Decision, the 'not be in reasonable dispute' requirement had been a consistent component of the ICTY jurisprudence on judicial notice.[19] It should have been impossible to settle the legal effect of judicial notice in favor of the presumptive approach without removing the 'not in reasonable dispute' requirement. However, the majority of the Appeals Chamber did not recognize the inherently interlocking nature of the two questions. Instead, the majority of the Appeals Chamber did not specifically address whether a proposed fact must be beyond reasonable dispute in order for judicial notice to be taken thereof.[20]

The origin of the Appeals Chamber's mistake lies in the confused submissions of the prosecution in that case. Wary of the consistent jurisprudence stating that judicial notice cannot be taken of facts which are in reasonable dispute,[21] (jurisprudence that had been adopted by the Milosevic Trial Chamber[22]), the prosecution argued that a fact is 'indisputable' if it has been litigated at trial and on appeal. The prosecution accepted that in 'exceptional cases' even such 'indisputable' facts might be unsafe and subject to reasonable dispute.[23] However, the 'indisputable' nature of litigated facts meant that a presumption should exist as to their veracity and it should be for the defence to show that the fact is unsafe. The prosecution escaped the inherent link between legal effect and the 'not in reasonable dispute' requirement by arguing that indisputability is actually a relative concept: indisputable facts might be subject to challenge. As a result of this bizarre reasoning, the Appeals Chamber (deliberately or otherwise) determined the legal effect of taking judicial notice without ever discussing the Trial Chamber's requirement that evidence 'not be in reasonable dispute.'

Perhaps the Appeals Chamber did not have the gumption to explicitly abolish the 'not in reasonable dispute' requirement given its consistent presence in the ICTY jurisprudence and believed (in some ways correctly) that

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[14] At paragraph 29. He argues, for this reason, 'it is not permissible to interpolate a limitation to matters which are not in reasonable dispute; that involves a reversal of the stated intention' [original emphasis].
[15] Supra, footnote 12.
[16] At paragraph 30.
[17] The Ntakirutimana Decision explicitly justified the relevance requirement on this ground, at paragraph 27.
[18] Milosevic Appeals Chamber Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's Decision on Prosecution Motion for Judicial Notice, 28 October 2003.
[19] See, for example, Prosecutor v Slobodan Milosevic, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts, para 6, Prosecutor v Simic, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International of the Conflict in Bosnia-Herzegovina', Case No. It-95-9-PT, 25 March 1999, Prosecutor v Sikirica et al, 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts,' 27 September 2000.
[20] Noted by the Trial Chamber in the Blagojevic Decision, at paragraph 17,
[21] 'Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts', filed on 21 May 2003 (Henceforth 'Interlocutory Appeal') at paragraph 51.
[22] Milosevic Trial Chamber I Decision, paragraph 3.
[23] Interlocutory Appeal, at paragraph 52.

their decision would necessarily result in its removal. Perhaps they hoped the expansive definition would increase the expediency of trials before the ICTY, aiding the court as it struggles to satisfy its Completion Strategy. Interestingly, this Decision directly followed the now infamous Appeals Chamber Decision on the Admission of Written evidence According to Rule 89(F). Indeed, the Decision was made by four of the five judges who also sat in that Decision. That Appeals Chamber Decision on Rule 89(F) led Judge Hunt to voice his concern that:

> 'The Majority Appeals Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal's reputation'.[24]

The Appeals Chamber's failure to abolish the 'not in reasonable dispute' requirement is clear from the failure of subsequent trial chambers to disapply that condition. Some Trial Chambers continue to apply the 'not in reasonable dispute' requirement explicitly by simply ignoring the Milosevic Appeals Chambers Decision.[25] Others pay lip-service to the Appeals Chamber's Decision but simply establish an alternative 'not in reasonable dispute' requirement. Appropriately, the first Trial Chamber to determine the issue in this manner was that of the Milosevic case itself.[26] The Trial Chamber paid lip-service to the Appeals Chamber decision by no longer explicitly mentioning a 'not in reasonable dispute' requirement. Instead, the Trial Chamber stated that, 'in the exercise of our discretion, the Trial Chamber may also consider the tendentiousness of the facts sought to be admitted'[27]'Tendentiousness', however, translated into a requirement of 'not in reasonable dispute'. This is clear from the Trial Chamber's pertinent analogy with Rule 92Bis, 'Proof of facts other than by oral evidence', of the Rules of Procedure of Evidence. Rule 92bis is strongly analogous to Rule 94(B) as it creates an exception to the immediate presentation of evidence. Under Rule 92bis, facts can be proved through previously recorded written witness statements. The Trial Chamber noted that in the Court's application of Rule 92Bis, there have been 'areas of evidence which the accused has strongly challenged and which the Trial Chamber has consistently allowed the accused to cross-examine'. In the exercise of discretion under Rule 92bis, one important factor considered by the Court was whether the accused contests the evidence which the Prosecution seeks to admit in written form. The Trial Chamber in Milosevic believed that this factor was extremely similar to the 'not in reasonable dispute' requirement. They stated that the 'starkest example' of the exercise of this discretion was mandatory cross-examination for evidence which 'related to a *live issue* between parties'. In these circumstances, the phrase 'live issue' is extremely similar to a 'not in reasonable dispute' requirement.[28] Using this reasoning, the Trial Chamber was able to refuse to modify its original decision on the judicial notice of facts in the *Milosevic* case, a decision based upon the existence of a 'not in reasonable dispute' requirement. For two of the sets of facts,[29] the Trial Chamber cited tendentiousness as a basis for the refusal of judicial notice.[30]

The reasoning of the Milosevic Trial Chamber, paying lip-service to the Milosevic Appeals Chamber Decision while maintaining a 'not in reasonable dispute' criterion, was followed by the Trial Chamber in Mejakic. In Mejakic, the Trial Chamber 'noted the Trial Chamber's previous approach with respect to judicial notice'. The Chamber believed that the requirement that 'the Trial Chamber may only take judicial notice of facts which are not the subject of reasonable dispute' was part of this 'previous approach'. The Trial Chamber then cited the Milosevic Appeals Chamber Decision as modifying this position.[31]The Court stated that 'applying the test of the Appeals Chamber [in Milosevic], once a particular fact has been the subject of a final adjudication by another Chamber, it is capable of admission under Rule 94(B) subject, as always, to the discretion of the Trial Chamber'.

The Trial Chamber's statement does not, however, modify the 'previous' conditions for judicial notice, particularly the 'not in reasonable dispute requirement'. The 'not in reasonable dispute' requirement was always applied as part of a Trial Chamber's discretion. Therefore, even when the 'not in reasonable dispute requirement' exists, any fact subject of a final adjudication could always be admitted subject to the discretion.

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[24] Dissenting Opinion Of Judge David Hunt On Admissibility Of Evidence In Chief In The Form Of Written Statement (Majority Decision Given 30 September 2003) at Paragraph 22.

[25] Oric, Decision on Defence Motion for the Trial Chamber to Take Judicial Notice of Adjudicated Facts in the Deronjic Case, 1 November 2004. Noting that 'other Trial Chambers of the Tribunal have established that, for a fact to be admitted pursuant to Rule 94(B), it should truly be adjudicated and neither based upon an agreement between parties to previous proceedings, nor subject to reasonable dispute.' The Trial Chamber considered the facts in that case subject to reasonable dispute. Hadzihasanovic, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubara, 20 January 2005. 'The Trial Chamber in the Krajisnik case found that for a fact to be admissible pursuant to Rule 94(B) of the Rules, it must actually have been admitted in previous judgments, so that is not the subject of 'reasonable dispute between the Parties in the present case'. Neither of these decisions mention the Milosevic Appeals Chamber Decision.

