ADC ICTY TPIY

NEWSLETTER

ISSUE 82

27 February 2015

Head of Office: Isabel Düsterhöft
Assistants: Isabel Meyer-Landrut and Daynelis Vargas
Contributors: Ruby Axelson, Anthea Burton, Soo Choi, Julie Grare, Stuti Kochhar, Molly Martin, Eleni Ntogka, Margaux Raynaud, Emma Roberts, Bas Volkers

Design: Sabrina Sharma

ICTY CASES

Cases at Trial

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-I)

Mladić (IT-09-92)

Šešelj (IT-03-67)

Cases on Appeal

Prlić *et al.* (IT-04-74)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

ICTY NEWS

Prosecutor v. Mladić (IT-09-92)

On 2 February, Slobadan Župljanin, Commander of the 5th Company of the 122nd Light Infantry Brigade, took the stand as the next Defence witness. He testified about the military situation in Kotor Varoš, where some military incidents broke out in April 1992 and which was, from a military perspective, surrounded by Muslim and Croat villages. Župljanin witnessed Muslims and Croats carrying weapons in Kotor Varoš and participated in the negotiations for the surrender of weapons. He testified that some villages surrendered their weapons and most villages remained untouched throughout the war. Župljanin was personally injured during an attempt to negotiate with the Muslims and Croats to ease tensions and avoid conflict, despite there being no combat activities at the time. Župljanin's unit was also involved in securing food, medical care and accommodation for the 5.000 civilians and 1.500 Croat soldiers who had left Travnik and Bugojno, fleeing Muslim forces.

During cross-examination, Župljanin confirmed that the people who surrendered at Grabovica in November 1992 were fleeing from Večići, but suggested that there was no combat in Večići until after people had left and the area was mopped up. Župljanin informed the Kotor Varoš War Presidency of the incident at Grabovica but was not aware that a Commission for War Booty was being set up in response to the valuables of the people who surrendered there. He was certain his subordinates were not involved in the incident because they were not present in the area.

On 2 and 3 February, Davor Kolenda appeared before the Trial Chamber. In 1993, the witness held the posi-

ICTY NEWS

Also in this issue

tion of Chief of General Affairs and General Secretary of the Croatian Defence Council of Travnik (HVO). Having been an official of Herceg-Bosna, Kolenda testified about the movement of 5.000-6.000 Croats across Mount Vlašić and Kupres, through Serb territory.

During cross-examination, Kolenda confirmed that he gave a few TV interviews when he reached Galica in order to describe the events in Travnik and to present what really happened in the field. He clarified that the Croatian side needed assistance with evacuating civilians, wounded persons, children and a part of the armed force. During talks with the United Nations Protection Force (UNPROFOR), the Croatian side asked for help with their evacuation but UNPROFOR refused, further stating that they would be committing ethnic cleansing. Further, the Croatian side tried to get assistance from the Serb side which immediately agreed to assist with evacuating civilians, wounded persons and children.

The witness confirmed the military element of the HVO was accommodated at Manjača for several days during the evacuation, until vehicles were provided for their further transport. He also confirmed that he told the media about the good treatment of evacuated people at the reception centre in Manjača, which was in accordance with international law standards.


Radomir Pašić

On 3 and 4 February, Radomir Pašić, former Head of the Crisis Staff in Bosanski Novi, appeared for the Defence to testify on the situation in and departure of the Muslim population from the municipality of Bosanski Novi. Pašić was already called to testify in the trials of Momčilo Krajišnik and Radovan Karadžić at the ICTY, who contrary to Mladić, both were indicted for crimes committed in Bosanski Novi.

Throughout his testimony, Pašić explained that the municipal authorities were unable to guarantee safety for both Muslims and non-Muslims. He testified that the poor economic situation and unstable political landscape led the Muslim population to leave Bosanski Novi, with the assistance of the municipal authorities. Responding to the Prosecution's claims that the Muslims' departure was triggered by the Serb police and Territorial Defence attacks, Pašić insisted that the paramilitaries were to blame for this. He further noted that UNPROFOR was also involved in the evacuation of Muslims.

Vojin Ubiparip testified on 4 and 5 February. Ubiparip was the Chief of Staff of the 22nd Light Infantry Brigade in the 1st Krajina Corps between January and June 1993. From June 1993 until the end of the war, Ubiparip was Commander of the Kotor Varoš Brigade of the Army of Republika Srpska (VRS). During examination-in-chief, he mentioned two encounters with Mladić. From his two encounters he understood Mladić's emphasis on abiding by the laws of war. In cross-examination, he confirmed that in the village of Siprage, near Kotor Varoš, a mosque had been destroyed. Muslims were leaving Siprage on commands, although it was unclear where these who given from.

On 5 February, Vinko Nikolić, a member of the Sanski Most Crisis Staff and representative of the Serb Defence Forces (SOS), appeared before the Court as the next Defence witness. His statement confirmed the non-existence of a plan to expel Muslims and Croats from the Sanksi Most municipality, as well as the presence of paramilitaries in the area. Despite recognising that many non-Serbs left the municipality, Nikolić stated that this was at their own request and noted that an estimated 8.000 Muslims and Croats continued to live there. Nikolić contended that it was Serbian cafés that were first blown up in Sanski Most and that any activities to intimidate the non-Serb population in Sanski Most was done by individuals and not in an organised manner.

