

ANALYSIS

Special Tribunal for Lebanon

by Lynn Maalouf, Beirut

## STL on the back burner

*Special Tribunal for Lebanon*

STL on the back burner p.1-2

Former Yugoslavia

Karadzic "not ready" for trial p.3

Interview

François Roux, STL Defence Office p.4

### *Dutch push harder to prosecute genocide*

Dutch Justice Minister Ernst Hirsch Ballin has drafted a bill to allow national courts to prosecute cases of genocide dating back as far as 1966.

"It is unacceptable that an alien who is otherwise guilty of genocide is immune from prosecution because the Netherlands, before the time of the crime, had no jurisdiction. This is an undesirable signal to victims and their families," Hirsch Ballin said.

At present, the Netherlands can prosecute aliens suspected of international crimes including genocide, but that law applies only to crimes committed after October 1<sup>st</sup> 2003. Prosecution of older cases is only possible if the crime of genocide was committed by or against a Dutch citizen.

If the law is passed next year, suspected *génocidaires* on Dutch territory – including those transiting via national airports – could be arrested.

The new measure comes as Dutch prosecutors expect to see more genocide cases relating to the Rwandan massacres, the wars in Afghanistan between 1978 & 1992 and the Balkan wars.

The new bill also regulates the extradition of genocide and war crimes suspects to other countries and to international courts. Hirsch Ballin has added a provision allowing Dutch courts to prosecute cases referred by international tribunals.

Six months after the Special Tribunal for Lebanon (STL) opened its doors, a drastically changed political and security environment in Lebanon, coupled with trim concrete output from The Hague, are driving even some of the tribunal's staunchest advocates to adopt an increasingly cautious stance towards the court. This is visible in both dampened expectations and increasing questions as to whether the very mechanism will prove to be the best model for trying a crime of terrorism.

The STL's primary mandate is to prosecute those responsible for an attack in Beirut on February 14<sup>th</sup> 2005 that killed former Lebanese prime minister Rafiq Hariri and 22 others. The court's mandate also covers other attacks between October 2004 and December 2005 that are found to be connected by method and motive to the 2005 assassination.

The STL came into force on June 10<sup>th</sup>, 2007 when the United Nations Security Council decided to enact what was a negotiated agreement between the Lebanese government and the UN. A severe political crisis in Lebanon, however, blocked the agreement's ratification process and led the Council to go ahead with establishing the Tribunal.

### *Lessons learned*

The latest in a series of hybrid model tribunals, the STL is composed of international and Lebanese judges. But it differs in many substantial ways from its predecessors: besides the fact that it will be hearing a limited number of cases (possibly only one), it will

also be the first to address crimes of terrorism, and the first where subject-matter jurisdiction will apply domestic law exclusively.

In the relatively young world of international justice, lessons have already been drawn that were explicitly integrated into this most recent newcomer. In his March 2006 report to the Security Council, former UN Secretary General Kofi Annan mentions that "a key lesson learned from these experiences was that the interested State should be associated in the establishment of the tribunal."

Indeed, the STL was meant to be created in accordance with an agreement between the UN and the government of Lebanon. But political upheaval in Lebanon cut short the ratification process and, at the request of Lebanese Prime Minister Fouad Siniora, the UN Security Council put this agreement into effect through a Chapter VII resolution. Chapter VII of the UN Charter allows the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and non-military action to "restore international peace and security."

Larry D. Johnson served as Deputy Legal Counsel of the UN from 2006-2008. He says the STL "was modelled on the Special Court for Sierra Leone: request by a State, not a Chapter VII 'imposed' model". The STL however fell short of both models - it was neither a treaty-based body, nor did it benefit from the full powers enjoyed by *ad hoc* tribunals - something that may well prove to be decisive when addressing a crime of terrorism.

Looking at the court's six-month

## ► ICTR: Nizeyimana to plead; Gatete on trial

Idelphonse Nizeyimana will appear before the International Criminal Tribunal for Rwanda (ICTR) this Wednesday following his arrest in Uganda earlier this month.

Nizeyimana, a prime suspect in the 1994 Rwandan genocide, is facing five counts of genocide, or in the alternative, complicity in genocide, direct and public incitement to commit genocide and crimes against humanity.