[26] Final Decision on Prosecution Motion for Judicial notice of Adjudicated Facts, 16 December 2003, following their Decision, the Appeals Chamber Decision returned the case to the Trial Chamber to allow the Trial Chamber to review its original decision as to which facts could be judicially noticed.

[27] At paragraph 10.

[28] The Trial Chamber stated: 'starkest example of this is evidence of participation by the JNA (or Serb Paramilitaries) in the perpetration of crimes alleged in the indictment. In one decision concerning the admission of transcripts under Rule 92bis (D) [which concerns the admission of transcripts of evidence given by witnesses in proceedings before the Tribunal], the Trial Chamber ruled that witnesses whose evidence concerned the participation by the JNA (or Serb Paramilitaries) in the takeover of Foca relating, as it did, to a live issue between the parties…must be called for cross-examination by the Accused'.

[29] The facts were divided into different subject areas; for example, 'Political Background' or 'Prijedor, including background and general facts, the attack on Kororac, the existence of an armed conflict and the detention camps'.

[30] At paragraph 14, Political Background, 'these facts are broad and tendentious. At paragraph 15, Prijedor, 'the excluded paragraphs are either not sufficiently significant, too detailed, too numerous, or otherwise too tendentious'.

[31] The Chamber states the Milosevic Appeals Chamber 'has since held', implying that the previous approach no longer applies.

The only change that the Milosevic Appeals Chamber decision might effect is to modify the criteria within that discretion.

The Mejakic Trial Chamber followed the Milosevic decision in describing the content of that discretion. The court stated:

> 'In the exercise of its discretion pursuant to Rule 94(B), factors that may be taken into account include:
>
> (b); whether the facts are too broad, *too tendentious*, not sufficiently significant, too detailed, too numerous, repetitive of other evidence already admitted by the Chamber or not sufficiently relevant to the case, thus excluded from the operation of Rule 94(B).' [Emphasis added].

As in Milosevic, 'tendentiousness' was applied so as to exclude the judicial notice of any facts which are 'in reasonable dispute.'[32]

The ICTY jurisprudence can therefore be summarised in the following terms. Either:

- The ICTY Appeals Chamber abolished the 'not in reasonable dispute' requirement in Milosevic, but there is still a requirement of not 'too tendentious' which operates in identical fashion.
- The ICTY Appeals Chamber did not abolish the 'not in reasonable dispute' requirement and it continues to apply.

ICTR and SCSL

The ICTR and the SCSL adopt the first, more restrictive interpretation. According to the ICTR and the Special Court for Sierra Leone, facts which are subject to reasonable dispute cannot be judicially noticed. The effect of the judicial notice of facts under Rule 94(B) is that the fact is proven conclusively.[33] However, there is only dicta in the SCSL on the matter and neither the ICTR or the SCSL has ever addressed the issue by considering the Milosevic jurisprudence or, indeed, any of the arguments raised in that case.

In sum, the jurisprudence of the international tribunals and SCSL does support the existence of a 'not-in reasonable' dispute requirement, although the ICTY jurisprudence is inconsistent and confused and the ICTR and SCSL have never fully considered the issue.

Policy

It is policy analysis which finally resolves this debate in favour of the more restrictive interpretation of Article 4 and therefore maintains the 'not in reasonable dispute' requirement.

The common objection to the more expansive definition of Article 4 is that the removal of the 'not in reasonable dispute' requirement will breach the accused's right to a fair trial, particularly the right to be presumed innocent until proven guilty. In his dissent to the Milosevic Appeals Chamber Decision, Judge David Hunt argued that to 'identify an adjudicated fact as a rebuttable presumption necessarily places some burden of proof (or more properly an onus of proof) upon the accused, and this is contrary to the presumption of innocence'.[34] Hunt correctly states that the only presumptions that can be operative in the criminal law are the presumptions of innocence and the presumption of sanity. Only the latter is (or can be) prejudicial to the accused. Hunt states that 'in every other case, such as (for example) the 'defence' of alibi, there is no onus of proof upon the accused at all. The prosecution must at all times establish beyond reasonable doubt that the accused did the act alleged in the indictment'.[35]

To adopt Hunt's position is, however, to fundamentally misconceive the relationship between judicial notice

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[32] The Defence teams in Mejakic claimed that the facts relating to the 'general conditions' at the Omarska Camp and certain facts relating to the Sikirica Judgment were in reasonable dispute. See 'Defence Response to Prosecution Motion for Judicial Notice Rule 94(B)', filed by Defence of Zeljko Mejakic, 27 January 2004, 'Defence Response to Prosecution Motion for Judicial Notice Rule 94(B)', filed by Defence of Dusan Fustar, 30 January 2004. Dusko Knezevic's 'Response to Prosecution Motion for Judicial Notice Rule 94(B)', filed by Defence of Dusko Knezevic. The Trial Chamber did not judicially notice the facts from the Sikirica Judgment and stated that facts 'relating to the conditions of detentions at the camps, shall be excluded as too tendentious to be admitted in the exercise of the Trial Chamber's discretion.'

[33] For the ICTR: Semanza, Decision on the Prosecution Motion for Judicial Notice and Presumptions of Facts, Pursuant to Rules 94 and 54, 3 November 2000. At paragraph 41, 'the Chamber holds that the judicially noticed facts shall serve as conclusive proof of the facts.' Unsurprisingly, then, the ICTR, referring to Rule 94(B), at paragraph 29 in the Nitakirutimana Decision, stated that 'the Chamber will avoid taking judicial notice of facts that are the subject of reasonable dispute'. See also, Prosecutor v Sikirica, Decision of 27 September 2000. The Appeals Chamber of the Special Court for Sierra Leone has stated, regarding the legal effect of judicial notice under Rule 94(B), 'the burden shifting approach'…does not seem to be compatible with the concept that facts capable of being judicially noticed are beyond reasonable dispute. If the possibility of a reasonable dispute exists then the fact should not be judicially noticed'. Appeals Chamber, Special Court for Sierra Leone, Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', at paragraph 31. The [convincing] reasoning of these two jurisdictions can be summarized in the following terms:

> (a) Rule 94(B) was added to Rule 94 after Rule 94(A) had been in existence for some time.
> (b) The concept of judicial notice is well settled under Rule 94(A) and in common and civil law (both for facts of common knowledge and adjudicated facts): because a judicially noticed fact was not subject to reasonable dispute, evidence of that fact was unnecessary and so that fact was deemed proved conclusively.
> (c) If Rule 94(B) concerns judicial notice (and refers to judicial notice in its terms), it must have been intended to adopt the existing meaning of judicial notice within Rule 94 and the meaning of judicial notice contained within the common and civil law. This argument is also well-made by Judge Hunt is his Dissent to the Milosevic Appeals Chamber Decision, para 8.