During cross-examination, the witness testified about the setting up of checkpoints by the Crisis Staff, where Agrokomerc trucks were confiscated and used for various activities such as distributing the goods contained within them to the population of all three ethnicities. Nikolić testified that many loyal non-Serbs were not removed from their jobs. He suggested that both, the Muslim Director of the Health Centre and the Muslim President of the Court in Sanski Most were removed after the take-over of power, due to the fact that they were prominent extremist members of the Party of Democratic Action (SDA) and had taken vast amounts of money for arming Muslim paramilitary organisations.

On 9 February, Mile Petrović testified before the Trial

Chamber. His testimony largely focused on his actions in his capacity as a platoon member of the Military police of the Bratunac Brigade during July 1995. Petrović recalled that during this time, he and Mirko Janković (then Commander of the military police platoon) were ordered by Momir Nikolić (then Captain and Chief of Intelligence and Security Affairs in the command of the Bratunac Brigade) to drive two members of UNPROFOR towards Bratunac as far as they wanted to go. In response to the order, the witness and Nikolić drove them to Bratunac and then back with a stolen UN armoured personnel carrier. The witness also disputed the testimony of Momir Nikolić and said he told many lies.

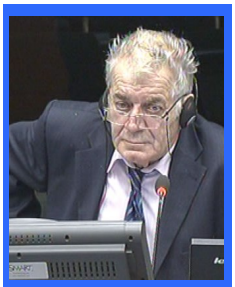

Rade Javorić

On 9, 10 and 11 February, former Commander of the Prijedor Territorial Defence Staff, Rade Javorić, testified about the situation in Prijedor before, during and after the multi-party elections. He also testified about the mobilisation processes in Prijedor.

During his testimony, Javorić explained that in 1991 there were call-ups in the Prijedor area. Many Muslims and Croats responded and fought in the Bosnian Serb Army, some of them were even holding various leadership positions. He added that every person who responded to these mobilisation calls received equipment, weapons and ammunition in the same conditions, regardless of their ethnicity. Later on, when the Army of Republika Srpska was established, most of the non-Serbs remained in the Serb army until the end of the war, while others left for work obligations.

In his statement, Javorić stated that the war in Prijedor started with the murder of two soldiers by Muslim forces at the Hambarine village checkpoint. During cross-examination, the Prosecutor claimed that in late 1992, after this incident, around 7.000 Muslims were arrested and transferred by the VRS to prison camps. The witness refuted this allegation and clarified they went voluntarily to Omarska, Keraterm and Trnopolje to seek protection. The army only secured their passage to these collection centres.

On 11 February, Nenad Davidović, former Chief Medical Officer in the VRS 6th Sana Brigade and a member of the Crisis Staff in Sanski Most, appeared before the Chamber to testify. As a doctor, the witness used to keep a diary containing important notes on the Crisis Staff meetings that he attended from 5 May 1992 to 3 March 1993.


Nenad Davidović

His statement and testimony both advocated that the Brigade Command never planned, organised or ordered any killing of non-Serbs in and around Sanski Most. In his statement to the Defence, Davidović said, *inter alia*, that the Party of Democratic Action (DSA) had armed and organised Muslims in Sanski Most and the neighboring villages of Vrhpolje, Trnovo, Hrustovo and Kamengrad. He also acknowledged that he had taken part in the clean-up operation in late May and early June 1992, following action in which weapons were taken from non-Serbs in the area.

During cross-examination, the Office of the Prosecutor (OTP) put to the witness that prior to the conflict in Sanski Most, dated around October 1995, the Serb authorities had adopted the policy to expel forever those non-Serbs who were not loyal, together with their families. The witness explained that the people who were not loyal were extremists, guided by the DSA, eager to take up arms and fight and those who were opposed to the Serb authorities.

As the cross-examination continued on 12 February, the Prosecutor referred to the evidence showing that the Muslims who were killed in the operations to seize weapons, were thrown into mass graves. He then referred to an entry in the diary, dated 30 May 1992, according to which the bodies might be dressed up in uniforms by arguing that this was an attempt to cover up the fact that the victims were civilians disguised as soldiers. Davidović dismissed the allegation by saying that the entry referred to Muslims from the village of Hrustovo. He added that the bodies had, for several days, been outside, open to the wild and poorly dressed. His intention was therefore to put them into some clothes. Since the only clothes available were medical military uniforms provided to them by the International Committee of the Red Cross (ICRC), he suggested that the dead be dressed with those and be given a dignified burial. The proposal however was rejected by the ICRC itself.

On 12 and 16 February, Slavko Puhalić, former Logistics Officer in Trnopolje, appeared before the Chamber to testify on the situation in the Trnopolje camp. Although he never commanded the camp, Puhalić served as an intermediary between Major Slobodan Kuruzović and the people in Trnopolje. The witness insisted he was a regular soldier during the war, and did not hold the rank of Captain contrary to the Prosecution's allegations.

Throughout his testimony, Puhalić asserted non-Serbs were distanced from the combat zone for their own protection. He contended the people in Trnopolje could freely join and exit the camp after having notified the guard and left their documents. The witness further testified that the residents of Trnopolje were not abused, at the exception of some incidents, in which he was not involved.

Radinković

The next witness, Radomir Radinković, testified on both 16 and 17 February. When the war broke out in Bosnia and Herzegovina, he was mobilised as a Desk Officer for Security and Intelligence Affairs to the 1st Krajina Corps, holding the rank of Staff Sergeant. Important to his testimony was his service at the Manjača camp from the time it was established until it was disbanded.

