International Justice Tribune

No. 156
April 4, 2014

www.justicetribune.com

Twice a month, the independent magazine on international justice

Croatia–Serbia

by Radosa Milutinovic, The Hague (Netherlands)

War goes on - by judicial means

During a month-long, high-powered legal clash Croatia and Serbia have each accused the other of genocide before the International Court of Justice (ICJ) in The Hague. 20 years after last artillery salvos announced the end of the former Yugoslavia's bloody breakdown, two of its principal republics continued to wage war – by judicial means.

In its claim, filed before ICJ in the summer of 1999, the Croatian government alleged that in 1991-92 Serbia committed "ethnic cleansing" against Croatian citizens, as "a form of genocide", "by directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of Croatia", and that large numbers of Croats were "displaced, killed, tortured, or illegally detained". After protracted procedural wrangling over court's jurisdiction, Serbia retaliated in 2010, with a counterclaim: Croatia, it alleged, committed genocide against its Serb citizens during Operation Storm in August 1995, by persecuting 200,000 Serbs from their homes in a self-proclaimed rebel statelet; killing those who stayed; and destroying their property.

Once they finally found themselves before the judges, on March 3, both sides faced the substantial evidentiary difficulty to prove "genocidal intent" of the opponent state leadership to "destroy" Croats or Serbs as an ethnic group. The task was made near impossible by the fact that no Serb and no Croat has ever been respectively indicted for genocide in Croatia and Serbia by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Forced to rely on the international tribunal's jurisprudence, lawyers on both sides – among them heavyweights like William Schabas for Serbia or Philippe Sands and Kier Starmer for Croatia – did not have any choice but to cherry-pick evidence from different ICTY judgments.

The Croatian legal team, for example, repeatedly quoted the tribunal's finding – in the Milan Martic judgment – that Serbia's president Slobodan Milosevic had headed a "joint criminal enterprise" to create a unified Serbian state (Greater Serbia) by ethnically cleansing Croats from one-third of Croatian territory through violent crimes, including persecution and killings. Serbia responded that, in a separate case, the ICTY had acquitted Jovica Stanisic, chief of Milosevic's notorious secret police, who was indicted as the architect of the same criminal plan. Moreover, the Serbian team underlined, Greater Serbia was adopted and promoted by Vojislav Seselj, extreme nationalist opposition leader, and never became Serbian government's policy.

A dead president
and an acquitted general called in

Without any direct evidence of Belgrade's "genocidal intent", Croatia pleaded with ICJ judges to "infer" such an intent from the multitude of crimes committed in a similar pattern by the Serbian forces, including the Yugoslav People's Army and paramilitaries. While accepting that terrible crimes were committed against Croat and other non-Serb civilians, Serbia argued those atrocities in 1991-92 could not be attributed to the Milosevic's government, but to the then Yugoslav federal authorities, who had control and command over the Army.

But Serbia sought to document its counterclaim that Croatia's own president Franjo Tudjman possessed and implemented "genocidal intent", by quoting Tudjman's own "poisonous" and "racist" remarks against Serbs. In a key meeting with his military commanders – including Croatian general Ante Gotovina who was acquitted by the ICTY – a few days before Operation Storm to "liberate" territories inhabited by rebel Serbs, in August 1995, Tudjman said, according to an official transcript: "We have to inflict such blows that the Serbs will to all practical purposes disappear". According to Serbia, Operation Storm promptly "disappeared" 200,000 Serbs, who were, in Tudjman subsequent words, "spreading cancer in the heart of Croatia". Those who could not leave were killed.

Croatian representatives replied that Operation Storm was a legitimate and lawful military action to re-establish country's territorial integrity which the rebel Republic of Serbian Krajina had torn apart. Croatia also denied that its troops forcibly transferred tens of thousands of Serbs, suggesting it was a voluntary "evacuation" planned and executed by their own leadership.

Ironically, both states used rulings in the general Gotovina case to prove their points. Serbia relied on the first-instance judgment which found Gotovina, commander of Operation Storm, guilty of crimes against humanity. The same judgment established the existence of joint criminal enterprise to persecute Serbs from Kninska Krajina region, designed by president Tudjman and implemented by general Gotovina. Croatian lawyers replied, on the other hand, by repeatedly quoting the ICTY appeals chamber's final decision to acquit general Gotovina of all charges, based on the finding that joint criminal enterprise against Serbs did not exist on the part of Croatian leadership. President Tudjman, the judgment said, did not posses the intention to kill or forcible transfer Serb population.