[34] At paragraph 7.

and the presumption of innocence. The presumptions of innocence and sanity concern the burden of proof within criminal trials, the party who has the obligation of proving given facts before even any evidence has been adduced. Judicial notice does not modify these presumptions; it instead regulates the admissibility of evidence adduced to satisfy these presumptions and the legal effect given to that evidence. Factual findings in previous legal proceedings can be used as evidence of facts and are presumed to be conclusive of that fact. This distinction is well drawn out by Judge Shahabudden in his Separate Opinion to the Milosevic Appeals Chamber Decision. He states that 'a distinction has to be drawn between facilitating proof and dispensing with proof. It is not said that the accused must prove his innocence; the position still is that the prosecution must prove guilt. All that the law does is that it facilitates proof by allowing a party to adduce the evidence required in a certain way.'[36]

Problems also arise for other fair trial arguments for the more expansive interpretation. It is not, for example, possible to argue this would infringe the accused's right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, protected by ECHR Article 6(3)(d). The accused can examine as many witnesses at he desires during his attempts to rebut the presumption as to the accuracy of a judicially noticed fact. The expansive interpretation of Article 4 does not sacrifice the accused's right to a fair trial for the sake of expediency and consistency.

In fact, the first true policy argument for the restrictive definition is that the expansive definition improves neither expediency nor consistency.[37] This point requires some considerable explanation. In any given case, the prosecution must prepare and admit their evidence prior to the defence. For this reason, if judicial notice has only presumptive legal effect, the prosecution, fearful that the defendant might successfully rebut the presumption when presenting his evidence, will support evidence showing the acceptance of a fact in ICTY proceedings with other evidence admitted in the conventional manner. This will ensure that the court believes the fact proven 'beyond reasonable doubt', whatever evidence the defence raises to rebut that fact.[38] Only if the prosecution knows that the accused is not going to dispute the fact will they rely solely on the previous adjudication in the ICTY. As a result, where the accused disputes a fact, the fact is proved through the normal evidentiary process, with evidence admitted from both sides. In this case, the benefits of Article 4 disappear. Indeed, attempts by an accused to admit sufficient evidence to show that a fact is in 'reasonable doubt' may absorb considerable time and resources during the course of the proceedings.[39] After all, there is no limit on the evidence the accused can admit in this regard and it is not possible for the court to refuse to hear his evidence, as under the expansive interpretation judicial notice does not have conclusive legal effect.

Article 4 will also have a negative effect on the relationship between the Court of BiH and ICTY. It is the more restrictive definition of Article 4 which best avoids this danger. It will be a necessary part of the function of the Court of BiH that it will have to determine facts that have been previously adjudicated in the ICTY. The process involved in determining, in the Court of BiH, the accuracy of facts established before the ICTY might have a very degenerative effect on the relationship between the ICTY and the Court of BiH. If the prosecution can use Article 4 to establish a presumption as to the accuracy of an adjudicated fact, the defence will necessarily use evidence raised before the ICTY Trial Chamber which originally adjudicated that fact in order to rebut this presumption. In this situation, just as an Appeals Chamber proceeds when considering the effect of additional evidence upon a Trial Chamber's finding of fact,[40] the Court of BiH will then effectively be remaking the decision of the ICTY. Judge Hunt describes this as 'manifestly unsatisfactory' when referring to one Trial Chamber addressing the decision made by another. It is not difficult to see why: the effect of this process is that the subsequent court questions the credibility of the original Trial Chamber. These considerations apply even more pertinently to the relationship between the Court of BiH and the ICTY. The Court of BiH would have to reconsider, and at times disagree with, the decisions of a court in a different [probably higher] jurisdiction. That is patently undesirable. If we adopt the more limited interpretation of Article 4, this encourages the prosecution to rely only on conventional sources of evidence to prove facts, preventing the Court of BiH from 'remaking' the Decision of the ICTY. It is this fact which must be decisive between the two options.

These policy considerations, combined with jurisprudence concerning Rule 94(B) indicates that the Court of BiH must, therefore, adopt the restrictive definition of Article 4, which recognizes that facts cannot be judicially noticed where they are 'in reasonable dispute'.

Conclusion

We have therefore begun to fully clarify the limits of Article 4 of the Law on Transfer. We have established a

[35] At paragraph 7.
[36] At paragraph 24.
[37] Robertson, at paragraph 9 of his Separate Opinion to the Hinga Norman Appeals Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Admission of Evidence notes in this regard that under this definition, 'the doctrine would serve little purpose'.
[38] This perhaps explains the use by the Court of BiH of other evidence, including witness testimony, to support the accuracy of the facts that they had accepted as proven according to Article 4 in the Maktouf Judgment (Case Number: K-127/04 – Sarajevo, July 1, 2005), the only previous application of Article 4 by the Court of BiH.
[39] The Trial Chamber noted this point in its Final Decision in the Milosevic case.
[40] Hunt highlights this in his dissent to Appeals Chamber Decision in the Milosevic case, at paragraph 9.

full set of conditions which must apply to facts in order for them to be judicially noticed. These conditions require that the relevant adjudicated facts must be:

- the subject of adjudication by another Chamber, meaning that the fact has not been the subject of an appeal or appellate proceedings have concluded;[41]
- purely factual findings; not the legal characterisations of facts;[42]
- not too broad, too detailed, too numerous; sufficiently significant; repetitive of other evidence already admitted; or not sufficiently relevant to the case.[43]
- 'not in reasonable dispute' between the parties

Our determination of the limits of Article 4, will, however, only be complete when we can consider what makes a fact 'not in reasonable dispute'. In other words, what determines the 'reasonableness' of the dispute? It is often incorrectly presumed that the 'not in reasonable dispute' requirement for adjudicated facts is the same as the requirement that a fact be 'notorious' for a court take judicial notice of that fact as 'common knowledge'.[44] There is actually a subtle, but important, difference between the two terms. Facts which are 'notorious' are 'not in reasonable dispute' only because they are accepted as proven in society at large. In order to consider whether a fact is 'notorious', we might, for example, ask a school teacher or look in an encyclopedia. Adjudicated facts which are 'not in reasonable dispute' are, however, only so because of the fact of adjudication by a court in another trial. To consider whether a fact is 'not in reasonable dispute' because of the adjudications of that court, we must consider only jurisprudence of the relevant court.[45] If a fact is 'not in reasonable dispute' by virtue of proceedings before the ICTY, that in no way means it will be generally known in the same way as facts of common knowledge.[46]

Conceptual difficulties arise, however, in using the jurisprudence of a particular court to determine when a fact is 'not in reasonable dispute'. Clearly we can't view every fact ascertained by a court as 'not in reasonable dispute'. Neither can we consider the reasonableness of each fact that the court determines by re-examining the evidence put before the court in particular cases: judicial notice is the acceptance of facts without examining the evidence for or against their veracity. Instead, we can only examine the position of that fact in the jurisprudence of the court as a whole. But what does this actually involve? Must we, for example, consider whether a fact has been consistently uncontested by both parties in recent decisions? Do we look at whether that fact has been judicially noticed by other courts? What are the other criteria? How do these criteria interact?

Neither the ICTY, the ICTR nor the SCSL have attempted to outline these criteria. Judges are, in reality, using their intuition in this regard, an intuition influenced by two factors that do not refer to the 'reasonableness' of the dispute in the sense intended by Article 4.