Radinković discussed the logistics and operational features of the Manjača camp. In particular, he spoke about how prisoners of war entered the camp, how they lived there and were treated in accordance with the Geneva Conventions to the fullest extent possible, how commands were conveyed and interpreted, and how security measures continued to be taken despite their fallibility in some instances. He testified that there was a long chain of command from Colonel Bogojević at the camp to General Talić and then to Colonel Popović and that different information was given to, receive by and interpreted along this chain, rendering it difficult to monitor the misdemeanours in the camp.

During his testimony, the Chamber noted that the Prosecution were misconstruing Radinković's statements as saying the Manjača camp held 4.000-4.500 people at any one time, when in fact, throughout his testimony in the *Karadžić* case and his current testimony, he stated that this number was incorrect and so many people could not physically be held at the camp. The Chamber pointed out that the witness's statements were being repeatedly misunderstood by the Prosecution and that the Prosecution's line of questioning about the number of prisoners held, even in the *Karadžić* case, was improper. Accordingly, it was asserted that the Manjača camp never held more than about 2.500 people.

Prosecutor v. Tolimir (IT-05-88/2)

A status conference was held in *Prosecutor v. Zdravko Tolimir (IT-05-88/2)* (*Srebrenica*) on 11 February by Pre-Appeal Judge and Tribunal President, Judge Meron. Judge Meron took appearances from the parties, including Tolimir who is self-represented and accompanied by his *amicus* legal advisor, Aleksandar Gajić. Judge Meron clarified that Gajić was granted this right of audience during status conferences by an oral decision in July 2013 before reviewing rules and purposes of Rule 65 *bis* (B) Status Conferences.

Judge Meron enquired after Tolimir's health and conditions of detention; Tolimir reported suffering some recent heart problems, resulting in the insertion of four stents, and requested that Judge Meron ask the Detention Unit to send the medical documentation to the Chamber and to Gajić. Judge Meron referred this request to the Registrar. Judge Meron then moved to the usual review of recent developments in the case. There are currently no pending motions or decisions before the Appeals Chamber; the Appeals Chamber is deliberating on a Judgement following the 12 November 2014 Appeals Hearing. No additional issues were raised by the parties.

Zdravko Tolimir

LOOKING BACK...

International Criminal Court

Five years ago…

On 8 February 2010, the Pre-Trial Chamber I of the International Criminal Court (ICC) declined to confirm the charges of The *Prosecutor v. Bahar Idriss Abu Garda*. The Chamber unanimously found there was insufficient evidence to establish substantial grounds to believe Bahar Idriss Abu Garda could be held criminally responsible for the commission of three war crimes against the African Union Mission in Sudan (AMIS).

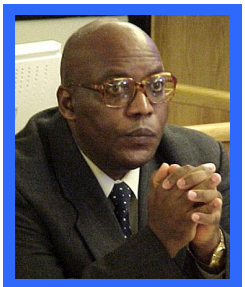
Bahar Idriss Abu Garda

The Chamber acknowledged the case was of sufficient gravity given that the attack had not just affected the AMIS but also the local population. Further, there were substantial grounds to believe AMIS personnel were entitled to protection given to civilians under the international law of armed conflict. However, the Chamber found the Prosecution's allegations Abu Garda participated in the common plan to attack the peace-keeping mission site were not supported by sufficient evidence.

International Criminal Tribunal for Rwanda

Ten years ago…

On 28 February 2005, the trial of Lieutenant Colonel Tharcisse Muvunyi began with the Prosecution's opening statement. Muvunyi was the former Commander of Ecole des Sous-officiers (ESO), the Rwandan military school, from April to June 1994. According to the indictment, Muvunyi incited the local population in Butare Prejecture to perpetrate massacres against the Tutsi, as well as having directly provided grenades to the militiamen and ordered the ESO officer corps to carry out massacres against the Tutsis and moderate Hutus. He was charged in a total of five counts including genocide, complicity in genocide (as an alternative to the first), direct and public incitement to commit genocide, and crimes against humanity (rape and other inhumane acts). The Prosecution argued that Muvunyi was at the centre of the Tutsi and moderate Hutu massacre in Butare Prefecture in 1994 that resulted in more than 100,000 Tutsi deaths. The Accused denied all allegations.



Tharcisse Muvunyi

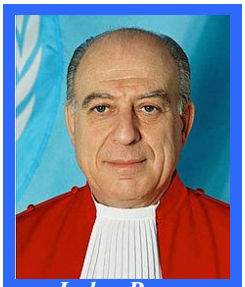
On 12 September 2006, Muvunyi was found guilty of genocide, direct and public incitation to commit genocide and inhumane acts as a crime against humanity and was sentenced to 25 years of imprisonment. This was overturned on appeal on 29 August 2008 where a partial re-trial was ordered. On 11 February 2010, Muvunyi was again found guilty by Trial Chamber II of direct and public incitement to commit genocide and was sentenced to 15 years imprisonment.

International Criminal Tribunal for the Former Yugoslavia

Fifteen years ago…

On 8 February 2000, Judge Fausto Pocar (Italy) was sworn in as a Judge at the ICTY. Judge Pocar was appointed to replace Judge Antonio Cassese. Judge Pocar was then appointed the Vice-President of the Tribunal between March 2003 and November 2005, before serving as President from November 2005 to November 2008.

Additionally, Judge Pocar has served as a Judge in the Trial Chamber, where he sat on the first case con-


Judge Pocar

cerned with rape as a crime against humanity, and in the Appeals Chamber of the Tribunal, where he is still sitting. As a Judge of the Appeals Chamber, he is also a Judge of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR). On appeal, he has participated in the adoption of the final judgments in several ICTY and ICTR cases, heard both at The Hague and in Arusha, Tanzania.