Nizeyimana is the second ICTR fugitive apprehended in less than two months. The former intelligence chief and captain in the Rwandan Armed Forces is one of four top accused earmarked by Chief Prosecutor Hassan Jallow to be arrested as part of the ICTR completion strategy and brought to trial in Arusha. The United States Rewards for Justice Program offered a \$5m bounty for information relating to his arrest.

Nizeyimana is alleged to have ordered the execution of entire families; ordered an attack on orphans evacuated from the Red Cross centre in Kacyiru; supplied transport and weapons to Interahamwe and soldiers; drawn up lists of people, mainly intellectuals and influential Tutsis, to be killed, as well as ordering the killing of Queen Rosalie Gicanda, the widow of former Rwandan king Mutara III, and a symbolic figure for Tutsis.

Prosecutors also allege that Nizeyimana did nothing to stop rapes and sexual assaults; an attack on the parish of Ngoma; and an attack on the University of Rwanda in Butare.

### Gatete on trial

Next week also sees the beginning of Jean Baptiste Gatete's trial at the ICTR. The prosecution case opens on October 19<sup>th</sup>. Gatete is accused of genocide and crimes against humanity and has been in custody since 2002. The ICTR prosecutor initially requested to refer his case to the Rwandan national courts, but the ICTR appeals chamber denied the request, citing concerns he would not receive a fair trial in Rwanda.

report released last month, one of the powers that seems to be lacking relates to UN member-state cooperation.

"Assistance from States, in the form of witness relocation agreements and protection of witnesses, is of vital importance for the success of the tribunal," writes STL president Antonio Cassese. "Although many countries have already been approached, the results so far have not yet borne fruit. The demanding operational environment and subsequent witness protection concerns, as well as the adequacy of State cooperation, remain the main challenges for the section."

True, a Chapter VII power regarding state cooperation does not guarantee anything, as was made clear by the experiences of the tribunals for the former Yugoslavia and Rwanda. But here we come again to the nature of the crime in question: an efficient investigation into a crime of terrorism, rather than widespread abuses, may very well be more dependent on a limited number of witnesses coupled with more stringent witness protection measures.

### No suspects

Less than two months after its establishment, and acting on the tribunal's rules and procedures, the pre-trial judge ordered the release of the only four persons to have been detained, on the grounds of insufficient evidence. A couple of weeks earlier, the Lebanese investigating judge lifted the arrest warrant issued *in absentia* for one person who had been identified as a witness, and then as a suspect, by the UN International Independent Investigation Commission (UNIIC).

Today, the tribunal has no suspects while the Office of the Prosecutor is replenishing its investigative resources. This seems to indicate that after four years of investigations led by the UNIIC, there may well be admissible evidence as prosecutor Daniel Bellemare has stated, but it is probably not sufficient to date.

Moreover, in the current regional context - marked by an international overture towards Syria and domestic political realignments in favour of Syria - assistance from third-party states, especially from within the region, may

become even more difficult to secure than when the STL was first set up.

In the past months alone, the Syrian Vice President Farouk al-Sharaa was quoted as saying that his country was "stronger in Lebanon than when it maintained troops in the country." Lebanon's Progressive Socialist Party leader Walid Jumblatt, meanwhile, whose well-known shifting political stances act as a barometer for shifting regional dynamics, went from explicitly accusing Syria of Hariri's assassination, to calling for "distinctive relations" with Syria.

### Low expectations

For those in Lebanon who believed that a full-fledged international commission of investigation, boosted by Chapter VII powers and significant human and technical resources, would, in four years, manage to gather sufficient evidence admissible in court, expectations are low.

According to Michael Young, opinion editor of the Lebanese Daily Star newspaper, there have been two reactions as of late among those who advocated for the STL's creation. "There are those, such as Walid Jumblatt, who appeared to have lost confidence a long time ago. And those, such as [Saad] Hariri who are still putting up a front of confidence. For *March 14* [the political group headed by Hariri], the STL has been put on the back burner while awaiting possible progress," he says.

Some observers are even predicting the death of the STL and calling for its incorporation into the International Criminal Court (ICC). While this may well be premature, it nonetheless raises the question of whether terrorism can be considered an international crime, and if so, whether in the future the ICC's statute could integrate crimes of terrorism; a discussion all the more relevant in the aftermath of former President Benazir Bhutto's assassination in Pakistan, and Iraq's request to the UN Security Council to investigate September's bombings in Baghdad.