Firstly, judges rely heavily on the conduct of the accused in the specific case before him. If the accused does not dispute the fact which is sought to be judicially noticed, the judge has no problem describing a fact as 'not in reasonable dispute' (although this conflates agreements between the parties as to the acceptance of facts with judicial notice). However, where the accused does dispute the fact, the judge will decide whether the accused genuinely seeks to dispute the fact at trial or whether his contestation aims only to undermine the process of trial (for example, as a delay tactic.) If the accused aims to undermine the process of trial, the judge will hold that fact as 'not in reasonable dispute'. Such an analysis of the accused's conduct, is not, however, a legitimate consideration. The 'reasonableness' criterion instead refers only to the way in which the fact has been litigated in previous jurisprudence, as discussed in earlier paragraphs. If the judge believes the accused

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[41] Prosecutor v. Slobodan Milosevic, Decision on Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Motion for Judicial Notice of Adjudicated Facts, 28 October 2003,

[42] Ibid.

[43] Mejakic, Decision On Prosecution Motion For Judicial Notice Pursuant To Rule 94(B), 1 April 2004. Ntakirutimana Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, paragraph 27.

[44] Stewart, for example, argues in 'Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent', 'notoriety or common knowledge could not possibly be an element of judicial notice pursuant to Rule 94(B). Because all matters of common knowledge 'must' be judicially noticed pursuant to Rule 94(A), the inclusion of common knowledge as an element of Rule 94(B) would render the section redundant'. International Criminal Law Review, 2003, 245-274. Stewart cites two authors who make this conflation of 'not in reasonable dispute' and 'notoriety' as evidence of the notoriety requirement in Rule 94(B). At page 254, footnote 7, Stewart cites Eugene O'Sullivan, in Judicial Notice, in R.May et al (eds.) Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, 329-399 – (2001, Kluwer International, London.). O'Sullivan states, at page 338, 'the types of facts falling under Rule 94(B) must be confined to those which are so notorious as to be beyond any reasonable dispute between people of good faith'. Then, at page 255, Stewart states: 'Former ICTY Judge Wald also tacitly acknowledges the reality that Rule 94(B) of the Two Rules allows for the judicial notice of facts adjudicated from previous proceedings even though those facts may be at issue and might not constitute common knowledge. Stewart considers 'at issue' to equate to 'in reasonable dispute', citing Judge Wald from To Establish Incredible Events by Credible Evidence, The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, Harvard International Law Journal, Summer 2001, 535.

[45] This distinction is recognized by Judge David Hunt in his dissent to the Milosevic Appeals Chamber Decision. He states, at paragraph 8, 'In relation to Rule 94(B), instead of referring to atlases, dictionaries or other reference books [as would be the case for Rule 94(A) in determining 'notoriety'], the Chamber must look at the judgments to which it is referred by the Parties.'

[46] An excellent example of this distinction was, in fact, recognized by Stewart in his piece. Stewart states, at page 254, that 'the Niyitegeka Decision, for instance, took judicial notice of a previously adjudicated fact that could not possibly be considered as common knowledge, namely that 'on 13 and 14 May 1993, a large scale attack occurred in Muyira Hill against Tutsi refugees'. While the existence of such an attack might be 'not in reasonable dispute' because of the judgments of the ICTR, it is no way constitutes common knowledge.

is undermining the trial process in challenging particular facts, he should sanction the accused in those terms, not by artificially deeming that fact 'not in reasonable dispute'.

Secondly, judges rely on the nature of the fact itself. Judges will be more likely to take judicial notice broad or 'historical' facts, as opposed to facts which refer to specific events or conduct. Broad, historical facts are essential to lay the foundations for convictions in war crimes trials. Historical facts can be disputed by a very large number of sources of evidence, meaning there is an almost unlimited amount of evidence to be heard. Specific events create only a limited number of witnesses and sources of evidence. For this reason, judges are keen to deem such historical facts 'not in reasonable dispute' because the taking of judicial notice of these facts represents a great saving in expediency. Again, however, such considerations, however, do not refer to the 'reasonableness' of disputing that fact and should not figure into determinations on this issue.

In relying on these two factors the court also breaches the accused's right to be presumed innocent. As we have seen, the presumption of innocence is not be infringed where a single piece of evidence adduced to prove a fact, here an adjudication by the ICTY, conclusively proves a certain fact 'beyond reasonable doubt'. Article 4 operates in this fashion where the court finds, upon an examination of the jurisprudence of the ICTY, that a fact established in previous adjudications of the ICTY is no longer 'in reasonable dispute'. However, if the court considers the conduct of the accused or the 'historical' nature of the fact in making this determination, the court is not assessing evidence based only on its quality but on other, external factors. In this circumstance, the court is accepting facts without analyzing whether the evidence proves that fact beyond reasonable doubt. This is contrary to the presumption of innocence.

Given the problems outlined above, it is perhaps not surprising that the ICTY, ICTR and SCSL have been reluctant to define what makes a fact 'not in reasonable dispute'. It is surely, however, unacceptable to leave the 'reasonableness' criterion unstructured where courts rely illegitimate considerations.

Perhaps it is due to these problems that the ICC Statute and RoPE abolish the judicial notice of facts entirely, accepting only judicial notice of facts of common knowledge[47] and agreements between the parties to accept facts (the only occasion that it is clear that Article 4 will operate without a problem).[48] The ICC understands that it will try only a small number of accused from one country, often in a single proceeding. There will be no or very few previous trials from which it would be able to accept previously established facts. The resulting loss in expediency is not a problem for the ICC. Rather like the International Tribunals, it is a flagship of international criminal justice which aims to address the full history of a conflict or human rights abuses in order to hold high-level perpetrators responsible. For this reason, the ICC aims to spend time and resources establishing each historical fact using conventional evidentiary procedures. The Court of BiH does not have this luxury.

Instead, judges in the Court of BiH must grapple with what makes facts established in the previous adjudications of the ICTY 'not in reasonable dispute'. Clearly the Court must have some discretion in this regard, but that discretion cannot be exercised through intuition. It must involve the exercise of a structured discretion. The Court must establish the criteria which form the content of that discretion and for each decision to take judicial notice, state the basis on which the court believes a fact fulfils those criteria. Only in this fashion will the true limits of Article 4 be established: limits which will not only form the model for future co-operation between domestic and international courts, but which should also influence the confused jurisprudence of the ad-hoc tribunals.

[47] Rome Statute of the ICC, Article 69(6).
[48] ICC Rules of Procedure and Evidence, Rule 69.

Case Report: Vukovar Three

ICTY 11 bis Transfer Proceedings in the Vukovar Three Case

Introduction

In its Resolution 1534 the Security Council invited the Offices of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to review their cases and decide which cases would be processed further at the international level, and which ones could be transferred to national courts. The purpose of these transfers is to lessen the caseload of the Tribunals in hopes of bringing their work to a close in an efficient manner. Several cases have now been transferred as part of this completion strategy under Rule 11*bis* of the ICTY Rules of Procedure and Evidence, which regulates the transfer of cases to national jurisdictions. The following summary focuses on the transfer proceedings initiated and then later withdrawn by the ICTY Prosecution in the Vukovar Three Case.

Factual Summary

Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin (the Vukovar Three/Trojka) were indicted by the ICTY Prosecutor for their participation in events, which allegedly took place in the city of Vukovar in 1991. Following a three month siege by the Yugoslav Peoples Army (JNA), Vukovar fell to JNA forces. During the final stage of the siege several hundred people sought refuge in the Vukovar hospital, hoping that international observers would evacuate the hospital. The indictment alleges that the three accused participated in a joint criminal enterprise, the purpose of which was the persecution of Croats or other non-Serbs who were present in the Vukovar Hospital after the fall of Vukovar. The persecution took the form of murder, torture, cruel treatment, extermination and inhumane acts.