His career has been shaped by a close relationship with United Nations activities. Elected in 1984 as a member of the Human Rights Committee of the United Nations, he was its Chairman in 1991 and 1992. In 1993, he took part in the World Conference on Human Rights in Vienna. Pocar also conducted various missions for the High Commissioner for Human Rights, including those in Chechnya in 1995 and in Russia in 1996. Judge Pocar is also a Professor of International Law at the University of Milan, Italy.

NEWS FROM THE REGION

Bosnia and Herzegovina

Former ICTY Accused Has Sentence Reduced by Ten Years

Milorad Trbić, a former Army of Rebulika Srpska (VRS) Deputy Commander and Assistant Chief of Security for the Zvornik Brigade, had his sentenced reduced in a Bosnian Court. He was initially charged with genocide, conspiracy to commit genocide, extermination and forcible transfer as part of a Joint Criminal Enterprise (JCE) at the ICTY for his participation in mass executions of Bosnian Muslim men in Srebrenica. Trbić was initially indicted by the ICTY in March 2005 and represented by ADC-ICTY President Colleen Rohan. His case was transferred to a Bosnian Court by the Referral Bench on 27 April 2007 pursuant to the Prosecutor's Rule 11 *bis* motion based on the gravity of crimes and his alleged level of responsibility.

In January 2011, the Bosnian Court sentenced Trbić to 30 years for the capture, detention and summary execution of Bosnian men in Srebrenica in 1995 as part of a JCE with Ljubiša Beara (*Beara IT-02-58*) Vujadin Popović (*Popović et al. IT-05-88*) and Dragan Nikolić (*Nikolić IT-94-2*). However, in November 2014, the Bosnian Constitutional Court quashed the verdict (and 18 others previously) after determining that the rights of the Accused were violated because of improper application of the law: the State Court had applied the Bosnian Criminal Code in the case against Trbić, rather than the more lenient former Yugoslav Code. It is of note that re-trials were ordered in two cases by the European Court of Human Rights on the same basis that the Bosnian Courts had applied the wrong criminal law.

Following the re-trial, the Appellate Chamber modified portions of the verdict as they related to the applicable law and sentencing, ultimately reducing Trbić's sentence by a third, from 30 years to 20 on 16 February, the maximum penalty available under the Yugoslav Criminal Code in force in 1995 when the crimes were committed.

Croatia

Re-Trial of Five Croatian Soldiers Begins

The re-trial of Stepjan Klarić, Viktor Ivančin, Dražen Pavlović, Željko Živec and Goran Štrukelj began on 19 February in Zagreb. The Accused are former Croatian soldiers stationed at the Kerestinec military prison outside of Zagreb between December 1991 and May 1992. They were convicted of several counts of

torture and sexual abuse of detainees at Kerestinec by the Croatian Court in 2012; Klarić was sentenced to three and a half years, Ivančin to two years, and Pavlović, Živec and Štrukelj to one year. While the minimum sentence for war crimes under Croatian law is five years, the Trial Judge noted the presence of "many" mitigating factors, including their good behaviour in court, poor social status currently and their service to Croatia during the war.

A new trial was ordered by the Croatian Supreme Court, which annulled the original convictions, finding that when the Croatian Parliament broke all ties with the former Yugoslavia in October 1991, the conflict in Croatia was internationalised and the convention on internal conflicts applied by the trial court was thus improper. The same evidence and witnesses will be used during the new trial and the Accused have all pleaded not guilty.

Serbia

Trial for War Crimes Against Five Croatian Serbs Begins in Belgrade

The trial against Žarko Milošević, Dragan Mitrović, Dragan Lončar, Mirko Opačić, and Miroslav Milinković began in Belgrade on 4 February. All are former members of Croatian Serb forces accused of war crimes for murdering civilians in the village of Sotin (Croatia) and its surroundings from October to December 1991.

The indictment alleges that the Accused killed non-Serb civilians, including 13 Croats on 27 December 1991. Milošević pleaded guilty to the charges and received a nine-year sentence and is said to have been instrumental in leading to the discovery of the grave where the Sotin victims were buried. The remaining four Accused have pleaded not-guilty. However, during the first week of trial, there seemed to be some finger-pointing between the co-Accused, with Lončar asserting that Mitrović was present at the shooting and among those who started the argument with the villagers, while Mitrović denied being present at all. The trial is scheduled to continue on 16 March.

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

Aimel Yousfi-Roquencourt, Intern, Office of the Public Counsel for the Defence.

The views expressed herein are those of the author alone and do not reflect the views of the ICC.

Prosecutor v. Dominic Ongwen (ICC-02/04-01/05)

The Ongwen Pre-Trial Chamber (PTC) has ordered the severance of proceedings against Dominic Ongwen from the *Kony et al.* case.

In addition, the Prosecutor has proposed the lifting of certain redactions from her warrant of arrest application, pursuant to PTC directions communicated via email and telephone call.

Moreover, the Prosecutor has requested that the Confirmation of Charges hearing, provisionally scheduled for 24 August 2015, be postponed to 31 January 2016. The Prosecutor has submitted that, due to the case having been "dormant for almost a decade", an extension of time is needed to, *inter alia*, comply with her disclosure obligations, assess the security situation of witnesses interviewed years ago, translate relevant documents into the language of the accused, lift Article 54 (3) (e) redactions and potentially amend the charges.