In Lebanon today, says Michael Young, there is certainly the feeling that "the only thing that can give impetus today is a sign from Bellemare that things are moving forward."

The ICTY expressed its concern with the decision by the Bosnian parliament not to extend the mandates of international judges and prosecutors at the State Court and Prosecutor's Office.

It is "a very grave matter", and it must be taken seriously, said tribunal spokesperson Nerma Jelacic at a press conference in The Hague on October 7th.

The ICTY, Jelacic said, accepts that at some point the State Court will have to be comprised only of nationals but "the time is not yet right". Sarajevo, she added, "has been recognised as one of the biggest success stories in tackling the legacy of war in the region and the tribunal has demonstrated its trust in this institution by referring the largest number of its cases to it."

On October 1<sup>st</sup>, the parliament definitively refused to accept proposed changes to the Law on the Court and Prosecution of Bosnia and Herzegovina, by which the mandate of international personnel working in those institutions would have been extended.

As per the latest decision, nine international judges and six prosecutors will have to leave Bosnia and Herzegovina by December 31<sup>st</sup>, 2009. After this date only local personnel would staff the Court and Prosecution.

Representatives of the State Court and Prosecution warned that the decision could have a negative impact on the functioning of the Court and Prosecution.

In a joint announcement, the Court President and Chief Prosecutor said:

"Such an outcome demonstrated that members of the BiH Parliamentary Assembly, while making their decisions, failed to heed the professional suggestions and expert opinions offered by representatives of judicial institutions of Bosnia and Herzegovina, and thus brought into question the efficient operation of these institutions."

by *Sebastian Gottlieb, The Hague*

## Radovan Karadzic "not ready for trial"

**Former Bosnian Serb leader Radovan Karadzic is working hard on his defence case from his prison cell in Scheveningen. Since the beginning of his pre-trial proceedings before the International Criminal Tribunal for the Former Yugoslavia (ICTY) 14 months ago, he has filed more than a hundred motions – including one that claims that former United States Special Envoy Richard Holbrooke had promised him immunity from prosecution.**

Peter Robinson is Legal Advisor to Karadzic. He says that their team has already received over a million pages of documents from the prosecution and that more arrive every day. They have also asked 27 states and international organisations for documents to help them prepare for cross-examination of prosecution witnesses.

"Some states – such as Bosnia and Croatia - haven't replied at all, while others - such as Sweden, Norway and Belgium - responded right away. There are also states - including the Netherlands and the United States - who promised to cooperate but haven't yet done so," says Robinson.

Because of the heavy workload, Karadzic had asked to extend his trial preparation by another ten months. The Trial Chamber initially denied the request and ruled that the trial would start October 19<sup>th</sup>. However, on October 13<sup>th</sup> the appeals chamber ruled that the prosecution must submit a marked-up indictment by the 19<sup>th</sup>. Karadzic will then have an additional week to review it before going to trial.

### *Changing indictment*

Karadzic and the Trial Chamber judges have been trying to reduce the indictment against him in a bid to shorten the duration of trial. The original indictment was drafted in July 1995, right after the massacre of over 7,000 Muslim men and boys in

Srebrenica. A second indictment was filed in November 1995, following the Dayton peace talks. The indictments have been amended three times since then - most recently in February of this year.

Some of the biggest changes to the indictment include the addition of charges of involvement in joint criminal enterprises. Karadzic is now the only person to appear before the ICTY accused of being a member of as many as four different joint criminal enterprises.

On the other hand, the number of municipalities where Karadzic is accused of having committed war crimes has been reduced from 45 to 27.

Any further reduction of the indictment would jeopardize the possibility of securing Karadzic's conviction, the prosecution told the court.

***"I hope my trial is fair, but my expectations are very low."***

Peter Robinson visits Karadzic every other day to discuss the trial. Robinson drafts the motions which Karadzic then files with the Trial Chamber.

"Karadzic is in good shape and looking forward to the start of this trial," Robinson says, "but he will be very disappointed if the trial starts before he completes his preparation."

In a written interview with the IJT, Karadzic added: "I hope my trial is fair, but my expectations are very low."