The indictment also alleges that Miroslav Radić and Veselin Šljivančanin personally participated, with other JNA soldiers, in the removal of about 400 non-Serbs from the Vukovar Hospital. Certain detainees were selected to be loaded on buses and taken to JNA barracks. Thereafter, the detainees were transported in groups of about 10 to 20 to a ravine in the direction of Grabovo where the soldiers killed at least 264 Croats and other non-Serbs from Vukovar hospital. After the killings, the bodies of the victims were buried in a mass grave at the same location.

Procedural Summary

On 9 February 2005 the ICTY Prosecutor filed a "Motion by the Prosecutor under Rule 11*bis* for Referral of the Indictment" requesting the President of the Tribunal to appoint a Trial Chamber to consider the "Request by the Prosecutor under Rule 11*bis* for Referral of the Indictment to another court.

A hearing on the Request for Referral was held on 12 May 2005 with the Parties present as well as representatives from the Governments of Croatia and Serbia and Montenegro. After hearing those present the Bench adjourned the hearing without issuing a decision on the request for referral.

On 9 June 2005 the Prosecutor filed a Motion for Withdrawal requesting the Referral Bench to grant leave to withdraw the Motion and the Request for Referral and order reinstatement of the case to the appropriate Trial Chamber of the Tribunal.

On 10 June 2005 the Government of Serbia and Montenegro filed a submission requesting that the Motion for Withdrawal be rejected and the Indictment in the present case be referred to its relevant authorities.

On 13 June 2005 the Defence for the three accused responded jointly opposing the Motion for Withdrawal and requesting that the Indictment be referred to the authorities of Serbia and Montenegro.

On 30 June 2005 the Referral Bench granted the Prosecution's Motion for Withdrawal.

Standards for Referral

Referral of a case, based on Rule 11 *bis*, can be initiated either by a motion of the Office of the Prosecutor or by a panel on its own initiative. In this case the Office of the Prosecutor filed a motion, after reviewing all its cases in accordance with the UN Security Council Resolution. After the motion was filed, a panel composed of three judges (known as the Referral Bench) takes into consideration several factors in order to determine whether a case is transferable. In accordance with Rule 11 *bis* (C) the Referral Bench must consider the gravity of the crime and the level of responsibility of the accused. The Security Council invited both tribunals to "focus on the high ranking leaders who are suspected to be the most responsible for the crimes committed ".

Rule 11 *bis* foresees that a case may be transferred to the country:

- in the territory of which the criminal offence was committed,
- where the accused was arrested, or
- that is competent and willing, as well as adequately prepared to accept such case.

Arguments for Referring the Case

Representatives of Croatia and Montenegro appeared before the Referral Bench (the Panel composed of Judges Ori, Kwon and Parker) at a

hearing dated 12 May 2005 in order to present their arguments as to why the Vukovar Trojka case should be transferred to their respective countries.

The Croatian Delegation, led by Professor Željko Horvatić, pointed out that the case at issue should be transferred to Croatia since the crime was committed in its territory and because the majority of victims were Croatian citizens.

The Delegation of Serbia and Montenegro, led by the President of the National Council for Cooperation with the ICTY, Rasim Ljajić, and a legal expert from Belgrade, Vladimir Đerić, claimed that Serbia should prosecute the Vukovar Trojka case, since all accused were citizens of Serbia and because Serbia surrendered them to the ICTY.

The Croatian Delegation stated (and the Office of the Prosecutor agreed with it) that Rule 11 *bis* established the hierarchy of factors, the territorial factor being the most important one.

The Delegation of Serbia and Montenegro submitted that all three criteria were of equal value.

Legal Analysis of the Competing Agreements

Several principles have been accepted as the basis for jurisdiction in international criminal proceedings. They include:

- passive personality principle,
- principle of nationality (or "active personality" principle)
- territorial principle and
- principle of universal jurisdiction.

Arguments of Croatia are based both on passive personality and the territorial principal of jurisdiction. The passive personality principal enables the country to prove the responsibility of the persons who are indicted for the commission of criminal offences against its citizens – even in the situation when the accused is a foreign citizen. According to this principle, Croatia can try Mrkšić, Šljivančanin and Radić, since the majority of victims were Croats. The territorial principle provides for jurisdiction of the country in which the criminal offences were committed. Vukovar and Ovčara farm (where victims were murdered) are located in Croatia. Finally, Croatia emphasized that as a matter of principle it is always better that justice be met, if possible, in the area closer to the place where victims resided, which is the approach that has been supported by the Office of the Prosecutor.

Serbia and Montenegro based its jurisdictional claims on the principle of nationality– that is, it can claim jurisdiction with regard to its citizens who have committed criminal offences, regardless of where those crimes were committed. Serbia also argued universal jurisdiction for the purpose of trying the Vukovar Trojka. Universal jurisdiction is the most controversial theory among the theories of jurisdiction as it allows a country to try anyone for crimes committed in violation of international law without further ties to the events, victims or the accused. Universal jurisdiction is recognized in a way in Rule *11 bis* of, pursuant to which any country that has the jurisdiction and that is "willing and adequately prepared to accept such case" is qualified to receive an *11 bis* transfer. In addition to the issue of jurisdiction, Serbia and Montenegro requests that the case be referred to it, since under the domestic law it may not extradite its citizens to another country. Representatives of Serbia pointed out that the transfer of the case to Croatia would constitute a two-phase extradition of the accused to Croatia – via the ICTY. Both Croatia and the Prosecutor's Office dismissed this argument. The Prosecutor's Office pointed out that the ICTY was established by a resolution of the Security Council and that the choice of the place of trial (as long as the court can provide a fair trial) was solely a matter for the ICTY to decide.

Defence Counsel of the accused claim that the accused had "expectations" that they would be tried at The Hague and that they would not have "voluntarily" surrendered had they known that they would be transferred to Croatia. The Prosecutor's Office stressed that the opportunity for the accused to comment on the place of trial is limited, since this decision is an issue to be resolved by prosecutor and trial panel. This caused reaction of the Presiding Judge Ori who said that the ICTY as an international tribunal must also fully consider the rights of the accused.

Conclusions of the Referral Bench

Judge Ori, President of the Panel, summarized briefly the dilemma on referring this case to either country noting that the victims and their relatives "could think that rather small importance was dedicated to their interests" if the case were referred to Serbia, and that "the accused could feel that not enough importance was given to their rights" if Croatia were given the case. At the end of the hearing no decision was handed down.

Prosecutor's Motion for Withdrawal of the Transfer Request

In explaining its motion for withdrawal of the transfer request the Prosecution simply stated that the motion was based on "issues and potential difficulties" with the transfer, of which the Prosecution recently became aware. The submission goes into no detail as to what those issues and difficulties may be; however, it was pointed out that the Chief Prosecutor had become aware of these issues and difficulties after recent discussions with representatives of Croatia and Serbia and Montenegro.

