SCL Lecture: 'Appeals on Errors of Fact – Assessing the Reputational Consequences of the ICTY Appeals Chamber's Interventionist Approach' – Rupert Elderkin MA

On 27 February 2019, Rupert Elderkin MA presented his International Crimes Database (ICD) Brief as part of the Supranational Criminal Law (SCL) Lectures Series hosted by the T.M.C. Asser Instituut in The Hague. The SCL lectures, which relate to topical issues of international criminal law, have been organised since 2003 by the Asser Institute, in cooperation with the Coalition for the ICC and the Grotius Centre for International Legal Studies of Leiden University. The lecture was opened by Dr. Christophe Paulussen, Senior Researcher and coordinator of the research strand 'Human Dignity and Human Security in International and European Law' at the Asser Institute, who introduced Rupert Elderkin and his presentation on 'Appeals on Errors of Fact – Assessing the Reputational Consequences of the ICTY Appeals Chamber's Interventionist Approach'.

Rupert Elderkin formerly worked as Counsel for the Prosecution at the ICTY, during which he noticed the apparent interference with the factual findings of trial judges by Appeals Chambers, despite Trial Chambers being the judicial body with full exposure to the lengthy and complex sets of facts making up a case. This inspired his ICD Brief which investigated whether Appeals Chambers claiming to afford Trial Chambers a margin of deference in factual findings, but nevertheless interfering in these findings, is problematic from an institutional perspective. This was one of three Briefs published as part of the ICD Project initiated jointly with the International Criminal Tribunal for the former Yugoslavia, to capture some of the valuable insights of its employees.

Elderkin began by outlining that key factual findings necessary to sustain criminal convictions cannot always be established on the basis of direct evidence, which makes the role of a judge difficult. To illustrate, in proving the *mens rea* element of a crime, for example persecutory intent for the crime of genocide, it is impossible to definitively know what the mental state of a perpetrator was at the moment the crime was committed. In lieu of direct evidence, pattern-based evidence must be used to prove this particular intent, such as evidence that only members of a minority were targeted or evidence of the accused's discriminatory comments regarding the relevant ethnic group.

It has been highlighted by the ICTY that trial judges should be given a margin of deference in making factual findings. As stated in the Appeals Chamber decision of 30 January 2015 in the case of *Prosecutor v Popović et al*: "[i]t is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has occasioned a miscarriage of justice." As explained by Elderkin, the general position here is one of deference to trial judges' findings of fact, with interference only being warranted where there has been an error resulting in serious consequences.

The standard for interference in a Trial Chamber's factual findings "is that of unreasonableness, that is, a conclusion which no reasonable person could have reached" (*Prosecutor v Duško Tadić*, Appeal Judgement of 15 July 1999). The finding that "no reasonable trier of fact" could have come to a particular conclusion sets a high bar, according to Elderkin.

Nevertheless, despite this high standard and the claimed deference afforded to Trial Chambers, Appeals Chambers have continued to interfere in the factual findings of trial judges. Elderkin uses two cases in particular to highlight this point. The first is *Prosecutor v Dordević*, in which the Appeals Chamber struck down the findings of the Trial Chamber that the accused had the requisite *mens rea* of knowledge of crimes being committed in Kosovo. The Appeals Chamber found that no reasonable trier of fact could have inferred that the accused had personal knowledge of the crimes being committed on the basis of Humans Rights Watch reports outlining the crimes being sent to the Ministry of Interior, despite that at the relevant period Dordević was responsible for the Public Security Department within the Ministry of Interior. Nevertheless, despite this finding the Appeals Chamber reached the conclusion that other factors, such as media reports, established that the accused had knowledge of the crimes being

committed in Kosovo. Elderkin pointed out that the outcome of this decision indicates that there was no miscarriage of justice in the Trial Chamber's initial findings of fact, and therefore the examination of these by the Appeals Chamber was unwarranted and unnecessary.

The second case highlighted by Elderkin is *Prosecutor v Gotovina*, where a challenge was raised against the Trial Chamber's finding on alleged indiscriminate attacks being predicated on a factual assessment of the expected accuracy of artillery weapons. The Appeals Chamber characterised this as a legal error, an odd finding since according to Elderkin the analysis should have been related to whether a factual error existed, given that there is no law relating to the accuracy of artillery. Moreover, despite the complex and lengthy fact set considered by the Trial Chamber, the Appeals Chamber found that it had failed to give a reasoned opinion and that the standard used had not been accurately established. These findings were key to the acquittal of Gotovina, highlighting that the issue of errors of fact really matters.

In terms of quantifying the findings of errors of fact, Elderkin pointed out that according to his research, in 53% of trial judgements that were appealed, the Appeals Chamber found the Trial Chamber to have made findings of fact that no reasonable trier of fact could have made. Elderkin highlighted that this reflects a general trend of an increasingly interventionist approach taken by Appeals Chambers in reviewing factual findings. He suggested that this is problematic, since it is the Trial Chamber that has the benefit of going through long and complex fact sets and considerable evidence before making its factual findings. This concern is echoed in the dissent of Judge Pocar in *Prosecutor v Gotovina*, who stated: "I do not believe that justice is done when findings of guilt not lightly entered by the Trial Chamber in more than 1300 pages of analysis are sweepingly reversed in just a few paragraphs, without careful consideration of the trial record and a proper explanation".

In conclusion, Elderkin offered several possible solutions to the apparent problem with the review of facts endemic in ICTY proceedings. These included greater use by the Appeals Chamber of the power to remit particular issues to the Trial Chamber for elaboration or reconsideration, consultation by the Appeals Chamber with the relevant Trial Chamber to establish the full evidentiary basis for disputed factual findings or greater adherence by Appeals Chambers to the principle of deference to the findings of fact of Trial Chambers.

The lecture was closed by Dr. Paulussen, who gave thanks to the presenter Rupert Elderkin and the audience, drawing attention to future lectures organised by the Asser Institute, including the upcoming panel discussion for the 15th anniversary of the SCL Lecture Series.

The video of this lecture can be viewed here, on the International Crimes Database.