The PTC has further requested the Defence to respond expeditiously to the Office of the Prosecutor

(OTP) postponement application and reminded the Registry of their obligation to assist Ongwen in obtaining permanent Counsel.

In the meantime, Duty Counsel for Ongwen has filed a response to the "views and concerns of victims" submitted by the Office of Public Counsel for Victims (OPCV). Duty Counsel has averred that OPCV's submissions should be rejected since, *inter alia*, the referred victims have not been identified and the OPCV has acted as a "Prosecutor *bis*" contrary to the principle that an Accused must not face more than one accuser.

Rome Statute

Article 54 (3) (e)

(3) The Prosecutor may:

(e): Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;

DEFENCE ROSTRUM

Croatia v. Serbia Judgement at the International Court of Justice

By Ruby Axelson

On 3 February, the International Court of Justice (ICJ) delivered its final judgement in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, which was initiated by Croatia on 22 July 1999. The ICJ first gave a brief outline of the historical and factual background of the case, which arose out of the armed conflict between the two states, which began shortly after Croatia's declaration of independence on the 25 June 1991. Croatia claimed that genocide was committed during 1991 and 1995, when the Serb forces and the Yugoslav People's Army (JNA) controlled one-third of Croatia's territory. Serbia alleged its counter claim of genocide took place in August 1995 during Operation "Storm", when Croatia re-took the majority of its territory.

Convention on the Prevention and Punishment of the Crime of Genocide

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Recalling that its jurisdiction is founded exclusively on Article 9 of the Genocide Convention, the Court noted that its jurisdiction is therefore confined solely to disputes concerning the interpretation, application or fulfilment of the Convention itself and not to disputes relating to breaches of customary international law. The Court held that both Croatia's claim and Serbia's counterclaim were admissible.

Great Hall of Justice

With regard to Croatia's claim of genocide within the meaning of Article 2 of the Genocide Convention, the ICJ found that the *actus reus* of genocide had been established, concluding that in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces had committed certain acts of genocide upon the ethnic or national Croat group. It was held that the JNA or Serb forces had perpetrated acts of genocide within the meaning of subparagraphs (a) and (b) of Article 2 by committing acts of killing members of the Croat group and by committing acts causing serious bodily or mental harm to members of that group. The Court was unable to establish that genocide within the meaning of subparagraph (c), deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, or subparagraph (d), imposing measures intended to prevent births within the group, had been established.

Moreover, the ICJ found that the intentional element of genocide (*dolus specialis*) was lacking, since the acts perpetrated did not reflect genocidal intent. In the absence of direct evidence of such intent, such as an express policy, the Court considered whether a

pattern of conflict had been established from which the only reasonable inference would be intent on the part of the perpetrators to destroy part of the Croat group. The Court noted that the crimes committed against the Croats appeared to be aimed at their forced displacement from the regions concerned, rather than their physical destruction, and as such rejected Croatia's claims in their entirety.

With regard to Serbia's counter-claim the ICJ found again that the *actus reus* of genocide had been established, concluding that during and after Operation "Storm" in August 1996, forces of the Republic of Croatia perpetrated acts falling within the scope of subparagraphs (a) and (b). However, for the rest of Serbia's allegations there was a failure to substantiate them, in particular it was held that looting was not aimed at bringing about the physical destruction of the group under subparagraph (c). However, again, the Court held that Serbia had failed to establish *mens rea* of genocide. Firstly, the Court was not persuaded by Serbia's assertion that the minutes of the meeting on the island of Brioni, under the chairmanship of the President of the Republic of Croatia, Tudjman, in order to prepare Operation "Storm", demonstrated genocidal intent. Moreover, Serbia failed to establish a pattern of conduct displaying genocidal intent, since although ethnic cleansing had been demonstrated there must additionally be an intent to destroy the group rather than a mere intent to cause the movement of the group. Therefore, the Serbian counter-claim was also dismissed in its entirety. In the 2007 *Bosnian Genocide* case, Serbia was found to be responsible for not preventing and for nor properly punishing genocide perpetrators, but it was not found to be directly responsible for committing genocide. The *Bosnian Genocide* cases and the *Croatia v. Serbia* case emphasise the gravity of genocide, but the difficulties in establishing responsibility for acts of genocide in court.

Judge Mandiaye Niang's Separate Opinion on Aiding and Abetting in *Popović et al.*

By Molly Martin

On 30 January, the Appeals Chamber delivered its Judgement in *Prosecutor v. Vujadin Popović et al.* (IT-05-88-A), one of the largest multi-Accused cases and the only case with seven Accused at the International Criminal Tribunal for the former Yugoslavia (ICTY). The Appeals Chamber upheld the majority of the Accused's convictions, though reversing a few for each Accused, as well as entering new convictions. Three Judges (Judge Robinson, Judge Pocar and Judge Niang) entered Separate and Partially Dissenting Opinions. There is additional, albeit limited, discussion of the specific direction requirement in aiding and abetting, recognised in the *Perišić* Appeals Judgement (relying on *Tadić* and its progeny), but later rejected in the *Šainović* Appeals Judgement.

The issue of specific direction as an element of aiding and abetting liability at the ICTY has created quite a stir among practitioners and scholars alike recently, following the February 2013 Appeals Judgement of acquittal in *Perišić*, which held that the *actus reus* of aiding and abetting, in contrast to joint criminal enterprise (JCE), "requires a closer link between the assistance provided and particular criminal activities: assistance must be specifically – rather than in some way – directed towards relevant crimes." The *Perišić* Judgement relied on *Tadić* and more than a dozen other ICTY and International Criminal Tribunal for Rwanda (ICTR) Appeals Judgements to note that no Appeals Chamber to date had "found cogent reasons to depart from" the definition of aiding and abetting offered in *Tadić*, which includes the specific direction component.