The defence and the government of Serbia and Montenegro filed submissions opposing the withdrawal and arguing for transfer to Serbia and Montenegro. The Referral Bench sided with the

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Fair Trials for Crimes against Humanity

The Conference will be held on May 19, 2006 at the Court of BiH in Sarajevo

OKO Young Lawyers Conference 2006

Odsjek krivične odbrane (OKO) is inviting you to attend a conference for young lawyers from BiH. The Conference will examine the role of the Court in trials for war crimes and crimes against humanity. There will be four sessions:

- **Introduction to the Court of BiH.** Explaining the operation of the Court.
- **War Crimes Tribunals.** A Panel discussion with experts from different courts around the world.
- **Crimes against Humanity.** What are the legal issues that arise in defining and proving this crime?A practical demonstration of the adversial court room skills that will be used.
- **Panel of Experts.** Your opportunity to question those making the decision.

The Conference may be attendet by young lawyers, pripravniks and final year students from Law faculties in BiH.

The Application form for attending the Conference can be downloaded from the official OKO web site www.okobih.ba .

Please send your applications by e-mail to: oko@okobih.ba or by fax to: 033/ 560 270. Deadline for applications is April 21, 2006.

Due to limitations on space, applications will be selected on a random basis from each law faculty and city so as to ensure a balanced audience.

OKO will make a contribution towards the costs of attending the Conference.

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Одсјек Кривичне Одбране
Odsjek Krivične Odbrane
CRIMINAL DEFENCE SECTION

Case Report: Constitutionality

Constitutional Court Decision on the Constitutionality of the Court of Bosnia and Herzegovina

Constitutionality of the Court of BiH

28 September 2001

Introduction

Although handed down in 2001, this Constitutional Court decision reviewing the constitutionality of the Law on the Court of Bosnia and Herzegovina is of interest today for a number of reasons. Firstly, the Law on the Court itself has been amended a number of times since the Constitutional Court's decision, including notable amendments such as those which created the War Crimes Chamber of the State Court of Bosnia and Herzegovina and provided for the appointment of foreign judges to that Chamber. Such post-decision amendments raise the issue of whether the State Court, as it exists and functions today, remains constitutional.

Furthermore of significance in this decision, the Constitutional Court clarified its hierarchical position in relation to the State Court by holding that the Constitutional Court has the authority to review the constitutionality of judgments and decisions of the State Court. Hence, it follows for our purposes that decisions and judgments arising from the War Crimes Chamber of the State Court are also subject to constitutional review in the Constitutional Court.

Facts and Procedural History

The Law on the Court of Bosnia and Herzegovina (*hereafter*, "Law on the Court") was enacted by the High Representative for Bosnia and Herzegovina on 12 November 2000. The law was subsequently published in the Official Gazette of Bosnia and Herzegovina No. 29/00 of 30 November 2000.

On 23 March 2001, twenty-five representatives of the National Assembly of the Republika Srpska submitted a request to the Constitutional Court of Bosnia and Herzegovina for the evaluation of the constitutionality of the Law on the Court.

Applicants' Claim:

The Applicants – twenty-five members of Republika Srpska's National Assembly – claimed that the Law on the Court violated Article III of the Constitution of Bosnia and Herzegovina, which regulates the responsibilities of the institutions of the State and its Entities.

The Applicants argued that there was no constitutional basis for enacting the Law on the Court. They pointed out that apart from the Constitutional Court, the Constitution of Bosnia and Herzegovina does not explicitly envision any court at State level. Since Article III(1) does not unequivocally provide that the organization of the judicial system is the responsibility of Bosnia and Herzegovina, then by virtue of Article III(3)(a), judicial organization is the responsibility of the Entities.

The Applicants also requested, in order to prevent "detrimental consequences," a temporary measure to nullify the legal effect of the Law on the Court until the Constitutional Court could decide on its constitutionality.

Response From The Office Of The High Representative

At the request of the Constitutional Court, the Office of the High Representative (OHR) presented a memorandum outlining its views on the constitutionality of the Law on the Court. In its brief, the OHR asserted three main points:

The Law on the Court was enacted pursuant to the exercise of the High Representative's authority as representative of the international community for Bosnia and Herzegovina;

The Law responded to a constitutional obligation to establish a Court at the State level, expressed in the opinion of the Venice Commission of the Council of Europe, and also responded to a similar request by the Peace Implementation Council; and

Although the Law was not adopted through the usual parliamentary procedure, the draft version of the law was agreed upon by a working group, which was composed of members from the Ministry for Civil Affairs and Communications, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the Republika Srpska, and of the OHR.

As to the requested temporary measures, the OHR further suggested that they would only further endanger in Bosnia and Herzegovina both the establishment of the rule of law and the respect for fundamental human rights contained in the European Convention of Human Rights and Fundamental Freedoms (*hereafter*, European Convention).

Admissibility

Citing previous Constitutional Court decisions on the general reviewability of actions of the High Representative, the Court found that while the mandate of the High Representative and the exercise of that mandate are not subject to control of the Constitutional Court, insofar as the High Representative exercises his authority in a manner which supplants domestic authorities, the laws enacted by him in that capacity constitute domestic laws of Bosnia and Herzegovina. Because the Constitutional Court has the competence to review the constitutionality of domestic legislation, the Court may thus determine the con-

stitutionality of such laws enacted by the High Representative. Hence, here, since the High Representative substituted his authority for that of the Bosnia and Herzegovina Parliamentary Assembly when enacting the Law on the Court, the Law was reviewable as domestic legislation of Bosnia and Herzegovina. The dispute was, thus, substantively admissible.

Furthermore, the Court found that the request of the Applicants was procedurally admissible as it met the requirements of the provisions of Article VI(3)(a) of the Constitution.

Merits and Applicable Law

As to the specific constitutional issue in the Applicants' submitted request – whether the Law on the Court violated Article III(3)(a) of the Constitution of Bosnia and Herzegovina – the Court examined that issue in the context of those provisions of the Constitution which establish Bosnia and Herzegovina as a democratic State bound to the rule of law and to the protection of internationally-recognized human rights.

The Court also considered the structure and authority granted to the State in the Constitution, which provide that Bosnia and Herzegovina has the responsibility and authority to, among other things, ensure its sovereignty and political independence, and the highest level of human rights and fundamental freedoms. The Court found that such responsibilities require that the State be authorized to establish mechanisms other than those specifically provided for in the Constitution – such as a court intended to "strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention" – in order to achieve those explicit Constitutional responsibilities.

The Court further held that by the direct application of the European Convention in Bosnia and Herzegovina under the Constitution itself – namely the fair trial and effective legal remedy provisions of Articles 6 and 13 of that Convention –

"The establishment of the Court of Bosnia and Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina act in conformity with the rule of law and in satisfying the requirements of the European Convention."

Decisions

The Constitutional Court therefore concluded that the establishment of the State Court of Bosnia and Herzegovina was not in contravention of the Constitution and, thus, that the Law on the Court of Bosnia and Herzegovina was constitutional.

Notably, the Court also held in its decision that the judgments and decisions of the Court of Bosnia and Herzegovina will be subject to review by the Constitutional Court as to their constitutionality. This purported competence will thus effect the finality of judgments and decisions specifically by the Court of Bosnia and Herzegovina.

(Continued from page 26)

prosecution. They held that the transfer proceedings should be dismissed, and that the defendants should remain in the ICTY. The Bench noted that in this case the factors for and against transfer were evenly balanced. Since there was not an overwhelming argument for transfer the Bench chose not to act *proprio motu* to refer the case for trial in Croatia or Serbia and Montenegro.