ICTY President Patrick Robinson has said that he expects the Karadzic trial to end in early 2012 and all appellate proceedings to be concluded by mid-2013.

Robinson is concerned about the toll this could take on his client: "It would be exhausting for anyone to defend themselves before a court that sits five days a week for ... three years."

► International Criminal Court to hear Darfur case

The International Criminal Court (ICC) starts confirmation of charges hearings against Darfur rebel leader Abu Garda next week.

Bahr Idriss Abu Garda, a member of the Zaghawa tribe of Sudan, appeared before the ICC for the first time in May when he travelled to The Hague of his own free will. After his initial appearance, he was allowed to return to Darfur.

Abu Garda has the right to attend all hearings. His counsel, Karim Khan, said his client "waived his right to attend any status conference before the October date" but "may wish to attend" the confirmation hearing.

46-year-old Abu Garda faces three counts of war crimes, including murder and pillaging, allegedly committed during a 2007 attack against an African Union peacekeeping mission in Haskanita, North Darfur.

Abu Garda has denied any involvement in the attack and said he was prepared to defend his innocence before the court.

The Chairman and General Coordinator of Military Operations of the United Resistance Front is the first suspect to have surrendered voluntarily to the ICC. He is also the first to appear before the ICC in relation to the Darfur conflict. Three arrest warrants have also been issued in the ICC's Darfur investigation.

INTERVIEW

François Roux, STL Defence Office

by Franck Petit, Paris

# Changing attitudes at STL

**Appointed to a three-year term by the United Nations Secretary General last March, the French lawyer François Roux will take up his new role as head of the Defence Office at the Special Tribunal for Lebanon (STL) at the end of this month. During his 30-year career as an international lawyer, Roux has spent ten years working with international criminal tribunals.**

Mr. Roux spoke to the IJT's Franck Petit.

**You will be in charge of the first fully independent defence office at an international tribunal. What does that mean?**

It means that for the first time, the international community has realised the importance of putting up a strong defence in face of the prosecution. Until now, the defence has been incorporated into the Registry. Today at the STL, the Defence Office is an organ of the tribunal that has the same standing as the Presidency, the Prosecution and the Registry. We see it as enormous progress.

**What are the new roles that the defence will be taking on?**

I'm [...] going to organise as many training seminars as I can, particularly for lawyers from the Middle East who want to work with the tribunal. Then [...] I would like to set up a team of defence lawyers. At a traditional international tribunal, the prosecutor has a permanent team working for him. When the defence lawyers arrive, they are in entirely unfamiliar territory. It will be the role of the Defence Office to give them the chance to quickly get to the same level of understanding as the prosecutor.

**And does your budget allow for that?**

For the moment, the budget doesn't reflect the balance we're looking for between the prosecution and the defence teams...I hope that the [defence] teams [...] will be adequately equipped in terms of personnel and resources so that the equality of arms

will mean something. For the moment, there are five of us. At the prosecutor's office, there are about a hundred, seventy of whom are investigators. That's obviously a position that will diminish over time, while we will get stronger once the first suspects arrive. In any case, we all know that in the fight between David and Goliath, it was David who won!

**Are you going to increase the lawyers' salaries?**

There, I will really go to bat to make sure the defence lawyers are paid appropriately. At the ICTR [International Criminal Tribunal for Rwanda], the lawyers haven't had a raise in ten years. That's just not on. If we really want first class lawyers, we have to pay them appropriately. In this respect, the Cambodian chambers have made a lot of progress compared to Arusha.

**Why did you finally accept this job, when it meant you had to give up all your other commitments?**

Precisely because I want to be involved in changing the role of defence lawyers before these courts. The perverse thing about these tribunals - and it really is perverse - is that at the beginning, the international community created them to fight impunity. And so, as soon as we say that, it also means that the people who appear before them are assumed to be guilty. But if we really manage to change attitudes, the judges and states will have to change their understanding of the defence. The defence won't only be there to prevent convictions, but to fully exercise its role.

**And do you think that there's a will for that?**

I think that we are really at the beginning of international criminal justice, and some serious mistakes were made in the earliest days and it seems to me that we're at a point where we must correct those mistakes. The international community has taken the first step by creating this office, but it's not enough to have created it, it also needs to be given the means to thrive.

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