Indeed, in its review of the relevant case law, it found implicit endorsement of specific direction as a requisite element of aiding and abetting where explicit reference was lacking and, when considering the finding in *Mrkšić & Šljivančanin* that specific direction was not an "essential ingredient of the *actus reus* of aiding and abetting", it explained this statement away ultimately noting that it was not persuaded that this "reflected an intention to depart from the settled precedent" of specific direction as a component of the *actus reus*. Judge Liu, dissenting, noted that while many cases have indeed copied the language used in *Tadić*, most have failed to expressly apply the specific direction component and many have found aiding and abetting liability without it; as such, Judge Liu noted that while specific direction may be a factor, it is not a required factor nor an element of aiding and abetting liability.

It would seem clear then, that at least following *Perišić*, the law on aiding and abetting and the inclusion of a specific direction element had crystallised. The Trial Chamber in *Stanišić & Simatović* took this view in acquitting the pair in May 2013, highlighting its obligation to find that the aider and abettor's acts were specifically directed to assisting, encouraging, or lending moral support to the relevant crime, relying on *Tadić* and *Perišić* without extensive analysis of this obligation. However, these cases bringing specific direction to the fore were not necessarily met with open arms; there was a flurry of scholarship and debate, with many, even specific direction supporters, questioning the soundness of the legal reasoning in *Perišić*. It is not only the ICTY that has been drawn into this fight – shortly after the Trial Judgment in *Stanišić & Simatović*, the Appeals Chamber at the Special Court for Sierra Leone in the *Charles Taylor* case expressly rejected the *Perišić* standard, noting that its analysis only reflected a consideration of internally binding precedent, but had failed to consider whether specific direction is an element of aiding and abetting under customary international law.

The story, unfortunately, does not end here. Almost one year after the *Perišić* Appeal, an ICTY Appeals Judgment was delivered in *Šainović et al.* in January 2014, unequivocally rejecting the statement of the law and also some of the underlying legal analysis in *Perišić*. Regarding the *Perišić* Chamber's assessment of *Mrkšić & Šljivančanin* (and its progeny, *Lukić & Lukić*), the *Šainović* Appeals Chamber seemed to find *Perišić's* attempt to reconcile the findings disingenuous, ultimately noting that the cases represent a divergence or self-fragmentation of Tribunal jurisprudence, with *Perišić* and its precursors and progeny in one lane, and *Mrkšić & Šljivančanin* and *Lukić & Lukić* solidly in another.

Because of this divergence, the *Šainović* Chamber re-evaluated Tribunal jurisprudence and customary international law to determine the correct approach. To determine custom on this issue, the Chamber reviewed a collection of post-War cases, national law (in a footnote, though ambiguously blurring the issue of whether this was intended to consider State practice to discern custom or general principals because it has already determined that custom had failed), and international instruments. In all cases, it found insufficient uniformity of inclusion of a specific direction requirement, if included at all, to be considered an element of aiding and abetting under customary international law. In so doing, it expressly and "unequivocally" rejected *Perišić* and eliminated the specific direction element from aiding and abetting.

In the recent *Popović* Judgement, the Majority endorsed *Šainović's* conclusion that "specific direction is not an element of aiding and abetting under customary international law." Judge Niang noted in a separate opinion that, while he agrees with the Majority's adoption of *Šainović*, he believes that the legal characterisation of aiding and abetting is much more nuanced and inconclusive. Rather, it is Judge Niang's asserted position that, in fact, international and State practice is inconclusive on the definition of aiding and abetting and that the operative criteria vary depending on the exact circumstances of the case. As such, he noted that in applying varying operative criteria where the alleged acts of aiding and abetting are too remote or equivocal, "[w]hether that exercise is referred to as establishing the knowledge or wilful support of the crime, is for me a secondary issue, so long as the legitimacy of the enquiry is not called into question." This seems to be in line with some of the dissenting opinions in the above-noted cases, for example Judge Liu in *Perišić,* wherein specific direction was not soundly rejected, but asserted to be a possible factor, available for the assessment of evidence, rather than a requisite element of aiding and abetting in its own right.

What *Popović* accomplishes then is to affirm and endorse the *Šainović* rejection of specific direction, perhaps helping to (again) crystallise aiding and abetting. Judge Niang's separate opinion, however, leaves the door open, perhaps, to continued use of specific direction as a non-requisite but no less integral factor in assessing aiding and abetting where there is ambiguity or remoteness. Those following the specific direction saga will know that the Appeals Judgement in *Stanišić & Simatović* is expected in June of this year. It will be interesting to see if it follows *Šainović*, whether it takes advantage of the door Judge Niang left ajar, or if it again reverses course. It is of note that the *Stanišić & Simatović* Appeals Chamber shares three Judges with *Šainović* (including Judges Liu and Ramaroson) and two with *Popović* (including Judge Ramaroson), but also three with *Perišić* (including Judges Liu and Ramaroson).

The Eighteenth Defence Symposium

By Bas Volkers

On 4 February, the ADC-ICTY hosted another Defence Symposium. ADC-ICTY Vice President Christopher Gosnell spoke about "Legal Methods and Sources of Law as Applied in Practice in International Criminal Law". Gosnell used the legal development of aiding and abetting at the International Criminal Tribunal for the former Yugoslavia (ICTY) to describe the process of applying sources of law.