Conclusion

The case against the accused commenced on October 11, 2005 in Trial Chamber II of the ICTY. This is the only case to date where the prosecution has withdrawn its request for transfer. The Referral Bench has denied one prosecution request for transfer, three cases have been transferred to national courts and six cases are currently in transfer proceedings.

Case Report: Maktouf

Court of BiH, Case Number KPZ 32/05

Prosecutor v Maktouf

Case Number KPZ 32/05

24 November 2005

Background

On July 1st 2005, Abduladhim Maktouf was convicted of the offence of War Crimes against Civilians in violation of Article 173(1)(e) of the Criminal Code of BiH and sentenced to five-years imprisonment. The first-instance Court found that Maktouf had intentionally aided members of the Al Mujahid unit of the Army of BiH abduct the Croat citizens, Ivo Fišić, Kazimir Pobrić and Ivan Rajković, by acting as the driver of the car used during the abduction.

The Defence filed an Appeal against the verdict, arguing that a number of the possible grounds of appeal in Article 296 of the Criminal Procedure Code of BiH were satisfied. Specifically, the Defence argued that that verdict contained: essential violations of the provisions of the Criminal Procedure Code of BiH; violations of the Criminal Code of BiH; incorrectly and incompletely established facts; erroneous decisions on the sentence and erroneous decisions claims under property law. The Prosecutor's Office of BiH appealed against the sentence imposed by the first-instance Court, arguing that it was overly lenient.

The Defence Attorneys, Mr Ismet Mehić, Mr Bajro Čilić and Mr Adil Lozo and the Prosecutor, Mr Peter Tinsley, explained the contents of their respective appeals in a public session of the Appellate Panel held between November 8th – 10th 2005.

Decision

Following the hearing, the Appellate Panel issued a decision on November 24th 2005 revoking the first-instance verdict and scheduling a hearing before the Appellate Division Panel before which the evidence presented in the first-instance proceedings would be repeated, as necessary, and new evidence possibly presented, with the goal of establishing the facts correctly and completely.

Reasoning

As part of their appeal, the Defence contested the fact that Maktouf even participated in the abduction of three Croats on the evening concerned. This was the only aspect of the Defence's appeal addressed in the Appellate Panel's decision.

The Appellate Panel first outlined its view that the first-instance Panel founded its conclusion that Maktouf did not participate in the abduction 'mostly' on the testimony of two witnesses, specifically: one of the abductees, Ivo Fišić and a protected witness who participated in the abduction.

The Appellate Panel noted that Maktouf was convicted as an accessory to the abduction. The protected witness was a participant in the abduction. Despite this fact, the protected witness has not yet been prosecuted and tried for the events, even though those events took place in 1993. For this reason, the Appellate Panel stated, 'the Panel cannot rule out the existence of a de facto agreement between the Prosecutor's Office of BiH and the protected witness.'

The Appellate Panel also stated that the testimony of Ivo Fišić was inconsistent and contradictory to his previous statements on the participation of Maktouf in the event concerned.

According to the Appellate Panel, these facts cast doubts on the veracity of the testimony of these two key witnesses. The first-instance Panel should have made an additional effort to establish the decisive fact concerning the participation of the Accused in the criminal act. The Appellate Panel stated that this is 'particularly important' as there is no other direct evidence apart from the testimony of Ivo Fišić and the protected witness which can be used to establish the participation of the accused in the abduction. The Panel finally noted that their reasoning mirrors that of the Constitutional Court of BiH in its Decision of 22nd April 2005, Case Number AP 660/10, which concerned the use at trial of evidence obtained from an accomplice who had negotiated an agreement with the prosecutor in exchange for testifying.

For these reasons, the Appellate Panel stated that it was 'in doubt whether the first instance panel made a conclusion that is entirely corroborated by all the pieces of evidence that could justify the result of the first-instance Panel's deliberation' and the Appellate Panel rendered their decision on this ground.

Case Report: The Lora Camp Case

County Court in Split, Croatia

Prosecutor v Duić and others

Judgement

2 March 2006

On March 25th 2002, the County Prosecutor's office in Split issued Indictment number K-DO-131/01 againsat following individuals:

Tomislav Duić (32), former military camp commander in Lora, his deputy Tonči Vrkić (41), members of Military police intervention squad Miljenko Bajić (35), Josip Bikić (33) and Davor Banić (42), as well as camp guards Emilia Bungura (31), Anto Gudić (30) and Anđelko Botić (34).

In the explanation of the Verdict, the Panel emphasized that there is no doubt as to whether or not there were tortures in Lora camp and that two persons had died; however, the allegations from the indictment were not supported and proved in the course of proceedings. The Panel also stressed that during the mentioned period, Split was neither a war zone nor was it occupied and all detainees were citizens of Croatia. Four key witnesses did not provide direct evidence against the accused nor did the former camp detainees mention the names of the accused as persons who tortured them. In addition to the fact that it had not been proven that the eight accused had committed the alleged offences, the Panel ruled that the necessary elements for a war crimes conviction where not proved in this case. Specifically, they stated that war crimes cannot be committed against citizens of the same state and in this case all victims and the accused were citizens of Croatia.

The State Prosecutor filed an appeal against this Verdict to the Supreme Court of the Republic of Croatia. The Republic of Croatia Supreme Court issued a Decision on March 25th 2004 revoking the acquittal and stressing that the state of facts was erroneously and incompletely established. By this decision, the Supreme Court ordered that a new trial be held before a different war crimes panel of the Split County Court, to repeat the evidence presented in the first instance proceedings and to hear witnesses from Serbia and Montenegro and BiH who had not been heard before.

The retrial began on 12 September 2005 before the Split County Court War Crimes Panel. On 2 March 2006 the Panel handed down its verdict finding the eight accused guilty of war crimes committed against Serb civilians in the Military Investigation Prison Lora in the period from June until early September 1992. The sentences ranged from six to eight years. The Panel found that the accused were liable for the mistreatment of captured civilians, which resulted in the death of two civilians, Nenad Knežević and Gojko Bulović. It should be noted that four of the accused were not present during the retrial. In addition to the three accused tried *in absentia* in the first trial, Bungur did not appear for the second trial. These four are still at large.

Case Report: Radaković and others

District Court of Banja Luka

Prosecutor v. Radaković, Krndija and Knežević K.50/01

Judgement

12 December 2005

Facts

Drago Radaković, Draško Krndija and Radoslav Knežević, all three from Prijedor, Bosnia and Herzegovina, citizens of Bosnia and Herzegovina, Serbs by ethnicity, were indicted for war crimes against civilian population according to article 142 of the Criminal Code of Republic of Srpska. The accused were in custody from April 11, 1994 until October 4, 1994. The first indictment against these individuals was filed on June 29 1994 and the accused were charged with murder. The District Prosecutor's Office of Banja Luka amended the indictment in 2004 to war crimes against civilian population. The judgment was issued on November 17, 2005.

Legal Provisions

Article 142, paragraph 1 of the Rupublic of Srpska Criminal Code from 1993 – war crimes against civilian population

Decision of the Court

The District Court of Banja Luka, sitting in a panel presided by judge Bojović Duško found the three accused guilty for war crimes against the civilian population. Three accused have found guilty for killing six Bosnian Moslem civilians in Prijedor between March 29 and March 31 1994 together with Kesar Duško (still at large). The accused were initially indicted in 1994 for murder according to Article 36 (2) of Republic of Srpska Criminal Code and were detained from April 11 until October 4, 1994.