The ICJ's ruling – in which the court said in 2007 that the government in Belgrade failed to prevent genocide only in Srebrenica [IJT-63] – poses another hurdle for the parties. Realising the judges' interpretation of genocide sets the bar high, Croatia last week appealed to the Court to abandon its "narrow" interpretation of genocide or risk becoming "irrelevant". Serbia, by contrast, pleaded that the ICJ should stick to its own Srebrenica standard.

A ruling in the Croatia against Serbia case is expected early next year.

by Blake Evans-Pritchard, The Hague (Netherlands)

Gbagbo: is there a new prosecution case?

Will the evidence be sufficient this time? After a series of hearings last year, the International Criminal Court (ICC) judges told the prosecution to think again. The central challenge is how to establish, more convincingly than a year ago, "the absolute authority" that former president Laurent Gbagbo allegedly exerted over the Ivorian security forces.

Asserting that the evidence the prosecution had submitted is "apparently insufficient", the pre-trial chamber declined to confirm charges against Gbagbo in June 2013. Judges asked the prosecution to provide further evidence about the "organisational structure of pro-Gbagbo forces, including how the different sub-groups interacted within the overall structure and especially how the 'inner circle' coordinated, funded and supplied the means for the activities of the different sub-groups". They also requested further details about "how, when and by whom the alleged policy / plan to attack the 'pro-Ouattara civilian population' was adopted". Judges stressed that the prosecution's case lacked sufficient details about each of the alleged incidents. For one particular incident – the March 17, 2011 shelling of Abobo, north of the capital Abidjan – judges said that the accusation should be backed up with "forensic or other evidence indicating who fired the ammunition and what their alleged target was".

The prosecution's new January submission attempts to address some of these weaknesses. In particular, the prosecution seeks to extend the "modes of liability", so that the former president can be prosecuted for his role as commander of the Ivorian Defence Security Forces (FDS) – composed of the armed forces, the police and the republican guard – in addition to being held individually accountable for the crimes. "The prosecution want to make sure that all bases are covered" comments Param-Preet Singh, a senior counsel within the International Justice Programme at Human Rights Watch (HRW). "It's now up to the judges to decide whether the new evidence that the prosecution has provided is sufficient."

Via the 1,100 "new" documents – some of which the defence already had in their possession – the prosecution is attempting to make a stronger connection between Gbagbo and what was happening on the ground at the time – a point that judges highlighted was particularly weak in the original case. The prosecution uses witness' testimonies to list a number of incidents that took place "as a result of direct orders that Gbagbo had given". On this testimonial basis, the prosecution claims that orders to besiege l'Hôtel du Golf – where his opponent, Alassane Ouattara, was based during the crisis – came from the former president on December 14, 2010.

The office of the prosecutor has conducted its own forensic investigations into key incidents such as the shelling of Abobo. It alleges that "agents of the FDS" fired mortars into a highly-populated area, which was "visited exclusively by civilians and where one finds among other things a local market, a mosque and several private residents". The shelling resulted in 25 deaths and 40 injuries, according to the prosecution. One point of contention is a report from the UN's Office of the High Commissioner for Human Rights (OHCHR) that judges believe could provide important forensic evidence with regards to the shelling of Abobo. The prosecution details the steps that it has taken to try and get hold of the report, without success. OHCHR has not indicated why it has refused to hand over the report.

"Lack of precision", says the defence

For external observers, in the absence of a public debate and with no more elements than eavily redacted submissions, the full substance of the prosecution charges remains to be seen. In their response, the defence says that none of the additional information provided "corrects any of the errors" of the previous submissions. The prosecution still fails to answer the judges' demands, and the continued "lack of precision" in the elements they put forward shows they cannot substantiate their case. "A DCC [Document Containing the Charges] is not an NGO report", states the defence. The defence asked for a new confirmation of charges hearing in response to the prosecution submission, which the judges turned down.