Gosnell explained that in principle the ICTY's sources of law are clear-cut; the Tribunal applies international humanitarian law, consisting of both conventional and customary law, that existed at the time the crimes were committed. In its report of 3 May 1993 on the establishment of the ICTY, the Secretary-General stated that the Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law.

Gosnell used aiding and abetting as a mode of liability to show how the ICTY used customary law as a legal source. Aiding and abetting was dealt with extensively for the first time in the *Furundžija* case. The Trial Chamber of that case reviewed customary law to define the precise elements of aiding and abetting. Gosnell pointed out, however, that the sources used were not indicative of international customary law. For instance, the post-World War II Control Council Law No. 10 cases cited by the Chamber applied domestic as opposed to international law. The *Furundžija* Chamber also referred to the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind and the Rome Statute, both of which were not legally binding at the time. It is clear that from those sources it is impossible to find state practice or *opinio juris*. Gosnell pointed out that in practice it is too difficult to properly find an international customary rule of criminal law or a general principle of law. One could perform a comprehensive comparative survey of aiding and abetting in all national legal systems. Besides the impracticability of such a study, however, this would not provide an exact rule that could be applied in international criminal law. At best, one would likely come up with a small number of similar but distinct doctrines. Gosnell explained that customary law will likely always be too vague to prescribe a precise rule of international criminal law and would thus violate the principle of *nullum crimen sine lege*.

The difficulty of discerning a precise rule of customary international criminal law has significantly affected the jurisprudence of the ICTY. For instance, while the *Perišić* Appeals Chamber held that "specific direction" was part of the *actus reus* of aiding and abetting, the *Šainović* Appeals Chamber later ruled that this was not the case. Each Chamber was able to find sources of law supporting its ruling.

Gosnell concluded that ICTY Judges seem to have adopted what amounts to a comparative law approach when confronted with an absence of orthodox sources of customary international law. This was not surprising because the standards of customary law are too high for any criminal justice system. However, if the standards were properly applied no rules could be found at all and a legal vacuum would exist instead.

Supranational Criminal Law Lecture Series
International Crimes Division of Uganda

By Ruby Axelson

On the 21 January, three interns from the ADC – ICTY attended a lecture at the T.M.C. Asser Instituut titled "The International Crimes Division of Uganda: The First International Crimes Court in Africa." The Speaker, Harriet Ssali Lule, the Deputy Registrar of the International Crimes Division (ICD) of the High Court of Uganda, has been working at the ICTY as a visiting professional. Lule spoke passionately about the situation in Northern Uganda and the resulting International Crimes Division. The lecture began with a brief overview of the war in Northern Uganda, which started in 1987, following violence by the Lord's Resistance Army (LRA) against President Yoweri's oppression in this part of the country. The war quickly escalated and the LRA developed into a feared rebel group, turning on civilians and utilising

heinous methods of warfare such as torture and rape.

In 2000, the Amnesty Act was signed and in 2002 Uganda signed the Rome Statute of the International Criminal Court (ICC). In 2006, peace talks took place in Juba between the government of Uganda and the LRA. The peace talks resulted in three different initiatives for peace and justice. It was agreed that the ICD would be set up as a formal mechanism to trial perpetrators for international crimes committed during the conflicts. Additionally, it was also agreed that informal mechanisms reflecting local traditions would be established. Lule described one such tradition as being the common tribal belief that if a member of your family is killed, the perpetrator must pay for that death with the blood of cattle. Lastly, a truth commission, similar to the one in South Africa, was established, recognising the simultaneous nature of peace and justice.

In June 2011, Thomas Kwoyelo was arrested by the Ugandan authorities and was due to be the first Accused to go before the ICD for international crimes. His Defence lawyers raised the issue of the Amnesty Act 2000. In the opinion of Lule this situation is demonstrative of many of the issues with the Amnesty Act, which although necessary and successful in promoting peace, failed to differentiate between levels of rebels and perpetrators. This issue goes directly to the heart of the peace and justice debate and demonstrates the necessity of a balance between peace and justice. Lule discussed the desire of parents to get their children home being in contrast to the desire of justice. Nevertheless, the Amnesty Act is due to expire in May of this year and many people hope that the Supreme Court's judgment regarding Kwoyelo will not be made until this time.

The development of the ICD was discussed in great detail. In 2014, the ICD created its Rules and Procedure of Evidence, which are separate from the usual Criminal Code of Uganda due to the nature of international crimes. With the ICD ready to begin trials, the reasons as to why Ongwen was brought to the ICC, on 20 January the night before the lecture, raises some important questions. Many assert that the decision to deport Ongwen to The Hague was a political decision which increased President Yoweri's standing in the international community. Moreover, it was felt that the ICC may be more appropriately equipped, both in experience and financially, for a large case involving multiple countries. Furthermore, since the Amnesty Act still covers Ongwen in Uganda and the ICC arrest warrant came before the one issued by Ugandan, it was seen as appropriate to deport him to the ICC.

There are some advantages that the ICD has over the ICC. Most notably the feasibility of witnesses being able to testify in front of domestic courts. Whilst the ICD now has increased jurisdiction, challenges still remain, including a lack of witness protection and the Amnesty Act. One of the disadvantages of the ICD is that it has a domestic court structure and limited resources. Lule recognised that the ICC and ICD cases will be interlinked and that there is a need for collaboration in order to use the proper application of the complementarity principle.

The lecture ended with a pertinent quote by Nelson Mandela: "It always seems impossible until it is done."