The indictment was reaffirmed by District Prosecutor's Office of Banja Luka, who has jurisdiction over this case, which amended the indictment and charged the accused for war crimes against civilian population in 2004.

In the period between 29 and 31 March 1994 the accused entered the house of Ćanić Atif and Ćanić Zlata, threw a hand grenade inside and t wounded the couple. Accused Radaković shot Ćanić Zlata in head and Kesar Duško shot Ćanić Atif in the head. On the night between 30 and 31 March 1994, they arrived at the house of Hergić Šefik and Kesar Duško, entered the house and shot Mr. Hergić in head. The same night, they went to the house of Ruzvić Faruk and first planted explosives one of the windows of the house. After the explosion, Knežević Radoslav, a local police officer arrived and found the residents alive. They told the other accused, who were hiding, to wait until they left. After Knežević and the other police officer left, the other accused entered the house and murdered Rizvić Faruk, Rizvić Refika and Mahmuljin Fadila.

In this case, the Court decided to apply the Criminal Code of the Republic of Srpska from 1993, which was the law in force at the time the crimes were committed although the Court did not provide reasons for its application. The Court was of the opinion that the police forces were part of armed forces of the Republic of Srpska. Even though it did not go further to explain the existence of the armed conflict, the Court found that circumstances in Prijedor were of the nature suitable for the application of provisions of the international law of armed conflict. The Court did not qualify the conflict, as international or internal. The judgment stated that "it is doubtless that the victims had the status of civilians of non-Serb ethnicity, or Muslim ethnicity" and "since they lived on the territory of Republic of Srpska, controlled by Serb forces, they wereof different nationality and thus had the status of protected persons in light of IV Geneva Convention."

For these crimes the Court sentenced Radaković Drago to twenty (20) years, Krndija Draško to twenty (20) years and Knežević Radoslav to fifteen (15) years of imprisonment. While imposing the sentence, the Court pointed out aggravating factors such as degree of criminal responsibility, motives for the crime, method and consequences of perpetration and conduct after the crime. As mitigating circumstances the Court recognized the fact that the accused had no criminal records , that it has been 12 years since the act was perpetrated, that they are family people with children and are unemployed. The Court decided that aggravating circumstances have prevailed over mitigating factors and therefore sentenced each of the accused to the maximum sentence prescribed by law for these acts. Nevertheless, the Court decided that 20 years of imprisonment is the maximum sentence since abolition of the death penalty by ratifying the European Convention of Human Rights.

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OKO provides training for advocates wishing to appear before the Court of BiH. This Spring, there will be two courses presented in both Sarajevo and Banja Luka.

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- *Sarajevo: 8-11 May 2006*
- *Banja Luka: 22-25 May 2006*

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CRIMINAL DEFENCE SECTION

Odsjek Krivične Odbrane (OKO) is the criminal defence section of the Registry of the Court of BiH, with responsibility for maintaining the highest standards of defence in war crimes cases before the Court.

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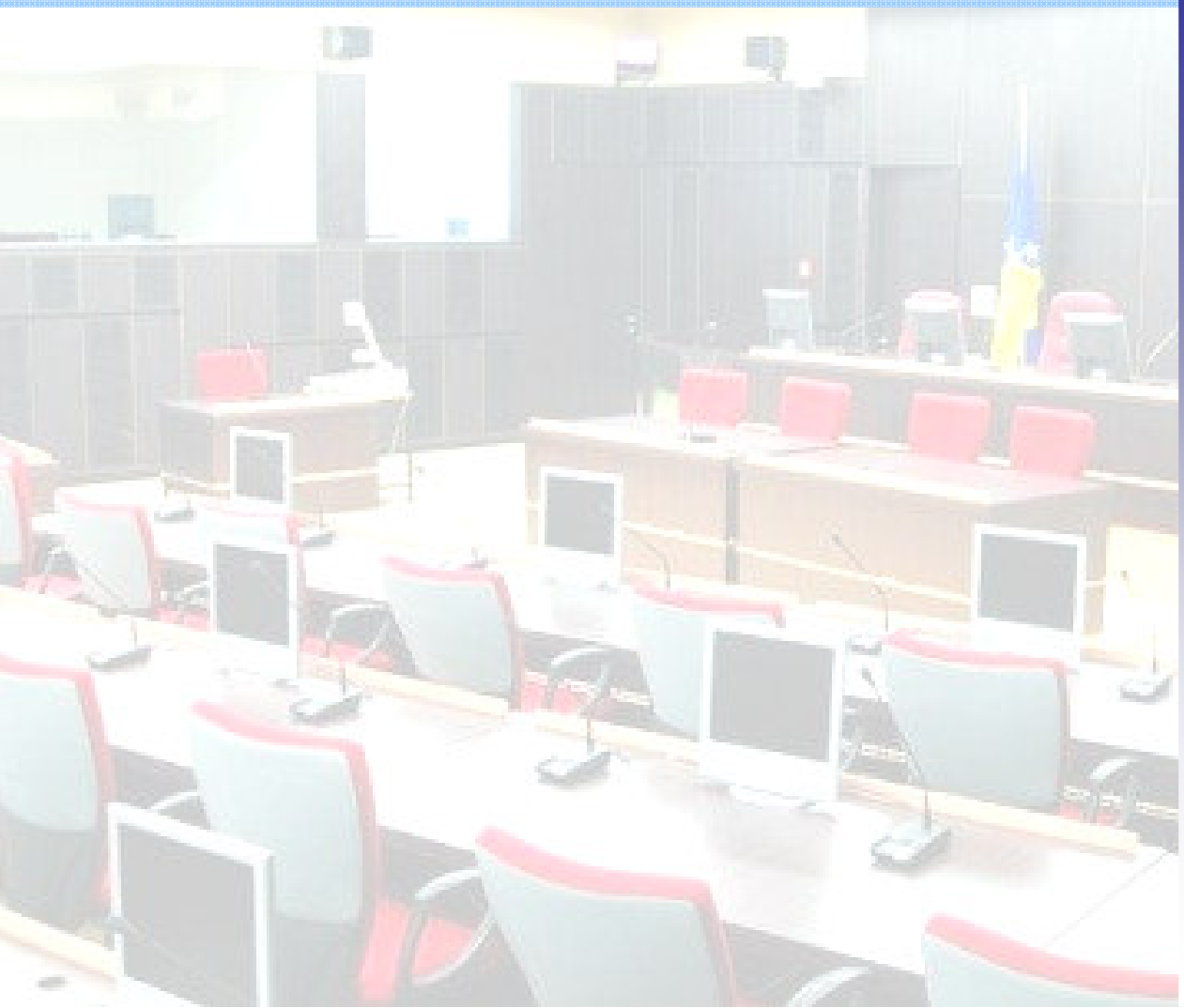
OKO War Crimes Reporter

The OKO War Crimes Reporter is published four times a year, and is intended to provide information on war crimes trials in south eastern Europe, primarily dealing with the Court of Bosnia and Herzegovina.

Published in both English and Bosnian-Croatian-Serbian, the War Crimes Reporter will be a source of information on legal developments in domestic trials, as well as articles dealing with specific problems that arise in practice.



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