Hague Case Law: Latest Developments

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International Court of Justice

(1) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*)

On 3 February 2015, the International Court of Justice rendered its judgment in the dispute between Croatia and Serbia concerning the responsibility of both states for breaches of the Genocide Convention. Croatia contended that Serbia was responsible for breaches of the Genocide Convention in relation to events which occurred in Croatia between 1991 and 1995, while Serbia contended in a counterclaim that Croatia was responsible for breaches of the Genocide Convention in relation to events which occurred in 1995 in the 'Republika Srpska Krajina' ('RSK').

First, the Court ruled that it had jurisdiction to hear this dispute on the basis of Article IX of the Genocide Convention (Croatia became a party to the Genocide Convention on 8 October 1991 and Serbia became a party to the Convention by means of succession on 27 April 1992). The Court already ruled on 18 November 2008 that it had jurisdiction to hear this dispute in relation to events which had occurred as from 27 April 1992. In the present judgment, the Court ruled that it also had jurisdiction to hear this dispute in relation to events which occurred prior to that date. According to the Court, it is possible that Serbia succeeded in the

For the full judgments, see: http://www.icj-cij.org; http://www.pca-cpa.org; http://www.icc-cpi.int; http://www.icty.org; and http://www.unictr.org. See also: http://www.internationalcrimesdatabase.org.

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responsibility of the (Socialist) Federal Republic of Yugoslavia for breaches of the Genocide Convention prior to 27 April 1992. Further, the Court ruled that both Croatia's claim and Serbia's counter-claim were admissible.

Subsequently, the Court ruled in relation to both claims that neither state was responsible for breaches of the Genocide Convention. The Court held that acts of genocide (the '*actus reus*') occurred in various localities in Croatia in the period between 1991 and 1995 and that acts of genocide indeed occurred in the 'RSK' in 1995, as contended by both states. However, the Court was of the opinion that there was no genocidal intent ('*dolus specialis*') in relation to these acts (namely an intent to destroy in whole or in part a national or ethnic group), which can be established on the basis of express statements or inferred from a pattern of conduct.

Permanent Court of Arbitration

(1) *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*)

On 28 March 2015, an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) rendered its award in the dispute between Mauritius and the United Kingdom concerning the establishment by the United Kingdom of a Marine Protected Area (MPA) around the Chagos Archipelago on 1 April 2010. The Chagos Archipelago is located in the Indian Ocean and is administered by the United Kingdom. The Chagos Archipelago was detached from Mauritius in 1965 prior to Mauritius' independence from the United Kingdom in 1968. Upon this detachment, the United Kingdom undertook, among other things, that it would pay compensation to Mauritius, safeguard its fisheries rights and that it would return the Archipelago to Mauritius when it would no longer be needed by the United Kingdom for defence purposes. The Archipelago hosts a military installation from the United States on the island of Diego Garcia.

The Tribunal held that it had no jurisdiction to decide to what extent the United Kingdom qualified as a coastal state for the purposes of UNCLOS and to what extent it was entitled to proclaim an MPA (Mauritius' first two claims). According to the Tribunal, both issues were part of a larger dispute between both states concerning sovereignty over the Chagos Archipelago and this dispute did not relate to the interpretation or application of UNCLOS. The determinations sought by Mauritius would require the Tribunal to pronounce on this larger dispute. Further, the Tribunal held that it did not have jurisdiction to hear Mauritius' claimed right to make submissions to the Commission on the Limits of the Continental Shelf, since there was no dispute between both states on this issue which would call for the Tribunal to exercise jurisdiction.

However, the Tribunal ruled that it had jurisdiction to decide on the compatibility of the MPA with the United Kingdom's substantive and procedural obligations under UNCLOS. According to the Tribunal, the requirement to exchange views regarding the settlement of the dispute before resorting to arbitration had been met. The Tribunal held that the United Kingdom's undertakings, which were made in 1965 when the Chagos Archipelago was detached from Mauritius, were legally

binding on the United Kingdom and that the United Kingdom was estopped from denying the binding effect of these undertakings. Subsequently, the Tribunal found that by establishing the MPA surrounding the Chagos Archipelago, the United Kingdom had breached its obligations under Articles 2(3), 56(2) and 194 UNCLOS which require the United Kingdom, among other things, to have due regard for Mauritius' rights and to act in good faith with respect to its 1965 undertakings. Finally, the Tribunal observed that its concern had been with the manner in which the MPA had been established, rather than its substance. It was now open to the United Kingdom and Mauritius to enter into negotiations with a view to achieving a mutually satisfactory arrangement for protecting the marine environment, to the extent necessary under a 'sovereignty umbrella'.