During the question and answer part of the lecture the relationship between the ICC and ICD were discussed and it was noted that the ICC is seen as distant to local Ugandans, many whom perceive the court as a foreign imposition. The suggestion that the ICC could sit 'in country' was raised, an interesting idea which although unprecedented at the ICC it could increase the visibility of the ICC in local communities and vitally improve victim participation in the justice process.

Lule discussed her view that Amnesty should necessarily be conditional, reflecting the idea that whilst in certain circumstances it is necessary to promote peace but that the promotion of justice should not be sidelined. Moreover, despite the necessity to hold high ranking government officials to account for their actions, the reality of this must be acknowledge, especially in light of the witnesses found dead in the Kenyan case. Finally, how international law can address the concept of victim hood was discussed. The situation in Uganda brings to light the complexities surrounding the perpetrator and victim dichotomy, where many perpetrators, having begun their time in the LRA as child soldiers, are victims of the very crimes they go on to perpetrate later in life.

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Patryk I. Labuda, **"Is International Criminal Justice Coming to South Sudan?"**, 4 January 2015, available at: http://tinyurl.com/qbm95nm

Michael G. Karnavas, **"The ADC-ICTY Publishes its Legacy Conference Proceedings"**, 13 February 2015, available at: http://tinyurl.com/o6afnua

Vera Padberg, **"Independent Report into the Proceedings of the International Crimes Tribunal of Bangladesch"**, 17 February 2015, available at: http://tinyurl.com/kdxb86s

Online Lectures and Videos

"Crimes against Humanity", Online lecture by Sean D. Murphy, 2 March 2015, available at: http://tinyurl.com/k54nv3w

"Transitional Justice in Transitional Libya", Podcast Seminar by Michael Bibb, Lecturer in Philosophy at University College, Oxford, 5 November 2013, available at: http://tinyurl.com/mvho7e3

"**Victim Participation in Proceedings of the International Criminal Court**", lecture by Jens Dieckmann, 2 March 2015, More Info at: http://tinyurl.com/pgzznku

PUBLICATIONS AND ARTICLES

Books

Elliesie, H. and Marauhm, T. (2015), **Legal Transformation in Northern Africa and South Sudan**, Eleven International Publishing.

Human Rights Watch (2015), **World Report 2015, Events of 2014**, Human Rights Watch.

Melgar, B. (2015), **The Transit of Good in Public International Law (Developments in International Law)**, Brill – Nijhoff, Lam edition.

Park, W.W. (2015), **Arbitration International**, LCIA – Arbitration and ADR worldwide.

Articles

Materu, S.F. (2015), **"The Post-Election Violence in Kenya, Domestic and International Legal Response"**, International Criminal Justice Series, Vol. 2.

D'Ambruoso, W.L. (2015). **"Aggression and the symmetrical application of International Humanitarian Law"**, International Theory, Vol. 7, Issue 1.

Hughes, K. (2014), **"The Limits of freedom of Information and Human Rights, and the Possibilities of the Common Law"**, The Cambridge Law Journal, Vol. 73, Issue 3.

CALL FOR PAPERS

The Toronto Group Conference for the Study of International, Transnational and Comparative Law has issued a call for paper for the 7th Annual Conference on "Conflicting Legal Orders"

Deadline: 14 March 2015 More Info: http://tinyurl.com/pndrkoz

The European Conference on Politics, Economics and Law 2015 has issued a call for paper to its theme "Power"

Deadline for abstract submission: 25 March 2015 More Info: http://tinyurl.com/kqpjhlm

The Society of Legal Scholars has issued a call for paper for its Annual Conference York 2015

Deadline 20 March 2015 More Info: http://tinyurl.com/p3r5g46

HEAD OFFICE

ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085/087

Phone: +31-70-512-5418
Fax: +31-70-512-5718

Any contributions for the newsletter should be sent to Isabel Düsterhöft at iduesterhoeft@icty.org

WWW.ADC-ICTY.ORG

EVENTS

Seminar on "Victim Participation in Proceedings of the International Criminal Court – Observation from a Counsel's Perspective"
Date: 2 March 2015
Location: University of Oxford, Seminar Room G, Manor Road Building
More Info: http://tinyurl.com/pgzznku

Distinguished Speaker Series: Lord Mark Malloch-Brown
Date: 23 March 2015
Location: The Hague Institute for Global Justice
More Info: http://tinyurl.com/o3vpmsh

The Hague Conference on International Legal Diplomacy
Date: 22 April 2015
Location: The Hague Institute for Global Justice
More Info: http://tinyurl.com/or5uj49

OPPORTUNITIES

Legal Counsellor (P-2), Antakya Turkey
The Danish Refugee Council (DRC)
Closing Date: 3 March 2015

Associate Analyst (P-2), The Hague
Investigative Strategies and Analysis Unit, Investigation Division, Office of the Prosecutor, ICC
Closing Date: 10 March 2015

Information Analyst (P-2), The Hague
Protection Strategies Unit, Office of the Prosecutor, ICC
Closing Date: 19 March 2015

Internship Communication Section (I-1), The Hague
International Criminal Tribunal for the former Yugoslavia
Closing Date: 20 June 2015

Announcement!

The ADC-ICTY is pleased to announce that the conference proceedings of the **Legacy Conference** held on 29 November 2013 are now publicly available and have been published in the form of a **Legacy Conference Publication**. The publication contains the transcripts of the conference as well as additional articles and is available at **http://adc-icty.org/home/legacy/legacy-conference.html**