ICC-Ivory Coast: two from the same side

Charles Blé Goudé, the 42 year old former charismatic head of the Youth Patriots, a pro-Gbagbo movement, introduced himself as a "consultant in political communication" during his first appearance before the International Criminal Court (ICC), on 27 March. Transferred from Ivory Coast five days before, he has joined in The Netherlands the ex-president Laurent Gbagbo, who has been held for two years. Both are accused of crimes against humanity committed during the post-electoral crisis, between December 2010 and April 2011, that left some 3000 people dead. "I am happy to be here", Blé Goudé declared to the court. "Despite some opinions who estimate that a journey to the ICC is of no return, I believe that a citizen who is considered a suspect by this court can come and return to his home if he is proved innocent. And I know I will come back home! " Arrested in Ghana in January 2013 before being transferred to Abidjan, Blé Goudé denounced what he described as "fourteen months of sequestration" in Ivory Coast, "naked, hardly fed ... blindfolded".

"Victor's justice"

The Ivorian opposition decried his transfer as "victor's justice", from the government and the international court. When in June 2011 the former ICC prosecutor Luis Moreno Ocampo asked the judges for an agreement to open an investigation in Ivory Coast, he stressed that crimes have been committed by both sides of the conflict; those loyal to former president Laurent Gbagbo as well as of his rival, the current president Alassane Ouattara. The ICC issued a third warrant of arrest in February 2012 against the former first lady Simone Gbagbo, who has been held for three years under house arrest in Northern Ivory Coast. On February 25, Ivory Coast presented the ICC with additional documents to assert that she "is currently subject to effective prosecution by the Ivorian judicial authorities in connection with the crimes of concern before the ICC".

Chad: last but not least investigative mission

by Nathalie Magnien, N'Djamena

The third investigative mission of the Dakar-based African Extraordinary Chambers (AEC) took place in Chad from the 15th to the 28th of March. The team included four Senegalese investigative judges accompanied by two prosecutors.

They gathered new statements from 543 direct and indirect victims. In total, 1835 persons have been heard from, as witnesses and/or civil parties, since their first mission in August 2013. They continued to search and select evidence in the archives of the "DDS", the Documentation and Security Directorate often described as the political police of the Hissène Habré's regime. Thousands of these documents are considered as key elements by the prosecution who recently appointed an expert graphologist to try and identify Habré's handwriting, and a military expert, to reconstitute the chain of command within the DDS.

All the documents are currently classified in chronological order: they cover the 8 years from 1982 to 1990 when Hissène Habré was president of Chad. During their second mission, in December 2013, the AEC investigative judges and the prosecutor went with a team of Argentinean forensic anthropologists to the south of Chad and near the capital N'Djamena to identify mass graves sites. According to the chief prosecutor Mbacké Fall, the Argentinean experts will be back in April, to exhume some bodies.

Two new defendants?

Fall is also confident that two detainees currently held in custody in Chad will be transferred to Dakar; Saleh Younouss, a former director of the DDS and Mahamat Djibrine a former "coordinator" at the DDS also known as "El Djonto". The two are part of the 27 persons also being investigated by Chad in relation to crimes committed under the Habré regime. Fall said he received guaranties from N'Djamena that the warrants will be executed "within a month or two". According to him, the Habré trial could start early next year.

ICTR

by Clive Muhenga, Arusha (Tanzania)

Trying to avoid another acquittal

Against the backdrop of preparations for Rwanda's twentieth commemoration of the 1994 genocide, the appeals chamber of the International Criminal Tribunal for Rwanda (ICTR) has severed the case of former chief of staff of the Rwandan army, General Augustin Bizimungu, just before acquitting two other high-ranking military officers and reducing the sentence of a fourth defendant.

Pointing to the "absence of legal findings" in the trial chamber's judgment against Bizimungu, the appeals judges – in an apparent attempt to avoid a third acquittal in the "Military II" trial – asked the prosecution to file further submissions, just days before the final judgment. The Military II trial of four senior Rwandan military officers, on charges of genocide and crimes against humanity, has lasted ten years. General Bizimungu was sentenced to 30 years imprisonment in May 2011, principally for crimes committed by soldiers and Interahamwe militiamen in different parts of Rwanda in 1994.