International Criminal Court

(1) *Prosecutor v. Lubanga* (*Appeals Chamber*)

On 1 December 2014, the Appeals Chamber of the International Criminal Court (ICC) rendered its judgment on appeal in the case against Lubanga concerning the situation in the Republic of the Congo. Lubanga is the former President of the Union des Patriotes Congolais (UPC) and the former commander in chief of the Front Patriotique pour la Libération du Congo (FLPC), which is the armed wing of the UPC. The UPC/FLPC was an armed group which participated in the (non-international) armed conflict in Ituri in the north east of the Democratic Republic of the Congo (DRC). Ituri is ethnically diverse and fertile and rich in resources, such as gold, diamonds, oil, timber and coltan. On 14 March 2012, Trial Chamber I of the ICC convicted Lubanga of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute in Ituri from early September 2002 to 13 August 2003. On 10 July 2012, he was sentenced by Trial Chamber I to 14 years' imprisonment.

The Appeals Chamber held that the proceedings appealed from were not unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence was materially affected by an error of fact or law or a procedural error. It rejected Lubanga's appeal and confirmed his convictions. Subsequently, the Appeals Chamber, in a separate judgment, rejected the Prosecutor's and Lubanga's appeal against the Trial Chamber's Decision on Sentence and confirmed Lubanga's sentence of 14 years' imprisonment.

International Criminal Tribunal for the Former Yugoslavia

(1) *Prosecutor v. Popović et al.* (*Appeals Chamber*)

On 30 January 2015, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) rendered its judgment on appeal in the case against five senior Bosnian Serbian military officials in relation to crimes committed in

Eastern Bosnia and Herzegovina in 1995 after the fall of the enclaves of Srebrenica and Žepa. The convicted officials were: Popović (Chief of Security of the Drina Corps of the Bosnian Serb Army); Beara (Chief of Security in the Main Staff of the Bosnian Serb Army); Nikolić (Chief of Security of the Zvornik of the Bosnian Serb Army); Miletić (Chief of the Administration for Operations and Training in the Main Staff of the Bosnian Serb Army); Pandurević (Commander of the Zvornik Brigade of the Bosnian Serb Army). On 10 June 2010, they were sentenced by Trial Chamber II to life imprisonment (Popović and Beara), 35 years' imprisonment (Nikolić), 19 years' imprisonment (Miletić) and 13 years' imprisonment (Pandurević) for their involvement in a large number of crimes, including genocide, crimes against humanity (extermination, persecution), and war crimes (murder). According to the Trial Chamber the attack against the civilian population had commenced with a directive of March 1995 issued by Karadžić setting out the plan to attack the enclaves of Srebrenica and Žepa. The Drina Corps of the Bosnian Serb Army was tasked with creating an unbearable situation of total insecurity with no hope for survival for the inhabitants of both enclaves. According to the Tribunal at least 5336 (maybe as many as 7826) identified individuals were killed following the fall of both enclaves.

The Appeals Chamber upheld most convictions and affirmed the sentences of Popović (life imprisonment), Beara (life imprisonment), Nikolić (35 years' imprisonment) and Pandurević (13 years' imprisonment). Only Miletić's sentence of 19 years' imprisonment was reduced to 18 years' imprisonment. The proceedings against Gvero (Assistant Commander for Moral, Legal and Religious Affairs in the Main Staff of the Bosnian Serb Army and sentenced to 5 years' imprisonment for persecution and inhumane acts by the Trial Chamber in 2010) were terminated after his death in 2013.

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

On 8 April 2015, the Appeals Chamber of the ICTY rendered its judgment on appeal in the case against Tolimir. Tolimir is the former Assistant Commander and Chief of Intelligence and Security of the Main Staff of the Army of the Republika Srpska (VRS). He was convicted on 12 December 2012 by Trial Chamber II. Tolimir was convicted of genocide and conspiracy to commit genocide, crimes against humanity (extermination, persecutions and inhumane acts through forcible transfer) and war crimes (murder) committed in 1995 after the fall of Žepa and Srebrenica. He was sentenced to life imprisonment. According to the Trial Chamber Tolimir participated in a Joint Criminal Enterprise to forcibly remove the population from Srebrenica and Žepa. Further, it was held that Tolimir had participated in a Joint Criminal Enterprise to murder the able-bodied Muslim Men from Srebrenica.

The Appeals Chamber upheld most of the convictions for genocide, conspiracy to commit genocide, crimes against humanity and war crimes. It only reversed the Trial Chamber's convictions for crimes concerning the killing of three Žepa leaders (genocide and extermination as a crime against humanity); the killing of six Bosnian Muslim men near Trnovo (genocide, extermination as a crime against humanity, murder as a war crime); and his conviction for genocide committed through the causing of serious mental harm to the Bosnian Muslim population of Eastern Bosnia and Herzegovina to the extent that this conviction was based on the forcible transfer

of Bosnian Muslims from Žepa; and his conviction for genocide through inflicting conditions of life calculated to destroy the Bosnian Muslim population of Eastern Bosnia and Herzegovina. The Appeals Chamber subsequently affirmed Tolimir's sentence of life imprisonment.