Panel Theme: the International Tribunals

Paper Title: Reopening the Big Fish Small Fish Debate – An Examination of the Prosecutorial Discretion of the Ad Hoc and Hybrid International Criminal Tribunals

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It is widely known that the ICTY’s earlier practices have been criticized for having dealt with comparably minor war criminals. The implications behind such a criticism may be that an ad hoc international or hybrid criminal tribunal should concentrate on those who are most responsible for the crimes and serious violations of international humanitarian law. In this connection, the so-called big fish v. small fish debate has been at issue since the early years of the ICTY. At the heart of the debate is the question about the extent to which the international criminal Prosecutors should focus on superior levels of perpetrators of atrocities. At the same time, there is always a question of the necessity to prosecute the foot-level actual perpetrators of atrocities for justice at hand. More importantly, obligations imposed by international humanitarian norms are conceptualized not only for senior leaders but also ordinary individuals within the international community. The dilemma is distilled to the following question: “Should the Prosecutor only investigate and indict persons in positions of leadership in view of their overall responsibility? Or is there also good reason to punish low-ranking perpetrators?”

The big fish v. small fish issue was hotly debated and still sometimes resurfaces. The phenomenon is documented in the Nikolić indictment, as well as the Tadić and Erdemović trials. These three defendants have all been regarded as small fish. Even the then Prosecutor of the ICTY, Justice Goldstone himself does not hesitate to admit the fact. Nikolić was a Bosnian Serb and a commander in Šušica detention camp. The first ICTY indictment resulted in a 20 year prison sentence. Justice Goldstone reflected elsewhere that Dragan Nikolić was hardly an appropriate defendant for the ICTY.

The first part of the presentation will thus focus on the logic of targeting big fish. The logic can be explained by several institutional and practical demands. Institutionally speaking,

although the ICTY and the ICTR Statutes guarantee that the Prosecutor acts independently as a separate organ of the Tribunals, the bodies of the ICTY and the ICTR themselves remain one of the substitute organs of the Security Council. As a part of the United Nations system, the ICTY and the ICTR Prosecutors are financially subject to the Member States of the United Nations. The reason why the first indictment was issued against Nikolić was that he was the only person for who the Prosecutor had sufficient evidence to justify the budget of the ICTY before the Advisory Committee on Administrative and Budgetary Questions made up of representatives elected by the General Assembly.

The recent *ad hoc* tribunals’ practice of Rule 11bis also provides an account of the practice of dealing with big fish by international criminal tribunals. As of mid November 2006, the ICTY has transferred eleven indictees to local courts pursuant to a Rule 11bis ruling. Accordingly, there is a division of labour emerging between the ICTY and domestic courts which is similar to the complementarity principle of the ICC.

On the contrary, the recent practices of the Special Panel for Serious Crimes of East Timor have been criticized for focusing on low-level offenders and minor charges with regard to the selected crimes. Although this situation is comparable to the problem of the ICTY, the Former Yugoslavia experienced a changing political climate and government in the aftermath of the conflict, resulting in a willingness to punish perpetrators, so that the high-ranking defendants were captured as time passed. On the contrary, it is evaluated that there is little likelihood that such a dramatic change in circumstances will take place in Indonesia.

Irrespective of the institutional and practical demands of targeting big fish, the concern remains whether there is a normative demand for targeting only senior leaders of mass atrocities. The crime of aggression is arguably the only ‘leadership crime’ recognized by international criminal law. Therefore, the last part of the paper will discuss the big fish versus small fish debate by examining the possibilities of a leadership element in *ratione materiae* of international criminal tribunals.

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3 Article 11 of the ICTY Statute; article 10 of the ICTR Statute.

4 However, the Prosecutor of the ICTY, Carla Del Ponte, claimed before the Security Council that “the Tribunal has reached the limits in this matter and, *unless the Security Council modifies the seniority conditions under which an accused can be transferred to local courts, there is no legal possibility to transfer more cases.* And therefore, in her view, with the present case-load it will not be possible to achieve the target date of 2008 (emphasis added)”. The Prosecutor’s Address to the Security Council, 15 December 2006, Press Release Cdp/PO/1137e <http://www.un.org/icty/pressreal/2006/p1137-e.htm> (31 January 2007). This statement must illustrate her frustration with the amendment of rule 28 by the Judges to comply with the Completion Strategy which eventually touched upon her independence.


6 For the ICC, the seniority requirement also became a part of the admissibility for a case before the ICC. See the Prosecutor v. Thomas Lubanga Dyilo ‘Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58’ Pre-Trial Chamber I, Case No. ICC-01/04-01/06 (10 February 2006) para. 50.