Apart from a speech he allegedly made in Ruhengeri, in the north of the country, the charges focused on killings and rapes committed by soldiers in Kigali and the central town of Gitarama. According to the trial chamber, "he knew or had reason to know that his subordinates were about to commit [those acts]", and did not take all the necessary measures to prevent such crimes or punish the perpetrators.

In his appeal, the former chief of staff contended there was a chain of command, a structured hierarchy through which he exercised his authority. Therefore, to have been able to punish soldiers, Bizimungu needed to have had them identified, to know which unit they belonged to, and who was their commander. But the indictment failed to identify directly the individuals who were involved in the crimes. And in relation to crimes committed by the Interahamwe militia, Bizimungu's lawyers argued that the prosecution had not explained what the link was between the militia and the general.

A retrial?

The prosecution suggests a (partial) retrial could be a solution. "Should the appeals chamber believe that the trial chamber's subsidiary findings are not sufficient (...) it should remit or remand the case to the trial chamber for additional findings", the prosecutor writes in a 32 page brief on March 7. "Remittance would be particularly appropriate here given that the trial chamber clearly intended to make further subsidiary findings on each element of the crimes but inexplicably failed to do so prior to issuing its judgment", he adds.

French scholar André Guichaoua, who has testified many times as an expert before the ICTR, says that "for high-ranking military officers, it has been difficult to adduce evidence of orders", pointing out that throughout the genocide "a significant part of the massacres were committed under the activism of low-ranking soldiers" or even civilians such as "demobilized people or victims of war".

In recent years, the ICTR has delivered a series of reversals at the appeals stage. Some have resulted in reduced sentences, others in acquittals. In the "Military I" trial, three years ago, Colonel Théoneste Bagosora, who was initially referred to as the "mastermind of the genocide" by the prosecution, had his sentence reduced from life to 35 years imprisonment. In the same case, Colonel Anatole Nsengiyumva who had also been sentenced to life was handed 15 years after appeal.

But this year's reversals in the "Military II" trial look even more spectacular, with the acquittals of both the former commander of the "Reconnaissance Battalion" Major François-Xavier Nzuwonemeye and the former Chief of Gendarmerie, General Augustin Ndindiliyimana. Ndindiliyimana's initial conviction was already "an acquittal in disguise", analyzed Rwanda's historian and Antwerp-based law professor Filip Reyntjens at the time [IJT-128]. The appellate judges confirmed that he had no effective control over the gendarmes who committed crimes.

"The severing order indicated there were no legal findings against Bizimungu, so why was he not acquitted on the 11th?" asks Christopher Black, the Canadian lawyer who has been representing Ndindiliyimana. "Instead they give the prosecutor a second chance to make its non-existing arguments. No doubt that to acquit both the chiefs of staff on the anniversary (of the genocide) would draw a lot of criticism from Kigali. They appear to want to deflect that", he comments.

Bizimungu's defence has to file its response to the prosecution's further submissions by April 4.

by Tjitske Lingsma, The Hague (Netherlands)

Acquitted by the ICC, but still not free

Since he was acquitted by the International Criminal Court (ICC) in December 2012 – the fate of the Congolese ex-militia leader Mathieu Ngudjolo Chui remains unsettled. Last week he appeared in a Dutch district court to appeal against a decision to deny him asylum in The Netherlands – showing how the ICC, like its ad hoc predecessors, has not prepared for possible acquittals.

"I miss my children and my wife. I would love to live with them and see how my kids grow up. My mother is over eighty years old, and I would like to take care of her. I can't take it anymore, living separated from them," said Mathieu Ngudjolo Chui on March 25, when he was given the opportunity to address the Dutch district court in Amsterdam, pleading in his asylum case. "I did not come here to The Netherlands to ask for asylum. I came here for a court case," he told the three Dutch judges.

Ngudjolo was tried at the ICC for war crimes and crimes against humanity committed during an attack in February 2003 on the village of Bogoro, in Ituri in the Democratic Republic of Congo (DRC). After a three-year long trial, he was acquitted on 18 December 2012. "We were ready to go to the ICC detention centre to take him to a hotel, when suddenly the Dutch authorities said they would take him to another hotel near Schiphol airport," recalls his Congolese defence counsel Jean-Pierre Kilenda. On 21 December 2012 the Dutch police took Ngudjolo straight to the airport. "When it became clear I was going to be sent to Congo, I asked for asylum," said Ngudjolo, in a brief interview with IJT after his hearing. He was locked up at the immigration detention centre at Schiphol airport. "The conditions there were far worse than at the ICC," adds Ngudjolo. After more than four months at the airport detention centre, a Dutch court ruled in early May 2013 that Ngudjolo had to be released and secured him 2,400 EUR in compensation for that period of unlawful detention.

A second trial, for asylum

Since his release from Dutch jail, Ngudjolo is now staying "in a hotel in The Hague", his lawyer Kilenda explains. "The ICC is now taking care of him", he assures. The court "protection" means that the former militia leader has limited movement and spends his days "reading, praying, watching TV and following the news ", according to his lawyer. His contact with his family, whom he hasn't seen in three years, is by phone only. "They live in terrible conditions in Ituri, while I seemingly live in luxury," Ngudjolo told the court guiltily.

De facto, Ngudjolo now faces a second trial as he and his team of lawyers battle for asylum. Last July the Dutch Immigration and Naturalisation Service (IND) rejected Ngudjolo's application for asylum and ordered him to "immediately" leave The Netherlands, asserting there are "serious reasons" to believe that he has committed crimes and can therefore be denied the protection of the UN Refugee Convention. In court last week the IND argued again that Ngudjolo's acquittal by the ICC is not in itself sufficient to prove he is innocent. "Mr. Ngudjolo was not just a militia member, he was the spider in the web. He was the deputy chief of staff of the FNI and FRPI alliance and very narrowly involved with military activities," state advocate Elisabeth Pietermaat argued on behalf of the IND, naming militia groups in Ituri which have been accused of committing serious crimes. "When a person is a commander of such groups, that is enough reason to assume that he had knowledge these crimes were being committed." That was the basis, she explained, on which the Dutch authorities had denied him asylum.

Her words echo those of the ICC judges in their first ever acquittal ruling in December 2012: "Finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent". However, the presiding Dutch judge Jet van Gijn asked the IND to be more specific about Ngudjolo's functions. "Okay, he was at meetings and he signed documents. But there should be a link between his position and what Mr Ngudjolo did himself," van Gijn said.

At the hearing the judges also heard that the Victims and Witness Unit of the ICC has concluded that Ngudjolo cannot be sent back to the DRC because he will not be safe in his home country. "I have shown the heads of state of Congo and Uganda in a very bad light. What will be my fate if I return to Africa?" Ngudjolo asked the judges. "I am not looking for a better life, it is just for my safety." Ngudjolo's Dutch lawyer Flip Schüller told the court that because the ICC prosecutor's appeal against his client's acquittal is still pending, Ngudjolo would have to stay in the country. The IND representative Pietermaat acknowledged that if the ICC deems it necessary that Ngudjolo stays in The Netherlands, then the Dutch government "will have to cooperate." Dutch obligations based on the Headquarters Agreement with the ICC seem to weigh more heavily, for the government representative, than asylum. "The ICC is leading with regard to his stay in The Netherlands," Pietermaat told the court, adding "In the end, it is the ICC that decides about what is going to happen."

Finding a place for an acquitted person who can't return home "is a shared responsibility of the courts and the states", says Lorraine Smith van Lin, director of the ICC program at the International Bar Association. "But so far there are no agreement between the court and the states. We have seen it with the ICTR, and now it happens again. The situation is troubling. It is about the credibility of the ICC [as] fairness means that when a person is acquitted there should be respect for that."

The decision by the Dutch district court on Ngudjolo's asylum application is expected at the beginning of May.

International Justice Tribune

published by
Justice Tribune Foundation
Zeestraat 100, 2518 AD
The Hague - The Netherlands
info@justicetribune.com

Director
Arjen van Dijkhuizen
arjenvandijkhuizen@justicetribune.com

Editor in chief
Franck Petit
franckpetit@justicetribune.com

English Assistant Editor
Janet H. Anderson
janethanderson@justicetribune.com